

Civil No. 13-1507 (GAG)

1 Manuel Sariego (“Sariego”), a co-worker from the Directorate of Human Resources (“DHR”); (2)
2 sexual harassment in 2009 by Luis Comas (“Comas”), a supervisory human resources specialist at
3 DHR, and (3) sexual harassment in August 2013 by a sexual harassment training instructor. Id.
4 As to her retaliation claims, Plaintiff alleges: (1) retaliation by her supervisor Maria Morales
5 (“Morales”) after filing an EEO complaint for Sariego’s sexual harassment in 2009; (2) retaliatory
6 transfer from the DHR to the Religious Support Office (“RSO”) in the wake of her sexual
7 harassment complaint against Comas in 2009; (3) non-selection for the Managerial Support
8 Technician G6/G7 position at the DHR; and (4) a two-year delay in giving Plaintiff an annual
9 appraisal due in 2011. Id.

10 After reviewing the parties’ submissions and pertinent law, the Court hereby **GRANTS in**
11 **part and DENIES in part** Defendants’ Motion to Dismiss at Docket Nos. 38, 40; and **DENIES**
12 Defendants’ Motion for Summary Judgment at Docket Nos. 38, 40.

13 **I. Sham Affidavit**

14 As a threshold matter, the Court addresses Defendants’ contention that some of Plaintiff’s
15 factual allegations should be stricken because they contradict or are materially different than
16 Plaintiff’s previous statements during the administrative hearings. (Docket No. 54 at 1-2.)
17 Defendants contend Plaintiff is attempting to “create[] a genuine dispute of fact for purposes of
18 summary judgment by disagreeing with herself.” Id. at 1 (citing Malave-Torres v. Cusido, 919 F.
19 Supp. 2d 198, 203 (D.P.R. 2013); Rivera-Garcia v. Sprint PCS Caribe, 841 F. Supp. 2d 538, 546
20 (D.P.R. 2012)). Defendants urge the Court to strike the following factual statements from the
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1 record: Docket No. 43 at 17-21 ¶¶ 8, 9, 14, 24, and 27. These factual statements all originate from
2 Plaintiff's deposition on December 8, 2014. (See Docket No. 43-1.)¹

3 Defendants essentially argue that Plaintiff's 2014 deposition is similar to a "sham affidavit"
4 being introduced solely in an effort to create a material issue of fact. (Docket No. 54 at 1-2.)
5 However, the Court disagrees that any of these statements contradict Plaintiff's prior testimony,
6 and holds instead they serve to provide more details and further explain Plaintiff's statements from
7 her administrative hearings. Malave, 919 F. Supp. 2d at 203 (citing Nelson v. City of Davis, 571
8 F.3d 924, 928 (9th Cir. 2009)) ("[t]his doctrine excludes conflicting testimony given by an
9 interested party, but does not bar a party from 'elaborating upon, explaining or clarifying prior
10 testimony elicited by opposing counsel on deposition.'"). Viewing the facts in the light most
11 favorable to the non-moving party, in this case, the Plaintiff, the Court finds that the statements are
12 properly supported by the record. Thus, the challenged statements shall not be stricken and are
13 admissible as evidence. At trial, Defendants are welcomed to use any statements they deem
14 inconsistent as impeaching material. See FED. R. EVID. 613. However, at this stage, there are no
15 grounds to exclude said statements.

16 **II. Relevant Factual Background**

17 The Court states the facts in the light most favorable to Plaintiff. See Anderson v. Liberty
18 Lobby, Inc., 477 U.S. 242, 255 (1986) (consistent with the motion for summary judgment
19 standard); see also Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008) (consistent with the motion to
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22 ¹ These statements contain Plaintiff's testimony that Sariago wanted to talk to her about her personal
23 relationships, and whether she was single or divorced. (See Docket No. 43 at 17 ¶ 8.) Plaintiff also declared that she
24 talked to Morales about Sariago's behavior, including his constant sexually charged comments towards Plaintiff. Id. at
17-18 ¶¶ 9-14. Plaintiff then testified that because Morales was not receptive to her complaints, she decided to create
a separate folder for all of Sariago's non-work related e-mails. Id. at 21 ¶¶ 24. Plaintiff explained that while a
separate folder would keep her from having to read Sariago's e-mails, she would nevertheless be disrupted by the e-
mail notifications on her desktop. Id. at 21 ¶ 27.

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1 dismiss standard). Additionally, in accordance with Local Rule 56, the Court credits only facts
2 properly supported by accurate record citations.² See Local Rule 56(e).

3 Plaintiff is a civilian employee of the Army at Fort Buchanan (“Buchanan”) Military Base
4 in Puerto Rico who claims she has been subjected to sexual harassment by three different
5 coworkers and subsequent retaliation by senior management over the course of 5 years. (See
6 Docket No. 13.) At the time Plaintiff Osiris Soto filed this complaint, she was employed as a
7 Management Support Technician at the DHR at Fort Buchanan. (Docket Nos. 39 ¶ 1; 43 at 1 ¶ 1.)
8 Plaintiff had been employed by the organization for approximately eleven years, and held the
9 Management Support Technician position for the last two years under the supervision of Maria
10 Morales, the Director of the DHR. Id. Plaintiff never received any warnings or negative
11 performance reviews while working for the DHR. (Docket Nos. 43 at 53 ¶ 225; 54 ¶ 225.)

12 Given the complicated history underlying Plaintiff’s sexual harassment and retaliation
13 claims, and the importance of the sequence of events to evaluating her claim, the Court has divided
14 the account of the relevant facts into specific time periods based on her allegations.

15 **A. Sexual Harassment Claim against Manuel Sariego**

16 Plaintiff’s first alleged harasser was Manuel Sariego, the Casualty Assistant Officer at the
17 DHR. (See Docket No. 43 at 16-22.) Like Plaintiff, Sariego’s supervisor was also Maria Morales.
18 (Docket Nos. 43 at 30 ¶ 75; 54 ¶ 75.) Starting in 2008, Plaintiff described several instances in
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20 ² Local Rule 56 governs summary judgment practice before the U.S. District Court of Puerto Rico. L.Cv.R.
21 56. Local Rule 56 requires, in part, that “[u]nless a fact is admitted, the reply shall support each denial or qualification
22 by a record citation as required by subsection (e) of this rule.” L.Cv.R. 56(d). In addition, Local Rule 56 states:
23 “[f]acts contained in a supporting or opposing statement of material facts, if supported by record citations as required
24 by this rule, shall be deemed admitted unless properly controverted.” L.Cv.R. 56(e). The First Circuit has made it
pellucidly clear that a party, who ignores any provision of Local Rule 56, does so “at their peril.” Ruis Rivera v.
Riley, 209 F.3d 24, 28 (1st Cir. 2000). In this case, the Court deems the following statements admitted and
uncontested due to Defendants’ failure to provide any citation to the record: Docket No. 54 ¶¶ 14, 29, 32, 50, 66, 67,
80, 113, 138, 142, 148, 156, 179, 216, 218, 223-25, 227, 244, 281, 282, and 286. (See Docket No. 54.)

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1 which Sariego allegedly harassed her by inviting her out to dinner, asking her to go to a hotel with
2 him, and inquiring about her relationship status and what she liked about men. (See Docket Nos.
3 43 at 17 ¶¶ 6-8; 54 ¶¶ 6-8.) Plaintiff continually declined Sariego’s advances. (See Docket Nos.
4 43 at 17 ¶¶ 6-8; 54 ¶¶ 6-8.)

5 Plaintiff also claims Sariego created a hostile work environment by sending her
6 inappropriate e-mails, visiting her constantly and often using phrases with inappropriate sexual
7 connotation. (Docket Nos. 43 at 18 ¶¶ 13-14; 54 ¶¶ 13-14.) Plaintiff provided several e-mails in
8 which Sariego referred to her as “nena,”³ stated that the web portal was “orgasmic” and included
9 explicit sexually suggestive pictures suggesting that in order to get promoted, a female had to give
10 good “blow jobs.” (Docket Nos. 43 at 18-20 ¶¶ 15, 16, 22; 54 ¶¶ 15, 16, 22.) Plaintiff alleges she
11 told Morales about Sariego’s e-mails and behavior, but Morales was “not receptive” to Plaintiff’s
12 complaints. (Docket No. 43 at 21 ¶ 24.) Around August 2008, Plaintiff decided to create a
13 separate folder in her e-mail where all non-work related e-mails from Sariego would be sent to. Id.
14 at 21 ¶¶ 24, 26. Sariego sent Plaintiff a total of 448 e-mails. (Docket Nos. 43 at 22 ¶ 29; 54 ¶ 29.)
15 Master Sergeant Russell, a Non-Commissioned Officer in charge of DHR, and others also received
16 inappropriate e-mails from Sariego. (Docket Nos. 43 at 19 ¶¶ 17, 18; 54 ¶¶ 17, 18.) Plaintiff
17 complained to both Russell and Luis Comas, a Supervisory Human Resources Specialist at DHR,
18 about these e-mails. (Docket Nos. 43 at 19 ¶¶ 17, 18; 54 ¶¶ 17, 18.)

