UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

67 M.S.P.R. 667

Docket Number **PH-0432-94-0708-I-1**

CARLA VINES, Appellant,

v.

DEPARTMENT OF DEFENSE, Agency.

Date: June 15, 1995

Neil C. Bonney, Neil C. Bonney and Associates, Virginia Beach, VA, for the appellant.

Gilah G. Goldsmith, Washington, DC, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Antonio C. Amador, Member

Chairman Erdreich and Member Amador Both Issue Separate Opinions

ORDER

This case came before the Board by petition for review of the January 24, 1995 initial decision. The two Board members cannot agree on the disposition of the petition for review. Accordingly, the initial decision is the final decision of the Merit Systems Protection Board in this appeal. This decision shall not be considered as precedent by the Board in any other case.

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C.§ 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C**.** § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. §§ 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

SEPARATE OPINION OF BENJAMIN L. ERDREICH, CHAIRMAN

I have directed that the initial decision in this case become the final, nonprecedental opinion of the Board. Currently the Board has only two members, and we are in irreconcilable disagreement as to the outcome of the appeal. Issuance of my

order affirming the initial decision provides a timely adjudication of the dispute. The resolution of a petition for review in this nonprecedental manner is a ministerial act on my part as the Chairman of the Board. It adds nothing to the body of law on which Board decisions are based, and is simply a mechanism for reducing the harm to both parties that would be caused by a protracted, unproductive adjudication.

Since the Member has taken this opportunity to express his view of this case, and to state his conclusion that the removal of Ms. Vines should be sustained, I feel compelled to respond, to set forth what I view as the proper disposition of this appeal.

Carla Vines was first hired by the agency in August 1988 as a GS-9 auditor. She worked her way up through the system and was promoted to a GS-12 auditor position in December 1990.

During the relevant period of time she served as a GS-12 auditor, Ms. Vines received day-to-day guidance and direction from Gene Akers, a senior auditor who served as a leader for the audit team of which she was a member. During the spring and summer of 1993, Akers engaged in certain acts of misbehavior which Administrative Judge Wilhelmina Douglas Stevenson and I (and Member Amador) conclude constitute hostile-environment sexual harassment. Specifically, as testified to by the appellant or as found by the Administrative Judge, Akers:

1. Made inappropriate sexual comments to co-workers such as repeatedly commenting on female co-workers' clothing and legs,
2. Showed "playboy-like" magazine pictures of scantily dressed and nude women to Ms. Vines and other men and women in the office,
3. On at least one occasion, told Ms. Vines about a sexual dream he had had that involved her,
4. Openly referred to a female co-worker as "my sweet meat,"
5. Once told Ms. Vines that "if he had a butt like a black man, he could have her." (Ms. Vines is black and Akers is white.) Immediately after making this statement to Ms. Vines, Akers slapped the buttocks of a black male co-worker to emphasize his point,
6. Suggested to Ms. Vines that he was "hanging neck to neck" with a black male co-worker when they simultaneously used the rest room together, and
7. Hung "a cow's ... testicles" from the end of his desk.

In response to Ms. Vines' sexual harassment complaint regarding Akers, the agency's investigator concluded that Akers' conduct either did not affect Ms. Vines or was not sufficiently severe or pervasive as to create a work environment hostile to women. Although the Member in his Concurring Opinion would find that Akers' conduct did create a hostile environment, he would dismiss the effect of that environment on Ms. Vines' performance because no specific incidents occurred **during** the official performance improvement period. This conclusion is overly narrow and reflects a lack of understanding of the effects of sexual misconduct on the victim.

Akers served in a quasi-supervisory position over Ms. Vines for almost the entire period of her performance difficulties, during which time the sexual harassment occurred. He even participated in the performance improvement period counseling sessions the agency provided for Ms. Vines through February 11, 1994. Although the agency extended the improvement period through April 5, 1994, almost every incident of unacceptable performance relied on by the agency in its removal of Ms. Vines occurred during the time Akers was her work leader, or within a few days of the end of this period.

Apparently the Member believes that an agency can provide an employee a meaningful opportunity to improve her performance by assigning her to work under the direction of a man who has sexually harassed her in the very recent past, so long as he does not sexually harass her during the official improvement period, even though the two (her prior performance and her performance improvement period) are of course intertwined,[1] and there is no evidence that the effects of the hostile work environment somehow ended during the performance improvement period. That defies common sense and is contrary to the legal standard this Board must follow:

A discriminatorily abusive work environment ... can and often will detract from employees' job performance.... The purpose of Title VII [of the Civil Rights Act of 1964] is through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.'

The Board has held that an employee's right to a meaningful opportunity to improve is one of the most important substantive rights in the entire Chapter 43 performance appraisal framework.' Ms. Vines has been denied a reasonable opportunity to demonstrate acceptable performance because the agency allowed a sexually harassing supervisor to be involved in the placement of Ms. Vines in a performance improvement period, and allowed that sexually harassing supervisor to be involved in the evaluation of her performance during most of that period.

I would affirm the well-reasoned initial decision of Administrative Judge Wilhelmina Douglas Stevenson, whose opinion is attached hereto. Administrative Judge Stevenson was in the best position to make the significant creditability determinations necessary for resolution of this appeal. In addition, her legal analysis is without flaw and adequately supports a finding of sexual harassment.

ATTACHMENT

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD PHILADELPHIA REGIONAL OFFICE

Carla Vines, Appellant,
v.

Department of Defense, Agency.

DOCKET NUMBER PH-0432-94-0708-I-1
DATE: Jan. 24, 1995

Neil C. Bonney, Esquire, Virginia Beach, Virginia, for the appellant.

Gilah G. Goldsmith, Esquire, Washington, D.C., for the agency.

BEFORE WILHELMINA DOUGLAS STEVENSON, ADMINISTRATIVE JUDGE.

INITIAL DECISION

INTRODUCTION

On September 14, 1994, Carla Vines timely filed an appeal from the decision of the Department of the Defense, Office of Logistics Support, Directorate of the Assistant Inspector General For Auditing, Norfolk Field Office, Hampton, Virginia, removing her from the position of auditor for unacceptable performance. The Merit Systems Protection Board (Board) has jurisdiction over the appeal. 5 U.S.C. § 4303.

Pursuant to the appellant's request, a hearing was held in Norfolk, Virginia on December 13 and 14, 1994. The record closed on January 6, 1995. For the reasons set forth below, the agency's action is REVERSED.

ANALYSIS AND FINDINGS

Background.

The appellant was employed as a GS-12 auditor in the Norfolk Field Office. The agency removed the appellant based on its determination that she was not performing at an acceptable level of competence in two critical elements of her position: (1) data gathering and documentation; and (2) data analysis. Appeal File, (AF), Vol. 1, Tab 6, Agency File Subtab 4k. The parties stipulated that the appellant's appraisal period was from December 16, 1992 to April 4, 1994, and that the appellant's performance improvement period (PIP) was from November 1993 to March 22, 1994, and extended to April 5, 1994. *Id.* at Vol. 2, Tab 16. The stipulation satisfied the agency burden of proving these facts. 5 C.F.R. § 1201.63 (1994).

The agency's performance appraisal plan was approved by the OPM.

The Office of Personnel Management (OPM) letter approving the agency's performance plan is part of the record. AF, Vol. 1, Tab 6, Subtab 4ii. Thus, I find the agency has met its burden of establishing that its performance appraisal system was approved by the OPM.

The standards were communicated to the appellant and are valid.

