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INSPECTOR GENERAL

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Report of Investigation: Mr. James M. Branham Former Chief Operating Officer Armed Forces Retirement Home

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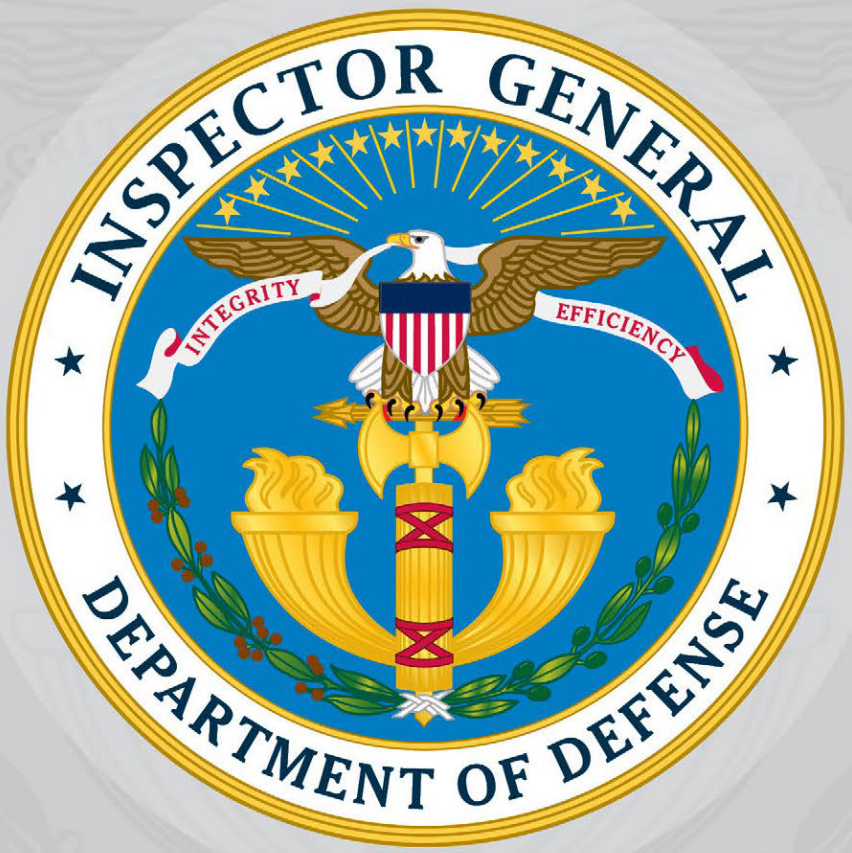
INSPECTOR GENERAL
INTEGRITY
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DEPARTMENT OF DEFENSE

REPORT OF INVESTIGATION:
MR. JAMES M. BRANHAM
FORMER CHIEF OPERATING OFFICER
ARMED FORCES RETIREMENT HOME

I. INTRODUCTION AND SUMMARY

Complaint Origin and Allegations

The DoD Hotline received a complaint against Mr. James M. Branham, former Chief Operating Officer (COO), Armed Forces Retirement Home (AFRH), on August 15, 2020. The complaint alleged that Mr. Branham sexually harassed subordinate female employees and reprised against a female employee because she rejected his sexual advances. The DoD Office of Inspector General (DoD OIG) initiated an investigation on November 10, 2020, into the allegations.

Section III A of this report provides the results of our investigation regarding the allegations of sexual harassment. We address the reprisal allegation in Section III B of this report. We evaluated the conduct against the sexual harassment and reprisal standards described in Appendix A of this report.

Scope and Methodology of the Investigation

Using the information provided in the complaint and in the documents obtained during our investigation, we identified and interviewed the Complainant and eight witnesses who had information relevant to the allegations. We reviewed over 200,000 DoD records, including official e-mails and attached documents and photos, calendar appointments, and meeting invitations. We also reviewed memorandums, official personnel files, and phone data containing the phone numbers of calls, texts, or photos that were sent or received from Mr. Branham's personal cell phone.

We provided Mr. Branham several opportunities to interview with our investigators. After our initial request to arrange an interview with him, Mr. Branham submitted his resignation from Government service on November 9, 2021, which took immediate effect. Subsequently, through his attorney, Mr. Branham has refused our followup requests for an interview. Although he left Government service, we completed our investigation consistent with our standard practice.

Conclusions

We substantiated the allegation that Mr. Branham sexually harassed female employees and reprised against a female employee because she rejected his sexual advances. Specifically, we determined that Mr. Branham engaged in an overall course of conduct in which he sexually harassed subordinate female employees at the AFRH.

