U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Denver Field Office

950 17th Street, Suite 300
Denver, CO 80202
Direct Dial: (720) 779-3624
Website: www.eeoc.gov
lucila.rosas@eeoc.gov

Josephine Zahn and Kathy Bennett Complainants, v. Robert Wilkie, Secretary, US Department of Veterans Affairs, Agency.	) EEOC No. 541-2016-00108X) Agency No. 2003-0554-2015104789)) EEOC No. 541-2016-00117X) Agency No. 2003-0554-2015104476))) Lucila G. Rosas) Administrative Judge)) Date: December 23 , 2020

DECISION AND ORDER

I. INTRODUCTION

Pursuant to EEOC regulation 29 C.F.R. § 1614.109, a hearing was conducted in Denver, Colorado on January 28 – 30, 2020. Post hearing briefs were filed on April 6, 2020. Complainants' individual cases were consolidated throughout the litigation due to the similarity in the allegations, i.e. both alleged sexual harassment by Patient LL, and the fact that they were both represented by the same legal counsel, Gilbert Employment Law, P.C.

Therefore, I will be issuing one decision for both cases. Several witnesses testified during the hearing and the parties introduced sixteen (16) exhibits (totaling over three thousand pages), including medical records, medical progress notes, deposition transcripts and discovery responses, which were admitted and marked by the court reporter. In reaching this decision, the following have been reviewed and considered: Record of Investigation ("ROI"), prehearing reports, and hearing testimony (HT) and hearing exhibits ("Hrg. Ex.") and closing briefs.

II. ISSUES AND CLAIMS

The claims and issues at hearing were:

> Whether Complainants were subjected to a hostile work environment when, from in or around May 2014 through in or around September 2014, they were subjected to unwelcome comments and touching based on sex, including sexual assault.

III. FINDINGS OF FACT

A. Administrative Judge's Previous Findings of Fact

1. Complainants are members of a protected class (female).
2. Complainants were subjected to unwelcome conduct because of their sex (female).
3. The Agency knew or should have known of Patient LL's conduct toward Complainants.

B. Joint Stipulations

1. At all times relevant to this complaint, Kathy Bennett was a Certified Nursing Assistant working on the unit and floor known as "7IPU", which is an inpatient psychiatric unit, at the VA Eastern Colorado Health Care System[1].
2. At all times relevant to this complaint, Josephine Zahn was a Licensed Practical Nurse working on 7IPU at the VA Eastern Colorado Health Care System.
3. At all times relevant to this complaint, Nicole Moline was the Assistant Nurse Manager on 7IPU at the VA Eastern Colorado Health Care System, and was the Complainants' first level supervisor.
4. At all times relevant to this complaint, Madeline Belarde was the Nurse Manager on 7IPU at the VA Eastern Colorado Health Care System, and was the Complainants' second level supervisor.
5. On May 7, 2014, Patient LL was admitted to 7IPU. Patient LL remained on 7IPU until his discharge on October 7, 2014.
6. On May 25, 2014, the Attending caring for Patient LL documented the need for 1:1 care assistance to stop action, move action, and/or re-initiate the action discussing Patient LL's triggers for outburst and those actions which are helpful to redirect him.
7. On June 15, 2014, Toni Johnson contacted VA police due to Patient LL assaulting a male staff member, and a VA police investigation was conducted.
8. Several nursing staff members provided written statements in the June 2014 investigation detailing Patient LL's inappropriate behavior.

[1] Throughout this decision, the court will refer to the VA Eastern Colorado Health Care System as the "Denver VA," "Agency," or "VA."

9. On June 26, 2014, 7IPU staff prepared a Behavioral Plan that recommended at least 2-3 staff members be present when providing for Patient LL's personal and physical needs and coordinate timing of care to minimize his agitation.
10. On July 8, 2014, Patient LL was moved to 7 North.

C. Additional Findings of Fact

11. The North side of 7IPU housed only male patients, but until July 8, 2014, Patient LL was treated in the South side of 7IPU, which provided care to both female and male patients. HT at 22:5 – 24; 189:4:1 – 12; Zahn ROI at Ex. C-1 at 000187.
12. Patient LL engaged in sexually, inappropriate conduct from the first moment he was admitted to 7IPU. Despite complaints, Patient's LL sexual conduct toward nurses never stopped and he was never under control. Zahn ROI at 000097 – 000099; 000101 – 000104; Bennett ROI at 000128 – 000130; HT 33:21-34:13; 141:9 – 14; 218:14-219:20; 545:10-17; 555:20-556:3; Ex. 5 - Patient LL's Progress Notes at 1414, 1632.
13. Patient LL was verbally and physically sexually abusive, to Bennett, Zahn and the female nurses. His conduct was egregious, and exceptionally inappropriate, as compared to any other, psychiatric patient that the nurses, including Bennett and Zahn previously cared for and/or encountered. Patient LL knew exactly what he was doing. *Id.*; HT at 32:2 – 13; 137:13 – 138:22; 139:16 – 141:5; 213:3 – 23; 280:8 – 281:3.
14. Both Bennett and Zahn complained to management, Moline and Belarde, about Patient LL's verbal and physical sexual conduct toward them. Zahn ROI at Ex. B-1, 000094, 000097 – 000099; Bennett ROI at 000123 – 000124, 000127 – 000128, 000132 – 000147, 000151 – 000159; HT 32:24 – 33:8; 45:9 – 46:25; 142:21 – 146:25; 630:17 – 631:6.
15. Belarde testified that Patient LL was a "unique" patient engaging in severe conduct. Similarly, Moline testified that, based on her 20 years of experience at the Agency, Patient LL's conduct was uniquely bad. HT at 537:18 – 21; 630:17 – 19; 660:3 – 8. Moline further testified Patient LL was verbally vulgar, sexually inappropriate and aggressive. They were well aware of Patient LL's conduct. HT at 208:18 – 15; 513:15 – 23.

16. Deb Reh worked full-time at the Denver VA starting in September 2013. From May 2014 through the end of 2014, Reh was an inpatient psych nurse (RN) in the 7IPU north and south. She provided care to Patient LL during the entire time he was in the psych unit. Reh was supervised by Moline and Belarde. HT at 278:20 – 279:21).
17. Patient LL often subjected nurses to vulgar language while they were providing intimate care to him, such as cleaning his genitals. During those times, he asked them to perform sexual acts on him, such as, "suck my dick," and asked the nurses to "hold it" for him and have sex with him. HT at 137:13 – 138:10; 207:9 – 208:8; 284:14 – 285:1.
18. As a Navy veteran, Reh heard curse words regularly. However, Patient LL had his own curse words which were very hard to listen to. Patient LL regularly used words such as "motherfucker, cunt, bitch, whore, cunt breath [and] cock breath." HT at 280:8 – 281:3; Bennett ROI at 000164.
19. Patient LL grabbed Reh's buttocks despite there being a male nurse in the room with her. *Id.;* HT at 280:12 – 281:19.
20. The nurses on 7IPU were used to being called "bitch, you bitchy nurse, Nurse Betty," by patients. However, Patient LL's conduct was purposeful, intentional, and constant. HT at 140:12 – 20.
21. Patient LL called women "cunt breath." He told Bennett he wanted to "dick" her or put "his pee-pee" in her. HT at 30:3 – 13.
22. Besides the vulgar language, Patient LL also continuously and openly masturbated in front of nurses. It was not uncommon for patients to masturbate in hospitals, but normally they attempted to be discrete about it and were embarrassed if the nurses caught them. In contrast, Patient LL made sure the nurses saw him masturbate, including masturbating while they were providing him intimate care. HT at 30:1 – 32:13; 139:20 – 140:11; 246:8 – 13.
23. While Zahn changed his Depends or washed Patient LL, he would masturbate and say vulgar things such as, "'why don't you suck my dick,' or 'let me feel your titties,' or 'let me stick it in you,' or "touch my ball[s]." HT at 141:25 – 142:10.

24. The hospital gave Patient LL a stuffed animal as a soothing mechanism, and rather than calming him, he frequently masturbated into the stuffed animal. HT at 50:5 – 20.
25. Patient LL groped and grabbed Zahn, Bennett, and the other nurses' breasts and buttocks, throughout each day, on a daily basis. Bennett testified, "I would be changing him, and he would constantly touch your boobs, or pat your ass, or try to grope you." He also grabbed or attempted to grab the nurses' vaginas. HT at 30:1 – 6; 138:11 – 139:9; 236:23 – 25; 281:20 – 282:14.
26. Sarah Divina, who began working as a nurse for the VA in June 1991 and treating psychiatric patients since April 2007, was particularly disturbed by Patient LL's behavior. HT at 201:4 – 13. She testified that Patient LL was "violent with everyone, but he sexually targeted any female…I witnessed it, I experienced it. It wasn't pleasant." HT at 206:23 – 207:16.
27. Patient LL's conduct was "over the line, over the top;" much more egregious than any other psychiatric patient the nurses had treated. HT at 213:3 – 23.
28. Patient LL used filthy language, grabbed nurses' breasts and genitals and said horrible things 99.9 percent of every interaction a nurse had with him. Patient LL grabbed at Divina's breasts, called her names and made sexual references such as that "she wanted it, wanted what he had." He also tried to hit her and threw a dirty spoon at her. HT 207:18 – 208:8; Bennett ROI at 000149, 000165 – 000167.
29. In June 2014, Patient LL put his fingers between Bennett's legs on two occasions. The first time, he put his hand between her buttocks and legs. However, on the second instance, Patient LL put his fingers inside her vagina. When she felt his hand go inside of her, Bennett jumped and asked him why. Patient LL told her that he did it because Bennett "had a good ass." HT at 36:14 – 38:3; Bennett ROI at 000121 – 000154.
30. Bennett felt violated. Patient LL violated her body with his hands that were often covered in feces from masturbating in his own feces. HT at 58:21 – 25.
31. Patient LL grabbed Zahn's breast and buttocks. He also tried to grab her vagina, but she slapped his hand away even though she knew that she could be fired for putting her hand on the patient. HT at 138:11 – 19; Zahn ROI at 000102.

Duration, Frequency and severity of conduct

32. Patient LL verbally and sexually harassed the nurses in 7IPU the entire time he was admitted to the hospital. Belarde confirmed that Patient LL's conduct was pervasive because it occurred any time someone treated him. She also acknowledged the sexual assaults were severe. *Id.*; HT at 236:19 – 22; 281:20 – 282:14; 659:24 - 660:8; Bennett ROI at B-1; Zahn ROI at B-1.
33. It normally takes a psychiatric patient an adjustment period of a week to approximately 10 days to get acclimated to the medical care and for the medicines to start working on a patient. Nurses expect that the patients, generally, will be violent and non-compliant. However, Patient LL's conduct was egregious and continuous. HT at 29:13 – 25; 137:6 – 11; 140:24 – 141:5.
34. Between May 7 – June 21, 2014, Patient LL's physical sexual assaults of Bennett did not stop. Instead, his behavior escalated including constantly touching her breasts and buttocks. HT at 33:21 – 34:13.
35. Every time Zahn treated Patient LL or participated in his care, he was always grabbing her breast or her buttocks. HT at 138:11 – 139:3.
36. Divina described Patient LL's conduct as follows: "Every day, every day it was hitting. It was horrible, horrible abuse. And it was grabbing at breasts 99.9 percent of the time." HT at 236:19 – 22; *see also* HT at 281:20 – 282:14 (Reh testifying the conduct was frequent and continuous).