19 In November of 2008, Plaintiff claims Soto and Sariego were at Plaintiff’s office when
20 Morales entered, and Plaintiff informed Morales that she was unhappy with Sariego’s visits, that
21 he had called her a “gamberra”⁴ and that she did not want to talk about non-work related things
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23 ³ “Nena” means honey, dear, darling. Nena, SPANISHDICT.COM, <http://www.spanishdict.com/translate/nena>.

24 ⁴ “Gamberra” means loose living, immoral, libertine. Gamberra, REVERSO DICTIONARY, www.dictionary.reverso.net (translating DICCIONARIO ENCICLOPÉDICO VOX 2009).

1 with him. (Docket No. 43 at 17 ¶ 9.) It is uncontested that Morales told Soto that she was the one
2 who had to deal with “several sexual gossips” and that it looked like Plaintiff and Sariego had a
3 mishap marriage.⁵ (Docket Nos. 39 ¶ 4; 43 ¶ 9, 12; 54 ¶ 9, 11.) Plaintiff contends this was the
4 first time Morales learned of Sariego’s sexual harassment of Plaintiff, and yet, failed to take
5 appropriate action. (Docket No. 43 at 18 ¶ 10.) Morales instead claims to have understood
6 Plaintiff’s “complaint” as one that was work related, since Morales perceived Plaintiff and
7 Sariego’s relationship as one where they joked and teased each other often. (Docket No. 39 ¶ 10.)

8 **B. EEO Complaint #1 – Sexual Harassment by Manuel Sariego**

9 On May 5, 2009, Plaintiff was blind copied on an e-mail from Sariego, which was
10 especially alarming to her because in it Sariego stated that Comas had prior sexual relationships
11 with two other female coworkers, and asked if Plaintiff had “fucked” Comas too. (Docket Nos. 43
12 at 22 ¶ 32; 43 ¶ 32.) After Plaintiff received this e-mail, she called Russell and translated it to him.
13 (Docket Nos. 43 at 23 ¶ 35; 54 ¶ 35.) She informed Russell she would be heading to the EEO
14 Office to report Sariego. (Docket Nos. 43 at 23 ¶ 35; 54 ¶ 35.) Plaintiff then went to Morales’
15 office to tell her she was planning to file a complaint with the EEO, and Morales acknowledged
16 that she had received Sariego’s e-mail as well. (Docket Nos. 43 at 23 ¶ 37; 54 ¶ 37.) Plaintiff
17 contends Morales then told Plaintiff she had to “stop being the way [she is] with that type of man,”
18 and that she had to be “more serious.” (Docket Nos. 43 at 24 ¶ 42; 54 ¶ 42.) Later on both
19 Morales and Russell admitted that there had been a previous incident with Sariego and another e-
20 mail containing sexual content, for which the acting Director of Human Resources at that time
21 tried to take disciplinary action, but failed to do so. (Docket Nos. 43 at 34 ¶ 101; 54 ¶ 101.)

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⁵ Morales said in Spanish: “un matrimonio mal lleva’o.” (Docket Nos. 39 ¶ 4; 43 at 2 ¶ 4.)

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1 Defendants claim to have taken appropriate action after Plaintiff's complaint because
2 immediately after Plaintiff informed Morales she had received Sariego's e-mail, Morales informed
3 the Civilian Personnel Office and the Directorate of Information Management (DOIM) of
4 Sariego's behavior and requested the e-mail to be added to a pending disciplinary action she had
5 against Sariego related to the computer misuse claims. (Docket No. 39 ¶ 9.) Plaintiff claims the
6 Army did not conduct a separate investigation to determine if Sariego had sexually harassed
7 Plaintiff. (Docket No. 43 at 41 ¶ 148.) The Army policy on sexual harassment requires
8 management to take immediate action to correct harassing behavior before it rises to the level of a
9 hostile environment. (Docket Nos. 43 at 35 ¶ 110; 54 ¶ 110.) It is uncontested that within a period
10 of six months, Sariego harassed three different women, including Plaintiff. (Docket Nos. 43 at 41
11 ¶ 152; 54 ¶ 152.)

12 In Plaintiff's EEO complaint, she also claimed that Morales knew about what had
13 previously happened between Sariego and her, and had not taken corrective action, and thus should
14 be held accountable as a Management Official. (Docket No. 43 at 25 ¶ 46-47; 54 ¶ 46-47.) After
15 Plaintiff filed the EEO Complaint, she returned to Morales' office and handed her the complaint.
16 (Docket Nos. 43 at 24 ¶ 43; 45 ¶ 45.)

17 **C. Retaliation by Maria Morales**

18 Plaintiff contends Morales began to retaliate against her after learning that Plaintiff had
19 also complained about her to the EEO. (Docket Nos. 43 at 24 ¶ 39; 54 ¶ 39.) Plaintiff claims from
20 that point on, Morales stopped using her as an assistant, stopped sending her e-mails, making
21 phone calls to her, assigning her work, and eventually decided to detail her to another section.
22 (Docket No. 43 at 25 ¶¶ 48-49.) Plaintiff also asserts Comas told her that Morales no longer
23 trusted her. Id. at 25 ¶ 49.

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1 Morales admits that she became more “guarded” after Plaintiff filed her complaint.
2 (Docket No. 54 ¶ 49.) However, Defendants posit that it was Plaintiff who stopped responding to
3 Morales’ work-related e-mails. (Docket No. 54 ¶ 48.) Because Plaintiff was heavily involved in
4 the Lean Six Sigma project, which aimed to reduce cycle time for the ID cards section in the
5 military personnel division, (Docket Nos. 43 at ¶ 54; 54 ¶ 54), Morales decided to take away some
6 of Plaintiff’s duties so she could focus on the Lean Six Sigma project. (Docket No. 39 ¶ 43; 54 ¶
7 43.) Morales claims she was under significant pressure from the Command to make sure the Lean
8 Six Sigma project was completed on time. (Docket No. 39 ¶ 43; 54 ¶ 43.) Nevertheless, Plaintiff
9 asserts that even after July 31, 2009, when Plaintiff finished the Lean Six Sigma project, Morales
10 still did not give Plaintiff her duties back. (Docket No. 43 at 26-28 ¶¶ 52, 53, 56, 57, 60.)

11 Plaintiff claims Morales further retaliated by deciding to detail Plaintiff to the ID Card
12 Section. (Docket Nos. 43 at 41 ¶¶ 153, 154; 54 ¶ 153, 154.) Plaintiff alleges Morales knew she
13 had had issues with employees from that section before, due to Plaintiff’s work on the Lean Sigma
14 Six program, in which she was forced to make changes affecting those employees in the ID card
15 section, and she had been met with opposition from those employees. (Docket Nos. 43 at 42 ¶¶
16 155, 160; 54 ¶ 155, 160.) When Morales informed Plaintiff of her transfer to the ID card section,
17 Morales acknowledged it was not a good move for Plaintiff’s career. (Docket Nos. 43 at 42 ¶ 157;
18 54 ¶ 157.) The position within the ID Card section was the same one Plaintiff held in 1995 when
19 she first started working for the Army. (Docket Nos. 43 at 42 ¶ 159; 54 ¶ 159.)

20 **D. EEO Complaint #2 – Sexual Harassment by Luis Comas**

21 Morales was Luis Comas’ direct supervisor. (Docket Nos. 43 at 30 ¶ 76; 54 ¶ 76.) Comas
22 interacted with Plaintiff on a daily basis. (Docket Nos. 43 at 37 ¶ 121; 54 ¶ 121.) Comas was also
23 Sariego’s first level supervisor. (Docket Nos. 43 at 37 ¶ 122; 54 ¶ 122.) After Sariego sent
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1 Plaintiff the May 5, 2009 e-mail, Comas' visits to Plaintiff's office increased. (Docket Nos. 43 at
2 43 ¶ 165; 54 ¶ 165.) On one occasion in Plaintiff's presence, Comas mentioned being shocked at
3 the size of a female customer's breast. (Docket Nos. 39 ¶ 44; 43 at 7 ¶ 44.) He also had another
4 discussion about active duty soldiers being sodomized in basic training. (Docket Nos. 39 ¶ 44; 43
5 at 7 ¶ 44.) Plaintiff alleges Comas' behavior was intimidating, specifically since Comas, being
6 Sario's supervisor, knew that Plaintiff had filed a sexual harassment complaint against Sario.
7 (Docket Nos. 43 at 44 ¶ 168; 54 ¶ 168.)

8 On August 26, 2009, Plaintiff claims Comas entered Plaintiff's office and stood behind her
9 looking down at her while she was sitting. (Docket Nos. 43 at 43 ¶ 166; 54 ¶ 166.) Plaintiff then
10 proceeded to get up, as Comas told her in Spanish: "If what I tell you happens, you'll be mine for
11 one night." (Docket Nos. 43 at 44 ¶ 169; 54 ¶ 169.) Comas then pushed her back down with his
12 hand on Plaintiff's breast. (Docket Nos. 43 at 44 ¶ 169; 54 ¶ 169.) Comas then proceeded to
13 leave, but as Plaintiff followed him out, he turned around and brushed his penis against her arm.
14 (Docket Nos. 43 at 44 ¶ 169; 54 ¶ 169.) Comas then left her office. (Docket Nos. 43 at 44 ¶ 169;
15 54 ¶ 169.)