We determined that Mr. Branham initiated and engaged in an intimate, personal, "physical" relationship for several months with a subordinate female employee (Employee 1). Employee 1 described feeling awkward and uncomfortable when Mr. Branham asked her out on a date because she did not think she could say no since he [redacted]. Employee 1 said that she discussed this issue with Mr. Branham, who told her that it was not a problem for him. In

contrast, Employee 1 described her relationship with Mr. Branham as inappropriate and wrong because Mr. Branham was ultimately her boss.

Separately, Mr. Branham made several sexually harassing comments to two subordinate female employees (Employee 2 and Employee 3), including telling one, "We should go to a remote island and have crazy, wild sex" and telling the other, "I bet you just want to kiss me right now." In addition, on multiple occasions, Mr. Branham rubbed Employee 2's and Employee 3's shoulders without their permission. Mr. Branham also sent texts to Employee 2 containing sexual or flirtatious innuendos that made her feel uncomfortable. Employee 2 told us that Mr. Branham's actions and comments were weird, and made things very difficult for her in the office. Employee 3 stated that Mr. Branham's actions and comments made her feel terrible and grossed out.

Mr. Branham's comments to and interactions with subordinate female employees created an intimidating, hostile, and offensive work environment that made them uncomfortable or caused them distress. Accordingly, we concluded that Mr. Branham engaged in a pattern of sexual harassment toward three subordinate female employees.

Mr. Branham's Response to our Conclusions

We provided Mr. Branham our tentative conclusions on May 11, 2022, for his review and comment before finalizing our report. Mr. Branham responded that he agreed with our conclusion that he engaged in an inappropriate relationship with Employee 1. However, he disagreed with some of our other conclusions. We carefully considered Mr. Branham's comments regarding our preliminary conclusions, re-examined our evidence, and included his comments, in part, where appropriate in this report.

While Mr. Branham agreed with our conclusion that he engaged in an inappropriate relationship with Employee 1, Mr. Branham stated that his relationship with Employee 1 was consensual and did not constitute sexual harassment. We disagree. Mr. Branham initiated, pursued, and engaged in an intimate relationship with a subordinate employee [redacted] The subordinate employee told us that she felt uncomfortable and awkward and did not think she could say no. After considering Mr. Branham's response, we did not change our report and stand by our conclusions.

Mr. Branham agreed that his written communications to Employee 2 and Employee 3 were unprofessional and regretted that the communications made those employees feel uncomfortable. He also stated that he should not have written those comments to Employee 2 and Employee 3. However, Mr. Branham denied making other inappropriate comments to Employee 2 and Employee 3. After considering Mr. Branham's response, we did not change our report and stand by our conclusions.

Mr. Branham disagreed with our conclusion that he retaliated against Employee 2. Specifically, he asserted that Employee 2 did not make a protected disclosure; therefore, he could not have retaliated against her. After considering Mr. Branham's response, we did not change our report and stand by our conclusions.

Mr. Branham asserted that DoD OIG personnel pressured him to participate in a voluntary interview with us. We reject his assertion. Mr. Branham retired while we were requesting, through his attorney, that he participate in an interview with our investigators. Following his retirement, he declined to participate voluntarily in an interview with our office, and we did not find it necessary to obtain an interview with him before finalizing our report.

The following sections of this report provide the detailed results of our investigation. First, we provide background information about Mr. Branham and the AFRH. Next, we discuss Mr. Branham's alleged sexual harassment of subordinate female employees. Then, we discuss the allegation of reprisal. Finally, we present our overall conclusions and recommendations.[1]

II. BACKGROUND

Mr. James M. Branham

Mr. James M. Branham became the AFRH COO on February 5, 2018. As the COO, Mr. Branham set the AFRH's strategic goals and business plans and managed the day-to-day operations and administration of its two facilities, one in Washington, D.C., and the other in Gulfport, Mississippi. Mr. Branham was responsible for all facets of policy, advocacy, and oversight pertaining to the delivery of quality programs and services throughout the agency's continuing care retirement community.

Mr. Branham resigned from his position as the AFRH COO on November 9, 2021.

Organization

The AFRH is an independent agency in the Executive branch of the U.S. Government, authorized and governed by title 24, United States Code (U.S.C.), Chapter 10, "Armed Forces Retirement Home." The agency was created by congressional legislation in 1991 by merging the U.S. Soldiers' and Airmen's Home in Washington, D.C., and the U.S. Naval Home in Gulfport, Mississippi. Per the AFRH website, the AFRH is the nation's premier community for retired and former enlisted members of the U.S. Armed Forces and their spouses. The AFRH encompasses two separate functions: managing the agency and providing direct care and services every day to the residents. The AFRH COO leads the agency and guides the administrators of the two residential communities. The DoD exercises oversight of the COO through the AFRH Chief Executive Officer, who reports to the Director, Washington Headquarters Services.

III. ANALYSIS OF THE ALLEGATIONS

Chronology of Significant Events

Table 1 lists the significant events related to this investigation.

