

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DISTRICT OFFICE**

_____)		
_____)		
Complainant,)		EEOC No. _____
v.)		
_____)		
_____, SECRETARY,)		
U.S. DEPARTMENT OF THE ____,)		
Agency.)		
_____)		

**COMPLAINANT’S MOTION FOR SANCTIONS
FOR AGENCY FAILURE TO CONDUCT
A FORMAL INVESTIGATION
WITHIN 180 DAYS**

Complainant, by Counsel, hereby requests the Department of the _____ (“Agency”) be sanctioned for failure to conduct a formal investigation within a 180 days of the filing of the formal complaint as required by 29 C.F.R. § 1614.108(e). Complainant’s complaint is based on sexual harassment and reprisal actions by Complainant’s co-worker _____ when Complainant was performing her duties as a _____ at the _____.

CASE SUMMARY

(Practice Tip: The case summary is the most important part of the brief and maybe the only part of the brief that a busy Judge will read carefully. It is essentially your opening statement at a hearing. Make it strong and compelling. You want the Judge to get the impression that sanctions for liability might as well be entered since Complainant will win anyway.)

STATEMENT OF FACTS

(Practice Tip: Used numbered paragraphs and not a narrative for the Statement of Facts so the Judge can easily find what the Judge considers important when writing a decision.)

1. Complainant is employed by the Agency as a _____, at the _____. In early 20____, co-worker _____ was assisting Complainant _____ when _____ molested her by _____. Complainant objected, but he just laughed. **(Practice Tip: Go heavy with multiple citations to the record in the fact section of the brief)**
2. On _____, 20____, Complainant reported to her Supervisor _____ that Mr. _____. *Ex. 1, 2, 3 & 4; Ex. 5 p. 1, _____ Declaration.* _____ did not separate Complainant from _____ and only reassigned him to another project. Mr. _____ did not tell Mr. _____ why he was re-assigned and did not instruct Mr. _____ to have no contact with Complainant. Complainant continued to see Mr. _____ each morning at work when employees put on wet suits and again in the break/control room during lunch. *Id.*
3. Within a few days after Complainant asked Supervisor _____ to protect her, _____ continued the sexual harassment by sending her text messages or emails. On _____, 20____, _____ sent Complainant the text message: “_____.” *Ex. _ & Ex. 1, paragraph d.* He sent the text message as they were both sitting _____ during lunch. Complainant made clear that she was not interested, but he ignored her objections to his offensive conduct. *Ex. 1, 2, 3 & 4.*
4. In mid-September, _____ said to Complainant “_____.” He said “_____.” Complainant told _____ that he may _____. Later that day, _____ said to her, “*I am going to _____.*” *Ex. 1, 2, 3 & 4.*

(Practice Tip: The fact section of the brief is completed when all the facts are included that the Judge will need to write a decision awarding sanctions.)

ARGUMENT

I. STATEMENT OF LAW ON SANCTIONS

The Commission's regulations afford broad authority to AJs for the conduct of hearings. See 29 C.F.R. § 1614.109 et seq.; *Equal Employment Opportunity Management Directive* for 29 C.F.R. Part 1614 (EEO-MD-110), Ch. 7, Sec. III(D) (Nov. 9, 1999). An AJ has inherent powers

to conduct a hearing and to issue appropriate sanctions, including a default judgment. See *Id.*; *Matheny v. Dep't of Justice*, EEOC Request No. 05A30373 (Apr. 21, 2005); *Rountree v. Dep't of the Treasury*, EEOC Appeal No. 07A00015 (July 13, 2001). The Commission's regulations provide that an Administrative Judge may impose sanctions when an Agency fails to respond to an order of an AJ, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses. 29 C.F.R. § 1614.109(f)(3) An AJ may: (1) draw an adverse inference that the requested information would have reflected unfavorably on the non-complying party; (2) consider the requested information to be established in favor of the opposing party; (3) exclude other evidence offered by the non-complying party; (4) issue a decision fully or partially in favor of the opposing party; or (5) take other action deemed appropriate, e.g., payment of costs and expenses by the non-complying party. *Id.*

