

**UNITED STATES  
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
ATLANTA DISTRICT OFFICE**

<b>DESTINEY S. BROOKS,</b>	)	<b>EEOC Hearing No.:</b>
	)	<b>410-2010-00330X</b>
Complainant,	)	
	)	<b>Agency Case No.:</b>
v.	)	<b>BOP-2010-0116</b>
	)	
<b>ERIC H. HOLDER,</b>	)	
<b>Attorney General,</b>	)	
<b>Department of Justice,</b>	)	
	)	
Respondent Agency.	)	

**DECISION**

Pursuant to notice, the above-style complaint came to be heard by the Equal Employment Opportunity Commission, Atlanta District Office, at the Department of Justice, Federal Bureau of Prisons, Atlanta, Georgia, on February 14–17, 2010, and May 16–20, 2010, Vincent Hill, Administrative Judge, presiding.

**APPEARANCES:**

For the Complainant:

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For the Respondent:

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## I. SUMMARY

This Decision finds that: (1) the Department of Justice, Federal Bureau of Prisons (“the Agency”), subjected Destiney S. Brooks (“Complainant”) to a hostile work environment based on her sex; (2) the Agency has failed to demonstrate an affirmative defense to liability as to Complainant’s hostile environment claim; and (3) the Agency did not retaliate against Complainant for her prior protected activity.

## II. STATEMENT OF JURISDICTION

This case arises under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C. and 42 U.S.C.). Authority to conduct the hearing and to issue this Decision is found in 29 C.F.R. § 1614.109 of the Equal Employment Opportunity Commission’s regulations governing federal sector equal employment opportunity.

## III. PROCEDURAL HISTORY

On November 13, 2009, Complainant initially contacted an EEO counselor, alleging that the Agency discriminated against her based on her sex (harassment) and retaliation for prior protected activity. (Report of Investigation (“ROI”) at 13). The counselor was unable to resolve the matter through informal inquiry, and Complainant filed a formal complaint (“Complaint”) with the Agency on January 4, 2010. (ROI at 13). On June 8, 2010, I granted Complainant’s request for a hearing and issued an Acknowledgement and Order. On September 28, 2010, the Agency filed its Motion for Decision Without a Hearing. The Agency’s Motion was denied and a Scheduling Order was issued on October 29, 2010. A Revised Scheduling Order was issued on March 11, 2011.

#### IV. STATEMENT OF THE ISSUES

The question herein presented is whether the Agency retaliated against Complainant or subjected her to a hostile work environment when, allegedly: (1) Complainant was subjected to harassment in the form of vulgar comments and conversations of a sexual nature; (2) Complainant experienced threats to her career advancement; and (3) staff and inmates continuously told Complainant that they knew of the details regarding her previous EEO complaint and subsequent settlement agreement.

#### V. STATEMENT OF THE FACTS

After reviewing the Report of Investigation, the testimony of the witnesses, and the other evidence in the administrative record, I find the facts as follows.

##### A.

Complainant began working for the Agency over ten years ago as a correctional officer at the United States Penitentiary in Atlanta, Georgia ("USP Atlanta"). (Hearing Transcript ("HT") at 270). All correctional staff at USP Atlanta work under the supervision of the chief correctional supervisor. (HT at 860-61). Until November 9, 2009, the chief correctional supervisor was Captain Michael Branch. (HT at 945).

By most accounts, Captain Branch was an imposing figure. His dominant personality and his willingness to engage inmates on their terms gained him the respect of inmates and staff alike. (HT at 41, 64-65, 849, 1475). And while he was accountable to the associate warden of programs, he was regarded by many as being in de facto control of the day to day running of the facility. (HT at 64). At times it seemed that rules did not apply to him. For example, notwithstanding a strict prohibition against the use of profanity in the workplace, he swore constantly and with apparent impunity. (See e.g., HT at 1294, 1347, 1401-02, 1445-46, 1494-95, 1554, 1569, 1687-

88). On the rare occasions that he was disciplined for his misconduct, he would receive only a modest reprimand (such as a brief suspension) and remained in his position. (HT at 85, 588-89, 982). These exploits gave him an air of invulnerability, earning him the nickname “Teflon Don” and sparking a rumor that he was married to Regional Director Raymond Holt’s niece<sup>1</sup> (with the inference being that he enjoyed Holt’s protection). (HT at 63, 68, 118). Not surprisingly, as a result of Branch’s reputation, few employees at USP Atlanta wanted to cross him. (HT at 64).

According to several witnesses, Captain Branch’s power went to his head. Warden Loren Grayer—Branch’s second-line supervisor—described him as “cocky.” (HT at 930). Officer Rovi Oliver explained that Branch had a god complex and believed that “no matter how many times [he was written up] or [complained about], nothing [could] happen [to him].” (HT at 1690-92). Officer Shon Terrell similarly testified that Branch used profanity in front of Warden Grayer and thought he was “untouchable.” (HT at 1513; *cf.* HT at 834).

Officer Terrell further testified that Branch derived “great pleasure” from taunting the inmates in his custody, and in doing so would not hesitate to use all manner of vulgarity. (HT at 1496). In addition to inmates, Branch also allegedly disparaged other USP Atlanta employees. (HT at 1496). According to former Unit Manager Deborah Parks, Branch frequently voiced his contempt for certain female staff members whom he regarded as “loose” by referring to them as “whores” or by claiming that they were “screwing an inmate.” (HT at 1401-02). He would similarly refer to certain male employees as “faggots.” (HT at 1402). Officer Xavier Johnson noted that Branch made no apologies for his provocative language, and that he even bragged about being the “grimiest nigger you’re ever going to meet.” (HT at 40). Branch denies these allegations, though he admits to using profanity on occasion. (HT at 1033).

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<sup>1</sup> Captain Branch and Regional Director Holt both testified that this rumor is false and that their relationship is strictly professional. (HT at 972, 1112).

