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EEOC DOC 0120081287, 2009 WL 1173547 (E.E.O.C.)

U.S. Equal Employment Opportunity Commission (E.E.O.C.)
Office of Federal Operations

*1 WENDY L. LEMONS, COMPLAINANT,
v.
ERIC HOLDER, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE (FEDERAL BUREAU OF PRISONS),
AGENCY.

Appeal No.
0120081287
Agency No. P-2006-0215

April 23, 2009

DECISION

On January 15, 2008, complainant filed an appeal from the agency's December 20, 2007 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. The appeal is deemed timely and is accepted pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission REVERSES the agency's final decision.

ISSUES PRESENTED

- (1) Whether complainant was subjected to sexual harassment by a prison inmate;
- (2) Whether the agency took immediate and appropriate corrective action when made aware of the harassment against complainant.

BACKGROUND

The record reveals that complainant has worked for the Bureau of Prisons since June 1991. At the time of events giving rise to this complaint, complainant worked as a senior officer specialist at the agency's Federal Correctional Institution in Tucson, Arizona.

On June 2, 2006, complainant filed an EEO complaint alleging that she was subjected to a sexually hostile work environment by an inmate and that management officials failed to take reasonable steps to address the harassment.

In an EEO investigative affidavit, complainant stated that on August 5, 2005, a male inmate exposed his penis to her at his cell door as she locked cell doors in preparation for the 4:00 p.m. inmate count. Complainant stated that she told the inmate to "quit what he was doing," but the inmate spoke very little English and she had a difficult time communicating with him. Complainant stated that she reported the incident to a lieutenant (Lt. 1) and wrote an incident report that day. Complainant further stated that after she returned to work the following week after having the

weekend off work, the inmate remained in her housing unit. Complainant stated that a lieutenant (Lt. 2) told her that if the inmate exposed himself again, complainant should report the incident again. Complainant stated that another female officer informed her that the same inmate exposed himself to her on the weekend following the August 5, 2005 incident, and the inmate was sent to a special housing unit for the weekend.

Complainant further stated that she felt unsafe after the August 5, 2005 incident because the inmate was returned to her unit days after the incident. Complainant stated that the next incident occurred on January 3, 2006 while she was working in the Saguaro Unit. Complainant stated that at approximately 4:45 a.m., she was unlocking cell doors for the morning. Complainant stated that while she was performing this work duty, the inmate followed her with his pants dropped around his ankles, held his erect penis in his hand, and gazed at complainant. Complainant stated that she instructed the inmate to go back to his room and called her lieutenant (Lt. 3) to report the incident.

*2 Complainant stated that Lt. 3 directed her to write an incident report and send the inmate to see Lt. 3. Complainant stated that she wrote an incident report and gave it to Lt. 3, although she is not sure if it was placed in the log-book. Complainant stated that after the inmate met with Lt. 3, the inmate came back to her unit and mumbled something while looking at complainant. Complainant stated that she felt very uncomfortable and unsafe after the inmate returned to her unit. Complainant stated that after the inmate returned to the cell, she told Lt. 3 that she felt that it was not right to send him back to the unit. Complainant stated that Lt. 3 stated that inmates exposing themselves to her is "part of the job."

Complainant further stated that on January 25, 2006, the inmate exposed his penis to her again while she was conducting an inmate count at 12:48 p.m. Complainant stated that after she finished counting, she reported the incident to the lieutenant on duty (Lt. 4), who instructed her to write an incident report. Complainant stated that she submitted an incident report to Lt. 2 regarding the matter. Complainant stated that Lt. 2 instructed her to send the inmate to him, which she did, but the inmate returned to her unit within minutes and looked angrily at complainant. Complainant stated that when she asked Lt. 2 why the inmate remained in her unit, Lt. 2 "acted like it was no big deal." "He [Lt. 2] said he didn't care and then that was the end of the conversation," complainant stated. Complainant's Affidavit at p. 15.

Complainant also stated that at approximately 2:30 a.m. on January 26, 2006, the inmate exposed himself to her yet again in a similar manner as she was doing an inmate count. Complainant stated that she reported the incident to the lieutenant on duty (Lt. 5), Lt. 5 asked her to write an incident report, and complainant submitted the incident report to Lt. 5. Complainant stated that nothing was done about the matter.

Complainant further stated that at 4:00 a.m. on January 26, 2006, she released Food Service workers from their cells and prepared for the 4:00 a.m. count. Complainant stated that as she worked in her office, the inmate walked past her office window and stood in front of her office door completely naked. Complainant stated that she directed the inmate to stand back, but he came toward her holding his penis. Complainant stated that the inmate had oil on his body. Complainant further stated that she activated her body security alarm and screamed for the inmate to leave her alone and return to his room. Complainant stated that she tried to hold the inmate back, but the inmate grabbed her left hand in an attempt to force her to touch his penis. Complainant stated that she held her arm out in an attempt to hold the inmate back, but the inmate pushed her arm away, touched her between her legs with his hand, grabbed her breast, called her by her name, and pinned her against the window. Complainant stated that a senior officer then entered her office and took the inmate off complainant and out of the unit in handcuffs. Complainant stated that Lt. 5 came to the unit and asked complainant to write an incident report and memorandum on the incident. Complainant stated that she was examined at the facility hospital because she hurt her back when the inmate shoved her against a window and was unable to work for two weeks after the assault.

*3 Lt. 2 stated that he did not recall the August 5, 2005 incident. He further stated that he recalled the January 25, 2006 exposure incident. Lt. 2 stated that he processed complainant's incident report and forwarded it to the Unit Disciplinary Committee. Lt. 2 stated that he decided to allow the inmate to remain in complainant's unit because another

officer was "only a second behind" complainant but did not see the inmate engage in misconduct. Lt. 2 stated that he instructed the inmate "not to do it again" and sent him back to complainant's unit.

Lt. 3 stated that on January 3, 2006, complainant reported that the inmate exposed his genitals to her. Lt. 3 stated that the inmate was brought to her office so that she could talk with him. Lt. 3 stated that she sent the inmate back into the unit because he was lucid, although the inmate has "mental issues" and has a history of not taking his medication. Lt. 3 stated that a pending Mental Health Evaluation was being conducted because two previous incident reports had been logged concerning the inmate. Lt. 3 stated that exposure is "not that common" in the facility, and she has only known of two other inmates exposing themselves to officers in her ten-year career at the Tucson facility. Lt. 3 stated that it is the lieutenant's job to manage the inmate and safety of the institution, including staff. Lt. 3 stated that inmates can be moved into a disciplinary special housing unit but special housing units have limited space. Lt. 3 stated that complainant turned in her January 3, 2006 incident report to the Control Center, instead of properly submitting it to her office.

Lt. 4 stated that he does not recall the January 25, 2006 exposure incident or complainant reporting such an incident. However, Lt. 4 stated that if he had been informed that an inmate indecently exposed himself to complainant, he would have "yanked him out and put him in special housing." When asked by the EEO investigator if such a course of action would have been normal, Lt. 4 responded that "it depends on the lieutenant" on duty.

Lt. 5 stated that she told complainant to write an incident report regarding the earlier January 26, 2006 exposure incident and send the inmate to her later that morning. Lt. 5 stated that complainant informed her that the inmate had masturbated in front of her before. Lt. 5 stated that even so, "there was nothing for me to do" because the inmate was secured in his cell. Lt. 5 stated that it was the job of the lieutenant to investigate and respond to indecent exposure incidents. She stated that indecent exposure incidents are "not uncommon, but it's not common." Lt. 5 stated that if the situation warranted it, she could have locked up an inmate who exposed himself.

The Associate Warden stated that he became aware of the harassing inmate's conduct after complainant was assaulted. He stated that he investigated the matter and found that Lt. 2 processed one of complainant's incident reports, recommended that the report be expunged and forwarded the matter to the next level of disciplinary action, the Unit Disciplinary Committee.

*4 The Warden stated that she was first made aware of the inmate's harassing conduct after the assault occurred on January 26, 2006. The Warden stated that complainant wrote reports on the inmate that were entered into the Inmate Information Management System. The Warden stated that she questioned complainant about why she left the inmate's cell door open after unlocking it to let his cellmate go to work with Food Services. The Warden stated that complainant could have locked the cell after letting the inmate's roommate out if she felt threatened, although "we all leave it open because it just makes it easier later." The Warden further stated that she felt that lieutenants should not informally resolve reports of inmate misconduct, although lieutenants have the ability to do so.

A senior officer on duty with complainant on January 25, 2006, stated that complainant told him that the inmate exposed himself to her, but when the senior officer later went by his cell, the inmate was merely underneath blankets. Another senior officer stated that on January 26, 2006, complainant also told her that the inmate had exposed himself. The senior officer stated that he then followed behind complainant by about three to five seconds, but only saw the inmate covered with a sheet when he passed his cell.

