



U.S. Department of
Transportation

Office of the Secretary
of Transportation

1200 New Jersey Ave., S.E.
Washington, D.C. 20590

January 11, 2021

By Electronic Transmission Only

Michelle Underwood
1200 Braddock Place, #705
Alexandria, VA 22314

RE: Underwood v. MARAD, DOT Complaint No. 2018-28045-MARAD-01

Dear Ms. Underwood:

This letter transmits the U.S. Department of Transportation's Final Agency Decision (FAD) in the subject discrimination complaint filed against the Maritime Administration (MARAD). A finding of no discrimination is made with respect to the Claim 2, but a finding of discrimination is made with respect to Claims 1 and 3 as well as a finding of discrimination that the Complainant was subjected to harassment on the basis of reprisal. If you are dissatisfied with this Decision, you have the following appeal rights:

- Within 30 calendar days of your receipt of this final decision, you may appeal this decision to the Director, Office of Federal Operations¹, Equal Employment Opportunity Commission. (EEOC Form 573, Notice of Appeal/Petition, is enclosed for reference purpose only).² You may also file your appeal online at:

<https://publicportal.eeoc.gov/Portal/Login.aspx>

- Within 90 calendar days of your receipt of this final decision or after 180 days from the date of filing an appeal with the EEOC if there has been no final decision by the EEOC, you may file a civil action in an appropriate U.S. District Court. The Court, at your request, may

¹ As of March 16, 2020, the EEOC has been unable to obtain complaint information sent by U.S. mail services, thus the agency has requested the submission of any previous or subsequently submitted case information through the portal listed above. All appeal requests must be filed electronically until further notice.

² The Equal Employment Opportunity Commission provided instructions, dated April 6, 2020, concerning Federal EEO complaints being processed under the COVID-19 pandemic. Please review the following instructions <https://www.eeoc.gov/processing-information-all-parties-federal-eeo-processing-under-29-cfr-part-1614> as it may have implications regarding your EEO complaint and applicable timeframes. On July 27, 2020, the EEOC provided updated instructions which lifted the moratorium on Final actions; thus, the Department is issuing the following Final Agency Decision in this matter. See <https://www.eeoc.gov/update-april-6-2020-memorandum-processing-information>.

appoint and authorize legal counsel in circumstances that it deems just without the payment of fees, costs or security. The granting or denial of the request is within the sole discretion of the Court.

You must name the person who is the official agency head and his or her official title as the defendant in your appeal. In your case, you must name the following official as the defendant:

The Honorable Elaine L. Chao
Secretary of Transportation
1200 New Jersey Ave., S.E.
Washington, DC 20590

Failure to provide the name or official title of the agency head may result in dismissal of your case. Please be advised that at the time you file an appeal or civil action, you must furnish a copy of the documents to the following officials.

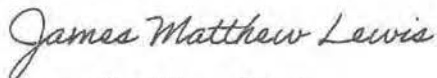
For the Departmental Office of Civil Rights³ send to:

DOCR-EEOC-HearingandAppealCorrespondence@dot.gov

Associate Director, Equal Employment Opportunity
Complaints and Investigations Division (S-34)
Departmental Office of Civil Rights
Department of Transportation

Office of the Chief Counsel (MAR-221)
Maritime Administration
U.S. Department of Transportation
1200 New Jersey Ave., S.E., W24-302
Washington, DC 20590

Sincerely,



James Matthew Lewis
Acting Associate Director
Equal Employment Opportunity Complaints &
Investigations Division
Departmental Office of Civil Rights

Enclosures

cc: MAR-130

MAR-221

³ Due limited access to Federal buildings, DOCR is requiring correspondence regarding your complaint to be sent via electronic mail only. If you decide to appeal the Final Agency Decision submit your request to the electronic mail address listed.

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
OFFICE OF CIVIL RIGHTS

Michelle Underwood,
Complainant,

v.

U.S. Maritime Administration,
U.S. Department of Transportation,
Agency.

Date: January 11, 2021

FINAL AGENCY DECISION
COMPLAINT NO.: DOT 2018-28045-MARAD-01

This is the United States Department of Transportation's (DOT) final agency decision in the above-referenced discrimination complaint filed by Michelle Underwood [hereinafter *the Complainant*] against the Maritime Administration (MARAD), DOT [hereinafter *the Agency*].

I. CLAIMS¹

Whether the Agency subjected Complainant to discrimination and/or harassment (non-sexual) based on reprisal (for prior EEO activity) when:

1. Since May 17, 2018, she has been denied developmental training needed to perform her job requirements, was treated differently from other Program Managers with regard to her autonomy in managing her staff, and because management denied her request for an Alternative Work Schedule (AWS).

Proven

¹ The Complainant also raised the following claim in her formal complaint, "Were you subjected to reprisal (for prior EEO activity) when on May 11, 2018, you were denied an Alternate Work Schedule (AWS)?" The Agency dismissed this claim pursuant to 29 C.F.R. 1614.107(a)(1) because it was identical to a claim that had been resolved via a settlement agreement on May 17, 2018. (Report of Investigation (ROI) Exhibit (Ex.) C2). The Complainant is advised that should she decide to appeal any part of this Final Agency Decision, she may appeal the dismissal of the previously dismissed claim at that time.

2. On July 16, 2018, the Deputy Superintendent rescinded her approval to attend a training conference.
3. On September 13, 2018, she learned that management had submitted her performance evaluation to Human Resources (HR) without her input, review, or signature and that management had issued to her a rating of "Achieved Results."

Proven

II. PROCEDURAL BACKGROUND

Date of Most Recent Alleged Discriminatory Action:	07/16/2018
Initial Counseling Contact Occurred:	07/30/2018
Notice of Right to File Received:	10/16/2018
Formal Complaint Filed:	10/26/2018
Complaint Accepted:	02/14/2019
Investigation Conducted:	05/22/2019 – 08/16/2019
ROI Issued:	10/02/2019
Complainant's Response:	10/08/2019

This decision is issued pursuant to 29 C.F.R. §1614.110(b).

III. FACTUAL BACKGROUND

At the time the facts giving rise to this complaint arose, the Complainant was employed as a Sexual Assault Prevention and Program Manager (SAPR) GS-13, at the United States Merchant Marine Academy (USMMA) in Kings Point, New York. Her first-line supervisor was Rear Admiral (RDML) Susan Dunlap, Deputy Superintendent, USMMA. Her second-line supervisor was RDML James Helis, Superintendent (at the time), USMMA. (ROI Ex. F1)

The Complainant's previous EEO activity consists of a formal complaint (DOT 2018-27781-MARAD-01) filed on April 8, 2018 and resolved pursuant to a May 17, 2018 settlement agreement. She herein alleges that management officials have harassed her since she signed the settlement agreement and that this harassment is in reprisal for that EEO activity. The management officials alleged to have engaged in retaliatory harassment here are the same officials whom she alleged harassed her in the previous EEO case that was settled on May 17, 2018. ² (ROI Ex. F1)

² The acceptance letter, dated May 15, 2018, for DOT Complaint No. 2018-22781-MARAD0-01 (the Complainant's prior EEO complaint), states the following as the accepted claim, "Were you subjected to reprisal (prior EEO activity) when, on February 16, 2018, you were issued a Letter of Expectations." Her current supervisor, RDML Dunlap, issued the Letter of Expectations. (DOT iComplaints Case Management System)

A. *Autonomy and AWS Request*

1. Complainant's Testimony

The Complainant was supposed to hire and manage two full-time SAPRs/Victim Advocates (VAs) and one Strategic Sealift Officer (SSO) for a total of three staff members in at USMMA's SAPR office. She states that RDML Dunlap took her program management away from her. She states that management also took away her autonomy in making decisions regarding the delegation of work in the SAPR office that she supervised, as evidenced by "performance feedback to [RDML Dunlap] outlining how I was to run programs, events, meetings, etc." (ROI Ex. F1)

The Complainant states that she received an e-mail on July 20, 2018, from RDML Dunlap asking her for a list of tasks her (the Complainant's) one employee would be doing while the Complainant was on travel for a week. She questions whether other department heads have been asked to inform RDML Dunlap what their subordinates would be working on when they (the department heads) are out of the office. (ROI Ex. F1)