a. Complainant's Motion for Sanctions is Adequate Notice to the Agency

The Commission's regulations provide for the issuance of a Notice to Show Cause prior to the issuance of an order on sanctions. EEO-MD-110, Chap. 7, Section III(D), n.6; see *DaCosta v. Dep't of Educ*, EEOC Appeal No. 01995992 (Feb.25, 2000). A Show Cause order is not required if a complainant files a motion for sanctions because the Agency had an opportunity to submit an opposition to the motion for sanctions prior to issuance of the AJ's sanction order. *Torie A. v. Department of the Air Force*, EEOC Appeal No. 0120132260 (July 17, 2015); See *Miller v. Dep't of the Navy*, EEOC Appeal No. 01A01735 (June 18, 2004) (noting that "we consistently provided the party the opportunity to respond prior to the issuance of sanctions, whether by issuing that party a show cause order . . . or by permitting the party opposing sanctions an opportunity to submit an opposition to the motion for sanctions prior to issuance of the AJ's sanction order." (Emphasis added)).

b. An Agency’s Failure to Investigate a Formal Complaint of Discrimination within 180-days Is a Violation of the Commission’s Regulations and Is Subject to Sanctions Including a Finding of Agency Liability.

The Commission’s regulations require an agency to conduct an investigation “develop[ing] an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint.” 29 C.F.R. § 1614.108(b). These regulations also obligate an agency to “complete its investigation within 180 days of the date of filing of an individual complaint.” 29 C.F.R. § 1614.108(e). Furthermore, “[w]ithin 15 days of receipt of the request for a hearing, the agency shall provide a copy of the complaint file to EEOC and, if not previously provided, to the complainant.” 29 C.F.R. § 1614.108(g).

After a hearing has been requested, the Commission has inherent authority to enforce its Part 1614 Regulations by ordering sanctions in response to various violations. *See Reading v. Dep’t of Veterans Affairs*, Appeal No. 07A40125 (October 12, 2006); *Gray v. Dep’t of Defense*, Appeal No. 07A50030 (March 1, 2007); *Brown v. Dep’t of Homeland Sec.*, EEOC App. No. 0120064652 n.3 (July 3, 2008) (citing *Matheny v. Dep’t of Justice*, EEOC Req. No. 05A30373 (April 21, 2005)). In particular, the Commission has exercised this inherent authority to order sanctions with regard to an agency’s failure to conduct, complete, or produce investigative files within 180 days from the filing of the original complaint. *Id.* EEOC Management Directive 110 (“MD-110”) also provides for sanctions when an agency fails to adequately develop the record. “Where it is clear that the agency failed to develop an impartial and appropriate factual record, an Administrative Judge may exercise his/her discretion to issue sanctions[.] In such circumstances, the sanctions listed in § § 1614.109(f)(3) are available.” MD-110, Ch. 6, § XIII (internal citations omitted).

The Commission's case law on sanctions for late Agency investigations supports an order for severe sanctions based on Agency failure to respect and comply with the Commission's regulations. In the instant case, the formal complaint was filed _____ which was over _____ days ago and the Agency has not yet conducted an investigation. In *Montes-Rodriguez v. Dep't of Agriculture*, Appeal No. 0120080282 (January 12, 2012), the Agency overturned an AJ's finding of no discrimination and entered a default judgment for complainant where the Commission ordered an investigation completed in 150 days, and the Agency delayed 202 days before initiating the formal investigation. In *Montes-Rodriguez*, the Commission states:

An Agency which treats the time deadlines for production of an adequately developed investigation as optional has a negative effect on the outcome not only of the immediate case, but also of any other cases under its jurisdiction. (citation omitted). The Commission must ensure that all parties abide by its regulations and orders. Our decision to issue a default judgment will effectively emphasize to the Agency the need to comply with Commission orders in a timely manner, as well as ensure that future Agency investigations are adequately developed for adjudication.

Id.

