Equal Employment Opportunity Commission
Baltimore Field Office
10 South Howard Street, Third Floor
Baltimore, Maryland 21201

CRYSTAL ROBINSON, COMPLAINANT v. SECRETARY, U.S. DEPARTMENT OF THE ARMY, AGENCY	EEOC CASE NO. 531-2012-00210X 531-2012-00211X AGENCY CASE NO. ARAPG10SEP04263 ARAPG11JAN00242

OCT 17 2012

ORDER GRANTING SANCTION OF DEFAULT JUDGMENT AGAINST AGENCY

This matter is pending before the Commission on Complainant's Motion for Sanctions-Default Judgment and the Agency's Response to Show Cause Order and Agency's Response to Complainant's Motion for Sanctions.

The procedural history of this matter is as follows. In regard to ARAPG10SEP04263 (531-2012-00210X), Complainant sought EEO counseling on September 22, 2010. On November 3, 2010, Complainant filed her formal complaint alleging that the Agency subjected her to discrimination on the basis of sex (female) and reprisal under Title VII when:

1. Between November 2009 and September 17, 2010, Complainant has been subjected to sexual harassment from her supervisor: and
2. On November 13, 2010, Complainant's supervisor filed a civil suit against Complainant.

The Agency dismissed claim 1 for untimely EEO Counselor contact and claim 2 for failure to state a claim.

On July 28, 2011, the Office of Federal Operations (OFO), issued a Decision which reversed the Agency's action and remanded the claims to the Agency. The Agency was directed to issue to Complainant a copy of the investigative file within one hundred fifty (150) calendar days of the date of OFO's Decision. *Robinson v. Department*

of the Army, EEOC Appeal No. 0120111526 (July 27, 2011).

In regard to ARAPG11JAN00242 (531-2012-00211X), Complainant sought EEO counseling on January 21, 2011. On February 14, 2011, Complainant filed her formal complaint alleging that the Agency subjected her to discrimination on the basis of sex (female) and reprisal under Title VII when it issued Complainant a performance rating of "1" "unacceptable" for the period of January 1, 2010 to September 30, 2010, which rating was provided by the individual Complainant had alleged sexually harassed her.

On December 5, 2011, the 150th day after OFO's Decision in EEOC Appeal No. 0120111526, Complainant submitted her request for a hearing in regard to both complaints. Complainant's request was received by the Commission on December 8, 2011. Complainant's request was also sent to the Agency.[1]

The Agency did not provide a copy of the Report of Investigation for either complaint to the EEOC Baltimore Field Office as required by the relevant EEOC regulations. 29 C.F.R. Section 1614.108(g) ("Within 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").

As a result of the Agency's failure to comply with the applicable regulations, on March 12, 2012, the undersigned issued an Order Directing Agency to Produce Complaint File. This Order stated:

> On **DECEMBER 8, 2011**, this office received a hearing request from complainant in the above-referenced complaint. The agency is ordered, within the earlier of fifteen (15) days from receipt of this Order or from receipt of complainant's request for a hearing, to provide this office a copy of the complete complaint file,

[1] The request was sent by first-class mail to:

Aberdeen Proving Ground EEO Office
IMNE-APG-EEO
2201 Aberdeen Blvd., Building 2043
Aberdeen Proving Ground, MD 21005

It was also sent by email to:

Roxanne Conley, EEO Specialist - Roxanne.r.conley.civ@mail.mil
Brian Garfield, Agency Counsel (who represented Agency at the two Fact Finding Conferences) - brian.garfield@us.army.mil.

including the report of investigation, if any, for the above-referenced complaint. The agency also shall send a copy of the complaint file including the report of investigation to the complainant, if it has not previously done so. 29 C.F.R. § 1614.108(g); EEO MD-110, Chapter 7, Sections I-II. The complaint file must be forwarded even where there has been no investigation or there is an incomplete investigation. If the agency cannot provide the complaint file within fifteen (15) days, it must show good cause in writing to the Administrative Judge.

If the agency fails to provide the requested materials within fifteen (15) days from the date of receipt of this Order or to show good cause why it has not done so, the Administrative Judge may require the agency to bear the costs of the complainant's discovery, including attorney's fees, or impose other sanctions as appropriate. 29 C.F.R. § 1614.109(f)(3); EEO MD-110, Chapter 7, Section III. Sanctions may also be imposed for failure to investigate the claims adequately pursuant to EEO MD-110, Chapter 6.