An agency is required to insure that employees are aware in advance of the performance standards and critical elements of their positions, and when an employee contends that the agency violated this requirement, the agency must prove by substantial evidence that the employee was made aware and understood the performance standards and critical elements in question at the beginning of the appraisal period which forms the basis of the adverse action. *Weirauch v. Department of the Army,* 26 M.S.P.R. 53, 56, *aff'd,* 782 F.2d 1560, 1563 (Fed.Cir.1986).

The record indicates that the appellant acknowledged receipt of her performance standards on March 2, 1993. AF, Vol. 1, Tab 6, Subtab 4gg. Although James Beach, the appellant's project manager and second-level supervisor, admitted that he did not discuss the standards with the appellant, he testified without contradiction that the appellant's standards were identical to those that she had performed under for at the past five years. Moreover, he noted that she had no questions regarding the standards. Hearing Transcript (HT) at 13.

The standards an employee must meet in order to be evaluated as demonstrating performance at a level sufficient for retention may be communicated to the employee in the performance improvement plan, in counseling sessions, in written instructions, or in any manner calculated to apprise the employee of the requirements against which she is to be measured. *Baker v. Defense Logistics Agency, 25* M.S.P.R. 614, 617 (1985), *aff'd* 782 F.2d 1579, 1583 (Fed.Cir.1986); *Donaldson v. Department of Labor,* 27 M.S.P.R. 293, 297-98 (1985). In this case, the agency has shown by substantial evidence that it made the appellant aware of the required performance in the performance improvement plan and in counseling sessions. Thus, I find the appellant knew and understood her performance standards. *Hsieh v. Defense Nuclear Agency,* 51 M.S.P.R. 521, *aff'd,* 979 F.2d 217 (Fed. Cir.1992) (Table).

An agency is required to establish standards that permit accurate appraisal of performance based on objective criteria, and which are reasonable, realistic, attainable, and clearly stated in writing. 5 U.S.C. § 4302; *Chaggaris v. General Services Administration,* 49 M.S.P.R. 249, 253 (1991). An agency must use performance standards that are sufficiently precise and specific to invoke a general consensus as to their meaning and content. *See Wilson v. Department of Health and Human Services,* 770 F.2d 1048, 1052 (Fed.Cir.1985). An agency, however, is not required to include in each performance standard specific indicators of quantity, quality, and timeliness that are used to evaluate work. *See Romero v. Equal Employment Opportunity Commission,* 55 M.S.P.R. 527, 537 (1992), *aff'd,* 22 F.3d 1104 (Fed.Cir.1994) (Table).

The agency's performance plan defines acceptable performance in each critical element and requires appraisal in each element at the "met", "exceeds" or "not met" level. In order to meet her standard in critical element 2, data gathering and documentation, the appellant must independently identify types and sources of data, obtain data required to support assigned audit objectives and potential findings and incorporate data and records gathered into working papers. Also, the appellant must rarely fail to identify or obtain all relevant data, fail to prepare working papers in accordance with OAIG-Audit instructions or miss established time frames. Critical element 3, data analysis, requires the appellant to independently analyze data and draw

appropriate conclusions which rarely requires substantive changes and the data analysis is usually accurate and timely. AF, Vol. 1, Tab 6, Subtab 4gg.

The appellant contended that the performance standards were vague, unattainable, and not objective. Regarding the data gathering and documentation element, she argued that she was not required to gather the data; rather, she was given incorrect and insufficient data which ultimately affected her performance under this element. She challenged the use of the word, "rarely" as being undefined and subjective, leading to a differences of opinion among professionals which effectively prevented her from being aware of the requirements of the element. *See* id. at Vol. 2, Tab 19.

Mr. Beach described a typical audit as having two phases: (1) a survey phase which is a fact-finding review that takes approximately three months; and (2) the audit phase in which the statistical sampling basis is completed within two weeks after the onsite visit. He explained that each auditor is given an objective and obtains the data at the audit site. Thus, an auditor rarely needs to get supplemental information after the onsite visit. He emphasized that auditors at the appellant's GS-12 level are expected to work independently and with minimal supervision. Mr. Beach indicated that an auditor's accuracy, crossreferencing of data, and ability to analyze data and reach a sound and supportable conclusion is significant and important in conducting an audit. According to Mr. Beach, the appellant's performance standards accurately measure an auditor's performance and the standards are reasonable and achieveable. HT at 8-11, 14-17.

Although the appellant's performance standards do not prescribe mechanical numerical percentages of allowable errors and missed deadlines, I find the agency has shown that the appellant's performance standards are sufficiently detailed, both in description of duties and the acceptable level of performance, to invoke a general consensus as to their meaning and content. *See Wilson* at 770 F.2d 1052. In a professional position, such as an auditor, where the position is not subject to a mechanical rating system, the Board has held that an agency may reasonably establish performance standards which include a supervisor's subjective evaluations of the employee's performance. *Benavides v. Department of the Air Force,* 43 M.S.P.R. 468, 471–72 (1990); *Melnick v. Department of Housing and Urban Development,* 42 M.S.P.R. 93, 99, *aff'd,* 899 F.2d 1228 (Fed.Cir.1989) (Table).

Moreover, I find that the appellant's standards were clarified in the notice of unacceptable performance and the biweekly counseling sessions. AF, Vol. 1, Tab 6, Subtabs 4z, 4m, 4n, 4p, 4q, 4r, 4u, 4v, & 4w. Based on the record as a whole, I find that the agency has shown by substantial evidence that the appellant's performance standards are valid and that she was apprised of the requirements against which she was measured. *Scillion v. Department of Health and Human Services,* 45 M.S.P.R. 521, 524 (1990).

The agency has the burden of proving by substantial evidence its reasons for removing the appellant based on unacceptable performance.

In removing the appellant for unacceptable performance because she failed to meet two critical elements of her position, the agency processed the removal action under the provisions of 5 U.S.C. § 4302 and 5 C.F.R. Part 432. In order to sustain the

removal action, the agency must establish by substantial evidence that the appellant's performance was unacceptable in one or more critical elements. *Kadlec v. Department of the Army,* 49 M.S.P.R. 534, 539 (1991); *Griffin v. Department of the Army,* 23 M.S.P.R. 657, 663 (1984). "Substantial evidence" is defined as that degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. 5 C.F.R. § 1201.56(c)(1) (1994).

The agency proved by substantial evidence that the appellant's performance was unacceptable in one critical element.

To sustain the removal action, the agency is required to prove the appellant's unacceptable performance in only one critical element. *Luscri v. Department of the Army,* 39 M.S.P.R. 482, 490, *aff'd,* 887 F.2d 1094 (Fed.Cir.1989) (Table). The critical elements: (1) Data gathering and documentation and (2) data analysis are interrelated and are an integral part of the audit process. The data gathering and documentation critical element required the appellant to independently identify types and sources of data, to obtain data required to support assigned audit objectives and potential findings, and to incorporate data and records gathered into working papers. The data analysis critical element required the appellant to independently analyze data and draw appropriate conclusions.

Mr. Beach testified that the appellant's PIP was essentially a data analysis assignment based on documentation that she had previously gathered at the sites covered in earlier surveys. Mr. Beach explained that based on a comparison of workloads and the joint health care manpower standards, the appellant was to determine if a particular hospital's requirement for physicians, professional healthcare providers, and particular clinics justified the hospital hiring contract providers. HT at 32. In performing this assignment, the appellant was required to use various data to support her analysis regarding the adequacy of assigned healthcare personnel at three sites. The assignment consisted of three main objectives and an overall objective summarizing the results obtained on the three main objectives. Each objective was subdivided into three audit steps and he set a completion date for each objective and audit step. *Id.* at 31.