In 2005, Complainant settled a complaint of discrimination against the Agency in which she had alleged that Captain Branch sexually harassed her.<sup>2</sup> (ROI at 64-67, 78). As part of the settlement agreement, Complainant was subsequently promoted to the position of case manager in USP Atlanta's holdover unit so that she would no longer be in Branch's chain of command. (ROI at 67; HT at 270).

Following the settlement of her sexual harassment claim, Complainant began to suspect that Captain Branch was making derogatory comments about her to others. (HT at 302; *see also* ROI at 74). According to Complainant's former supervisor, Deborah Parks, Complainant's suspicions were well-founded. Parks testified that Branch complained to her during the summer of 2005 that while Complainant "was slinging it around the institution" (i.e., giving away sex), when he approached her, she "screamed on him" (i.e., filed a complaint). (HT at 1402-04). Parks did not bring this comment to Complainant's attention at the time. (HT at 1407). Consequently, despite her suspicions, Complainant would not have any hard evidence that Branch was slandering her until November 2009.

In the meantime, Complainant's promotion to the position of case manager failed to deliver the prophylactic effect she had hoped for: Although Complainant was no longer under Captain Branch's direct chain of command, she alleges that he continued to harass her on a daily basis. (HT at 282-83). The harassment took numerous forms. First, in order to get to and from her new duty station, which was located in the detention center unit (DCU), Complainant had to traverse the rear corridor connecting DCU to the main compound. (HT at 280). Unfortunately for Complainant, this meant walking past Branch's office. (HT at 280). Branch allegedly exploited this situation, ensuring that he was in the hallway whenever Complainant walked by. (HT at 279-80). If no one else was present, Branch would greet Complainant by groping her shoulder. (HT at

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<sup>2</sup> This is the prior protected EEO activity which forms the basis of Complainant's retaliation claim.

281). He would also call Complainant his “black China [sic] doll” and make other inappropriate comments. (HT at 281). If there were others nearby, Branch would greet Complainant by announcing her presence in a condescending tone. (HT at 281). Complainant tried to avoid these interactions by varying her work schedule, but her attempts were unsuccessful. (HT at 283).

In addition to her “chance” encounters with Captain Branch in the rear corridor, Complainant was required to interact with Branch in order to perform her new job. For example, one of her responsibilities as a case manager was to disseminate routing instructions for the transportation of “special needs inmates” (such as gang members and terrorists) to and from USP Atlanta. (HT at 270-71). Because of the safety concerns associated with transporting prisoners, Complainant’s routing instructions had to be approved by the chief correctional supervisor—that is, by Branch. (HT at 278, 864-65). According to Complainant, Branch always found a pretext for denying her written requests, knowing that she would then be forced to meet with him in person; when she did so, Branch used the opportunity to harass her. (HT at 311-13).

Complainant contends that Captain Branch was aware that his advances were unwelcome, but that he didn’t care; quite the contrary, he frequently reminded her that, despite the settlement of her prior complaint against him, “he wasn’t leaving” USP Atlanta. (HT at 283). Complainant also claims that Branch’s interference with her routing instructions made her look like an ineffective case manager. (HT at 316). Complainant testified that she made numerous attempts to complain about Branch’s behavior, but that such attempts were unsuccessful and only made matters worse. (HT at 286, 288, 320; ROI at 78). Complainant could not identify any specific instances where she complained to her supervisors about Branch’s behavior interfering with her work performance. (*See* HT at 319-322; *cf.* HT at 1232).

Complainant gave up complaining about Captain Branch's behavior until the events of October 30, 2009, once again compelled her to act. That morning, Warden Grayer was conducting a routine inspection of the institution. (HT at 22). Grayer was accompanied by his key supervisors, including Captain Branch. (HT at 23). During his rounds, Grayer stopped by the suicide ward to check on a particularly troublesome inmate named Marvin Smith. (HT at 22-24). Branch had assigned inmate Smith to the suicide ward after Smith had cut himself and thrown water on another person. (HT at 957). Branch also assigned Smith a period of isolation—to be served at the Special Housing Unit (SHU)—as a punishment for these actions. (HT at 957-58). After consulting with the chief psychologist, Grayer informed Smith that he could return to the main compound on the advice of his doctors. (HT at 28-29). Smith took this to mean that he could bypass SHU and go straight back to general population. (HT at 31-32). Branch, who had an entirely different understanding of Grayer's directive, taunted Smith about his erroneous interpretation. (HT at 31-32). Smith held firm that he would be returned to general population, and Branch left the suicide ward frustrated, feeling that his authority had been usurped. (HT at 29).

Fatefully, Captain Branch returned to the suicide ward later the same day. (HT at 30). According to Officer Xavier Johnson, who was on duty at the suicide ward at the time, Branch proceeded down the hallway and went straight into the room containing inmate Smith's cell, whereupon he got up close to the glass security screen and began arguing with Smith. (HT at 30). At first, Branch and Smith began rehashing their disagreement from that morning, but before long the argument became personal. (HT at 31-34). Smith began taunting Branch about his relationship with Complainant, making reference to the settlement of Complainant's 2005 sexual harassment claim against Branch. (ROI at 40; HT at 38-39). Smith suggested that Complainant

had used the proceeds from that settlement to buy the Lexus that her then-boyfriend Officer Terrell had been seen driving. (ROI at 40, 119; HT at 38-39). Smith also suggested that Branch was having sexual relations with a male coworker. (ROI at 40; HT at 39).