The Complainant states that in September 2018, she was responsible for coordinating the sound system for an event in Ackerman with a guest speaker. She states that her autonomy publicly was taken from her when in a staff meeting, RDML Dunlap directed another department head, George Rhynedance (who was the Complainant's peer), to follow up on the coordination of audio for the event. She states that Mr. Rhynedance had only been on station for three months whereas she had been coordinating the audio for over a year with multiple speakers, and she had never had an issue with the sound at any of her four previous speaker events. She alleges that during this staff meeting, she stated that she had the audio coordinated and did not need Mr. Rhynedance to oversee her work. She states that nevertheless, RDML Dunlap and Mr. Rhynedance went to Ackerman together to see if the audio had in fact been coordinated. (ROI Ex. F1)

The Complainant alleges that several of her peers were treated more favorably than she. She alleges that Commandant Stroud was not told who to send on travel, he was not shadowed while doing routine work, and he was given the autonomy to authorize ^{Redacted} an AWS, whereas when the Complainant was ^{Redacted} direct supervisor, the Complainant was not allowed to grant the requested AWS. She alleges that Captain Gene Albert was not told whom to send to sea to oversee shipping concerns. She alleges that David Socolof was not told which of his employees would get what training, when, and where, nor did RDML Dunlap direct his workload. She states that Bob Lovell was permitted to manage his HR's staff's workload. She alleges that Coach Toup was allowed to manage his coaching staff without RDML Dunlap's oversight. She states that the Academic

Dean and the Academic Department heads managed staff, trainings, attendance, and workload without oversight and delegation of duty from RDML Dunlap. She alleges that every department head--except her--was permitted to manage their staff and tasks. (ROI Ex. F1)

The Complainant states that RDML Dunlap denied her request for an AWS, citing the need for a fully staffed SAPR Office. She alleges that one of her employees, ^{Redacted} requested an AWS from her, but she denied it because RDML Dunlap said no one could be on an AWS until the SAPR Office was fully staffed. She alleges that ^{Redacted} then complained to HR about not being granted an AWS, and she ^{Redacted} states that she was told by RDML Dunlap that she could not work an AWS until her supervisor (the Complainant) was onboarded. The Complainant alleges that ^{Redacted} was then realigned under the Commandant, Michael Stroud, who then granted ^{Redacted} an AWS. She alleges that this is another example of her authority as a supervisor being disregarded. She also states that ^{Redacted} still remained officially on her staff, and she took up a billet, which the Complainant could not fill; therefore, the SAPR Office would never fully be staffed. She states that she was made out to be the villain for not granting ^{Redacted} her AWS, and that this also crippled her office dynamic because she had a billet for work to be completed by a person who was no longer under her supervision. (ROI Ex. F1)

The Complainant states that an AWS is afforded in her position description and that it was also offered in her job interview as a condition of her employment. She explains that she lived on campus, but because she was not granted an AWS, she was unable to modify her time off as planned, and she “worked 24/7 holding a SAPR hotline without having the option of earning time off for work life balance in a position where living and working at the same location and holding a hotline causes burnout (other SARCS made it less time than [she did] and this was, as stated, a condition her [her] accepting the position as [she has] been working in the SAPR field for a long time and know[s] the importance of separation.”) (ROI Ex. F1)

2. MARAD Management’s Testimony

RDML Susan Dunlap (prior EEO activity as a responding management official), Deputy Superintendent, USMMA, was the Complainant’s supervisor at the time of the alleged incidents. She states that she was aware of the Complainant’s prior EEO activity, but she states that she played no role in it. She asserts that she became aware of the Complainant’s current complaint around the time the Complainant left MARAD in January 2019. (ROI Ex. F3)

RDML Dunlap states that she did not deny the Complainant autonomy in directing her office. She denies delegating work in the office the Complainant supervised. She states that she asked the Complainant to tell her what ^{Redacted} was

tasked to do while she (the Complainant) was on travel, “as is [her] purview as [the Complainant’s] supervisor.” (ROI Ex. F3)

RDML Dunlap states that the Complainant sent out an e-mail regarding the audio, in which she expressed a desire to “collectively problem solve for success.” She explains that she interpreted this e-mail as a request for assistance in establishing audio for the presentation. She states that because she knew of another individual who had succeeded at setting up computer audio in the auditorium, she suggested that he help the Complainant establish audio for the presentation. (ROI Ex. F3)

Regarding AWS, RDML Dunlap states that the Complainant was told to wait until her SAPR office fully was staffed with an established routine before setting up AWSs for her office members. She asserts that before the office fully could be staffed, ^{Redacted} transferred to the Commandant’s Office. She explains that because ^{Redacted} moved to a different position in the organization, that had differing time requirements, the Commandant allowed her to go on an AWS. She points out that the Commandant does not work for her (RDML Dunlap). She explains that ^{Redacted} approached management and said she would rather quit working for the Academy than continue to work for the Complainant. She states that because Dr. McGuire was a valued employee, management sought to retain her and was able to find a valid position in the Commandant’s Office for her to fill on a temporary basis. She asserts that at that point, ^{Redacted} had vacated the billet in the Complainant’s office, which became available for the Complainant to fill. She states that the Complainant hired ^{Redacted}, who reported on June 25, 2018, and ^{Redacted}, who reported on September 17, 2018. At that point, the Complainant’s office was fully staffed. (ROI Ex. F3)

RDML Dunlap disagrees with the Complainant’s contention that she was promised an AWS as a condition of her accepting the position. She clarifies that the Complainant was not denied an AWS, but rather, she was told to wait until the office was fully staffed and in a routine. She states that during the Complainant’s entire tenure at the Academy, she never presented a written request for an AWS, as required by Maritime Administrative Order 760-640 and the AWS Guide. (ROI Ex. F3)

In response to the Complainant’s claim that she is not afforded as much autonomy as other department heads in the office, RDML Dunlap states that only one of the individuals, David Socolof, works for her. She asserts that the Complainant had just as much autonomy over her employees as Mr. Socolof, who works for RDML Dunlap, had over his employees. She states that she cannot speak to the autonomy of individuals who do not work for her. (ROI Ex. F3)

3. Complainant's Rebuttal

The Complainant states that it is not true that RDML Dunlap, to her knowledge, was not involved in any of her previous EEO activity. DOT records indicate that the Complainant's previous complaint involved a Letter of Expectations that RDML Dunlap issued to the Complainant. (ROI Ex. F8)

The Complainant states that Redacted start date was June 2018, which was after her rating period had ended. She asserts that Ms. Brent started after Redacted in August 2018. She states that Redacted operational supervision for the purpose of his performance evaluation is LDCDR Brad Hawksworth (at the time). She states that during her performance period, she had no employees under her supervision. She asserts that the SSO³ is aligned under Sexual Assault Prevention and Response but is rated for performance by CMDR Hawksworth. (ROI Ex. F8)

The Complainant claims that she was denied her AWS request because the office could not be fully staffed as long as Redacted billet was filled by her, and she (Redacted) was aligned under the Commandant. She alleges that RDML Dunlap states that the Complainant had three employees and therefore, a fully staffed office, yet she was not approved to work an AWS, and HR did not tell her about any administrative process to formalize her request. She states that when she went to Ray Venkersammy, HR Director at the time, he referred her to RDML Dunlap to "discuss" it, and she denied her verbal request for AWS. (ROI Ex. F8)

B. *Rescission of Approval for Training Conference*

1. Complainant's Testimony

The Complainant states that she sent her training request to RDML Dunlap on July 9, 2018, via e-mail. She requested the training entitled, "Campus Sexual Assault: Progress Through Collaborations Training," which was to be held from September 6-9, 2018, in San Diego, California. She states that the total cost calculated for this training was \$2,036.00. She states that RDML Dunlap approved the training on July 10, 2018. (ROI Ex. F1)

The Complainant explains that she requested this training because it was the first ever to address campus sexual assaults and sexual misconduct through collaborations offered from the International Summit on Violence Abuse and Trauma. She states that when she asked for the SSO in charge of sexual assault at sea to be able to attend, management asked again for cost breakdown. She alleges that not only did management deny the SSO's attendance, but they also indicated

³ This acronym is not defined in the ROI.

that the Complainant could no longer attend. (ROI Ex. F1)