A senior officer stated that on January 26, 2006, he responded to complainant's body alarm. He stated that as he entered the Saguaro unit, he heard complainant screaming from the office. He stated that after he entered the office, he observed that the inmate was naked and had complainant pinned against the wall while groping her body. The senior officer stated that he pulled the inmate off complainant, placed him on the ground, handcuffed him, escorted him to the lieutenant's office, and sent him to the special housing unit. The record reveals that the inmate was transferred to

the Federal Correctional Institution in Phoenix, Arizona on January 26, 2006. On September 26, 2006, a federal court found the inmate guilty of aggravated sexual abuse and resisting or impeding officers in the January 26, 2006 incident involving complainant and sentenced the inmate to 60 months incarceration.

At the conclusion of the investigation, complainant was provided with a copy of the report of investigation and notice of her right to request a hearing before an EEOC 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).

In its final decision, the agency found that the "few isolated alleged incidents of the [inmate] exposing himself in complainant's presence likely did not rise to the level of actionable harassment" in the context of a correctional environment because it is unlikely that a reasonable correctional officer would have viewed these incidents as sufficient to create a hostile work environment. The decision further stated that there was no evidence that the inmate specifically targeted complainant prior to January 25, 2006. However, the agency further determined that the January 26, 2006 physical assault on complainant in her office was sufficiently severe to constitute actionable sexual harassment.

*5 The agency decision nonetheless found that the agency took appropriate actions prior to the January 26, 2006 assault in light of the fact that the objectionable inmate conduct occurred in a prison environment and there was insufficient evidence that the inmate targeted complainant. The agency decision further stated that management acted appropriately in response to complainant's reports that the inmate had exposed himself on January 3 and 25, 2006 by talking to the inmate, evaluating the inmate, determining that he was not a danger to anyone, and returning him to his cell. The decision noted that a lieutenant stated that inmates are usually only moved out of the unit if they present a safety risk, and complainant did not express any fear for her safety before the January 26, 2006 physical assault.

The decision further stated that the agency acted promptly after the January 25 and 26, 2006 exposure incidents by having a lieutenant talk to the inmate and tell him to stop the inappropriate behavior, processing complainant's incident report, and referring the matter to the Unit Disciplinary Committee. The decision further determined that although complainant believed that the inmate should have been moved to another unit prior to the January 26, 2006 assault, the agency will not transfer an inmate to another housing unit "for something that BOP considers a fairly minor infraction." The decision concluded that lieutenants had discretion to handle this matter informally, and the lieutenants appropriately determined that complainant was not in danger merely because of the exposure incidents.

CONTENTIONS ON APPEAL

On appeal, complainant argues that the agency improperly found that it was not liable for the inmate's harassing conduct. Complainant notes that the Warden acknowledged in his investigatory statement that the lieutenants improperly processed complainant's incident reports and improperly handled such incidents in an informal matter. Complainant further argues that the agency's argument that she was not harassed by the indecent exposure because the inmate was locked in his cell is erroneous since complainant had to observe the inmate in his cell in order to fulfill her essential work duties. Complainant also contends that correctional officers often left the cells of Food Service Workers open so that they could go eat meals or go to work or school. Complainant maintains that the Tucson facility was "not a lockdown prison," and "inmates pretty much have free range from 10:00 p.m. until the morning around 3 a.m., when I start opening cell doors to let Food Service Workers out." Complainant's Appellate Brief at p. 2. The agency did not submit a statement on 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 EEOC Management Directive

110, Chapter 9, § VI.A. (November 9, 1999) (explaining that the *de novo* standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

Sexual Harassment/ Hostile Work Environment

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

Here, complainant, a female, is a member of a statutorily protected class. Further, we find that the inmate’s conduct was based upon complainant’s sex because the evidence indicates that the only other employee who was subjected to similar indecent conduct by this inmate was also female, and the inmate covered himself when male guards observed him. Complainant, other witnesses, and documentary evidence reflect that complainant immediately reported the harassing incidents to management verbally and through incident reports and resisted the inmate’s physical attack on her. Thus, the record reflects that the inmate’s conduct was unwelcome to complainant.

Turning to the fourth prong of the *prima facie* case, we note that whether or not an objectively hostile or abusive work environment exists is based on whether a reasonable person in complainant’s circumstances would have found the alleged behavior to be hostile or abusive. The incidents must have been “sufficiently severe and pervasive to alter the conditions of complainant’s employment and create an abusive working environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 23 U.S. 75 (1998). To ascertain this, we look at the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; whether it was hostile or patently offensive; whether the alleged harasser was a co-worker or a supervisor. See *Harris*, 510 U.S. 17, 23 (1993); see also *Policy Guidance on Current Issues of Sexual Harassment*, EEOC Notice No. N-915-050 (Mar. 19, 1990).

In this case, the agency improperly severed the incidents wherein the inmate indecently exposed himself to complainant from the inmate’s ultimate physical assault on complainant when examining whether the inmate’s conduct subjected complainant to a hostile work environment. [FN1] We determine that the inmate’s conduct should be viewed as a whole because each incident is part of an ongoing pattern of similar conduct directed against complainant by the same harasser over a span of five and a half months. [FN2]

*7 As such, we first determine that complainant credibly reported that on four occasions, an inmate intentionally exposed and touched his genitals while gazing at or following complainant. Although the agency attempts to cast doubt on complainant’s account of the inmate’s indecent exhibitionism on January 25 and 26, 2006 by asserting that two male co-workers merely saw the inmate covered under a sheet or blanket when they arrived on the scene, we are persuaded that complainant’s accounts are accurate because there is consistency between the incident reports filed contemporaneously with the harassing conduct and complainant’s subsequent investigatory and appellate statements. Further, we are convinced that complainant’s immediate reporting of each incident to management and submission of incident reports indicates that complainant’s accounts of the inmate’s conduct are accurate and trustworthy. We further note that by the male co-workers’ own accounts, they did not observe the inmate at the precise moment complainant stated that the inmate exposed himself to her, but followed complainant after she reported the harassment.

The lapse of seconds afforded the perpetrator the opportunity to obscure his misdeeds toward complainant underneath bed sheets, which we are persuaded was the case here. [FN3] Furthermore, the details of the sexual assault on complainant is corroborated by a senior officer whose description of the inmate's conduct is very similar to the *modus operandi* of the inmate described in complainant's accounts of his previous acts of indecent exposure.

We further find that contrary to the agency's assertion that the indecent exposure was not directed at complainant, complainant proved that the conduct was directed at her by credibly testifying that the indecent exposure occurred as the inmate followed her with his pants dropped around his ankles, held his penis in his hand as he gazed at complainant, laid in wait for complainant to pass his cell so that he could expose his genitals to her, and looked angrily at complainant after she reported his indecent acts.

Furthermore, we find that a reasonable person in complainant's circumstances would find that she was subjected to conduct that was sufficiently severe to alter the conditions of her employment when she was targeted by an inmate's indecent exposure on four occasions; physically overpowered against her will by the naked inmate; groped between the legs; touched on the breasts; pinned against a window; almost physically forced to touch the inmate's genitals; and, injured by the inmate's sexual assault. See *Cori A. Wilson v. Department of Justice* (Federal Bureau of Prisons), EEOC Appeal No. 0120023614 (February 3, 2004) (Commission held that complainant was subjected to a hostile work environment when her coworker exposed himself, grabbed complainant's hand, and tried to force complainant to touch his exposed genitals as he was masturbating); *Lopez v. United States Postal Service*, Appeal No. 0120045212 (February 10, 2005) (Commission held that instance of co-worker grabbing complainant and grinding against her, coupled with one subsequent comment, was sufficient to establish a hostile work environment); *Hayes v. United States Postal Service*, EEOC Appeal No. 01954703 (January 23, 1998) (Commission held that incident where co-worker stuck his tongue into complainant's ear was sufficient to constitute hostile work environment); *Smith v. Sheahan*, 189 F.3d 529, 534 (7th Cir.1999) (Court held that episode in which plaintiff was called a "bitch," was pinned against a wall, and had her wrist twisted severely enough to damage her ligaments, draw blood, and eventually require surgical correction was severe enough to create an actionable hostile work environment); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1072 (10th Cir.1998) (Court held that an incident in which a customer pulled his waitress by the hair, grabbed her breast, and placed his mouth on it severe enough to create an actionable hostile work environment); *Todd v. Ortho Biotech, Inc.*, 138 F.3d 733, 736 (8th Cir.) (Court held that single attempted rape at national sales meeting was sufficiently severe misconduct to be actionable), *rev'd* on other grounds, 525 U.S. 802, 119 S.Ct. 33, 142 L.Ed.2d 25 (1998); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2nd Cir.1995) (Court held that "even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability"). Thus, we find that complainant was subjected to sexual harassment.