Management Knowledge of LL's Conduct

37. From the time Patient LL was admitted, in May 2014, until his discharge, October 2014, nurse management, doctors and executive leadership, were aware of Patient LL's egregious sexual harassing behavior but failed to stop his conduct. HT at 141:6 – 21; 208:18 – 209:15; 211:10 – 212:23; 302:1 – 304:4; Bennett ROI at 000132 – 000134; 000165 – 000167; 000168 – 000173.
38. Management, i.e. Belarde and Moline, acknowledged that they were aware that Patient LL engaged in inappropriate behavior against all the female nurses from the very beginning of his time on the unit. Hrg. Ex. 14, M, Belarde Dep. at 39:3-40:20 (hereinafter "Belarde Dep.") (explaining that it was almost immediately after Patient LL was admitted that they began to have problems with him touching the nurses on

the waist and breasts and using explicit language); 42:17-43:7 (explaining that the conduct started, "probably mid-May, first part of June."); Hrg. Ex. 11, N. Moline Dep. at 19:2-19, 37:17-38:8, 92:4-9 (hereinafter "Moline Dep.").

Management Response

39. Management blamed the nurses for Patient LL's sexual behavior toward them. The nurses were told that they should expect to be treated this way because of where they work. Some nurses were told that if they were not prepared to deal with patients like LL, they did not "have any business working in psychiatry," and they could leave. HT at 31:23 – 24; 145:19 – 146:18; 211:10 – 212:23; 260:16 – 261:5; Bennett ROI at 000128, 000134 – 000142, 000171.
40. Bennett, Zahn and other nurses were belittled and made to feel incompetent by management because they could not take care of Patient LL. *Id.;* HT at 238:13 – 239:19.
41. Management sent Bennett for more training, forcing her to work on the day shift, which resulted in lost pay and time to take care of personal matters. HT at 77:3 – 24; 526:25 – 527:25; Bennett ROI at 000218 - 000219.
42. Management's actions to provide additional training to Bennett were not calculated to stop the harassment by Patient LL. HT at 656:5 – 19.
43. Patient LL's chart was not "flagged" to alert nurses about his egregious conduct. In fact, management encouraged nurses not to write behavioral notes in his chart because doing so would make it difficult to place Patient LL in a nursing home or other care facility. HT at 88:18 – 89:1; 156:25 – 157:17; 255:10 – 21, Hrg. Ex. 3.

Complainants Continued Working with Patient LL

44. For a few weeks, Bennett did not have to care for Patient LL. However, the change was temporary. From July 8, 2014 through October 2014, Bennett was required to provide care, including intimate care, every other week when she worked the north side. HT at 69:13 – 73:19; 109:24 – 110:3; 525:25 – 526:21; 544:24 – 545:5; Bennett ROI at 000159.
45. Management never made any effort to separate Zahn from providing care to Patient LL. Management could have separated Bennett from Patient LL without changing shift. HT at 545:6 – 9; 656:20 – 657:25.

Agency did not Investigate the Harassment

46. Management did not conduct any investigation into the complaints of Patient LL's sexual harassment and assault of the nurses, despite being aware either through oral complaints from the nurses and notes in Patient LL's medical files. HT at 667:1 – 668:22; 538:10 – 539:9; Hrg. Ex. 9 at 999, 1000, 1205.
47. Belarde was aware Bennett alleged Patient LL fondled her, yet she did not speak to Bennett regarding the allegation. HT at 654:8 – 655:11.
48. The VA police conducted an investigation related to incidents that took place on June 15, 2014. This investigation occurred more than a month after Patient LL's admission in to unit and his continuous sexual harassment and assault of the nurses. Hrg Ex. 3. On June 17, 2014, the U.S. Attorney's office informed Officer Michael Robinson that they would not prosecute the case due to the patient's mental state. *Id.* Further, management did nothing with the police report and no actions were taken based on it. HT at 301:18 – 25; 539:2 – 9.
49. The police obtained affidavits from many of the nurses. Hrg. Ex. 3. In the affidavits, the nurses detailed the ongoing sexual harassment and management's failure to respond to it. They shared with the investigating officer their concern that management was directing the nurses to minimize written reports of Patient LL's inappropriate behavior. *Id.*
50. The police report also included information concerning an outstanding warrant pending against Patient LL for "sex assault," among other things. *Id.*; HT at 156:25 – 158:9.
51. Despite Patient LL having an outstanding warrant for sexual assault, the Agency did nothing with this information. Management claimed they were not aware of the warrant. *Id.*; HT at 562:8 – 21; 614:15-18.

Timing and Effectiveness of Agency's Actions

52. Although Patient LL was certified for short term treatment when he was admitted, he remained on 7IPU until his discharge on October 7, 2014. HT at 587:16 – 18; Hrg. Ex. 9 at 1512 – 1513.
53. When Patient LL was first admitted to 7IPU, he was not on any medications and was in behavioral dyscontrol. Hrg. Ex. 9 at 1582; HT at 669:20 – 25. The only way to

gain control of Patient LL's behavior was with medication, which takes time to become effective. HT at 514:15 – 23; 515:3 – 5; 670:1 – 8.

54. On May 11, 2014, Patient LL hit Divina and another female CNA while they attempted to care for him. He was agitated and cursed vulgar language at them. On this occasion, he was placed on an "AP1" or "Assault Precautions 1" order and put in seclusion for approximately 90 minutes. Hrg. Ex. 9 at 1521, 1531 – 1535.
55. On June 15, 2014, Patient LL began repeatedly punching a CNA (Marlo De La Cruz), in the chest. VA Police were called and an investigation conducted. Hrg. Ex. 3 and Hrg. Ex. 9 at 1191 - 1195.
56. Patient LL was not put on emergency medications until June 16, 2014. HT at 179:1 – 11; 522:1 – 4; 600:24 – 601:5; Hrg. Ex. 2; Hrg. Ex. 9 at 1183, Hrg. Ex. 12 at 42.
57. The Agency put Patient LL on emergency medications again, after Patient LL sexually assaulted a female patient on July 7, 2014. The Agency ignored the nurse's prior complaints, including the complaints of sexual assault toward the nurses. Hrg. Ex. 9 at 970 – 971; Hrg. Ex. 12 at 31; HT at 111:5 – 24; 609:3 – 8.
58. Divina, Reh and other nurses regularly submitted behavioral notes describing sexual harassment, assault and physical aggression but only minimal action was taken by the Agency. Hrg. Ex. at 972, 997, 999, 1142, 1184, 1191 – 1195, 1198, 1200, 1368, 1418, 1451, 1493, 1521, 1531 – 1535; Hrg. Ex. 3.
59. On June 16, 2014, orders were written to have a male nursing assistant assigned to Patient LL. On June 20, 2014, the order was changed from "male CNA only" to "male CNA preferred." Hrg. Ex. 12 at 36, 43.
60. The Agency did not put Patient LL on a behavioral plan until June 26, 2014. Hrg. Ex. 2 at 1; HT at 118:19 – 119:9; 120:21 – 121:5.
61. Patient LL's sexual harassing behavior continued from May 2014 through October 2014. Moline, Belarde, Divina and other witnesses testified that Patient LL's conduct never actually stopped, and in some instances escalated. HT at 545:10 – 17; 555:20 – 556:4; 33:21 – 34:13; 218:14 – 219:23; Hrg. Ex. 5, LL's Progress Notes, at 1414, 1632 (demonstrating the ongoing issues of sexual harassment and assault that have occurred "on a daily basis since admission").

The Agency Failed to Employ Other Possible Responsive Strategies

62. The Denver VA had, and still has, no policy or training in place for dealing with sexual harassment of staff by a patient such as someone like Patient LL. HT at 538:2 – 5; 577:8 – 578:4; 622:1 – 6.
63. The Agency has a policy entitled "Management of Disruptive Behavior," which calls for zero tolerance of disruptive behavior. However, management did not implement or comply with the policy. It did not use any of the tools that the policy provides, such as issuing Patient LL a warning letter and/or remedial documents. Hrg. Ex. 13; HT at 679:5 – 684:24.
64. The Agency's Seclusion and Restraint policy did not identify sexual assault as an action that would permit for seclusion and restraint of a patient. Hrg. Ex. 8; HT at 575:10 – 577:7.
65. Management could have treated Patient LL's conduct as criminal under its policies, thereby triggering police involvement. However, they did not do so. HT at 562:16 – 563:15; 572:14 – 574:9; 692:23 – 693:11.
66. Belarde never reported the extent of the sexual assault and harassment by Patient LL to her chain of command. She did not tell anyone that the conduct was unacceptable. HT at 662:1 – 7.
67. The Agency never required a male staff to be involved in treating Patient LL at all times. HT at 214:5 – 15; 543:25 – 544:7; 548:25 – 549:3.
68. The Agency did not attempt to recruit male staff to work on certain shifts and/or on 7IPU. HT at 215:12 – 216:22.
69. The Agency, especially management, failed to protect the nursing staff. They did not ensure the cameras and call buttons were working appropriately in the unit. HT at 45:5 – 15. They did not take the nurses' notes in Patient LL's medical file seriously, did not listen to their suggestions, or cared for their safety. They did not medicate Patient LL properly. HT at 243:7 – 244:13; 246:24 – 249:15; 251:24 – 255:21.
70. Agency could have implemented a policy requiring VA police to conduct a criminal check on involuntary holds, especially if the patient is continuously assaulting staff. HT at 692:14 – 22.
71. Other hospitals, including VA hospitals, regularly take additional actions the Agency failed to take to ensure their nurses are protected. HT at 302:24 – 303:16. For

example, if there is a behavior flag on a patient file, the police remain to observe the patient until the patient leaves and shut down any inappropriate behavior, escorting the patient out of the building. HT at 305:7 – 19.

Bennett Emotional Distress and Damages

72. Due to the sexual assaults and harassment by Patient LL, Bennett suffered life altering emotional and mental anguish. She experienced suicidal ideation and required involuntary hospitalization. HT at 79:21 – 82:8; 83:2 – 8; 343:3 – 344:10; 346:10 – 347:4.
73. Bennett suffered a nervous breakdown at the VA. She had visions of Patient LL masturbating on the stuffed animal, and felt repulsed by having to provide intimate care for him. She felt "tainted" and as if she was a person of "no value." HT at 84:14 – 85:18.
74. The blame and shame placed on Bennett by management's actions affected her emotionally on a daily basis. She cried, felt helpless, worthless and broken. *Id.*
75. To date, Bennett suffers from nightmares; no longer enjoys reading, hiking, and spending time with her son and daughter. HT at 86:15 – 25; 90:3 – 20.
76. Despite her religious beliefs, Bennett now has tattoos and a piercing in her genital area. She did this to reclaim control of her body and replace the emotional pain. However, her pain has not gone away. HT at 91:10 – 92:9.
77. Since October 2014, Bennett has seen therapist David Wood, and psychiatrist, Dr. Punjwani. She was diagnosed with Post Traumatic Stress Disorder (PTSD), with secondary diagnoses of major depression, insomnia, general anxiety and agoraphobia. HT at 318:7 – 15; 319:15 – 320:10; 335:15 – 336:3; 360:4-10; Hrg. Ex. 6.
78. Wood described Bennett as being "fairly emotionally and cognitively dysregulated." HT at 320:14 – 20. She experienced daily anxiety, panic attacks, and social fear. HT at 322:8 – 11. Bennett's emotional and psychological condition was due to the sexual harassment and assault by Patient LL and by the Agency's failure to support and protect her from Patient LL. HT at 327:22 – 329:16; 333:1 – 334:11; 336:9 – 338:1.
79. Bennett became isolated, less social and less interactive with her family. Her tolerance for stress severely decreased and she has become less equipped to handle normal stressors in life. HT at 340:4 – 24.