The Complainant states that RDML Dunlap felt it would be better for the newly hired Prevention Educator/Victim Advocate to attend the training. She states that she did not send RDML Dunlap's suggested person to the training because he was not available, and he was not trained to attend the conference and then relay what he learned to the USMMA, where he had just started working two weeks prior. She adds that she did not go back and ask again if she could attend the conference because she had been told specifically that she could not. (ROI Ex. F1)

The Complainant alleges that by not attending the training, she missed an opportunity to network with other Title IX campus representatives. She also alleges that she lost out on an opportunity to gain a greater understanding of the protocols that are promising and are being tested to end sexual violence on campus. She states that there are no other conferences that have made this a priority. She states that because the USMMA SAPR program has Congressional oversight and answers to a presidentially elected Board of Visitors, it is imperative that the SAPR Office Program Manager is a subject matter expert (SME) as it relates to services provided in that unique environment. She adds that professional development is one of the measures in her annual performance evaluation, as well as in her Position Description. (ROI Ex. F1)

The Complainant states that initially upon his arrival, ^{Redacted} was denied permission to attend the Coast Guard Sexual Assault Response Coordinator Training (a no cost and highly coveted training), a requirement for a sea mariner walking into a sexual assault prevention and response at sea job. She states that RDML Dunlap originally denied the training, but after she (the Complainant) deliberated with her at length, ^{Redacted} was allowed to attend the training. She notes that RDML Dunlap also denied ^{Redacted} the opportunity to be a trained VA (also at no cost). She states that ^{Redacted} also reached a settlement with the Academy, and states that RDML Duncan's denial of her training was reprisal against ^{Redacted}. (ROI Ex. F1)

2. MARAD Management's Testimony

RDML Dunlap states that it is not true that the Complainant was denied the training in question. She asserts that after the Complainant sent her initial cost breakdown, she (the Complainant) asked if she could send the SSO, ^{Redacted} to the training as well. She states that she asked the Complainant who would run the office while they were both away, and the Complainant responded that ^{Redacted} would be in the office. She asserts that ^{Redacted} was a new hire ^{Redacted} who was untrained and uncertified. She explains that given the high profile of the SAPR Office, she did not think it was prudent for the Complainant to leave an untrained and uncertified new hire employee by himself in the office while the Complainant

and Redacted were on travel. She states that she told the Complainant she could only send one person from the SAPR Office. She asserts that she recommended that the Complainant send Redacted to the training, because the Complainant was the Office Manager, and Redacted would be on the front lines providing training to the Midshipmen. She states that the Complainant thanked her for her recommendation, but said that she “will attend as the program manager to ascertain what can be utilized her at the Academy.” She asserts that this was the last communication she had with the Complainant regarding the training in question. She states that the Complainant never told her that she (the Complainant) had changed her mind about going to the training, never sent her a request for training someone else, and never told her that Redacted had become unavailable due to personal issues. She asserts that had the Complainant told her these things, she would have sent the Complainant or Redacted to the training. (ROI Ex. F3)

3. Other Evidence

The record contains an e-mail, from RDML Dunlap to the Complainant, dated July 16, 2018, in which she tells the Complainant, “please limit attendance at the IVAT to one person from the SAPR Office. I strongly recommend that you, as office manager, send your Victim Advocate/Prevention Educator to the conference since he will be the one of the front lines providing training to the Midshipmen.” (ROI Ex. F3)

The Complainant responded on July 30, 2018, as follows:

Thank you for considering the needs of my department. As this conference is specifically hosting a track that addresses campus interpersonal violence I will attend as program manager to ascertain what can be utilized here at the Academy. I can then train as needed or search out additional info that I feel would best benefit prevention and response efforts.

(ROI Ex. F3)

C. *Performance Appraisal*

1. Complainant’s Testimony

The Complainant states that agency guidelines require her to submit her accomplishments and review the final appraisal for input etc., concur or non-concur, sign and then it is routed through HR. She states that she learned that management had submitted her performance evaluation to HR without her input when she went to HR to inquire about the final date to submit performance

appraisals for end of year close out, and she was told that the period had passed. She alleges that she was informed that her appraisal had been submitted. She alleges that her performance evaluation was submitted to HR without her input by RADM Helis. (ROI Ex. F1)

The Complainant does not offer a reason that management gave for submitting her performance appraisal to HR without her input. She states that she supplied her supervisor with her accomplishments for the rating at issue within the requested time. She alleges that the reasons given for her achieving a rating of "Achieved Results" are outlined in the performance appraisal that was submitted without her knowledge or input. She further contends that the standards of performance are not captured, but, in fact, are misconstrued and misrepresented. She alleges that she should have received a "Fully Successful" rating. She does not know if her coworkers (rated by her supervisor), with similar or poorer performance, received higher ratings than she did. (ROI Ex. F1)

The Complainant states that the performance shell is supposed to outline how to achieve Fully Successful, etc., but hers was written so that there was no room for the appraisal to result in anything other than "Achieved Results." She explains that because she had no higher-level management, and in an attempt to ensure her performance appraisal was not negative in retaliation for her previous settlement, she met with Dr. Marvin Williams and asked him to attend her weekly meeting with RDML Dunlap to discuss her performance appraisal shell on July 20, 2018. She states that this was at the recommendation of the HR Director (at the time), Mr. Venkersammy, who expressed concern to her about the way her shell was written. She asserts that she had sent him her contributions for consideration and asked him to review them before she routed them to RDML Dunlap. (ROI Ex. F1)

The Complainant states that she complained about this incident to the HR Director, Mr. Lovell. She notes that Mr. Lovell scheduled a meeting with the RADM Helis and her to go over the appraisal, which RADM Helis proffered "unsigned" as if he had never signed it. (ROI Ex. F1)

The Complainant notes that her job was affected by this incident because she realized that she would be professionally tarnished, despite the work she achieved and that she had no way around management, despite her addressing the hostile work environment and reprisal. She states that HR employees Vivian Baierwater, Mr. Lovell and Mr. Venkersammy, told her that the series of events for her performance appraisal were against agency standards. (ROI Ex. F1)

The Complainant believes the HWE administrative settlement two months prior contributed to reprisal in her appraisal. (ROI Ex. F1)

2. MARAD Management's Testimony

RDML James Helis (no prior EEO activity), Director, Sexual Harassment and Assault Response and Prevention, Readiness, and Resilience, Office of the Deputy Chief of Staff, Department of the Army, states that at the time of the alleged incidents, he was the Superintendent, USMMA. He was the Complainant's rating official. He asserts that he became aware of the Complainant's prior EEO activity when he was asked if he was willing to engage in mediation with the Complainant. He states that he was notified that an agreement had been reached between the agency and the Complainant in the case for which he participated in mediation. (ROI Ex. F2)

RDML Helis states that the agency's performance rating process is described in Maritime Administration Maritime Administrative Orders, and the process includes establishing the performance plan, a mid-point review, and final evaluation. He insists that this process was followed for the rating at issue. He states that he evaluated the Complainant for the rating period at issue and provided a rating of "Achieved Results." He does not recall the details of the Complainant's rating. He asserts that the Complainant's total performance, including her accomplishments, was taken into account in determining her rating. (ROI Ex. F2)

Regarding the Complainant's contention that the process was not followed because she submitted her accomplishments, but no other action taken (i.e., review for input, sign and submission to HR), RDML Helis states that the process, including employee input, was followed. He notes that the Complainant provided RDML Dunlap with a Microsoft Word version of the draft and her rating, with tracked changes, and RDML Dunlap forwarded that draft with the Complainant's suggested changes to him. He states that he updated the draft rating based in part on the Complainant's input, and he provided the Complainant an electronic copy of the updated draft. He states that she was again allowed to provide input via track changes to this updated version. He asserts that in a meeting, which to the best of his recollection was in September 2018, and included the Complainant, MMA's HR Director, Mr. Lovell, and himself, he provided the Complainant a paper copy of her appraisal for her to read and sign before it was submitted to HR. He states that the Complainant was given the opportunity to sign the appraisal but refused to do so, and in the Complainant's presence, he noted that the employee declined to sign the appraisal, and gave it to Mr. Lovell with instructions to file the appraisal. (ROI Ex. F2)