Agency Liability

*8 Because complainant established that she was subjected to sexual harassment, the next inquiry is whether the agency is liable for the inmate's actions. EEO Regulations provide that employers may be held liable for the acts of non-employees where the employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action." 29 C.F.R. § 1604.11(e); Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999). That is, an agency can raise an affirmative defense when it shows that it took immediate and appropriate corrective action. *Id.* What is appropriate remedial action will necessarily depend on the particular facts of the case, such as the severity and persistence of the harassment and the effectiveness of any initial remedial steps. See *Taylor v. Department Of Air Force*, EEOC Request No. 05920194 (July 8, 1992)

In this case, complainant immediately reported each incident of harassment to various management officials, both verbally and through incident reports. Thus, the agency was aware of the inmate's harassing conduct immediately after the harassing incidents occurred. After the first incident of indecent exposure and a subsequent incident involving another female coworker in August 2005, the agency reportedly sent the inmate to a special housing unit for the weekend, but inexplicably returned him to complainant's unit in time for complainant's next day of work.

The final agency decision concluded that the lieutenant's complainant complained to each addressed her allegations and handled her complaints properly. However, the lieutenant's "response" merely consisted of talking to the harassing inmate, instructing him "not to do it again," and returning the inmate to complainant's unit, which was wholly inadequate because it made complainant vulnerable to further harassment without disciplining the harasser. In fact, the lieutenant to whom complainant reported the August 5, 2005 incident could not recall responding to the incident and stated that he merely instructed the inmate to "not to do it again" after exposing himself to complainant on January 25, 2006. The lieutenant to whom complainant reported the January 3, 2006 incident stated that after complainant reported the incident, she merely talked to the inmate and sent him back to complainant's unit because he was "lucid." Likewise, the lieutenant to whom complainant reported the January 26, 2006 exposure incident stated that although complainant informed her that the same inmate had masturbated in front of her before, she could do nothing because the inmate was secured in his cell. Although a lieutenant stated that lieutenants had the authority and ability to immediately transfer the inmate to a special housing unit where he would have no interaction with complainant, the lieutenants did not exercise their discretion to do so in this case until after complainant was physically attacked. [FN4] Consequently, we find that the agency did not take immediate and appropriate steps to ensure that the harassment would not recur.

*9 Despite the final decision's attempt to insulate the agency from liability by asserting that the agency followed its own process for handling inmate misconduct, there is no evidence that the agency actually used the process to effectively respond to complainant's reports of harassment. In fact, although complainant provided the EEO investigator with copies of her incident reports after the agency failed to provide them for the record, there is no indication in the record that the agency actually took any action in response to complainant's incident reports. [FN5] Even if the agency forwarded complainant's incident reports to the Unit Disciplinary Committee in accordance with its inmate disciplinary process, there is no evidence that the Committee took any prompt or corrective action to address the harassment before complainant was sexually assaulted. After complainant reported that she was subjected to harassment when an inmate repeatedly exposed himself to her, the agency was required to take immediate and effective corrective action instead of deferring its duty to respond to a protracted procedure that did not adequately address the urgency of the situation. Given the fact that inmates were allowed to sometimes roam outside their cells, complainant's job duties included going into or near the inmate's cell, the repeated nature of the indecent exposure, the questionable mental state of the inmate, and the targeted and confrontational manner in which the inmate exposed himself to complainant, we find that the agency did not exercise reasonable care to prevent further harassment of complainant before she was sexually assaulted.

Additionally, we reject the agency's suggestion that its duty to protect its employees in this case is somehow reduced by the nature of a prison facility. In *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), the Ninth Circuit upheld a jury's determination that a female correctional officer was subjected to a hostile work environment when inmates subjected her to exhibitionist masturbatory conduct on at least five occasions within several months. Regarding the agency's liability for the inmate's harassment of the officer, the Ninth Circuit concluded:

Nothing in the law suggests that prison officials may ignore sexually hostile conduct and refrain from taking corrective actions that would safeguard the rights of the victims, whether they be guards or inmates. As the district court found, "even in an inherently dangerous working environment, the focus remains on whether the employer took reasonable measures to make the workplace as safe as possible." The CDCR is not, by simple virtue of its status as a correctional institution, immune under Title VII from a legal obligation to take such measures and to protect its employees to the extent possible from inmate sexual abuse.

*10 *Freitag*, 468 F. 3d at 539.

Finally, we note that in *Freitag*, the Court observed that prisons have curtailed indecent exposure by imposing serious disciplinary measures for sexual misconduct; restraining sexually aggressive inmates or taking away their yard privileges; working with the prosecutor's office to prosecute serious and repeat offenders; and, even installing devices so that officers can observe inmates but inmates cannot see the officers. *Freitag*, 468 F.3d at 535. In this case,

the agency failed to avail itself of any such measures, which allowed the inmate's conduct to escalate to the point of physically attacking complainant.

The final agency decision concluded that the agency was not aware of any threat to complainant's safety until complainant was physically assaulted on January 26, 2006. However, we determine that the physical assault on complainant was the foreseeable escalation of the inmate's indecent exposure against complainant in light of the agency's failure to take advantage of the options available to control his indecent exhibitionist behavior. The inmate's violent propensity was revealed in his reported stalking of complainant while exposing his genitals to complainant on January 3, 2006, yet the agency failed to fulfill its obligation to do "whatever is necessary" to end the harassment, make the victim whole, and prevent the misconduct from recurring. Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. N-915-050 (Mar. 19, 1990); *see also* Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999) (stating that "remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur").

In essence, the fact that the harassment recurred and escalated after complainant immediately reported the inmates' repeated harassment indicates that the agency's response was not prompt, effective, nor appropriate. *See Logsdon v. Department of Agriculture*, EEOC Appeal No. 07A40120 (Feb. 28, 2006) (Commission held that taking only some remedial action does not absolve the agency of liability where that action is ineffective); *Slayton v. Ohio Department of Youth Services*, 206 F.3d 669, 677 (6th Cir. 2000) (Court held that although allegations of inmate misconduct alone cannot support a hostile work environment claim, "this general rule against prison liability for inmate conduct does not apply when the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior"). Due to the agency's failure to keep the harasser away from complainant or properly discipline him, complainant was forced to work with the harasser which culminated in the sexual assault. Accordingly, because the agency has not satisfied the affirmative defense, we find that it is liable for the harassment of complainant.

CONCLUSION

*11 Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, the Commission REVERSES the agency's final decision. We REMAND this matter to the agency for further processing in accordance with this decision and the ORDER below.

ORDER

The agency is ordered to undertake the following remedial relief:

1. The agency shall undertake a supplemental investigation to determine complainant's entitlement to compensatory damages under Title VII. The agency shall give complainant notice of her right to submit objective evidence (pursuant to the guidance given in *Carle v. Department of the Navy*, EEOC Appeal No. 01922369 (January 5, 1993)) and request objective evidence from complainant in support of her request for compensatory damages within forty-five (45) calendar days of the date complainant receives the agency's notice. No later than ninety (90) calendar days after the date that this decision becomes final, the agency shall issue a final agency decision addressing the issue of compensatory damages. The final decision shall contain appeal rights to the Commission. The agency shall submit a copy of the final decision to the Compliance Officer at the address set forth below.
2. Within sixty (60) calendar days after the date this decision becomes final, the agency shall restore any leave to complainant attributable to the hostile work environment, including the January 26, 2006 assault.
3. The agency shall provide training to all management officials in the Federal Correctional Institution facility in Tucson, Arizona regarding their responsibilities with respect to Title VII with special emphasis on preventing and responding to harassment (including inmate harassment) and EEO anti-retaliation provisions.

4. The agency shall consider taking appropriate disciplinary action against the responsible management officials. The Commission does not consider training to be disciplinary action. The agency shall report its decision to the compliance officer. If the agency decides to take disciplinary action, it shall identify the action taken. If the agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials 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, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall 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 (G0900)

The agency is ordered to post at its Federal Correctional Institution facility in Tucson, Arizona copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (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 at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K1208)

*12 Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. 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.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M1208)

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 or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and argu-

ments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. 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 request or opposition must also include proof of service on the other party.

***13** 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 (R0408)

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 (Z1008)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden
Director
Office of Federal Operations

FN1. We note that the final agency decision maintained that a reasonable correctional officer would not have viewed the indecent exposure as sufficient to create a hostile work environment. However, we note that the agency's own inmate disciplinary guide provides that indecent exposure is a prohibited offense that can result in serious sanctions against inmates, including rescission of parole, disciplinary transfers, segregation, restitution, loss of job, and banishment to living quarters. Moreover, management stated that indecent exposure was "not that common" in the facility; a lieutenant stated that she could only recall two indecent exposure incidents during her ten years working at the facility; and, another lieutenant stated that the inmate's indecent exposure was so serious that he would have "yanked" the inmate out of his cell and placed him in a special housing unit after complainant reported such an incident.