80. Bennett's personal and romantic relationships were severely affected. Her five-year relationship with Ravi, someone she loved deeply, ended due to her emotional state. *Id.*; HT at 81:6 – 23; 341:2 – 23.
81. Bennett was placed in a 72-hour psychiatric hold after her son, Tally, expressed immediate concern that Bennett was suicidal and unsafe. HT at 343:25 – 344:10; 346:10 – 348:6; 380:2 – 8; 498:18 – 501:3; Hrg. Ex. 6.
82. Bennett suffers from anxiety and depression. As a result, she has been prescribed various medication to alleviate the heightened anxiety, and panic attack episodes she experiences. HT at 315:24 – 316:16; 338:2 – 339:5.
83. Bennett continues to experience social phobias and fear of public spaces, and fear of being around individuals she doesn't know. She experiences anxiety and fear whenever coming into interaction with health professionals or patients that she doesn't know. She is afraid of being vulnerable, intimate, and hurt, which results in a protectiveness or guardedness. HT at 349:5 – 349:18.
84. Bennett's therapist testified she has not returned to her baseline level of functioning where she can return to employment. She will need further therapy for several months to a year. It may be possible that Bennett can return to work in two years. HT at 354:16 – 355:13; 348:18 – 349:10; 352:19 – 353:12.
85. Bennett will need to be on medications for sleep and mood stability indefinitely. HT at 387:22 – 388:7.
86. Bennett will never be able to return to work as a nurse or in the medical field given the extent of her emotional and psychological injury due to actions at the Agency and Patient LL. HT at 388:23 – 389:23.
87. Several witnesses, including Bennett's brother and son, testified about the dramatic changes they witnessed in Bennett's personality. For example, her brother Jason described Bennett as being a shell of her old self; she doesn't have the fire in her eyes; she lacks confidence and is unable to make decisions. HT at 450:7 – 453:15. She is no longer interested in doing the things she used to do before, such as baking, cooking, and taking care of the chickens. HT at 455:7 – 456:24; 461:16 – 462:8 459:1 – 462:8.

88. Bennett avoids crowds of people, especially if there are men in the crowd; does not go to family events unless they are at her house, and often finds an excuse to leave the family gatherings. She did not used to be this way. HT at 467:17 – 471:6.
89. Both Bennett's brother and son have observed drastic changes in her personality and mood. She is often crying for no reason, is moody and not as sociable. HT at 471:24 – 474;3; 474:18 – 476:20; 484:19 – 486:19; 491:25 – 492:11. For example, her son, Tally, described Bennett's temperament as combative and confrontational. She yells more and has even kicked out family members from her home. This did not happen prior to her experience at the Agency. HT at 495:4 – 23; 496:3 – 497:25.
90. Bennett's son has noticed a role reversal in his relationship with his mother. Whereas before she would be his caretaker, now he finds himself looking out for her and taking care of her. He helps her through the tough times, when she is sad or angry, as a parent would do to a child. He also worries for her safety. He is often afraid she will hurt herself. HT at 501:14 – 502:16.
91. Bennett incurred medical expenses in the amount of $68,083.52 for treatment related to the sexual assaults and harassment as well as in an inpatient psychiatric care facility. Bennett's therapist anticipates she will continue treatment for approximately 9 – 12 months, two sessions a month. She will then transition to once a month for an indefinite period. Bennett will also continue seeing Dr. Punjwani once every 1 to 2 months. HT at 352:13 – 353:12; 385:8 – 10; Hrg. Ex. 6 and Hrg. Ex. 15.

Zahn Emotional Distress and Damages

92. Zahn was diagnosed with PTSD, panic disorder, and general anxieties by her therapist David Wood and psychologist Dr. Punjwani. Prior to her treatment with Wood and Dr. Punjwani, Zahn had never been in therapy or did not take medications for such medical conditions. Instead, Zahn had been self-medicating with alcohol. HT at 358:22 – 359:4; 359:24 – 360:7; 391:4 – 22.
93. Zahn suffered a number of panic and anxiety disorders following the sexual harassment and assault, requiring extended psychotherapy and leaving her with behavioral disorders that require ongoing treatment. HT at 162:8 – 20; 357:9 – 358:21; Hrg. Ex. 4 and Hrg. Ex. 7.

94. These disorders cause her to "flee" when feeling anxious or panicked, sometimes leading her to travel hundreds of miles seeking a safe environment. She was involuntarily hospitalized for psychiatric care out of concern that she would harm herself and continues to struggle to maintain a normal life. HT at 170:14 – 171:25; 360:11 – 361:13; 362:17 – 363:5.
95. Zahn's self-esteem and self-worth was greatly affected by the sexual harassment. Zahn felt like a failure because she was not strong enough to walk away from Patient LL's abusive sexual conduct. HT at 162:5 – 163:24.
96. As a result of the sexual assault and harassment, Zahn suffered from anxiety, stomach pains, nausea, and vomiting. She was afraid to go certain places; experienced heart palpitations, especially when going to VA. HT at 151:14 – 152:10.
97. Zahn sought treatment for her gallbladder and ultimately had it removed, as she was convinced the symptoms she experienced had to be due to a physical condition rather than mental health condition. HT at 152:7 – 153:4.
98. However, Zahn continued to experience anxiety. She would hyperventilate, and could not focus or concentrate while at work. In April 2015, Zahn experienced a debilitating panic attack. As soon as she arrived at the psych unit, Zahn "felt an impending doom," and ultimately had a nervous breakdown. HT at 153:5 – 154:7.
99. Since that time, Zahn has become withdrawn, angry, hostile, and has had countless panic attacks, some of which have resulted in her children finding her passed out on the bathroom floor and having to call 911. HT at 161:11 – 162:4; 395:8 – 14; 425:1 – 10.
100. Zahn also attempted suicide. At one of the lowest points in her life, she put a gun to her head. She lost her job; her home and her children were suffering. Her self-worth, dignity and reputation had been ruined so she was looking for a way out. She believed her family would be better off if she killed herself. HT at 163:19 – 166:25.
101. Both her son Christopher and her partner Eric Phillips worry that Zahn will try to hurt or kill herself, which is "deeply troubling and terrifying" for Christopher. HT at 407:7 – 408:19; 435:6 – 436:17.

102. In 2016, Zahn went to a drug rehabilitation facility that treats panic disorders and depression. She was admitted for 23 days. HT at 169:4 – 13. She voluntarily checked into another inpatient facility in 2017. HT at 170:14 – 22.

103. For a period of time in 2015, Zahn was homeless. She was living in her car. She sent her daughter to live with a friend in Florida while her son moved in with his girlfriend in Canada. This experience was completely humiliating and devastating for her. HT at 166:21 – 167:22.

104. Zahn's personal relationships were also greatly affected due to the sexual assaults and harassment she experienced. For example, her partner, Phillips, described her as someone who ". . . loved her job…Wasn't ever scared to challenge a lack of leadership or question something that didn't make sense." HT at 416:16 – 25. In contrast, Zahn now is very different: she does not get involved in anything. She stays away from people, lacks confidence and is very emotional. HT at 417:4 – 10.

105. Zahn's son, Christopher, has always lived with his mom and described her as someone who was vibrant, active, and healthy prior to the sexual harassment and assault by Patient LL. HT at 394:1 – 395:7. Now she is dramatically different: constantly depressed, always emotionally distraught and panicky. HT at 394:21 – 395:19.

106. Zahn's severe panic attacks were/are triggered by simple things such as a door locking, which reminds her of being in 7IPU, a locked unit, or older white men who look like Patient LL. The attacks cause her to have difficulty breathing; she gets anxious and nervous and it is difficult for her son or partner to calm her down. Zahn's panic attacks occur almost every day, depending on what is going on in her life. HT at 160:10 – 164:3; 401:16 – 402:10; 418:3 – 18; 423:1 – 13; 424:2 – 426:11. Her son has found her on the floor multiple times, passed out, hyperventilating. HT at 395:8 – 12.

107. Zahn has difficulty leaving her house, and will only do so with her son or her partner. However, she sometimes has panic attacks when out in public and she has to be removed from the situation very quickly. HT at 169:22 – 170:13; 395:15 – 396:6; 399:13 – 19; 418:3 – 419:5.

108. Zahn also experienced changes in appetite, weight loss, and difficulty sleeping, including nightmares, due to her anxiety and stress. HT at 363:8 – 15; 363:25 – 364:6; 367:16 – 368:3. For example, her son brings her food to eat but she only eats a few bites. Similarly, her partner testified she eats very small meals. Both noticed the significant weight loss. HT at 396:19 – 25; 397:17 - 398:3; 422:1 – 12.

109. While Zahn sleeps, her son checks on her multiple times at night and has seen her having panic attacks in her sleep. To this day, it still happens about twice a week, but closer to the time of the assault and harassment, it occurred even more frequently. It never happened prior to the assault and harassment by Patient LL. HT 398:18 – 399:12.

110. Zahn's therapist was concerned about Zahn's self-harm or suicidal ideation, particularly because she is impulsive. She was involuntarily hospitalized more than once as a result. HT at 364:18 – 365:9.

111. On one occasion, Wood "attempted to do an M1[2] on Jo when she was visiting Dr. Punjwani for medication management appointments," and she knew the M1 was coming. HT at 369:16 – 23. Zahn actually fled the office, but was ultimately detained and hospitalized. *Id.* On another occasion, Zahn was hospitalized against her will because she would not commit to not harming herself. HT at 370:1 – 15.

112. Zahn will need to continue therapy for another 18 to 24 months, about twice a month, along with continuing to see Dr. Punjwani once every 1 to 2 months for medication management. HT at 385:6 – 10; 387:12 – 21. She will, however, need to be on mood stabilizers indefinitely. HT at 388:19 – 22.

113. Zahn also will not be able to return to any employment until her therapist sees an "extended period" of consistency in "basic daily self-care and time management, to stress tolerance and anxiety management," which he has not yet seen at all. HT at 390:7 – 21.

114. Even once that occurs, she will never be able to re-enter the nursing or medical field, due to the sexual assault and harassment she experienced, which is particularly

[2] "M-1" is a form approved by the Colorado Department of Behavioral Health that evaluators use to determine if an individual's behavior is so risky that they need to be held in a hospital against their will.

devastating for Zahn given that her entire life has been dedicated to the field and her identity shaped around it. *Id.*

115. Zahn's socializing habits have also changed drastically. Before 2014, she used to be very outgoing and friendly. Now, Zahn rarely goes out, does not socialize, is very withdrawn and isolated. HT at 399:20 – 401:21; 402:11 – 15; 419:15 – 420:20.

116. Phillips' and Zahn's relationship has changed drastically. She used to accompany him when he traveled for work but now she is simply emotionally unable to join him. They used to go to the movies and dinners but do not do that anymore. HT at 417:24 – 418:2; 421:16 – 25.

117. Their sexual relationship has been impacted as well. Zahn would have panic attacks and break down into tears while they were being intimate. He cannot touch or hug her and is much more cautious in how he approaches her now. HT 443:3 – 445:7.

118. While the sexual assault and harassment was going on, in the summer of 2014, they did not have any significant sexual relationship. Although it has improved a bit since then, their relationship has never fully gotten back to where it was before the sexual harassment and assault. *Id.*

119. Christopher's relationship with his mother has been impacted greatly. Not only does he worry that she will hurt herself, he has also been affected mentally and emotionally. It hurts him to see someone he loves so much be in so much pain. It makes him depressed and gives him anxiety, causing him not to sleep well either. He wishes he had his old mom back, to "see her healthy again, mentally, physically, and emotionally." HT at 408:20 – 409:16; 413:6 – 414:6.

120. Zahn has seen a therapist and psychiatrist for years to address the mental and emotional pain and suffering. Zahn's past medical expenses total $221,964.55. Hrg. Ex. 4 and Ex. 7.

121. She will continue to see a therapist for approximately another two years, with two sessions a month. Further, Zahn will need to continue seeing Dr. Punjwani, on average, one every 1 to 2 months. HT at 384:22 – 385:10; 386:12 – 21.