16 After this incident, Plaintiff did not come back to the office because she was highly
17 disturbed. (Docket Nos. 43 at 44 ¶ 171; 54 ¶ 171.) Plaintiff alleges that later on, Comas sent her a
18 message through a co-worker advising her that he was not going to admit that he did anything
19 wrong, and that he had hired two lawyers. (Docket Nos. 43 at 45 ¶ 172; 54 ¶ 172.) However,
20 Comas denies ever touching Plaintiff. (Docket No. 39 ¶ 51.)

21 Because of this incident, Plaintiff filed a second EEO Complaint alleging sexual
22 harassment by Comas. Defendants decided not to transfer Comas from his actual position upon
23 receipt of the harassment complaint against him. (Docket Nos. 43 at 52 ¶ 217; 54 ¶ 217.) Instead,
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1 Plaintiff was transferred to the RSO as a Management Support Technician the day she came back
2 to work after the Comas incident. (Docket Nos. 43 at 51 ¶¶ 210, 214; 54 ¶¶ 210, 214.) Plaintiff
3 was told this would be a temporary transfer for 90 days, but she remained in that position for one
4 year. (Docket Nos. 43 at 51 ¶¶ 210, 214; 54 ¶¶ 210, 214.)

5 In support of their motions, the parties have provided conflicting sworn declarations from
6 their respective attorneys as to the cause Plaintiff's transfer to the RSO. Defendant's counsel, Mr.
7 Latimer, declared that Plaintiff's attorney contacted him directly and requested that Plaintiff be
8 transferred away from DHR after the Comas' incident. It was then that Plaintiff was transferred to
9 the position in the RSO. (Docket No. 39 ¶ 54; 39-5.) Defendants also provided Plaintiff's
10 "Amendment to the Complaint" in the Administrative EEO Proceeding, in which Plaintiff
11 specifically requested to be "assigned to work in a harassment free atmosphere." (Docket No. 51-3
12 at 6.) Conversely, Plaintiff's attorney, Manuel Porro-Vizcara, contends that he never called
13 Attorney Latimer to request that Plaintiff be removed from her position. (Docket No. 43-20 ¶ 12.)
14 Additionally, Plaintiff's counsel argued that if he had made this request he would have done so in
15 writing, in accordance with his customary practice. Id. ¶ 9. Attorney Latimer also contends
16 Plaintiff has corroborated his story several times when questioned. Id. ¶ 13.

17 **E. Retaliation Claims – Non-selection G6/G7 Position and Failure to Appraise in**

18 **2011**

19 Plaintiff contends that before filing her complaints, and because of her excellent
20 performance at work, Morales had initiated efforts to upgrade the GS classification of her position
21 to benefit Plaintiff, but was not successful. (Docket Nos. 43 at 62 ¶ 275; 54 ¶ 275.) Eventually,
22 Morales was able to create this new position after Plaintiff had already been transferred to the RSO
23 office. (Docket Nos. 43 at 62 ¶ 276; 54 ¶ 276.) When Plaintiff learned of the vacancy, she applied
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1 for the position. (Docket Nos. 43 at 51 ¶ 213; 54 ¶ 213). On September 9, 2010, Plaintiff learned
2 the position had instead been given to Ricardo Villalba (“Villalba”). (Docket Nos. 43 at 51 ¶
3 247; 54 ¶ 247.) Villalba was previously a mail assistant in the Mail Distribution Center at
4 Buchanan. (Docket Nos. 43 at 54 ¶ 226; 54 ¶ 226.) At the time Villalba was chosen for the
5 position, he had been working at Fort Buchanan for approximately two years. (Docket Nos. 43 at
6 57 ¶ 251; 54 ¶ 251.) Plaintiff contends that Villalba had no prior experience with that position, and
7 she was better qualified than Villalba considering she was the position’s incumbent and had
8 excellent performance evaluations. (Docket No. 43 at 53 ¶ 225.) Plaintiff alleges that she was not
9 selected for this position in retaliation for her previous EEO activity. (Docket Nos. 43 at 54 ¶ 227;
10 54 ¶ 227.)

11 In addition to not being selected for her previous upgraded position, Plaintiff contends
12 Defendants also retaliated against her by failing to rate Plaintiff during her tenure at the RSO for
13 the year 2011. (Docket No. 13 ¶ 104.) Plaintiff did not receive an evaluation until two years later
14 in 2013. (Docket Nos. 43 ¶ 286; 54 ¶ 286.) Plaintiff claims that being non-rated diminished her
15 chances of receiving promotions and salary increases in the future. (Docket No. 13 ¶ 114.)

16 **F. 2013 Sexual Harassment Claim**

17 Lastly, Plaintiff asserts that on August 26, 2013, she attended a sexual harassment training
18 provided by the Sexual Assault Response coordinator in which she was touched inappropriately by
19 the instructor. Id. ¶¶ 115-116. She claims the instructor made Plaintiff the subject of a “role play”
20 sexual harassment exercise in which he made Plaintiff walk to the front of the room as a co-worker
21 gave her “a leering up and down look like as if he wanted her.” Id. ¶ 115. Plaintiff felt singled out
22 as the only woman in the training, and informed the instructor that because she had previously
23 suffered as a victim of sexual harassment in the office, she did not want to participate any longer.

1 Id. ¶ 116. The instructor then directed Plaintiff to sit down, and advised her to not worry since it
2 was “just a training.” Id.

3 In sum, Plaintiff filed three EEO complaints from which her claims in this case arise. First,
4 on May 5, 2009, Plaintiff complained of sexual harassment by Sariego and subsequent retaliation
5 by Morales. Second, on September 14, 2009, Plaintiff complained of sexual harassment by
6 Comas, and additional retaliatory action by Morales and the Army when she was involuntarily
7 transferred out of her position. Lastly, on November 2, 2010, Plaintiff filed her third EEO
8 complaint, alleging that she was not selected for the Management Support Technician G6/G7
9 position in the DHR in retaliation for her previous EEO activity.

10 **III. Motion to Dismiss**

11 **A. Standard of Review**

12 Under Rule 12(b)(6), defendants may move to dismiss an action for failure to state a claim
13 upon which relief can be granted. See FED. R. CIV. P. 12(b)(6). To survive a Rule 12(b)(6)
14 motion, a complaint must contain sufficient factual matter “to state a claim to relief that is
15 plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Court must
16 decide whether the complaint alleges sufficient facts to “raise a right to relief above the speculative
17 level.” Id. at 555. In so doing, the Court accepts as true all well-pleaded facts and draws all
18 reasonable inferences in the plaintiff’s favor. Parker, 514 F.3d at 90. However, “where the well-
19 pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the
20 complaint alleged—but it has not show[n]—that the pleader is entitled to relief.” Ashcroft v.
21 Iqbal, 556 U.S. 662, 679 (2009) (quoting FED. R. CIV. P. 8(a)(2)) (internal quotation marks
22 omitted).

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1 Defendants also argue that Plaintiff’s failure to exhaust administrative remedies is a
2 jurisdictional issue. (Docket No. 40 at 8.) Under Rule 12(b)(1), defendants may move to dismiss
3 for lack of subject-matter jurisdiction. See FED. R. CIV. P. 12(b)(1); see also Sumitomo Real
4 Estate Sales, Inc. v. Quantum Dev. Corp., 434 F. Supp. 2d 93, 95 (D.P.R. 2006) (citing Valentin v.
5 Hosp. Bella Vista, 254 F.3d 358, 362-63 (1st Cir. 2001)). “In this type of jurisdictional challenge,
6 ‘the standard applied to a 12(b)(1) motion is similar to the standard applied to a 12(b)(6) motion,
7 namely, the court must take all of plaintiff’s allegations as true and must view them, along with all
8 reasonable inferences therefrom, in the light most favorable to plaintiff.’” Torres Maysonet v.
9 Drillex, S.E., 229 F. Supp. 2d 105, 107 (D.P.R. 2002) (quoting Freiburger v. Emery Air Charter,
10 Inc., 795 F.Supp. 253, 257 (N.D.Ill. 1992)).

11 **B. Discussion**

12 **1. Punitive Damages**

13 Plaintiff seeks punitive damages against the Army pursuant to 42 U.S.C. §1981a. (Docket
14 No. 13.) However, 42 U.S.C. §1981a expressly excludes the federal government from a claim of
15 punitive damages. See 42 U.S.C. §1981a(b)(1). Plaintiff concedes any claim for punitive damages
16 is barred because Congress has not waived sovereign immunity to permit recovery of such
17 damages against an agency of the federal government. (See Docket No. 45 at 2.) Thus,
18 Defendants’ Motion to Dismiss Plaintiff’s claim for punitive damages is hereby **GRANTED**.

19 **2. Failure to Exhaust Administrative Remedies**

20 Defendants urge the Court to dismiss Plaintiff’s claims for (1) retaliatory assignment to the
21 RSO, (2) failure to provide an annual appraisal in 2011, and (3) sexual harassment during a 2013
22 training, based on Plaintiff’s failure to exhaust administrative remedies. (Docket No. 40 at 6.)
23 She claims to have complied with all conditions precedent to the filing of this complaint by filing
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1 three administrative charges before the Agency’s EEO Office and the EEOC, including sexual
2 harassment, discrimination, hostile work environment and retaliation. (Docket No. 13 ¶ 8.)
3 Plaintiff further alleges that on September 4, 2012, the EEOC issued an Order of Voluntary
4 Dismissal in which it directed the Agency to issue a Final Agency Decision. Id. Finally, Plaintiff
5 alleges on March 28, 2013, the Agency issued its Final Decision, and Plaintiff filed within 90 days
6 of receiving such decision. Id. ¶ 9.