In *Dacosta v. Dep't of Education*, Appeal No. 01995992 (February 25, 2000), the EEOC found that the agency's failure to investigate within the 180 days and continuing failure to investigate after two orders by the administrative judge was sanctionable. The EEOC focused its inquiry on whether the agency showed good cause for its failure to have the complainant's complaint timely investigated as required by regulation, not as the agency contended the standard should be, whether the agency acted in bad faith. Id. The EEOC pointed out that the agency was not ignorant of its responsibility to have the complaint investigated and yet it failed to do so. Id. The EEOC sanctioned the agency by issuing a decision in favor of the complainant, awarding back pay, and remanding for determination of compensatory damages. *Id.* See *Adkins v. FDIC*,

EEOC Appeal No. 0720080052 (January 13, 2012)(Upholding default judgment when Agency produced the complaint file 862 days late, Agency failed to show good cause for the delay and gave “inconsistent and contradictory accounts.”).

Similarly, in *Cox v. Social Security Administration*, Appeal No. 0720050055 (December 24, 2009), the Commission, indicating its intent to “emphasize to the agency the need to comply with AJ Orders in a timely manner, as well as ensuring that any ROI produced by the Agency, either on its own or through a contractor, is adequately developed from which to make a decision on the merits of complainant's complaint.” The *Cox* decision affirmed a default judgment order by an AJ against the Agency for its failure to develop the record and its failure to timely proceed with discovery. *Id.* The Commission in *Cox* noted glaring deficiencies in the agency’s investigation and specifically stated:

The fact that the agency contracts with an outside company to conduct the investigation does not absolve it of its responsibility to ensure that the ROI is adequately developed on which to base a decision. See 29 C.F.R. § 1614.108; EEO MD-110, p. 5-27. The agency has a duty to develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. See *Carr v. U.S. Postal Service*, EEOC Appeal 01A43665 (May 18, 2006); 29 C.F.R. § 1614.108(a). The purpose of discovery is to perfect the record in the hearing process, but it is not a substitute for an appropriate investigation. Moreover, the Commission notes that every complainant does not choose the option of requesting a hearing.

The regulations found at 29 C.F.R. § 1614.108(b) squarely place the responsibility for an accurate, complete investigation, completed within 180 days, upon the agency. Even if an agency contracts with a company to produce the investigation, it retains control of the outcome of that investigation, and is well within its rights to review the result and require the contractor to complete it in a satisfactory manner. Contracting out the investigation does not relieve an agency of its responsibility to ensure that a complete and timely investigation has occurred.

Id.

In *Cox*, the Commission went even further, elaborating upon guidance provided in a decision months earlier, *Royal v. Dep't of Veterans Affairs*, EEOC Request No. 0520080052 (September 25, 2009), held that an agency formal investigation completed 64 days after the 180 day deadline violated the “integrity of the process” *Id.* The Commission explained:

We conclude that AJ-1's decision to issue a default judgment in favor of complainant was appropriate under the circumstances of this case, and does not constitute an abuse of discretion ... Under our decision in *Royal v. Dep't of Veterans Affairs*, EEOC Request No. 0520080052 (September 25, 2009), we found that the fourth factor in appropriately tailoring a sanction, the effect on the integrity of the EEO process, should not be underestimated. As we noted there, “Protecting the integrity of the 29 C.F.R. Part 1614 process is central to the Commission's ability to carry out its charge of eradicating discrimination in the federal sector.” An agency which treats the deadlines in the hearings process, and the requirement to produce an adequately developed ROI, as optional, based on when its staffing and resources may allow it comply, has a negative effect on the outcome not only of the immediate case, but also of any other cases under its jurisdiction, as well as those under the jurisdiction of an AJ. The Commission must ensure that agencies, as well as complainants, abide by its regulations and the Orders of its AJs.

Our decision to affirm AJ-1's issuance of a default judgment will effectively emphasize to the agency the need to comply with AJ Orders in a timely manner, as well as ensuring that any ROI produced by the agency, either on its own or through a contractor, is adequately developed from which to make a decision on the merits of complainant's complaint.

Id. (emphasis added).

