APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5187

September Term, 2020 **Filed On: November 20, 2020** Katrina L. Webster, Appellant, v. Kenneth J. Braithwaite, Secretary of Navy, etal., Appellees, **BEFORE:** Millett, Pillard, and Rao, Circuit Judges

ORDER

Upon consideration of appellant's brief, the motion for summary affirmance, theresponse thereto, the reply, the motion for leave to file surreply, and the lodged surreply, it is **ORDERED** that the motion for leave to file a surreply be granted. The Clerk isdirected to file the lodged surreply. It is **FURTHER ORDERED** that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). First, appellant has forfeited any challenge to the district court's June 27, 2018 order dismissing her claims against individual defendants by not raising it on appeal. See U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004). Next, appellant has not shown that the district court abused its discretion in denying her motion to compel certain depositions. See U.S. ex rel. Folliard v. Gov't Acquisitions, Inc., 764 F.3d 19, 26 (D.C. Cir. 2014). Further, the district court properly dismissed

appellant's claims arising from two Equal Employment Opportunity complaints as time- barred and unexhausted, and correctly granted summary judgment to appellee on appellant's other claims. See Totten, 380 F.3d at 497. Appellant failed to offer evidence that appellee's stated legitimate, nondiscriminatory reasons for bonus determinations and appellant's non-selection for two positions were pretextual. See Brady v. Office of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008). Appellant also failed to show that she suffered an adverse action with respect to any of her remaining claims. See Baird v. Gotbaum, 662 F.3d 1246, 1248 (D.C. Cir. 2011); Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006). Additionally, the district court did notabuse its discretion by denying appellant's final motion for reconsideration. See Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam). Finally, appellant has not offered evidence to support her claims that the district court was impartial or acted inappropriately. See Rafferty v. NYNEX Corp., 60 F.3d 844, 847-48(D.C. Cir. 1995) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerkis directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:/s/
Manuel J. CastroDeputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5187
(1:17-cv-01472-DLF) KATRINA L. WEBSTER

Plaintiff - Appellant v. Kenneth J. Braithwaite - Defendant-Appellee, Secretary of Navy for the United States Department of Defense; James L. Lee, EEOC Deputy General Counsel; Dean R. Berman; Strategic Systems Program (SSP) Counsel; Kevin Keefe, SSP's Assistant Counsel; Jack W. Rickert, Associate General Counsel National Geospatial-Intelligence Agency's (NGA's); Defendants v. UNITED STATES OF AMERICA Party-in-Interest.

MANDATE

The judgment of this court, entered January 11,2021, takes effect today. This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

_____/s/_____
Mark J. Langer, Clerk

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5187 September Term, 2020

1:17-cv-01472-DLF

Filed On: January 11, 2021

Katrina L. Webster,

Appellant

v.

Kenneth J. Braithwaite, Secretary of Navy, etal.,
Appellees

BEFORE: Srinivasan, Chief Judge, and Henderson, Rogers, Tatel, Garland*,Millett, Pillard, Wilkins, Katsas, Rao, and Walker, Circuit Judges

O R D E R

Upon consideration of the petition for

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* Circuit Judge Garland did not participate in this matter.

rehearing en banc, and the absence of arequest by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

_____/s/_____
Daniel J. Reid
Deputy Clerk

APPENDIX D

FILED: July 06, 2020 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5187 (1:17-cv-01472-DLF) KATRINA L. WEBSTER Plaintiff - Appellant v. Kenneth J. Braithwaite - Defendant-Appellee, Secretary of Navy for the United States Department of Defense; James L. Lee, EEOC Deputy General Counsel; Dean R. Berman; Strategic Systems Program (SSP) Counsel; Kevin Keefe, SSP's Assistant Counsel; Jack W. Rickert, Associate General Counsel National Geospatial-Intelligence Agency's (NGA's); Defendants v. UNITED STATES OF AMERICA Party-in-Interest.

STAY OF MANDATE UNDER
FED: R. APP.P. 41 (d)(l),

FED: R. APP.41 (d)(l), the timely filing of a petition for rehearing or rehearing en banc or the timely filing of a motion to stay the mandate stays the mandate until the court has ruled on the petition for rehearing or rehearing en banc or motion to stay. In accordance with Rule 41 (d) (1), the mandate is stayed pending further: order of this court.

_____/s/_____
Mark J. Langer, Clerk

APPENDIX E

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5187 September Term, 2020

1:17-cv-01472-DLF Filed On: November 20, 2020

Katrina L. Webster,

Appellant

V.

Kenneth J. Braithwaite, Secretary of Navy, et al.,

Appellees

BEFORE: Millett, Pillard, and Rao, Circuit Judges

ORDER

Upon consideration of appellant's brief, the motion for summary affirmance, the response thereto, the reply, the motion for leave to file surreply, and the lodged surreply, it is

ORDERED that the motion for leave to file a

surreply be granted. The Clerk is directed to file the lodged surreply. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). First, appellant has forfeited any challenge to the district court's June 27, 2018 order dismissing her claims against individual defendants by not raising it on appeal. See U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004). Next, appellant has not shown that the district court abused its discretion in denying her motion to compel certain depositions. See U.S. ex rel. Folliard v. Gov't Acquisitions, Inc., 764 F.3d 19, 26 (D.C. Cir. 2014). Further, the district court properly dismissed appellant's claims arising from two Equal Employment Opportunity complaints as timebarred and unexhausted, and correctly granted summary judgment to appellee on appellant's other claims. See Totten, 380 F.3d at 497. Appellant failed to offer evidence that appellee's stated legitimate, nondiscriminatory reasons for bonus determinations and appellant's non-selection for two positions were pretextual. See Brady v. Office of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008). Appellant also failed to show that she suffered an adverse action with respect to any of her remaining claims. See Baird v. Gotbaum, 662 F.3d 1246, 1248 (D.C. Cir. 2011); Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006). Additionally, the district court did not abuse its discretion by denying appellant's final motion for reconsideration. See Firestone v.

Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam). Finally, appellant has not offered evidence to support her claims that the district court was impartial or acted inappropriately. See Rafferty v. NYNEX Corp., 60 F.3d 844, 847-48 (D.C. Cir. 1995) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en bane. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Manuel J. Castro Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURTFOR THE DISTRICT OF COLUMBIA

KATRINA L. WEBSTER,

Plaintiff,

v.

RICHARD V. SPENCER[1], Secretary of theNavy,

Defendant.

No. 17-cv-1472-DLF

MEMORANDUM OPINION

Katrina L. Webster, acting pro se, brings these Title VII and Age Discrimination in Employment Act claims against Richard V. Spencer in his official

[1] When this suit began, Sean Stackley was the Secretary of the Navy. When Richard Spencer became the Secretary, he was substituted automatically as the proper the defendant. *See* Fed. R.Civ. P. 25(d).

capacity as the Secretary of the Navy.[2]

She alleges that while working for the Navy she experienced retaliation, discrimination, and a hostile work environment. Before the Court are the Navy's Motion to Dismiss and for Summary Judgment, Dkt. 66, and Webster's Cross-Motion for Summary Judgment, Dkt. 71. For the following reasons, the Court will grant in part and deny in part the Navy's motion and deny Webster's cross-motion.

I. BACKGROUND

Webster is a longtime Navy employee. She started there in 1998, as a GS-0318-05 secretary in the Technical Division of the Navy's Strategic Systems Programs. Def.'s Statement of Undisputed Material Facts ("Def.'s Facts") ¶ 1, Dkt. 66.[3] In 2000, the Navy promoted her to a GS-0318-06 secretary, and she remains in that position today. *Id.* ¶ 2. She identifies as "African-American" and "female." Am. Compl. ¶ 8, Dkt. 47-1.

A. Webster's Claims

Webster alleges that since 2003 multiple Navy employees "have colluded. . . to deny herpromotions, bonuses[,] and awards." *Id.* ¶ 15. Their goal: to cause "enough financial hardship" for Webster and her

[2] Though the Department of the Navy is not formally a defendant in this case, the Court willrefer to the Secretary of the Navy as "the Navy".

[3] The Court cites to the parties' statements of facts for information that is not genuinely disputed. Any disputes are either not genuine or immaterial.

husband that the Navy would "revoke their security clearances." *Id.* ¶ 11. Their motive: to retaliate against Webster for an Equal Employment Opportunity (EEO) complaint that she and her husband had filed in March 2002. *Id.* She contends that in seeking these ends the colluders created a hostile work environment and committed numerous instances of retaliation and race-, sex-, and age-based discrimination. *See id.* ¶ 16. She raised these allegations in seven Navy EEO complaints, and her amended complaint incorporates and focuseson these complaints and allegations. *See id.* The first two EEO complaints cover activity from December 23, 2008 to March 25, 2010.[4] As explained in Part III below, the Court will dismiss the claims associated with these complaints for Webster's failure to timely exhaust administrative remedies and failure to timelyfile suit. The Court thus need not recount those claims here.

