



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

[REDACTED]  
Glenna O.,<sup>1</sup>  
Complainant,

v.

Matthew P. Donovan,  
Acting Secretary,  
Department of the Air Force,  
Agency.

Appeal No. 0720180030

Hearing No. 570-2016-00054X

Agency No. 9O0D15001F18

**DECISION**

Simultaneously with its August 24, 2018 final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). The Agency requests that the Commission affirm its rejection of the finding by an Administrative Judge (AJ) with the EEOC of 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked for the Choctaw Archiving Enterprise of the Choctaw Nation of Oklahoma (Staffing firm 1) serving the Agency as an Outreach Manager (social worker) at the Agency's 48th Medical Group, Mental Health Flight, Family Advocacy Program located on a Royal Air Force base in Lakenheath, United Kingdom.

Her position description reflects she managed the Prevention/Outreach program with the goals of promoting and fostering capacity, resilience, family wellness, deterring predictable maltreatment problems, and decreasing maladaptive behavior to support mission readiness.

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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.

Tools to do this included social marketing campaigns, behavioral health and family violence education, program interventions with active duty and squadrons to promote protective factors and address maltreatment risk factors, and maintaining current resource information both on and off the base. Report of Investigation (ROI), Ex. F-1.c., at Bates Nos. (lower right) 478 – 479. This was a non-clinical position.

Complainant served Agency populations in Lakenheath and for substantial periods at the Royal Air Force Base in Mildenhall, about five miles from Lakenheath. She grew up in Mildenhall, was educated in Great Britain, and earned a Masters' degree in Social Work in 2005.

On January 13, 2015, Complainant filed an EEO complaint, with amendments accepted at the direction of the AJ during the hearing process, alleging that the Agency harassed and discriminated against her:

1. Based on her sex (female) when, in February and March 2014, her Agency first line supervisor (S1 - female) wrote on the back of a group gift license plate to a departing employee "see you later, B/F Blue Falcon", slang for "buddy fucker", and said to Complainant, "I see you have your hooker heels on" and "who did you have to lie down with to get that printer".
2. Based on reprisal for prior protected EEO activity when she was subjected to harassment from November 3, 2014 through May 15, 2015, as evident by 23 listed examples; and
3. based on her sex and reprisal when she was constructively discharged on February 5, 2016, the date she resigned.

The harassment alleged in claim 2 including the Lakenheath hospital's delay in granting her the privileges she needed to take a higher paying position as a clinical social worker. Complainant had been selected for the position in August 2014 by the Squadron Commander at Mildenhall, with hiring through Potomac Healthcare Solutions, LLC of Woodbridge, Virginia (Staffing firm 2). HT 1, at 28, 31 – 32; HT 5, at 192; ROI, Exhs. B-1, at Bates Nos. 45 – 46 and F-3, at Bates Nos. 1547 – 1548, 1553, 1559 – 1560. The Lakenheath hospital served both the Lakenheath and Mildenhall bases. As a result of the delay in granting her privileges, Complainant was unable to assume the position.

In August 2015, following the Agency's investigation into her complaint, Complainant requested a hearing before an EEOC Administrative Judge (AJ). After a hearing, the AJ found discrimination on all three claims, and awarded various remedies, including instatement, back pay, front pay, and damages. The Agency's final order rejected the AJ's findings of discrimination and all relief ordered, and filed the instant appeal.

In opposition to the appeal, Complainant argues the AJ's decision should be affirmed, with an update in awarded attorney fees.

### ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), at 9-17 (revised Aug. 5, 2015).

#### Preliminary Matters: Agency's Appeal of AJ's Procedural Rulings

##### *Joint Employment*

In opposing Complainant's motion on an unrelated matter almost a year prior to the hearing, the Agency argued that Complainant was an independent contractor who was not a common law employee of the Agency with standing to bring a complaint of unlawful employment discrimination in the EEO process. In her decision following the hearing, the AJ without discussion treated Complainant as a common law employee of the Agency.

On appeal, the Agency argues that it had insufficient control over Complainant's employment to be her common law joint employer.

EEOC Regulation 29 C.F.R. § 1614.103(a) provides that complaints of employment discrimination shall be processed in accordance with Part 1614 of the EEOC regulations. EEOC Regulation 29 C.F.R. § 1614.103(c) provides that within the covered departments, agencies and units, Part 1614 applies to all employees and applicants for employment therewith.

In Serita B. v. Department of the Army, EEOC Appeal No. 0120150846 (November 10, 2016), the Commission reaffirmed its long-standing position on “joint employers” and noted it is found in numerous sources. See, e.g., EEOC Compliance Manual Section 2, “Threshold Issues,” Section 2-III(B)(1)(a)(iii)(b) (May 12, 2000) (Compliance Manual)<sup>2</sup>; EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997) (Enforcement Guidance), “Coverage Issues,” Question 2;

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<sup>2</sup> The EEOC Compliance Manual and other guidance documents, as well as federal-sector appellate decisions, are available online at [www.eeoc.gov](http://www.eeoc.gov).

Ma v. Dep't of Health and Human Servs., EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998).

The term “joint employer” refers to two or more employers that each exercises sufficient control of an individual to qualify as the worker’s employer. Compliance Manual, Section 2-III(B)(1)(a)(iii)(b). To determine whether the Agency has the right to exercise sufficient control, EEOC considers factors derived from common law principles of agency. See Enforcement Guidance, “Coverage Issues,” at Question 2. EEOC considers, *inter alia*, the Agency’s right to control when, where, and how the worker performs the job; the right to assign additional projects to the worker; whether the work is performed on Agency premises; whether the Agency provides the tools, material, and equipment to perform the job; the duration of the relationship between the Agency and the worker whether the Agency controls the worker’s schedule; and whether the Agency can discharge the worker. EEOC Compliance Manual, Section 2-III(A)(1) (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992)); EEOC v. Skanska USA Bldg., Inc., 550 F.App’x 253, 256 (6<sup>th</sup> Cir. 2013) (“Entities are joint employers if they ‘share or co-determine those matters governing essential terms and conditions of employment’”) (quoting Carrier Corp. v. NLRB, 768 F.2d 778, 781 (6<sup>th</sup> Cir. 1985); see also Ma, EEOC Appeal Nos. 01962389 & 01962390.

In determining a worker’s status, EEOC looks to what actually occurs in the workplace, even if it contradicts the language in the contract between the staffing firm and the agency. Baker v. Dep’t of the Army, EEOC Appeal No. 01A45313 (Mar. 16, 2006) (while contract between staffing firm and agency provided that contract personnel were employees of staffing firm under its administrative supervision and control, agency actually retained supervisory authority over the contract workers).