According to Officer Johnson, Captain Branch—who was visibly angered by inmate Smith's comments—attempted to regain control of the situation by playing along with Smith's accusations. (HT at 42). For example, Branch validated Smith's assertion that Complainant bought a Lexus with the proceeds from her settlement against him, adding that the standard practice at USP Atlanta was to “pay bitches off,” and that Regional Director Holt paid Branch's “pussy bills.” (ROI at 22, 40, 120, 127; HT at 134, 301-02). Branch also claimed that before he met Complainant, she did not have a car and was walking with her five children. (ROI at 40, 119, 127; HT at 38-39, 130-31, 301-02). Branch further stated that he was going to “fuck” Complainant and her boyfriend. (ROI at 22, 40, 119, 127-28; HT at 130-31, 138, 301-02; *cf.* HT at 38-39, 130-31).

Captain Branch also attempted to draw the sting from the accusation that he was sleeping with a male coworker by admitting that he liked having sex with men and by encouraging Smith to have sex with him right then and there. (ROI at 40, 121; HT at 43, 130). To this end, Branch pressed his buttocks up against Smith's food slot, and invited Smith to penetrate him. *Id.* Smith declined to do so, suspecting that Branch was trying to lure him into a trap. (HT at 43).

At the hearing, Captain Branch admitted to cursing at inmate Smith, but denied talking to him about Complainant or her prior claim. (HT at 960, 994-96). He also denied inviting Smith to have sex with him through the food slot. *Id.* Branch's testimony thus differed sharply from Officer Johnson's. Ironically, the entire incident was probably recorded by the video camera in Smith's cell, but due to a technical problem, the Agency's investigator was unable to retrieve the



recording. (HT at 1619).

Following the above altercation, inmate Smith believed that he had gotten the better of Captain Branch. (HT at 50-51). Immediately after Branch left the suicide ward, Smith began gloating to Officer Johnson about his performance. (HT at 51). Over the next few days, Smith related the details of his confrontation with Branch to inmates and staff members. (ROI at 128; HT at 50-51, 107, 136). He wrote letters to several employees, including Complainant, claiming that Branch had made derogatory comments about them. (ROI at 22-23; HT at 138-39).

Captain Branch's conduct also came to the attention of Special Investigative Agent Gerson Rivera. (HT at 1614). On Friday, November 6, 2009, after some preliminary fact-finding, Rivera informed Warden Grayer about Smith's allegations. (HT at 801, 869). Grayer called Complainant, who had since learned of Branch's conduct from her then-boyfriend and union representative, Officer Terrell. (HT at 801). Complainant expressed serious reservations about returning to work while Branch remained at USP Atlanta. (HT at 477, 801-02). Grayer told Complainant he would look into the matter and that he would take care of it. (HT at 802). The following Monday, November 9, 2009, Grayer referred the incident to the Office of Internal Affairs, and an official investigation was initiated. (HT at 821). He also issued a letter to Branch notifying him that he was being reassigned to the Southeast Regional Office while the investigation was being conducted. (HT at 822, 1104). Branch transferred to the regional office the same day. (HT at 1105).

#### B.

Following the incident on October 30, 2009, Complainant started having panic attacks, felt helpless and violated, and feared that she would become a target of inmates who might now view her as promiscuous. (HT at 303-04). Complainant also claims that her coworkers began to

distance themselves from her, and that rumors circulated that she was responsible for Captain Branch's temporary reassignment. (HT at 304-05).

According to Complainant, she discussed some of these concerns with Warden Grayer, but he brushed them aside, explaining that it was normal for an attractive woman to experience some hostility from coworkers. (HT at 289). Complainant also alleges that when she told Grayer that Branch had been spreading sexual rumors about her, Grayer replied that "we all do things that we're not so proud of." (HT at 289). Grayer admitted to saying these things, but testified that Complainant misunderstood his meaning; he was only trying to comfort Complainant, and never meant to imply that she had committed an indiscretion or that Branch's behavior was something that she was expected to endure, or that the Agency in any way tolerated. (HT at 807-08, 927-28). Quite the contrary, Grayer testified that the Agency has a zero-tolerance policy for sexual misconduct.<sup>3</sup> (HT at 812, 896).

Complainant also discussed her concerns with Affirmative Employment Administrator Margaret Harris. (HT at 718). Again, there is some disagreement as to what was said during this conversation. Complainant claims that Harris advised her not to tell anyone about the October 30, 2009, incident because doing so would render her career "dead in the water." (HT at 342). Harris denies making this statement; according to Harris, Complainant had expressed her reluctance to initiate another long and drawn-out EEO process and had asked Harris what she would do under

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<sup>3</sup> Chapter 14 of the Agency's Program Statement provides in pertinent part:

a. The Bureau of Prisons will not condone acts of sexual harassment or inappropriate behavior by staff or inmates. All employees will be informed that sexual harassment is prohibited conduct which will not be condoned, and appropriate corrective action will be taken against persons who engage in sexual harassment.

b. Staff must take seriously all reported statements from their fellow staff alleging claims of inappropriate sexual behavior or claims of sexual harassment. The responsibility to report under the Program Statement on Standards of Employee Conduct will apply. At no time will an attitude of "that's what you have to put up with in a correctional environment" be condoned.

(ROI at 161). Warden Grayer testified that USP Atlanta employees are required to attend an annual training session at which they are instructed on the Agency's anti-discrimination policies. (HT at 828-29). On the other hand, there is some evidence that the Agency's sexual harassment training was conducted in a rushed or otherwise less-than-rigorous fashion. (HT at 186-87, 470-71).

the circumstances. (HT at 749). To this end, Harris suggested that Complainant not file a formal complaint unless the warden failed to adequately deal with the situation. (HT at 749). Harris also claims that she advised Complainant to call the warden regarding the matter and gave her the telephone number of Ombudsman Yvonne Hinkson. (HT at 718-19).

Beyond these immediate effects, Complainant asserts that, as a result of the fallout from Captain Branch's temporary reassignment to the regional office and the subsequent investigation into the October 30, 2009, incident, her career prospects have suffered. In this regard, she identifies four major areas of concern.