The remaining EEO complaints that fuel Webster's suit allege a potpourri of employment actions to support her claims.[5] Given the discrete nature of each action, the Court organizes them by category, not chronology. The undisputed material

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[4] These are Navy EEO complaint numbers: 09-00030-00674, *see* Def.'s Ex. 2, Dkt. 65-3; and10-00030-00266, *see* Def.'s Ex. 7, Dkt. 65-8.

[5] These are Navy EEO complaint numbers: 11-00030-02576, *see* Def.'s Ex. 10, Dkt. 65-11;
12-00030-00282, *see* Def.'s Ex. 12, Dkt. 65-13; 12-00030-03671, *see* Def.'s Ex. 18, Dkt. 65-19;
13-00030-03295, *see* Def.'s Ex. 18; 15-00030-01985, *see* Def.'s Ex. 22, Dkt. 65-23; and
15-00030-03003, *see* Def.'s Ex. 25, Dkt. 65-26.

facts of each action follow.

Performance reviews. Webster alleges that she "was denied favorable performance reviews to deny her salary increases, bonuses, [and] awards." Am. Compl. ¶ 347; *see also id.*¶ 307; *id.* ¶ 326. In particular, Webster considers certain narratives to be "negative and demeaning" and argues that she deserved higher ratings. Pl.'s Statement of Material Facts as toWhich There is No Genuine Issue ("Pl.'s Facts") at 4, Dkt. 70-1.

- In the 2010 annual review, Captain Michael Gill, documented Webster's successes and areas for improvement. *See* Def.'s Ex. 34 at 16–18, Dkt. 65-35.Gill rated her "acceptable" in all critical areas. *Id.* at 21.

- In the 2011 annual review, Gill again documented Webster's strengths and weakness. He wrote that Webster "can complete tasks when given the proper supervision and guidance but still needs to improve in the areas of paying attention to detail and operating independently." Def.'s Ex. 35 at 14. He added that she "processes letters and memos within [two] days but they need to be checked closely by a supervisor for errors. As a result, [she] has only been assigned basic clerical tasks in the Branch. We have been working . . . tohelp her improve in this area." *Id.* Gill ultimately rated Webster "acceptable" under a pass-fail rating system. Def.'s Facts ¶ 77.

- In a 2012 "close-out" review covering part of fiscal year 2012, which Gill prepared before his April 2012 retirement, Gill similarly noted where Websterexcelled and where she still could improve.

See Def.'s Ex. 26 at 14–16. He rated her "acceptable" in all critical areas. Def.'s Facts ¶ 82.

- In a 2014 mid-year review, Captain Douglas Williams mistakenly listed Webster's career stage rating as "entry" rather than "expert." Def.'s Ex. 37 at10–11. Once he learned about the mistake, he changed the rating to expert. *Id.* Williams gave Webster a "glowing" rating. Def.'s Facts ¶ 100.

- For the 2015 annual review, Commander Patrick Croley gave Webster a ratingof 40. Def.'s Facts ¶ 105. Based on Webster's expected performance range of 37 to 44, this represented an average rating. Pl.'s Facts at 12.

Bonus decisions. Webster alleges that she was denied "bonuses and awards consistentwith other [similarly situated] members of her branch." Am. Compl. ¶ 307; *see also id.* ¶ 325;*id.* ¶ 346. She appears to challenge the following bonus decisions:

- For 2010, Gill gave Webster a reward recommendation of "1.33." Def.'s Facts ¶ 63. The predetermined year-end bonus payout for a 1.33 rating was $243, which Webster received. *Id.* ¶¶ 64–65.

- In 2011, "[a] few individuals received on-the spot awards . . . for special acts or special outstanding performance." *Id.* ¶ 80. Though Webster "believed shedeserved" such an award, *id.* ¶ 78, she did not receive one, Pl.'s Facts at 7.

- For 2015, Webster received a $403 bonus, Def.'s Facts ¶ 110, which was lower than the $750 bonus she received in 2014, Pl.'s Facts at 13. A "standard formula that took into account the employee's [performance] score and salary" determined this amount. Def.'s Facts ¶ 111.

Letter of requirement. On March 12, 2010, Gill placed Webster on a "letter of requirement" after determining that Webster "maintain[ed] an unacceptable leave pattern" and did "not follow appropriate [leave] request procedures." Def.'s Ex. 32 at 63. The letter requiredthat Webster follow specific procedures for requesting and documenting leave "due to [her] unacceptable time and attendance record." *Id.* Webster cites the letter of requirement as "direct evidence" of "retaliation, harassment, and hostile work environment." Am. Compl. ¶ 114.

Leave request. Webster alleges that the Navy "[c]onsistently denied [her] requests for leave." Am. Compl. ¶ 320. Webster alleged some of those denials in the two EEO complaints that the Court will dismiss in Part III.A below, so the Court does not recount them here. But there is one alleged denial that survives the motion to dismiss. In early May 2011, Webster submitted a leave request to Gill, her immediate supervisor. Def.'s Facts ¶ 69. She asked for three total hours of leave to take her son to two upcoming appointments. *Id.* ¶ 69–70; Def.'s Ex. 34 at 91. Webster asserts that Gill denied this initial request, Pl.'s Opp. at 10–11, Dkt. 70, whilethe Navy says he "merely requested more information," Def.'s Reply at 12, Dkt. 72. No matter who is correct, Gill

approved a modified leave request after "she had submitted what he wanted to approve." Pl.'s Opp. 11–12.

Letter of reprimand. While Webster was waiting for Gill ultimately to approve her Mayleave request, she emailed Webster's superior, Captain Steven Lewia, asking him to approve theleave request and claiming that Gill had denied it. Def.'s Facts ¶ 72.

A similar thing had happened before. In March 2011, Webster bypassed Gill to requestleave and training approval from Lewia and Rear Admiral Terry Benedict. Def.'s Ex. 34 at 41.

This incident caused Gill to issue a "letter of direction" to Webster. *Id.* It reiterated that leave-approval authority rested with Gill alone and directed Webster to follow the chain ofcommand for future requests. *Id.* When Webster bypassed Gill again over the May leave request, Gill issued her a "letter of reprimand" for violating the letter of direction. Def.'s Facts ¶¶ 75–76. Like the letter of requirement, Webster considers the letter of reprimand to be "direct evidence" of "retaliation, harassment, and hostile work environment." Am. Compl. ¶ 114. *Security clearance issue.* In 2013, Lieutenant Commander Travis Plummer generated areport from the Joint Personnel Adjudication System (JPAS), which stores security clearance information. Def.'s Facts ¶ 87.

The report revealed that the JPAS entries for Webster and 12 other Strategic Systems Programs employees showed no current security access. *Id.* ¶ 88. Plummer was unable to fix the error for Webster and one other

employee. *Id.* ¶ 89.

The Navy could not grant Webster or the other employee the "secret" access that their jobs required without a JPAS entry showing a current security clearance. *Id.* ¶¶ 90–91. So the Navy placed Webster and the other employee on paid leave until it could fix the JPAS errors. *Id.*

¶ 91. Webster was on paid leave status for about six weeks. *Id.* ¶ 92. Her security clearance was never revoked, and she was paid while on leave. *Id.* ¶ 93–94. When Commander Doug Williams placed Webster on leave, he did not know about her past EEO activity. *Id.* ¶ 96. Thesame was true of Plummer. *Id.* ¶ 96.

Webster admits that "Plummer was just doing his job." Pl.'s Opp. 33. She contends that other "officials colluded to remove [her] security access from JPAS" to justify searching her credit history for "credit issues that [they] could use to revoke [her] security clearance." *Id.* 32.

Promotion opportunities. Webster alleges that the Navy denied her certain promotion opportunities. Am. Compl. ¶ 15. Two alleged opportunities survive the Navy's motion to dismiss. The first opening was for a GS-0318-08 secretary position; it opened after the incumbent, a white female, retired. Def.'s Facts ¶ 97; Am. Compl. ¶ 179. The Navy did not advertise this position as a government vacancy and did not fill it with a government employee. Def.'s Facts ¶ 98. It hired a contractor who identified as an African-American female. *Id.* ¶ 97.

Webster does not appear to allege that she ever applied for this position. *See* Am. Compl.

¶¶ 179–182. Her complaint is that "the position was not announced" and that Navy officials didnot want her to apply. Pl.'s Opp. 34. She believes that the Navy filled the position"non-competitively" and that she "should have been given the opportunity to be promoted." *Id.*

The second opening was for a management analyst position in Strategic Systems Programs. Def.'s Facts ¶ 115; *id.* ¶ 126. Webster did apply for this position and completed the occupational questionnaire. *Id.*

Each answer on the occupational questionnaire received a predetermined, standard numerical rating, depending on the candidate's answer. *Id.* ¶ 120. A software system calculated the candidate's overall rating based on those answers. *Id.* To be considered eligible for this position, a candidate had to score 90 or higher on the occupationalquestionnaire. *Id.* ¶ 122.