FN2. A complainant's legal claim of harassment should not be fragmented, or broken up, during EEO complaint processing, as fragmented processing comprises a complainant's ability to present an integrated and coherent claim

of unlawful harassment. *See* Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (MD-110), Chapter 5, Section III (November 9, 1999).

FN3. We note that the two co-workers did not indicate that they went into the inmate's cell to investigate the matter further; instead, they merely observed the inmate underneath the covers from outside the cell.

FN4. In fact, the record is devoid of evidence documenting that the agency took any action to protect complainant or discipline the harassing inmate for reported indecent acts committed against complainant in January 2006 until after the inmate sexually assaulted complainant on January 26, 2006.

FN5. We note that the agency contends that complainant improperly submitted an incident report to the Control Center instead of to a lieutenant. However, the agency has not shown that reporting the matter to the lieutenant on one occasion would have resulted in a prompt and effective response from the agency, since complainant clearly submitted other incident reports to lieutenants that did not result in a prompt and appropriate response from the agency.

EEOC DOC 0120081287, 2009 WL 1173547 (E.E.O.C.)
END OF DOCUMENT

C
EEOC DOC 0120071846, 2009 WL 1441519 (E.E.O.C.)

U.S. Equal Employment Opportunity Commission (E.E.O.C.)
Office of Federal Operations

*1 MICHELLE D. MAYER, COMPLAINANT,
v.
JANET NAPOLITANO, SECRETARY, DEPARTMENT OF HOMELAND SECURITY, AGENCY.

Appeal No.
0120071846
Hearing No. 120200500163X
Agency No. HS03TSA001181

May 15, 2009

DECISION

On March 2, 2007, complainant filed an appeal from the agency's February 1, 2007 final order 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.* The appeal is accepted pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission REVERSES the agency's final order.

BACKGROUND

At the time of her complaint, complainant was employed by the agency as a Transportation Security Screener at the Newport News-Williamsburg International Airport in Newport News, Virginia. In her formal EEO complaint, dated May 5, 2003, complainant alleges that she was subjected to discriminatory harassment on the bases of sex (female) and in reprisal for prior protected EEO activity when from December 4, 2002, to March 24, 2003:

1. A co-worker gave her a letter which stated in part, "As I watch you move from station to station, your smile shines like a missing star from the Heavens," which made her feel uncomfortable and threatened, and management failed to respond;
2. Her supervisor (S1) stated that a pizza she was eating would put dimples on her buttocks;
3. S1 leered at her and stated that she would look good in a tight cat suit and heels;
4. S1 placed one of his boots between a female co-worker's legs and made sexually explicit comments while moving his foot around;
5. S1 stated that he would approve her request for leave if she kissed him;
6. S1 put his hands inside the waistband of complainant's pants and pulled her underwear up her buttocks;
7. S1 asked her to lift her pant leg and made explicit comments about her legs and genital area, including insisting that she waxes her pubic area;
8. S1 made an oral sex gesture while kissing his lips at her;
9. S1 initiated an erotic dance while touching his genitals and encouraging her to touch his genitals;
10. S1 touched her buttocks;
- 11 She was given the wrong telephone numbers by management officials when she asked for the agency's Of-

Office of Civil Rights;

12 She was intimidated by a co-worker for reporting an incident; and

13 She was ostracized by co-workers and management kept her separate from her co-workers after she complained about the harassment.

The record suggests that S1 was notorious among employees for sexual harassment. Complainant stated that after March 22, 2003, complainant "had all of [S1's] actions that [she] could take" and that she was afraid to file a complaint because of reprisal. The only incident that complainant reported to management was the letter she received from a co-worker. Complainant asserts that management officials did not respond to this incident, and told her that the co-worker acted like that with all women.

*2 On March 28, 2003, complainant did not show up for work as scheduled because of S1's harassment. She was subsequently subjected to discipline for the absence. On April 2, 2003, complainant's father contacted the Deputy Federal Security Director (DFSD) and complained that it was not fair that his daughter was being disciplined for missing work when she was a victim of sexual harassment. The DFSD told complainant's father to have complainant call him immediately. When complainant did not call him, the DFSD called her supervisor and told him to have complainant meet with the Human Resources Manager (HRM). Following the meeting with the HRM, S1 was transferred to Norfolk while the matter was investigated. S1 subsequently resigned from his position on April 8, 2003.

After complainant met with the HRM, she alleges that she was ostracized and denigrated by her co-workers for filing the complaint. Complainant alleges that she was denied work assistance by management, her co-workers stopped talking to her, and she was subjected to her co-workers making jokes about sexual harassment complaints whenever complainant was in their presence. Complainant alleges that the retaliation got so bad that she was forced to take time off work until she could be transferred to a different airport.

At the conclusion of the investigation, complainant was provided with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. When the complainant did not object, the AJ assigned to the case granted the agency's Motion for a Decision Without a Hearing and issued a decision without a hearing on December 20, 2006. The AJ found that complainant failed to establish that liability for S1's harassment should be imputed to the agency because complainant failed to report S1's harassment to other management officials. Further, the AJ found that complainant failed to establish that she engaged in prior protected activity, therefore no reprisal existed. The agency subsequently issued a final order adopting the AJ's finding that complainant failed to prove that she was subjected to discrimination as alleged. Complainant now appeals to the Commission.

CONTENTIONS ON APPEAL

On appeal, complainant asserts that the AJ's issuance of a decision without a hearing was inappropriate because genuine issues of material fact are in dispute. Specifically, complainant alleges that she was subjected to harassment based on sex and in reprisal for prior protected EEO activity, and liability should be imputed to the agency. The agency does not dispute that complainant was subjected to sexual harassment by S1. The agency asserts that the Commission should uphold the AJ's finding that liability cannot be imputed to the agency for S1's sexual harassment because complainant did not report the harassment to management officials and, when it was ultimately reported, the agency acted immediately. Additionally, the agency asserts that the Commission should also uphold the AJ's finding that complainant was not subjected to retaliation because she failed to engage in prior protected EEO activity.

ANALYSIS AND FINDINGS

*3 In rendering this appellate decision we must scrutinize the AJ's legal *and* factual conclusions, and the agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an

agency's final action shall be based on a *de novo* review . . ."); *see also* EEOC Management Directive 110, Chapter 9, § VI.B. (November 9, 1999) (providing that an administrative judge's "decision to issue a decision without a hearing pursuant to [29 C.F.R. § 1614.109(g)] will be reviewed *de novo*"). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and agency's, factual conclusions and legal analysis -- including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. *See id.*, at Chapter 9, § VI.A. (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").

We must first determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. *Id.* at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. *Id.* at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

*4 If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. *See Petty v. Department of Defense*, EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." *Anderson*, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. *Cf.* 29 C.F.R. § 1614.109(g)(2) (suggesting that an administrative judge could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

After a careful review of the record, we find that summary judgment was appropriate because no genuine dispute of material fact exists. However, we find that the AJ erred in finding in favor of the *agency*, as the record reflects that complainant was subjected to sexual harassment and a hostile work environment, and liability can be imputed to the agency as discussed below.

Agency Liability for Supervisor Harassment

We first note that the agency does not contest that complainant was subjected to sexual harassment and a hostile work environment; the agency only contests that it is not liable for the harassment because complainant failed to report it to management officials. In the context of supervisory liability, employers are subject to vicarious liability for unlawful harassment by supervisors. *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). The standard of liability set forth in these decisions is premised on two principles: (1) an employer is responsible for the acts of its supervisors, and (2) employers should be encouraged to avoid

or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action.

*5 In a case where harassment does not result in a tangible employment action, the employer may prove an affirmative defense comprised of two elements: (1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Ellerth, supra*; *Faragher, supra*. Further, if the harassment is pervasive, it could result in a finding that the agency had constructive knowledge of the harassment. *See Padilla v. United States Postal Service*, EEOC Appeal No. 0120063761 (April 8, 2008) (supervisor's harassment was so pervasive that the agency should have had constructive knowledge of the harassment).

Here, while the agency denies that management officials had any knowledge of the harassment, the record establishes that management was aware of some of the harassment. For example, complainant reported the romantic letter from a co-worker to three management officials, all of whom ignored her complaint. Further, another manager witnessed S1 making oral sex motions with his hand and mouth towards complainant. Complainant asserts that the other manager just shook his head at S1 and took no action. Further, another manager stated in his affidavit that complainant mentioned the harassment to him in a casual conversation, and he considered it only hearsay. We find that management officials were aware that complainant felt that she was being sexually harassed.