*First*, Complainant claims that her role in the National Association of Blacks in Criminal Justice (NABCJ) was diminished. (HT at 333). Complainant became involved with NABCJ—an influential organization among criminal justice professionals—in 2009. (HT at 326-27). Shortly after joining NABCJ, she was elected second vice president of the Georgia chapter. (HT at 326-27). Following the October 30, 2009, incident, Complainant alleges that the president of the Georgia chapter, Therone Pratter, approached her concerning the incident involving Captain Branch. (HT at 330). Pratter allegedly told Complainant that she was being placed in the “penalty box” and that, from then onwards, she would have to submit all proposed actions through two specially appointed “advisors”—something which no other NABCJ executive board member was required to do. (HT at 330-31). Pratter denies asking Complainant about Branch or telling Complainant that she was being placed in the “penalty box.” (HT at 1307). According to Pratter, Complainant was never assigned any “advisors,” but rather was required to submit proposals through the president and the first vice president—something which all Georgia NABCJ executive board members were required to do. (HT at 1306). Pratter also testified that Complainant was never cut off from participating in NABCJ; in fact, if anything, Complainant

cut herself off by failing to show up for most meetings and by being frequently unprepared (Complainant admits that she “withdrew” from her usual NABCJ activities following her conversation with Pratter). (HT at 1308; *cf.* HT at 332). At any rate, Complainant was always free to call Pratter’s cell phone and was entitled to inspect the minutes of any meetings she missed. (HT at 1308).

*Second*, Complainant’s relationship with members of her unit deteriorated. One of her coworkers, Tamia Scott, accused her of filing complaints against everybody. (HT at 306; *but see* HT at 1578, 1587). Complainant also alleges that her supervisor, Unit Manager Deborah Parks, began assigning her more work, manipulated her performance evaluations, and allowed Scott to disrespect her. (HT at 305-06). Though Parks denied these allegations, she did admit to having some significant personal and professional problems with Complainant. Parks, who was going through a difficult divorce, had called Complainant on October 26, 2008, to inquire about her husband, whom she suspected was having an affair with one of Complainant’s friends, Ms. Gibson. (HT at 305, 1239, 1356). Parks also had issues with Complainant’s written work product, and told her so. (1358-59). Ultimately, Complainant felt that Parks was treating her unfairly, and in about August 2010 complained to Parks’ supervisors. (HT at 1226). In a heated meeting with Associate Warden of Programs Norbal Vasquez, Complainant brought up Parks’ bitter divorce. (HT at 1229-30, 1239). In response, Parks accused Complainant of fabricating complaints against everybody as a means of advancing her career. (HT at 1229-30, 1239, 1356, 1372-73). Parks tendered her resignation during the same meeting. (HT at 1230).

*Third*, Complainant alleges that her involvement in the ongoing investigation into Captain Branch damaged her reputation with key decision-makers, thereby depriving her of opportunities for advancement. For example, at a NABCJ career fair in Atlanta, Complainant approached

Correctional Services Administrator Rufus Williams about potential vacancies in his department. (HT at 327). Williams allegedly told Complainant that he had heard she was “crazy” and asked her about the “whole Captain Branch thing.” (HT at 327). Williams, who recalled having a conversation with Complainant at the career fair, denied making these comments. (HT at 773-74).

In September, 2010, Complainant also unsuccessfully applied for former Unit Manager Parks’ recently vacated position. (HT at 347). Complainant claims that she was qualified for this position and suspects that management manipulated the selection process in order to exclude her. (HT at 354-55). Complainant’s suspicions are refuted by the testimony of Human Resources Specialist Maria Rodriguez, who was on the merit promotion board for the position in question and rated the candidates. (HT at 1260-61). Rodriguez testified that Complainant scored about five points lower than the average for all applicants, and that she therefore failed to make the list of “best qualified” candidates. (HT at 1263). As such, the selecting official, Regional Director Holt, could not have selected Complainant for the position. (HT at 1268).

*Fourth*, Complainant claims that there was a conspiracy among employees loyal to Captain Branch to retaliate against her. For example, she testified that Lieutenant James Jemison interfered with her present complaint by repeatedly hanging up on EEO Investigator Wayne Stephens, who was calling to obtain an affidavit from Officer Johnson. (HT at 509). Jemison denied this allegation. (HT at 1411).

Complainant also alleges that Lieutenant Mendiola threatened to write up Officer Terrell for helping Complainant with her present EEO claim. (HT at 552-54; *cf.* HT at 1491). Mendiola denied threatening to discipline any employee for helping Complainant with her case; regarding Terrell, he explained that on the day in question, he was shorthanded and could not allow Terrell to leave his post. (HT at 1567-68).

Complainant asserts that, on one occasion, an unknown supervisor instructed Officer Gary Rolle to disregard a request by Complainant to move a particular inmate. (HT at 498). Rolle confirmed this incident, but testified that security concerns dictated the result. (HT at 1668).

Complainant claims that she was ostracized and treated in a hostile manner by members of the special operations tactics (SORT) team, which had long been under Branch's stewardship. (HT at 382-84). Officer Rovi Oliver allegedly told Complainant that he wanted to spit in her face and that while he would "[f]uck]" her, he would "never make [her his] girlfriend." (HT at 394). Complainant also claims that Officers John Deloatch and Dexter Butler called her various names, including "bitch," and "whore." (HT at 394-95). She alleges that Officer Rodriguez Westbrook told her he would not "fuck with [her] like that." (HT at 383). She also claims that Officer Rosa Rivera called her a "bitch" and a "ho" and told other officers that Complainant was sleeping around. (HT at 395). According to Complainant, Officer Cheryl Williams spread similar rumors about her. (HT at 395). When called as rebuttal witnesses, each of the officers Complainant named, with the exception of Officer Westbrook, denied making such statements or otherwise retaliating against Complainant for her prior EEO activity. (See HT at 1683, 1451, 1442, 1472-73, 1708-09). Officer Westbrook testified that he told Complainant that he "don't [sic] get down with you like that;" he explained that he doesn't like to engage Complainant because she has a tendency to make complaints and then name people like him who have nothing to do with the underlying allegations. (HT at 1457, 1462).