A human resources specialist based in the state of Washington named Judith Stout handled the initial screening. *Id.* ¶ 116. Stout did not now Webster, did not have a working relationship with her, did not know Webster's race, age, or sex, and was unaware that Webster had engaged in past EEO activity. *Id.* ¶ 129. Stout's job was to review each applicant's resume and occupational questionnaire and then to assemble a list of eligible candidates. *Id.* ¶¶ 116–117. Based on Webster's self-reported answers to the questionnaire, she received a rating of 86.

Id. ¶ 124. This placed Webster below the 90-point cutoff, so Stout did not include Webster on the list of eligible candidates that she sent to Strategic Systems Programs. *Id.* ¶¶ 125–126. From the list of eligible candidates, Strategy Systems Programs ultimately selected Michael Mendoza for the position. *Id.* ¶ 127.

B. Procedural History

Webster filed this action on July 25, 2017. *See* Dkt. 1. The Court had resolved a motion to dismiss Webster's original complaint, *see* Dkt. 19, and the parties were in discovery when Webster moved to amend her complaint on April 17, 2019, *see* Dkt. 47. The Court granted in part and denied in part that motion on June 12, 2019. *See* Dkt. 56. The amended complaint asserts claims under Title VII (Counts I–III), *id.* ¶¶ 304–359, and the Age Discrimination in Employment Act (Count IV), *id.* ¶¶ 360–378, of a hostile work environment and discrimination based on race, gender, age, and retaliation.

On October 7, 2019, the Navy moved to dismiss certain claims, moved for judgment on the pleadings for certain claims,[6] and moved for summary judgment on all claims. On December 2, 2019, Webster cross-moved for summary judgment. These motions are now ripe.

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[6] The Court must treat the Navy's motion for judgment on the pleadings as one for summary judgment because "matters outside the pleadings are presented to and not excluded by the court." Fed. R. Civ. P. 12(d). Both sides have had "a reasonable opportunity to present all the material that is pertinent to the motion," given that both have moved for summary judgment. *Id.*

II. LEGAL STANDARDS

A. Motion to Dismiss

The Navy moves to dismiss the claims associated with EEO complaint no. 09-00030-00674 for failure to timely exhaust administrative remedies and EEO complaint no. 10-00030-00266 for failure to timely file suit. *See* Def.'s Mem. in Support of Mot. for Summ. J. ("Def.'s Br.") at 28–29, Dkt. 67. The Navy moves under Rule 12(b)(1), which policies jurisdictional deficiencies. *See id.* at 1. But the Navy's arguments raise only procedural deficiencies and thus properly proceed under Rule 12(b)(6). *See Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1851 (2019) (holding that Title VII's charge-filing provisions are mandatory procedural requirements, not jurisdictional requirements); *Artis v. Bernanke*, 630 F.3d 1031, 1034 n.4 (D.C. Cir. 2011) (noting "that failure to exhaust administrative remedies is not jurisdictional under current precedents"); *Gordon*, 675 F.2d at 360 (holding that Rule 12(b)(6) applies to assertions of untimely Title VII suits); *Porter v. Sebelius*, 944 F. Supp. 2d 65, 68 (D.D.C. 2013) (holding that exhausting administrative remedies and timely filing suit under Title VII "are not jurisdictional" requirements). The Federal Rules of Civil Procedure permit the Court to consider the Navy's motion to dismiss under Rule 12(b)(6), as the rules follow the "guiding principle" of "[f]airness, not excessive technicality." *Gordon*, 675 F.2d at 360. And here, because "the parties do not disagree about the facts" underlying these procedural requirements "but rather about purely legal issues, which have been fully briefed," the parties "will not be prejudiced by the

Court's consideration of [the Navy's] motion pursuant to the standards of Rule 12(b)(6)." *Kamen v. Int'l Bhd. of Elec. Workers (IBEW) AFL-CIO*, 505 F. Supp. 2d 66, 71 n.1 (D.D.C. 2007). The Court will construe the Navy's Rule 12(b)(1) motion as a Rule 12(b)(6) motion. Rule 12(b)(6) allows a defendant to move to dismiss the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must contain factual matter sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp.*, 550 U.S. at 570. Well-pleaded factual allegations are "entitled to [an] assumption of truth," *Iqbal*, 556 U.S. at 679, and the court construes the complaint "in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged," *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012) (internal quotation marks omitted). A Rule 12(b)(6) dismissal for failure to state a claim—including for failure to exhaust administrative remedies—"is a resolution on the merits and is ordinarily prejudicial." *Okusami v. Psychiatric Inst. of Wash., Inc.*, 959 F.2d 1062, 1066 (D.C. Cir. 1992). When deciding a Rule 12(b)(6) motion, the court may consider only the complaint itself, documents attached to the complaint, documents incorporated by reference in the complaint, and judicially noticeable materials. *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). As relevant here, a court may consider a plaintiff's EEO documents for assessing exhaustion and timeliness attacks, particularly when—as is true in this case—neither side disputes their authenticity. *See Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997) (considering "the pleadings and undisputed documents in the

record" while reaching the merits on a motion to dismiss); *Vasser v. McDonald*, 228 F. Supp. 3d 1, 11 (D.D.C. 2016) (taking judicial notice of informal and formal administrative complaints on a motion to dismiss); *Williams v. Chu*, 641 F. Supp. 2d 31, 35 (D.D.C. 2009) ("A plaintiff's EEOC charge and the agency's determination are both public records, of which this Court may take judicial notice." (quotation marks and alteration omitted)).

B. Summary Judgment

Under Rule 56, summary judgment is appropriate if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247–48 (1986). A "material" fact is one that could affect the outcome of the lawsuit. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). A dispute is "genuine" if a reasonable jury could determine that the evidence warrants a verdict for the nonmoving party. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895. In reviewing the record, the court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000).

But a party "opposing summary judgment" must "substantiate [its allegations] with evidence" that "a reasonable jury could credit in support of each essential element of [its] claims." *Grimes v. District of Columbia*, 794 F.3d 83, 94 (D.C. Cir. 2015). The moving party is entitled to summary judgment if the

opposing party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. ANALYSIS

A. Motion to Dismiss

The Court will dismiss Webster's claims associated with Navy EEO complaint numbers 09-00030-00674 and 10-00030-0026.

As to complaint number 09-00030-00674, Webster failed to timely exhaust her administrative remedies. "Title VII complainants must timely exhaust their administrative remedies before bringing their claims to court." *Payne v. Salazar*, 619 F.3d 56, 65 (D.C. Cir. 2010) (internal quotation marks and alterations omitted); *see also* 42 U.S.C. § 2000e-16(c). The exhaustion requirement "serves the important purposes of giving the charged party notice of the claim and narrowing the issues for prompt adjudication and decision," *Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995) (internal quotation marks and alteration omitted), and it "ensure[s] that the federal courts are burdened only when reasonably necessary," *Brown v. Marsh*, 777 F.2d 8, 14 (D.C. Cir. 1985). In the Title VII context, failure to exhaust is an affirmative defense, and thus "the defendant bears the burden of pleading and proving it." *Bowden*, 106 F.3d at 437; *see also Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578(D.C. Cir. 1998) ("[A]n affirmative defense may be raised by pre-answer motion under Rule12(b) when the facts that give rise

to the defense are clear from the face of the complaint.").

On March 26, 2013, the Navy rejected complaint no. 09-00030-000674 and warned Webster that she had 30 days to appeal the decision to the EEOC. Def.'s Ex. 3 at 1–2. But Webster did not appeal to the EEOC until more than two years later, on October 10, 2015. Def.'s Ex. 4 at 1. The EEOC unsurprisingly dismissed that appeal as untimely. *Id.* at 1–2. The Court similarly concludes that by failing to timely appeal the Navy's decision to the EEOC, Webster failed to exhaust her administrative remedies.

As to complaint number 10-00030-00266, Webster failed to heed Title VII's requirement "that plaintiffs file suit within 90 days of receiving notice from the EEOC of their right to sue." *Gordon*, 675 F.2d at 359; *see also* 42 U.S.C. § 2000e-5(f)(1). On May 3, 2012, the EEOC granted summary judgment for the Navy on this complaint. Def.'s Ex. 7 at 1, 8. On July 16, 2012, the EEOC affirmed that judgment and told Webster that she had 90 days either to request reconsideration or to file a complaint in federal court. Def.'s Ex. 8 at 1, 4. The record contains no evidence that Webster requested reconsideration with the EEOC, and she did not file this suit until July 25, 2017—nearly five years after the EEOC gave Webster the green light to sue. Thus, Webster failed to bring these claims to federal court on time. Webster does not dispute this procedural history for either complaint. *See* Pl.'s Opp. at 1.