Regarding the Complainant's allegations that based on advice from Dr. Williams, either EEO or ADR would attend the meeting to discuss her performance appraisal shell on July 20, 2018, RDML Helis states that he does not remember receiving advice from Dr. Williams on who should attend any meetings with the Complainant concerning her appraisal. He asserts that the Complainant's performance appraisal

was completed on the same form used throughout the agency. He states that he does not recall the details of the Complainant's appraisal. He asserts that he met with the Complainant regularly through the performance period and counseled her on multiple occasions that because this was her first supervisory position, she needed to work on her supervisory skills. He notes that as the official who supervised the day-to-day activities of the Complainant, RDML Dunlap provided him a draft appraisal, a detailed description of the employee's performance, and the Complainant's comments on the draft. (ROI Ex. F2)

Regarding Complainant's contention that he used ^{Redacted} and ^{Redacted} as examples of her having bad judgment and her allegation that she did not recommend ^{Redacted} (knowing his past conduct issues), RDML Helis states that he does not recall details concerning ^{Redacted}. However, he states that at the time of the issues at hand, ^{Redacted} was the ^{Redacted}

He explains that it would have been inappropriate for ^{Redacted} to play a role in the Academy's sexual assault program pending the outcome of that investigation. (ROI Ex. F2)

In response to the Complainant's allegation that he submitted her performance evaluation to HR without her input, RDML Helis testifies that he submitted the Complainant's performance evaluation directly to the HR Director in Complainant's presence after she refused to sign it. He states he followed the process for employee input and review. (ROI Ex. F2)

Regarding Complainant's contention that her prior EEO activity was a factor in her performance rating, RDML Helis testifies that the Complainant's performance rating was based solely on her performance. (ROI Ex. F2)

RDML Dunlap states that the agency follows Maritime Administrative Order 750-541 dated September 22, 2011. She notes that the process calls for an employee to receive a written performance plan at the beginning of the appraisal period and, at minimum, one midpoint progress review, and at the end of the appraisal period, employees may submit an optional self-assessment to the supervisor. She states that employees then receive a performance appraisal and a rating of record. She notes that the rating official and employee sign and date the appraisal record to indicate that the discussion took place, however the employee's signature does not indicate agreement with the rating, and the rating does not require the employee's signature for it to be official. She states that this process was followed with respect to the rating at issue. She asserts that she did not evaluate the Complainant for the rating period at issue but did provide input to the Superintendent so that he could formulate his rating. (ROI Ex. F3)

Regarding the Complainant's contention that she should have received "Fully Successful" because her accomplishments were not taken into account, RDML Dunlap contends that is not true. She states that the Complainant's performance standards input was forwarded to the Superintendent on September 11, 2018. She asserts that she was not responsible for rating the Complainant, so she does not know what transpired after she provided the Complainant's input to the Superintendent. (ROI Ex. F3)

Regarding Complainant's allegation that based on advice from Dr. Williams, either EEO or ADR would attend the meeting to discuss her performance appraisal shell on July 20, 2018, RDML Dunlap notes that she and the Complainant had weekly status meetings in which she would brief her on the activities of the office, and she would ask questions or provide guidance. She states that the Complainant had a habit of missing these meetings without informing her, and she missed her regularly scheduled meeting on July 20, 2018. She asserts that the Complainant subsequently sent her an e-mail indicating that she wanted to reschedule the meeting because she wanted HR to sit in on their meeting, but she did not explain why. RDML Dunlap states that she was confused by this request because the Complainant's performance appraisal was not one of the topics up for discussion at the meeting. She asserts that it was only later that she figured out that the Complainant thought that her performance appraisal was going to be discussed, and she wanted HR to be present for the discussion. (ROI Ex. F3)

Regarding Complainant's contention that the appraisal shell was formatted in a fashion that was designed to prevent a successful rating, RDML Dunlap states that the standard appraisal shell was used for all of her subordinates. She asserts that the Complainant was provided with a counseling memorandum on December 5, 2017, telling her how she could improve her performance. She states that there were no others who provided input into the Complainant's rating. (ROI Ex. F3)

In response to the Complainant's contention that (1) she used ^{Redacted} and ^{Red} ^{acte} as examples of the Complainant having bad judgment and (2) she did not recommend ^{Redacted} RDML Dunlap states that the Complainant did recommend ^{Redacted} for the Bringing in the Bystander training. She explains that this showed poor judgment because newspaper articles reported that ^{Red} had been ^{Redacted}. She asserts that the Complainant showed poor judgment in selecting ^{Redacted} because ^{Redacted} was the only person in the External Affairs Office, and with a heavy public affairs load, it would have hurt the institution's public profile to have her distracted by working on sexual assault matters. (ROI Ex. F3)

RDML Dunlap states that she did not rate the Complainant and does not know what transpired between her and the Superintendent. She does not know whether

the Complainant was allowed to provide input to her performance evaluation. (ROI Ex. F3)

3. Other Witnesses' Testimony

Vivian Baierwater (no prior EEO activity), HR Specialist, states that she was not assigned to work with the performance evaluations, but that her role was to collect the evaluation forms and forward them to MARAD HR. She asserts that she did not advise on performance appraisals. She notes that the Complainant did not inform her that she did not have an opportunity to sign or concur with her FY18 performance evaluation, but she received the Complainant's performance evaluation from the Supervisor with a note that said, "Employee declined to sign." It was signed and dated by RDML Helis. She states that the Complainant stopped in HR and asked if she had received her performance evaluation form, and she (Ms. Baierwater) said yes and showed it to her. (ROI Ex. F6)

Ms. Baierwater states that it is not unusual for an employee not to sign their performance evaluation. She asserts that if employees don't agree with their evaluations, employees think that by not signing the form it will not be processed; however, it clearly states on the form, "I acknowledge receipt of this rating; however, my signature on this form does not imply agreement or disagreement with the rating received or that I forfeit any rights of review." She asserts that employees are given the opportunity to sign the form, but if they do not, the Supervisor marks the form that the "employee refused to sign," and they sign and date it. (ROI Ex. F5)

4. Other Evidence

The record contains an e-mail, dated June 14, 2018, from the Complainant to RDML Dunlap, with a copy to RADM Helis, entitled "Contributions for end of year feedback." She states that she was not sure when the end of the year appraisal was due, so she drafted accomplishments and program major responsibilities for her consideration. The attached document was three pages long. (ROI Ex. A2)

The record contains an e-mail, dated September 18, 2018, from the Complainant to several different people apparently involved in mediation, which states that she was meeting with RADM Helis that day to discuss his process for not including her in his performance evaluation process. She was requesting to see her evaluation for the first time and to ask the basis for his rating. (ROI Ex. A2)

The record contains an e-mail, dated September 19, 2018, from the Complainant to herself, which states that she met with RADM Helis with Mr. Lovell in attendance. She asserts that RADM Helis told her she had a "good year." She states that he said she needs to learn to delegate work. She indicates that there was a "gig on

[her] performance eval for actually doing just that.” She states that he told her she needs to improve her relationships with all departments. She asserts that she asked which ones in particular because she has e-mails and volunteers from every department, as well as working relationships with the alumni, parents, and other outside representatives. (ROI Ex. A2)

The Complainant states that RADM Helis told her she did things in a “reactionary fashion.” She asserts that she “challenged that [she] was one deep with no staff, to which RADM Helis argued that [she has] had staff...Fionna (sic) and Laura, who he said was great, saw victims, and completed education...none of which she did at all.” She noted for the record that she refused to sign her performance evaluation. (ROI Ex. A2)

The record contains an e-mail, dated October 19, 2018, from the Complainant to RDML Dunlap, which states the following:

Ma'am,

I feel completely blindsided by the meeting I just left with you.

I had the right to have representation of my choosing at that meeting, as I am actively involved in an AGR regarding my performance evaluation. The fact that you scheduled to have Katina Whitehead from MARAD HR "call in" without my knowing, to force me to sign my performance evaluation under duress without having had a chance to see the final product post my suggested changes, without letting me know that was the "intention" of the weekly meeting - blindsided me.

When I stated that I needed a minute to read over the performance eval and Katina Whitehead suggested that I was refusing to sign -that placed me in a very hostile situation because I never said the words “I refuse to sign this.” All I said was I needed a minute to read over it.