Regarding critical element 2, data gathering and documentation, Mr. Beach conceded that the appellant was not required to gather documentation on the two assignments given to her during the PIP because she had gathered the data at the audit sites prior to the PIP. Mr. Beach testified specifically regarding two different audit assignments, one involving the Brighton Marine Facility and one involving Langley Air Force Base. Mr. Beach noted that during the PIP, the appellant was required to ascertain whether Medicare was being billed for services provided to persons eligible for Department of Defense (DOD) insurance at the Brighton Marine Facility. According to Mr. Beach, the appellant failed to obtain the underlying documentation to explain credit entries that had been annotated "Allowance Medicare." He found that contrary to agency audit instructions, the appellant relied on unsupported statements. HT at 22-24.

Regarding the contract health care providers in the Langley Air Force Base audit, Mr. Beach testified that the appellant was assigned the task of determining whether

contract doctors were being properly compensated for services provided. He explained that the Langley Air Force Base assignment required the appellant to ascertain the hours that the contract doctors actually worked. The appellant was not required to copy the signin logs; rather, she was expected to copy the information onto a spreadsheet for analysis and she failed to do so. *Id.* at 27–30, 40-41. To explain the appellant's errors, Mr. Beach noted that the appellant had difficulty analyzing the data because she had incorrectly used military time to determine the length of time that the physicians worked in the emergency room. *Id.* at 30.

As to critical element 3, data analysis, the appellant was assigned three objectives: (1) Determine the adequacy of staffing levels or professional healthcare providers at the Fort Jackson Military Treatment Facility; (2) determine the adequacy. of authorized and most efficient organization billets for professional and paraprofessional healthcare providers when the workload is compared to the Joint Healthcare Manpower Standards at the Naval Medical Center in Portsmouth; and (3) determine if the number of fulltime equivalent professional healthcare providers employed by the Naval Medical Center in San Diego are justified by patient workload. These three objectives were subdivided into three audit steps and an overall objective. AF, Vol. 1, Tab 6, Subtab 4k.

Mr. Beach testified extensively as to each objective and step of the assignments that the appellant performed under critical element 3. He pointed out that the appellant either had the necessary data to complete the assignments or she failed to obtain data necessary to support her assigned audit objectives. *See* HT at 38, 51–52, 87-80, 109. He further testified that the appellant unnecessarily copied the review standards, failed to crossreference data, failed to use correct file numbers, inaccurately determined the manpower requirements for internal medicine, erred in considering personnel other than healthcare professionals, erred in analyzing data by clinic, and produced work which contained repetitive mathematical errors. He pointed out that due to miscalculations, the appellant's conclusions were inaccurate. Additionally, Mr. Beach testified that despite several extensions of the deadlines, the appellant failed to meet the time frames established for each step of the objectives. HT at 38-45, 50-61, 63-66, 71, 73, 75, & 85-93.

In sum, Mr. Beach testified as to the instances of unacceptable performance under the critical elements. He thoroughly explained each of the appellant's tasks as outlined in the proposal letter and pointed out the specific errors in the appellant's work. To further support the agency's finding that the appellant's performance was unacceptable, the agency provided numerous samples of the appellant's work, her work papers and reviewer's notes, which indicated the extent of her workload, defined her tasks, and set forth her errors. *See* AF, Vols. 3 & 4, Agency Exhibits 1-20; *see also* AF, Vol 1, Tab 6, Subtabs 4d, 4e, 4x, & 4y.

The appellant testified regarding each objective outlined in the proposed removal. As to the Langley Air Force Base project, she explained that she used a supervisor's calendar rather than data on a signin and signout log because the data on the calendar was more accurate than the log. She further explained that she performed the crossreferencing tasks at the end of the audit project but Gene Akers, her team leader, took her work papers before she completed them. She admitted that contrary to instructions, she copied standards that she felt she needed in order to complete her assignments. HT at 348-52, 354-55, 390–92, & 395.

Based on the testimonial and documentary evidence presented, I find that the agency has shown by substantial evidence that the appellant failed to meet critical elements 2 and 3 of her performance standards. Thus, I find the agency has proven by substantial evidence that the appellant's performance was unacceptable.

The agency failed to prove that it afforded the appellant a meaningful and reasonable opportunity to improve before taking the removal action.

The right to an opportunity to demonstrate acceptable performance is a substantive right, not just a procedural one. *Sandland v. General Services Administration,* 23 M.S.P.R. 583, 587 (1984). The Board has further held that an employee's right to a meaningful opportunity to improve is one of the most important substantive rights in the entire Chapter 43 performance appraisal framework. *Thompson v. Farm Credit Administration,* 51 M.S.P.R. 569, 578 (1991).

The appellant contended that the agency failed to provide her with assistance; thus, it denied her a reasonable opportunity to improve her performance. The appellant acknowledged participating in the biweekly counseling sessions with Akers and Beach regarding her work, but she felt that the counseling sessions were counterproductive because she received no assistance from either of them. HT at 381–82. The appellant further testified that during the PIP there were matters that she did not understand but when she asked for assistance, Messr. Akers and Beach refused, and they often responded that as a GS-12 she should know what to do. *Id.* at 366–67, 379, & 389.

Richard Hanley, a retired auditor from the appellant's office, and Robert Briggs, an auditor, corroborated the appellant's testimony that the appellant did not understand her assignment. Messrs. Hanley and Briggs testified that they met with the appellant and she asked them to explain the performance plan that she was given. They opined that the objectives were confusing and the appellant was unclear as to what was required of her. *Id.* at 199, 206-12, 216-17, 221, & 267.

Mr. Beach, however, testified that he discussed the assignments with the appellant, but he instructed her to not seek assistance from her co-workers because the standards required the appellant to work independently. *Id.* at 35-36. He further testified that there was no additional training that the appellant required. Mr. Beach explained that the deadlines were reasonable because the data had already been gathered, and the only necessary step was for the appellant to do the scheduling and analyze the data. *Id.* at 34. He further noted that notwithstanding the intervening Thanksgiving holiday and the appellant's approved leave at the beginning of the PIP, he felt the 2-day time frame was reasonable for the first objective. *Id.* at 38.

The appellant testified that the PIP period was stressful and she was overwhelmed by the demanding workload and the unreasonably short deadlines. *Id.* at 402, 404. She felt pressured by the hostile work environment that Akers created. The appellant testified that prior to being placed on the PIP, she had a good working relationship with Akers until he began making offensive comments to her. She testified that prior to the PIP, Mr. Akers told her that he dreamed about the two of them on a beach, and he told her that he could have her if he had a butt like a black man. The appellant testified that she was offended by Mr. Akers' comment and when she ignored his comments, his scrutiny of her work intensified, their working relationship worsened, and, finally,

resulted in her being placed on a PIP. According to the appellant, Mr. Akers' verbal harassment adversely affected her ability to complete her assignments. *Id.* at 360—65.

Several co-workers observed the appellant's relationship with Akers during the time that she was on the PIP. Raheema Shabazz, an auditor, testified that when the appellant first started working with Akers, they had a good working relationship. However, she witnessed the relationship deteriorate as months passed. She testified that she observed Akers' standing over the appellant's shoulder and he had a rude attitude towards her when she approached the appellant's work area. *Id.* at 274—81.