She maintains instead that the "continuing violation" doctrine excuses her tardiness. *Id.* This

"muddled" doctrine is one of several "exceptions to, and glosses on," the "general rule" that a "claim normally accrues when the factual and legal prerequisites for filing suit are in place." *Earle v. District of Columbia*, 707 F.3d 299, 306 (D.C. Cir. 2012). It can apply to conduct that turned out to be illegal only after its cumulative impact revealed the illegality—e.g., the conduct that often forms hostile work environment claims. *See id.* It can apply also to conduct that violates a statutorily imposed "continuing violation to act or refrain from acting." *Id.* at 307.

But it does not apply to a "discrete unlawful act." *Id.* at 306. And discrete acts are all that complaints 09-00030-00674 and 10-00030-00266 allege. *See* Def.'s Ex. 2; Def.'s Ex. 7. These complaints do not allege hostile work environment claims or other similar claims, and they do not allege that the Navy violated a continuing obligation. The continuing violation doctrine thus does not absolve Webster of her failure to exhaust administrative remedies or to timely file suit.

For these reasons, the Court will grant the Navy's motion to dismiss the claims arising under these two complaints. The Court thus will also deny as moot the Navy's motion for summary judgment and Webster's cross-motion for summary judgment as to those claims.

B. Summary Judgment

The Court will grant summary judgment for the Navy on Webster's remaining discrimination, retaliation, and hostile work environment claims.

1. Discrimination and Retaliation Claims

Webster alleges that numerous incidents constituted some combination of unlawful discrimination and retaliation under Title VII and the Age Discrimination in Employment Act(ADEA).[7] Title VII requires that any "personnel actions affecting employees. . . in executive agencies . . . be made free from any discrimination based on," among other characteristics, "race" or "sex." 42 U.S.C. § 2000e–16(a). The ADEA requires that [a]ll personnel actions affecting employees . . . who are at least 40 years of age . . . in executive agencies . . . be madefree from any discrimination based on age." 29 U.S.C. § 633a(a). Webster "offers no direct evidence of discrimination" under either statute. "[T]o survivesummary judgment and earn the right to present her case to a jury, she must resort to the burden-shifting framework of *McDonnell Douglas Corp. v. Green.*" *Barnette v. Chertoff*, 453 F.3d 513, 515 (D.C. Cir. 2006); *see Broderick v.Donaldson*, 437 F.3d 1226, 1231 (D.C. Cir. 2006) (explaining that the *McDonnell Douglas* framework applies to retaliation claims).

The *McDonnell Douglas* framework has three steps. The employee first must make a prima facie case of discrimination or retaliation. *See Iyoha v. Architect of the Capitol*, 927 F.3d 561, 566 (D.C. Cir. 2019). The "two essential elements of a discrimination

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[7] Not every EEO claim involved race, sex, and age discrimination, or retaliation and Webster's complaint is not entirely precise on which actions related to which counts. The Court will construe Webster's complaint broadly and analyze each incident for discrimination or retaliation.

claim" under Title VII and the ADEA "are that (i) the plaintiff suffered an adverse employment action (ii) because of the plaintiff's race, color, religion, sex, national origin, age, or disability." *Baloch v. Kempthorne*, 550 F.3d 1191, 1196 (D.C. Cir. 2008). And "[t]o prove retaliation, the plaintiff generally must establish that he or she suffered (i) a materially adverse action (ii) because he orshe had brought or threatened to bring a discrimination claim." *Id.* at 1198.

If the plaintiff makes the prima facie showing, the employer must produce a "a legitimatereason for the challenged action." *Id.* Four factors are "paramount" here: (1) whether the employer's evidence would be admissible at trial; (2) whether "the factfinder, if it believed the evidence, [would] reasonably be able to find that the employer's action was motivated by a nondiscriminatory reason"; (3) whether the employer's justification is "facially credible"; and (4) whether the employer's explanation is "clear," "reasonably specific," and "articulated with some specificity." *Figueroa v. Pompeo*, 923 F.3d 1078, 1087–88 (D.C. Cir. 2019) (internal quotations omitted).

And if the employer carries this burden, the final and "central inquiry" is "whether the plaintiff produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the plaintiff on a prohibited basis." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). The issue here "is not the correctness or desirability of

thereasons offered but whether the employer honestly believes in the reasons it offers." *Fischbach D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (alterations adopted and internal quotation marks omitted). Most often, if the employer carries its burden at step two, the district court "need not— and should not—decide whether the plaintiff actually made out a prima facie case." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). But if an employer contests whether the plaintiff suffered a sufficiently adverse action to sustain a discrimination or retaliation claim, it is appropriate to consider first whether the plaintiff has made a prima facie case. *See Baloch*, 550 F.3d at 1197 (analyzing whether the employee suffered an adverse action despite the plaintiff's failure to rebut the employer's nondiscriminatory rationale).

Based on these standards, the Navy is entitled to summary judgment on Webster's discrimination and retaliation claims. Some of the actions supporting Webster's claims do not satisfy the adverse action element of discrimination and retaliation claims. And Webster fails torebut the Navy's legitimate basis for the remaining actions.

i. Failure to Satisfy the Adverse Action Element

An employer's action is sufficiently adverse for a *discrimination* claim only if it causes "a significant change in employment status"—e.g., "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." *Baird v. Gotbaum*, 662 F.3d 1246, 1248 (D.C. Cir. 2011). The action must

cause the employee "materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." *Id.* at 1248–49. An employer's action is sufficiently adverse for a *retaliation* claim if it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 1249 (internal quotation omitted). Such actions "are not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* (internal quotation marks omitted). Yet "while the scope of actions covered by Title VII's substantive provision and its anti-retaliation provisions differ, the magnitude of harm that plaintiff must suffer does not"—in both cases, the plaintiff must suffer "objectively tangible harm." *Hornsby v. Watt*, 217 F. Supp. 3d 58, 66 (D.D.C. 2016).

The following actions do not meet even the more-forgiving definition used in the retaliation context and thus are not adverse actions in either context. The Navy is thus entitled to summary judgment on these claims.

Performance reviews. To be materially adverse, a performance appraisal "must affect the employee's position, grade level, salary, or promotion opportunities." *Taylor v. Solis*, 571 F.3d 1313, 1321 (D.C. Cir. 2009) (internal quotation marks omitted). An employee's "bare, conclusory allegation" of financial harm will not do. *Id.* Here, the challenged performance appraisals all rated Webster as acceptable. In addition, the narratives were hardly derogatory or dismissive. They included ordinary feedback and some guidance for improvement. In fact,

Gill noted in several reviews that Webster was improving, and her 2014 review was "glowing." Far from demonstrating adverse action, these reviews instead seem to have operated as designed, prompting Webster to make continued improvement over time. Though Webster believes that her reviews were unduly negative, she presents no concrete evidence that these fairly ordinary reviews affected her position, grade level, salary, or promotion opportunities. *See Grimes*, 794 F.3d at 94. The reviews were not adverse actions.

Letter of requirement. The letter of requirement clearly was not an adverse action for *discrimination* purposes. It was not "a significant change in employment status" along the lines of a hiring, firing, failure to promote, or reassignment. *Baird*, 662 F.3d at 1248. Nor did it effect a "significant change in benefits." *Id.* All it did was require that she follow additional procedural and documentation requirements when requesting leave. It is a closer call whether the letter of requirement was an adverse action for *retaliation* purposes. But because the letter imposed procedural rather than substantive requirements, it would not have dissuaded a reasonable employee from making a discrimination charge. *See id.* at 1249. It thus was not an adverse action for retaliation purposes either.

Leave Request. There is a dispute whether Gill denied Webster's May 5 request for three hours' leave or merely requested more information before granting it. But there is no dispute that he ultimately granted Webster a modified request a short time later. Gill's action—an initial denial (or request for more information) of a request for three hours of leave—is plainly not an adverse action either for discrimination

purposes or retaliation purposes.

Letter of reprimand. A letter of reprimand that "contained no abusive language" but instead included "job-related constructive criticism" that "can prompt an employee to improve her performance" does not satisfy the adverse action element—even for retaliation claims. *Baloch*, 550 F.3d 1199. Gill's letter of reprimand was such a letter. It contained no abusive language and instead explained what Webster need to do to improve her performance in the future. *See* Def.'s Ex. 34 at 43. On top of that, Gill had a sound and reasonable basis for issuing the letter, given that Webster had violated the letter of direction that Gill had issued just two months earlier. *See id.* at 41. The letter of reprimand was not an adverse action of any sort.

Security clearance issue. Webster did not suffer an adverse action when the Navy placed her on six weeks of paid administrative leave while it resolved the security clearance issue. Even a "19 month period of paid administrative while an investigation is ongoing . . . does not, by itself, constitute adverse action" for discrimination purposes. *Jones v. Castro*, 168 F. Supp. 3d 169, 179 (D.D.C. 2016) (citing cases). The same goes a retaliation claim: "placing an employee on paid administrative leave does not, in and of itself, constitute a materially adverse action for purposes of a retaliation claim." *Hornsby*, 217 F. Supp. 3d at 66. The employee must show "objectively tangible harm." *Id.* at 67.