The Agency did not respond to this Order. As a result of the Agency's failure to provide the complaint file for either complaint in accordance with the applicable EEOC Regulations and the March 12, 2012 Order, the undersigned issued a Show Cause Order dated July 27, 2012. This Order, after setting forth that the Agency had not submitted the complaint files to the Commission following her timely request for hearing and the Order Directing Agency to Produce Complaint File stated:

As of the date of this Order, the Agency has not responded in any manner to the Order Directing Agency to Produce Complaint File. Accordingly, the Agency is hereby notified that it must submit no later than **AUGUST 10, 2012**, a written explanation showing good cause why a decision fully favorable to Complainant should not be issued in light of the Agency's failure to comply with the Commission's previously issued Order.

Following the issuance of the Show Cause Order, the Agency submitted the Complaint Files to the EEOC Baltimore Field Office on August 2, 2012.[2] On August 7, 2012, Agency counsel submitted Agency Response to Show Cause Order. In this Response the Agency argues:

[2] The Complaint Files were received by the Baltimore Field Office on August 9, 2012.

While the Agency acknowledges delay in responding to the Administrative Judge's Order for the Complaint File, the error on the Agency's part was made in good faith and remedied as soon as possible. The Agency continues to experience problems as a result of change over in personnel as noted in previous filings with this Administrative Judge. In the absence of bad faith it would not be appropriate to sanction the Agency or be appropriate for a decision in favor of the Complainant under such circumstances. Our Equal Employment office simply was not aware of the prior orders until the July 27 order.

The interests of justice would best be served in this complaint if the Agency is allowed an opportunity to provide evidence and arguments in Complainant's action in order to ensure the most complete accounting for actions which the Complainant argues are discriminatory.

Attached to the Agency's Response was an affidavit of Rosa L. Garris-Turner, Equal Employment Opportunity Officer for U.S. Army Garrison Aberdeen Proving Ground. In this affidavit, the Garris-turner sets forth facts which are essentially consistent with those set forth above. The affidavit further states:

The first time I received information about the Administrative Judge's March 12, 2012 Order, requesting that the Complaint File be sent to the EEOC was when I received the July 27, 2012 Show Cause Order.

...

When I took over as the EEO Officer for the U.S. Army Garrison Aberdeen Proving Ground EEO Office, the office was severely understaffed, with only one of five available positions filled. This level of staffing was insufficient to effectively handle the number of complaints that required processing.

I do not know why the Administrative Judge's March 12, 2012 Order was not satisfied at an earlier date but it is the intention of this office to support all future requests in a timely manner. This office's higher headquarters, U.S. Army Installation Management Command-Atlantic Region, and the U.S. Army Equal Employment Opportunity Compliance and Complaints Review office are both aware of the situation with delay in this

case and are equally committed to supporting the processing of this complaint.

On August 14, 2012, Complainant submitted Complainant's Reply to Agency Response to Show Cause Order. In her Reply, Complainant requested the sanction of a default judgment (Complainant's Motion for Sanctions-Default Judgment). On September 4, 2012, the Agency submitted Agency Response to Complainant's Motion for Sanctions.

The Agency Response to Show Cause Order and the Agency's Response to Complainant's Motion for Sanctions do not establish good cause for its failure to either submit the Complaint Files within 15 days of receiving Complainant's Request for Hearing dated December 5, 2011, in accordance with 29 C.F.R. Section 1614.108(g), or its failure to submit them within 15 days of the Order Directing Agency to Produce Complaint File.

First, in regard to the 1614.108(g) violation, Complainant's Request for Hearing was mailed on December 5, 2011. It is appropriate to presume that the Request was received by the Agency within five days of its mailing.[3] 29 C.F.R. § 1614.604(b) & (d). The Agency should therefore have submitted the Complaint File to the EEOC Baltimore Field Office on or about December 27, 2011. Although the Agency cited turnover in the EEOC office, it acknowledged that Charles Thomas, the previous Acting Equal Employment Opportunity Officer, remained in that position until March 1, 2012, some 60 days after the date that the Complaint File should have been sent to the Baltimore Field Office.