On the factor of the right to control when, where, and how the worker performs the job and to assign additional projects, complete agency control is not required. Rather, the control may be partial or joint and still point to joint employment. Shorter v. Dep’t of Homeland Sec., EEOC Appeal No. 0120131148 (June 11, 2013) (where both staffing firm and agency made assignments, this pointed to joint employment); Complainant v. Dep’t of the Navy, EEOC Appeal No. 0120143162 (May 20, 2015), request for reconsideration denied, EEOC Request No. 0520150430 (Mar. 11, 2016) (where staffing firm wrote and issued complainant’s appraisal with input from agency, this pointed toward joint employment). Likewise, where both the agency and staffing firm provided tools, material, and equipment to perform the job, this pointed to joint employment. Elkin v. Dep’t of the Army, EEOC Appeal No. 0120122211, 2012 WL 5818075 (Nov. 8, 2012). The EEOC considers an entity’s right to control the terms and conditions of employment, whether or not it exercises that right, as relevant to joint employer status. Enforcement Guidance, “Coverage Issues,” at Question 2, Example 5 (where an entity reserves the right to direct the means and manner of an individual’s work, but does not generally exercise that right, the entity may still be found to be a joint employer).

In sum, a federal agency will qualify as a joint employer of an individual if it has the requisite right to control the means and manner of the individual's work, regardless of whether the individual is paid by an outside organization or is on the federal payroll. See id., at Q. 2.

The parties stipulated that Complainant reported to the Agency chain of command at the Family Advocacy Outreach office. She was chosen by local Agency management at Lakenheath after they reviewed her resume and interviewed her, she was hired through Staffing Firm 1, and served as Outreach Manager since November 2008, a long duration. HT 1, at 79, 149 – 150. Staffing Firm 1 management was located in the United States. Agency management had control how Complainant performed her work, e.g., setting what percentage of time Outreach Managers worked outside of the office, how much detail was required on their electronic appointment calendar, gave them assignments and requirements like attending weekly meetings, creating an annual public relations campaign with First Sergeants at both Lakenheath and Mildenhall to create good will since they would be heavily involved in the referral process, doing one-to-one coaching for clients that did not feel comfortable attending classes, having a monthly information booth, creating more partnerships with other Agencies like partnering with the gym to host 5K runs, creating a script for volunteers for the Black Eye Campaign, and deadlines to plan for events. See Outreach Meeting Minutes, dated October 14 and 24, 2014, one led by S1, the other by S2, both attended by four people, including Complainant. ROI, Ex. F-1.m., at Bates Nos. 856 – 857, Ex. F-2.b. at Bates Nos. 1180 – 1181. Complainant worked on Agency premises, the Agency dictated when she was required to report to work and had input on when she could take leave, and required her to take certain training and set deadlines therefore. The Agency also exercised significant control over Complainant's employment when its Lakenheath local management discriminatorily refused to release her privileges for sign off unless she resigned, denying her the promotion for which she was chosen by an Agency Squadron Commander at Mildenhall.

While Staffing Firm 1 also exercised control over Complainant's employment by compensating her, approving her leave, and significantly independently looking into the validity of the Agency complaints about Complainant and declining to remove her against the Agency's wish from serving in its Family Advocacy Program, the Agency had sufficient control over Complainant's employment to be her common law joint employer.

#### *AJ's Rulings on Witness Testimony*

The Agency argues that during the liability phase of the hearing, the AJ improperly prevented it from impeaching Complainant's Witness 1, one of her coworkers. Witness 1 testified that S1 treated Complainant badly by telling him to stay away from her, that she was on the way out of her job, undercutting her at meetings by talking over and contradicting her, and after meetings turning to other colleagues to mock and smirk at her. Witness 1 previously signed a March 2015 memo indicating that during the same time period S1 had impeccable adherence to ethics and fairness and was a consummate professional. When the Agency attempted to impeach Witness 1 with a line of questioning using the memo, Complainant's attorney objected because the memo was not listed with the Agency's exhibits in its pre-hearing report, as required. The AJ sustained the objection, explaining that the exhibit was an unfair surprise.

We agree with the Agency that the AJ's ruling was an abuse of discretion. While it was proper to reject the memo as an exhibit, the Agency was entitled to use it to ask questions for impeachment purposes. Nevertheless, we find that this error was without consequence. First, the Agency was able to ask Witness 1 an impeaching line of questions using his record January 2015, statement for S1's CDI that he "witnessed no inappropriate comments or actions on anyone's part" during his tenure. HT 1, at 397 – 401. More importantly, while the Agency argues Witness 1 was a key witness, which we find questionable, the AJ in her detailed, single spaced 41 page decision only referred to Witness 1's testimony once - for the general observation that Complainant became withdrawn, guarded, and depressed in string citation that included other witnesses to this, and these observations were supported by Complainant and other witnesses.

The Agency argues that the AJ improperly cut off other lines of cross-examination on Witness 1 during the remedies hearing. On direct examination, in response to the question on what Complainant said about why she was depressed and anxious, Witness 1 testified that Complainant felt targeted in the workplace – insulted, berated, and marginalized, and Complainant related an instance of S2 screaming at her that left her in tears. HT 4, at 15. On cross examination, the Agency asked Witness 1 how Complainant felt about Successor S1 telling her she needed to take leave for an EEO appointment she had the day before. The Agency also asked Witness 1 if he was aware of any heated discussions Complainant had, which the record strongly suggests referred to an Airman who once aggressively screamed at Complainant. In response to subsequent Agency questioning at the hearing, Complainant described the Airman as a very young man with professional and personal difficulties whom she and a coworker were informally supporting. Complainant explained that the Airman came to the office she shared with two others and said he wanted to cut his wrists, so she took him down to the Emergency Room, the Airman was then assigned to litter picking duty around the base, and came to her office and screamed at her because he believed she made things much worse by taking him to the Emergency Room. Complainant testified the Airman apologized after he cooled down and she felt he was going through a lot. Complainant's attorney objected to the first referenced cross examination question to Witness 1 for being outside the scope of direct examination, and because Witness 1 was not the Agency's witness. The AJ sustained the objection. When Agency counsel protested that Witness 1 testified about how Complainant's injuries were related to the Agency's treatment of her, the AJ conceded this was true, but explained his testimony went to broad strokes versus this particular leave policy. The AJ sustained Complainant's objection to the Agency's second cross examination question for being outside the scope of direct examination. HT 4, at 33.