Webster shown no such harm. First, she "continued to receive full pay and benefits." *Id.* Second, if 19 months of paid leave is not an adverse action, *see*

Castro, 168 F. Supp. 3d at 179, then six weeks surely "is not, in itself, so long as to have caused [Webster] any objectively tangible harm," *Hornsby*, 217 F. Supp. 3d at 67. Third, Webster was ultimately reinstated. *Cf. Hornsby*, 217 F. Supp. 3d at 67 (holding that even a failure to reinstate was not materially adverse when the plaintiff failed to allege that the failure was unreasonable). Fourth and finally, Webster has shown no other evidence that she suffered "other harms result[ing] directly from the terms of [her] administrative leave." *Id.* For these reasons, the paid administrative leave was not an adverse action. Failure to Rebut the Navy's Legitimate Rationales Webster fails to rebut the Navy's legitimate, nondiscriminatory rationales for the remaining challenged actions—even assuming they are sufficiently adverse. *See Iyoha*, 927 F.3dat 566. The Navy is thus entitled to summary judgment on these claims.

Bonus decisions. The Navy has established that it based Webster's bonus determinations on legitimate, nondiscriminatory rationales. *Fischbach*, 86 F.3d at 1183. Webster has not produced evidence to rebut the Navy's rationales.

For 2010, Webster received a $243 year-end bonus that she considers unjustified. Def.'s Facts ¶¶ 63–69. This was based on a predetermined formula that incorporated Gill's reward recommendation score. *Id.* Gill based this score in part on Webster's self-assessment, which was incomplete but noted her 12 years of experience, two college degrees, emails of commendation, and the duties that she accomplished. *See* Def.'s Ex. 34 at 16. He also evaluatedthe "critical elements" for Webster's position, determining that she

could complete certain tasks adequately but still required some supervision and had room for improvement. *See id.* at 16–18. Webster has not produced sufficient evidence to show that Gill based his reward recommendation on anything but these legitimate, nondiscriminatory grounds.

In 2011, Webster received no on-the-spot awards for outstanding performance despite herbelief that she deserved one. Def.'s Facts ¶ 78–80. Webster did not highlight a special project or act that she accomplished that would have merited such an award. Def.'s Ex. 35 at 28–29. And Gill was unaware of any such accomplishments. *Id.* at 39–40. Webster has produced no evidence to support that she should have received an on-the-spot award or that a decision not to give her one was motived by illegitimate, discriminatory intent.

For 2015, Webster received a bonus of $403. Def.'s Facts ¶ 110. Her 2015 bonus was based on Croley's review that concluded she was meeting expectations for her position and level of compensation. Def.'s Ex. 37 at 21. Webster believes that her 2015 bonus should have been higher, since Williams had given her a glowing review in 2014 and her 2014 bonus was for $750. Pl.'s Facts at 13. But Webster supplies no evidence that Croley based his rating on anything but the legitimate rationales given in her 2015 review. In fact, two other secretaries in Webster's division, neither of whom had participated in EEO activity, received equal or worse ratings. Def.'s Ex. 37 at 39–41.

Promotion opportunities. A successful failure to hire claim requires, among other things, that the employee "applied for and was qualified for an available position." *Cones v. Shalala*, 199 F. 3d 512,

516 (D.C. Cir. 2000). The Navy did not hire Webster for the GS-08 secretary position for a simple reason: She didn't apply for it. *See* Pl.'s Opp. at 34. She "believes" that she "should have been given the opportunity to be promoted" and that Navy officials "did not want her to apply." *Id.* But even if those beliefs were relevant, Webster cites no evidence to support them. *See id.* The position was not advertised as a government vacancy, *see* Def.'s Ex. 37 at 8, because the Navy was transitioning from using government employees to contractors to fill secretarial positions as those positions became vacant, *see id.* at 26; *id.* at 237. And the Navy ultimately hired a contractor, not a government employee, to fill the position. *Id.* at 7.

The Navy did not hire Webster for the management analyst position because she was not qualified for it. *See Cones*, 199 F. 3d at 516. Webster's score on the self-reported occupational questionnaire was too low for Webster to make the list of eligible candidates, and so she was notamong the candidates that her branch considered. Def.'s Facts ¶¶ 125–126. Webster believes that Stout, the person in Washington state who assembled the list of eligible candidates, "colluded" with hiring officials in Webster's branch to eliminate Webster from the list of eligible candidates. Pl.'s Opp. at 42. Not only does Webster have no evidence to support this claim, she also has none to rebut the Navy's evidence that her score of 86 was below the eligibility cutoff. *See id.* at 42–44.

2. Hostile Work Environment Claim

That leaves Webster's hostile work

environment claim. To establish a discriminatory or retaliatory hostile work environment claim, "a plaintiff must show that his employer subjected him to 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Baloch*, 550 F.3d at 1201 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)); *see also Bergbauer v. Mabus*, 934 F. Supp. 2d 55, 79, 82–83 (D.D.C. 2013) (collecting cases establishingthat "the same legal standard" applies to discriminatory and retaliatory hostile work environmentclaims). Courts examine "the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance." *Id.* Title VII is not a "general civility code"; the alleged conduct "must be extreme to amount to a change in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal quotation marks omitted); *see also Baloch*, 550 F.3d at 1201. And the alleged conditions must be both "objectively and subjectively hostile, meaning that a reasonable person would find [the work environment] hostileor abusive, and that the victim must subjectively perceive the environment to be abusive." *Hill v. Assocs. for Renewal in Educ., Inc.*, 897 F.3d 232, 237 (D.C. Cir. 2018) (alteration adopted and internal quotation marks omitted).

Webster claims she faced a hostile work environment claim based on her race and in retaliation for past EEO activity when: she received her 2010 performance appraisal; Gill issuedthe March 2010 letter of requirement concerning her leave usage;

Gill allegedly denied her May5, 2011 leave request; Gill issued the June 2011 letter of reprimand for disobeying the chain of command; she received her 2011 performance appraisal; she received her 2012 close-out appraisal; and she was placed on paid administrative leave while the Navy investigated her security clearance issue. *See* Def.'s Exs. 9, 11, 17.

None of these allegations, whether alone or together, are sufficiently severe or pervasive to sustain a hostile work environment claim. First, the allegations span five years and involve different supervisors. *See Nurriddin v. Bolden*, 674 F. Supp. 2d 64, 94 (D.D.C. 2009) (dismissing a hostile work environment claim, in part because "the alleged events [we]re temporally diffuse, spread out over a four-year period, suggesting a lack of pervasiveness"). Second, they are not the "extreme conditions" that "constitute a hostile work environment." *Hill*, 897 F.3d at 237. Webster's grievances instead are "ordinary tribulations of the workplace." *Faragher*, 524 U.S. at 788. Webster's appraisals were acceptable; the narratives were ordinary, not demeaning. In fact, they "recommended areas of improvement—hardly the stuff of severe or pervasive workplace hostility." *Brooks v. Grundmann*, 748 F.3d 1273, 1277 (D.C. Cir. 2014). The letter of requirement was thoroughly justified, based on Webster's history of leave usage, and such restrictions are generally insufficient to sustain a hostile work environment claim. *See Baloch*, 550 F.3d at 1195. Even if Gill initially denied Webster's May 2011 leave request, all agree that he subsequently granted a modified one. The letter of reprimand was sound given that Webster had again flouted the chain of command, squarely violating the earlier letter of direction. And the Navy's

well-justified decision to placeWebster on paid leave while it resolved her security clearance issue was hardly abusive. In short, these actions were all "far from severe" enough to support a hostile work environment claim. *Brooks*, 748 F.3d at 1276.

Third and finally, Webster has failed to establish any evidentiary link between the alleged hostile behavior and either her race or her protected EEO activity. Her fundamental premise is that as a longtime Navy employee with a college education, her career should not have stalled in neutral for nearly two decades. *See* Pl.'s Reply at 4, Dkt. 73. She believes that discrimination and relation must be to blame. *See id.* But no matter how sincere this belief is, summary judgment requires evidence. On that requirement, Webster comes up short.

CONCLUSION

For the foregoing reasons, the Court grants in part and denies as moot in part the Navy'sMotion to Dismiss and for Summary Judgment, and the Court denies Webster's Cross-Motion for Summary Judgment. A separate order accompanies this memorandum opinion.

_____/s/_____
DABNEY L. FRIEDRICH
May 01, 2020

United States District Judge

APPENDIX G

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSIONOffice of Federal Operations

P.O. Box 77960
Washington, DC
20013
Katrina Webster,
a/k/aRosamaria F.,[1]
Complainant,
v.
Thomas B. Modly,

Acting
Secretary,
Department of the
Navy,Agency.