Ms. Shahan also noticed a change in the appellant's demeanor during the PIP. According to Ms. Shabazz, the appellant appeared guarded, stressed, fearful, and nervous. *Id.* at 281. The appellant complained to her of an overload of work, and she always appeared to be extremely busy. Ms. Shabazz further testified that the appellant eventually confided in her that Akers had made sexual advances towards her which she had tried to ignore. Ms. Shabazz urged the appellant to report Akers' harassing conduct but the appellant feared doing so. *Id.* Arlillian Coleman, another auditor in the appellant's office, testified that the appellant complained to her that Akers was rude and she was having difficulty working with him.

Mr. Akers was described as sarcastic, "nitpicky," and demanding. However, Akers denied harassing the appellant. Mr. Beach acknowledged that Mr. Akers' comments on the appellant's work may have been strongly worded, but he felt the comments merely reflected Akers' impatience with the appellant's tendency to not follow instructions. HT at 93. Mr. Beach admitted that the appellant complained that she was tired of Akers harassing her about her work. *Id,* at 25. Rather than seriously consider the appellant's complaint, Mr. Beach told the appellant that Akers was going to help her straighten out her work. Mr. Beach further testified that he was unaware of any improper conduct from Mr. Akers whom he considered to be his best and strongest team leader. Because of Mr. Akers' reputation as a meticulous and thorough auditor, he felt the appellant could benefit from Akers' supervision. *Id.* at 19.

Mr. Beach pointed out that after learning that the appellant had complained about Akers, he assumed total responsibility for reviewing the appellant's work. AF, Vol. 1, Tab 6, Subtab 4o. I note that Mr. Beach assumed a more direct supervisory role in the appellant's work almost four months after she had been placed on the PIP. However, the evidence in this case indicates that most of the appellant's work leading to and during the PIP, and upon which the agency relied to support the appellant's unacceptable performance rating was performed while she worked under Mr. Akers.

Based on the evidence presented, I find that the appellant was subjected to harassment which ended prior to the beginning of the PIP. However, the record is clear from the testimonies of the appellant and two of her co-workers, Shabazz and Coleman, that the appellant continued to feel intimidated and fearful of Akers. I further find this environment continued to adversely affect the appellant's ability to work during the period in which she was to demonstrate acceptable performance. Thus, I find that under the circumstances presented here, the appellant was denied a reasonable opportunity to demonstrate improved performance. *Deskins v. Department of the Navy,* 29 M.S.P.R. 276, 278 (1985) (employee denied a reasonable opportunity to improve where there is

evidence of verbal abuse, insults, and harassment which interfered with employee's ability to work).

Timely meeting the due dates and deadlines was an important part of the PIP. The appellant admitted to missing the deadlines given in the PIP, despite her best efforts to timely submit her work. She testified that after one month on the PIP, she realized that she would have trouble passing the PIP. The appellant testified that when she missed the first deadline, which was extended, it became evident that she could not pass the PIP. HT at 372-74. Hence, she argued that the PIP was designed for her failure, and that she had neither a realistic nor reasonable opportunity to improve. *Id.* at 404. For the following reasons, I agree.

The agency placed the appellant on the PIP beginning on November 23, 1993. The appellant testified that without any explanation Mr. Beach and Mr. Akers gave her the notice letter shortly before she left on November 23, the day before Thanksgiving. *Id.* at 368—72, 409—12. The appellant was on approved leave between November 24 and December 2. *Id.* at 369, 409—12; *see also* AF, Vol. 2, Tab 17. The first scheduled completion date for Objective A, Step 1 was December 2, 1993. Timely completion of this step was necessary for the completion of the remaining steps under Objective A. The agency extended the date to December 6 and revised the completion dates for the remaining data analysis assignments. The appellant was warned in a December 6, 1993 memorandum that under the PIP, she would be allowed three instances of failure of meet an established time frame. *Id. Vol. 1,* Tab 6, Subtab 4x.

Mr. Beach acknowledged that the effect of missing the first deadline and extending the remaining deadlines resulted in requiring the appellant to do more work in a shorter period of time. He conceded that under the circumstances of the holiday, the appellant's approved leave, and the extension of the first deadline, the appellant had one day less than was originally called for in the PIP. HT at 117. He further acknowledged that no other auditors were given the type of time schedule that was assigned to the appellant for completing work. *Id.* at 118—19.

As a result of approved leave, the appellant started her PIP by missing the first completion date. Even though the agency granted a short extension, missing the first completion date adversely impacted the remaining dates. Under these circumstances, I find from the beginning of the PIP, the appellant's efforts to demonstrate acceptable performance became futile. Thus, I find the opportunity provided the appellant was neither meaningful nor reasonable.

The appellant asserted that the agency's actions removing her were based on reprisal and sex discrimination.

The appellant asserted that the agency's decisions were in reprisal for having engaged in protected Equal Employment Opportunity (EEO) activity and as a result of sex discrimination. 5 U.S.C. § 2302(b)(1)(A) and (b)(9)(A) prohibit discrimination based on sex and reprisal against an employee for exercising any right granted by law, rule, or regulation. The appellant's allegations, if proven by a preponderance of the evidence, would establish that the agency engaged in a prohibited personnel practice and require reversal of the agency's actions. *Mascarenas v. Department of Defense,* 54 M.S.P.R.

303, 309 (1993) (describes the appellant's burden when raising an affirmative defense); 5 C.F.R. § 1201. 56(a)(2) (1994).

The appellant proved sex discrimination.

The appellant contends that she was sexually harassed by Gene Aker, her team leader. Discrimination based on sex includes sexual harassment, including allegations of offensive sexually related conduct that creates an intimidating, hostile, or offensive working environment. *Kelsch v. Department of Labor,* 59 M.S.P.R. 503, 509 (1993). A claim of sexual harassment can be founded on a "hostile or offensive working environment" which the Supreme Court has recognized as an unlawful employment practice. *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 65-67, 106 S.Ct. 2399, 2404-06, 91 L.Ed.2d 49 (1986).

Under the EEOC regulations, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

See 29 C.F.R. § 1604.11(a) (1994).

The appellant has the burden of proving her discrimination defense by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2)(iii) (1994). In this case, the appellant must prove that the harassing conduct occurred, that it was unwelcome, that it was of a sexual nature, and that it unreasonably interfered with her work performance or created an intimidating, hostile or offensive working environment. *Biddle v. Department of the Treasury,* 63 M.S.P.R. 521, 527 (1994).

In alleging that Mr. Akers' conduct towards her created a hostile working environment, the appellant must show that Akers' conduct was sufficiently severe or pervasive to create an objectively hostile or abusive environment, one that a reasonable person would find hostile or abusive. *See Harris v. Forklift Systems, Inc.,* - U.S. , , 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993); *King v. Hillen,* 21 F.3d 1572, 1582 (Fed.Cir.1994). Where there are multiple incidents, it is the cumulative effect of the offensive behavior that creates the work environment. *Id.* at 1581.

The appellant's evidence via the testimonies of her co-workers Iceilla Etheridge, Cheryl Smith, and Arlillian Coleman, described a relaxed office atmosphere wherein Mr. Akers freely made inappropriate sexual comments and shared "playboy"type magazines which displayed scantly dressed women centerfolds. The appellant testified that Mr. Akers told her that he dreamed about the two of them on a beach, that he made an inappropriate comment about him and Mr. Etheridge in the bathroom, and he remarked that if he had a butt like a black man, he could have her. HT at 360-63. She further testified that in addition to muscle media magazines; Akers showed her centerfold pictures of nude women. *Id* at 362. The appellant explained that she felt uncomfortable

in Mr. Akers presence. *Id.* at 364, 373. She complained of losing weight, difficulty sleeping, lack of concentration, and other symptoms of stress which prompted her to seek psychological counseling. *Id.* at 373-75.