7 Generally, federal employees pursuing discrimination claims in federal court must first
8 exhaust all available administrative remedies. Brown v. General Services Administration, 425
9 U.S. 820, 832 (1976); Franceschi v. U.S. Dep’t. of Veterans Affairs, 514 F.3d 81, 85 (1st Cir.
10 2008). “The Title VII administrative process begins with the filing of an administrative charge
11 before the EEOC.” Franceschi, 514 F.3d at 85 (citations omitted). The Code of Federal
12 Regulations (“CFR”) provides the procedures a complainant must follow administratively before
13 filing an action in district court.⁶ See 29 C.F.R. §§ 1614.103, 1614.105.

14 The First Circuit has recognized an exception to the exhaustion of administrative remedies
15 requirement for discrimination claims. See Clockedile v. New Hampshire Dept. of Corrections,
16 245 F.3d 1, 6 (1st Cir. 2001). Retaliation claims can be brought before a district court without
17 being explicitly alleged before the EEOC “so long as the retaliation is reasonably related to and
18 grows out of the discrimination complained of to the agency-e.g., the retaliation is for filing the
19 agency complaint itself.” Id. A retaliation claim is “reasonably related” when it shares the same

21 ⁶ The plaintiff must make the initial contact with an EEO officer within 45 days of the complained conduct
22 and then may file a formal complaint with the EEO if the issue is not resolved. See 29 C.F.R. §§ 1614.105, 1614.106.
23 The formal complaint must be filed with the agency within 15 days of receiving notice from the EEO counselor. See
24 29 C.F.R. § 1614.105. If the agency issues a final agency decision (“FAD”), then the plaintiff has 90 days to appeal.
See 29 C.F.R. § 1614.407. If after 180 days the agency has not issued a FAD, the plaintiff may file an action with the
district court or appeal to the EEOC to have the complaint decided by an administrative law judge. See id.; 29 C.F.R.
§ 1614.110(a). Federal employees, such as Plaintiff in this case, must exhaust these administrative remedies prior to
filing an action with the district court. See Velazquez-Ortiz, 657 F.3d at 71.

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1 factual allegations as the original discrimination claim. See Garayalde-Rijos v. Municipality of
2 Carolina, 747 F.3d 15, 22 (1st Cir. 2014); see also B.K.B. v. Maui Police Dept., 276 F.3d 1091,
3 1100 (9th Cir. 2002) (for purposes of determining whether a claim is reasonably related courts
4 look to such factors as the alleged basis of discrimination, dates of discriminatory acts alleged,
5 perpetrators named in the EEOC charges, and the location at which the discrimination is alleged to
6 have occurred). That a retaliation claim may lie even though a plaintiff failed to exhaust the
7 administrative requirement indicates “the First Circuit’s concern with retaliatory conduct . . .
8 which arises after, if not as a result of, an employee’s invocation of the EEOC process.” Munoz
9 Rivera v. Walgreens Co., 428 F. Supp. 2d 11, 22 (D.P.R. 2006) (quoting Kenney v. MML
10 Investors Servs., 266 F. Supp. 2d 239, 245-46 (D. Mass. 2003)) (internal quotation marks omitted).

11 In this case, Defendants argue that because Plaintiff’s failure to initiate the complaint
12 process with the EEO office on her claim that she was transferred to the RSO, she did not exhaust
13 administrative remedies and her claim is barred. (Docket No. 40 at 7.) The Court disagrees.
14 Plaintiff’s claim that she was transferred to the RSO falls squarely within Clockedile’s exception
15 as a “discrete act[] of retaliation” stemming from a plaintiff’s EEO activity. See Clockedile, 245
16 F.3d at 6.

17 Plaintiff filed her first EEO complaint on May 9, 2009. (Docket No. 13 ¶ 45.) Plaintiff has
18 presented evidence that immediately following this complaint, Morales began retaliating against
19 her by reducing her duties, detailing her to another section, and giving her the “silent treatment.”
20 Id. ¶ 58-60. Plaintiff then filed a second EEO complaint, on September 14, 2009, alleging sexual
21 harassment, naming Comas as the harasser and again identifying Morales as a responsible
22 supervisor who failed to take action. Id. ¶ 89. Immediately thereafter, Plaintiff claims that in
23 response to her EEO complaint, the Army transferred her to the RSO office instead of transferring
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1 Comas, her alleged harasser. Id. ¶ 90, 91. Thus, like in Clockedile, the pattern of alleged
2 retaliation began almost immediately after Plaintiff filed her initial EEO complaint, and continued
3 after her second EEO complaint, culminating with Plaintiff’s transfer to the RSO. Clockedile, 245
4 F.3d at 2-3. Because Plaintiff’s alleged retaliation claim is “reasonably related” and “grow[s] out”
5 of her sexual harassment complaints, the administrative process for such claim was properly
6 exhausted. See id. at 6.

7 However, Plaintiff did fail to exhaust administrative remedies as to the two other claims.
8 Though Plaintiff claims to have effectively exhausted administrative remedies in relation to her
9 2011 appraisal claim by raising the issue before the EEOC, and amending the pending EEO
10 complain to add a “like or related” claim, she has not satisfied her burden to allege enough facts to
11 show she has exhausted administrative remedies.⁷ See Gregory v. YWCA Haverhill, Inc., CIV.
12 13-11342-FDS, 2014 WL 3798893, at *2 (D. Mass. Jul. 30, 2014). While Plaintiff contends that
13 the EEOC decided that Plaintiff did not need to present her claim before the EEO office, she
14 provides no evidence to substantiate this claim. (Docket No. 45 at 29.)

15 Plaintiff also argues the Army’s failure to provide her with an annual appraisal in 2011 was
16 a retaliatory action, and thus, under Clockedile her claim is not barred for failure to exhaust the
17 administrative process. However, the Clockedile exception is a narrow one, and claims are not
18 “reasonably related” unless they share factual allegations. See Franceschi, 514 F.3d at 86; see also
19 Garayalde, 747 F.3d at 22. Plaintiff does not allege any facts that link the Army’s failure to
20 provide her with an appraisal in 2011 to any of the actors that she mentioned in her EEO

21
22 ⁷ Plaintiff raised this issue at the EEOC, seeking to amend the Complaint pursuant to 29 C.F.R. §
23 1614.106(d), to assert the Army failed to complete her 2011 annual rating in retaliation for filing the 2010 EEO
24 complaint. (Docket No. 51-1 at 2-5.) The Army objected, stating that the new allegation was not previously included
as part of the claim, and had not been investigated during the administrative fact finding conference. (Docket No. 51-2
at 1.) Additionally, the Army argued the amendment should be denied because the failure to appraise in 2011 was a
different discrete act, separate and apart from the previous acts complained about. Id.

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1 complaint. Furthermore, Plaintiff did not plead any facts to show that her previous sexual
2 harassment or retaliation complaint is connected to the Army's failure to appraise her. The timing
3 also does not support an inference of retaliation because Plaintiff filed the EEO Complaint in
4 November, 2010, and the annual rating at issue was not overdue until March 31, 2011. Because
5 the Court does not find this claim is "reasonably related to" or that it "grew out of" Plaintiff's EEO
6 complaint, she has not properly exhausted her administrative remedies as to this claim.

7 Plaintiff's claim for sexual harassment during the 2013 training is also barred for failure to
8 exhaust administrative remedies. By its own terms, the Clockedile exception does not extend to
9 additional discrimination claims. See Clockedile, 245 F.3d at 6 (taking "no position on the proper
10 rule for non-retaliation claims."); see also Calderon v. UNITEX, INC., 885 F. Supp. 2d 539, 543
11 (D.P.R. 2012) ("the First Circuit rationale was that the exception is to be interpreted in a narrower
12 manner, and should only be limited to retaliation claims."). While certainly exhausting her
13 administrative remedies with regards to retaliatory assignment to the RSO, the Clockedile
14 exception does not extend to additional non-retaliation claims such as a different sexual
15 harassment incident.

16 Thus, the Court **GRANTS** Defendants' Motion to Dismiss the 2013 sexual harassment and
17 2011 failure to appraise claims, hereby dismissing both claims for failure to exhaust administrative
18 remedies. However, because Plaintiff's alleged involuntary retaliatory transfer to the RSO is
19 "reasonably related to and grows out of" her sexual harassment complaints, this Court **DENIES**
20 Defendant's Motion to Dismiss as to that claim. See Clockedile, 245 F.3d at 6.