Table 1. Chronology of Significant Events

Date	Event
February 2018	Mr. Branham begins duty as the AFRH COO.
[redacted] **2019**	Mr. Branham begins a relationship with Employee 1.
August 15, 2020	The DoD Hotline receives a complaint against Mr. Branham.
November 10, 2020	The DoD OIG initiates this investigation.
November 9, 2021	Mr. Branham resigns from Government service.

Source: The DoD OIG.

[1] We based our conclusions on a preponderance of the evidence, consistent with our normal process in administrative investigations.

A. ALLEGATIONS OF SEXUAL HARASSMENT

In this section, we discuss Mr. Branham's interactions with Employees 1, 2, and 3, all of whom were subordinate female employees, and we include relevant information from witnesses, e-mails, documents, phone records, and other evidence.

Employee 1

Employee 1 told us that she had a close physical relationship with Mr. Branham from [redacted] 2019 until about March 2020. Employee 1 also told us that her close personal relationship began when Mr. Branham asked her to dinner in [redacted] 2019. According to Employee 1, Mr. Branham first asked her when no one else was around and she responded, "maybe." At the end of the workday, he returned to her office and again asked her to dinner, and she accepted his invitation. During our interview, Employee 1 told us that Mr. Branham's dinner invitation made her feel awkward and uncomfortable, leaving her to ask, "What are you supposed to do?" She also told us that Mr. Branham [redacted] and that she would have never asked Mr. Branham out to dinner.

Employee 1 said that Mr. Branham did not "directly" use his position to get something he wanted from her. However, Employee 1 told us that she was uncomfortable dating Mr. Branham because he was her boss. Employee 1 said that she discussed this [redacted] issue with Mr. Branham, and he responded that it was not a problem for him. In contrast, Employee 1 described her relationship with Mr. Branham as "inappropriate" and "wrong" because Mr. Branham was, in her words, "ultimately my boss."

Employee 1 told us that [redacted] We obtained and reviewed personnel actions related to Employee 1 and reviewed Mr. Branham's e-mails with Employee 1 and her supervisors. We found no information to indicate that Mr. Branham influenced the [redacted].

We reviewed numerous e-mails between Mr. Branham and Employee 1 and found e-mails beginning in [redacted] 2019 that included sexually suggestive comments from Mr. Branham to Employee 1. Mr. Branham sent the suggestive e-mails to Employee 1 throughout the day, including before, during, and after the workday. Examples of what Mr. Branham sent to Employee 1 using his official Government e-mail include the following.

- I told you I hadn't had the sensation I experienced with you since high school, and now it feels like anticipation of a second date following the first and greatest.
- It will be so nice to be alone and be able to talk, joke, and be more intimate all at the same time.
- I want(ed) to be there as early as possible to get the most time with you….. you're worth it! (parenthetical clause and ellipsis in original)
- Don't want you to feel ANY pressure on anything. You've already shown your worth. Zero expectations on "performance" as just being with you has already proven to be worth it. (emphasis in original)

- When I think about you, of all the things that come to mind, "dorK" [*sic*] and "awkward" are not on the list. The more predominant ones would be beautiful, intelligent, grounded, personality, fun and easy to talk to, knee-weakening smile, ... There are many more but they [*sic*] several are either R or X rated. (ellipsis in original)

- Driving in still, and thinking about…… what else? Kissing you. (ellipsis in original)

- I miss you, I want to hear your voice, and I want you.

- Good morning Miss Wonderful.

- [I am] someone who adores you.

- Good morning. Crazy about you!

- I am really missing you. I hope your weekend was really wonderful. … However, I will be happier if that weekend is spent with me.

- Good morning. I'm still feeling unbelievable effects of earlier correspondence awhile ago….!!

- And will you tell them that your future mate is not having same issue with his Droid?

- I felt I must have been unintentionally smothering you with my texts and making you feel I was demanding too much from you.

- I'm falling for you, and know that things are complicated for both of us. I don't want to lose you, and want us to be as close as possible (I don't know how close that will ultimately be) for as long as life will let us.

We also found five photographs that Mr. Branham forwarded from his personal e-mail account to his Government e-mail account. These five photographs appear to be the same female in various states of dress or undress. Our analysis of the photographs revealed that Mr. Branham sent the photographs from his mobile telephone to his Government e-mail address within minutes or hours of sending highly sexually explicit e-mails to Employee 1.

According to Employee 1, the "physical" relationship ended about March 2020 during the onset of the coronavirus disease–2019 (COVID-19) pandemic. She said that after the physical relationship ended, she felt that her professional and personal relationship with Mr. Branham was, in her words, "awkward" and "weird" because of the previous physical relationship. Additionally, Employee 1 told us that she thought Mr. Branham's conduct was part of a pattern and that she was not "the only one that he's scoped out and proceeded with" having an inappropriate physical relationship.