In *Koudry v. Dept. of Education*, EEOC Request No. 0520100196 (April 13, 2010), the Commission reiterated its requirement that the agency, on its own or through a contractor, adequately develop the record. The Commission noted:

The agency attributes its failure to sufficiently explain its actions on the lack of a hearing before an AJ, but the agency is charged with the obligation to develop an adequate investigative record whether or not the matter will be heard before an AJ. 29 C.F.R. § 1614.108. Thus, the agency failed to set forth with sufficient clarity a legitimate reason for its actions, which deprived complainant of a full and fair opportunity to demonstrate that the agency's explanations are a pretext for unlawful discrimination. *See Parker v. United States Postal Service*, EEOC Request No. 05900110 (April 30, 1990); *Lorenzo v. Dep't of Defense*, EEOC

Request No. 05950931 (November 6, 1997). The agency has therefore failed to overcome complainant's *prima facie* case of reprisal and disability discrimination. See *Prevo v. Federal Deposit Insurance Corporation*, EEOC Appeal No. 01972832 (March 10, 2000).

Id. (emphasis added). See *Talahongva-Adams v. Dept. of the Interior*, Appeal No. 0120081694 (May 27, 2010) (noting that “the agency's repeated and continued failure to comply with the entirety of the 29 C.F.R. Part 1614 regulations is inexplicable and inexcusable,” and that “future noncompliance with our regulations could subject it to the imposition of more stringent sanctions.” The Commission’s determination is seemingly based in the Administrative Judge’s Handbook, which states, “Administrative Judges should consider whether the conduct at issue constitutes an attack on the integrity of the EEO process.” *U.S. Equal Employment Opportunity Commission Handbook for Administrative Judges*, Chapter 6, § I (July 1, 2002).

1. ARGUMENT FOR SANCTIONS

a. AGENCY WILLFUL DISREGARD OF COMMISSION REGULATIONS SUPPORTS ENTRY OF DEFAULT AS SANCTION.

The Agency’s handling of the instant complaint has been marked by willful disregard of Complainant’s rights to a formal investigation of the Commissions regulations. 29 C.F.R. §1614.108. There is substantial Commission precedent supporting the imposition of default judgment to “protect the integrity” of the investigative process in circumstances such as these, where the Agency made no effort to preserve evidence, engage Complainant, or conduct an appropriate investigation. See, e.g., *Miller v. DOI*, Appeal No. 0120091228 (March 24, 2011); *Suit v. USDA*, Appeal No. 0120082737 (November 8, 2010); *Cox v. Social Security Administration*, Appeal No. 0720050055 (December 24, 2009); *Royal v. Dept. of Veterans Affairs*, Appeal No. 0720070045 (September 10, 2007); *Matheny v DOJ*, Appeal No. 07A00045 (April 21, 2005) (upholding default judgment as an appropriate sanction for the agency’s failure

to provide an investigative file); *Vandesande v. USPS*, Appeal No. 07A40037 (September 28, 2004) (finding default judgment appropriate where the agency “failed to comply with the Commission regulations to investigate complaints”); *Lomax v. Dept. of Veterans Affairs*, Req. No. 0520080115 (December 26, 2007) (finding default judgment appropriate where the agency failed to conduct the investigation until after the 180 day period).

If for any reason the AJ determines that a default judgment may not be entered, Complainant requests the Agency be required to pay the attorney’s fees incurred to draft this motion and any reply, as well as those associated with Complainant’s development of the record via discovery. Had the Agency complied with 29 C.F.R. § 1614.108 and the provisions of MD-110, Complainant’s attorney would have had a record that was current, and contained some of the information necessary to litigate this case. More than likely, some of the information which Complainant will now seek in discovery, could have been revealed through the investigation process through the questioning of witnesses. Given that no witnesses have been questioned under oath by an IRD investigator, Complainant will likely have to depose witnesses she would not have otherwise needed. In addition, there may be some information which has been lost as many retention policies for emails and other records require that the information be disposed of after one year. Given that the Complainant will now incur fees which would not have otherwise been incurred, this sanction will remedy the harm suffered by the Agency’s galling disregard of its obligation to investigate this complaint.