I have a right to review before signing, my performance evaluation, without duress, with notice of the intention of a scheduled meeting.

As I explained in that hostile session, there are things on my current eval that I am contesting, that continued to be on my 2019 performance appraisal shell as identified today.

The tactic utilized, to get my signature was unacceptable.

To schedule meetings like that without your employee knowing your intention, to not offer your employees the opportunity to have time to review their final drafted performance eval after making suggested changes before

signing, to request that your employee sign under duress, with you having reached to “leverage” me to sign and to deny your employee the opportunity to reach for HR or other counsel continues to create hostility,

Katina saying that my having a representative is “not necessary.” Katina saying she is serving as a third party to all in the room was inaccurate. Katina served as the managements (sic) agent despite her trying to state otherwise.

Note for the record. Without any representative to be available to attest to what just transpired.

(ROI Ex. A2)

5. Complainant’s Rebuttal

In response to RDML Dunlap’s statement that the Complainant’s input was given to the Superintendent on September 11, the Complainant claims that she submitted her input to RDML Dunlap in May, per her (RDML Dunlap’s) request. She alleges that her rating was completed and submitted to HR before that date. (ROI Ex. F8)

D. *Miscellaneous*

1. Complainant’s Testimony

The Complainant states that she notified management that she was being subjected to harassment when she told the MARAD Administrator, Mark Buzby, verbally in approximately February 2018. She asserts that she also told EEO and an ADR counselor in approximately February 2018. She adds that witnesses saw her being harassed in staff meetings. She notes that she reached out to EEO back in October 2017, three months after arriving at station, and she continued to work with EEO throughout her time at the USMMA. She asserts that this resulted in a hostile work environment administrative settlement. (ROI Ex. F1)

The Complainant claims that she attempted to schedule another ADR session with a mediator to allege that she was being subjected to harassment by the supervisor/manager and that the actions must cease, but her supervisors refused to participate. She states that she requested a different supervisor from MARAD. She asserts that the Agency’s response was not appropriate in her view, because she should have been aligned directly under RADM Helis at a minimum, as outlined in MAO-150-1 or under MARAD. She alleges that the harassment did not cease after she reported it to the Agency. (ROI Ex. F1)

The Complainant states that she received 40 hours of training in a Supervisors Course on harassment and/or hostile work environment in 2018. She states that the Agency's anti-harassment/hostile work environment policy is not posted in her office or in any other location such as an agency intranet site. She alleges that management's actions impacted her terms and conditions of employment by taking all of her energy to have a successful program and resulting in her getting sick. She asserts that she ultimately left the position in January of 2019. (ROI Ex. F1)

The Complainant asserts that she observed the person about whom she is complaining behave similarly toward others. She lists various incidents of RDML Dunlap subjecting others to a hostile work environment. She states that she was told by ^{Redacted} and ^{Redacted} HR, about similar behavior involving RDML Dunlap. She states that RADM Helis, the Maritime Administrator, and his liaison, Brian Blower, knew of the harassment, but failed to take prompt remedial action. (ROI Ex. F1)

2. MARAD Management's Testimony

RDML Dunlap states that she did not learn of the Complainant's allegations of harassment until after she (the Complainant) left the Agency. She asserts that she did not take any actions because the Complainant had already left the Agency, and the allegations were not true. She states that the Complainant did not indicate to her that she found her conduct offensive. She asserts that she would prefer not to speculate as to why the Complainant would make up these allegations; however, many of her claims are inaccurate. She notes, for example, the Complainant says that she denied her the opportunity to receive training on campus sexual assault, but she (RDML Dunlap) has the e-mail documentation that clearly indicates the Complainant intended to go to the training. She adds that the Complainant indicates that her training is in her position description and in the Report to Congress, which is not true. She notes further that the Complainant denies that she nominated ^{Redacted} to receive bystander training, although his name is on the Complainant's Sexual Assault Review Board Agenda bystander training list. She states that she did not learn of these allegations until she received this affidavit. (ROI Ex. F3)

RDML Dunlap states that the Agency's procedure for responding to allegations of harassment (non-sexual) is outlined in Maritime Administrative Order 770-713-3, dated April 18, 2002. She asserts that the order states that "any affected person is encouraged to report instances of harassment of which they are aware their first line supervisor/manager." She notes that they also have the option of reporting these incidents involving discriminatory harassment to MARAD's Director of Civil Rights or an EEO Counselor. She states that incidents reported to the Office of Civil Rights are investigated, and if the inquiry results in a finding of harassment, the offender is subject to disciplinary action. She does not know what procedure the

Agency followed in responding to the Complainant's allegations, nor does she know if the Agency made a determination as to whether the Complainant was harassed (non-sexual). RDML Dunlap states that she has not previously been accused of harassment. (ROI Ex. F3)

RDML Helis states that he became aware of the Complainant's first EEO activity when he was asked to engage in mediation. He asserts that he became aware that the Complainant had entered the EEO process sometime between their meeting on her appraisal and his departure from the Academy in October 2018. He states that he did not become aware of the specifics of her complaint until he received this questionnaire. He asserts that at the meeting at which he presented the Complainant with his appraisal of her performance, the Complainant indicated she did not think the rating reflected her performance, but she did not raise any concerns about harassment, or any connection to earlier EEO activity. He does not know why the Complainant filed her complaint. He states that he learned sometime later in 2018, that the Complainant had entered the formal complaint process. He asserts that he cannot remember the specific circumstances, and he was not told the specifics, nor was he asked for information. He explains that he was no longer responsible for any matters at the USMMA and had no role in this case prior to receiving this questionnaire. (ROI Ex. F2)

RDML Helis states that allegations of non-sexual harassment were handled through the normal EEO process. He is not aware of the details of how the Agency responded to the Complainant's allegations. He asserts that he is not aware of any Agency determination as to whether the Complainant was harassed. He notes that he is unaware of any complaints of harassment filed against him. (ROI Ex. F2)

Dr. Williams states that all the interactions that he observed between the Complainant and RDML Dunlap were in formal staff meetings. He states that there were moments when it was clear that people felt uneasy about how the Complainant was treated in a professional setting. He asserts that the best way to describe RDML Dunlap's conduct towards him is cordial. He states that she is not one to throw fits and insult people, but she uses the power of the pen. He notes that if one has the power to build or destroy, one does not have to say much of anything at all. He further notes that just a few slight comments are enough to derail an employee's career. (ROI Ex. F6)

Dr. Williams states that he is not aware of the Complainant confronting RDML Dunlap. He further states that in this case, the Complainant was completely intimidated by RDML Dunlap because of the power dynamics. He notes that in a way, he believes that RDML Dunlap treats the Complainant less favorably than she treats others similarly situated to the Complainant. He states, however, that he thinks it's anyone in the SARC position because of the level of control and micromanagement involved. He notes that controlling the person is one thing, but

controlling the program is something altogether different and in other areas of the organization, RDML Dunlap cannot exercise that kind of control over such divisions as Legal, Budget and Finance, etc. (ROI Ex. F6)

Dr. Williams states that he is not willing to say management as a whole displays a pattern of harassment, but it is important to note the authoritarian style of RDML Dunlap can lead to unintended forms of bullying. He asserts that organizational theory has shown the impact of authoritarian leadership. He further states that leading people and leading through authority are two very different concepts with overwhelming consequences and that harassment can be the result of authoritarian leadership. He is aware of the Agency's EEO harassment policy because he is one of the persons who provides input for policy statements such as the anti-harassment policy. He does not believe the Complainant's prior EEO activity was a factor in these incidents. (ROI Ex. F6)

3. Other Witnesses' Testimony

Redacted

(prior EEO activity), Redacted

, USMMA, states that until late May 2018, RDML Dunlap was her direct supervisor. In late May 2018, she began reporting to Mr. Rhynedance, who reports to RDML Dunlap. She states the following:

Rear Admiral Dunlap and Academy Counsel Ilene Kreitzer were often disrespectful and condescending toward [the Complainant] from her earliest days at the Academy. (Background: Ilene Kreitzer who works for MARAD at USMMA is Rear Admiral Dunlap's very close friend. Their friendship extends outside official business. This friendship has complicated the actions of both parties and influenced many opinions, behaviors and decisions at USMMA. Ilene Kreitzer and Rear Admiral Dunlap seem to gang-up on women at the Academy. Dunlap's behavior is always worse when she has Kreitzer present to empower her.) Things became outright hostile when a new employee was added to [the Complainant]'s Department. When Redacted Redacted started working in the SARC Office, she was often unable or unwilling to perform some of her duties. She also lacked the certification to provide some of the training that Rear Admiral Dunlap wanted her to perform. [The Complainant] spoke up at meetings and said that as a Licensed practitioner she could not allow Redacted to deliver this training and that the responsible and ethical response would be to have only qualified (or licensed – I'm not sure which language was specifically used in this situation) deliver some of this training. Instead of backing [the Complainant], Ilene Kreitzer and Rear Admiral Dunlap, backed the subordinate, Redacted and undermined [the Complainant] as Department Head, empowering a clearly insubordinate, Redacted. They even changed her job description. Twice a week, [the Complainant] faced public humiliation from Dunlap and

or Kreitzer at management meetings. Even on days when Rear Admiral Dunlap was acting mostly professionally, she passively stood-by when Kreitzer rolled her eyes, interrupted or made sarcastic- or hostile remarks toward [the Complainant].