Second, in regard to the Order Directing Agency to Produce Complaint File, the fact that Garris-Turner did not learn of it until after the July 27, 2012 Show Cause Order does not mean that the Agency did not receive it. Indeed, her statement, "I do not know why the Administrative Judge's March 12, 2012 Order was not satisfied at an earlier date but it is the intention of this office to support all future requests in a timely manner" implies that it was received in the office. Obviously, Garris-Turner would know the reason the Order was not satisfied if the Order had never been received. In any event, notwithstanding this statement by Garris-Turner, it is appropriate as set forth above to presume that the Order was received by the Agency's EEO Office within five days of its mailing on March 12, 2012. It was mailed to the same address as the Show Cause Order (which was received by the Agency) and was never returned to the Baltimore Field Office as being undeliverable.

[3] In addition, as noted above, the Request for Hearing was sent by email to Agency counsel and Roxanne Conley, an EEO Specialist.

Third, as discussed below, the fact that the Agency may have been understaffed and/or did not act in bad faith does not establish good cause for failing to obey the relevant EEOC regulations and Orders.

The Commission's regulations afford broad authority to Administrative Judges to control 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 MD-110, Ch. 7, Sec. III.(D) (November 9, 1999). An Administrative Judge has inherent powers to conduct a hearing and to issue appropriate sanctions, including a default judgment. *See Id.*; *Matheny v. Justice,* EEOC Request No. 05A30373 (April 21, 2005); *Rountree v. Treasury,* EEOC Appeal No. 07A00015 (July 17, 2001).

The factors pertinent to tailoring a sanction or determining whether a sanction is, in fact, warranted include: (1) the extent and nature of the non-compliance, including the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice, if any; and (4) the effect on the integrity of the EEO process. *Gray v. Department of Defense,* EEOC Appeal No. 07A50030 (March 1, 2007); *Voysest v. Social Security Administration,* EEOC Appeal No. 01A35340 (January 18, 2005).

In *Royal v. Department of Veterans Affairs,* EEOC Request No. 0520080052 (September 25, 2009), the Complainant filed a formal complaint on May 1, 2006. This was accepted for investigation by the Agency on May 25, 2006. On November 9, 2006, 192 days after Complainant filed her complaint, the Agency assigned an investigator to the discrimination complaint. Complainant submitted a request for hearing on November 14, 2006.[4] The Agency forwarded the complaint file to the Administrative Judge on November 27, 2006, but noted that the investigation was incomplete. On December 28, 2006, 241 days after her complaint had been filed, Complainant filed a motion requesting sanctions. In its response to this motion, the Agency claimed that sanctions were not warranted. On December 29, 2006, the Agency completed the investigation and sent copies of the report of investigation to the Administrative Judge and Complainant. On January 30, 2007, the Administrative Judge issued an Order directing the agency to show cause why a decision fully in favor of Complainant

[4] Complainant had earlier, on October 4, 2006, 166 days after filing her complaint, submitted a premature request for hearing. Based on this premature request for hearing, the Administrative Judge issued an Order to the Agency to produce the complaint file or to show good cause for the failure to do so. The Agency responded by stating that both the Order and the request for hearing were premature.

should not be issued in light of the Agency's failure to timely investigate the complaint. In its response, the Agency claimed that it did not fail to investigate but merely delayed the investigation and that Complainant had not been adversely affected by the delay. It also argued that Complainant had a history of abusing the EEO process and that a decision in favor of Complainant would harm the VA Medical Center, as opposed to the Agency entity responsible for conducting EEO investigations. The Administrative Judge then issued an interim decision on February 15, 2007, sanctioning the Agency for its failure to assign an investigator until after the expiration of the 180-day period to complete the report and entered a default judgment in favor of the Complainant. The Agency rejected the Administrative Judge's decision.

On appeal, the Commission stated:

> [A] sanction in the form of a default judgment is the appropriate sanction in this case. This decision turns on the fact that the Agency failed to commence an EEO investigation that could reasonably be completed within the 180-day period following the filing of the formal complaint, as required by the regulations.

Royal at 6.

In arriving at this Decision, the Commission addressed the same type of arguments made by the Agency in the instant case.