CONCLUSION ON SANCTIONS

For the reasons stated above, Complainant requests that the Agency be sanctioned for its willful failure to complete counseling or conduct a formal investigation. The Agency’s conduct is precisely what the Commission sought to deter with its recent decisions in *Talahongva-Adams*,

Adkins, Royal and Cox. Therefore, the appropriate sanction for the Agency's conduct is default judgment.

II. COMPLAINANT ESTABLISHED A PRIMA FACIE CASE THAT SUPPORTS A FINDING OF AGENCY LIABILITY

Once a default judgment is entered for a complainant, the Commission reviews the evidence to determine complainant's right to relief. *Smith v. Social Security Administration*, Appeal No. 0120092646 (EEOC April 11, 2012). The Commission has held that one way to show a right to relief is to establish the elements of a prima facie case. *Id.* citing *Royal Dep't of Veterans Affairs*, EEOC Request No. 0520080052; see also *Matheny v. Dep't of Justice*, EEOC Request No. 05A30373 (Apr. 21, 2005).

1. STATEMENT OF LAW: THE ELEMENTS NECESSARY FOR A PRIMA FACIE CASE ESTABLISHING A HOSTILE WORK ENVIRONMENT

To establish a prima facie case of sexual harassment that caused a hostile work environment, Complainant must prove, by a preponderance of the evidence that: (1) she belongs to the statutorily protected class; (2) she was subjected to unwelcome conduct related to her membership in that class; (3) the harassment complained of was based on sex; (4) the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. *Shaffer v. U.S. Postal Serv.*, EEOC Appeal No. 07A20081 (September 22, 2003) citing *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. *Id.* citing *Enforcement Guidance on Harris v. Forklift Systems Inc.*, EEOC Notice No. 915.002 (March 8, 1994)). Harassment is actionable only if the harassment of

complainant was sufficiently severe or pervasive as to alter the conditions of the complainant's employment. *Cobb v. Dep't of the Treasury*, EEOC Req. No. 05970077 (March 13, 1997).

Title 29 C.F.R. §1604.11(d) states, "In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis." *Id.* The above regulation further explains that with respect to sexual harassment by a co-worker, "an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d).

2. COMPLAINANT SATISFIES THE REQUIREMENTS FOR A PRIMA FACIE CASE OF A HOSTILE WORK ENVIRONMENT

Each of the five elements of a prima facie case will be discussed:

a. Complainant Has Proven the First Three Elements of the Standard for a Hostile Work Environment.

The record establishes Complainant satisfies the first three elements required to prove a hostile work environment: (1) member of a protected class; (2) subjected to unwelcome conduct related to membership in that class; (3) the harassment complained of was based on sex.

Complainant easily satisfies the three elements. As a woman, Complainant is a member of a protected class and was subjected to sexual conduct she furiously objected to including the

. *Ex. 1, 2, 3, 4, 5 & 6.*

b. Complainant Was Subjected To A Hostile Work Environment That Was Sufficiently Severe And Pervasive To Alter the Terms And Conditions Of Her Employment.

The fourth element of a prima facie case requires Complainant establish the “harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment.” *Shaffer supra*. The EEOC holds federal agencies to a rigorous standard when determining whether harassment in the workplace was sufficiently severe or pervasive as to constitute a hostile work environment. In the instant case, _____s’ action are far more offensive than his single molesting of Complainant’s buttocks but it is well-settled in EEOC case law that a single slap on the buttocks is sufficient to create a hostile work environment. In *McKinney v. U.S. Postal Serv.*, EEOC Appeal No. 07A00049 (May 2, 2003) a single-incident physical contact case, the Commission held a single touching of a complainant’s buttocks was sufficiently severe without any other objectionable conduct to establish a hostile work environment. In *Montoya v. U.S. Postal Serv.*, EEOC App. No. 01A21475 (February 24, 2003), two incidents of rub and slap on buttocks and the statement, “*Tight squeeze, tight fit*” were sufficient to establish hostile work environment.