Mr. Akers denied that he either made inappropriate comments to the appellant or that he showed to her a playboy magazine. He admitted, however, that he kept playboy magazines locked in his office and that he showed a muscle media magazine to the appellant.

Mr. Akers and the appellant's testimonies differ as to Mr. Akers' behavior and statement. Where there is conflicting testimony I must make credibility determinations after having had the opportunity to hear all testimony, review all evidence and observe the demeanor of all parties and witnesses. *Hillen v. Department of the Army,* 35 M.S.P.R. 453, 458-62 (1987). In resolving the credibility issue, I have considered the following factors: (1) The witness' opportunity and capacity to observe the event or act in question; (2) the inherent improbability of the witness' version of events; and (3) the witness' demeanor. *Id.* at 458-62.

Based on the record, I find the appellant's version of the events to be more credible. The appellant's testimony was thorough, consistent, straightforward, and unwavering under an arduous, and piercing crossexamination. Although no one witnessed Mr. Akers' comments to the appellant, I find that Cheryl Smith testified that Akers made similar statements to her regarding a dream. HT at 292, 314-16. She further testified that Akers commented on her clothes and her legs.

Akers admitted that he joked with Cheryl Smith, that he commented on her clothing, and he told her about a dream that he had involving her. He openly admitted that he jokingly called Ms. Smith, "my sweet meat", and she referred to him as "her white delight." Mr. Akers felt there was nothing wrong with his conduct. Although he denied showing playboy magazines to the appellant, Mr. Etheridge testified that Akers shared playboy magazines with him. Based on the corroborating evidence of Akers' inappropriate office demeanor, I find it more likely than not that Akers made the comments to the appellant and that he showed to her playboy type magazines.

In determining whether the appellant's environment was abusive or hostile, the totality of the circumstances must be considered. 29 C.F.R. § 1604.11(b) (1994). Factor used to determined whether the environment is hostile includes, the frequency of the discriminatory conduct, its severity, and whether it is physically threatening or humiliating, or a mere offensive utterance. *Hillen v. Department of the Army,* 66 M.S.P.R. 68, 73 (1994). In evaluating the totality of the circumstances, the Board has held that it is the cumulative effect of the conduct on the alleged victim(s) and the work environment that must be considered. Thus, incidents of sexual harassment directed at other employees in addition to the appellant are relevant to a showing of hostile work environment. *Id.* at 75, *see also Hillen,* 21 F.3d at 1581 (citing EEOC Policy Guidance, 8 F.E.P. Manual at 405:6691).

The appellant and several other witnesses found Akers' comments and sexually suggestive conduct (patting Mr. Etheridge on the buttocks) to be offensive. At the hearing, I note that Mr. Etheridge was visibly embarrassed to discuss Akers' conduct. Based on the evidence presented, I find that the Akers' statements and flirtatious

behavior were unwelcomed by the appellant and other employees in the office. I find that Akers' statement to the appellant that if he had a butt like a black man he could have her, and his recalling a dream about being on the beach with the appellant, coupled with showing playboy type magazines is probative of the conclusion that under a reasonable person's standard, Akers' conduct was sexually suggestive and offensive. Because of Akers' comments and behavior, I find that a reasonable person would have experienced a hostile environment based on Akers' conduct. Thus, I find that the appellant subjectively experienced a hostile, offensive, and intimidating working environment.

By suggesting that Akers was merely a team leader without supervisory authority, the agency carefully attempted to distinguish Akers' and Beach's role in the appellant's evaluation process. Akers had day-to-day supervisory authority over the appellant's work. Mr. Beach greatly relied on Akers' review of the appellant's work and he sought Akers' input into the counseling sessions. I find that Akers was in a position to affect the appellant's career and performance appraisal. This fact exacerbated the hostility to the appellant's environment, and would have been an exacerbating factor for a reasonable person. *See Hillen,* 21 F.3d at 1583, 1582 (under 29 C.F.R. § 1604.11(b) a reasonable person's perception of any one incident must be determined in the context of all the incidents). Thus, I find that the appellant's feelings of intimidation were justified.

The appellant's affirmative defense of discrimination, if proven, negates the agency's action even though the agency has met its burden of proof on the charges. 5 U.S.C. § 7701(c)(2)(B). After considering all the evidence, I find that the appellant has shown by a preponderance of the evidence the existence of sexual harassment which is included in a claim of sex discrimination. Since the appellant proved her affirmative defense, the agency's removal action must be reversed.

The agency's decisions to place the appellant on a PIP and to remove her were not reprisal for protected activity.

The appellant maintains that the agency is retaliating against her because she previously filed EEO complaints. To prevail on an allegation of retaliation, the appellant has the burden of showing that: (1) A protected disclosure was made; (2) the accused official knew of the disclosure; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *See Warren v. Department of the Army,* 804 F.2d 654, 656—58 (Fed.Cir. 1986); *Rockwell v. Department of Commerce,* 39 M.S.P.R. 217, 222 (1988).

It is undisputed that the appellant filed an EEO complaint and she contacted her congressman's office and reported the difficult working conditions that existed in the office. Mr. Beach admitted that he was aware of the appellant's complaints. The appellant's complaints were investigated. AF, Vol. 1, Tab 6, Subtabs 3c & 3d. The filing of an EEO complaint is protected activity. *See Williams v. Department of Defense,* 46 M.S.P.R. 549, 553—54 (1991). Thus, I find the appellant engaged in protected activity.

After examining the evidence, I find the appellant failed to establish a nexus between her protected EEO activities, the letter to her congressman, and her removal from the agency. I find that the evidence of the appellant's poor performance

outweighed any motive of the agency to retaliate against her. The record is clear that the appellant's poor performance prompted the agency's decisions. Thus, I find that the appellant has failed to carry her evidentiary burden on this affirmative defense. *See Trammell v. Department of Veterans Affairs,* 60 M.S.P.R. 79, 89 (1993); *Neff v. Department of the Treasury,* 39 M.S.P.R. 142, 146 (1988), *aff'd,* 884 F.2d 1398 (Fed.Cir.1989) (Table); *Cooney v. Department of the Air Force,* 37 M.S.P.R. 240, 242 (1988), *aff'd,* 883 F.2d 1027 (Fed.Cir.1989) (Table).

DECISION

The agency's action is **REVERSED.**

ORDER

The agency is ORDERED to cancel the removal and to retroactively restore the appellant to the position of GS-12. Step 3 Auditor, effective September 9, 1994. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is also ORDERED to issue a check to the appellant for the appropriate amount of back pay, with interest, and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations, no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency in furtherance of compliance.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office concerning the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its intentions.

INTERIM RELIEF

If a petition for review is filed, I ORDER the agency to provide interim relief to appellant in accordance with Section 6 of the Whistleblower Protection Act of 1989. 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective upon the issuance of this decision and will remain in effect until the decision of the Board becomes final.

FOR THE BOARD:
/s/ Wilhelmina Douglas Stevenson
Wilhelmina Dougas Stevenson
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. § 1201.112(a)(5) (1994).

NOTICE TO APPELLANT

This initial decision will become final on Feb. 28, 1995, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the Administrative Judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Review and Appeals
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a petition with the appropriate United States District Court no later than 30 calendar days after the date this initial decision becomes final.

If you choose *not* to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be *received* by the court of appeals no later than 30 calendar days after the date this initial decision becomes final.

ENFORCEMENT

If, after the agency has informed you that it has complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees and costs by filing a motion with this office no later than 20 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 U.S.C. § 7701(g), 5 C.F.R. § 1201.37(a), and applicable case law.