I also believe that Dunlap and Kreitzer made it difficult, perhaps impossible for [the Complainant] to do her job effectively. When the Academy decided to hire a Special Victim Counsel (Attorney), the obvious place to put that person would be in the Sexual Assault Prevention Office, so she could assist any (student) victims. However, once the funds were in place the Administration (Dunlap) put that job in Ilene Kreitzer's chain of command. Now, the Special Victim Counsel (SVC) is working as, what appears to be, an assistant to Ilene Kreitzer. Regardless of the SVC's actual duties, the midshipmen will not go to this person because she appears to be working to protect MARAD against victims. instead of assisting the victim. The position has become a waste of funding, and appears to have been given to Kreitzer based on her friendship with Dunlap....

Rear Admiral Dunlap has a pattern of treating women at the Academy badly. (Note: Kreitzer, a woman, doesn't work for the Academy - she works for MARAD.) I suspect that Dunlap is the reason that one of my prior supervisors, Ms. Marcie Katcher, left the Academy. I don't know if Katcher filed an EEO complaint, but the circumstances surrounding her leaving USMMA made it look like Rear Admiral Dunlap forced her out. The bullying and public humiliation by Rear Admiral Dunlap and Ilene Kreitzer was incessant. RDML Dunlap has been hostile to me since her arrival at USMMA. From her earliest days at USMMA when she acknowledged that she was aware of my prior EEO activity. I believe that her hostile behavior toward me and disparate treatment are acts of gender description (sic) and reprisal for my previous EEO activity as well as my participation in an official government investigation.

(ROI Ex. F4)

Ms. Baierwater states that the Complainant did not notify her that she felt she was being subjected to harassment when these incidents occurred. She does not know who the Complainant may have notified. She asserts that she has received the annual in person EEO training given by Dr. Williams and/or Rachel Krizito-Ramos, EEO Specialist, MARAD Headquarters. She notes that the agency anti-harassment policy is not posted in her office. She had no prior knowledge of the Complainant's EEO activity, so she does not know if it affected her performance evaluation. (ROI Ex. F5)

Redacted states that he has observed interactions between the Complainant and RDML Dunlap. He notes that the interactions were not positive. He states that RDML Dunlap seemed to have contention for the Complainant. He asserts that it would appear as if RDML Dunlap would go out of her way to make the Complainant's life difficult. He asserts that RDML Dunlap made it difficult for the Complainant to succeed and thrive at her job. He notes that he maintains a professional relationship with RDML Dunlap, and her conduct towards him has been minimal as he tries to operate through his chain of command, which involves him more with his immediate supervisor. (ROI Ex. F7)

Redacted states that the Complainant would tell RDML Dunlap that her conduct was not welcome, and he knows this because she (the Complainant) would tell him of situations in which she had to verbally request to stop being harassed. He states that the Complainant would also have to use sick leave because the harassment would make her have medical reactions. He believes RDML Dunlap had a closer eye on the Complainant than on the other Program Managers. He further asserts that RDML Dunlap always seemed to make the Complainant's life more difficult in terms of requests, reports and justifications, and no other Program Manager appeared to be as heavily scrutinized or micro-managed as the Complainant. (ROI Ex. F7)

Redacted states that at the time of these incidents, management had a pattern of harassment. He believes many people felt belittled, harassed, and disrespected by management. He notes that management included the Superintendent at the time and the Deputy Superintendent. (ROI Ex. F7)

Redacted notes that he has been loosely aware of the Agency's EEO harassment policy through being a part of the community. He further notes that he is an active duty member, and not a federal employee, and their EEO procedures work differently from the Academy's procedures. (ROI Ex. F7)

Redacted believes the incidents at issue are a continuum of larger problems seen at the USMMA. He states that academy leadership was harassing, and not supporting, their employees, and it caused a lot of harm to the community. He asserts that having worked with the Complainant for two years, she is a hard worker and an excellent boss. He notes that she struggled at the USMMA because of leadership, and she was never fully able to do her job because she was constantly bombarded and beat down by the people who should have been most empowering her. (ROI Ex. F7)

4. Complainant's Rebuttal

In response to RDML Dunlap's statement that she has not previously been accused of harassment, the Complainant states that this is "hilarious."

IV. APPLICABLE LAW

A. *Disparate Treatment*

The Complainant can establish a *prima facie* case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. *Shapiro v. Social Sec. Admin.*, EEOC Request No. 05960403 (December 6, 1996) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Specifically, in a reprisal claim, and in accordance with the burdens set forth in *McDonnell Douglas, Hochstadt v. Worcester Found. for Experimental Biology*, 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976), and *Coffman v. Dep't of Veteran Affairs*, EEOC Request No. 05960473 (November 20, 1997), a Complainant may establish a *prima facie* case of reprisal by showing that: (1) he or she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he or she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. *Whitmire v. Dep't of the Air Force*, EEOC Appeal No. 01A00340 (September 25, 2000).

The Commission has stated that adverse actions need not qualify as “ultimate employment actions” or materially affect the terms and conditions of employment to constitute retaliation. EEOC Compliance Manual Section 8: Retaliation, No. 915.003, at 8-15 (May 20, 1998); see *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found “materially adverse,” which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEO process).

B. *Harassment*

The Complainant also alleges that she was subjected to harassment (non-sexual) in reprisal for her prior EEO activity. Harassment of an employee that would not occur but for the employee's protected status is unlawful, if it is sufficiently patterned or pervasive. *Wibstad v. United States Postal Service*, EEOC Appeal No. 01972699 (August 14, 1998) (citing *McKinney v. Dole*, 765 F.2d 1129, 1138-39 (D.C. Cir. 1985)); *EEOC Enforcement Guidance on Harris v. Forklift Systems, Inc.* at 3, 9 (March 8, 1994). In determining whether a working environment is hostile, factors to consider are the frequency of the alleged discriminatory conduct, its severity, whether it is physically threatening or humiliating, and if it unreasonably interferes with an employee's work performance. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Enforcement Guidance* at 6. The Supreme Court has held: “Conduct that is not severe or pervasive enough to create an objectively hostile

work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview." *Harris*, 510 U.S. at 22 (1993).

To establish a *prima facie* claim of harassment, the Complainant must show: (1) she belongs to a statutorily protected class; (2) she was subjected to unwelcome conduct; (3) the conduct complained of was based on her protected status; (4) the conduct 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. *Murray v. Department of Agriculture*, EEOC Appeal No. 01986319 (May 22, 2000); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

If the Complainant satisfies the five elements, then the agency is subject to vicarious liability insofar as the harassment would have been "created by a supervisor with immediate... authority over the [the Complainant]." *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, EEOC Notice No. 915.002 (June 18, 1999), at 4 (citing *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)).

When the harassment does not result in a tangible employment action, the agency can raise an affirmative defense to liability that it can meet by demonstrating: (1) it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, at 12. This defense is not available when the harassment results in a tangible employment action (e.g., a discharge, demotion, or reassignment) taken against the employee. *Id.* at 7.

V. ANALYSIS

A. *Disparate Treatment*

The Complainant alleges disparate treatment based on reprisal.