IV. LEGAL STANDARD AND ANALYSIS

Harassment of employees that would not occur but for the employee's sex (female) is

unlawful if sufficiently severe or pervasive. *Wibstad v. U.S. Postal Service,* EEOC Appeal No. 01972699 (Aug. 14, 1998). To prevail on a claim of discriminatory harassment, Complainants must prove, by a preponderance of the evidence, that because of their sex (female), they were subjected to conduct so severe or pervasive that a reasonable person in their position would have considered it hostile or abusive. *See Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 22 (1993) ([T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to their employees because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality). That conduct should be evaluated from the objective viewpoint of a reasonable person in the victims' circumstances. *Enforcement Guidance on Harris v. Forklift Systems, Inc.,* EEOC Notice No. 915.002 (March 8, 1994). Only if Complainants satisfy their burden of proof with respect to both of these elements, motive and hostility, will the question of Agency liability for harassment present itself. *Complainant v. Dep't of Veterans Affairs,* EEOC App. No. 0120132783 (Sept. 11, 2015).

When the Agency knew or should have known of the harassment, it can only avoid liability by establishing that it took prompt, effective remedial action to stop the harassment. *See Weaver v. U.S. Postal Serv.*, EEOC App. No. 0120065324 (Aug. 26, 2008). Where the Agency took some action but there is a delay to responding to the complaints or the harassment continues, the Agency is liable, regardless of the fact that it may have taken some steps to address the harassment. *See, e.g., Rockymore v. U.S. Postal Serv.*, EEOC App. No. 0120110311 (Jan. 31, 2012) (waiting a week to talk to the harasser was not prompt remedial action); *Coley v. U.S. Postal Serv.*, EEOC App. No. 0120062109 (Apr. 11, 2008) ("Given the severity of complainant's allegations, specifically the physical touching, the agency should have taken immediate measures to correct the harassment.").

This analysis applies to harassment by a patient against a nurse as well. The Commission has consistently held that,

> An Agency may be responsible for the acts of non-employees, with respect to harassment of its own employees in the workplace, where the Agency (of its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing such claims, the Commission considers the extent of the Agency control and any other legal responsibility which the Agency may have with respect to the conduct of such non-employees.

Brady v. Dep't of Veterans Affairs, EEOC App. No. 0120100292 (Mar. 30, 2011); *see also* 29 C.F.R. § 1604.11(e) ("An employer may also be responsible for the acts of non-employees"). Time and again, the Commission has acknowledged that an Agency can be liable for the harassment of a doctor or nurse by a patient where the evidence establishes the requisite evidence of a prima facie case of harassment. *See Baker v. Dep't of Veterans Affairs*, EEOC App. No. 0120071840 (July 27, 2007); *Carroll v. Dep't of Veterans Affairs*, EEOC App. No. 01930567 (1993). The Commission has also held that the duty of an agency to protect its employees is *not* reduced by the nature of the work the agency performs or the customers it serves. *See Larae S. v. Dept. of Justice*, EEOC App. No. 0120143209 (Mar. 9, 2017); *Lemons v. Dep't of Justice*, EEOC App. No. 0120081287 (Apr. 23, 2009) *req. for recon. denied*, Req. No. 0520090501 ("Additionally, we reject the agency's suggestion that its duty to protect its employees in this case is somehow reduced by the nature of a prison facility.").

The remedial action taken by the employer must be prompt and reasonably calculated to end the harassment. *See EEOC Policy Guidance on Current Issues of Sexual Harassment*, N-915-050, No. 137 (March 19, 1990). It must include ensuring that the employee and harasser do not continue to interact. *Sedillos v. Dep't of Energy*, EEOC App. No. 01951256 (Sept. 26, 1996). In *Sedillos*, the Commission found that the harasser's "reassignment was ineffective in preventing him from having contact with" complainant because he was reassigned across the hall and was therefore too close to complainant. Therefore, where an alleged harasser is relocated, the relocation must be effective in actually preventing regular contact between complainant and the alleged harasser. The corrective action must also include investigating the allegations of harassment "promptly and thoroughly." *Tom v. Dep't of Health & Human Servs.*, EEOC App. No. 01966875 (Oct. 1, 1998). The Commission's Guidance states:

> 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 . . . 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.

EEOC Policy Guidance on Current Issues of Sexual Harassment, N-915-050, No. 137 (March 19, 1990)*; see also Douglas v. U.S. Postal Serv.*, EEOC App. No. 0120091037 (Oct. 26, 2010) (explaining that when an employer becomes aware of alleged harassment, the employer has the duty to investigate such charges promptly and thoroughly.) (emphasis added).

"The mere fact that the agency took some remedial action by initiating an investigation does not absolve it of liability where that action was ineffective." *Logsdon v. Dep't of Agric.*, EEOC App. No. 07A40120 (Feb. 28, 2006); *see also Cheeks v. Dep't of the Army*, EEOC App. No. 0120091345 (Feb. 1, 2012) ("Taking only a stop-gap remedial action does not absolve the Agency of liability where that action is ineffective."). If the agency does not conduct an immediate investigation into the allegations of harassment, it will be liable for coworker harassment, even where the Agency takes other corrective actions. *Complainant v. Carter*, EEOC App. No. 0120130331 (May 29, 2015) (finding the Agency liable for coworker harassment as the supervisor took 21 days to address the harassment with the harasser, and the supervisor refused to remove the harasser from the workplace); *Sedillos,* EEOC App. No. 01951256 (finding that despite verbally reprimanding the harasser, reassigning him for 30 days, and requiring him to attend sexual harassment training, the agency's actions did not constitute prompt and effective action because "the Director immediately should have initiated an investigation.") (emphasis added); *see also Rockymore v. U.S. Postal Serv.*, EEOC App. No. 0120110311 (Jan. 31, 2012) (waiting a week to talk to the harasser was not prompt remedial action); *Coley v. U.S. Postal Serv.*, EEOC App. No. 0120062109 (Apr. 11, 2008) ("Given the severity of complainant's allegations, specifically the physical touching, the agency should have taken immediate measures to correct the harassment.").

When the alleged harasser continues to engage in inappropriate conduct after the agency takes "corrective," action, the agency will still be liable for the harassment because the corrective action was not effective. *See Weaver v. U.S. Postal Serv.*, EEOC App. No. 0120065324 (Aug. 26, 2008) (finding the Agency liable for harassment because management's statement to the harasser to "stay away from [complainant]…did not include any sort of admonishment of the [harasser's] behavior or a clear statement communicating that the [harasser's] behavior was inappropriate…[and it] was insufficient to ensure that [he] did not engage in similar behavior in the future."); *Cooper v. U.S. Postal Serv.*, EEOC App. No 01954737 (Feb. 27, 1998) (finding the agency liable for harassment based on the harasser's continued inappropriate conduct and the

"the dearth of evidence presented by the agency to clearly indicate what actions it took to fully investigate appellant's allegations of a discriminatory hostile work environment and to eradicate that atmosphere."); *Palmer v. Dep't of Justice*, EEOC App. No. 01953022 (Feb. 27, 1998) (holding that the agency was liable for the harassment because, "management staff failed to both understand and convey the serious nature of the harassment occurring," and highlighting that there was "insufficient evidence that the agency placed strong, immediate emphasis on the seriousness of the matter."); *Marr v. Air Force*, EEOC App. No. 01941344 (June 27, 1996) (holding that the agency was liable for the harassing behavior, despite disciplining the harasser, particularly because "witnesses indicated that Supervisor 1's remarks and 'jokes' continued in the work environment.").

A. Complainants Were Subjected to Severe and Pervasive Sexual Harassment by Patient LL.

The overwhelming evidence in the record established that Patient LL subjected Bennett, Zahn and the majority of the nursing staff, in particular female staff, in 7IPU to unwelcome sexual conduct including sexual assaults (groping of breasts, vagina, and buttocks), verbal requests for sex, vulgar and sexually explicit language as well as exposure to semen due to Patient LL's continuous act of masturbation. The sexual harassment was severe, pervasive and hostile. It occurred on a daily basis while Zahn, Bennett or the other female nurses tended to his care. From the day Patient LL was admitted (on May 7, 2014) until the day he was discharged (on October 7, 2014), Bennett, Zahn and the other nurses risked their safety and well-being every time they tended to his medical needs. Moline and Belarde agreed that Patient LL's conduct was uniquely egregious and flagrant.

Also, there is no question that the conduct was because of their sex and that Patient LL knew what he was doing. Zahn, Bennett, Divina and Reh all testified credibly that Patient LL was well aware of what he was doing. While he may have been physically hostile toward male nurses, he did not sexually harass them. Patient LL specifically targeted the female nursing staff. He became sexually aroused when they provided intimate care and proceeded to make vulgar sexual comments as well as sexually assault and grope them, including but not limited to inserting his finger in Bennett's vagina.

The Agency's argument that Complainants cannot prove a prima facie case of sexual harassment because of the context in which Patient LL's conduct occurred, i.e., admitted involuntarily into a psychiatric ward, is completely misplaced and offensive. The Agency cannot absolve itself of its responsibility to ensure a safe, harassment-free work environment for its medical staff simply because Patient LL was a psychiatric patient with dementia. Nothing in Title VII of the Civil Rights Act exempts agencies from prohibiting or preventing sexual harassment of employees by patients. The Commission has repeatedly held that agencies such as the VA and the Bureau of Prisons cannot absolve themselves of responsibility or liability simply because of the population they serve, i.e. inmates and patients. *See Larae S.*, EEOC App. No. 0120143209; *Lemons*, EEOC App. No. 0120081287; *Baker*, EEOC App. No. 0120071840; *Carroll*, EEOC App. No. 01930567.

As for Patient LL's diagnosis, again it does not matter what a patient's diagnosis is, the Agency must ensure a safe work environment, free of sexual harassment for all of its employees. In this case, Patient LL was diagnosed with dementia, among other ailments. Moline's testimony that Patient LL's dementia ("frontal lobe") caused the sexually and socially inappropriate behavior and therefore, his conduct was unintentional, was not credible. HT at 513:24 – 514:14. Nowhere in the ROI, medical records or progress notes for Patient LL is there a doctor's diagnosis that "frontal lobe" dementia causes sexually and socially inappropriate behavior. *See* Hrg. Ex. 9, Bennett and Zahn ROIs. In addition, Moline's testimony was not credible because she did not care for or interact with Patient LL on a regular basis and thus, she could not attest to his intent. HT at 536:17 – 537:8. Witnesses Divina and Reh both testified credibly that Patient LL knew exactly what he was doing. Since they cared for and treated him regularly, they were in a better position to determine Patient LL's level of competency and intent. Their credible testimony corroborated Zahn's and Bennett's experience with Patient LL. In addition, most of the medical progress notes for Patient LL detail how he understood when instructed to change his behavior or given other instructions by medical staff. *See* Hrg. Ex. 9.

Bennett, Zahn, Reh and Divina testified, and to an extent agreed with the Agency, that it takes time for a patient to become acclimated to the hospital environment and for the medicines to start taking effect. It usually takes approximately 10 days. Yet, Patient LL's sexually inappropriate behavior was never under control as exemplified by the incident where he groped a female patient, two months after he was admitted into 7IPU. Based on the totality of the

evidence in the record, a reasonable person in Zahn's and Bennett's position would conclude that Patient LL's sexual conduct was hostile and motivated because of the victim's gender.

B. Agency Knew Patient LL Was Engaging in Egregious Sexual Conduct and Failed to Take Effective Corrective Action.

1) Agency management admitted they knew of Patient LL's sexual conduct.

It is undisputed that the Agency was aware of Patient LL's sexual assaults and harassment of Bennett, Zahn, and the other female nurses in 7IPU. From day one, Patient LL was physically abusive and hostile toward the staff. Both Belarde and Moline acknowledged that Patient LL's sexually inappropriate conduct began immediately after he was admitted. They also acknowledged they were made aware of Patient LL's inappropriate conduct both by the nursing staff and the VA police. Moline's and Belarde's testimony that Zahn never complained to them of sexual harassment by Patient LL is not credible. There is ample evidence in the record that refutes their lack of knowledge regarding Zahn's complaints. Zahn testified credibly that she told management, including Moline and Belarde. She also submitted a voluntary witness statement in June 2014, when the VA police was called to 7IPU South due to Patient LL's physical assault of a male CNA. The statement described how Patient LL grabbed her buttocks. Zahn explicitly stated this was not an isolated incident and described feeling violated and sexually harassed by Patient LL. Hrg. Ex. 3 at 000717.