As further evidence that she was being targeted, Complainant characterizes as suspicious the timing of her random drug testing in February 3, 2010, which was followed one month later by the random drug testing of her then-boyfriend, Officer Terrell. (HT at 385-86).

Finally, Complainant alleges that another employee, Officer Greg Widmire, fabricated charges against her on May 4, 2009. (HT at 388, 1623, 1655). Specifically, she claims that Widmire, who had accused Complainant of releasing confidential information to inmates, provided false documents to investigators. (HT at 388, 1623, 1655). Widmire did not testify at the hearing. Complainant was cleared on March 2011, of all wrongdoing related to this charge. (HT at 1625).

C.

By September, 2010, the OIA had concluded its investigation into the allegations against Captain Branch, sustaining charges of unprofessional conduct and unprofessional conduct of a sexual nature. (HT at 1616; Agency's Ex. 8 ¶ 2). As a result of OIA's findings, it was initially proposed that Branch be demoted for "conduct unbecoming of a management official." (HT at 1143; Agency's Ex. 11). This proposal was later modified, however, and Branch was instead issued a 14 day suspension. (HT at 967, 1108). It is unclear why Branch's proposed punishment was changed. Regional Director Holt testified that disciplinary decisions regarding institutional staff are ordinarily made by the warden, but that at the time Branch's charges were sustained, Warden Grayer had resigned from USP Atlanta and had yet to be replaced; consequently, Branch's disciplinary decision was handled by the regional office. (HT at 1189, 1211). Moreover, because Complainant was alleging that Holt had protected Branch in the past, Holt did not take part in the decision, leaving Assistant Regional Director Kim White to decide the appropriate punishment. (HT at 1107). White did not testify at the hearing, so it is unclear why she reduced the proposed demotion to a 14 day suspension.

With the OIA's investigation concluded, regional management notified Warden Jeffery Keller—who had since assumed Warden Grayer's position—of Captain Branch's scheduled

return to USP Atlanta on October 4, 2010, following the serving of his 14 day suspension. (HT at 1148, 1535).

News of Captain Branch's impending return spread quickly. Several staff approached Warden Keller, voicing their concerns and asking that Branch not be allowed to return. (HT at 1539). When the news reached Complainant, she began to panic, believing that Branch was "coming to get [her]." (HT at 365). According to Keller, Complainant came to him and was "very emotionally upset." (HT at 1536). Keller suggested that Complainant see a psychologist from outside USP Atlanta, both for her own wellbeing and so that he could get a sense of her state of mind.<sup>4</sup> (HT at 1537-38).

In addition to speaking to Warden Keller, Complainant wrote to Director Harley Lappin, pleading that Branch not return to USP Atlanta while her EEO claim was still pending. (HT at 366; Complainant's Ex. 6). Lappin instructed Complainant to direct her concerns to Regional Director Holt. (HT at 366.) Complainant wrote to Holt, but did not receive a response. (HT at 366; Complainant's Ex. 6). Complainant also wrote to the United States Attorney General, Eric Holder, describing the incidents at USP Atlanta and asking that Branch not return. (Complainant's Ex. 6). Finally, Complainant contacted me, with the same complaints about her safety if Branch returned to USP Atlanta. I contacted Agency counsel and requested that Branch not return to USP Atlanta during the pendency of this action. The Agency agreed and directed Branch to stay at the regional office.

In light of the complaints he had received, Warden Keller became concerned that Branch's return to USP Atlanta would disrupt the general welfare of the institution. (HT at 1542). Keller relayed this concern to Regional Director Holt. (HT at 1149). Holt discussed the situation

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<sup>4</sup> Complainant subsequently met with psychologist Dr. G.K. Bailey. (HT at 1538-39). Bailey issued a report to Warden Keller in which she concluded that Complainant's fears were rational. (HT at 371).



with EEO Officer Mina Raskin and Assistant Director for Office of General Counsel Kathy Kenney. (HT at 1109-1110). Based on these conversations, Holt decided it would be best to keep Branch at the regional office for the time being. (1109-1110).

## VI. DISCUSSION

For the reasons set forth below, I find that the Complainant was subjected to a hostile work environment and, moreover, that the Agency has failed to establish an affirmative defense to liability under *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). I do not find, however, that the Agency retaliated against Complainant.

### A. Sexual Harassment

To establish unlawful sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., Complainant must show that, because of her sex, she was subjected to conduct so offensive that it altered the conditions of her employment, from the perspective of a reasonable person in her position. *See e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993); *Meritor Savs. Bank F.S.B. v. Vinson*, 477 U.S. 57, 67 (1986); *Winston v. Dep't of Health and Human Servs.*, EEOC Appeal No. 01985752 (Dec. 13, 2000); Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002, at 2 (June 18, 1999). The conditions of employment are altered only if the harassment culminated in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment.

*Id.*

#### 1. Complainant was subjected to a hostile work environment.

To demonstrate a hostile work environment, Complainant must show that, because of her sex, she was subjected to conduct so offensive that it altered the terms or conditions of her

employment, from the perspective of a reasonable person under like circumstances. *See Oncale*, 523 U.S. at 81; *Harris*, 510 U.S. at 21-22; *Meritor*, 477 U.S. at 67; *Winston*, EEOC Appeal No. 01985752. Where such as here the alleged harassment does not culminate in an ultimate employment action, Complainant must demonstrate that the harassment she experienced was so severe or pervasive that it altered the terms, conditions, or privileges of her employment and rendered the workplace a discriminatory working environment. *Meritor*, 477 U.S. at 67.