First, the Complainant has established the *prima facie* case of reprisal. She is a member of a protected group in that she participated in prior EEO activity of which management was aware. The previous complaint resulted in a settlement agreement, executed on May 17, 2018, and involved the same management officials named in the current complaint. The Complainant alleged that about two months after settlement, they subjected her to retaliatory and harassing conduct consisting of: (1) different treatment with regard to autonomy and denial of her requested AWS, (2) rescission of her approval to attend a conference, and an (3)

“Achieved Results” rating. The involvement of the same management officials and the close proximity from the settlement of her EEO complaint to the allegations raised here demonstrates a causal connection, which sufficiently sets forth a *prima facie* case of reprisal.

At this point, management carries the burden to provide a legitimate nondiscriminatory reason for its action. The burden is not one of persuasion, but rather a burden of production to “clearly set forth, through the introduction of admissible evidence, the reasons for [its employment decision].” *Burdine*, 450 U.S. at 254-55.

With respect to Claim 1, RDML Dunlap denied the Complainant’s claim as stated. She clarifies that the Complainant was not denied an AWS, but rather, she was told to wait until the office was fully staffed and in a routine. She states that during the Complainant’s entire tenure at the Academy, she never presented a written request for an AWS, as required by Maritime Administrative Order 760-640 and the AWS Guide. (ROI Ex. F3)

With respect to the Complainant’s claim that she is not afforded as much autonomy as other department heads in the office, RDML Dunlap states that only one of the individuals identified, Mr. Socolof, works for her. She asserts that the Complainant had just as much autonomy over her employees as Mr. Socolof had over his employees. She states that she cannot speak to the autonomy of individuals who do not work for her. (ROI Ex. F3)

Regarding Claim 2, RDML Dunlap presented an e-mail that showed that the Complainant was intending to attend the training, even after RDML Dunlap suggested that the newly hired employee should go instead.

With respect to Claim 3, we find it telling that Ms. Baierwater indicated that the Complainant did not inform her that she did not have an opportunity to sign or concur with her performance evaluation. RDML Helis claims that the Complainant was given the opportunity to review her performance evaluation in September during a meeting with Mr. Lovell in attendance, and she refused to sign it. He asserts that all proper procedures were followed with respect to her performance evaluation.

Taking this testimony as true, as we are constrained to do at this stage, we now examine the record to determine whether Complainant has proven that the asserted reasons were a mere pretext for reprisal discrimination regard her claims. *Aikens*, 460 U.S. at 714-15; *Reeves*, 530 U.S. at 141.

1. *Pretext*

With respect to Claim 1, the Complainant explained that she eventually became fully staffed, but that at first she did not receive a response to her verbal request for an AWS. She alleges that HR did not tell her about any administrative process to formalize her request for an AWS. Instead, when she went to Mr. Venkersammy, the HR Director at the time, he referred her to RDML Dunlap to “discuss” her request for an AWS, and RDML Dunlap denied her verbal request. Based on the foregoing, we find that the Complainant has shown RDML Dunlap’s explanation, i.e., that the office was not fully staffed and that the Complainant had not provided a written request for an AWS, to be pretextual.

Regarding Claim 2, the Complainant failed to explain the e-mail, dated July 30, 2018, from her to RDML Dunlap, which stated that she (the Complainant) would attend the training conference. She also failed to explain why she chose not to attend the training. Instead, she stated that after she had been told she could attend, she asked if the SSO could attend, but she was told he could not. RDML Dunlap suggested that she send the newly hired Prevention Educator/Victim Advocate, but the Complainant did not send him because he was not available, and he was not trained to attend the conference and relay the information back to the USMMA. The Complainant states that she did not go back to RDML Dunlap and ask again if she could attend the conference because she specifically had been told that she could not, which is contrary to the e-mail, dated July 30, 2018, in which she stated she would attend. Based on the foregoing, we find that the Complainant has failed to establish that her request to attend the conference was denied.

With respect to Claim 3, the Complainant has established that she was not given the opportunity to see her performance evaluation before it was turned in to HR. The Complainant happened to find out on September 13, 2018, from Ms. Baierwater that her performance evaluation had been turned in, but she reviewed it with RDML Helis for the first time on September 18, 2018. Ordinarily, employees are given a chance to see their evaluations before they are finalized so that if they disagree with them, they have a chance to present arguments to their supervisors why they feel their ratings should be higher. In this case, had the Complainant not happened to find out her rating had been turned in, she would not have had the opportunity to challenge her rating if she disagreed with it, which could affect any monetary performance award to which she may have been entitled depending on her rating. Based on the foregoing, we find that the Complainant has established that it was not true that proper procedures had been followed with respect to her performance evaluation and that she had not been given the opportunity to see it before it was turned in to HR.

B. *Harassment*

Although the individual incidents specifically cited in the acceptance letter do not rise to the level of harassment, we have to look at the work environment as a whole to make a determination as to whether harassment occurred. We are troubled by the fact that a few witnesses stated that RDML Dunlap definitely treated the Complainant differently and less favorably than others. Dr. Williams stated that during staff meetings, there were moments when it was clear that people felt uneasy about how RDML Dunlap treated the Complainant in a professional setting. He states that he is not willing to say management as a whole displays a pattern of harassment, but he does state it is important to note RDML Dunlap's authoritarian style, which can lead to unintended forms of bullying. We note that Dr. Williams states that he does not believe the Complainant's prior EEO activity was a factor in these incidents.

Redacted stated that he observed interactions between the Complainant and RDML Dunlap, and states that they were not positive. He states that RDML Dunlap seemed to have contempt for the Complainant, and it would appear as though RDML Dunlap would go out of her way to make the Complainant's life difficult. He asserts that RDML Dunlap made it difficult for the Complainant to succeed and thrive at her job.

Redacted stated that the Complainant told RDML Dunlap that her conduct was not welcome. He states that the Complainant would tell him of situations during which she verbally had to request that the harassment stop. He states that the Complainant also used sick leave because the harassment would make her have medical reactions. He asserts that many people felt belittled, harassed, and disrespected by management, but he believes RDML Dunlap had a closer eye on the Complainant than on other Program Managers. He states that RDML Dunlap always seemed to make the Complainant's life more difficult in terms of requests, reports, and justifications, and no other Program Manager appeared to be as heavily scrutinized or micromanaged as the Complainant.

Redacted states that having worked with the Complainant for two years, she is a hard worker and an excellent boss. He asserts that she struggled at the USMMA because of leadership, and she was never fully able to do her job because she was constantly bombarded and beaten down by the people who should have empowered her. We give greater weight to Redacted testimony than Dr. Williams' testimony because Redacted was the Complainant's direct report and worked more closely with her than Dr. Williams, who was in the Civil Rights Office. We find that any reasonable employee would find such a work environment hostile, abusive, and humiliating, which would interfere with the employee's job performance.

We find this situation troubling for a number of reasons. First, we find RDML Dunlap's testimony to be untruthful when she states that she was aware of the Complainant's prior EEO activity, but that she "played no role in it." The accepted claim in the Complainant's prior EEO complaint involved a Letter of Expectations that RDML Dunlap issued to the Complainant, which makes it untrue that she played no role in it. RDML Dunlap states that the Complainant did not indicate to her that she found her conduct offensive, but Redacted indicates the opposite and states that the Complainant verbally requested Redacted to stop the harassment. RDML Dunlap states that she has not previously been accused of harassment, but that is simply not true: She was one of the responsible management officials accused of harassment in the Complainant's first EEO complaint.

Regarding how RDML Dunlap treated others, Dr. Williams indicates that RDML Dunlap's conduct towards him was "cordial." Redacted states that he maintains a professional relationship with RDML Dunlap. Therefore, it cannot be argued that RDML Dunlap was just a bad supervisor or that she was just horrible to everyone because it is apparent that she treated the Complainant more harshly than she treated others.

Redacted states that RDML Dunlap has a pattern of treating women at the USMMA badly. She asserts that RDML Dunlap has been hostile towards her since her (RDML Dunlap's) arrival at the USMMA. She believes that RDML Dunlap's hostile behavior toward her and the disparate treatment she received from her was in reprisal for her (Redacted) prior EEO activity of which RDML Dunlap was aware. Redacted states that RDML Dunlap acknowledged she was aware of Redacted prior EEO activity when she (RDML Dunlap) first arrived at the USMMA. It appears that RDML Dunlap treats those who have participated in prior EEO activity more harshly than those who have not, which is retaliatory harassment.