Further, the harassment was pervasive, often occurred in front of co-workers, and permeated the workplace. For example, while speaking to complainant and a female co-worker, S1 put his foot between the legs of a female co-worker and moved his foot around while making sexually explicit comments. Further, S1 reached into complainant's waistband and pulled her underwear up her buttocks in front of her co-workers. S1 asked complainant if she waxed her pubic area in front of her co-workers. S1 attempted to give complainant a lap dance and asked her to touch his genitals in front of her co-workers. Additionally, S1 touched complainant's buttocks while she was talking to a co-worker. We find that these acts were pervasive. Additionally, we find the agency had constructive knowledge that the sexual harassment was taking place. The record establishes that employees were aware that S1 was sexually harassing complainant, and therefore, management knew or should have known of the harassment as well.

Next, the agency contends that when it was made aware of the harassment, it acted immediately to end the harassment. When an employer becomes aware of alleged harassment, it has the duty to investigate the charges promptly and thoroughly. *See Rodriguez v. Department of Veterans Affairs*, EEOC Appeal No. 01953850 (August 29, 1996). By "thoroughly" the Commission means "effectively," taking whatever action necessary to end the harassment and prevent the misconduct from recurring. *See Voigt v. United States Postal Serv.*, EEOC Appeal No. 01931799 (Dec. 20, 1994). We find that the agency failed to take prompt and effective action after it was aware that complainant was harassed. For example, when complainant reported the letter she received from her co-worker, management officials failed to take action. Additionally, when a management official observed S1 make a gesture towards complainant that indicated oral sex, the management official merely shook his head and failed to take any action. The record establishes that the agency clearly failed to address the harassment; therefore it is liable for the harassment.

Retaliation

*6 Complainant alleges that she was retaliated against after she reported S1's harassment to the HRM. Complainant alleges that management officials purposely gave her numerous wrong numbers for the agency's Office of Civil Rights in an attempt to deter her from pursuing the EEO process. Further, complainant asserts that once it became known that she complained about S1's harassment, she was subsequently subjected to retaliation by management officials who kept her separated from her co-workers, and co-workers ostracized her, refused to talk to her, and made jokes in her presence about people filing sexual harassment complaints. Complainant further alleges that the retaliation became so severe that she had to take leave until a hardship transfer to Logan International Airport in Boston was processed.

We find that the record is inadequate to make a determination on this claim. Specifically, the investigator's questions regarding retaliation were vague, and the record does not contain specific information identifying the responsible co-workers and management officials, or the responses to these allegations from the responsible management officials and responsible co-workers. Therefore, a hearing is necessary to adjudicate complainant's retaliation claim. [FN1]

CONCLUSION

Therefore, after a careful review of the record, including complainant's arguments on appeal, the agency's response, and arguments and evidence not specifically discussed in this decision, the Commission REVERSES the agency's final decision, REMANDS complainant's retaliation claim for a hearing, and orders the agency to comply with the Order below.

ORDER

There agency is hereby ORDERED to take the following remedial action:

1. The agency shall immediately cease and desist from all discriminatory conduct directed at complainant and members of her protected class, and ensure that complainant is no longer subjected to a hostile work environment. Additionally, the agency shall ensure that complainant is not subjected to retaliation for her participation in protected EEO activity. Further, the agency shall ensure that others at the facility are not subjected to sexual harassment and/or retaliation.
2. Within sixty (60) calendar days from the date this decision becomes final, the agency will conduct and complete a supplemental investigation on the issue of complainant's entitlement to compensatory damages for her harassment claim, and will afford her an opportunity to establish a causal relationship between the harassment she was subjected to and the pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the agency's efforts to compute the amount of compensatory damages, and will provide all relevant information requested by the agency. The agency will issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.1.10. A copy of the final decision must be submitted to the Compliance Officer, as referenced below.
- *7 3. Within sixty (60) calendar days from the date this decision becomes final, the agency shall award complainant reasonable attorney's fees and costs for her harassment claim, as described below.
4. Within sixty (60) calendar days from the date this decision becomes final, the agency shall provide sixteen (16) hours of EEO training to all management officials at this facility.
5. Within thirty (30) calendar days from the date this decision becomes final, the agency shall consider taking disciplinary action against S1 and all of the managers who had actual or constructive knowledge of the harassment and failed to take prompt and effective action. The agency does not consider training to be disciplinary action. The agency shall report its decision to the compliance officer. If the agency decides to take disciplinary action, it shall identify the action taken. If the agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the agency's employ, the agency shall furnish documentation of their departure date(s).
6. With regard to complainant's claim of retaliation, the agency is ordered to remand the instant complaint to the Hearings Unit of the appropriate EEOC Field Office for scheduling of a hearing in an expeditious manner. The case should be assigned for an administrative hearing before a **different** EEOC AJ than the AJ who issued the summary judgment decision addressed herein. The agency shall submit to the Hearing Unit of the appropriate EEOC Field Office the request for a hearing within fifteen (15) calendar days of the date this decision becomes final. The agency is directed to submit a copy of the complaint file to the EEOC Hearing Unit within fifteen (15) calendar days of the date this decision becomes final. The agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.110.

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

been implemented.

POSTING ORDER (G0900)

The agency is ordered to post at its Newport News-Williamsburg International Airport in Newport News, Virginia facility copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (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 at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H0900)

*8 If complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the agency. The attorney shall submit a verified statement of fees to the agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K1208)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. 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.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M1208)

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 tends to establish that:

- *9 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 or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and argu-

ments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. 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 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 (R0408)

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 (Z1008)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security, See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

*10 Carlton M. Hadden
Director
Office of Federal Operations

FN1. We note that because complainant's retaliation claim and harassment claim are not inextricably intertwined, remanding only the retaliation claim for a hearing will not result in harmful fragmentation.

EEOC DOC 0120071846, 2009 WL 1441519 (E.E.O.C.)
END OF DOCUMENT

C
EEOC DOC 0120060791, 2008 WL 276454 (E.E.O.C.)

U.S. Equal Employment Opportunity Commission (E.E.O.C.)
Office of Federal Operations

*1 ELIZABETH THOMPSON, COMPLAINANT,
v.
JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY.

APPEAL
0120060791
[FN1]

Agency No. 1H391002903

January 16, 2008

DECISION

Pursuant to 29 C.F.R. § 1614.405, the Commission accepts complainant's timely-filed appeal from the agency's October 13, 2005 final decision concerning the above-referenced equal employment opportunity (EEO) matter. Complainant alleged that the agency discriminated against her on the bases of her race (African-American) and sex (female) in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. when her supervisors subjected her to harassment (inappropriate verbal comments and physical contact) including the denial of her request for a detail, assignment of multiple tasks outside of her bid job after she complained of "abuse," moving her desk twice, belittling her, calling her at home, yelling at her and treated her less favorably than persons not of her race or sex. For the following reasons, the Commission REVERSES the agency's final decision, in part, as discussed below.

BACKGROUND

At the time of events giving rise to this complaint, complainant worked as a Maintenance Support Clerk at the agency's Jackson Processing and Distribution Center facility in Jackson, Mississippi. Complainant worked for RMO1, who is an African-American male. RMO1 was a high level official, who had the authority to assign work, grant promotional opportunities, oversee her daily routine and relocate her work station. Complainant also worked for RMO2, a Caucasian male, who also had supervisory authority over complainant's work activities.

Complainant made her initial EEO contact on July 10, 2003, and filed her formal complaint on December 16, 2004. She alleged that for the previous two and a half years, she was discriminated against and "abused" by her supervisors on the bases of her race (African-American) and sex (female), which harassment caused her to suffer physical and mental injury. She requested back pay for the alleged denial of a detail and front pay for 20 years, as well as compensatory damages.

Specifically, complainant alleged that the pattern of harassment by RMO1 culminated on May 28, 2003, when RMO1 made vulgar and explicit comments to her. He told her that she was "tense, because [she] needed a man." He

previously told her that she should let him "take care" of her, that "you need to let me be your man," that "women don't call him big daddy for nothing," that he would "slide something" between her legs that would make her "walk bowlegged and beg for more."

Complainant states that RMO1 made many graphic sexual comments during the two-year period leading up to May 28, 2003. According to complainant, she previously told him that his comments and touching were offensive. Complainant alleged that she attempted to detail out of the division, but RMO1 denied complainant's request for a detail to Human Resources. The record confirms that RMO1 did not allow complainant to detail out; and he denied the request of his [RMO1's] wife [who also worked at the facility] to detail in. RMO1 stated in his affidavit that he made the decision to deny complainant's detail request because complainant was needed.