Prior to the remedies hearing, the Agency included in its proposed witness list an expert psychologist with a Ph.D. It proffered that he would use his expertise to opine on the reliability of the testimony and evidence presented by Complainant, her witnesses, and the evidence she presented during the remedies hearing based on his expertise. Prior to the hearing the AJ rejected this witness on the grounds of relevance. On appeal, the Agency reiterates these arguments for why its expert witness was relevant.

In opposition to the Agency's appeal, Complainant argues that the Agency's proposed expert witness' testimony was not relevant because he had no personal knowledge of the harm suffered by her and could not possibly undermine her testimony or that of her witnesses because he would not be permitted to sit in the hearing and listen to their testimony. The AJ did not abuse her discretion in not approving this witness.

Finally, on appeal, the Agency argues that the AJ prevented it from obtaining evidence on alternative causes of damages, as recounted above. We find that the AJ did not abuse her discretion in sustaining the above objections. Witness 1 was not an Agency witness, and as found by the AJ while he testified in broad strokes about what caused Complainant's injuries, the Agency's above two questions went to specific matters not covered on direct. It appears that the Agency was attempting to do an end run around the AJ's discovery sanction order with these questions.<sup>3</sup>

### Agency's Appeal of AJ's Conclusions on the Merits of Complainant's Claims

#### *Hostile Work Environment*

To establish a claim of harassment a complainant must show that: (1) they belong to a statutorily protected class; (2) they were 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. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

S1 (female) became Complainant's first line Agency supervisor in November 2013. The AJ found as follows. Around February 2014, S1 wrote slang for "buddy fucker" on a going away gift for an employee. Complainant told S1 this was inappropriate, especially since all office members chipped in to purchase the gift, and S1 reacted by saying the employee would have been fired anyway.

Around the same time, S1 walked into Complainant's office and told her she had her "hooker heels on." Complainant shared her office with Coworker 1 (male), another contract social worker who

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<sup>3</sup> On appeal, the Agency also questions the AJ's earlier decision to impose the payment of attorney's fees to Complainant for discovery efforts as a sanction. We need not decide this issue because, as the prevailing party in this case, Complainant is entitled to such fees and costs anyway as set forth in 29 C.F.R. § 1614.501(e).

reported to S1. Complainant was shocked and embarrassed by S1's comment and told S1 it was inappropriate. Coworker 1 was shocked and viewed the comment as directed at Complainant.

Several months later (sometime in February or March 2014), when she learned Complainant obtained a new printer, S1 asked her, in the presence of Coworker 1, "who did you sleep with for that printer" or words to that effect. Coworker 1 shook his head in shock and said to Complainant that, "if I said that, I'd get fired," and testified with S1, "every day, it seemed like it was some hostility, be it subtle, be not, it was always targeted towards [Complainant]."

The AJ concluded that S1 made patently sexual comments on several occasions, Complainant protested the remarks, showing they were unwelcome, and the harassment was severe, particularly the "hooker heels" and printer remarks. The AJ found that it was reasonable for Complainant to be deeply offended by these sexualized comments which denigrated both her person and professionalism, and because this conduct was severe, the AJ need not determine whether it was pervasive. The AJ found that as the leader of the Family Advocacy Program, S1 set the tone there, creating an environment where sexually vulgar commentary could be used to denigrate subordinates, and thus she created a hostile work environment.

The AJ found that from the time Complainant first objected to S1's vulgar sexual remarks, S1 engaged in a campaign of retaliation against her, enlisting Complainant's second and third line supervisors (S2 – female) (S3 – male) and the 48<sup>th</sup> Medical Group hospital Chief of Medical Staff (Medical Staff Chief - female) at the Lakenheath base. The AJ found that S2 learned Complainant was using the EEO office during a site visit by the Staffing Firm 1 Senior Program Manager (Staffing Firm Manager 1). This occurred on October 30 – 21, 2014. S3 learned then also, and the AJ found S1 learned in early November 2014. HT 2, at 125 – 126.

After the EEO office learned that Complainant had standing as a common law employee, the local EEO Director in December 2014, advised Complainant's Agency fourth line supervisor (S4 – female) of the advantages of conducting a command-directed investigation (CDI). In December 2014, S4 appointed an Investigating Officer to conduct the CDI, who drafted a report on January 7, 2015, that reflected statements were taken from a dozen people, including S1. The AJ found that Agency management's harassment of Complainant intensified in the wake of the CDI. The finalized CDI substantiated that S1 made sexually harassing comments. The AJ found that based on this S1 was moved to a non-supervisory role, effective March 4, 2015. S1 was succeeded by Successor S1 (female). S4 testified she placed S1 in a non-supervisory position to give her an opportunity to better develop her skills.

The AJ found that the Agency subjected Complainant to retaliatory harassment starting in February or March 2014, when S1 and at some point S2 started calling the Staffing Firm Manager 1 complaining about her performance, whereabouts, time sheet entries, and people with whom she had contact. The AJ found that Staffing Firm Manager 1 looked into these concerns, determined they were unsubstantiated and decided to take no action. At some point S3 called Staffing Firm Manager 1 to raise S1 and S2's concerns and brought up having her terminated. HT 2, at 121. However, Staffing Firm Manager 1 was unmoved.



The AJ found that S3 was complicit in S1's retaliatory vendetta against Complainant. The AJ found that S3's lack of respect about the EEO process was evident from his testimony. The AJ found that after S1, S2 and S3's efforts with Staffing Firm 1 to get Complainant fired failed, by November 2014, they elevated their concerns to the Air Force Medical Operations Activity (AFMOA), which has oversight and funding responsibility for all family advocacy programs within the Air Force. Observing that AFMOA took no action, the AJ found that one could conclude that like Staffing Firm Manager 1, AFMOA found no evidence to support terminating Complainant.

The AJ found that S1, Successor S1, and S2 continued to engage in retaliatory harassment aimed to make Complainant's life a "living hell." Specifically, S1 scoured Complainant's Facebook page via Complainant's friends in an attempt to find anything she could use against her. This occurred by May 2015. ROI Ex. F-2.b., Bates No. 1027. The AJ referred to Successor S1 talking behind Complainant's back, Successor S1 and S2 badgering her on her whereabouts as she performed her outreach duties in two military bases and the surrounding community, on April 24, 2015, even though Complainant called in sick Successor S1 badgered her via multiple contacts to contact her, Successor S1 delayed approval of her leave, and on May 15, 2015, Successor S1 unnecessarily required Complainant to complete training before she could take leave the following Monday for her birthday, making her late in picking up her nieces from school. The AJ found that even though Complainant would start her day later in the morning to accommodate her schedule because she often gave presentations in the evening or outside normal work hours to reach target audiences, beginning in May 2015, S2 required her work normal office hours, and if she had an evening event to leave the office at the end of the business day (4:30 PM), go home, and come back to the base for the evening event.