A look at the circumstances and the timing of the prior EEO activity and the current EEO complaint reveals strong evidence of a retaliatory motive. The Complainant filed a prior EEO complaint on April 8, 2018, and she signed a settlement agreement on May 17, 2018. Within two months, the Complainant sought EEO Counseling because she believed she was being harassed again. We find that the recent incidents of harassment followed the Complainant's prior protected EEO activity within such a period of time that a retaliatory motive is inferred. See Solomon v. United States Postal Service, EEOC Appeal No. 07A50082 (September 27, 2006) (Complainant established a strong *prima facie* case of retaliation when the supervisor was identified as a responsible management official in the prior EEO complaint; the parties entered into a settlement agreement; and an adverse action took place less than three weeks after the parties had entered into the settlement agreement).

MARAD cannot raise an affirmative defense to liability because the Complainant reported the harassment to upper management, but according to the record, no actions were taken to address the harassment. Therefore, there is a basis for imputing liability to the Agency. Based on the foregoing, we find that the Complainant established that she was harassed in retaliation for her prior EEO activity.

VI. CONCLUSION

Therefore, it is the final decision of the U.S. Department of Transportation that a finding of **no discrimination** is made with respect to the Claim 2, but a **finding of discrimination** is made with respect to Claims 1 and 3 as well as a **finding of discrimination** that the Complainant was subjected to harassment on the basis of reprisal.

VIII. ORDER FOR RELIEF

1. The MARAD is ordered to post at its USMMA facility copies of the attached notice. Copies of the notice shall be posted by MARAD within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The MARAD shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notices are to be submitted to the U.S. Department of Transportation, Departmental Office of Civil Rights (DOCR), at the address cited in the paragraph entitled "Compliance Order" within ten (10) calendar days of the expiration of the posting period.
2. The MARAD shall take immediate steps, no later than 60 days after receipt of this decision, to provide EEO training to all management staff at its USMMA facility on the current state of the law on employment discrimination, including discrimination based on age and also anti-harassment training. The training must address the goals behind the laws requiring equal employment opportunities for all. This training shall be provided annually for the next three years from the date of this decision.

In addition to the above training, no later than 60 days after receipt of this decision, the MARAD shall provide Rear Admiral (RDML) Susan Dunlap, Deputy Superintendent, with specific training on effective communication skills within the workplace.

3. The MARAD shall review the actions of the responsible management officials and take corrective or disciplinary action, as appropriate, in accordance with Agency disciplinary policies and procedures. A report on the actions taken, or the reasons action will not be taken, shall be submitted in accordance with the paragraph titled "Compliance Order."
4. The MARAD shall post a notice of nondiscrimination policies to include a roster of EEO Counselors no later than 30 days after receipt of this decision. The MARAD must disseminate, to all employees in the USMMA, a copy of its policy prohibiting discrimination based on national origin and the procedures for filing a complaint no later than 30 days after receipt of this decision.
5. If the Complainant has been represented by an attorney, she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. §1614.501(c). The award of attorney's fees will be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim of attorney's fees in accordance with 29 C.F.R. §1614.501.
6. The Complainant has requested compensatory damages. Because the record does not contain sufficient evidence upon which to calculate what sum would be necessary to compensate her for the actual harm suffered, the amount of the award will be determined after the Complainant has submitted objective documentation to support her claim.
 - a. In order to be awarded compensatory damages, the Complainant has to show that she has suffered some harm as a result of the Agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or the expected duration of the harm. *Rountree v. Department of Agriculture*, EEOC Appeal No. 01941906 (July 7, 1995).
 - b. For requests for compensatory damages based on pecuniary (i.e., quantifiable out-of-pocket) losses such as medical expenses, past and future lost wages, the Complainant must submit objective documentation (e.g., receipts, bills from medical professionals on the official letterhead) supporting her claim and demonstrating a causal connection between the harm that she suffered and the Agency's discriminatory action. The Complainant should also submit documentation indicating what portion of any psychiatric, medical, or other expenses were covered by insurance.
 - c. With respect to damages based on non-pecuniary losses, the Complainant should submit objective evidence, such as a notarized personal statement concerning any emotional distress resulting from the

discriminatory conduct, and notarized statements from witnesses, including family members, friends, health care providers, and other counselors (including clergy), addressing, for example, the outward manifestations or physical consequences of her distress. See *Carle v. Department of the Navy*, 94 FEOR 1043, EEOC Appeal No. 01922369 (January 5, 1993). In order to properly explain that emotional distress, such statements should include detailed information on the physical or behavioral manifestations of the distress, information on the duration of the distress, and examples of how the distress affected the Complainant on a day-to-day basis, both on and off the job. In addition, the Complainant should submit evidence to establish a causal connection between the alleged discriminatory action and the resulting injury. She should be aware that a request for compensatory damages related to emotional pain and suffering may permit the Agency to seek personal and sensitive information from her, in order to determine whether the injury is linked solely, partially, or not at all to the alleged discriminatory conduct.

d. The Complainant has a duty to mitigate her damages and may not recover damages for any harm that could have been avoided or minimized with reasonable effort. Accordingly, the evidence she submits should also include documentation concerning her efforts to mitigate her damages.

e. Within 45 days of receipt of this decision, the Complainant must submit documentation, in support of her claim for compensatory damages, to the following:

Associate Director, Adjudication & Program Evaluation Division (S-36)
U.S. Department of Transportation
Departmental Office of Civil Rights
W78-316, 1200 New Jersey Avenue, S.E.
Washington, DC 20590

Failure to file a submission, within the above stated time period, will have a negative impact on a decision concerning the claim for compensatory damages.

f. The Associate Director, Adjudication & Program Evaluation Division, will forward a copy of the Complainant's submission to the MARAD upon receipt. The MARAD will have 45 days from its receipt of the Complainant's evidence to proffer rebuttal information. A final agency decision containing the exact amount of damages to be awarded will be issued within 60 days from the expiration of the 45-day period in which the MARAD may make a submission.

g. The MARAD shall compensate the Complainant for any compensatory damages she can prove that resulted from these acts of discrimination no later than 60 days after receipt of the Department's Final Decision on the Complainant's claim for compensatory damages.

VIII. COMPLIANCE ORDER

Within ninety (90) days of receipt of this final agency decision, the MARAD will submit to the Departmental Office of Civil Rights, S-30, 1200 New Jersey Avenue, Washington, DC 20590, a report regarding the status of its compliance with the corrective actions set forth above, including:

- a. A copy of the sign-in sheet for those individuals attending the EEO training, a copy of the agenda from the training, a copy of the MARAD non-discrimination policy, and a copy of the notice to employees addressing the types of disciplinary actions which may have been taken against employees who engaged in the discriminatory activity, within the applicable time-frame;
- b. Affirmation that a copy of the notices posted in compliance with Item #2 above, was displayed. Please provide the dates and location of the posted notices.

James Matthew Lewis
Acting Associate Director
Equal Employment Opportunity Complaints &
Investigations Division
Departmental Office of Civil Rights

Date

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
DEPARTMENT OF TRANSPORTATION
An Agency of the United States Government**

This notice is posted pursuant to an Order by the U.S. Department of Transportation dated _____ which found that a violation of Title VII of the Civil Rights Act of 1964, as amended, occurred at this facility.

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

The MARAD USMMA facility supports and will comply with such Federal law and will not take action against individuals because they have exercised their rights under law.

The MARAD USMMA facility has been found by the Department to have engaged in discrimination against an individual on the basis of reprisal. The MARAD has been ordered, among other things, to ensure this individual is offered appropriate relief; provide specific EEO training to all MARAD USMMA staff; and ensure that officials responsible for personnel decisions will abide by the requirements of all Federal equal employment opportunity laws.

The MARAD USMMA facility will not in any manner, restrain, interfere, coerce, or retaliate against any individual who files an EEO complaint, or otherwise exercises his or her right to oppose practices made unlawful by Federal equal employment opportunity law, or who participates in proceedings pursuant to such laws.

Signature

(Title)

Date Posted: _____

Posting Expires: _____