In assessing whether harassment is sufficiently severe or pervasive to give rise to liability, the Commission looks to all the circumstances, examining factors such as the frequency of the alleged discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23. The conduct must form an environment deemed hostile or abusive both subjectively by the victim and objectively in light of circumstances. *Id.* Generally, a single incident or a group of isolated incidents, unless extremely serious, will not be regarded as discriminatory harassment. *See Phillips v. Dep't of Veterans Affairs*, EEOC Request No. 05960030 (July 12, 1996); *Banks v. Dep't of Health and Human Servs.*, EEOC Request No. 05940481 (Feb. 16, 1995). Likewise, rudeness or ostracism, standing alone, is insufficient to support a hostile work environment claim. *Id.*; *see also Manatt v. Bank of America*, 339 F.3d 792, 803 (9th Cir. 2003); *Gagnon v. Sprint Corp.*, 284 F.3d 839, 850 (8th Cir. 2002). Title VII was not enacted to create or enforce a "general civility code." *Oncale*, 523 U.S. at 80.

Complainant was subjected to a hostile work environment. As an initial matter, the record establishes that Complainant was subjected to numerous instances of harassment. During the October 30, 2009, altercation between Captain Branch and inmate Smith, Branch threatened to rape Complainant and her boyfriend. Branch also made several derogatory and sexual comments

about Complainant, and these remarks were quickly propagated via USP Atlanta's notorious rumor mill, making Complainant the object of much salacious gossip and forcing her to defend herself against rumors that she was promiscuous and traded sex for promotions. In addition to these abuses, Complainant was also subjected to Branch's frequent and unwanted verbal and physical advances, which occurred on a daily basis.

It is also clear that the harassment Complainant experienced was based on her sex. For proof of this, one need look no further than Captain Branch's statements to inmate Smith that it was the standard practice at USP Atlanta to "pay bitches off" and that Complainant would still be walking with her five children were it not for the car she was able to purchase from the proceeds of her sexual harassment settlement. These remarks reek of misogyny and show that the abuse Complainant experienced was tied to her sex.

The harassment at issue here was "subjectively" severe or pervasive. Following the events of October 30, 2009, Complainant started having panic attacks, felt helpless and violated, and feared that inmates would target her for sexual abuse. Complainant thus perceived her work environment as hostile and abusive.

The harassment was also "objectively" severe or pervasive. First, Captain Branch's behavior on October 30, 2009, was extremely severe. As chief correctional supervisor, Branch was responsible for ensuring the safety of all staff at USP Atlanta. Far from ensuring Complainant's safety, however, Branch made vulgar statements about Complainant to a mentally unstable inmate. These actions created an ongoing threat to Complainant's safety; for example, as Complainant explained at the hearing, it is not uncommon for an inmate to obsess or focus on a staff member; by discussing Complainant's personal information and alleged sexual habits with inmate Smith, Branch made Complainant a ready target for such abuse.

In addition to being severe, Captain Branch's behavior was also physically threatening. Branch told inmate Smith that he was going to "fuck" Complainant and her boyfriend. This statement, which is already threatening on its face, is all the more menacing in light of Branch's entrenched position at USP Atlanta and his history of aggressive behavior toward Complainant. Branch's unrivaled power as chief correctional officer gave him the means to deliver on his threat, and his history of singling Complainant out for harassment gave him a motive for doing so. A reasonable person in Complainant's position would thus likely have felt in very real danger after learning of Branch's threatening comments.

Complainant has also suffered frequent humiliation as a result of the October 30, 2009, incident. While most of the Agency's witnesses denied using sexually derogatory terms against Complainant or spreading rumors about her, their testimony was often evasive and implausible. Examining the record as a whole, I find it more likely than not that Complainant has been—and in all likelihood, will continue to be—subjected to considerable abuse from her coworkers as a result of the rumors regarding her relationship with Captain Branch. No employee should be forced to endure such indignities.

Finally, the Agency's failure to appropriately discipline Captain Branch sent a powerful message to Complainant that the Agency did not regard the harassment she experienced as serious and would not guarantee her a safe work environment. In particular, the Agency's attempt to return Branch to his prior position—even after OIA sustained charges against him of unprofessional conduct of a sexual nature, and despite the ongoing pendency of this action—is astonishing. Indeed, the prospect of Branch's return put Complainant in such fear for her safety that she had to see a psychologist (who, incidentally, confirmed that Complainant's fears were rational under the circumstances). As for Branch's 14 day suspension, this can be regarded as

little more than a "time out," and is further evidence that the Agency is not serious about enforcing its anti-harassment policies.

Against these indications, and after considering the totality of the circumstances, I find that Complainant, because of her sex, was subjected to harassment so severe and pervasive that it altered the conditions of her employment and rendered her workplace a discriminatory working environment. *Meritor*, 477 U.S. at 67.

**2. The Agency has failed to establish an affirmative defense to liability.**

Where harassment does not result in a tangible employment action, the Agency may raise an affirmative defense to liability. To meet this defense, which is subject to proof by a preponderance of the evidence, the Agency must demonstrate: (1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that Complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Agency or to otherwise avoid harm. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); see also Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (Enforcement Guidance), EEOC Notice No. 915.002 at 12. (June 18, 1999); *Parker v. Dep't of the Navy*, EEOC Appeal No. 01970412 (Oct. 4, 2000), request for reconsideration granted, EEOC Request No. 01A12829 (Jan. 28, 2002).

What is appropriate remedial action necessarily depends on the particular facts of the case, such as the severity and persistence of the harassment and the effectiveness of any initial remedial steps. See *Taylor v. Dept. Of Air Force*, EEOC Request No. 05920194 (Jul. 8, 1992).

The Commission's Policy Guidance provides:

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.