Appeal No. 0120181068

Agency No. DON-17-

00030-01579

DECISION

On February 6, 2018, Complainant filed an appeal with the Equal Employment Opportunity

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[1] This case has been randomly assigned a pseudonym which will replace Complainant's namewhen the decision is published to non-parties and the Commission's website.

Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 8, 2018, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission MODIFIES and REMANDS the Agency's final decision for further processing.

ISSUES +PRESENTED

Whether the Agency subjected Complainant to discriminatory harassment on the bases of race (African-American) and reprisal when her first-line supervisor allegedly permitted a working environment where she was subjected to a hostile work environment by a contract employee.

Whether the Agency's anti-harassment policy adequately addresses the Agency's legal obligation to prevent harassment in the workplace in accordance with the Commission's Management Directive 715 (MD-715).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Secretary, NK-0318-II, for Strategic Systems Programs Headquarters at the Washington Navy Yard in Washington, D.C.

On May 20, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American) and in reprisal for prior protected EEO activity arising under Title VII when on or about March 3, 2017, her first line supervisor allegedly permitted a working environment where she was subjected to a hostile work environment by a contract employee (Information Technology Manager, Caucasian).

During the EEO investigation, Complainant recounted several incidents of harassment by the contract employee. Specifically, Complainant alleged that the contract employee told another employee, "If you see [Complainant] turn the other way." Complainant maintained that the contract employee also referred to Complainant as "trouble" and allegedly told Complainant's new Assistant Branch Chief to "watch out for [Complainant]." She declared that the contract employee sought to dissuade her from engaging in EEO activity by making statements that were critical of her prior EEO activity and even tried to remove a printer from her desk. She reasoned that the contract employee may have learned about her prior EEO activity from her supervisor, an individual whom she had previously named as a responsible management official and/or witness in 18 EEO complaints (excluding instant complaint). Complainant indicated that she became very suspicious about the true motivations of the contract employee when the Agency's EEO counselor only spoke to her supervisor and the Assistant Branch Chief during the informal EEO process anddid not interview the contract employee or other witnesses.

She emphasized that management didnot respond to her cries for help and that the Agency's harassment policies only address sexual harassment and never nonsexual harassment.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the reportof investigation and notice of her right to request a hearing before an EEOC Administrative Judge(AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD- 110), at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations ofthe 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").

Harassment Claims

For Complainant to prevail on her allegation of harassment, she must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) thereis a basis for imputing liability to the Agency. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of complainant's employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993); see also Oncale v. Sundowner Offshore Services, Inc., 23 U.S. 75 (1998).

To establish a claim of retaliatory harassment by a coworker (in addition to showing that the harassment is motivated by protected EEO conduct), Complainant must show that: (1) the coworker's retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination; (2) supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior; and (3) supervisors or members of

management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances. Hawkins v. Anheuser Busch, Inc., 517 F.3d 321 (6th Cir.2008); See Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 68 (2006); see also, Owen v. Peake, 2008 WL 4449011, at 4 (S.D. Ohio 2008); Satterfield v. Karnes, 736 F. Supp.2d 1138, 1170 (S.D. Ohio 2010).

After careful consideration of the record, we conclude that the Agency properly found that Complainant failed to persuasively show that she was subjected to a hostile work environment. In reaching this conclusion, we considered Complainant's contention that the contract employee subjected her to harassment on the bases of race and reprisal; however, we find that the preponderant evidence fails to establish a causal link between the contract employee's actions and Complainant's protected characteristics.[2]

Regarding the printer incident, we note that the contract employee stated that he allowed Complainant to keep her printer as a courtesy even though he was technically required to take away

[2] Because Complainant has failed to demonstrate a causal link between the alleged harassment and her protected characteristics, we need not consider whether the alleged 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.

Complainant's printer because a Presidential Directive required agencies to reduce their IT equipment footprints.

The Chief Information Officer, in contrast, averred that the contract employee removed Complainant's printer because the Agency implemented a "Printer Reduction Plan." While we note that there is a discrepancy as to whether the contract employee removed Complainant's printer, we find that the preponderant evidence fails to show that the contract employee acted with discriminatory or retaliatory motive with regard to Complainant's printer.

As for the alleged remarks, the record reflects that the contract employee admitted that he said, "Here comes trouble," as Complainant approached him; however, he explained that he made the comment in jest because Complainant always turned to him for assistance with IT issues even though he did not deal with everyday IT issues. The contract employee, however, outright denied telling Complainant's colleagues to "turn the other way" and "watch out for her." While we acknowledge Complainant's disagreement with the contract employee's explanations, we note that Complainant requested a final decision from the Agency. In so doing, Complainant waived her right to request a hearing before an EEOC Administrative Judge, where she could have engaged in discovery and crossed-examined witnesses such as the contract employee. Therefore, we can only evaluate the facts based on the weight of the evidence presented to us. Based on the totality of the record before us, we find that Complainant has not established that she was

subjected to harassment on the bases alleged.

Breach of EEO Confidentiality

Notwithstanding our finding of no discrimination with regard to Complainant's alleged harassment claims, we find that the Agency subjected Complainant to discrimination on the basis of reprisal when Complainant's supervisor revealed Complainant's protected EEO activity to the Fire Control and Guidance Branch Deputy. We remind the Agency that complainants are generally entitled to confidentiality with regard to their EEO complaints.[3] Our review of the affidavit from the Fire Control and Guidance Branch Deputy shows that the Agency fell short of its legal obligation to ensure confidentiality.

As a general matter, the statutory anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). Although petty slights and trivial annoyances are not actionable, adverse actions or threats to take adverse actions such as

[3] We note that an agency cannot guarantee complete confidentiality, because it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis. See Enforcement Guidance on Retaliation, Part V(C)(1)(c) ("Confidentiality").

reprimands, negative evaluations, and harassment are actionable. Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004 (Enforcement Guidance on Retaliation), at § II. B. (Aug. 25, 2016).

Given the importance of maintaining "unfettered access to [the] statutory remedial mechanisms" in the anti-retaliation provisions, we have found a broad range of actions to be retaliatory. For example, we have held that a supervisor threatening an employee by saying, "What goes around, comes around" when discussing an EEO complaint constitutes reprisal. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), req. for recons. den., EEOC Request No. 0520090654 (Dec. 16, 2010). We have also found that a supervisor attempting to counsel an employee against pursuing an EEO complaint "as a friend," even if intended innocently, is reprisal. Woolf v. Dep't of Energy, EEOC Appeal No. 0120083727 (June 4, 2009) (violation found when a Labor Management Specialist told the complainant, "as a friend," that her EEO claim would polarize the office).

Similarly, the Commission has held that disclosure of EEO activity by a supervisor to coworkers constitutes reprisal. Complainant v. Dep't of Justice, EEOC Appeal No. 0120132430 (July 9, 2015) (reprisal found where a supervisor broadcasted complainant's EEO activity in the presence of coworkers and management); see also Melodee M. v. Dep't of Homeland Sec., EEOC Appeal No. 0120180064 (June 14, 2019) (affirming agency's finding of reprisal when complainant's second level supervisor disclosed

complainant's EEO activity to others). We have also found reprisal where a human resources (HR) employee inadvertently negatively left a message on a complainant's voicemail regarding the settlement of a prior EEO complaint. Complainant v. Dep'tof Justice, EEOC Appeal No. 0720120032 (May 1, 2014) (complainant subjected to retaliation when a HR employee and coworker inadvertently left message on complainant's work voicemail berating her and using strong language while discussing settlement of complainant's prior EEO complaint);

In this case, the record clearly shows that the Fire Control and Guidance Branch Deputy, when questioned about how she learned about Complainant's prior EEO activity, responded with the following: "I was told by the Branch Head at the time, [Complainant's supervisor], that [Complainant] has made EEO complaints in the past." See Affidavit of T.J.Y., Complaint File, pg. 9. By the Agency's own admission, the Fire Control and Guidance Branch Deputy did not supervise Complainant. See Memorandum from Agency Representative, id. at pg. 5. As such, Complainant's supervisor should not have disclosed Complainant's prior EEO activity to the Fire Control and Guidance Branch Deputy. We find that this disclosure, on its face, discourages participation in the EEO process and constitutes reprisal.

In reaching this conclusion, we are mindful that Complainant did not allege that she was subjectedto discrimination on the basis of reprisal when her supervisor disclosed her protected EEO activityto the Fire Control and Guidance Branch Deputy. Nevertheless, in our prior decisions, we have found

reprisal even where a complainant did not claim reprisal. For example, in Light v. Dep't ofVet. Aff., EEOC Appeal No. 0120111229 (Nov. 22, 2011), the Commission affirmed the agency'sfinding of reprisal when complainant's second-level supervisor admitted to telling complainant that she took offense at complainant's complaints about discrimination. req. for recons. den., EEOC Request No. 0520120207 (June 6, 2012).