Bennett also testified credibly that she reported the sexually inappropriate conduct to management, including Belarde and Moline. Both Zahn and Bennett wrote several disruptive behavior reports, filed police reports, and complained to management and the union repeatedly. However, their complaints went unheard. Instead of investigating the complaints, Belarde and Moline ignored them. Zahn, Bennett, Divina and Reh testified credibly that Belarde and Moline repeatedly told them and the other nurses that if they could not handle working in a psychiatric unit, then they should find another job and/or quit. They also testified credibly that they were told not to include details of Patient LL's inappropriate conduct in the progress notes because if they did, it would be more difficult to discharge and transfer Patient LL to an assisted living facility. The police officer noted in his report that the nurses explained to him that "they were encouraged by doctors, social workers and the treatment teams not to document or report the assaults, sexual assaults and inappropriate language." Hrg. Ex. 3 at 000707. In fact, the police officer spoke to the on call Psychologist, Dr. Benjamin Metelits, and informed him of what the

nurses reported. Dr. Metelits informed the officer he would speak with Patient LL and inform the resident Psychologist. Thus, all medical staff at 7IPU was aware of the sexual harassment and assault of nurses by Patient LL.

2) Agency's actions were not prompt or reasonably calculated to end harassment.

There is evidence in the record that the Agency took some action to prevent Patient LL's conduct. For example, the Agency placed Patient LL on emergency medications twice, developed a behavioral plan which Patient LL was required to adhere to and on one occasion called the VA police to report the physical assault of a staff nurse (CNA Marlo De La Cruz). The Agency also petitioned the court for involuntary medications but did not administer them. Lastly, the Agency initially issued orders stating that a male nursing assistant should be assigned to Patient LL. However, that order was changed from "male CNA only" to "male CNA preferred." *See also* Hrg. Ex. 9 at 857.

However, the Agency's actions were not prompt or reasonably calculated to end the harassment. Instead of having an "offensive plan" on how to handle sexual harassment of medical staff by patients, the Agency was on the "defensive" the entire time that Patient LL was in 7IPU.

a) The Agency has no policy or procedure prohibiting sexual harassment by patients.

One of the most glaring failures by the Agency is its complete disregard in developing and implementing a policy that prevents sexual harassment of staff by patients. To this day, the Denver VA does not have an explicit policy addressing this topic. The Agency's lack of policy or procedure exacerbated the sexual assaults by Patient LL and enabled management's complete disregard for their employee's safety. Both Moline and Belarde failed to recognize that Zahn, Bennett and all the nursing staff are entitled to a workplace free of harassment and sexual assaults. Their focus on patient's rights above all else led to their reckless disregard for the well-being of their staff.

At the hearing, neither could articulate what was expected of them as managers when a patient sexually harassed an employee. They also acknowledged they did not conduct an investigation or speak directly with Zahn and Bennett regarding the specific allegations of sexual harassment they reported to management, the union or the police. In fact, Belarde admitted that it never occurred to her that Patient LL's conduct could be criminal or that she had to do

something to protect her nurses. HT at 692:23 – 693:11. Instead, the evidence shows that management blamed Zahn and Bennett for Patient LL's conduct. They along with other nursing staff were told to get used to the treatment and if they couldn't handle it, they should quit or get another job.

b) The Agency did not investigate the allegations.

As soon as an agency has knowledge of allegations of harassment, the law requires that it investigate the allegations immediately. Where there is even a delay of a week, the response is not sufficiently prompt. *Rockymore*, EEOC App. No. 0120110311. Here, management never conducted an investigation into the allegations of sexual harassment and assault. HT at 538:10 – 539:9; 654:8 – 20. In fact, based on their testimony at trial, it was vividly clear that Belarde and Moline did not understand their obligation as supervisors with respect to the anti-harassment EEO laws. They did not realize that as supervisors, they were required to investigate the allegations or at a minimum report them to their chain of command and/or the EEO office for investigation. Their failure to investigate, or at a minimum talk with Bennett and Zahn about their allegations, further demonstrates the Agency's complete negligence and disregard for their employees. Such disregard is further evidence of the Agency's failure to take effective corrective action.

While there is evidence that the VA police conducted a brief investigation into the physical assault incident that occurred on June 15, 2014, that investigation was not an investigation directed at any of the allegations made by Complainants. It also was not a prompt investigation since it occurred over a month after Patient LL started sexually harassing and assaulting the nurses. Moreover, the investigation was ineffective, as management allowed Patient LL's conduct to continue in spite of the police report and investigation. HT at 301:18 – 25; 538:6 – 539:9. Accordingly, the June 15th police investigation does not shield the Agency from liability. *Logsdon*, EEOC App. 07A40120; *see also Cecille W. v. Dep't of Veterans Affairs*, EEOC App. No. 0120181765 (Aug. 22, 2019) (indicating that where some investigation is done, it is not specifically an investigation into complainant's allegations of harassment, it will not shield the Agency from liability).

c) The behavioral plan, emergency medications and other agency actions were ineffective.

The Agency argues that it placed Patient LL on an interdisciplinary plan of care when Patient LL was admitted on May 7, 2014. The plan was amended on May 11, 2014 to address Patient LL's impulse control and acts of physical aggression after being placed in seclusion. (*See* Agency's Closing Argument and Agency's Response to Interrogatory No. 12). On June 26, 2014, Patient LL was also put on a behavioral plan. The plan identified behaviors that were inappropriate, including grabbing staff, using foul or inappropriate sexual language. It also "emphasized" helpful behaviors. The plan was acknowledged and signed by Patient LL. Hrg. Ex. 2.

While the evidence does show that the Agency took these actions, they were neither prompt or effective. In fact, the court is unable to reconcile how the Agency could genuinely believe that by placing Patient LL on a Behavioral Plan the sexual and inappropriate conduct would cease. If Patient LL's dementia was so severe that he could not control his actions, as testified to by Moline, why did the Agency believe that Patient LL would adhere to the behavioral plan? It is clear to this court that the Agency's management officials had no idea how to manage the care of Patient LL. In fact, Belarde admitted that Patient LL was not expected to correct his behavior in accordance with the behavior plan. HT at 676:11 – 678:22. Moline and Belarde were completely inept at developing solutions and/or seeking help from the doctors and psychologists to develop a medical plan that fully addressed the sexually inappropriate behavior of Patient LL while at the same time balancing the patient's rights and medical needs.

Management also did not properly assess the gravity of Patient LL's conduct and the drastic harm it caused Bennett and Zahn. If the Agency had properly assessed Patient LL's conduct, it would have immediately sought legal intervention to administer emergency medication soon after he was admitted to 7IPU. It also should have sought additional guidance from legal counsel regarding their legal obligation to provide care to a patient who had an outstanding arrest warrant from Adam's County Sheriff's Office for sexual assault – the same conduct he engaged in with the nursing staff, in particular Zahn and Bennett, in 7IPU. Hrg. Ex. 3 at 000710 - 000713.

Likewise, although management temporarily stated that a male staff member should always be involved in providing care to Patient LL, this did not happen and was never enforced.

The two-to-one care did not stop the harassment and assault. HT at 214:5 – 15; 543:25 – 544:7; 548:25 – 549:3.

d) Agency did not separate the harasser from the Victim.

Despite being aware of Patient LL's sexual harassment and assault of Complainants from the beginning, management never separated Patient LL from Zahn's care. HT at 545:6 – 9; 656:20 – 657:5. After Bennett endured over a month of sexual harassment and assault by Patient LL, management temporarily removed her from providing him care after he digitally penetrated her. HT at 69:13 – 70:24; 109:24 – 110:3; 525:25 – 526:21; 544:24 – 545:5. This lasted only a few weeks, and ultimately, she was forced to provide care for him again, including intimate care, through October 2017. *Id.*

e) The Agency could have but failed to take additional actions.

The Agency could have taken additional actions to stop the sexual harassment by Patient LL but failed to do so. For example, the Agency never complied with its own Management of Disruptive Behavior Policy or issued any of the documents or letters to Patient LL called for by the policy. Hrg. Ex. 13; HT 679:5 – 684:24. Belarde conceded that although the policy states there is "ZERO TOLERANCE for disruptive, threatening or violent behavior," individuals, such as Patient LL, may be given several chances before any action is taken. *Id.*

In addition, the Agency's seclusion and restraint policy should have stronger and specific language to include sexual assault as an action that qualifies as an eminent risk. HT at 575:10 – 577:7. Further, under the seclusion and restraint policy, the Agency could have treated Patient LL's conduct as criminal and asked for police involvement. HT at 562:16 – 563:15; 572:14 – 574:9. The Agency did not take any of these actions.

With regard to staffing, the Agency should have required that a male staff person care for and treat Patient LL at all times. If there were not enough male nurses, the Agency should have recruited male staff from other units to work on 7IPU. In the alternative, the Agency could have hired additional nurses so that at least two nurses were available per shift to care for Patient LL.

The Agency could have also requested to have a security guard or police officer stationed outside Patient LL's room to assist whenever Patient LL engaged in disruptive behavior. It also should have allowed Zahn, Bennett and the other nurses to put a "behavior flag" in Patient LL's medical file to alert staff about Patient LL's dangerous behavior. In some VA facilities, if there is a behavior flag on a patient file, the police remain to observe the patient until the patient

leaves/discharged and the police shut down any inappropriate behavior, escorting the patient out of the building. HT at 305:7 – 19.

According to Belarde and other witnesses, the Agency has established committees made up of doctors and other personnel to review patient conduct. Yet, nurses (RN, LPN, CNA) do not participate in these committees. HT at 552:19 – 554:20; 681:18 – 684:5. The Agency should have nursing representatives in these committees to ensure that their voices are heard, and their recommendations considered since they are in the front line of patient care. Perhaps if the doctors, psychologist, and nurse managers had listened to the nursing staff and followed through with administering appropriate emergency medication, Patient LL's conduct would have been curtailed at the onset.

Lastly, the Agency could have protected the nursing staff by ensuring that the cameras and call buttons were working properly in the unit. HT at 45:5 – 15. Agency could have implemented a policy requiring VA police to conduct a criminal background check and notify management when a patient, who is admitted involuntarily, has a criminal record or arrest warrant pending, as Patient LL. HT at 692:14 – 22. And as discussed above, the Agency should have implemented a sexual harassment policy explicitly detailing what management must do when medical staff is sexually harassed by a patient.

Clearly, there were many other actions the Agency could have taken to end the sexual harassment by Patient LL. Yet, the overwhelming evidence on the record establishes that the Agency failed to take effective corrective action to end the sexual harassment by Patient LL.

C. Agency is Liable for Patient LL's Sexual Harassment of Complainants as well as Nurses Sarah Divina and Deborah Reh.

In sum, there were many additional actions the Agency could have taken to stop and prevent Patient LL's sexual harassment of Zahn, Bennett and the other female nurses. The evidence at trial established that the Agency failed to take prompt and effective action. The action taken by the Agency was not reasonably calculated to end the harassment. Therefore, the Agency is liable for Patient LL's sexual harassment of Complainants Zahn and Bennett.

In addition, the Agency is also liable for the sexual harassment of nurses Divina and Reh. Complainants are correct in their assertion that the Administrative Judge has wide discretion to develop the record and rule on issues other than those raised in the complaint itself. (*See*

Complainant's Closing Argument on Liability at 31). The record established that Divina and Reh were subjected to unwelcome conduct based on their sex, they reported the sexual assaults and harassment, however, the Agency failed to take effective corrective action. At trial, both nurses testified to the emotional toll Patient LL's conduct had in their personal lives. Reh in particular described having to seek mental health counseling to grasp and cope with what Patient LL did to her while she worked at the Denver VA. HT at 302:21 – 303:10. Even in 2020, when she was called to testify at trial, Reh admitted that she had to work hard not to cry during her testimony at trial. *Id.* Both Reh's and Divina's testimony was very compelling and credible. To this day, they are visibly shaken and traumatized not only by what Patient LL did to them but by the lack of action by management. Based on this court's assessment of their demeanor and testimony at trial, Reh and Divina, just like Bennett and Zahn, felt disrespected and devalued by Agency's management, especially Belarde, Moline and some of the doctors. In sum, the Agency's actions exemplified a callous disregard to the safety and well-being of the nursing staff.