In May 2014, in hopes of becoming a clinical social worker and advance her career, Complainant applied to obtain a Licensed Independent Social Worker (LISW) license. After submitting documentation, including of 3,000 hours of supervised social work practice from October 2011-April 2014, and passing the Ohio Board's clinical exam, Ohio granted Complainant a LISW license in September 2014. The Agency's August 2014 Mildenhall promotion offer was conditioned on her obtaining privileges from the Agency's Lakenheath hospital to practice clinical social work. A prerequisite to this was her US social work license.

In September 2014, S1 learned from the Medical Staff Chief that Complainant was offered the Mildenhall position and applied for privileges. The Medical Staff Chief was Chair of the privileges committee, which was made up of representatives of different health care specialties at the Lakenheath hospital.

The AJ found as follows. On October 2, 2014, S1 sent a letter to the Ohio Board seeking to have Complainant's LISW license revoked by writing that because Complainant did not perform clinical work for the Agency it would be impossible for her to accumulate 3000 supervised, and that while Coworker 1 submitted documentation representing himself as Complainant's clinical supervisor, as a contractor he was prohibited from serving as a supervisor and never did so. ROI, Ex. F-2.b., Bates No. 1225.

S1 followed up on October 16, 2014, by emailing the Ohio Board Deputy Director argument that under specified Ohio regulations Complainant obtained the license under false pretenses, that she applied for a counseling/therapeutic job at one of their base clinics, and the hospital was extremely surprised she obtained an independent Ohio license.

On October 16, 2014, the Ohio Deputy Director replied to S1 by questioning her concerns and her interpretation of Ohio's regulations, noting Complainant represented herself as a Family Advocacy Outreach Manager, not a Treatment Manager, that under Ohio regulations Coworker 1's supervision only needed to provide professional mentoring as opposed to clinical supervision, and obtaining an LISW does not require experience diagnosing and treating emotional disorders.

The AJ found that while S1's concerns about Complainant's LISW license may have been reasonable before she received Ohio's explanation in October 2014, she continued to be fixated in retaliatory persistent efforts to get Ohio to rescind the license and worked in concert with S2. The AJ found that Ohio explained its standards to S1 in a way that a reasonable person would have seen Complainant did not misrepresent her experience. But S1 did not stop her efforts to get Complainant's Ohio LISW license revoked, as evidenced by S1 sending a follow up letter to the Ohio Deputy Director. Subsequently, in January 2015, the Ohio Board notified Complainant that there was a complaint against her license, asked her to provide specified information, which she did, and in March 2015, Ohio Board closed the investigation, finding it was unable to substantiate the complaint against her license. The AJ found that nevertheless, a month later S1 wrote a memorandum which she testified may have been sent to the Ohio Board or her supervisors that Complainant misrepresented herself before the Board, and urged that this be considered that this demonstrates she lacked professionalism, had poor ethical practices, and placed patients at significant risk.

As Complainant's first line supervisor and senior social worker at the facility, S1 was involved in the process on Complainant's request for privileges at the Lakenheath hospital. HT 3, at 66. The AJ found that S1 and S2 co-opted the Medical Staff Chief, and even though the privileges committee voted to approve Complainant's privileges and the Ohio Board closed the complaint against her LISW license, the Medical Staff Chief would not release her privileges for final sign off. The AJ found that the Medical Staff Chief also spoke with M1, the Agency official with oversight of the medical program at Mildenhall with whom Complainant would work, advising she did not have the clinical experience to take the job and asking they rethink the hiring. The AJ recounted testimony that when the hiring Squadron Commander at Mildenhall was advised an issue was raised that Complainant was unqualified, he said, "that's not their job, that's my job."

The AJ examined the Medical Staff Chief, asking her to elaborate on her reason for not releasing Complainant's privileges, and later found her explanation that Complainant must resign from her current job to be eligible for privileges was not cogent, was contradicted by other specified evidence, and would be risky for Complainant.

The AJ found that roughly nine months after the clinical social worker job at Mildenhall was offered to Complainant, Mildenhall withdrew the offer because they needed someone in the position and it was clear approval of Complainant's privileges was not forthcoming. The withdrawal occurred after the Medical Staff Chief relayed that Complainant needed to resign to get her privileges. HT 1, at 216.

On appeal, the Agency argues that Complainant did not make out a prima facie case of sexual harassment discrimination because S1's alleged sexualized statements were not sufficiently severe or pervasive to create an abusive working environment. It contends that the AJ erred because she did not apply the objective, reasonable person standard to determine whether the alleged statements constituted harassment, i.e., she erroneously found that the referenced three statements were "severe" because Complainant was deeply offended by them which denigrated her person and her professionalism.

As an initial matter, we find that the AJ's factual findings on the incidents of harassment occurring are supported by substantial evidence. In stating the law on harassment, the AJ set forth the reasonable person standard. See AJ decision, at 19. While the AJ wrote that Complainant was deeply offended by the sexualized comments, she found this was reasonable – a reference to the reasonable person standard. The AJ did not error as a matter of law in finding these comments created a hostile work environment.

Regarding retaliatory harassment, the Agency argues that the AJ incorrectly found that the Medical Staff Chief gave no cogent explanation for why Complainant must resign prior to her privileges being released for final sign off so she would be eligible for the Mildenhall job. While we concede, as argued by the Agency, that the Medical Staff Chief provided a regulatory explanation, the AJ's finding that the explanation was unpersuasive is supported by substantial evidence. On appeal, the Agency does not dispute the AJ's other factual findings supporting Complainant's retaliatory harassment claim, nor argue that they do not constitute a hostile work environment. We agree with the AJ's findings that Complainant proved she was subjected to a retaliatory hostile work environment by the Agency, and both its attacks on her Ohio LISW license and its interference which prevented her from taking the job at Mildenhall constituted severe harassment.

#### *Imputing Liability to Agency*

Before finding a violation of Title VII and Rehabilitation Act, however, there must be some basis to impute liability to the Agency. An employer is always liable for harassment by a supervisor on a prohibited basis that culminates in a tangible employment action. No affirmative defense is available in such cases. See Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999), Section IV. (available at [www.eeoc.gov](http://www.eeoc.gov)). The Agency Lakenheath hospital's refusal to release Complainant's privileges for final sign off unless she resigned constituted, in effect, a denial of those privileges which caused her to lose being promoted, both of which are tangible employment actions. While the AJ did not find these events were tangible, we do. Accordingly, the Agency is liable for these actions.