CONCURRING OPINION OF ANTONIO C. AMADOR, MEMBER.

I concur in the Chairman's decision to direct issuance of an order which will result in the initial decision becoming the final opinion of the Board pursuant to the Board's regulation, 5 C.F.R. § 1200.3(b),[4] While I, of course, recognize that the initial decision and this order are nonprecedential, 5 C.F.R. § 1200.3(d), I write to indicate my basis for concluding that the agency's action should have been sustained.

Under 5 U.S.C. § 4302(b)(6), an agency may only reassign, reduce in grade, or remove an employee for unacceptable performance after first providing the employee with an opportunity to demonstrate acceptable performance. In order for a performance

based action taken under 5 U.S.C. § 4303 to be sustained, the agency must prove, by substantial evidence, that it afforded the employee an opportunity to demonstrate acceptable performance. *See Thompson v. Farm Credit Administration,* 51 M.S.P.R. 569, 578 (1991). Substantial evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. 5 C.F.R. § 1201.56(c)(1). The opportunity to demonstrate acceptable performance is an important substantive right, not just a procedural one. *Thompson,* 51 M.S.P.R. at 578; *Sandland v. General Services Administration,* 23 M.S.P.R. 583, 587–90 (1984).

Here, the administrative judge found, based on several factors, that the agency failed to afford the appellant a reasonable and meaningful opportunity to improve her performance. First, she credited the appellant's testimony that her biweekly counseling sessions with her firstline supervisor and team leader were counterproductive and that she received no assistance during them. Initial Decision (I.D.) at 9-10. The administrative judge based her finding in part on the fact that the appellant's testimony that she was confused and did not understand her assignment was corroborated by two witnesses, Richard Hanley and Robert Briggs, both of whom offered the opinion that the appellant's assignment was not clear. However, neither Hanley nor Briggs reviewed all of the documents that the agency provided the appellant with her assignment, *see* Transcript (Tr.) at 226–27, 229-32, 266; their assessment that the assignment was confusing lacks probative value because it was based solely on the incomplete information provided to them by the appellant. *See Brown v. Department of the Navy,* 65 M.S.P.R. 245, 251 (1994) (the appellant's physician's conclusory statement that the appellant was an alcoholic was entitled to little weight because it was based on the appellant's self reports rather than the physician's firsthand observations); *Johnson v. Department of Health & Human Services,* 22 M.S.P.R. 521, 529 (1984) (the testimony of the appellant's co-workers was largely speculative as to whether his return to duty would be disruptive, based on their admitted lack of knowledge of the details of the appellant's off duty criminal misconduct, and was insufficient to rebut the presumption of nexus between the alleged off duty misconduct and the efficiency of the service). Moreover, the mere fact that the appellant was confused and. did not understand her assignment does not mean that the agency failed to provide her with adequate guidance; instead, her confusion could be construed as evidence that she did not understand how to perform the data analysis required of her.

Further, the administrative judge's reliance on the appellant's general assertion that the biweekly counseling sessions were not helpful is misplaced. *See Robinson v. Department of the Army,* 50 M.S.P.R. 412, 419 (1991) (the appellant's mere allegation in her petition for review that she was inadequately counseled during her performance improvement period [PIP] was insufficient to disturb the administrative judge's finding that she was afforded a reasonable opportunity to improve). Although the appellant testified that "those biweekly sessions turned into more like a criticizing," Tr. at 381, she does not dispute that they occurred. In fact, the documentary record reflects that six of these sessions occurred between December 17, 1993 and March 8, 1994. Appeal File (AF), Tab 6, Subtabs 4m, 4n, 4p, 4r, 4v, 4w. After each session, the appellant's supervisor or team leader prepared a memorandum summarizing the matters discussed during the session. These memoranda all show that the appellant received specific,

substantive criticism and suggestions, she was permitted to ask questions, and her questions were answered. *See Corbett v. Department of the Air Force,* 59 M.S.P.R. 288, 290-92 (1993). In addition, for each working paper that she turned in during her assignment, she received extensive reviewer comments, each containing specific, substantive criticisms. AF, Tab 11, Exhibits 1A, 2A, 3A, 4A, 5A, 6A, 7A, 8A, 9A, 10A, 11A, 12A, 13A, 14A; *see Griggs v. Department of the Army,* 53 M.S.P.R. 597, 601 (1992) (although the appellant's PIP notice provided that his supervisor would meet with him biweekly, the evidence showed that the agency's failure to comply with this provision did not prejudice the appellant's opportunity to demonstrate acceptable performance), *aff'd,* 5 F.3d 1503 (Fed.Cir.1993) (Table).

The agency is required by statute to provide the appellant a reasonable opportunity to improve, but the agency cannot guarantee an employee's success during a PIP. *See Bare v. Department of Health & Human Services, 30* M.S.P.R. 684, 688 (1986) (where the agency made appropriate assistance available to the appellant during his PIP, it was not responsible for the appellant's apparent failure to benefit from this assistance). Although the appellant may have subjectively experienced her biweekly counseling sessions as counterproductive, the record clearly shows that the agency offered her ample assistance during the PIP--more, in fact, than it would otherwise offer an Auditor at the GS-12 level. Tr. at 37, 141-42. In this regard, it is important to note that a GS-12 Auditor such as the appellant is required to perform with a great degree of independence and with minimal supervision. AF, Tab 6, Subtab 4gg; *see also* Tr. at 17. The appellant's supervisor testified that, because he wanted to make sure that she could perform independently as her performance standards required, he instructed her not to seek assistance from her co-workers. Tr. at 35-36. Rather, if she needed help or had questions, she was to consult with him or with her team leader. *Id.* Notwithstanding this instruction, the appellant testified that she sought help from former and current co-workers, obtaining assistance on her own beyond that which the agency provided. Tr. at 382-84. Consequently, she, in fact, received even more assistance during her PIP than that explicitly provided to her by her supervisor and team leader. Thus, the administrative judge's finding that the agency provided her with no assistance during the PIP is unsupported by the record and by Board precedent.

Second, the administrative judge found that the appellant's untimeliness, when she missed the deadline for the first portion of her assignment, had a domino effect on her ability to meet other deadlines, and that, therefore, "from the beginning of the PIP, [her] efforts to demonstrate acceptable performance became futile." I.D. at 12-13. The appellant was placed on a PIP on Monday, November 22, 1993, and received her PIP assignment on November 23. AF, Tab 6, Subtabs 4y, 4z. At that time, the due date for the first portion of the assignment was Thursday, December 2, 1993. *Id.,* Subtab 4z at 1. Accordingly to the appellant's supervisor, the first portion of the assignment was simply to copy a series of numbers from one document to another and add them up. Tr. at 40-41.

On November 24, the appellant met with her team leader and her supervisor to discuss the assignment and then went on leave for some portion of the remainder of the day. AF, Tab 11, Exhibit 17, Tab 17. The next date that the appellant reported for duty was December 2, 1993, due to the Thanksgiving holiday, a weekend, 3 days of

approved annual leave, and 1 day of sick leave. The appellant requested and received an extension of the due date for the first portion of the assignment until December 3; her supervisor informed her that this short extension would not be counted against her. AF, Tab 6, Subtab 4x. The appellant missed the extended December 3 deadline and received a further extension to December 6. *Id.* On that date, she also received an extension for four additional deadlines for other portions of the assignment. *Id.*

The appellant turned in her assignment on December 6, and it was seriously deficient. She failed to follow agency practice and did not properly title and number her work paper. AF, Tab 11, Exhibits 1A, 1B. She also failed to follow agency practice when she did not cross reference her figures to the documents from which she obtained her data. *Id.* She made errors in copying the data, and she made arithmetical errors in adding the figures that she copied. *Id.* She received her team leader's reviewer comments on December 6 and was instructed to make appropriate corrections, which she turned in on December 8. AF, Tab 11, Exhibits 2A, 2B. She failed to correct many of the deficiencies pointed out to her in her first draft and had to prepare a third draft. Even in her third draft, she failed to make all of the corrections required of her. *Id.,* Exhibits 3A, 3B.