Unfortunately, the court cannot award Divina and Reh any compensatory damages because they did not file an individual EEO complaint. Instead, the court will recommend actions that the Agency should take to ensure such conduct is not repeated and tolerated at the VA.

V. DAMAGES

Having found the Agency liable of discrimination, Complainants are entitled to make-whole relief, (*i.e.,* to be placed in the position she would have been absent the discrimination). 29 C.F.R. § 1614.501(a). A complainant who establishes unlawful intentional discrimination under Title VII may receive compensatory damages for non-pecuniary losses (*e.g*., pain and suffering, loss of health) and past and future pecuniary losses (*i.e*., out-of-pocket expenses) as part of this make-whole relief. 42 U.S.C. § 1981a(b)(3); *See also Complainant v. U.S. Postal Serv.*, EEOC App. No. 0720130028 (June 10, 2015). Compensatory damage awards are limited to the sums necessary to compensate a complainant for the actual harm suffered as a result of the agency's discriminatory conduct. In *West v. Gibson*, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in

the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is $300,000. 42 U.S.C. § 1981a(b)(3).

A. Non-Pecuniary Damages

1) Legal Standards

To establish a claim for compensatory damages, a complainant must provide proof of actual harm or injury and proof that the unlawful conduct caused the harm or injury. *Farrington v. Dep't of Homeland Sec.*, EEOC App. No. 0720090011 (Jan. 19, 2011) (*citing Rivera v. Dep't of the Navy*, EEOC App. No. 01934157 (July 22, 1994)). *Alexander v. Dep't of the Army,* EEOC App. No. 0720060050 (Apr. 15, 2010); *EEOC's Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14 (hereinafter "EEOC Guidance"). Compensatory damage awards are limited to the sums necessary to compensate a complainant for the actual harm suffered as a result of the agency's discriminatory conduct. *See Carey v. Piphus*, 435 U.S. 247, 254 (1978).

Non-pecuniary losses are losses that are not subject to precise quantification and may include things such as emotional pain, loss of enjoyment of life, loss of health, marital strain, and anxiety. *Zoila P. v. Dep't of Justice*, EEOC App. No. 0720130036 (Nov. 24, 2015). Non-pecuniary losses involving emotional harm are more difficult to prove and are not presumed simply because Complainant is a victim of unlawful discrimination. *See EEOC Guidance.*

An award of non-pecuniary damages is based on the extent, nature, severity, and duration of the harm. *Rivera*, EEOC App. No. 01934157. While expert testimony is not required, the harm must be established by credible evidence. *Emiko S. v. Dep't of Trans.*, EEOC App. No. 0120161130 (July 19, 2016). Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his burden in addressing the outward manifestations of the emotional harm suffered. *Taylor G. v. U.S. Postal Serv.*, EEOC App. No. 0120120164 (Apr. 17, 2018). Moreover, the more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. *Id.*

A complainant must also establish a causal connection between the unlawful discrimination and the injury. *Alexander v. Dep't of the Army*, EEOC App. No. 0720060050

(Apr. 15, 2010). Emotional distress is often evidenced by changes in behavior or conduct, and where there is a short proximity in time between when the discrimination occurred and when the symptoms surfaced, a causal connection will likely be established. *Cf., Benjamin v. U.S. Postal Serv.*, EEOC App. No. 01A02246 (Aug. 14, 2002) (finding "complainant has not demonstrated the necessary nexus that links the discriminatory incident which occurred in 1994 to events which occurred some two to three years later, e.g., dropping out of school or having a stroke").

2) Findings of Fact and Conclusions of Law Regarding Non-Pecuniary Damages.

In support of their request for compensatory damages, Complainants Bennett and Zahn provided compelling, credible, and heart-breaking testimony about the harm they suffered and continue to suffer due to the Agency's unlawful discrimination. As detailed in the *Section III Findings of Facts (Emotional Distress Section)* above, and in Complainants' brief entitled *Complainants' Closing Arguments on Damages*, both Bennett and Zahn have suffered very similar harm for the past six years and will continue to suffer the same harm for years in the future. This harm includes: PTSD, major depression, anxiety, agoraphobia, suicidal ideation and attempts, involuntary psychiatric hospitalization, almost complete withdrawal from friends and family, and a fundamental shift in identity and self-worth. In addition, as a result of the harassment, Zahn lost her home and was homeless for a significant period of time. Although Bennett maintained her home, the harassment resulted in the end of a 5-year relationship with a man she loves dearly. Neither of them can perform the work they love and never will be able to work in the nursing field again.

Both Bennett and Zahn testified credibly about the effects that Patient LL's conduct has had on their lives. At hearing, they exhibited a lot of emotion and strength when they described the physical and emotional changes in their personality. They tried to be strong during parts of their testimony; however, both of them broke down and cried. It was as if they were re-living the events that led to their nervous breakdowns, suicidal ideation, depression and anxiety. Their testimony was further corroborated by the testimony of their therapist, David Wood. He provided credible testimony, supported by medical documentation of the hours of therapy that both Bennett and Zahn have needed to get to the point where they can function in a somewhat normal capacity. However, Wood testified that Complainants will need further therapy, are not

ready to return to work and will never be able to work as nurses. He also testified that they will continue to be on medication indefinitely.

Bennett's brother and son testified credibly regarding the dramatic changes they witnessed in Bennett's personality. They both described her as moody, no longer sociable, lacks confidence, and is often crying uncontrollably. Her son became very emotional at trial, especially when he described the incident where he was scared that his mother would hurt herself. He was so scared that he contacted her therapist to have her hospitalized involuntarily. It was very apparent from her son's testimony that he too has been affected emotionally by what his mother has experienced. He has also taken on the role of caretaker because of his mother's emotional distress.

Similarly, Zahn's son testified about his mother's unpredictable behavior, uncontrollable and debilitating panic attacks as well as her extreme weight loss. He described vividly finding his mother on the floor passed out several times after she experienced a panic attack. He also described in a very emotional and heart-breaking manner the incidents when his mother attempted suicide, when she drove off and no one knew where she was, when she hyperventilates and is unable to breathe, and when he checks in on her while she sleeps because she is having a panic attack. Ultimately, he "would like to see his old mom back. See her health again, mentally, physically, emotionally." It was very apparent that Zahn's medical condition has also taken a toll on her son. He described having difficulty sleeping, being depressed and having anxiety.

Zahn's partner, Eric Phillips, also corroborated Zahn's account of the emotional distress she experiences. He also described the effects it has had on their relationship, in particular their sexual and intimate relationship. He testified credibly that Zahn would have panic attacks and break down into tears while they were being intimate. He also cannot touch or hug her and is much more cautious in how he approaches her now. Phillips has noticed some improvements in how she interacts with him, but she is still not the same as she was before the incidents in 2014.

As noted above, awards for non-pecuniary compensatory damages must take into consideration the amounts awarded in other similar cases, and I have consulted other awards in similar cases in making the damages calculation in this case. *See, e.g., Geraldine B v. USDA*, EEOC App. No. 0720180025 (June 5, 2019)(awarding $250,000 to Complainant who experienced nightmares, feelings of worthlessness and recurring PTSD, among other effects);

Augustine S. v. Dep't of Homeland Security, EEOC Appeal No. 0720110018 (October 22, 2015) (awarding $250,000 to Complainant who experienced sleep disturbances, physical pain, social withdrawal, fear of others, and inability to work due to the Agency's failure to provide reasonable accommodation over an extended period); *McCormick v. Dep't of Justice*, EEOC Appeal No. 0720100040 (November 23, 2011) (awarding $200,000 to Complainant who experienced depression, severe migraines, sleeplessness, strain on familial relationships, severe physical damage, social withdrawal, and damage to her professional reputation due to the Agency's failure to provide reasonable accommodation and its portrayal of Complainant as an insubordinate employee); *Blount v. Dep't of Homeland Security*, EEOC Appeal No. 0720070010 (October 21, 2009) (awarding $200,000 to Complainant who experienced severe depression and loss of self-esteem and sense of worth due to the Agency's failure to engage in the interactive process and provide reasonable accommodation).

Based on the evidence in the record and considering the nature, severity, and duration of the harm, along with comparing awards in similar cases, I hereby find Complainant Bennett and Complainant Zahn are each entitled to an award of nonpecuniary damages in the amount of $300,000.00. Such an award is supported by substantial evidence described above, as there is sufficient causation between the Agency's actions and the Complainants' resulting depression, anxiety, feelings of worthlessness, social isolation, suicidal ideation and attempts, among other emotional distress. This amount takes into account the extreme nature and severity of the harm suffered by Bennett and Zahn. Their heart wrenching testimony, six years later, demonstrates the severity of harm and the long road ahead they both have to fully heal and recover from these life altering events. This amount is not the result of passion or prejudice.

The Agency shall pay $300,000.00 to Complainant Bennett and $300,000.00 to Complainant Zahn within sixty (60) days of the date on which this Decision is final.

B. Pecuniary Compensatory Damages

Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination. *See EEOC Guidance.* Past pecuniary compensatory damages are not subject to the statutory cap of $300,000.00. *Id.*; 42 U.S.C. § 1981a(b)(3). Future pecuniary losses are losses likely to occur after resolution of the complaint. *See EEOC Guidance.* Future pecuniary damages, when added

to non-pecuniary compensatory damages, are limited to an aggregate amount of $300,000.00. 42 U.S.C. § 1981a(b)(3).

1) Past pecuniary damages

During trial, Complainants provided evidence of out-of-pocket expenses incurred as a result of the discrimination they experienced. At trial and in their closing briefs, Complainants provided copies of receipts and medical records related to the expenses they incurred. *See* Hrg. Exs. 4, 6, 7, and 15; *see also* Attachment 1 to Complainants' Closing Brief on Damages. Some of Complainants medical expenses were paid by their health insurance. Complainants argue that under the "collateral source" rule, they are entitled to the full amount of medical expenses, not simply the co-payment.

The Commission has held that under the "collateral source" rule, an agency may not use funds distributed by health insurance to offset an award of pecuniary damages." *Miller v. Dep't of Treasury,* EEOC App. No. 10A60181 (Apr. 11, 2006) citing *Wallis v. U.S. Postal Serv.,* EEOC App. No. 01950510, 1995 WL 869201 (Nov. 13, 1995). In *Wallis*, the Commission held that the application of the "collateral source" rule, which holds that "benefits received by the plaintiff from a source collateral to the defendant may not be used to reduce that defendant's liability for damages," was appropriate. *Id.* at 11 - 13. Thus, the Commission held that the agency must reimburse the appellant for the full amount of his pecuniary damages, even though some of the expenses have been paid by appellant's health insurer. *Id.*

Consistent with Commission precedent, I hereby find that Complainants have provided the requisite proof to establish they are entitled to past pecuniary damages. **The Agency shall pay Zahn a total amount of $221,964.55 for past pecuniary damages. The Agency shall pay Bennett a total amount of $68,083.52 for past pecuniary damages. Payment shall be made within sixty (60) days of the date this decision becomes final.**

2) Future Pecuniary Damages

Future pecuniary damages, when added to non-pecuniary compensatory damages, are limited to an aggregate amount of $300,000.00. 42 U.S.C. § 1981a(b)(3). Since I have awarded each Complainant $300,000.00 for non-pecuniary damages, they are not entitled to future pecuniary damages.