> The Agency's argument emphasizes that the delay in completing the investigation was very short (62 days), and that the cause of the delay was not an intentional act designed to prejudice Complainant personally. The Agency also argued that the Complainant did not suffer any actual prejudice caused by the delay. However, given the length of time that the processing of a federal sector EEO complaint can take, any delays past the time frames in the regulations can impact the outcome of Complainant's claims. Witnesses may retire or leave the Agency, often without notice, or documents may be misplaced or destroyed (either intentionally or not) when the responsible party in not notified to maintain the documents as relevant to an ongoing EEO investigation. The Agency's assertion that Complainant did not suffer any prejudice is speculative, at best.
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> Although the Agency's argument focuses on the first three factors [of the four factors set forth in *Gray, supra*],

> which consider the impact of the Agency's non-compliance on an individual Complainant, we find that in the case where an Agency has not initiated an investigation that could reasonably be completed within the 180-day time frame, the fourth factor, the effect on the integrity of the EEO process, is paramount. 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.

Royal at 5.

The Commission specifically rejected the argument that a lack of bad faith excuses the Agency for not timely completing an investigation. It stated it had not seen any evidence "that willful delay in processing a complaint is perforce less harmful to a Complainant's cause, nor less a violation of the integrity of the EEO process, than the flat-out refusal to investigate a complaint." *Royal* at 4. *See, also, Reading v. Department of Veterans Affairs*, EEOC Appeal No. 07A40125 (Oct. 12, 2006) (The Commission affirmed the sanction of default judgment " not[ing] that the Regulations do not require that the Agency exhibited 'bad faith' as a prerequisite to the imposition of sanctions.").

The Commission also specifically rejected the argument that a large backlog or lack of resources excuses the Agency for not timely completing an investigation. It stated "it is the Agency's decision as to how it allocates its funding; the Agency cannot expect to evade the consequences of its funding decisions." *Royal* at 5. *See, also, Lomax v. Department of Veterans Affairs*, EEOC Appeal No. 0720070039 (Oct. 2, 2007) (The Commission affirmed the sanction of default judgment notwithstanding the Agency's argument concerning its heavy caseload stating the "Agency's internal situation cannot be used as a defense to its failure to comply with the Commission's regulations.").[5]

In the instant case, it appears the Agency complied with OFO's July 27, 2011 Decision by completing the investigation of ARAPG10SEP04263 within 150 days.[6] However, the Agency still delayed

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[5] The Commission further stated: "Finally, we note that the procedures provide for extensions of time. Before imposing a sanction, an Administrative Judge may consider a Complainant's refusal, if given the reason for the Agency's request, to agree or not agree to an extension. The Agency, however, may not simply ignore the Commission's regulations." *Lomax* at 3. This is exactly what the Agency did in the instant case.

[6] However, it does not appear the Agency completed the investigation for

the processing of that and the other complaint by not submitting the Complaint Files within the 15 days as required by the applicable EEOC regulations. Indeed, the Agency's delay in the instant case is even more egregious than in *Royal*. In the instant case the Agency did not submit the Complaint File to the EEOC Baltimore Field Office until August 2, 2012, which was some seven months after it should have been submitted. In *Royal* the Agency completed the investigation 242 days after the filing of the formal complaint and only 62 days after it should have been completed. As a result, the Agency's action in *Royal* delayed the processing of the complaint 62 days while in the instant case the Agency's action delayed the processing in excess of 200 days or some 140 days longer than the delay in *Royal*.[7]

Another case that is instructive is *Cox v. SSA*, EEOC Appeal No. 0720050055 (December 24, 2009). In this case the Commission approved the Administrative Judge's entry of a default judgment for failure to adequately develop the factual record prior to hearing, to respond to the complainant's initial request for admissions and subsequent written discovery requests, to comply with the Administrative Judge's Order to produce 30 witnesses for depositions within a week, and to timely respond to the Judge's Order to Show Cause why a default judgment should not be entered against the agency. The Commission upheld the default judgment, even though the Administrative Judge's requirement that the agency produce 30 witnesses within a week was unreasonable, because the agency never even made an effort to comply by producing any witnesses for deposition. In making its ruling, the Commission in *Cox* stated:

> An agency may not pick and choose which Orders of an AJ will be followed.
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> ...
>
> [T]he Agency's blatant refusal to even attempt to

ARAPG11JAN00242 in a timely manner. Although it conducted a Fact Finding Conference on June 9, 2011, it appears that the investigation was still not complete when the complaint file was submitted to the Commission in August 2012 as it does not include a Report of Investigation. August 2012 was some 540 days after the filing of the formal complaint, almost exactly triple the 180 day period prescribed by EEOC regulations.