*2 The record shows that complainant's supervisor admitted that "on occasion" he made physical contact with complainant in the form of massaging her shoulders and touching her hair. RMO1 admitted that he told complainant that she needed a man, but stated that he did not mean this in a sexual way. RMO1 denied that his comments were unwelcome. Witnesses confirmed that RMO1 touched complainant's hair, as well as the hair of another African-American employee on several times and that complainant had told her supervisor to stop at least once.

Complainant stated in her affidavit, that she brought her concerns to the attention of several managers as early as 2001, that she was being "abused" and was being harassed by RMO1. The record shows that complainant did not initially report the harassment as sexual harassment, but had reported that she was being abused and harassed by her supervisor. The record shows that other managers had spoken with RMO1 regarding complainant's concerns; but complainant stated in her affidavit that the abuse would just get worse. According to complainant's affidavit, she was given assignments that her male colleagues were not, and that she was assigned multiple tasks outside of her bid job after she complained of "abuse." Further, complainant claims that RMO1 moved her desk twice to a less favorable location after she complained of abuse.

In accordance with complainant's request, the agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b) concluding that complainant failed to prove that she was subjected to discrimination as alleged. The agency found that the conduct was infrequent, not severe or pervasive, not unwelcome and that complainant failed to report the conduct. The agency concluded that the totality of the evidence (RMO1 touching her hair and massaging her shoulders on several occasions, moving her work station twice, "occasionally" telling her that she needed a man, denying her at least one detail, and making vulgar comments) did not rise to the level of harassment. The agency stated that the conduct occurred on an infrequent basis and constituted "simple teasing" that did not alter the terms and conditions of her employment or create an abusive working environment.

CONTENTIONS ON APPEAL

On appeal, complainant argues the agency's investigation was biased and its decision was legally erroneous because the agency did not look at the totality of the evidence. Complainant argues that the investigator viewed the evidence through the lens of a male, rather than the victim. Complainant submits that to leave the agency's decision standing would open the door for the workplace to be made into a sexual harassment "playground." The agency did not submit a statement or brief in opposition to complainant's 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).

*3 We find that the agency erred in holding that complainant failed to establish the elements of her Title VII claims of hostile environment sexual harassment. Harassment of an employee that would not occur but for the employee's

race, color, sex, national origin, age, disability, or religion is unlawful. McKinney v. Dole, 765 F.2d 1129, 1138-1139 (D.C. Cir. 1985).

In order to establish a *prima facie* case of hostile environment sexual harassment, a complainant must prove, by a preponderance of the evidence: (1) s/he is a member of a statutorily protected class; (2) s/he was subjected to harassment in the form of unwelcome verbal or physical conduct related to her sex; (3) the harassment complained of was based on the statutorily protected class; and (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. Humphrey v. United States Postal Service, EEOC Appeal No. 01965238 (October 16, 1998); 29 C.F.R. §1604.11.

Further, the incidents must have been "sufficiently severe and 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); see also Oncala v. Sundowner Offshore Services, Inc., 23 U.S. 75 (1998). Whether the harassment is sufficiently severe to trigger a violation of Title VII must be determined by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17 (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 (March 8, 1994).

We find that complainant's testimony is credible and is sufficiently buttressed by others. The evidence shows that on May 28, 2003, and prior to that time, RMO1 harassed complainant when he engaged in inappropriate verbal comments that were clearly sexual in nature (telling complainant that she needed a man, that she should let him [the supervisor] take care of her because she was tense and making other vulgar statements). RMO1 admits that he made physical conduct in the form of massaging complainant's shoulders "on occasion." Based on the comments made, RMO1's conduct was clearly sexual in nature. In addition, it is clear that the conduct was unwelcome in that witness testimony indicated that complainant told her supervisor to stop the conduct.

*4 We find that the sexually harassing conduct by RMO1 contributed to an intimidating and offensive work environment that seriously affected complainant. The totality of RMO1's conduct had the effect of unreasonably interfering with complainant's work environment and was sufficiently severe and pervasive in nature. Taken together over the two-year period from 2001 to 2003, we find that the agency subjected complainant to sexual harassment that created a hostile work environment in violation of Title VII.

While we find that the overwhelming evidence of record supports a finding that complainant was subjected to unlawful sexual harassment with regard to the comments and touching, we do not find that complainant met her burden of proof with regard to her claim of discrimination based on race or her other claims, such as the denial of the detail, phone calls to her home, alleged excessive visits while complainant was on detail or the increase in her assignments. Other individuals received calls at home. She did not offer evidence to refute the agency's stated reasons for denying the detail. The increase in duties appears to be related to her request for a special assignment.

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, 760-765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, EEOC Notice No. 915.002 (June 18, 1999). When harassment by a supervisor does not result in a tangible employment action, the employer can raise an affirmative defense, which it must prove by a preponderance of the evidence. *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, EEOC Notice No. 915.002 (June 18, 1999). In this case, we do not find that the harassment resulted in a tangible employment action.

Accordingly, our analysis moves to the issue of whether the agency is liable for the supervisor's harassment after complainant complained of the abuse. If an employer cannot prove that it discharged its duty of reasonable care and that the employee unreasonably failed to avoid the harm, the employer will be liable. *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, EEOC Notice No. 915.002 (June 18, 1999).

The agency must demonstrate, by a preponderance of the evidence: (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, supra; Faragher, supra; Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, EEOC Notice No. 915.002 (June 18, 1999).

*5 In this case, we find there is a basis for imputing liability to the agency because the agency failed to prove that it exercised reasonable care. The agency was placed on notice of the abuse as early as 2001, because complainant told several managers that she believed she was being "abused" and blocked from leaving her unit. When an employer becomes aware of alleged harassment, it has the duty to investigate the charges promptly and thoroughly. By "thoroughly" the Commission means "effectively," taking whatever action necessary to end the harassment and prevent misconduct from recurring. *See Voigt v. United States Postal Service*, EEOC Appeal 01931799 (Dec. 20, 1994).

We find that the agency failed to act promptly and effectively. The agency's investigations into the sexual harassment were still ongoing in 2005, two years after the incidents at issue. Accordingly, the employer cannot prove that it discharged its duty of reasonable care.

Entitlement to Full Relief / Damages

Complainant requested full relief, including back pay, front pay, compensatory damages and attorney's fees. The record does not show a loss of back pay or the basis for awarding front pay. In this case, complainant did not include an allegation of constructive discharge in her complaint and does not clearly prove she suffered a loss of pay as a direct result of the harassment. Therefore, we do not order back or front pay.

The record clearly shows that complainant suffered both severe emotional and physical distress as a result of the agency's actions. In support, we note that complainant presented evidence that before the alleged discrimination, she was a productive, efficient woman, who was able to work in a way that won positive recognition. Complainant's physical condition allegedly deteriorated after the harassment and abuse. She asserts that she suffered major (severe) depression, anxiety, loss of enjoyment, suicidal thoughts, nightmares, weight gain, crying spells, headaches, loss of self-esteem and the loss of the ability to work or care for herself. In addition, complainant allegedly incurred insurance, medical expenses and attorney expenses.

When discrimination is found, the agency must provide complainant with a remedy that constitutes full, make-whole relief. *See e.g. Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes his or her claim of unlawful discrimination may receive, in addition to equitable remedies, compensatory damages for past and future pecuniary losses (*i.e.*, out of pocket expenses) and non-pecuniary losses (*e.g.*, pain and suffering, mental anguish). 42 U.S.C. §1981a(b)(3). For an employer with more than 500 employees, such as the agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. *Id.* The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in EEOC Notice No. 915.002, *Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991* (July 14, 1992) (Guidance). Statements from others, including family members, friends, and health care providers could address the outward manifestations of the impact of the discrimination on the complainant. *Id.* The complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. *Id.* The Commission applies the principle that "a tortfeasor takes its victims as it finds them." *Wallis v. United States Postal Service*, EEOC Appeal No. 01950510 (November

13, 1995) (quoting *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1295 (7th Cir. 1987)). The Commission notes, however, that complainant is entitled to recover damages only for injury, or additional injury, caused by the discrimination. *Terrell v. Department of Housing and Urban Development*, EEOC Appeal No. 01961030 (October 25, 1996); EEOC Notice No. 915.002 at 12.

*6 For all of these reasons, we find that complainant has shown that the agency discriminated against her on the basis of her sex in violation of Title VII and she is entitled to full relief, including compensatory damages and attorney's fees, if proven. We remand the matter to the agency in order to determine the amount of the appropriate relief and the payment of the relief and implementation of the remedies noted below.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, the Commission reverses the agency's final decision in part and remands the matter to the agency to take corrective action in accordance with this decision and the Order below.