*Policy Guidance on Current Issues of Sexual Harassment*, EEOC Notice No. 915-050 (March 19, 1990) [hereinafter "Guidance"]. Additionally, the employer should not only take immediate and appropriate corrective action to end the harassment, but also make the victim whole by restoring lost benefits and prevent the misconduct from recurring. See *Quintero v. U.S. Postal Serv.*, EEOC Appeal No. 01960836 (Apr. 21, 1998). Furthermore, appropriate relief may include taking steps to ensure that the perpetrator of sexual harassment is no longer assigned to a common workplace with the victim. See *Guerra v. U.S. Postal Serv.*, EEOC Appeal No. 01965639 (Jun. 19, 1997). It is not a remedy for the employer to do nothing simply because the coworker denies that the harassment occurred. See *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995). Additionally, and in citing to a series of cases discussing sexual harassment by co-workers, the Supreme Court has stated that: "In such instances, the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct as its results, quite as if they had been authorized affirmatively as the employer's policy." *Faragher*, 524 U.S. at 789.

Here, the Agency has failed to demonstrate an affirmative defense under *Faragher*. Beginning with the first prong of the Agency's affirmative defense, I find that the Agency failed to exercise reasonable care to prevent and promptly correct the sexually harassing behavior here at issue. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Critically, the Agency did not adequately discipline Captain Branch for his behavior on October 30, 2009. After OIA sustained

charges of unprofessional conduct and unprofessional conduct of a sexual nature against Branch, it was initially proposed that he be demoted from his position as chief correctional supervisor. Had the Agency adopted this proposed disciplinary action, it would have sent a strong message to Branch as well as to other would-be harassers regarding the Agency's willingness to enforce its anti-harassment policies. But for reasons that the Agency has still yet to articulate, this initial proposal was never implemented. Instead, Branch was issued a nominal 14 day suspension, after which it was determined that he would be returned to his previous position with his powers fully restored.

Given the nature of Captain Branch's misconduct, a 14 day suspension barely qualifies as punishment; in fact, it tends to affirm the common perception at USP Atlanta that, when it comes to the Agency's disciplining of Branch, a "revolving door" policy applies. *Cf.* Guidance ("corrective action should reflect the severity of the conduct"). Branch has served similar suspensions in the past, and has yet to reform his behavior in any meaningful sense. There is thus no reason to expect in this case that a 14 day suspension will deter Branch from engaging in future acts of harassment towards Complainant.

The Agency's attempt to return Captain Branch to his previous position, even before the resolution of this action, is also deeply troubling, and flies in the face of the Agency's assertion that it exercised reasonable care to prevent future harassment. Given Branch's past recalcitrance and his history of abusive behavior, Branch's return would have resulted in the proverbial fox guarding the henhouse.

To the Agency's credit, it did act promptly in temporarily reassigning Captain Branch to the regional office after first becoming aware of his alleged misconduct. There is also much to commend in the thoroughness of the Agency's subsequent investigation. But these positive steps

cannot make up for the Agency's basic failure to administer appropriate sanctions and to otherwise adequately remedy the harassment at issue here. At the very least, the Agency's actions sent a dangerous message to other would-be harassers that it is not serious about enforcing its anti-harassment policies. Because the Agency failed to take necessary measures to prevent and correct harassment, it cannot establish the first prong of its affirmative defense under *Faragher*.

Turning to the second prong of the Agency's affirmative defense, I find that Complainant did not unreasonably fail to avail herself of available preventive or corrective opportunities, nor did she otherwise fail to avoid harm. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. First, if the Agency's handling of the Captain Branch incident is any indication, its procedures for reporting and remedying sexual harassment are so defective that Complainant can scarcely be said to have had any viable preventive or corrective opportunities available to her. Second, even assuming the Agency's procedures were adequate, most of the harassment at issue in this case flows from the events of October 30, 2009, of which the Agency had ample notice. Given the Agency's manifest failure to remedy the harassment that it was aware of, any failure on Complainant's part to report prior or collateral instances of harassment is of little significance, and certainly does not relieve the Agency of liability. Thus the Agency has failed to establish the second prong of its affirmative defense under *Faragher*.

Having failed to establish either prong of its affirmative defense, the Agency is liable for Complainant's injuries suffered as a result of her hostile work environment.

#### **B. Retaliation**

Title VII prohibits an employer from discriminating against an employee "because he has opposed any practice made an unlawful employment practice . . . or because he has made a



charge . . . or participated in any manner in an investigation, proceeding or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a).

To establish a *prima facie* case of retaliation<sup>5</sup> Complainant must show that: (1) she engaged in statutorily protected expression; (2) she suffered an adverse employment action; and (3) there was some causal relationship between the two events. *Holifield v. Reno*, 115 F.3d 1555, 1566 (11th Cir. 1997). “[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse.” *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). A materially adverse action is one that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Id.* (internal quotation and citation omitted). “To establish a causal connection, a plaintiff must show that the decision-makers were aware of the protected conduct and that the protected activity and the adverse action were not wholly unrelated.” *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 590 (11th Cir. 2000) (quotations and alterations omitted). “The cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case uniformly hold that the temporal proximity must be ‘very close.’” *Clark Cnty. School Dist. v. Breeden*, 532 U.S. 268, 273 (2001). Thus, in the absence of other evidence tending to show causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law. *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007).

Retaliation claims should be analyzed according to the burden shifting standards established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). See *Howard v. U.S. Postal Serv.*, EEOC App. No. 0720060026 (May 2, 2008). Therefore, after making out a

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<sup>5</sup> Complainant does not allege that she was subjected to a retaliatory hostile work environment, and I do not decide the question here.

*prima facie* case of retaliation, the burden shifts to the Agency to articulate a legitimate, nondiscriminatory reason for the challenged actions. *Burdine*, 450 U.S. at 253-54; *McDonnell Douglas*, 411 U.S. at 802. The Agency's burden in this regard is not an onerous one; the Agency need only provide an explanation that is "legally sufficient" to justify a judgment for the Agency. *Id.* at 255. The Commission has interpreted this language to mean that the "explanation is set forth with sufficient clarity as to allow the employee a full and fair opportunity to demonstrate pretext." *Parker v. U.S. Postal Serv.*, EEOC Req. No. 05900110 (Apr. 30, 1990).