21 The Court now directs its analysis to Defendants' Motion for Summary Judgment at
22 Docket Nos. 38, 40.

1 **IV. Motion for Summary Judgment**

2 **A. Standard of Review**

3 Summary judgment is appropriate when “the pleadings, depositions, answers to
4 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
5 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter
6 of law.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see FED. R. CIV. P. 56(a). “An issue
7 is genuine if ‘it may reasonably be resolved in favor of either party’ at trial, . . . and material if it
8 ‘possess[es] the capacity to sway the outcome of the litigation under the applicable law.’” Iverson
9 v. City of Boston, 452 F.3d 94, 98 (1st Cir. 2006) (alteration in original) (internal citations
10 omitted). The moving party bears the initial burden of demonstrating the lack of evidence to
11 support the non-moving party’s case. Celotex, 477 U.S. at 325. “The burden then shifts to the
12 nonmovant to establish the existence of at least one fact issue which is both genuine and material.”
13 Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994). The nonmovant may
14 establish a fact is genuinely in dispute by citing particular evidence in the record or showing that
15 either the materials cited by the movant “do not establish the absence or presence of a genuine
16 dispute, or that an adverse party cannot produce admissible evidence to support the fact.” FED.
17 R.Civ. P. 56(c)(1)(B). If the Court finds that some genuine factual issue remains, the resolution of
18 which could affect the outcome of the case, then the Court must deny summary judgment. See
19 Anderson, 477 U.S. at 248.

20 When considering a motion for summary judgment, the Court must view the evidence in
21 the light most favorable to the nonmoving party and give that party the benefit of any and all
22 reasonable inferences. Id. at 255. Moreover, at the summary judgment stage, the Court does not
23 make credibility determinations or weigh the evidence. Id. Summary judgment may be
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1 appropriate, however, if the nonmoving party’s case rests merely upon “conclusory allegations,
2 improbable inferences, and unsupported speculation.” Forestier Fradera v. Mun. of Mayaguez,
3 440 F.3d 17, 21 (1st Cir. 2006) (quoting Benoit v. Technical Mfg. Corp., 331 F.3d 166, 173 (1st
4 Cir. 2003)).

5 **B. Discussion**

6 Defendants seek summary judgment of Plaintiff’s sexual harassment claim because she
7 does not have sufficient evidence to show that any harassment was severe or pervasive, or in the
8 alternative, because Plaintiff lacks the ability to impute liability to Defendants for the conduct of
9 Sariego and Comas. (Docket No. 40 at 2.) Defendants also argue that Plaintiff’s retaliation claim
10 fails because she lacks evidence of retaliatory motive and has not identified an adverse
11 employment action that is actionable under Title VII’s retaliation standard. Id. The Court will
12 discuss each argument in turn.

13 **1. Title VII**

14 **a. Sexual Harassment**

15 Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating “against
16 any individual with respect to his compensation, terms, conditions, or privileges of employment,
17 because of such individual's race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-
18 2(a)(1). Sexual harassment constitutes sex discrimination prohibited by Title VII. Meritor Sav.
19 Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986); see also Gorski v. N.H. Dep’t of Corrections, 290
20 F.3d 466, 472 (1st Cir. 2002). There are two types of actionable sexual harassment claims under
21 Title VII: hostile work environment claims and quid pro quo harassment claims. See Valentin-
22 Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 94 (1st Cir. 2006). Plaintiff’s claim is based
23 on a hostile work environment theory.

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1 A plaintiff may establish a violation of Title VII by proving that discrimination based on
2 sex has created a hostile or abusive work environment. See Forrest v. Brinker Intern. Payroll Co.,
3 LP, 511 F.3d 225, 228 (1st Cir. 2007) (internal citations and quotations omitted); Meritor, 477 U.S.
4 at 66 (“Title VII affords employees the right to work in an environment free from discriminatory
5 intimidation, ridicule, and insult.”). In order to state a prima facie case of hostile work
6 environment under Title VII a plaintiff must show the following:

- 7 (1) that she (or he) is a member of a protected class; (2) that she was subjected to
8 unwelcome sexual harassment; (3) that the harassment was based upon sex; (4)
9 that the harassment was sufficiently severe or pervasive so as to alter the
10 conditions of plaintiff’s employment and create an abusive work environment; (5)
11 that sexually objectionable conduct was both objectively and subjectively
12 offensive, such that a reasonable person would find it hostile or abusive and the
13 victim in fact did perceive it to be so; and (6) that some basis for employer
14 liability has been established.

15 Forrest, 511 F.3d at 228 (quoting Crowley v. L.L. Bean, Inc., 303 F.3d 387, 395 (1st Cir. 2002)).

16 Defendants contend that Plaintiff fails to establish the fourth and sixth elements of the prima facie
17 case: that the conduct was sufficiently severe or pervasive, and that Defendants can be held liable
18 as the employer.

19 **i. Severe or Pervasive**

20 A Title VII hostile work environment claim exists where a “workplace is permeated with
21 ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter
22 the conditions of the victim’s employment and create an abusive working environment.’” Harris v.
23 Forklift Sys., 510 U.S. 17, 21 (1993) (quoting Meritor, 477 U.S. at 65). The First Circuit has
24 explained that finding a hostile work environment “does not depend on any particular kind of
conduct” and “that [t]here is no precise formula for establishing sufficiently egregious conditions.”
Perez-Cordero v. Wal-Mart Puerto Rico, Inc., 656 F.3d 19, 29 (1st Cir. 2011). Courts must look at
the “totality of the circumstances, including ‘the frequency of the discriminatory conduct; its

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1 severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and
2 whether it unreasonably interferes with an employee’s work performance.” Valentin-Almeyda,
3 447 F.3d at 94.

4 Courts have distinguished between commonplace indignities and actionable harassment in
5 the workplace. Offhand remarks, simple teasing, tepid jokes, and isolated incidents are at one end
6 of the continuum and are not actionable. Faragher v. City of Boca Raton, 524 U.S. 775, 788
7 (1998). This type of behavior, standing alone, usually does not amount to a hostile work
8 environment. Id. Severe or pervasive sexual remarks, bothersome attentions, innuendoes, ridicule,
9 and intimidation are at the other end of the continuum and may establish a hostile work
10 environment. Noviello v. City of Boston, 398 F.3d 76, 92 (1st Cir. 2005); Marrero v. Goya of
11 Puerto Rico, Inc., 304 F.3d 7, 19 (1st Cir. 2002). Determining where on the continuum specific
12 conduct lies is a difficult task typically best left to a jury. See Marrero, 304 F.3d at 18 (quoting
13 Gorski, 290 F.3d at 474 (“[s]ubject to some policing at the outer bounds,’ it is for the jury to
14 weigh those factors and decide whether the harassment was of a kind or to a degree that a
15 reasonable person would have felt that it affected the conditions of her employment.”).

16 Mindful that the “totality of the circumstances” must be taken into consideration when
17 analyzing the existence of a hostile work environment, the Court will evaluate Plaintiff’s two
18 sexual harassment claims jointly. See Valentin-Almeyda, 447 F.3d at 94.

19 Plaintiff’s first EEO complaint filed on May 5, 2009 dealt with Sariego’s sexual
20 harassment. Plaintiff presented evidence that Sariego continually made sexual comments, sent
21 inappropriate e-mails, and asked her out multiple times after she refused. (See Docket Nos. 43 at
22 17 ¶¶ 6-8; 54 ¶¶ 6-8.) Sariego specifically asked Plaintiff out to dinner, to meet at a hotel, and
23 inquired about “the things she liked in men.” (See Docket Nos. 43 at 17 ¶¶ 6-8; 54 ¶¶ 6-8.) He

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1 would constantly call her names such as “gamberra,” “nena” and used inappropriate language like
2 “orgasmic.” (Docket Nos. 43 at 18-20 ¶¶ 15, 16, 22; 54 ¶¶ 15, 16, 22.) Furthermore, Plaintiff
3 presented evidence that Sariego sent a total of 448 e-mails to her in the span of two or three
4 months, which included sexually suggestive pictures suggesting that in order to get promoted, a
5 female had to “give good blow jobs.” (Docket Nos. 43 at 22 ¶ 29; 54 ¶ 29.) The massive amount
6 of inappropriate e-mails from Sariego culminated with a final e-mail in which he asked if Plaintiff
7 had “fucked” Comas. (Docket Nos. 43 at 22 ¶ 32; 43 ¶ 32.) Plaintiff presented evidence of
8 multiple incidents of sexual harassment, occurring over several months that bothered Plaintiff
9 enough that she created a separate folder for Sariego’s e-mails. (Docket No. 43 at 21 ¶ 24-26.) At
10 this stage, the Court finds that Plaintiff provided sufficient evidence to support a finding that such
11 conduct is sufficiently severe or pervasive to survive a motion for summary judgment.

12 Additionally, Comas’ alleged sexual harassment, for which Plaintiff filed her second EEO
13 Complaint on September 9, 2009, is also sufficiently severe and pervasive. A “single act of
14 harassment may, if egregious enough, suffice to evince a hostile work environment.” Gerald, 707
15 F.3d at 18; (citing Noviello, 398 F.3d at 84 (citations omitted)). The allegations that Comas
16 purportedly pushed Plaintiff’s breast and brushed his penis against her arm clearly qualifies as
17 egregious. Additionally, Plaintiff has further alleged other unwelcome and sexually harassing
18 conduct by Comas, such as lewd comments about a costumer’s large breasts and about active duty
19 soldiers being sodomized in basic training. (Docket Nos. 39 ¶ 44; 43 at 7 ¶ 44.) Such conduct was
20 especially intimidating to Plaintiff because Comas knew that she had filed a sexual harassment
21 claim against Sariego, who worked under Comas’ supervision. (Docket Nos. 43 at 44 ¶ 168; 54 ¶
22 168.) There is enough evidence to show that Comas’ behavior certainly was severe enough to
23 affect the conditions of Plaintiff’s employment, because Plaintiff left that day, and did not come
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1 back to the office until two weeks later, on September 14, 2009. (Docket Nos. 43 at 44 ¶ 171; 54 ¶
2 171.)