Verbal harassment as suffered by Complainant has been held to create a hostile work environment as well. In *Crawford v. U.S. Postal Serv.*, EEOC Appeal No. 0720070020 (March 5, 2010), a co-worker asked the complainant out on dates, and, when the dates were denied, the harasser made frequent offensive comments to and about complainant. The Commission found the complainant was subjected to a hostile work environment and stated that the agency’s characterization of the earlier reported incidents as “*trivial*” was a classic example of “*blaming the victim*.” *Id.*

In *Gray v. Dep’t of Interior*, EEOC App. No. 0120053424 (May 5, 2006), a case without any offensive physical contact, the Commission found the following acts by a supervisor

constituted sexual harassment: rubbed her shoulders, asked her what kind of bra she wore, called her into his office to pick up trash off the floor in front of his desk, put a bottle of oil on her desk for her hair; told her that there was “*nothing he did not know about a woman’s body.*” Id. When the complainant was going out of town, he said, “*I hope you don’t give up nothing,*” and told her that her outfit was “*risqué.*” Id. The supervisor looked at a co-worker’s breasts and said, “*Oh, I see the girls this morning*” on more than one occasion. Id.

The sexual harassment suffered by Complainant exceeded the facts in the above cases in which the Commission held a complainant established a hostile work environment.

c. Agency Liability for Hostile Work Environment

The fifth element of the test for a hostile work environment based on sexual harassment is whether “there is a basis for imputing liability to the employer.” *Shaffer v. U.S. Postal Serv.*, EEOC App. No. 07A20081 (September 22, 2003). An employer is liable for sexual harassment by a co-worker where the supervisory employees “knew or should have known of the conduct, unless [the employer] can show that it took immediate and appropriate corrective action.” 29 C.F.R. § 1604.11(d).

1. Agency Knowledge and Complainant’s Report of Sexual Harassment

Complainant reported the sexual harassment first to her supervisor and next to her _____ Manager but the Agency did not separate Complainant from _____ until _____. On _____, Complainant reported to her supervisor that _____. *Ex. 1 & 2.* **(Practice Tip – Write a detailed fact discussion on this point. Many sex harassment cases fail because the complainant did not show the Agency knew or should have known of co-worker sexual harassment.)**

2. The Agency Failed to Take Prompt Remedial Action

The Agency failed to take “immediate and appropriate corrective action” by separating Complainant from Owens. 29 C.F.R. § 1604.11(d).

The Commission’s Guidance on sexual harassment states,

Remedial measures also should correct the effects of the harassment. Such measures should be designed to put the employee in the position s/he would have been in had the misconduct not occurred.

* * * *

Footnote 74. An oral warning or reprimand would be appropriate only if the misconduct was isolated and minor. If an employer relies on oral warnings or reprimands to correct harassment, it will have difficulty proving that it exercised reasonable care to prevent and correct such misconduct.

EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, Number 915.002, June 18, 1999.

a. Failed to Take Prompt Remedial Action

What is appropriate remedial action will necessarily depend on the particular facts of the case, such as the severity and persistence of the harassment and the effectiveness of any initial remedial steps. *Taylor v. Dept. of Air Force*, EEOC Request No. 05920194 (July 8, 1992). When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. *Policy Guidance on Current Issues of Sexual Harassment*, N-915-050 (March 19, 1990). The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. *Id.* Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. *Id.* Generally, the corrective action should reflect the severity of the conduct. *Id.* Whether the Agency's action is appropriate depends upon "the severity and persistence of the harassment and the effectiveness of any initial remedial steps." *Taylor v. Dep't of the Air Force*, EEOC Appeal No. 05920194

(July 8, 1992). The appropriateness of the Agency's conduct in response to harassment depends upon "the particular facts of the case-the severity and persistence of the harassment, and the effectiveness of any initial remedial steps." *Owens v. Dep't of Transportation*, EEOC Appeal No. 05940824 (September 5, 1996).

b. The Agency Failure to Separate Complainant from the Sexual Harasser for Seven Weeks Was an Inadequate Remedial Action.