Ultimately, the Complainant must prove, by a preponderance of the evidence, that the Agency's articulated reason for its action was a pretext for unlawful discrimination. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000); *Hicks*, 509 U.S. at 511; *Burdine*, 450 U.S. at 252-253; *McDonnell Douglas*, 411 U.S. at 804. The Complainant always retains the ultimate burden of persuading the trier of fact that the Agency unlawfully discriminated against her. *Hicks*, 509 U.S. at 511; *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

Complainant has failed to demonstrate a *prima facie* case of retaliation. In particular, Complainant's allegations of retaliation cannot succeed because, in each case, she has failed either to demonstrate that she suffered a materially adverse action or to show a causal connection between the relevant action and her protected expression.

According to Complainant, she was subjected to retaliation by Captain Branch when he rejected her written routing requests, thereby making her look like an ineffective case manager; but Complainant does not assert that the denial of her routing requests resulted in her being admonished, receiving a negative job evaluation, or suffering any other direct consequences. While no one wants to look ineffective at his or her job, this prospect alone is not enough to

dissuade a reasonable worker from making or supporting a charge of discrimination. The denial of Complainant's written routing requests cannot, therefore, be regarded as a materially adverse action.

Next, Complainant claims that an unknown supervisor instructed Officer Gary Rolle to disregard her request to move a particular inmate. Rolle's refusal to move the inmate in question inconvenienced Complainant, but hardly subjected her to a materially adverse action. Also, the record suggests that Rolle's actions were dictated by security concerns and had nothing to do with Complainant's protected expression.

Citing the curious behavior of former Unit Manager, Debra Parks, Complainant claims that members of her unit retaliated against her by treating her disrespectfully and accusing her of filing unmeritorious complaints as a means of advancing her career. For the most part, however, the record suggests that the difficulties Complainant encountered in dealing with members of her team stemmed from personal differences and problems with her communication skills. Any comments about Complainant's prior EEO activity were probably incidental, making it very unlikely that the trials and tribulations she alleges had any causal connection to her prior protected expression.

Complainant claims that her non-selection for the position of Unit Manager was an act of retaliation. But while Complainant's non-selection for the position constituted a materially adverse action, Complainant has not demonstrated a causal connection between her non-selection and her protected expression. Specifically, Human Resources Specialist Rodriguez testified at length regarding the selection process for that position, and explained that Complainant simply did not make the shortlist of "best qualified" applicants. Nor is there any evidence that this initial stage of the selection process—which took place at the Agency's human resources offices in

Texas—was manipulated to exclude Complainant. Thus, Complainant's non-selection was not causally connected to her prior EEO activity, and as such, could not have been the result of retaliation.

Somewhat related to her non-selection allegation is Complainant's assertion that, as a result of her protected expression, she was denied opportunities to network and advance her career. Apparently, Complainant's role in NABCJ was diminished. Also, Complainant claims that when she asked Correctional Services Administrator Williams about vacancies in his department, Williams brushed her off and asked about her prior complaint against Captain Branch. These assertions are vague and once again do not identify a specific injury or adverse action that would support Complainant's claim of retaliation. Moreover, the evidence suggests that the reason Complainant's role in NABCJ was diminished was that she stopped attending meetings. As for the incident involving Williams, he denies making the remarks attributed to him by Complainant, and there is no evidence that there ever were any vacancies in his department, or that Complainant would have even applied for a position if it existed.

Complainant also claims abstractly that her reputation with key decision-makers was tarnished as a result of her protected expression. It is enough to say that there is no evidence of this in the record, and that Complainant has failed to identify a single relevant decision by any management official that was adverse to her.

Complainant's next allegation of retaliation concerns Lieutenant Mendiola's threat to write up Officer Terrell if he helped Complainant with her present EEO claim. At the time Mendiola issued this threat, however, he was short-staffed and could not afford to let Terrell leave his post during work hours. Viewed in this light, Mendiola's actions were dictated by work demands, and Complainant's protected expression played no determinative role in the outcome.

Finally, Complainant alleges that she was drug tested and that Officer Widmire fabricated charges against her in retaliation for her having caused Captain Branch to be reassigned from USP Atlanta. There is insufficient evidence in the record to corroborate either of these allegations.

In sum, Complainant has failed to show that she suffered a materially adverse action as a result of her prior protected expression, and therefore cannot prevail on her retaliation claim.

## VII. DECISION

For the foregoing reasons, I find that Complainant was subjected to a hostile work environment because of her sex, and that the Agency—having failed to assert an affirmative defense under *Faragher*—is liable as to Complainant's hostile environment claim. I also find that the Agency did not retaliate against Complainant for her prior protected expression. *Wherefore, it is Ordered that a damages hearing be scheduled at a later date.*


Based upon my finding of hostile work environment discrimination, I am **Ordering** the Agency to initiate the following injunctive relief:

That Michael Branch be removed and/or not returned to the United States Penitentiary in Atlanta, Georgia, for the duration of his employment with the Agency, or in any subsequent non-federal employee capacity in which Michael Branch may be employed in the future, for so long as Destiney Brooks' duty location is the United States Penitentiary in Atlanta, Georgia.

In addition to the foregoing injunctive relief, I strongly recommend that the Agency reconsider its decision, dated September 10, 2010, in which it refused to impose the July 13,

2010, proposed discipline of Michael Branch that he be demoted from his position of Supervisory Correctional Officer for Conduct Unbecoming a Management Official.

SO ORDERED this 15<sup>th</sup> day of December, 2011.



VINCENT HILL  
Administrative Judge