When harassment by a supervisor creates an unlawful hostile environment but does not result in a tangible employment action, the employer can raise an affirmative defense to liability or damages, which it must prove by a preponderance of the evidence. The defense consists of two necessary elements: (1) the employer exercised reasonable care to prevent and correct promptly any harassment; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* at Section V. The first prong of the affirmative defense usually requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. The AJ imputed liability to the Agency on Complainant's harassment claims using this analysis.

The AJ found that the Agency did not exercise reasonable care to prevent the sexual and retaliatory harassment. In support, the AJ referenced the following. Complainant testified that she did not recall any poster or other notices of EEO rights in Lakenheath. When asked if she received training for supervisors and EEO training for supervisors, S1 testified she did in 2015, subsequent to the instant EEO case. HT 1, at 151. When asked if she ever reviewed the Agency's harassment policy, S1 replied, "not in its entirety." S4 testified that upon S1's removal from supervision, she did not direct that S1 to participate in any form of EEO training, or take action to ensure S1 did not leave Complainant alone. The AJ found that while the Agency asserted that all new employees in "MDOS" (of which S1 was a part) attend face to face Squadron Newcomers Orientation where discussion is prompted on discrimination/harassment, the Agency provided no training slides nor materials, or documentation of staff taking the training. The AJ found that a 1¼ page excerpt of a February 3, 2007 policy which addressed sexual harassment and retaliation in the record did not show the policy was adequate.

The AJ concluded that the Agency failed to prove it exercised reasonable care to prevent the sexual and retaliatory harassment – S1 testified that she did not receive training on sexual harassment or EEO, the Agency offered no proof to the contrary, and the Agency offered scant evidence of any policy, training, or other measures that could have prevented the harassment by S1 and others.

The AJ found that the Agency failed to take prompt remedial action to remedy the sexual harassment. Specifically, while Complainant reported her concerns about the sexual harassment to the EEO office in March 2014, it did not assist her because it failed to recognize until December 2014, some eight months later, that a contractor could receive EEO counseling to file an EEO complaint under 29 C.F.R. Part 1614.<sup>4</sup> The AJ also found that the record did not show why the EEO office did not recommend a CDI or alert the Command about Complainant's allegations until December 2014, since these options are independent of EEO jurisdiction. The AJ found that had the CDI been conducted in the first weeks after Complainant contacted the EEO office in 2014, this might have helped timely remedy the sexual harassment.

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<sup>4</sup> Citing Commission precedent that EEO offices are required to give individuals EEO counseling and a notice of right to file a complaint, and then dismiss the complaint with appeal rights if believes the complainant does not have standing, the AJ found this was inexcusable.

The AJ found that since the Agency had constructive knowledge of Complainant's sexual harassment allegations in March 2014, it cannot avoid liability on the grounds that it took prompt, remedial action starting in December 2014.

The AJ found that the Agency did not take steps to correct the retaliatory harassment to which Complainant was subjected, despite Complainant on January 22, 2015, notifying the EEO office and S4 by email that she believed the complaint against her Ohio LISW may have been initiated because of her EEO activity. ROI, Ex. B-1.d.; Bates No. 381 – 383.

On appeal, the Agency disagrees with the AJ's finding that S1 did not receive EEO or sexual harassment training and that it did not offer sufficient evidence of policies, training, or other measures to prevent sexual harassment. It cites to S1's EEO investigatory declaration that all active duty members (S1 was active) are required to attend an EEO briefing once per assignment, and in November 2014, the EEO office provided EEO training to all MDOS in the 48<sup>th</sup> Fighter Wing. The Agency also cites to S2 and S4's EEO investigative declarations about postings of Agency non-discrimination policies. They refer in part to an updated Agency wide Equal Opportunity and Non-Discrimination Policy Memorandum dated May 14, 2014, that was publicly posted on Medical Group bulletin boards. It instructs that those subjected to unlawful discrimination or harassment must report it promptly to their supervisor, but if a superior is the alleged perpetrator the report must be made to the next level or the local EEO office, and another option was reporting the unlawful discrimination or harassment to a specified Air Force Discrimination Hotline. ROI, Ex. F-2.d., at Bates No. 1420. The Agency argues that after the EEO office notified S4 of Complainant's sexual harassment complaint, she promptly ordered a CDI which resulted in S1 being moved to a non-supervisory position.

We find that the AJ's imputation of liability to the Agency on Complainant's sexual and retaliatory harassment is supported by substantial evidence. Specifically, even if S1 took EEO training, as found by the Agency there was insufficient information about the content thereof to show it was of sufficient quality to be preventative. Further, since the Agency wide EEO policy instructs that reporting discrimination and harassment to a superior, the local EEO office, or a hotline are all options, and Complainant promptly reported the harassment to the local EEO office, the AJ correctly imputed knowledge to Agency management, supporting her finding that the Agency failed to promptly correct the harassment. Also, given that the Agency's posted policy instructs that those subjected to unlawful discrimination or harassment must report it promptly to their supervisor, but if a superior is the alleged perpetrator the report must be made to the next level or the local EEO office, the latter which Complainant promptly did, we find that the second prong of the Agency's affirmative defense to imputation of liability for intangible actions (the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise) fails.

### *Constructive Discharge*

The Commission has adopted a three-pronged test for establishing a constructive discharge. Complainant must show that: (1) a reasonable person in her position would have found the working

conditions intolerable; (2) the conduct which constituted prohibited discriminatory treatment created the intolerable working conditions; and (3) Complainant's involuntary resignation resulted from the intolerable working conditions. Taylor v. Air Force and Army Exchange Service, EEOC Request No. 05900630 (July 20, 1990).

The AJ found that Complainant met this test. Specifically, the AJ found as follows. From the time Agency management was aware that Complainant engaged in EEO activity, management officials looked for a way to terminate her employment, including attacking her Ohio LISW license, complaining to Staffing Firm 1, and elevating these concerns to AFMOA. When these efforts failed, they attempted to coerce Complainant to resign as a condition for her obtaining the privileges she needed take the Mildenhall promotion she was offered. This left Complainant to either remain in her job, miss out on the Mildenhall promotion, or see if she could stick it out and endure continued harassment without escape until the perpetrators rotated elsewhere. When she learned that this could be more than a year away, she ultimately resigned. Complainant testified that because of the sustained harassment, her health suffered, she lost weight, had to take medication to sleep, could not take it anymore, and had to resign. Preponderant evidence shows these intolerable working conditions were calculated successfully to make Complainant resign.

On appeal, the Agency makes no specific argument on the constructive discharge claim. We find the AJ's finding that Complainant was constructively discharged when she resigned on February 5, 2016, is supported by substantial evidence.