3 Viewing the evidence in the light most favorable to Plaintiff and resolving all factual
4 disputes in her favor, the record provides several sexually charged incidents, including one
5 unwanted sexual physical contact with an intimate body part. Consequently, the Court declines to
6 find that this behavior is insufficient to support a claim because a reasonable jury could find it
7 severe and pervasive.

8 **ii. Employer Liability**

9 Defendants argue that they are not liable under Title VII because it is (1) impossible to
10 conclude that the Army knew or should have known that Sariego subjected Plaintiff to a hostile
11 work environment; and (2) there was no negligence by the Army's handling of Comas' alleged
12 sexual harassment. The sixth prong of a hostile work environment test requires a plaintiff to
13 demonstrate some basis for employer liability. See Crowley, 303 F.3d at 395. Different rules
14 apply depending on whether the harassing employee is a supervisor or a co-worker. Id. at 401.
15 Because there is no dispute that Sariego and Comas were Plaintiff's co-workers, Plaintiff must
16 prove that Defendants "knew or should have reasonably known" of the alleged sexual harassment
17 and failed to take prompt action for her claim to lie. Id.

18 An employer is vicariously liable when a supervisor creates a hostile work environment,
19 absent an affirmative defense. Noviello, 398 F.3d at 94 (citing Burlington Indus., Inc. v. Ellerth,
20 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998)). This
21 defense, familiarly known as the Ellerth/Faragher defense, is not available when "the supervisor's
22 harassment culminates in tangible employment action, such as discharge, demotion, or undesirable
23 reassignment." Faragher, 524 U.S. at 808.

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1 In this case, Plaintiff argues that “there is no controversy” that Comas was Plaintiff’s
2 supervisor, but presents no evidence to substantiate this claim. (Docket No. 57 at 7.) In order for
3 vicarious liability to apply, Comas must have been Plaintiff’s supervisor at the time he allegedly
4 harassed her. See Vance v. Ball State U., 133 S. Ct. 2434, 2439 (2013) (“an employee is a
5 ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the
6 employer to take tangible employment actions against the victim.”). There is no evidence before
7 the Court that Comas possessed the authority to “hire, fire or demote Plaintiff.” See id. Thus, the
8 Court will apply the negligence standard.

9 To establish employer liability for the conduct of a co-worker, a plaintiff must demonstrate
10 the employer was negligent; essentially, that the defendant “knew or should have known” of the
11 alleged harassing conduct and failed to respond with prompt and appropriate action. Crowley, 303
12 F.3d at 401. Knowledge may be imputed to an employer if information regarding the harassment
13 reaches an individual who is designated to receive such complaints and has the power to remedy
14 the problem, or “who is reasonably believed to have a duty to pass on the information.” Id. at 403
15 (citing Sims v. Health Midwest Physician Servs. Corp., 196 F.3d 915, 920 (8th Cir. 1999)). When
16 a plaintiff bases a hostile work environment claim on the actions of co-workers, she retains the
17 burden of proof to show the employer’s knowledge and the inadequacy of its response. Ortiz v.
18 Hyatt Regency Cerromar Beach Hotel, Inc., 422 F. Supp. 2d 336, 342 (D.P.R. 2006). The
19 employer’s response “must be reasonably calculated to prevent further harassment under the
20 particular facts and circumstances of the case at the time the allegations are made.” Otero Vazquez
21 v. Am. Home Prods. Corp., No. Civ. 01-2126(RLA), 2005 WL 2001299, at *10 (D.P.R. Aug. 19,
22 2005). “Determining what constitutes a ‘prompt and appropriate’ employer response to allegations
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1 of sexual harassment often requires the sort of case-specific, fact-intensive analysis best left to a
2 jury.” Forrest, 511 F.3d at 232.

3 In the present case, Plaintiff has presented enough evidence to raise a trial issue regarding
4 whether high-up management at Buchanan was aware of Sariego’s e-mails and the adequacy of
5 their response to Plaintiff’s complaint. There are also triable issues of material fact as to when
6 Morales first learned of Sariego’s harassing conduct. Plaintiff has presented evidence that it was
7 in 2008, when Morales came to Plaintiff’s office and found Sariego in there, and Plaintiff asserted
8 that Sariego called her “gamberra” and that she did not like to talk about non-work related matters
9 with Sariego. (Docket No. 43 at 17 ¶ 9.) Plaintiff asserts that Morales did not take immediate
10 action, and instead told her that Plaintiff had “several sexual bochinches” to deal with herself, and
11 that it looked like Sariego and Plaintiff had a “mishap marriage.” (Docket Nos. 39 ¶ 4; 43 ¶ 9, 12;
12 54 ¶ 9, 11.) Additionally, Plaintiff presented evidence that Morales had to know of Sariego’s
13 inappropriate e-mails, since Morales herself had also received multiple inappropriate e-mails from
14 Sariego prior to this date. (Docket No. 43 at 24 ¶ 44.)

15 Morales on the other hand, claims that she could have not reasonably understood Plaintiff
16 to have complained about sexual harassment then, since she perceived Plaintiff and Sariego’s
17 relationship as one where they joked and teased each other often. (Docket No. 39 ¶ 10.) Morales
18 instead claims that she only learned about Plaintiff’s allegations of sexual harassment by Sariego
19 after the May 5th e-mail, for which Plaintiff filed the first EEO complaint. (Docket No. 39 ¶ 7.)
20 Morales asserts that as soon as Plaintiff told her about the e-mail, and Morales acknowledged she
21 had also received it, Morales informed the Civilian Personnel Office and the Directorate of
22 Information Management and added Plaintiff’s complaint to Sariego’s already pending
23 investigation for other incidents of computer misuse. (Docket No. 39 ¶ 9.)

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1 Plaintiff's uncontested testimony establishes that she informed the following supervisory
2 and management-level individuals of alleged sexual harassment incidents: Comas, Morales, and
3 Russell, all of whom had already received multiple inappropriate e-mails from Sariego in the past.
4 (Docket Nos. 43 at 19, 30 ¶¶ 17, 18, 75; 54 ¶¶ 17, 18, 75.) All three had the power to remedy the
5 situation and a duty to pass on information regarding Plaintiff's sexual harassment complaints.
6 The Court also notes Plaintiff's assertion that she told Morales she was going to file a complaint
7 with the EEO against Sariego, and Morales told Plaintiff to "stop being the way [she is] with that
8 type of man," and that she had to be "more serious." (Docket Nos. 43 at 24 ¶ 42; 54 ¶ 42.)

9 Defendants argue that they were not negligent because Morales and other officials were
10 already taking disciplinary action against Sariego, which ultimately lead to his termination.
11 (Docket No. 51 at 12.) However, a reasonable jury could find that even though an investigation
12 already ensued against Sariego, Defendants' failed to take prompt action given the amount of
13 complaints and issues they had had with Sariego's computer misuse in the past. A reasonable jury
14 could also find the Army had multiple prior complaints about Sariego, and information that would
15 have left any reasonable employer to believe that he would continue to act inappropriately towards
16 other employees, especially women.

17 As to Comas' sexual harassment, it is undisputed that Comas made inappropriate
18 comments and had inappropriate physical contact with Plaintiff. Plaintiff alleges Defendants were
19 negligent in handling her complaint, because she involuntarily transferred her to another
20 department, while Comas, the alleged harasser, remained in his previous position. (Docket Nos.
21 43 at 52 ¶ 217; 54 ¶ 217.) Defendants argue that she never reported Comas' alleged physical
22 contact to any management official, or informed Comas or any management official that she felt
23 uncomfortable or harassed. (Docket No. 40 at 24.) Plaintiff contends that the Army's failure to in
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1 handle of all of her complaints perpetuated the harassment at the office and exposed her to further
2 sexual harassment by others, such as Comas. (Docket No. 45 at 32.) Defendants maintain that
3 they investigated Plaintiff’s complaint, and interviewed eight employees. (Docket No. 39 ¶ 55.)
4 Plaintiff declined to be interviewed or to participate in the investigative process, leaving the Army
5 without any evidence to substantiate her claim that she had been harassed by Comas. Id. Plaintiff
6 claims that she cooperated with the investigation through her attorney. (Docket No. 43 ¶ 55.) This
7 is a disputed material fact that precludes summary judgment.

8 Both parties have provided conflicting sworn testimony from counsel for each side as to the
9 cause of this transfer, and thus, triable issues of material fact remain as to how the Army dealt with
10 Plaintiff’s sexual harassment allegations. Because genuine issues of material fact regarding
11 employer liability for severe and pervasive sexual behavior remain, summary judgment as to
12 Plaintiff’s sexual harassment claim is **DENIED**.

b. Retaliation

14 Plaintiff also alleges Defendants retaliated against her for filing EEO complaints alleging
15 sexual harassment. (Docket No. 13 at 26-28.)

16 Title VII makes it unlawful for an employer to retaliate against a person who complains
17 about discriminatory employment practices “or has ‘made a charge, testified, assisted, or
18 participated in’ a Title VII ‘investigation, proceeding, or hearing’.” Burlington Northern & Santa
19 Fe Ry. v. White, 548 U.S. 53, 60 (2006) (citing 42 § 2000e-3(a)). “The relevant question is
20 whether [the employer] was retaliating against [the plaintiff] for filing a complaint, not whether he
21 was motivated by gender bias at the time.” See DeCaire v. Mukasey, 530 F.3d 1, 19 (1st Cir.
22 2008).