[7] Even if only the time from the date of the Order Directing Agency to Produce Complaint File is considered, the Agency's inaction still delayed the processing of this case in excess of 120 days, almost exactly twice the delay in *Royal*. This is not even considering the approximate seven month delay in ARAPG10SEP04263 caused by the Agency's inappropriate dismissal of Complainant's complaint by the Agency's Final Agency Decision (FAD) dated December 9, 2010, which was reversed by OFO as discussed above.

> comply [with the AJ's Order to produce 30 witnesses for deposition] was inexcusable.
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> ...
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> 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 [to] 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 insure that agencies, as well as complainants abide by its regulations and the Orders of its AJs.
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> ...
>
> Under our decision in *Royal* [citation omitted], we found that the fourth factor in appropriately tailoring a sanction, the effect on the integrity of the EEO process should not be underestimated.

Cox at 7-8.

Based on the above, the Agency has failed to show good cause for its failure to timely submit the Complaint Files following Complainant's timely request for hearing on December 5, 2011. Accordingly, the imposition of sanctions is appropriate.

As set forth above, where an Agency has failed to timely process an EEO complaint, the most important factor in determining the sanction to be imposed is the effect on the integrity of the EEO process. In accordance with the reasoning of the Commission in *Royal, supra; Reading, supra; Lomax, supra;* and *Cox*, supra, default judgment is the most appropriate sanction to be imposed in this case.[8] Failure

[8] Of course, not every violation of the EEOC regulations or delay in processing warrants the sanction of a default judgment. For example, in *Gray v. Department of Defense*, supra, the Commission reversed an Administrative Judge's imposition of default judgment against the Agency when it did not complete the investigation within 180 days. However, *Gray* is easily distinguished in that the Commission noted that the Agency in that case had actually begun the investigation prior to the completion of the 180-day period and was delayed from completing it, in part, by Complainant. In the instant case there is no allegation or evidence that Complainant delayed the processing of her complaint. Indeed, as set forth above, Complainant did all that she was required to do when she submitted her written request for a hearing to the Agency's EEO office. She had no part in or responsibility for the Agency delaying the submission of the complaint files to the EEOC Baltimore Field Office. The Agency cites *Voysest v. Social Security*

to do so would not adequately protect the integrity of the 29 C.F.R. Part 1614 process and would emasculate the Commission's ability to carry out its responsibility to eradicate discrimination in the federal sector.[9]

Administration, EEOC Appeal No. 01A35340 (Jan. 18, 2005). However, this case is even more easily distinguishable than is *Gray*. In *Voysest*, the Complainant submitted her pre-hearing statement and witness list six days late. As a result of this delay, the Administrative Judge sanctioned Complainant by not allowing either her witnesses or even herself to testify. The Administrative Judge did this without allowing Complainant any opportunity to "show cause" why such a sanction should not be imposed. The Commission, quite rightly, found that the Administrative Judge had abused his discretion. It must also be noted that *Voysest* was cited by the Commission in the *Royal, supra*. The Commission also cited Voysest in a recent Decision which reversed an Administrative Judge's determination not to impose sanctions for the Agency's failure to timely conduct an investigation. *Montes-Rodriguez v. Department of Agriculture*, EEOC Appeal NO. 0120080282 (Jan. 12, 2012). In this case, the Agency had been directed to issue Complainant a copy of the investigative file within 150 calendar days of the date its decision became final. The Agency failed to do so. Rather, it did not initiate the investigation until 202 days after the Commission's appellate decision became final and did not complete it until **299** days after the Commission's appellate decision became final. The AJ denied Complainant's Motion for Sanctions, finding instead that Complainant was given the opportunity to correct any deficiencies in the record during discovery but that she had failed to comply with the AJ's discovery orders. OFO reversed, finding that the AJ should have granted the Complainant's Motion for Sanctions and that the appropriate sanction was default judgment in Complainant's favor.