When the allegations of a hostile work environment are sufficiently severe, the Commission has held that remedial action must be taken immediately. *Coley v. U.S. Postal Serv.*, EEOC Appeal No. 0120062109 (April 11, 2008) ("Given the severity of complainant's allegations, specifically the physical touching, the agency should have taken immediate measures to correct the harassment."). *See also Rockymore v. U.S. Postal Serv.*, EEOC Appeal No. 0120110311 (January 31, 2012) (waiting a week to talk to the harasser was not prompt remedial action); *Bryant v. Dep't of Justice*, EEOC Appeal Nos. 07A40098, 07A40108 (October 5, 2004) (holding the agency liable for not taking prompt remedial action when a second racially offensive flyer was posted three days after the first and the Agency only took action after the second flyer was posted). In *Trevizo v. U.S. Postal Serv.*, EEOC Appeal No. 07A10003 (April 30, 2001), the Commission held that a one day delay was not "prompt remedial action" in a case where an employee made comments about walking around his house naked and having sex with his wife to his female co-worker and then exposed himself to her. In *Gray v. Department of Interior*, EEOC Appeal No. 01A53424 (May 5, 2006), discussed above, an Agency investigation six weeks after a charge of sexual harassment was ruled to be an inadequate Agency response.

In the instant case, on _____ the Agency received the gruesome details of the sexual harassment in writing from _____ employees but the Agency did not separate Complainant from the sexual harasser. *Ex. 1* _____ (Discussion of facts)

_____ It was not until _____, that _____ was detailed out of the work area. *ROI, p.* _____.

In the instant case, Complainant was also not separated from _____ until _____ weeks after she gave verbal and written notice of sexual harassment. Complainant has never been put “in the position she would have been in had the misconduct not occurred” as required by the Commission. *EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, Number 915.002, June 18, 1999.

c. The Agency Failed to Provide Appropriate Remedial Relief By Transferring Complainant Instead of Transferring the Employees Harassing Complainant

The Commission has held that the victim of sexual harassment should not be transferred, but rather it is the individual who committed the prohibited personnel action who must bear any derogatory effects by transfer in order to provide the victim full relief. *Evelyn Monroe v. Department of Navy*, EEOC Request No. 05910382 (June 27, 1991); *Negron-Oliver v. Department of Justice, Bureau of Prisons*, EEOC Appeal No. 01A35351 (September 30, 2005)(temporary removal from a work team of an employee who complained of harassment was a form of retaliation).

Some of Complainant’s co-workers in the laboratory continued harassing Complainant after _____ was transferred on _____. On _____ the Agency transferred Complainant and not the employees who harassed her.

d. The Three-Day Suspension for Team Leader Hunter Was an Inadequate Remedial Disciplinary Action

The severity of the discipline of a sexual harasser is a consideration when determining whether the employer took appropriate remedial action in response to a sexual harassment case. *Bryant v. Department of the Interior, National Park Service*, EEOC Appeal No. 0120091468

(August 31, 2012)(holding counseling of harasser was inadequate). The Commission's Guidance states:

Remedial measures also should correct the effects of the harassment. Such measures should be designed to put the employee in the position s/he would have been in had the misconduct not occurred.

EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, Number 915.002, at (V)(C)(1)(June 18, 1999)

An oral warning or reprimand would be appropriate only if the misconduct was isolated and minor. If an employer relies on oral warnings or reprimands to correct harassment, it will have difficulty proving that it exercised reasonable care to prevent and correct such misconduct.

Id. Footnote 74.

The _____ suspension of _____ was an inadequate remedial action in consideration of the three years of sexual harassment of Complainant and the one year of sexual harassment and reprisals against _____. *ROI, p. _____ Discipline Decision.*

*(Discuss facts re inadequate discipline)*_____

Accordingly, the Agency cannot assert an affirmative defense because the Agency failed to take prompt appropriate remedial actions following receipt of the sexual harassment complaint.

CONCLUSION

On the basis of the foregoing, Complainant requests a finding of Agency liability for Complainant being subjected to a hostile work environment including sexual harassment and verbal abuse based on gender. Complainant requests an opportunity to submit evidence in support of compensatory relief after receipt of the Agency's decision on liability.

Respectfully submitted,

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