ORDER (C0900)

The agency is ordered to take the following remedial action:

- (1) The issues of compensatory damages, attorney's fees and costs are REMANDED to the agency. The agency shall conduct a supplemental investigation of the compensatory damages issue, which shall include as appropriate, seeking submission of documentation or other evidence from complainant. Complainant, through counsel, shall submit a request for attorney's fees and costs in accordance with the Attorney's Fees paragraph set forth below. No later than sixty (60) days after the agency's receipt of the attorney's fees statement and supporting affidavit, the agency shall issue a final agency decision addressing the issues of attorney's fees, costs, and compensatory damages. The agency shall submit a copy of the final decision to the Compliance Officer at the address set forth below.
- (2) The agency shall provide a minimum of eight (8) hours of remedial training for all managers and supervisors located at the Jacksonville, Mississippi facility, to ensure that acts of sexual harassment do not recur, that no retaliatory acts are taken against any employee who opposes unlawful discrimination, including sexual harassment, and that persons reporting instances of alleged sexual harassment are treated in an appropriate manner.
- (3) The agency shall consider taking disciplinary action against the employees identified as being responsible for the discriminatory harassment perpetrated against complainant, if the employees are still employed by the agency. The agency shall report its decision. If the agency decides to take disciplinary action, it shall identify the action taken. If the agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline.
- (4) The agency shall take appropriate preventative steps to ensure that no employee is subjected to sexual harassment and to ensure that appropriate steps are taken immediately after management is notified of any such harassment.

The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the agency's calculation of back pay and other benefits due complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0900)

*7 The agency is ordered to post at its Jackson Processing and Distribution Center facility copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (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 at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H0900)

If complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the agency. The attorney shall submit a verified statement of fees to the agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0501)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. 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.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0701)

*8 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 tends 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 or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, and P.O. Box 19848, Washington, D.C. 20036. 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 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 (R0900)

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 (Z1199)

*9 If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden
Director
Office of Federal Operations

FN1. Due to a new data system, complainant's case has been re-designated with the above-referenced appeal number.

**NOTICE TO EMPLOYEES POSTED BY ORDER OF THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION**

An Agency of the United States Government

This Notice is posted pursuant to an order by the United States Equal Employment Opportunity Commission dated _____ which found that a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. has occurred at the United States Postal Service's Jackson, Mississippi Processing and Distribution Center facility (hereinafter this facility).

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE or DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

This facility was found to have engaged in unlawful sex discrimination when a management official subjected an employee to sexual harassment and a hostile work environment. The facility was ordered to provide compensatory

damages, attorney's fees and costs, to establish and implement policies and procedures relating to sexual harassment, to provide training to managers and supervisors regarding their obligations under federal EEO statutes and to consider disciplining the responsible management officials. This facility will ensure that officials responsible for personnel decisions and the terms and conditions of employment will abide by the requirements of all federal equal employment opportunity laws and will not retaliate against employees who file EEO complaints.

This facility will comply with federal law and will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, federal equal employment opportunity law.

*10 29 C.F.R. Part 1614

EEOC DOC 0120060791, 2008 WL 276454 (E.E.O.C.)
END OF DOCUMENT

C

EEOC DOC 0720080030, 2008 WL 2435799 (E.E.O.C.)

U.S. Equal Employment Opportunity Commission (E.E.O.C.)
Office of Federal Operations

*1 JOAN SCHMIDT, COMPLAINANT,
v.
JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY.

Appeal No.
0720080030
Agency No. 4E-800-0251-06
Hearing No. 541-2007-00050X

June 9, 2008

DECISION

Following its February 29, 2008 final action, the agency filed an appeal with this Commission requesting that we affirm its rejection of the discrimination finding of an EEOC Administrative Judge (AJ), in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The agency also requests that the Commission affirm its rejection of the relief ordered by the AJ.

Complainant, a Window/Distribution Clerk, Level 5, at the agency's Avon Post Office in Avon, Colorado, filed a formal EEO complaint on August 28, 2006. Therein, complainant claimed that she was subjected to harassment and a hostile work environment on the bases of sex (female) and age (64) when, between April 2005 and July 2006, the Postmaster, who was her immediate supervisor (S1) routinely screamed and yelled at her, culminating in an incident on July 5, 2007, when he yelled at her and placed her in off-duty status without pay.

At the conclusion of the investigation, complainant was provided with a copy of the report of investigation and requested a hearing before an AJ. On May 22, 2007, the AJ notified the parties that he was contemplating issuing a decision without a hearing, pursuant to 29 C.F.R. § 1614.109(g)(3), and requested that the parties to file a written response. Both parties filed responses.

On November 28, 2007, the AJ issued a decision without a hearing, finding discrimination. The AJ determined that after a review of the agency's Motion for Decision Without a Hearing, complainant's notice of non-opposition to the AJ's notice of intent to issue a decision without a hearing, and the record in evidence, complainant established a *prima facie* case of hostile work environment on the bases of sex and age. Specifically, the AJ concluded that the alleged discriminatory events were sufficiently severe or pervasive to alter conditions of her employment, and create an abusive working environment. The AJ found that, between April 2005 and July 2006, S1, who was also the Postmaster of the Avon Post Office, routinely screamed and yelled at complainant, emotionally brutalized her, physically intimidated her, and frightened her, which caused her severe anxiety and depression.

The AJ found that due to S1's actions towards her, complainant began seeing a psychologist in November 2005 for assistance in coping with the ongoing symptoms. The evidence showed that in March 2006 and April 2006, complainant's physician recommended that complainant not report to work so she could recover from the anxiety and depression caused by S1's behavior toward her. During this same period in spring 2006, the union filed a grievance against S1 for his treatment of certain employees in the Avon Post Office. S1 acknowledged that his supervisor directed him to apologize to his employees, including complainant. In his deposition, S1 stated that he did not know why he was apologizing.

*2 The AJ found that on July 5, 2006, S1 approached because of his dissatisfaction with the service she was providing a customer. Complainant stated that S1 yelled at her about what she had done wrong with the customer and called her "stupid." Specifically, complainant stated that in speaking to her, S1 brought his face within twelve inches of her face and began yelling at her for approximately two minutes. Complainant stated that she believed S1 was going to hit her and she tried to run away from him, tripping over a bucket badly bruising her knee. Complainant stated that S1 continued threatening her and indicated that disciplinary action would be taken against her. Complainant stated that at that point, she started crying and she was sick to her stomach and went to the restroom. Complainant stated that when she returned S1 told her he had clocked her out.

The AJ noted that in his deposition, S1 stated that he raised his voice because he and complainant were speaking under a large air conditioning unit. S1 stated that he instructed complainant to report to work the next day for an investigative interview concerning the issue with the customer and complainant's behavior towards him.

Following this incident, complainant was out of work on medical leave until September 23, 2007, when her psychologist and physician permitted her to return to work with some restrictions. On July 14, 2006, complainant received a letter from S1 dated July 6, 2006, indicating that he found her to be Absent Without Leave (AWOL) and threatened her with disciplinary action including removal from agency employment. Complainant also found a notice by S1 that she had been placed on off-duty status without pay on the grounds that she might be injurious to self and others. The AJ noted that no disciplinary action was actually taken with respect to the events of July 5, 2006. Based on the evidence of record, the AJ concluded that complainant has established by a preponderance of the evidence that the agency subjected her to discriminatory harassment and a hostile work environment. The AJ directed complainant to provide documentation on damages, and provided the agency an opportunity to respond no later than August 10, 2007.

On January 17, 2008, the AJ issued his final decision, incorporating his earlier finding of discrimination and addressing the issue of complainant's remedies. The AJ found complainant established a link between her being subject to discriminatory harassment and the stress and depression she suffered. To remedy the discrimination, the AJ awarded complainant back pay with interest and other benefits for the time she was out of work, including lost earnings to her Thrift Savings Plan (TSP) account. The AJ also ordered the agency to reimburse complainant for all annual leave and sick leave she had to use due to the agency's unlawful discriminatory treatment from July 5, 2006 to present. The AJ awarded complainant \$25,000 in non-pecuniary compensatory damages, as well as pecuniary damages for medical bills in the amount of \$16,086.11. The AJ awarded complainant \$18,000.27 in attorney's fees and costs. The AJ also ordered the agency to provide EEO awareness training with an emphasis on harassment and retaliation; not to retaliate against complainant; and post a notice on all employee bulletin boards stating that it was found in violation of Title VII and ADEA.

*3 On February 29, 2008, the agency issued its notice of final action, rejecting the AJ's finding of discrimination, and simultaneously filing the instant appeal.

On appeal, the agency argues that summary judgment was inappropriate in this case because there are genuine issues of material fact in dispute. Specifically, the agency asserts that a question of fact exists about the tenor and tone of S1's disputed communications with complainant, and whether or not the alleged improper treatment of complainant by S1 was because of her sex or age. The agency also argues that, if summary judgment is deemed appropriate, that

the ruling on damages be significantly reduced because neither compensatory damages nor attorney's fees are available under the ADEA for a finding of age discrimination. Moreover, the agency argues that even if granted under Title VII, the awards for both pecuniary and non-pecuniary damages are unsupported by the evidence of record.