[9] This is especially true in the instant case. As referenced by the Agency in its Response to Show Cause Order, there was a previous case in which the Agency failed to timely submit the complaint file. In that case, as in the instant case, Rosa L. Garris-Turner submitted an affidavit. In both affidavits, she stated:

> I do not know why the Administrative Judge's [prior] Order [Directing Agency to Produce Complaint File] was not satisfied at an earlier date but it is the intention of this office to support all future requests in a timely manner. This office's higher headquarters, U.S. Army Installation Management Command-Atlantic Region, and the U.S. Army Equal Employment Opportunity Compliance and Complaints Review office are both aware of the situation with delay in this case and are equally committed to supporting the process of this complaint.

Garris-Turner's affidavit in the earlier case was dated June 5, 2012. As set forth above, the Show Cause Order was issued in the instant case on July 27, 2012, some six weeks after Garris-Turner's affidavit in the previous case. While the Order Directing Agency to Produce Complaint File was actually issued one day earlier in the instant case than the Order Directing Agency to Produce Complaint File in the previous case, the Show Cause Order in the instant case was issued some two months after the Show Cause order in the previous case. It does not appear that the Agency made any effort in the six weeks after Garris-Turner's first affidavit and before the Show Cause Order in the instant case to address the backlog of Requests for hearings and/or Orders Directing Agency to produce Complaint Files.

However, prior to actually granting Complainant default judgment for the Agency's failure to timely process the complaint, the Commission has stated:

> Following a decision to issue a default judgment for complainant, an AJ would then need to decide if there was "evidence that satisfies the court" which established complainant's right to relief. For example, the establishment of the elements of a *prima facie* case would be sufficient to show such a right.

Royal at 7.

As set forth above, the claims in ARAPG10SEP04263 (531-2012-00210X) are that the Agency subjected her to discrimination on the basis of sex (female) and reprisal under Title VII when:

1. Between November 2009 and September 17, 2010, Complainant has been subjected to sexual harassment from her supervisor: and
2. On November 13, 2010, Complainant's supervisor filed a civil suit against Complainant.

As also set forth above, the claim in ARAPG11JAN00242 (531-2012-00211X), is that the Agency subjected her to discrimination on the basis of sex (female) and reprisal under Title VII when it issued Complainant a performance rating of "1" "unacceptable" for the period of January 1, 2010 to September 30, 2010, which rating was provided by the individual Complainant had alleged sexually harassed her.

A review of the Report of Investigation in ARAPG10SEP04263 reveals that there is more than sufficient evidence to establish a prima facie of sexual harassment. Indeed, the single incident on September 17, 2010, when Andrew Pahutski, Complainant's first level supervisor, approached her from behind, groped her breast, pulled open the front of her jeans, put his hand inside her jeans and cupped her vagina, is so heinous and egregious that it is sufficient in and of itself to establish unlawful sexual harassment. *See, e.g., Lans v. SSA*, EEOC Appeal No. 01980670 (Aug. 28, 2000); Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. 915-050 at 105 (March 19, 1990).

Contrary to Garris-Turner's affidavit, this failure on the part of the Agency does not demonstrate any commitment by any level of the Agency to support the processing of EEO complaints.

In addition, Pahutski had previously verbally harassed Complainant (e.g., "Your pants make you look like you have a penis," "Are you wearing a pushup bra, because it does not look like it." and that his wife "gets up 20 minutes early each morning to give him a 'blowjob' to wake him up.") and had physically touched her before when he "slapped" her on her buttocks. Complainant informed Tracy Sheppard, Complainant's acting second level supervisor since April 2010, of these incidents in June 2010. Sheppard took no action.[10] The September assault followed thereafter.

As correctly stated by OFO in its July 28, 2011 Decision, the allegation about Pahutski filing a civil suit against Complainant on November 13, 2010 is not, in actuality, a second claim. Rather, it is just one additional incident in the same claim of harassment by Pahutski against Complainant. In view of the above analysis that Complainant established a prima facie case of sexual harassment based on her allegations raised in regard to "Claim 1", it is found that

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[10] At most Sheppard looked into transferring Complainant. However, it is axiomatic that it is not appropriate to address sexual harassment by transferring the victim rather than taking action against the harasser. At the very least, Sheppard had a duty to investigate Complainant's sexual harassment allegation. *See, e.g., Tom v. Dept. of Health & Human Services,* EEOC Appeal No. 01966875 (Oct. 1, 1998) (The Commission stated when an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. 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. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct ... The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation). *See also, EEOC Policy Guidance on Current Issues of Sexual Harassment*, N-915-050, No. 137 (March 19, 1990). In carrying out this responsibility, the investigation must be "prompt, thorough, and impartial" and "objectively gather and consider the relevant facts". *EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), p. 21. The Enforcement Guidance also states:

> In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

Id. at 24. In appropriate cases, an employer may make a finding that harassment occurred based solely on the credibility of the victim's allegation. *See, Policy Guidance on Current Issues of Sexual Harassment*, Section B (Mar. 19, 1990). An employer may make a determination that unlawful harassment occurred based solely on the alleged victim's statements, no matter how vehemently the accuser denies them.

she has also established a prima facie case of harassment for the November incident.