## Remedies

### *Instatement/Reinstatement*

EEOC Regulation 29 C.F.R. § 1614.501(a) requires that when there has been a finding of discrimination against an employee, the Agency shall provide full relief. This includes an unconditional offer of placement in the position the person would have occupied but for the discrimination, or a substantially equivalent position. Id., at .501(a)(3).

The AJ found that the Agency's contention that it was powerless to direct the hire of Complainant by a staffing firm was without merit. She referred to the Staffing Firm Manager 1's testimony that Complainant was chosen in 2008 by local Agency management at Lakenheath after they reviewed her resume and interviewed her. HT 1, at 79. Complainant also testified that this was the case. HT 1, at 149 – 150. The AJ also referred to the testimony by a contract Operational Psychologist, who worked for Staffing Firm 3 serving the 352D Special Operations Group, 321<sup>st</sup> Special Tactics Squadron at Mildenhall, who was a consultant for the Squadron Commander, that the Commander made the decision to hire Complainant. HT 1, at 28, 30 – 32. We add he explained that the Commander informs the staffing firm who he intends to hire. Id., at 32.

The AJ ordered that the Agency offer to place Complainant to the social worker position at Mildenhall she was offered in August 2014, or a substantially equivalent position, which could include the Lakenheath base, effective October 1, 2014,<sup>5</sup> and give her 15 days to accept or decline the offer. The AJ instructed that failure to accept the offer shall be tantamount to declination, and should Complainant decline the offer, the date on which she declines will be the end date for any back pay due.

On appeal, the Agency makes no specific arguments on instatement/reinstatement. We agree with the tenor of the AJ's order, with a proviso. The AJ's finding that local Agency management, in practice, had the power which it exercised twice before to choose Complainant for hire by a staffing firm is supported by substantial evidence. But nevertheless, a staffing firm could decline the Agency's choice, and we do not have authority to order a staffing firm to hire Complainant. Accordingly, we find that make whole relief includes the Agency identifying a funded slot and if none exists opening one for the position of clinical social worker serving the Agency in Mildenhall that Complainant was denied in 2014, or a substantially equivalent position, choosing Complainant, and then without equivocation asking the appropriate staffing firm(s) verbally and in writing to offer Complainant the position or a substantially equivalent one.

We acknowledge that in Christmon v. Veterans Affairs, EEOC 07A50006 (Mar. 18, 2005), the Commission reversed the part of an AJ's decision that ordered the Agency to reinstate a complainant who was jointly employed by a staffing firm and was terminated due to the agency's discrimination on April 4, 2002, because the staffing firm's contract with the agency expired on August 31, 2002, and the successor staffing firm advised the former joint employees that they needed to apply to be considered for hire with all other eligible candidates. The Commission found that given this, it was too speculative to find that the complainant would have been hired by the successor staffing firm and hence would still be employed but for the discrimination. We distinguish Christmon because the AJ found that the Agency had the power to choose Complainant for hiring by a staffing firm is supported by substantial evidence. Accordingly, with modification as set forth in the order below we affirm the AJ's order regarding instatement.

#### *Back pay*

The AJ ordered that the Agency pay Complainant back pay with all associated benefits and interest in accordance with 5 C.F.R. § 550.805, for the difference between the compensation she would have received had she been able to accept the position at Mildenhall and the compensation she was paid as Outreach Manager in Lakenheath from October 1, 2014 through February 5, 2016, and thereafter at the compensation rate she would have received for the position at Mildenhall through the time she is instated or declines the offer of instatement. The AJ instructed that "all associated benefits" includes the value of tax-free compensation since while on contract for the Agency Complainant's salary was tax free, but she did not enjoy this in the employment she was able to

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<sup>5</sup> The AJ found that the administrative process for hiring Complainant at Mildenhall would likely have been completed on October 1, 2014.

obtain after her constructive discharge. The AJ further instructed that associated benefits includes the value during her employment with the Agency through Staffing Firm 1 of health insurance paid by Staffing Firm 1.<sup>6</sup>

The AJ found that the Staffing Firm Manager 1 credibly testified that each of the nine employees working for Staffing Firm 1 serving the Agency was picked up in November 2016, by the successor staffing firm and his belief Complainant would have been picked up as well. HT 4, at 112 – 113. The successor staffing firm underbid Staffing Firm 1. Based on the above, the AJ found that absent Complainant's constructive discharge, she could have been expected to continue in her employment as Outreach Manager in Lakenheath. The AJ found, however, that since the retaliatory harassment resulted in the rescission of the higher paying Mildenhall offer, make whole relief included entitlement to back pay at the higher rate Complainant would have earned at Mildenhall. We agree.

A back pay claimant under Title VII generally has a duty to mitigate damages. Specifically, §706(g) of Title VII, 42 U.S.C. §2000e-5(g)(1) provides that "interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." The burden is on the agency, however, to establish that the employee failed in her duty to mitigate. The Commission has generally held that an agency must satisfy a two-prong test to carry its burden of proof; this test requires the agency to show: 1) that the complainant failed to use reasonable care and diligence in seeking a suitable position, and 2) that there were suitable positions available which the complainant could have discovered and for which he or she was qualified. Where a complainant makes no effort to mitigate damages and does not explain the lack of effort, the agency does not have to meet the second prong. McNeil v. Postal Service, EEOC Petition No. 04990007 (Dec. 9, 1999).

The AJ found that the documentary and testimonial evidence demonstrated that Complainant continually worked or sought work to mitigate her damages following her constructive discharge, but was unable to find comparable employment, and the Agency did not show Complainant failed in her duty to mitigate losses.

On appeal, the Agency argues that Complainant failed in her duty to mitigate her losses. We find that the AJ's decision to the contrary is supported by substantial evidence.

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<sup>6</sup> The AJ found that while Complainant provided evidence that during her employment with Staffing Firm 1 serving the Agency she was entitled to "full logistical support" including gas coupons, she offered no evidence showing the allotment thereof to which she was entitled, and hence did not award the value thereof as a remedy. The AJ found that while Complainant contended that in connection with this employment, she received substantial discounts on gasoline purchased she purchased on base and a \$2,500 educational allowance, she provided insufficient evidence for her losses of purchasing gasoline off base such as receipts nor sufficient proof that she was entitled to a \$2,500 annual education benefit.



*Front pay*

Front pay may be awarded in lieu of reinstatement when: (1) no position is available; (2) a subsequent working relationship between the parties would be antagonistic; or (3) the employer has a record of long-term resistance to anti-discrimination efforts. The fact that front pay is awarded in lieu of reinstatement implies that the complainant is able to work but cannot do so because of circumstances external to the complainant. EEO MD-110, at 11-7.

The AJ found that a future employment relationship would not necessarily be antagonistic, nor had the Agency demonstrated long-term resistance to anti-discrimination obligations. This is supported by substantial evidence.