The appellant's supervisor testified without rebuttal that this assignment "should take a day, no more than two days to accomplish." Tr. at 38. After taking the two extensions into account, the appellant received much more than 2 days to complete this assignment.[5] The record contains three drafts of this assignment; the third draft still contained significant errors, some of which were pointed out to her in the reviewer comments to the first draft but remained uncorrected. Under these circumstances, the twice extended deadline that the agency set for completion of the first assignment was reasonable.

Moreover, the fact that the appellant missed the extended deadline for submission of the first portion of her PIP assignment does not mean, as the administrative judge found, that her efforts to demonstrate acceptable performance became futile. The agency extended the deadlines on four additional portions of her assignment to take her initial untimeliness into account. AF, Tab 6, Subtab 4x. The agency was unable to extend the remaining two deadlines because it needed her completed work product in order to turn in the larger project on time. *Id.,* Subtab 4w. In addition, the agency extended her PIP by 10 workdays to account for her absences. *Id.,* Subtab 41; *see Green v. Department of Labor,* 26 M.S.P.R. 96, 98 (1985). Although the appellant's failure to meet deadlines early in her PIP certainly had a domino effect on her ability to meet deadlines later in the PIP, I find that the agency was more than reasonable in attempting to accommodate the appellant's untimeliness by extending as many of her deadlines as it could and by extending her PIP as a whole. Under these circumstances, the agency has shown by substantial evidence that it afforded the appellant a reasonable opportunity to improve her performance.

Third, the administrative judge found that the appellant's team leader, Gene Akers, sexually harassed her prior to the commencement of the PIP and that the appellant continued to feel intimidated and threatened by him during the PIP. I.D. at 10–12. By the appellant's own testimony, however, the alleged sexual harassment had ceased at least several months before the PIP began. Tr. at 446-47.

Moreover, the administrative judge's reliance on *Deskins v. Department of the Navy,* 29 M.S.P.R. 276, 278–79 (1985), is misplaced. In *Deskins,* the Board found that the employee was subjected to verbal abuse, insults, and harassment during the PIP. Further, the agency denied him overtime that it permitted other employees and denied him access to its computers and to other materials that he needed to complete his assignments. *Id.* at 278. Here, there is no evidence that during her PIP the agency subjected the appellant to verbal abuse or insults or denied her access to the equipment and facilities that she needed to complete her assignments. To the extent that some of the team leader's more harshly worded criticisms of her work on his reviewer comments could be deemed "verbal abuse" or "insults," the appellant specifically testified that these comments did not upset her. Tr. at 445-46.

I further find that the administrative judge placed too much weight on the testimony of the appellant's co-workers Raheema Shabazz and Arlillian Coleman. The administrative judge found that Shabazz testified that the appellant's demeanor changed during the PIP and that she became "guarded, stressed, fearful, and nervous," complained of an overload of work, and always appeared to be extremely busy. I.D. at 11. In fact, Shabazz testified that she was very uncertain about dates and that she could not remember if the appellant's demeanor changed during the PIP or, instead, prior to the PIP when the alleged sexually harassing conduct was occurring. Tr. at 275, 281, 285. Shabazz further testified that, in approximately October 1993, the appellant confided that she was afraid of being demoted, Tr. at 281-82, and that "she was a nervous wreck because of the stress that was on her," Tr. at 286. At no point did Shabazz testify that the appellant "continued to feel intimidated and fearful of Akers," as the administrative judge found. I.D. at 12. Instead, Shabazz's testimony is that the appellant suffered from stress brought on by the fact of being placed on a PIP and the attendant fear of losing her job rather than stress brought on by alleged sexual harassment.

Likewise, the administrative judge found that Arlillian Coleman testified that the appellant told her that Akers was rude and that she was having difficulty working with him. I.D. at 11. Coleman testified that the appellant complained to her about Akers in August or September 1991, more than 2 years prior to the start of the PIP. Tr. at 325-28, 338. In fact, Coleman transferred to another agency installation in 1990, and has no knowledge of the appellant's demeanor during any of the period that she worked for Akers. Tr. at 329, 341. Further, she proffered no testimony that the appellant was subjected to sexual harassment during her PIP or that she felt fearful and intimidated by Akers during the PIP because of his prior alleged sexual harassment of her. Thus, I find that the testimony of Shabazz and Coleman is not probative of whether the appellant suffered any alleged sexual harassment or the effects of prior sexual harassment during her PIP, and the administrative judge erred by relying on this testimony.

I further find that the administrative judge erred by placing undue weight on the appellant's general allegations of stress during the PIP. A PIP is an inherently stressful event; it is understandable that an employee placed on a PIP might be fearful of losing her job or worried about failing the PIP. The appellant's allegations of stress and her assertion that she sought psychiatric care show only that she was suffering from general stress, not that she was suffering from the effects of prior alleged sexual

harassment. The appellant proffered no testimony or evidence relating her symptoms of stress during the PIP to Akers's alleged sexual harassment of her prior to the PIP.

In sum, the agency gave the appellant biweekly counseling sessions during the PIP and a great deal of written feedback on her work product. To accommodate the appellant's absences due to training, holidays, illness, and inclement weather, it extended the deadlines for most of her assignments during the PIP, and it extended her PIP as a whole by 10 workdays. *Green,* 26 M.S.P.R. at 98. As soon as the agency learned of the appellant's EEO complaint about Akers's prior alleged sexual harassment of her, it removed him from her chain of review. This occurred on February 11, 1994, approximately 6 weeks into the PIP. AF, Tab 6, Subtab 40. During the approximately 7 weeks that remained of the PIP, the appellant's performance continued to be deficient, despite the fact that Akers was no longer her team leader. *See* AF, Tab 6, Subtabs 4m, 4n, Tab 11, Exhibits 8A-8C, 10A-11B, 13A-13B, 15. Under all of these circumstances, I find that the agency has shown by substantial evidence that it afforded the appellant a reasonable opportunity to improve her performance and that the administrative judge erred by finding to the contrary. *See Bare,* 30 M.S.P.R. at 687-88.

In regard to the appellant's allegation that the removal action constituted sex discrimination, the administrative judge correctly noted that discrimination based on sex includes sexual harassment, including allegations of offensive sexually related conduct that creates an intimidating, hostile, or offensive working environment. I.D. at 14; *see Kelsch v. Department of Labor, 59* M.S.P.R. 503, 509 (1993), *review dismissed,* No. 94-3109, 1994 WL 745244 (Fed.Cir. Mar. 16, 1994) (Table). The administrative judge found, based on her assessment of the witnesses' credibility, that Akers made inappropriate sexual comments and shared "Playboy" type magazines with peers and subordinates in the workplace, that he once told the appellant that "if he had a butt like a black man, he could have her," and that he told her about apparently sexually oriented dreams that he had about her. I.D. at 15-17. The administrative judge further found that this conduct was severe and pervasive enough to create a hostile working environment, that a reasonable person would have experienced a hostile working environment, and that the appellant subjectively experienced a hostile working environment. *Id.* at 17. She thus found that Akers's conduct constituted sexual harassment, and that the appellant therefore had proven her affirmative defense of sex discrimination. *Id.* at 17–18.