3) Lost Future Earnings or Front Pay

In their Brief, Complainants argue that they should be awarded front pay, an equitable remedy, as opposed to lost future earnings[3]. They argue that front pay for a period of two years is an appropriate award due to the harassment and assault they suffered as well as the Agency's record of long-term resistance to anti-discrimination efforts. (*See* Complainant's Brief at 38). The Agency argues that Complainants are not entitled to front pay because they cannot show they are able to work. I agree with the Agency and find Complainants' argument unpersuasive.

Under Commission case law, front pay may be awarded in lieu of reinstatement when: (1) no position is available; (2) a subsequent working relationship between the parties would be antagonistic; or (3) the employer has a record of long-term resistance to antidiscrimination efforts. *Jackson Jr. v. U.S. Postal Serv.,* EEOC App. No. 0720060048, 2008 WL 559493 at *9 (Feb. 2008). Reinstatement is preferred to an award of front pay. *Augustine S. v. Dep't of Homeland Security,* EEOC App. No. 0720110018, 2015 WL 6689342 at *9 (Oct. 2015). Awards of front pay imply that the Complainant is able to work but cannot do so because of circumstances external to the complainant. *Id.* Here, Complainants are not entitled to front pay because they are unable to return to work at this time. Their therapist testified that both Zahn and Bennett would need additional therapy before he could approve their return to work. He also testified that neither would ever be able to work as nurses. Therefore, front pay will not be awarded in this case.

C. Back Pay Award

As argued in the *Agency's Closing Argument*, Complainants are not entitled to back pay because there is no removal or constructive discharge claim in this case. The court notes that on June 8, 2020, the Agency removed Complainant Bennett from employment with the Agency. (*See Complainants' Second Supplemental Closing Argument on Damages*). While this is further evidence of harm that Complainant Bennett has suffered due to the discriminatory conduct of the Agency, it does not change my decision regarding back pay or front pay.

Therefore, Complainants will not be awarded back pay in this case.

[3] Lost future earnings are an element of compensatory damages. Since I have awarded the monetary caps of $300,000 to each Complainant, they are not entitled to additional lost future earnings.

D. Equitable Relief

1) Policy

The Agency shall develop and implement a sexual harassment policy specifically addressing what employees must do if they are sexually harassed by a patient and/or customer at the facility. This policy shall be consistent with Title VII of the Civil Rights Act of 1964, Commission guidance and legal precedent. At a minimum, the policy shall include examples of what constitutes sexual harassment, describe the reporting protocol for victims of harassment, require a confidential investigation is conducted by either a third party or someone other than the management team where the harassment is alleged to have taken place. The policy shall also specify what management must do when they become aware of the sexual harassment allegations and it shall include potential disciplinary actions to be taken if management does not comply with the policy. The agency may include additional directives in this policy as it deems appropriate.

2) Sexual Harassment and Anti-Retaliation Training

The Agency shall consider conducting in-person annual training on the topic of sexual harassment by patient/customer and co-worker. The training shall also cover the anti-retaliation provision of Title VII. This training can be used as part of the "roll out" and dissemination of the Agency's new policy on sexual harassment by patients or customers (as detailed above). All staff, especially managers including Belarde and Moline, doctors, directors, psychologists, shall participate in this training.

In addition, the Agency shall consider conducting additional training for management officials, including Belarde and Moline, doctors, directors, psychologists, to further discuss the protocol and procedure to be followed when an employee alleges sexual harassment by a patient or customer. Such training shall include examples of prohibited conduct as well as a statement of disciplinary action that may be taken if a management official fails to comply with the policy or engages in retaliatory conduct against victim of sexual harassment.

3) Posting and Notice

Pursuant to 29 C.F. R. § 1614.501(a)(1) and (2), where an Agency is found liable for discrimination, the Administrative Judge can order the Agency to post an appropriate notice of the finding of discrimination. Therefore, the Agency shall post the Notice attached hereto as

Exhibit 1, in prominent place(s) at the VA's Eastern Colorado Health Care System location, where Complainants were employed. The Notice shall be posted within 30 days from the date this Decision becomes final and shall remain posted for 90 days. The Notice shall be posted in a size at least as large as that attached. The Notice shall be signed by the current head or director of the VA's Eastern Colorado Health Care System or his or her equivalent.

The Agency shall take reasonable steps to ensure that the posted Notices are not altered, defaced, or covered by any other material. The original, signed Notice shall be retained by the Agency for one year from the date this decision is final. The Agency shall also prepare, and retain, for the same time period, a declaration that the Notice has been posted, and a second declaration that the Notice remained posted for the required 90 days.

4) Discipline

The Agency shall consider taking disciplinary action against Belarde and Moline for their failure to properly address the complaints of sexual harassment by patients. The disciplinary action may include, but shall not be limited to, a written reprimand and/or warning that is placed in each person's personnel file for a specific period of time.

VI. ATTORNEYS' FEES AND COSTS

Pursuant to EEO MD-110, Chapter 11, Section VI, Complainants' attorneys shall provide a verified statement of their attorneys' fees and costs for their work and their office's work as it relates to this case. Complainants' attorneys were instructed to specifically identify the time spent on this case from the filing of the formal complaint up to the date of hearing. Should Complainant not submit sufficient documentation, pursuant to EEOC Management Directive ("MD") MD-110, Chapter 11, Section VI, the request for fees and costs may be reduced or denied.

On September 24, 2020, Complainants submitted a Fee Petition, totaling $650,279.37 in fees and costs. Attached to the fee petition were nine exhibits (with over 500 pages of supporting documentation), including Affidavits for Complainants counsel, Gary Gilbert, Shannon Leary, and James Hill, among several other attorneys who previously worked on the case. The Agency filed a response in opposition to petition on October 9, 2020, and Complainants provided a reply on October 15, 2020. In the reply, counsel for Complainants

supplemented its fee petition to account for the hours spent on briefing the Petition, updating their attorney fees to **$632,891.60** and **$20,213.59** in costs for a total of **$653,105.19.**

On December 22, 2020, Complainants' filed a Supplemental Fee Petition at the request of the court. The request was necessary due to some discrepancies in the billing rate for Mr. Hill as well as an explanation of the *Laffey* matrix chart. Based on the correction of the billing error, the attorneys' fees amount was updated. The total amount requested in fees is **$631,721.90.** The costs remain the same, **$20,213.59.**

A. Attorneys' Fees

An attorney's fee award is typically determined by multiplying a reasonable number of hours spent on the case by a reasonable hourly rate, also known as the "lodestar." *See* 29 C.F.R. 1614.501(e)(2)(ii)(b); *Williamson v. Dep't of the Treasury,* EEOC App. No. 0720070056 (Feb. 4, 2010) (*citing Hensley v. Eckerhart*, 461 U.S. 424 (1983)). It is the burden of the attorney requesting the fees to provide adequate information to establish that he or she is entitled to such payment, and the fee award may be reduced in the absence of such information. *See Brown v. U.S. Postal Serv.*, EEOC App. No. 07A30050 (July 14, 2004). The reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by attorneys in similar cases. *Cox v. Soc. Sec. Admin.,* EEOC App. No. 0720050055 (Dec. 24, 2009) (citing EEOC MD 110 at 11-6).

All hours reasonably spent on litigating the case are compensable, and the number of hours claimed should not include excessive, redundant, or otherwise unnecessary hours. *Cox,* EEOC App. No. 0720050055 (*citing* EEO-MD-110 at 11-5 (*citing Hensley*, 461 U.S at 434)). The hours claimed or spent on a case are "the most useful starting point for determining the amount of a reasonable fee." *Hensley, supra*. The fee petition must "contain sufficiently detailed information regarding the hours logged and the work performed" to permit the determination of the correct award. EEO-MD-110 at 11-9.

1) Analysis – Hourly Rates

Pursuant to the EEO-MD-110, Chapter 11, Section VII, Complainants' attorneys submitted a Petition for Attorneys' Fees, accompanied with affidavits by their counsel, detailing their background and experience. (*See* Exhibit 4 of Complainants' Fee Petition). Complainants also attached Retainer Agreements between Complainants and their counsel, and hundreds of

pages of billing records setting forth the work performed by the attorneys, law clerks and paralegals at Gilbert Employment Law, P.C.

The reasonable hourly rate is generally the prevailing market rate in the relevant legal community for similar services by attorneys in similar cases. *Cox*, EEOC App. No. 0720050055. However, if a party does not find local counsel readily available with the requisite skill level, the party may find an attorney elsewhere and the hourly rate will be calculated based on the attorney's location. *Jackson v. Dep't of Air Force,* EEOC App. No. 0720110036 (Mar. 3, 2012). The burden is on the Agency to show that Complainants decision to retain out-of-town counsel was unreasonable. *Jackson*, EEOC App. No. 0720110036; *Moore v. Dep't of Justice*, EEOC App. No. 0120072439 (July 31, 2007).

Here, the Agency does not dispute that the *Laffey* matrix should be applied in this case. *See Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.D.C 1983), *aff'd in part. rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984). At the request of the court, Complainants counsel has submitted the most current USAO Attorney's Fees Matrix – 2015 – 2021 (*See* Exhibit 3 attached to Complainants' Supplemental Fee Petition dated Dec. 22, 2020). Per the matrix, the hourly rates for Complainants counsel Gary Gilbert is $665; Shannon Leary is $532, and James Hill is $369. Although, as indicated in Complainants' petition, Mr. Hill's rate during the hearing was reduced to a paralegal rate of $180.

2) Analysis – Hours Expended

All hours reasonably spent on litigating the case are compensable, and the number of hours claimed should not include excessive, redundant, or otherwise unnecessary hours. *Cox*, EEOC App. No. 0720050055 at *12. The fee petition must "contain sufficiently detailed information regarding the hours logged and the work performed" to permit the determination of the correct award. *Huee Tan v. U.S. Postal Serv.*, EEOC Petition No. 0420060032 (Dec. 21, 2006); *see also Renwick v. Dep't of the Navy*, EEOC App. No. 0120112665 (Oct. 20, 2011). Excessive, redundant, unnecessary, or inadequately-documented expenditures of time may result in an across the board, or item-by-item, reduction in fees. *Jackson*, EEOC App. No. 0720110036

Complainants submitted a fee petition that included a list of services rendered for both their cases by the attorneys with a description of date, time, attorney, work performed, and total amount billed. The billing records provide a summary of fees incurred prior to consolidation of

the cases, (Ex. 1C and 1D) and then after the cases were consolidated (Ex. 1D). In total, Complainants requested $631,721.90 in fees for time spent working on this case from 2015 through the completion of the proceedings in October 2020 (filing of fee petition).

The Agency challenges the fee petition on several grounds. First, the Agency argues that Complainants cannot recover fees for services performed during the pre-complaint process. The amount requested by Complainant Bennett is 46.2 hours totaling $16,693.60 and Complainant Zahn is 24.7 hours totaling $7,759.20. Instead, the Agency argues the most that Complainants can recover is a total of 4 hours (2 hours each Complainant). Based on the Agency's calculations, the Complainants should only recover $2,062.80. *See* Agency's *Opposition to Fee Petition* at 1 – 2.

Second, the Agency argues that Complainants fees are redundant and excessive and therefore should be reduced at least 60% across-the-board reduction of attorney's fees. *Id.* at 3. The Agency argues Complainants billed for unrelated matters, such as the OWCP claims and improperly billed for clerical work, such as assembling binders and exhibits, serving documents, etc. *Id.* at 4 – 5. The Agency also argues that the attendance of two attorneys at depositions was unnecessary and therefore the rates should be reduced. Similarly, having three attorneys at hearing was also unnecessary and duplicative. *Id.* Agency also argues that Complainants should not be compensated for fees associated with filing two supplemental closing arguments which were submitted after the filing deadline and involved Bennett's removal from federal service, a matter unrelated to the instant matter. Lastly, Agency argues the travel time billed was inaccurate and should be billed at 50%. *Id.*

Based on my complete review of the attorneys' fees petition and my knowledge of the course of the proceedings in this action, I find that the hours expended by Complainants counsel are reasonable for a case that encompassed extensive legal work, commencing with the pre-complaint process, to discovery and motion practice, including motion to dismiss, motion to consolidate and motions for summary judgment, as well as a settlement conference, and all pre-hearing pleadings and hearing.