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1 To state a prima facie case of Title VII retaliation, Plaintiff must establish that: (1) she
2 engaged in protected conduct under Title VII; (2) she suffered a materially adverse employment
3 action that harmed the plaintiff inside or outside the workplace and that was harmful enough to
4 ‘dissuade a reasonable worker from making or supporting a charge of discrimination,’; and (3) that
5 the adverse action taken against her was causally connected to his or her protected activity. Fantini
6 v. Salem State College, 557 F.3d 22, 32 (1st Cir. 2009); Bibiloni Del Valle v. Puerto Rico, 661 F.
7 Supp. 2d 155, 168 (D.P.R. 2009) (quoting Mariani-Colon v. Dep’t of Homeland Sec. ex rel.
8 Chertoff, 511 F.3d 216, 223 (1st Cir. 2007)). The First Circuit has repeatedly acknowledged that
9 the plaintiff’s prima facie burden is not onerous and is easily satisfied. See, e.g., Calero-Cerezo v.
10 U.S. Dep’t of Justice, 355 F.3d 6, 26 (1st Cir. 2004); Chungchi Che v. MBTA, 342 F.3d 31, 38 (1st
11 Cir. 2003); Fennell v. First Step Designs, 83 F.3d 526, 536 (1st Cir. 1996).

12 Once the plaintiff satisfies her prima facie burden, the defendant must produce a legitimate,
13 nondiscriminatory reason for the adverse action. Wright v. CompUSA, Inc., 352 F.3d 472, 478
14 (1st Cir. 2003) (citations omitted). It ultimately falls on the plaintiff to show that the employer’s
15 articulated reason was pretext to cover up retaliation. Id. at 478.

i. Prima Facie Case - Adverse Employment Action

17 Defendants maintain that Plaintiff never suffered “adverse employment actions” as a result
18 of her EEO complaints, and thus, Plaintiff fails to make a prima facie case of retaliation. (Docket
19 No. 40 at 13-17.)⁸

20 Whether a particular action is “materially adverse” requires a case-by-case inquiry and
21 “should be judged from the perspective of a reasonable person in the plaintiff’s position,

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23 ⁸ Defendants do not dispute that Plaintiff engaged in conduct protected by Title VII when she filed charges
24 with the EEO in 2009 and 2010. See Mariani-Colón, 511 F.3d at 223. Defendants also do not dispute that if the Court
were to find the employment actions adverse, those actions would be casually connected to her protected activity. See
Univ. of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517, 2533 (2014).

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1 considering all the circumstances.” Id. at 71 (citation and internal quotation marks omitted); see
2 also Billings v. Town of Grafton, 515 F.3d 39, 54 n.13 (1st Cir. 2008) (“retaliatory actions that are
3 not materially adverse when considered individually may collectively amount to a retaliatory
4 hostile work environment.”).

5 To defeat summary judgment, a plaintiff must make a colorable showing that the actions
6 taken against her rise to the level of a “materially adverse” action such that it “well might have
7 dissuaded a reasonable [person] from making or supporting a charge of discrimination.”
8 Burlington N., 548 U.S. at 57. The plaintiff cannot simply make a trivial grievance; it must be
9 material, something “that produces an injury or harm.” Id. at 67.

10 “Examples of adverse employment actions in the retaliation context include termination of
11 employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a
12 material loss of benefits, significantly diminished material responsibilities, or other indices that
13 might be unique to a particular situation.” Morales-Vallellanes v. Potter, 605 F.3d. 27, 36 (1st Cir.
14 2010) (internal quotations omitted). “Minor disruptions in the workplace, including ‘petty slights,
15 minor annoyances, and simple lack of good manners,’ fail to qualify.” Id. (quoting Burlington N.,
16 548 U.S. at 68).

17 The Court deduces from Plaintiff’s statement of facts, parties’ submissions and attachments
18 thereto, four different adverse actions that Plaintiff claims are connected to her protected activity:
19 (1) she received “silent treatment” and had her work duties removed by Morales following the
20 2009 EEO Complaint; (2) she was transferred to the ID Card Section in retaliation for her sexual
21 harassment complaint against Sariego; (3) she was transferred to the RSO in retaliation of her
22 sexual harassment complaint against Comas, and; (4) she was not chosen for the G6/G7 position as
23 a Management Support Technician. (See Docket No. 57 at 4.)

1 **1. Silent Treatment and Removal of Duties**

2 Plaintiff first alleges Morales retaliated against her by giving her the “silent treatment”
3 because she stopped communicating with Plaintiff, sending her e-mails, calling her and assigning
4 her work. (Docket No. 45 at 19.) The Court notes that other district courts have found that a
5 plaintiff who is ignored or subjected to silent treatment after reporting discrimination has not
6 suffered a materially adverse employment action. See Thirkield v. Neary & Hunter OB/GYN,
7 LLC, 76 F. Supp. 3d 339, 350-51 (D. Mass. 2015). However, “a change in employee’s
8 responsibilities may be sufficient to establish an adverse employment action,” if under the totality
9 of the circumstances, the Court finds there has been a significant change in an employee’s work
10 assignments. Colon-Fontanez v. Mun. of San Juan, 660 F.3d 17, 42 (1st. Cir. 2011) (citing Blackie
11 v. State of Me., 75 F.3d 716, 725 (1st Cir. 1996)). A “significant change” that is materially
12 adverse can occur even when employee’s salary or benefits were not reduced. Simas v. First
13 Citizens’ Fed. Credit Union, 170 F.3d 37, 50 (1st Cir. 1999).

14 In this case, Plaintiff maintains that immediately after filing her complaint, Morales
15 stopped communicating with her, would not “use her” as her secretary, would not call her, and
16 would contact other people to communicate with Plaintiff. (Docket No. 43 at 27 ¶ 56-57.)
17 Plaintiff presented evidence that she had three main duties taken away from her: (1) the Defense
18 Travel System (DTS), (2) Performance Management Reviews (PMR) and (3) Installation Status
19 Report (ISR). Id. ¶ 58.

20 Before filling her sexual harassment claim, Plaintiff was appointed DTS for the DHR, and
21 assisted the directorates in generating travel vouchers, receiving reimbursements, and preparing
22 reservations. Id. ¶ 61. Plaintiff’s duties also included the creation of ISRs, which assessed
23 different divisions’ spending patterns on a quarterly basis. Id. at 28 ¶ 63. Plaintiff also worked on
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1 PMRs on a quarterly basis, creating power points based on data collection from all the directorates
2 to aid the preparation of action plans. Id. ¶ 64. Additionally, Plaintiff scheduled Morales’
3 appointments, and acted as her secretary, even considering herself Morales’ right hand. Id. ¶ 65-
4 66. Plaintiff testified that Morales considered Plaintiff her most trusted employee and Plaintiff
5 “would do practically everything for her.” Id. at 29 ¶ 66. Plaintiff maintains that these duties were
6 taken away from her when she filed her complaint and she was left only with the Lean Six Sigma
7 project. Id. at 27 ¶ 56. Morales maintains that none of these actions were retaliatory, and she
8 simply removed those duties so that Plaintiff could focus on Lean Six Sigma. (Docket No. 54 ¶
9 65.) Defendants claim the Lean Six Sigma project was a very important project for the installation
10 command, and it was a high profile responsibility for Plaintiff to handle. Id. ¶ 66.

11 Plaintiff was stripped of many of her responsibilities. Even if her duties were reduced to
12 free her time for the Lean Six Sigma project, a reasonable jury could find that a “significant
13 change” occurred in Plaintiff’s workload after she complained of sexual harassment in a complaint
14 that included Morales as a person with authority who failed to take remedial action. Such an
15 “objectively tangible harm” constitutes an adverse employment action. See Colon-Fontanez, 660
16 F.3d at 42.

17 **2. Transfer to ID Card Section**

18 Plaintiff alleges Morales retaliated against her by transferring her to the ID card section on
19 August 24, 2009. (Docket No. 45 at 20-21.) The Supreme Court has held a material adverse
20 employment action can occur where an employee is transferred out of a job that is considered
21 objectively better. Burlington N., 548 U.S. at 71. Yet, the Court advised that not all reassignments
22 are considered adverse employment actions; instead, the court must assess in an objective manner
23 “the circumstances of the particular case.” Id. A reassignment without salary or work hour
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1 changes may, in some circumstances, be an adverse employment action if it constitutes a demotion
2 evidenced by “a less distinguished title, a material loss of benefits, significantly diminished
3 material responsibilities, or other indices that might be unique to a particular situation.”⁹ Kocsis v.
4 Multi-Care Management, Inc., 97 F.3d 876, 886 (6th Cir. 1996).