Though the complainant in Light did not raise reprisal as a basis, the Commission affirmed the agency's finding that the evidence developed during the EEO investigation violated the "letter andspirit of EEO law which requires agencies to promote and support the full realization of equal employment opportunity." As in Light, supra, we too conclude that the evidence in this case manifestly demonstrates a violation of the "letter and spirit of EEO law which requires agencies to promote and support the full realization of equal employment opportunity." The only question that remains for us to decide is the appropriate remedy.

To remedy findings of discrimination, the Commission is authorized to award compensatory damages as part of "make whole" relief for a complainant. However, not all violations necessarily entitle a complainant to individual relief. Vincent v. U.S. Postal Serv., EEOC Appeal No.0120072908 (Aug. 3, 2009) (citing Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998)). Rather, the action giving rise to the damages must be intentional. Id.

Our prior decisions establish that complainants are entitled to compensatory damages for the unlawful

disclosure of their EEO activity. For example, in Light, supra, we awarded compensatory damages even though Complainant did not prevail on any of her individual claims of discrimination. In rejecting the agency's conclusion that complainant was not entitled to compensatory damages because she did not prevail on her underlying claims, we expressly foundthat the complainant was indeed entitled to compensatory damages because the agency's actions were likely to deter protected activity by complainant or others. Id.

The Commission has also awarded compensatory damages even where the agency claimed that the unlawful disclosure of a complainant's EEO activity was inadvertent. See Candi R. v. Envtl. Prot. Agency, EEOC Appeal No. 0120171394 (Sept. 14, 2018) (holding that the asserted inadvertent nature of the disclosure of complainant's EEO activity did not negate the fact that sending these emails to all her colleagues would be reasonably likely to deter an employee from engaging in EEO activity and therefore constituted reprisal warranting the imposition of compensatory damages); req. for recons. den., EEOC Request No. 2019000393 (Feb. 8, 2019). Weshall do the same in this case, as it clear from the record that Complainant's supervisor acted affirmatively (i.e., made the disclosure) to unlawfully disclose Complainant's protected EEO activity. See also Melodee M., supra.

For the above reasons, we find that Complainant was subjected to unlawful reprisal in the disclosure of her EEO activity by her supervisor and that compensatory damages may be awardedshould Complainant be able to show she suffered a compensable harm as a result of

the disclosure.

Sufficiency of the Agency's Anti-Harassment Policy

As we have serious concerns regarding the Agency's handling of harassment claims, particularly with regard to the Agency's legal obligation to ensure the confidentiality of such claims, we take this opportunity to review the Agency's anti-harassment policy in its entirety. See Executive Order11478, Sec. 3 ("The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees or applicants for employment."). After careful consideration of the record, we find that the Agency's anti- harassment policy does not adequately address the Agency's legal obligation to prevent harassment in the workplace.[4] We conclude that the Agency's anti-harassment policy is not in accord with the Commission's Management Directive 715 (MD-715) because the Agency's policy statement does not effectively communicate EEO policies and procedures regarding harassment. Because the preponderant evidence suggests this failure may have contributed to the unlawful disclosure of Complainant's protected EEO activity, as discussed above, we remind the Agency of its legal obligations as set forth below and direct the Agency to comply with the remedial actionslisted in the Order herein.

[4] We note that in the Report of Investigation Complainant raised concerns about the lack ofinformation about non-sexual harassment being posted in her workplace.

Federal Agencies Are Legally Obligated to Establish and Maintain Effective Anti-Harassment Programs

The Commission's MD-715 is the policy guidance which the Commission provides to federal agencies for their use in establishing and maintaining effective programs of equal employment opportunity under Title VII and the Rehabilitation Act. MD-715 provides a roadmap for ensuring that all employees and applicants for employment enjoy equality of opportunity in the federal workplace regardless of race, sex, national origin, color, religion, disability, or reprisal for engaging in prior protected EEO activity. Compliance with MD-715 is mandatory for all Executive agencies. See MD-715 ("Responsibilities") ("Agency Heads are responsible for the following: 1. Ensuring compliance with this Directive and those implementing instructions issued by EEOC in accordance with existing law and authority."). See also 29 C.F.R. § 1614.103(b)(2) ("This part applies to... Executive agencies as defined in 5 U.S.C. 105..."); and 29 C.F.R. § 1614.102(e) ("Agency [EEO] programs *shall* comply with this part and the Management Directives and Bulletins that the Commission issues.") (emphasis added).

It is critical to understand the legal requirements with which agencies must comply in order to avoid liability for harassment. Following the United States Supreme Court's decisions in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Indus. v. Ellerth, 524 U.S. 742 (1998), the Commission issued Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors in 1999,

advising employers (both public and private sector) to establish anti-harassment policies that contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct, including a reference to all of the protectedbases;
- Assurance that employees who make claims of harassment or provide information related to such claims will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues for complainants;
- Assurance that to the extent possible, the employer will protect the confidentiality of the individuals bringing harassment claims;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

The Commission subsequently issued MD-715 on October 1, 2003, which applied the minimum standards and guidelines set forth in Faragher, supra and Ellerth, supra to the federal sector (i.e., federal agencies). See Model EEO Programs Must Have An Effective Anti-Harassment Program, n. 8.[5] Sections II (A) and (C) of MD-715 expressly require federal agencies to establish and maintain effective

[5] MD-715 provides that "[t]he EEOC will also supplement this Directive on an as-needed basis through the issuance of additional guidance and technical assistance." See MD-715 ("Introduction"). Also, our report, Model EEO Programs Must Have An Effective Anti- Harassment Program, is available https://www.eeoc.gov/federal/model_eeo_programs.cfm.

affirmative programs of equal employment opportunity, which show demonstrated commitment from agency leadership and ensure management and program accountability. To this end, agencies must issue a written policy statement signed by the agency head that expresses commitment to EEO and a workplace free of discriminatory harassment, and the development of a comprehensive anti-harassment policy to prevent harassment on all protected bases, including race, color, religion, sex (sexual or nonsexual), national origin, age, disability, and reprisal. In this regard, a comprehensive anti-harassment policy that complies with MD-715 should: establish a separate procedure outside of the EEO complaint process; require a prompt inquiry of all harassment allegations to prevent or eliminate conduct before it rises to the level of unlawful harassment; establish a firewall between the EEO Director and the Anti-Harassment Coordinator to avoid a conflict of interest; and ensure that the EEO Office informs the anti- harassment program of all EEO counseling activity alleging harassment. See Instructions to Federal Agencies for MD-715 Section I The Model EEO Program, Part III. Element C (B); see also Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Part V(C)(1)("Policy and Complaint Procedure").

It is simply not enough to create an anti-harassment policy. MD-715 expressly requires agencies to effectively communicate EEO policies and procedures to all employees. Specifically, agencies must inform their employees of their rights and responsibilities pursuant to the EEO process, anti- harassment program, alternative dispute resolution (ADR)

process, reasonable accommodation program, and behaviors that could result in discipline. Methods of dissemination include training, webinars, brochures, emails, or other types of written communication. Instructions to Federal Agencies for MD-715 Section I The Model EEO Program, Part I. Element A (B).

We remind agencies that failure to effectively communicate anti-harassment policies not only violates MD-715 but may also expose them to liability. In this regard, we note that the first prong of the affirmative defense for harassment liability under Faragher, supra, and Ellerth, supra, requires a showing by the employer that it undertook reasonable care to prevent and promptly correct harassment.

Such reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. We emphasize that a federal agency's formal, internal EEO complaint process does not, by itself, fulfill its obligation to exercise reasonable care. That process only addresses complaints of violations of the federal EEO laws, while the Court, in Ellerth, made clear that an employer should encourage employees "to report harassing conduct before it becomes severe or pervasive." Ellerth, 118 S. Ct. at 2270. Furthermore, the EEO process is designed to assess whether the agency is liable for unlawful discrimination and does not necessarily fulfill the agency's obligation to undertake immediate and appropriate corrective action. See Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors at n. 57.

In this case, while we acknowledge that the Agency issued a Workplace Anti-Harassment Policy Statement on May 1, 2018, outlining its obligation to prevent harassment, we conclude that this policy fails to effectively communicate EEO policies and procedures in accordance with MD-715because it does not: 1) clearly establish the complaint procedure, including the appropriate channels for filing a complaint, that is separate from the EEO process; and 2) ensure confidentialityto the extent possible.