On review, the agency asserts that the administrative judge's credibility findings were erroneous and that she erred by finding that the alleged sexual harassment occurred and that, even assuming that it occurred, it did not rise to the level of sexual harassment. Petition for Review (PFR) File, Tab 1 at 9-13. The agency's argument is without merit. By his own admission, .Akers kept a cache of PLAYBOY magazines in his desk drawer at work and freely shared them with whoever asked to see them. Tr. at 458–59. Akers's magazine collection was common knowledge throughout the facility. Tr. at 279, 335, 362–63. The act of sharing and circulating such magazines in the workplace creates an environment that objectifies women, i.e., an environment that injects sex into the workplace, where it has no business, by relegating women to the status of sex objects to be prized for their physical attributes rather than their job performance. This is especially true where, as here, that environment is created by a quasisupervisory employee with direct responsibility for reviewing the work of

subordinate female employees and with substantial input into employees' performance appraisals. I find that the administrative judge correctly determined that, considering the totality of the circumstances, Akers's conduct created a working environment that was severe or pervasive enough that a reasonable person would find it hostile or abusive and that it constituted sexual harassment. *Hillen v. Department of the Army,* 66 M.S.P.R. 68, 74-75 (1994); I.D. at 16-18; *see Van Amber v. U.S. Postal Service,* 47 M.S.P.R. 320, 325-26 (1991); *Hayes v. Tennessee Valley Authority,* 4 MSPB 466, 4 M.S.P.R. 411, 416 (1980).

Upon finding that the appellant proved that Akers sexually harassed her, the administrative judge concluded, without further discussion, that the agency's removal action constituted sex discrimination. I.D. at 18. She failed to explain, however, why this prior sexual harassment, which ended months prior to the PIP, necessitates a finding that the agency's removal action, ostensibly for unacceptable performance, in fact constituted sex discrimination.

In order to establish a claim of prohibited employment discrimination through circumstantial evidence, as in this removal action, the appellant must first establish by a preponderance of the evidence a prima facie case. *Johnson v. Defense Logistics Agency,* 61 M.S.P.R. 601, 603–04 (1994). The burden of going forward then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action. *Id.* An agency meets its burden of articulating legitimate nondiscriminatory reasons when it introduces evidence, " `which *taken as true,* would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action,' " regardless of whether the agency actually proves its charges. *Carter v. Small Business Administration,* 61 M.S.P.R. 656, 666 (1994), *quoting St. Mary's Honor Center v. Hicks,* - U.S. , , 113 S.Ct. 2742, 2748, 125 L.Ed.2d 407 (1993) (emphasis in original). To ultimately prevail on a claim of sex discrimination, the appellant must also show by a preponderance of the evidence both that the agency's stated reason for the action was false or not the real reason for the action, *"and* that discrimination was the real reason" for the action. *Carter,* 61 M.S.P.R. at 666, *quoting Hicks,* - U.S. at -, 113 S.Ct. at 2752 (emphasis in original); *see Johnson,* 61 M.S.P.R. at 604.

The administrative judge failed to set forth the proper test for determining sex discrimination, including whether the appellant made a prima facie showing that her removal constituted sex discrimination; she also failed to determine whether the appellant satisfied her burden of showing that the agency's articulated reason for the removal was not the real reason and that sex discrimination was the real reason. Even assuming arguendo that the appellant has made a prima facie case, I find that the agency has articulated a legitimate, nondiscriminatory reason for the removal action, i.e., the appellant's unacceptable performance. *Boatman v. Department of Justice,* 66 M.S.P.R. 58, 64 (1994). I further find that the record is sufficiently well developed on the issue of sex discrimination so that remand is not necessary to resolve this issue.

The fact that the agency sexually discriminated against the appellant in the past by sexually harassing her does not necessarily mean that the removal action in dispute in this appeal constituted sex discrimination. *Boatman,* 66 M.S.P.R. at 63–64. However, the agency's prior sex discrimination can be circumstantial evidence that its removal action constituted sex discrimination, if it is of sufficient weight to warrant a finding that

the agency's real reason for the removal action was sex discrimination and not the appellant's unacceptable performance. Under the circumstances of this appeal, I find that the appellant has not shown that sex discrimination, rather than her unacceptable performance, was the real reason for the removal action.

First, the administrative judge found below that the agency proved its charge of unacceptable performance, and the appellant does not challenge this finding on review. I further note that some of the appellant's performance deficiencies, such as her repeated arithmetical mistakes and repeated failure to adhere to the agency's conventions for titling working papers, are egregious performance deficiencies in a GS-12 Auditor. The appellant's proven unacceptable performance is not in dispute.

Second, the appellant has not alleged or shown that Akers's sexual harassment of her in the spring of 1993 caused her poor performance during her PIP from November 1993 through April 1994. She testified that the sexual harassment ceased well before the PIP commenced. Tr. at 446. She testified that she suffered from stress during the PIP, but she did not state that the stress was caused by the prior sexual harassment. Although Shabazz and Coleman corroborated the appellant's claim of sexual harassment, and Shabazz corroborated the appellant's claim of stress, none of the witnesses testified that the appellant's symptoms of stress during the PIP were related to prior sexual harassment, and none of the witnesses testified that the appellant's unacceptable performance during the PIP was caused by prior sexual harassment. In short, while the appellant has shown that she was subjected in the past to conduct that constitutes sex discrimination, she has not met her burden of showing that the agency's real reason for the removal action in dispute in this appeal was sex discrimination, rather than her unacceptable performance. *See Boatman,* 66 M.S.P.R. at 63-64.

Finally, because the appellant has not proven her affirmative defense of sex discrimination, she is not entitled to compensatory damages under the Civil Rights Act of 1991, and I would deny her cross petition for review. *Goins v. Department of the Air Force, 67* M.S.P.R. 211, 216 n. 3 (1995). I note, as well, that only in her cross petition for review did the appellant first raise the issue of her entitlement to compensatory damages. The Board has previously determined that, where it has found discrimination in a final decision on the merits of an appeal, an appellant must have sought compensatory damages from the administrative judge during the appeal on the merits; an appellant thus may not wait to seek compensatory damages in a petition for enforcement unless the agency's failure to comply with the Board's final order constituted a separate act of discrimination. *See Hocker v. Department of Transportation,* 63 M.S.P.R. 497, 505 (1994). Similarly, the appellant here should have raised before the administrative judge the issue of compensatory damages based on her discrimination claim. *Banks v. Department of the Air Force,* 4 MSPB 342, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence).

Accordingly, I would sustain the agency's action.

1. Ms. Vines performance problems precede her placement into the improvement period by several months. The last midterm review given to her before the improvement period began

found her to be performing marginally in one critical element for the period of January through June 1993. This covers the period of time during which much of Akers' sexual harassment occurred. Were it not for her poor performance that preceded the improvement period, the agency would have been without the authority to initiate a performance improvement period. *See 5 C.F.R. § 432.104.*

2. *King v. Hillen and M.S.P.B.,* 21 F.3d 1572 (1994).

3. *Thompson v. Farm Credit Administration,* 51 M.S.P.R. 569, 578 (1991)

4. This regulation provides that the Chairman may direct issuance of an order when the Board's members, due to a vacancy, recusal, or other reasons, are unable to decide any case by majority vote.

5. She received the assignment on November 23, and thus had part of November 23 and 24, all of December 2 and 3, and part of December 6 to complete it.