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2D 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence, summary judgment is not appropriate. In the context of an administrative proceeding, an AJ may properly consider summary judgment only upon a determination that the record has been adequately developed for summary disposition. In response to the agency's appeal, the complainant urges the Commission to affirm in full the AJ's decision.

After carefully considering the arguments on appeal and the entire record, the Commission determines that this case was appropriate for summary judgment in favor of complainant. While the agency claims it was entitled to a hearing to present the testimony of S1 regarding the tenor and tone of his interactions with complainant, we note that the record does contain a deposition from S1 denying the behavior. However, we find that at a hearing, S1's denials could not have stood up against the other evidence of record concerning his harassment of complainant because of her sex and age. We conclude that the AJ's findings of fact are supported by the weight of the evidence, and that the AJ correctly applied the appropriate regulations, policies and laws. We note that while the agency is correct that neither compensatory damages nor attorney's fees are available as remedies for a violation of the ADEA, the record evidence supports that either claim--under the ADEA or Title VII--can stand independently. As compensatory damages and attorney's fees are remedies fully available under Title VII, the AJ's decision appropriately provided these remedies. While the agency seems to argue that complainant's damages should somehow be reduced because she also prevailed under the ADEA, it presents no legal support for this position and we are unpersuaded to undertake such a reduction.

*4 Accordingly, we **REVERSE** the agency's final action, and **REMAND** this matter to the agency to take remedial action in accordance with this decision and the **ORDER** below.

ORDER

The agency is ordered to take the following remedial action:

1. Within sixty (60) calendar days of the date this decision becomes final, the agency shall pay complainant back pay with interest and other benefits pursuant to 29 C.F.R. § 1614.501 for any lost earnings as a result of the discrimination. This shall include any lost earnings to complainant's Thrift Savings Plan account.
2. Within sixty (60) calendar days of the date this decision becomes final, the agency shall tender to complainant \$25,000.00 in non-pecuniary damages and \$16,086.11 in pecuniary damages (past medical expenses). The payment for past medical expenses shall be reduced by any amount complainant received in medical insurance health benefits for these expenses.
3. Within sixty (60) calendar days of the date this decision becomes final, the agency shall restore complainant all sick leave and annual leave she had to use due to the agency's unlawful discriminatory treatment from July 5, 2006 to present.
4. Within sixty (60) calendar days of the date this decision becomes final, the agency shall provide identi-

fied supervisor [S1] with EEO and sensitivity training with an emphasis on harassment and retaliation in the federal workplace.

5. Within sixty (60) calendar days of the date this decision becomes final, the agency shall tender to complainant's attorney \$18,000.27 in attorney's fees and costs.
6. Upon receipt of proper documentation, the agency shall tender to complainant payment for future medical costs in accordance with the AJ's decision for a period of one year from the date of the AJ's January 17, 2008 decision on damages.
7. The agency shall not retaliate any individuals who participate or assisted in the instant formal EEO complaint. Further, the agency shall assure that neither complainant nor any other employee be subjected to restraint, coercion and/or interference related to his or her right to participate in the EEO process.
8. The agency shall post a notice in accordance with the paragraph below.

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

ATTORNEY'S FEES (H0900)

If complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the agency. The attorney shall submit a verified statement of fees to the agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

POSTING ORDER (G0900)

*5 The agency is ordered to post at its Avon Post Office in Avon, Colorado, copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (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 at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0408)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. 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.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0408)

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:

- *6 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 or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. 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 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 (S0408)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0408)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

*7 Carlton M. Hadden
Director
Office of Federal Operations

EEOC DOC 0720080030, 2008 WL 2435799 (E.E.O.C.)

END OF DOCUMENT

C
EEOC DOC 0120083580, 2009 WL 362012 (E.E.O.C.)

U.S. Equal Employment Opportunity Commission (E.E.O.C.)
Office of Federal Operations

*1 CONNIE WILLIAMS, COMPLAINANT,
v.
JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY.

Appeal No.
0120083580
Agency No. 4G-730-0051-08

February 5, 2009

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final agency decision (FAD) dated July 16, 2008, dismissing her complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

At the time of her complaint, complainant was a regular city carrier with the Hennessey Post Office in Hennessey, Oklahoma. In her June 24, 2008 complaint, complainant alleged that she was subjected to discrimination based on her sex (female), age (48), and reprisal for prior protected EEO activity when she was harassed from March 2, 2008, to the present by her postmaster.

Much of the claimed harassment was the postmaster setting unrealistic expectations for the amount of time complainant had to prepare and complete delivery of her route, and repeated close monitoring and observation of her at the post office and on her route. Complainant claimed these unrealistic expectations forced her to walk at an uncomfortable pace, and skip lunch and breaks. When she did not meet the postmaster's expectations or engaged in allegedly time wasting activity, the postmaster allegedly kept up his intensive monitoring, pressured complainant with comments, threatened her with corrective and disciplinary actions, and on May 14, 2008, gave her a negative route evaluation.

To a lesser extent, complainant alleged that the postmaster harassed her about work practices relating to safety and a form. She raised an incident of the postmaster getting angry with her for not timely submitting and completing a form estimating route time, and warning her for not setting the emergency brake on her truck.

In her complaint, complainant also alleged that the postmaster discriminatorily inquired about her schedule with her second employer. The postmaster was trying to determine if complainant was working a second job while on sick leave. She also claimed that her request to come in early on April 16, 2008 so she would not have to use annual leave was denied by the postmaster, resulting in having to use leave. Complainant claimed that on April 21, 2008, the postmaster only granted a request for sick leave after she told him her doctor would speak to him personally if

necessary.

Complainant also alleged in her complaint that the postmaster told offensive jokes. She also claimed therein that on several occasions he got very physically close to her while monitoring her, bringing her work, and retrieving things. She wrote that he once brushed up against her hand and another time up against her while he was reaching. Complainant contended this was unnecessary, and was sexual harassment.

*2 The FAD dismissed the complaint for failure to state a claim. It reasoned complainant was not harmed. On appeal, complainant argues she was harmed, and contends the harassment is continuing. She alleges that the monitoring and comments about her productivity continue. She indicates that on or about October 15, 2008, the postmaster gave her a formal discussion for failure to signal and leaving a truck security door open, and also told her she was did not properly lift nor properly wear her seat belt. She alleges that the postmaster requires her to bring in medical documentation to account for each time she is off work due to stress. She also submits a letter of warning by the postmaster dated November 3, 2008, for failure to immediately report an injury to her back and deviating from her route.

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994).

In Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of the complainant's employment. The Court explained that an "objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive" and the complainant subjectively perceives it as such. Harris, supra at 21-22. Thus, not all claims of harassment are actionable. Where a complaint does not challenge an agency action or inaction regarding a specific term, condition or privilege of employment, a claim of harassment is actionable only if, allegedly, the harassment to which the complainant has been subjected was sufficiently severe or pervasive to alter the conditions of the complainant's employment.

The claimed actions of the postmaster setting unrealistic expectations for the amount of time for complainant to prepare and complete delivery of her route, coupled with repeated frequent intensive monitoring and observation of her and pressuring her with comments, threats of corrective and disciplinary actions; and a negative route evaluation state a claim. If these actions occurred as claimed and are discriminatory, this could alter the conditions of complainant's employment. Complainant contends the above forces her to walk at an uncomfortable hurried pace, and to skip lunch and breaks. The remaining claimed actions are part of the harassment claim, *i.e.*, the postmaster using his supervisory relationship to create a hostile work environment for complainant. This includes the incidents regarding denial of change of schedule, leave matters, comments about complainant's safety practices and the form, the October 2008 formal discussion, the November 3, 2008 letter of warning, and the alleged sexual harassment and jokes.

*3 The FAD is reversed.

ORDER

The agency is ordered to process the remanded claim in accordance with 29 C.F.R. § 1614.108. The remanded claim is whether complainant was discriminated against based on her sex (female), age (48), and reprisal for prior EEO activity when she was harassed from approximately March 4, 2008, onward by the postmaster. The agency shall

acknowledge to the complainant that it has received the remanded claim **within thirty (30) calendar days** of the date this decision becomes final. The agency shall issue to complainant a copy of the investigative file and also shall notify complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the complainant requests a final decision without a hearing, the agency shall issue a final decision **within sixty (60) days** of receipt of complainant's request.

A copy of the agency's letter of acknowledgment to complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K1208)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. 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.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M1208)

*4 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 or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. 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 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 (R0408)

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 (Z1008)

*5 If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden
Director
Office of Federal Operations

EEOC DOC 0120083580, 2009 WL 362012 (E.E.O.C.)
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