Failure to Clearly Describe the Complaint Procedure

Regarding the first deficiency, we note that the Agency's Workplace Anti-Harassment Policy Statement states that "any Sailor, Marine, or civilian employee who encounters workplace harassment should report the incident through appropriate channels." As noted above, however, MD-715 requires agencies to clearly inform their employees of their rights and responsibilities pursuant to their anti-harassment programs. While we acknowledge that the Agency's policy statement informs employees of their right to "report the incident through appropriate channels," we find this rather vague statement to be inconsistent with MD-715 because it does not notify employees of who they may approach to raise claims. As explained in our report, Model EEO Programs Must Have An Effective Anti-Harassment Program, a model EEO program must clearly describe the complaint process, particularly the agency officials who can receive harassment claims. We further explained in our report that agencies, in establishing model EEO programs, should consider designating at least one official outside an employee's chain of

command to accept claims of harassment. Indeed, agencies should ideally provide multiple points of contact for the employee, such that all claims need not go through the chain of command. In this case, it is clear that the Agency did not designate anyone to be the "go to" person for reporting harassment, muchless multiple points of contact.[6]

We emphasize the importance of clearly delineating channels of communication for reporting harassment, particularly in light of cases such as this where a complainant does not feel comfortable approaching the very people who are responsible for the conduct they are reporting or have reported in the past.[7]

Moreover, we note that agencies, as part of their legal obligation to establish procedures to preventall forms of discrimination, including harassment, must identify the investigation process, including where to file the complaint, who will conduct the investigation, and who will make the decision for corrective action. See Model EEO Programs Must Have An Effective Anti- Harassment Program, Part I (C). Here, our

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[6] We acknowledge that the ROI contains PowerPoint slides titled "EEO Essentials for Non- Supervisory Personnel" that contains the contact information for the Agency's EEO personnel. ROI, pg. 000122. We emphasize, however, that MD-715 still requires agencies to establish and maintain written anti-harassment policies consistent with MD-715.

[7] In her rebuttal to her supervisor's affidavit, Complainant stated that she did not discuss the contract employee's comments with her supervisor because, for all she knew, her supervisor could have been the person who discussed her prior protected EEO activity with the contract employee, which led the contract employee to call her "trouble." ROI, pg. 239.

review of the Agency's Workplace Anti-Harassment Policy Statement, shows that the Agency simply noted that its anti-harassment policy is "separate and apart from any administrative, negotiated grievance, or statutory complaint process that covers allegations of harassment, such as the Equal Employment Opportunity complaint process." There is no mention of where an employee must go to file a complaint, who will conduct the investigation, and who will make the decision for corrective action. To fulfill its legal obligations under MD-715, the Agency should develop complaint procedures that are separate from the EEO process and clearly establish the complaint procedure in accordance with our guidelines. See Model EEO Programs Must Have An Effective Anti-Harassment Program.

To establish a clearly-described complaint process, the policy must contain the time frames and responsible officials for the intake, investigation, and decision-making stages of the process. Two EEOC appellate decisions provide guidelines for time frames involving prompt investigations and immediate corrective actions. For the investigation to be prompt, an EEOC decision found the agency should have started the investigation within 10 days of receiving notice of a harassment allegation. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120123232 (May 21, 2015); see also MD-715, Part G, Question C.2.a.5. As to immediate corrective actions, another EEOC decision found the agency should have reached a decision and taken corrective action within 60 calendar days of receiving notice of the allegation. See Tammy S. v. Dep't of Defense (Defense Intelligence Agency), EEOC Appeal No. 0120084008 (June 6, 2014). As

such, the Agency's policy must include time frames for the intake, investigation, and decision-making stages of the anti-harassment complaint process.

Failure to Ensure Confidentiality to the Extent Possible Finally, with regard to the second deficiency, we again remind the Agency that complainants are generally entitled to confidentiality with regard to not only their EEO complaints, but their claims of harassment as well. Indeed, the right to confidentiality is an important hallmark of a model EEOprogram.

As explained in our Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, an employer should clearly inform its employees that it will protect the confidentiality of harassment allegations to the extent possible. See Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors,, Part V(C)(1)(c) ("Confidentiality"). While we recognize that an employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis. Id. Federal agencies, as partof their legal obligation to establish and maintain model EEO programs under MD-715, must ensure the confidentiality of all harassment allegations, to the extent possible, and effectively communicate to employees that their EEO activity will not be disclosed without their authorization, except in limited circumstances as

provided by law.

Our review of the Agency's Workplace Anti-Harassment Policy Statement reveals serious shortcomings with regard to this obligation. In this regard, we note that the Agency's policy statement makes no assurances that the Agency will protect the confidentiality of individuals bringing harassment complaints to the fullest extent possible. In fact, the Agency's policystatement contains no mention of any right to confidentiality.

This is a clear failure to communicate, which undermines the effectiveness of the Agency's anti-harassment program, as managers may unknowingly violate the law and employees may be discouraged from reporting harassment without assurances of confidentiality. MD-715 expressly requires management and program accountability, which involves putting employees and management officials on notice of their rights and responsibilities. As was demonstrated in this case where a Complainant's supervisor disclosed her EEO activity to someone without a need to know, it is critically important that an agency's anti-harassment policy inform its employees of the legal obligation to ensure the confidentiality of Complainant's protected EEO activity, including harassment allegations.

Summary of Policy Deficiencies and Corrective Action
The Commission finds that the Agency's Workplace Anti-Harassment Policy Statement does notmeet the standards as required by MD 715, our Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors and our Model EEO

Programs Must Have An Effective Anti-Harassment Program guidance. In particular, the Agency's policy does not set out with specificity the complaint procedures by which an employee may raise a claim of harassment,including time frames for the processing of the harassment allegations as well as naming officials who can receive such claims. Second, the Agency's policy does not provide notice of the requisite confidentiality accorded to the filing of claims of harassment.

Pursuant to 29 C.F.R. § 1614.501(a)(2), to remedy a finding of discrimination, the Commission may order an agency to provide corrective, curative or preventive actions to ensure that violationsof the law similar to those found will not recur. Here, as discussed above, the Agency's anti- harassment policy does not comply with the Commission's MD-715 policy guidance because it does not clearly establish the complaint procedure, including the appropriate channels for filing a complaint, and ensure confidentiality to the extent possible. We would be remiss to take no action to correct the Agency's clear violations of MD-715. As the Agency is not in compliance with MD- 715 regarding its anti-harassment policy, under circumstances that are capable of being repeated, we order the Agency to seek technical assistance from the Commission's Office of Federal Operations, Federal Sector Programs, and to correct the deficiencies in the policy identified above. This will ensure that the agency is taking the necessary preventive steps to avoid liability for harassment in the future.

CONCLUSION

Based on a thorough review of the record, we

MODIFY the Agency's final decision as set forth herein and REMAND the matter to the Agency for further processing in accordance with the ORDER below.

ORDER[8]

1. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall undertake a supplemental investigation concerning Complainant's entitlement to compensatory damages and determine the amount of compensatory damages due Complainant in a final decision with appeal rights to the Commission.

   The Agency shall pay this amount to Complainant within **thirty (30) calendar days** of thedate of the determination of the amount of compensatory damages. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to Complainant for the undisputed amount. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must befiled with the Compliance Officer, at the address

[8] Because the record reflects that the responsible management official (Complainant's supervisor) is an active duty military officer, we cannot order the Agency to provide training and consider disciplinary action, as we have no authority over active duty military personnel.

referenced in the statement entitled "Implementation of the Commission's Decision."

2. Within **thirty (30) calendar days** of the date of this decision, the appropriate Agency EEO component shall request technical assistance from the EEOC, Office of Federal Operations, Federal Sector Programs (FSP), on revising its anti-harassment policy to conform to the standards set forth in MD-715.

Within **sixty (60) calendar days** of the date this decision, the Agency shall revise its anti-harassment policy to FSP's satisfaction, and the Agency shall promptly reissue a new anti- harassment policy statement signed by the agency head.

To fulfill its legal obligation to effectively communicate EEO policies and procedures to all employees, the Agency shall disseminate its revised anti-harassment policy statement **within thirty (30) calendar days** of issuing the revised policy statement. Methods of dissemination include training, webinars, brochures, emails, or other types of written communication. Instructions to Federal Agencies for MD-715 Section I The Model EEO Program, Part I. Element A (B).

3. Within **thirty (30) calendar days** of the date this decision is issued, the Agency shall posta notice in accordance with the paragraph entitled "Posting Order."

POSTING ORDER (G0617)

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

ATTORNEY'S FEES
(H1019)

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

process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documentsin the digital format required by the Commission, referencing the compliance docket number underwhich compliance was being monitored.

Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agencymust send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on

the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp.IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth inthis decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS -
ON APPEAL
RECONSIDERATION
(M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact orlaw; or

2. The appellate decision will have a substantial impact on the policies, practices, oroperations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proofof 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 limitedcircumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT
TO FILE A CIVIL ACTION
(R0610)

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

RIGHT TO REQUEST
COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly,

if you cannot afford an attorney to represent you in the civil action, you may request thecourt to appoint an attorney for you. **You must submit the requests for waiver of court costs orappointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

Carlton M. Hadden, Director Office of Federal Operations February 1414,2020Date

_____/S_____