In addition, it is beyond dispute that Pahutski was aware that Complainant had engaged in protected EEO activity prior to the filing of the November 13, 2010 civil suit. Whether Pahutski was aware that Complainant sought EEO counseling or complained to Sheppard about him harassing Complainant is not controlling. Protected EEO activity includes not only participation in the EEO process but also opposition to unlawful discrimination. Complainant engaged in protected opposition activity when she sought a Peace Order against Pahutski in the District Court of Maryland on September 30, 2010 for sexual assault. It was reasonable for her to do so since the Agency had not taken any action to investigate her complaint of sexual harassment. Pahutski was aware of this protected activity. The November 13, 2010 civil suit in which Pahutski sought $100,000.00 in compensatory damages and $200,000.00 in punitive damages from Complainant could certainly have a chilling effect on Complainant, and any other employee, opposing unlawful discrimination.

A review of the Report of Investigation in ARAPG11JAN00242 reveals that there is sufficient evidence to establish a prima facie of discrimination on the basis of sex and reprisal when Pahutski issued Complainant a performance rating of "1" "unacceptable" for the period of January 1, 2010 to September 30, 2010.

Complainant had engaged in protected EEO activity. Pahutski, who issued the performance appraisal at issue, was aware of this EEO activity at the time that he issued it. The performance rating of "1" "unacceptable" is an adverse action. The rating was given within a short period of time after Complainant engaged in protected EEO activity so as to establish a nexus between the two events that would lead one to infer, absent any other reasonable explanation, that the motive of the latter was punishment for the former. In addition Complainant had received an earlier interim rating that would have supported at least the "3" rating that Complainant stated she was entitled to in regard to each of the elements of her rating. Complainant stated that she had received no counseling between the interim rating and final rating (or at any other time) in regard to her performance being anything less than fully satisfactory or needing improvement.[11]

Based on the above, Complainant has established a prima facie

[11] Even her current supervisor at the time of the Fact Finding Conference stated that there was a disparity between Complainant's interim review and final rating for which he stated Pahutski was responsible.

of discrimination in regard to the claims set forth in the two EEO complaints she filed with the Agency and which are currently pending before the Commission. Therefore in accordance with *Royal, supra; Reading, supra; Lomax, supra;* and *Cox*, supra, and the other cases discussed above, it is found that Complainant is entitled to default judgment in ARAPG10SEP04263 (531-2012-00210X) and ARAPG11JAN00242 (531-2012-00211X).

The Commission has stated that where, as in the instant case, there has been a Default Judgment, the remedy phase takes on greater importance. *Suit v. Department of Agriculture*, EEOC Appeal No. 0120082737 (Nov. 8, 2010). Complainant must be allowed the opportunity to offer evidence regarding entitlement to remedies such as compensatory damages, both pecuniary and non-pecuniary, as well as any other claimed remedy. *Suit, supra*. However, the Commission has further stated that the imposition of a default judgment sanction does not carry through to the remedy phase. Rather, the Agency must be allowed an opportunity to submit a rebuttal to Complainant's claim for relief. *Royal, supra* at 7.

Accordingly a status conference to discuss the procedure for conducting the remedy phase in this matter is scheduled as follows:

DATE: **NOVEMBER 15, 2012**
TIME: **2:00 P.M.**
PLACE: **TELECONFERENCE** (to be arranged by the Agency).

For the Commission:

It is so ORDERED,

Marlin D. Schreffler
Administrative Judge

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing ***ORDER GRANTING SANCTION OF DEFAULT OF JUDGMENT AGAINST AGENCY*** within five (5) calendar days after the date it was sent *via* first class mail. I certify that on October 17, 2012 the foregoing ***ORDER*** was sent *via* first class mail to the following:

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