While the Agency is correct that a complainant generally is not entitled to attorneys' fees for work performed during the informal EEO process, this case is the exception. As articulated in Complainants' Fee Petition and Reply, the Agency initially rejected the Complainants' EEO informal complaint and erroneously advised them that they could not file a complaint of

discrimination because they were alleging sexual harassment against a patient. Therefore, Complainants needed legal counsel to advocate for them and request that the Agency's ORM accept their EEO complaints. Since the counseling period had expired by the time Complainants obtained legal representation in 2015, the attorneys had to provided various documentation and evidence in order to convince the Agency to accept the complaints. The hours billed for these efforts, 46.2 for Bennett and 24.7 for Zahn, are reasonable. Therefore, Complainants shall be awarded attorneys fees for the time spent during the pre-complaint process.

Regarding the fees incurred during the course of litigating both complaints, there is no legitimate basis to reduce the amount by 60% across the board, as requested by the Agency. It is important to note that at the onset of this litigation, each complainant filed an individual EEO complaint which contained several allegations besides sexual harassment, such as disability discrimination, failure to accommodate, and retaliation. The complaints were consolidated on July 3, 2017 at which point these cases were aggressively litigated by both sides. Various motions were filed by both parties, extensive discovery was conducted on all the accepted claims, and several witnesses were interviewed prior to and in preparation for trial, including therapist and damages witnesses, as well as medical records obtained. Both parties filed summary judgment motions in April 2018. Subsequently, complainants withdrew the disability, failure to accommodate and retaliation claims. (*See* Complainants' Motion for Partial Withdrawal and Reframing of Claims (June 1, 2018). The litigation in this case commenced on or about April 2017 and concluded April 2020, when the parties filed their closing arguments. Therefore, many attorneys and paralegals were involved in litigating these cases. Throughout the course of the litigation, the Agency had ample opportunity to resolve this matter by entering into a settlement. In fact, I conducted a settlement conference with the parties on July 2019, several months prior to hearing. Unfortunately, the parties were unable to reach a resolution at that time.

I agree with Complainants' counsel that the failure to accommodate claims were inextricably intertwined with the harassment claims and thus any work related to these matters is compensable. However, any work related to Complainants' OWCP benefits, removal or FECA benefits **after June 1, 2018**, when Complainants withdrew those claims, are not recoverable since those issues were no longer part of the claims at hearing. The amount of fees billed for this work appears to be approximately **$5,000. (***See* footnote 3 in Complainants' fee petition).

Similarly, any work attributed to the supplemental closing arguments is not recoverable since Complainants did not seek leave from the court to file such pleadings. The approximate amount of fees billed for this work is **$700.**

Regarding billable hours for travel, I agree with Agency counsel that there are several entries where 100% of the time was billed as opposed to 50%. Complainants concur that those entries were made in error. The following entries will be reduced by 50%:

2/21/2018	5.3 hours	$3,524.50	reduced to	$1,762.25
2/21/2018	12.5 hours	$5,650.00	reduced to	$2,825.00
2/22/2018	7 hours	$4,655.00	reduced to	$2,327.50
2/22/2018	10.2 hours	$4,610.40	reduced to	$2,305.20
2/26/2018	5.9 hours	$3,923.50	reduced to	$1,961.75
3/01/2018	10.2 hours	$4,610.40	reduced to	$2,305.20
3/01/2018	7.9 hours	$5,253.50	reduced to	$2,626.75
1/26/2020	7.1 hours	$3,777.20	reduced to	$1,888.60
1/26/2020	7.1 hours	$2,619.90	reduced to	$1,309.95
	Total	**$38,624.40**	**reduced to**	**$19,312.20**

B. Final Attorneys' Fee Award

Accordingly, the total attorneys' fees award is as follows:

Attorney's fees requested:	$631,721.90
Reduction of travel fees:	-19,312.20
Reduction of removal/OWCP fees:	- 5,000.00
Reduction of supplemental briefs:	- 700.00

The total attorney's fees award to Complainants is: $606,709.70

VII. COSTS

EEOC regulations also provide for the recovery of costs by prevailing parties. 29 C.F.R. 1614.501(e). Adequate documentation of the expense incurred, and the nature of the expense is required in order to receive reimbursement of costs. Failure to submit copies of applicable bills justifies denial of reimbursement for the costs. *Williams v. Dep't of Homeland Security*, EEOC

Petition No. 04A40047 (June 30, 2005); *Constant v. Dep't of Energy*, EEOC App. No. 01924621 (April 5, 1993).

The Agency argued that certain out-of-pocket costs should be eliminated and/or reduced from the petition. (*See* Agency's Opposition to Fee Petition at 7 – 9). In particular, the Agency objects to meal expenditures, travel fees and online research fees. The Agency argues the costs should be reduced by $2,618.58. Id. In their reply, Complainants acknowledge that some of the travel expenses were included in error and thus have reduced their costs by $1,166.38.

Having reviewed the records, I hereby grant Complainants' request for costs in the amount of $20,213.59.

VIII. CONCLUSION AND ENTRY OF JUDGMENT

Judgment is entered for Complainants. The total monetary awards are as follows:

Compensatory Fees	
Non- pecuniary for Bennett	$300,000.00
Pecuniary for Bennett	$ 68,083.52
Total for Bennett	**$368,083.52**
Non- pecuniary for Zahn	$300,000.00
Pecuniary for Zahn	$221,964.55
Total for Zahn	**$521,964.55**
Attorney's fees	**$606,709.70**
Costs	**$ 20,213.59.**
TOTAL JUDGMENT	**$1,516,971.36**

The Agency is hereby ORDERED to comply with the remedies set forth above within the times specified. A notice of appeal rights follows.

It is so ORDERED.

For the Commission: /s/ Lucila G. Rosas

Lucila G. Rosas
Administrative Judge
lucila.rosas@eeoc.gov

NOTICE TO THE PARTIES

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to 29 C.F.R. § 1614.109(b), 109(g) or 109(i). **With the exception detailed below, Complainant may not appeal to the Commission directly from this decision.** EEOC regulations require the Agency to take final action on the complaint by issuing a final order notifying Complainant whether or not the Agency will fully implement this decision within forty (40) calendar days of receipt of the hearing file and this decision. **Agencies are advised to refer to the April 6, 2020 memo issued by Carlton Hadden to the Federal Sector EEO Directors and officials at https://www.eeoc.gov/processing-information-all-parties-federal-eeo-processing-under-29-cfr-part-1614 for information and directives regarding the tolling of timeframes during the pandemic. EEOC will not sanction an agency that holds off on taking final actions pursuant to the directives of the memo**. Complainant may appeal to the Commission within thirty (30) calendar days of receipt of the Agency's final order. Complainant may file an appeal whether the Agency decides to fully implement this decision or not.

The Agency's final order shall also contain notice of Complainant's right to appeal to the Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for such appeal or lawsuit. If the final order does not fully implement this decision, the Agency must also simultaneously file an appeal to the Commission in accordance with 29 C.F.R. § 1614.403, and append a copy of the appeal to the final order. A copy of EEOC Form 573 must be attached. A copy of the final order shall also be provided by the Agency to the Administrative Judge.

If the Agency has not issued its final order within forty (40) calendar days of its receipt of the hearing file and this decision, Complainant may file an appeal to the Commission directly from this decision. In this event, a copy of the Administrative Judge's decision should be attached to the appeal. Complainant should furnish a copy of the appeal to the Agency at the same time it is filed with the Commission, and should certify to the Commission the date and method by which such service was made on the Agency.

You may file an appeal with the Commission's Office of Federal Operations **when you receive a final order from the agency informing you whether the agency will or will not fully implement this decision**. 29 C.F.R. § 1614.110(a). You will have **thirty (30) days** to file an appeal from the time you receive the agency's final order. If the agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the agency's (40) day period for issuing a final order. *See* EEO MD-110, 9-3. In either case, please attach a copy of this decision with your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below. If you do not use the EEOC Public Portal to file your appeal, you must send a copy of your appeal to the agency at the same time that you file it with the Office of Federal Operations, and you must certify the date and method by which you sent a copy of your appeal to the agency.

HOW TO FILE AN APPEAL

RECOMMENDED METHOD – The EEOC highly recommends that you file your appeal online using the EEOC Public Portal at https://publicportal.eeoc.gov/, and clicking on the "Filing with the EEOC" link. If you have not already registered in the Public Portal, you will be asked to register by entering your contact information and confirming your email address. Once you are registered you can request an appeal, upload relevant documents (e.g., a statement or brief in support of your appeal), and manage your personal and representative information. During the adjudication of your appeal, you can also use the Public Portal to view and download the appellate record. **If you use the Public Portal to file your appeal you do not have to send a copy to the agency.**

BY MAIL – You may mail your written appeal to:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013-8960

BY HAND DELIVERY OR COURIER – You can also hand-deliver or send your appeal by courier service to:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
131 M St., NE
Washington, D.C. 20507

BY FAX – Finally, you may send it by facsimile to (202) 663-7022.

If you elect to mail, deliver, or fax your appeal you should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what you are appealing. Additionally, you must serve the agency with a copy of your appeal, and include a statement certifying the date and method by which service to the agency was made.

COMPLIANCE WITH AN AGENCY FINAL ACTION

An Agency's final action that has not been the subject of an appeal to the Commission or civil action is binding on the Agency. See 29 C.F.R. § 1614.504. If Complainant believes that the Agency has failed to comply with the terms of its final action, Complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within thirty (30) calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If Complainant is not satisfied with the Agency's attempt to resolve the matter, he or she may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. Complainant may file such an appeal within thirty (30) calendar days of receipt of the Agency's determination or, in the event that the Agency fails to respond, at least thirty-five (35) calendar days after Complainant has served the Agency with the allegations of noncompliance. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within thirty (30) calendar days of receiving the notice of appeal.

EXHIBIT 1

NOTICE TO EMPLOYEES

NOTICE TO EMPLOYEES

This notice is posted following a finding by the United States Equal Employment Opportunity Commission ("EEOC") that the United States Department of Veterans Affairs Eastern Colorado Health Care System (VA), violated Title VII of the Civil Rights Act of 1964, as amended, by discriminating against employees because of their sex (female).

As a result of the EEOC's finding, the Agency was ordered to make the employee whole by paying the employees compensatory damages, including out-of-pocket expenses, attorneys fees and costs incurred during the course of litigation.

Federal law requires that there be no discrimination against any employee because of that individual's sex. The Agency, VA, shall comply with federal law prohibiting discrimination against an individual based on sex.

The Agency, VA, shall ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all federal equal employment opportunity laws.

The Agency, VA, will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, federal equal employment opportunity law.

This notice is posted pursuant to regulations of the EEOC (29 C.F.R. § 1614.501).

_____

U.S. Department of Veterans Affairs, Director
Eastern Colorado Health Care System

Date Posted: _____
Posting Expires: _____

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing ORDER within five (5) calendar days after the date it was sent *via* first class mail and one (1) day after it was sent via facsimile or e-mail. I certify that, on December 23, 2020, the foregoing ORDER was uploaded to Fed/SEP and emailed to the following:

Complainant's Representative
Shannon C. Leary, Esq.
Gary M. Gilbert, Esq.
James A. Hill, Esq.
Dan Binder, Esq.
Gilbert Employment Law, P.C.
sleary-efile@gelawyer.com
gary-efile@gelawyer.com
jhill-efile@gelawyer.com
dbinder@gelawyer.com

Agency Representative
Chau B. Phan, Esq.
U.S. Department of Veterans Affairs
Office of General Counsel
Chau.phan@va.gov

/s/ Lucila G. Rosas
Lucila G. Rosas
Administrative Judge
lucila.rosas@eeoc.gov