A complainant who is jointly employed by an agency and staffing firm is eligible for front pay by the agency if the facts show that the joint employee could reasonably have been expected to continue her service on the contract. Gaynell A. v. Navy, EEOC Appeal No. 0720100043 (Apr. 4, 2014) (the complainant who was jointly employed as an electrician by the agency and a staffing firm was terminated on January 18, 2007, due to the agency's discrimination. The AJ ordered the agency to request the staffing firm to make an unconditional job offer to the complainant for the position of electrician, and if the staffing firm refused the agency would be liable for front pay for five years, or until such time that the staffing firm no longer had a contract with the staffing firm, whichever occurred first. The agency implemented the AJ's order that it request the staffing firm offer the complainant employment, but the staffing firm refused. On appeal, the agency argued that since its contract with the staffing firm ended on September 30, 2007, front pay should terminate then. The Commission modified the AJ's order by requiring the "front pay" to run three years. The Commission found that while the contract expired on September 30, 2007, the agency extended its contract with the staffing firm for its electricians for another three years, and the record showed that had the complainant not been terminated, absent discrimination by the agency she would have been employed until September 2010). The AJ cited Gaynell A., and found that Complainant had a reasonable expectation of continued employment by a staffing firm serving the Agency indefinitely.

The AJ ordered that if neither the position at Mildenhall nor a substantially equivalent position is available, that the Agency pay Complainant front-pay equivalent to the compensation she would have received from the time she may be placed in such a position, for a period not to exceed 10 years. The AJ found that an award of ten years in front pay was supported by Complainant's testimony regarding her difficulty finding comparable work outside the Lakenheath or Mildenhall bases, the salaries and the tax-free compensation and exceptional benefits associated with the positions, and her lack of eligibility for many on base jobs as a local national without status as a spouse or current employee. The AJ recounted that in its written closing argument, the Agency argued that if front pay is awarded, it should be granted with the following caveat: Complainant is required to "seek comparable work" and the Agency is to pay her front pay from the date of the AJ's decision until Complainant "finds comparable work or reaches full retirement age." At the time of the AJ's decision in July 2018, Complainant was 35 years old.

On appeal, the Agency argues that Complainant is not entitled to front pay because she has failed in her duty to mitigate damages. It argues that any award ordering front pay should include language on the duty to mitigate. Further, citing Brown-Fleming v. Justice, EEOC Petition No. 0420080016 (Oct. 28, 2010), the Agency argues that 10 years is too long, since front pay is only intended to bridge a time when the EEOC concludes the complainant is reasonably likely find comparable work. The Agency does not dispute the AJ's finding that while employed Complainant had a reasonable expectation of continued employment by a contractor serving the Agency indefinitely. In opposition to the appeal, Complainant argues that the AJ's findings supporting the award of front are supported by the record.

We find that the AJ's award of 10 years of front pay is supported by substantial evidence and is legally correct. We add that Complainant has a duty to mitigate damages, regardless of the language in the AJ's order.

We must make an adjustment to the AJ's back and front pay orders, i.e., make whole relief is based on the compensation Complainant would have received from the applicable staffing firms. Regulation 5 C.F.R. § 550.805 does not apply because Complainant received her pay from a staffing firm.

#### *Compensatory Damages*

Compensatory damages may be awarded for past pecuniary losses, future pecuniary losses, and non-pecuniary losses that are directly or proximately caused by the agency's discriminatory conduct. Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (July 14, 1992) (available at [www.eeoc.gov](http://www.eeoc.gov)). Non-pecuniary losses are losses that are not subject to precise quantification including emotional pain and injury to character, professional standing, and reputation. Compensatory damages are awarded to compensate for losses or suffering inflicted due to discrimination. Damages for past pecuniary damages will not normally be sought without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals of actual losses and expenses. Id.

The AJ found that Complainant did not prove an entitlement to pecuniary damages.

The AJ found that Complainant proved she sustained \$125,000 in non-pecuniary damages. In support, the AJ made the following findings and references. Prior to the progression of her emotional injuries from the harassment, Complainant was cheerful, bubbly, easy to talk to, outgoing, and hopeful about her future. Complainant was humiliated by the sexualized comments made in early 2014. As a result of the subsequent retaliatory harassment, she had feelings of isolation and lost trust of colleagues who may befriend her since they might report things about her to S1. Complainant physically shook when she learned of the Agency's complaint against her Ohio LISW license, and was devastated by the ensuing effective denial of her privileges which resulted in her loss of the getting the Mildenhall job, her "dream job". While the complaint against her LISW license was ultimately denied, it is still on her record which weighs on her.

The AJ wrote and/or referenced the following. Prior to the full effects of the harassment on Complainant, she had a fiancé, and close relationships with friends and her parents. Her parents lived a few doors down and Complainant visited most evenings, but over time because of the emotional harm caused by the harassment withdrew from them and started visiting much less, instead going home to bed absolutely exhausted. Sometimes when Complainant visited her parents after work she showed up sobbing with tears, and felt bad for stressing her parents out. Complainant's fiancé broke off their approximately eight-month engagement around August 2017, complaining Complainant never seemed to want to do anything, just went to bed all the time, and they did not have fun anymore. Complainant lost weight, was anxious, cried, and sought medical assistance for her conditions, including sleeplessness. Complainant shut down her Facebook account to avoid being monitored by colleagues, thereby increasing her isolation. She became withdrawn, untrusting, guarded, and depressed, and her personality changed for the worse. The AJ made these findings based on the testimony of Complainant and her coworkers, the PM, and Complainant's mother.

The AJ found that for Complainant's emotional injuries, an award of \$125,000 was consistent with the awards made in similar cases.

On appeal, the Agency argues that any nonpecuniary damages award should be limited to \$25,000. It disputes how the AJ weighed the evidence. The Agency makes much of the testimony of Complainant's mother that before October 2015, her daughter was very outgoing, was confident, and enjoyed being around people, but after October 2015 became withdrawn. The Agency argues that the incident with the Airman occurred in October 2015, so this shows this incident caused Complainant significant emotional injury. We observe at that at the hearing in April 2018, when the Agency asked Complainant's mother how Complainant's demeanor was before and after October 2015, it did so without referencing anything connected to this date, like the Airman incident. HT 4, at 60 – 61. Without such context, we are not persuaded that Complainant's mother was referring to the Airman incident or in that moment understood where along the hostile environment timeline October 2015 was.