5 Whether Plaintiff’s reassignment to the ID card section is an adverse employment action
6 depends on the circumstances surrounding the transfer. Plaintiff contends the move was retaliatory
7 because Morales knew that Plaintiff had had issues with the employees in that section before,
8 while implementing the Lean Six Sigma project. (Docket No. 43 at 42 ¶ 155-156.) Morales
9 admitted that she knew that in that section the employees in that section were negative towards
10 Plaintiff. Id. at 43 ¶ 161. Plaintiff offered evidence that in the ID Card Section she would perform
11 the functions of an Office Automation Assistant, the first position she held when she started
12 working for the Federal Government in 1995. Id. at 42 ¶ 159. Importantly, Morales even admitted
13 that this move would not be beneficial to Plaintiff’s career. Id. ¶ 157. Nonetheless, Morales
14 characterizes the transfer as a “temporary move” and argues that there were no negative
15 implications on Plaintiff’s career because there was no decrease in grade or loss in pay or benefits.
16 (Docket No. 54 ¶ 158.) Morales also contends even though she was aware the employees of the ID
17 Card Section were unhappy with Lean Six Sigma, she understood the complaints were more about
18 the project rather than Plaintiff. (Docket No. 39 ¶ 61.)

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21 ⁹ See, e.g., Burlington N., 548 U.S. 53 at 71 (establishing that an employee’s transfer from forklift operator to
22 a “dirtier,” more arduous and less prestigious position, even within the same job classification, constituted an adverse
23 employment action); Billings, 515 F.3d at 53 (finding a showing of loss of prestige could constitute objective evidence
24 contrasting employee’s former and current jobs to allow the jury to find a materially adverse employment action);
Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (finding adverse employment
action for employee that was taken from a position of substantial responsibility to one where she was given menial
tasks, even despite a small pay increase); Rodriguez v. Bd. of Educ., 620 F.2d 362, 366 (2nd Cir. 1980) (finding an
adverse employment action where the transfer would have radically changed the nature of plaintiff’s work and
rendered useless her 20 years of experience and specialized study).

1 **4. Non-Selection G6/G7 Managerial Support Technician**

2 **Position:**

3 Plaintiff claims that the decision to not select Plaintiff for a G6/G7 Managerial Support
4 Technician position was in retaliation for her previous EEO activity. (Docket No. 45 at 23-25.)

5 A failure to hire can be an “adverse employment action” for the purposes of a Title VII
6 retaliation claim. See Velez v. Janssen Ortho, LLC, 467 F.3d 802 (1st Cir. 2006). To show that a
7 failure to hire is an adverse employment action, a plaintiff must show that: “(1) she applied for a
8 particular position (2) which was vacant and (3) for which she was qualified,” and (4) “that she
9 was not hired for that position.” Id. at 803. Establishing an “adverse employment action” is part
10 of Plaintiff’s prima facie case, so the Plaintiff “has the burden of showing the [] aforementioned
11 factors from Velez.” Sanchez-Rodriguez v. AT&T Mobility Puerto Rico, Inc., 673 F.3d 1, 14 (1st
12 Cir. 2012).

13 In the present case, Plaintiff presented uncontested evidence that before she complained of
14 sexual harassment to the EEO, Morales unsuccessfully attempted to upgrade the GS classification
15 of Plaintiff’s position to benefit her. (Docket Nos. 43 at 62 ¶ 275; 54 ¶ 275.) Plaintiff presented
16 evidence that Morales eventually created the new position as a G7 classification, and after learning
17 of this vacancy, Plaintiff applied. (Docket Nos. 43 at 51 ¶ 213; 54 ¶ 213). Though Plaintiff was
18 considered for the position, it was ultimately given to Ricardo Villalba. (Docket Nos. 43 at 51 ¶
19 247; 54 ¶ 247.) Plaintiff provided evidence that she was qualified for the position because it was
20 modeled after her previous position as a Management Support Technician and she had excellent
21 performance evaluations in all her years of service. (Docket No. 43 at 53 ¶ 225.) Thus, a
22 reasonable jury could infer that not choosing Plaintiff for a position which she was qualified for
23 could preclude a reasonable person from filing sexual harassment complaints against her employer.

1 A review of the evidence presented by Plaintiff, viewed in the light most favorable to her,
2 shows that Plaintiff could have been subjected to several adverse employment actions, and thus,
3 Plaintiff has established a prima facie case of retaliation.

4 **ii. Legitimate, Non-discriminatory Reasons and Pretext for**
5 **Retaliation**

6 Because Plaintiff has stated a prima facie case, the burden shifts to Defendants to articulate
7 a legitimate, nondiscriminatory reason for the adverse employment actions taken against Plaintiff.
8 See Wright, 352 F.3d at 478 (citations omitted). The ultimate burden then falls on Plaintiff to
9 show that Defendants' articulated reason was mere pretext. Id. Still, "on summary judgment, the
10 need to order the presentation of proof is largely obviated, and a court may often dispense with
11 strict attention to the burden-shifting framework, focusing instead on whether the evidence as a
12 whole is sufficient to make out a question for a fact-finder as to pretext and discriminatory
13 animus." Fennell, 83 F.3d at 535.

14 Plaintiff has provided factual evidence from which a reasonable juror could conclude that
15 Defendants' real reason to undertake such employment action was retaliation. Defendants claim
16 Morales did not retaliate or discriminate against Plaintiff by giving her the "cold shoulder" or
17 reassigning her job duties, and that she simply needed Plaintiff to focus on the high priority Lean
18 Six Sigma project. (Docket No. 54 ¶ 65.) However, Morales conceded that she became more
19 "guarded" with Plaintiff right after Plaintiff filed her EEO complaint naming Morales as a
20 responsible management official who failed to take prompt and appropriate action. Id. ¶ 49.
21 Morales also admitted that she gave Plaintiff a verbal counseling because Plaintiff had a change of
22 behavior, she was not the same secretary, and she "used to be perfect." (Docket Nos. 43 at 31 ¶ 86;
23 54 ¶ 86.) Plaintiff provided evidence that even after July 31, 2009, when she finished the Lean
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1 Six Sigma project, she was not assigned any other duties, and Morales's silent treatment towards
2 Plaintiff continued. (Docket No. 43 at 27 ¶ 56-57.)

3 Defendants contend that Plaintiff was reassigned to the ID Card Section due to the pending
4 loss of two contractors and the retirement of two GS employees. (Docket No. 39 ¶ 59.) However,
5 Plaintiff provided evidence that Morales knew employees at the ID Card Section were unhappy
6 with Plaintiff, and that Morales admitted this move would not benefit her career. (Docket No. 43
7 at 42 ¶ 157.) Plaintiff also provided evidence that there were other candidates who could have
8 been detailed to the ID Card section, who had prior experience there. (Docket No. 43 at 42 ¶ 158.)

9 Defendants maintain that Plaintiff's activity did not affect Morales decision to hire Villalba
10 to the position of Management Support Technician as a G7. (Docket No. 39 at 15.) Defendants
11 claim that contrary to Plaintiff's belief, the new position was not the same position that Plaintiff
12 previously held, and instead had more responsibilities that she had no experience with. Id. Still,
13 Plaintiff offered evidence that the selection process was not blind, and that both Morales and
14 Albert Orellana, the other hiring panel member, knew the names of the candidates who applied for
15 the position, and which application belonged to Plaintiff. (Docket No. 43 at 64 ¶¶ 284-85.)
16 Additionally, Plaintiff presented evidence that once she filed her EEO Complaint, her duties in the
17 Management Support position at the DHR were slowly delegated to Villalba, who ultimately was
18 selected for the G7 position. (Docket No. 43 at 53 ¶ 223.) Plaintiff presented evidence that she
19 had previously trained Villalba, and at one point Villalba was Plaintiff's assistant at the DHR.
20 (Docket No. 43 at 57 ¶ 249.) Furthermore, Plaintiff presented evidence that Villalba use to work
21 as a mail assistant at the Mailing Distribution, while she had experience as a Management Support
22 Technician. Id. at 53-54 ¶¶ 225-226.

1 Thus, Plaintiff has pointed the Court to specific facts that support an inference that
2 unlawful retaliation played a part in Defendants' employment actions. Because Plaintiff
3 established genuine issues of fact regarding Defendants' legitimate business reasons for taking
4 adverse employment actions, and that these actions could have been taken in retaliation for
5 reporting sexual harassment, the Court **DENIES** Defendants' Motion for Summary Judgment as to
6 Plaintiff's retaliation claim.

7 **V. Conclusion**

8 For the reasons stated above, Defendants' Motion to Dismiss Plaintiff's claim for punitive
9 damages is **GRANTED**; Defendants' Motion to Dismiss the 2013 sexual harassment and 2011
10 failure to appraise claims is **GRANTED**; and Defendants' Motion to Dismiss Plaintiff's claim of
11 retaliatory transfer to the RSO is **DENIED**. (See Docket 38, 40.) Lastly, Defendants' Motion for
12 Summary Judgment is **DENIED** in its entirety as to Plaintiff's retaliation and sexual harassment
13 claims under Title VII. See id.

14 This case is hereby referred to Magistrate Judge Bruce McGiverin for the holding of a pre-
15 trial/settlement conference. The parties shall file a *joint*, proposed pre-trial order on or before
16 February 19, 2016. The parties shall engage in further, good-faith negotiations prior to the
17 conference, as Judge McGiverin may issue any other settlement directives. The Court hopes that
18 the instant ruling will aid the parties in reaching an acceptable compromise which will end this
19 litigation.

20 **SO ORDERED.**

21 In San Juan, Puerto Rico this 20th day of January, 2016.

22 *s/ Gustavo A. Gelpí*
23 GUSTAVO A. GELPI
24 United States District Judge