We find that the AJ's award of \$125,000 in nonpecuniary damages is supported by substantial evidence and is consistent with awards made in similar cases. See Brown-Fleming v. Dep't of Justice, EEOC Appeal No. 0120082667 (Oct. 28, 2010) (\$150,000 awarded in termination case where complainant suffered from depression, anxiety, stress, insomnia, difficulty concentration, disassociation, crying spells, social isolation, damage to her professional reputation, withdrawal from relationships, and nightmares); Champion v. Postal Service, EEOC Appeal No. 0720090037 (Mar. 10, 2010) (\$125,000 awarded in two-year harassment case where complainant suffered from depression, anxiety, sleeplessness, and required psychiatric treatment).

#### *Attorney Fees and Costs*

The hearing took place at the EEOC's Washington Field Office in Washington, DC, albeit some witnesses attended via video teleconference.

Complainant was represented by an attorney located in Washington, DC, whose hourly rate of \$563 was based on the current “Laffey Matrix.” The AJ awarded this rate, and cited a Commission case for the proposition that the proper reasonable hourly rate is the rate in effect at the time of the award and not at the time the services are provided. The AJ awarded Complainant \$186,207.12 in attorney fees and \$11,274.17 in costs, including reimbursement for international telephone calls related to representation, Complainant’s travel to the hearing in Washington, D.C., expert analysis and testimony, and a doctor’s letter submitted in lieu of live testimony.

On appeal, the Agency does not contest the AJ’s calculation of attorney fees and costs. Complainant argues that since the AJ issued her decision on attorney fees, the Laffey Matrix has been updated and her reasonable hourly rate is now \$572, and hence her fees should be recalculated. She submits the updated matrix. We agree, and update this fee award to \$189,183.28. Complainant’s attorney represents she expended an additional 62.76 hours drafting the opposition appellate brief. Based on our review, we find this was reasonable. Accordingly, we award an additional \$35,898.72 in attorney fees (\$572 X 62.76 hours), for a total fee award of \$225,082 (\$189,183.28 + \$35,898.72).

The Agency’s final order is reversed, and the AJ’s decision is **AFFIRMED**, with some modification.

#### ORDER (D0617)

The Agency is ordered to take the following remedial actions:

1. Within 40 calendar days of the date of this decision, provide Complainant the privileges she was denied to practice with the 48<sup>th</sup> Medical Group at the Lakenheath base, known as the Lakenheath hospital, which also serves the Mildenhall base in the United Kingdom.
2. Identify a funded slot and if none exists open one for the position of clinical social worker serving the Agency in Mildenhall that Complainant was denied in 2014, or a substantially equivalent position, select her for the position, and then without equivocation ask the appropriate staffing firm(s) verbally, and if necessary in writing, to offer the position or the substantially equivalent one to Complainant. The Agency is ordered to do this within 40 calendar days of the date of this decision. If complying with this time limit is not possible under current contract funding and logistical mechanisms, than the Agency shall complete this action as soon as it is able even if doing so takes an indefinite amount of time working within the parameters of the applicable contract(s), waiting for a renewal option thereto, modifying the contract(s) with the applicable staffing firm(s), or if such contract(s) is about to terminate, waiting for the successor staffing firm(s) to come on board and then taking the above actions with those staffing firm(s).
3. If the staffing firm(s) refuse to hire Complainant to the above position or substantially equivalent position, the Agency must, if Complainant agrees in writing in advance, using the same methodology outlined above, do the same for the position of Outreach Manager

at Lakenheath, or a substantially equivalent position. Should this result in a job offer to Complainant by a staffing firm, then the requirement to pay front pay would cease.<sup>7</sup>

4. The Agency shall determine and pay the amount of back pay, with interest, and associated benefits, which includes the value of receiving compensation tax free, no later than ninety (90) calendar days after the date this decision is issued based on the difference between the compensation Complainant would have received had she been able to accept the position serving the Agency at Mildenhall with Staffing Firm 2 and what she received as compensation serving the Agency as Outreach Manager in Lakenheath with Staffing Firm 1 from October 1, 2014 through February 5, 2016, and thereafter at the compensation rate she would have received serving the Agency at Mildenhall with Staffing Firm 2 and successor staffing firms, if any, through the time Complainant is instated or reinstated or declines an offer by a staffing firm made pursuant to this order. In calculating back pay, the Agency shall use 29 C.F.R. § 1614.501 as a general guide, to the extent applicable. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue payment to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute by mailing the petition to the address in the caption of this decision or uploading it via the EEOC Public Portal.
5. If staffing firm(s) refuse to offer Complainant a position pursuant to this Order, then from the date of the applicable last refusal for a period not to exceed 10 years, the Agency shall pay Complainant monetary front-pay equivalent to the compensation she would have received, including pay increases and the value of benefits, working in the denied Mildenhall position for Staffing Firm 2 and successor staffing firms serving the Agency.
6. Within 60 calendar days of the date of this decision, the Agency shall pay Complainant \$125,000 in non-pecuniary compensatory damages.
7. Within 60 calendar days of the date of this decision, the Agency shall pay Complainant \$225,082 for attorney fees and \$11,274.17 in costs.
8. To the extent they are still employed, contracted with or under the administrative or supervisory control of the Agency, within 90 calendar days of the date of this decision, the Agency shall provide 8 hours of mandatory in person or interactive training to S1, Successor S1, S2, S3, and the Medical Services Chief, and cover the following: how to

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<sup>7</sup> We understand that the Outreach Manager job is not substantially equivalent to the Mildenhall job, but order this option because Complainant was discriminatorily constructively discharged from the Outreach Manager position in February 2016, and in May 2018, expressed interest in the job by applying with a staffing firm to serve the Agency, but was rejected.

identify and practical steps to take to prevent sexual and non-sexual harassment, their legal obligations to report and stop harassment, and Workplace Civility and Bystander Intervention training.<sup>8</sup> If S4 is still employed by the Agency in a managerial role, then within 90 calendar days of the date of this decision it shall provide S4 training on her obligations and useful practical steps to prevent and stop harassment in her subordinate chain of command. If the local EEO Director, who served as Complainant's EEO counselor, still is employed by the Agency in an EEO capacity, then the Agency shall provide him a copy of this entire decision.

9. To the extent the Agency still directly employs as federal employees S1, Successor S1, S2, S2, and the Medical Services Chief, within 60 calendar days from the date of this decision the Agency shall consider discipline against them. 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 any of above individuals have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

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 48th Medical Group, Mental Health Flight, Family Advocacy Program office and Agency Lakenheath hospital at the Royal Air Force Lakenheath base 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).

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<sup>8</sup> Workplace Civility and Bystander Intervention training are described in EEOC's Report of the Select Task Force on the Study of Harassment in the Workplace (June 2016). See [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm).

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 20, 2019  
Date