We obtained and reviewed records of Mr. Branham's personal cell phone activity from February 2018 through June 2021. We also reviewed Mr. Branham's personal cell phone text activity from July 2020 through June 2021 and his cell phone picture and video message activity from October 2020 through June 2021. Our review found numerous contacts between Mr. Branham and Employee 1, including over 500 cell phone calls, 91 picture or video messages,

and over 6,000 texts. Over 1,000 of these contacts between Mr. Branham and Employee 1 occurred on weekends and holidays.

Employee 2

Employee 2 told us that Mr. Branham massaged her shoulders and made comments to her that she described as "scary." Employee 2 also told us that Mr. Branham sent her text messages that she believed were of "a sexual nature." As discussed below, we downloaded the text messages between Employee 2 and Mr. Branham.

Massages for Employee 2

Employee 2 told us of three instances at the AFRH office when Mr. Branham massaged her shoulder and neck area.

The first incident occurred around the end of 2018 after Employee 2 talked with another AFRH employee about their respective back issues and treatments. Employee 2 told us that Mr. Branham overheard this conversation, and later that same day, Mr. Branham approached Employee 2 and told her, "I'll give you a massage. … I've got the oils. I give good massages." Mr. Branham started to massage Employee 2's shoulders. Employee 2 told us that she shrugged her shoulders, and after a couple of minutes, Mr. Branham asked her if she was uncomfortable. Employee 2 told us that she was speechless and that Mr. Branham said, "I'll stop because I'm making you feel uncomfortable."

The second incident occurred around May 2019 when Employee 2 was massaging her own neck. Employee 2 told us that Mr. Branham noticed that she was massaging her neck because she was tense. Employee 2 told us that Mr. Branham started to massage her neck for a couple of minutes. Employee 2 said that she did not recall what caused Mr. Branham to stop massaging her neck during this incident.

The third incident occurred around the summer of 2020 after Employee 2 told Mr. Branham her concerns about preferential treatment and nepotism within the AFRH. Employee 2 told us that Mr. Branham started to massage her neck area for a couple of minutes. Employee 2 told us that she froze and that she believed that Mr. Branham realized she was uncomfortable, and he backed away.[2]

Employee 2 told us that every time Mr. Branham got close to her, she felt that she was in a precarious position because Mr. Branham [redacted].

We asked Employee 2 if anyone witnessed Mr. Branham massaging her shoulders. Employee 2 told us that one AFRH employee might have seen one instance when Mr. Branham massaged her shoulders. We asked that AFRH employee if she ever saw or heard of Mr. Branham massaging any AFRH employees. She told us that she never saw or heard of Mr. Branham massaging an AFRH employee.

[2] Our first interview with Employee 2 occurred within 6 months of the third incident. In a second interview, 16 months after the first interview, Employee 2 stated that she had difficulty recalling specific events due to the passage of time. In this second interview, Employee 2 only recalled two incidents when Mr. Branham massaged her and told us that "the others [incidents] might have been, you know, like putting his hand on my shoulder, and I'd just move away." We evaluated both interviews and relied on her statements in the first interview for Employee 2's recollection of the third incident because the interview was closer in time to the events.

Comments to Employee 2

Employee 2 told us that Mr. Branham made comments to her that she described as "weird." Specifically, Employee 2 told us that:

- Mr. Branham told Employee 2 that Mr. Branham and another male employee thought that she was "better proportioned physically" than another female AFRH employee;

- Mr. Branham told Employee 2 that she should travel with him and that he would take her out to drink margaritas. When Employee 2 told him that she would not cross the boundaries between [redacted], Mr. Branham told her, "[W]e'll have to do something about that"; and

- she often wore a [redacted] at work, and that on about 7 to 10 occasions, Mr. Branham told her not to cover up "her assets." Employee 2 interpreted Mr. Branham's use of the term "assets" to mean her chest.

Employee 2 told us of another comment that Mr. Branham made to her in July 2020. Employee 2 said that she [redacted] and commented that she was tired of the pandemic because she had to wear a mask everywhere. Mr. Branham responded and told Employee 2, "[T]hat's why we need to go to a remote island and have some crazy wild sex." Employee 2 did not respond to Mr. Branham's comment but told us that she quit talking to Mr. Branham unless he talked to her. Employee 2 told us:

> I just shut off communication. I don't talk to him [Mr. Branham] unless he speaks to me. I don't even look at him. … this is a deterrent for him to stop these comments or I don't want to give him firepower because if I say something nice to him he thinks he can come up with something crazy or say something of a sexual connotation to me and that that's okay. So I decided it's all professionalism from this point on. I'm looking for another job. … That's it, and that's the only way that I've been able to deter him from saying anything of a sexual nature to me.

According to Employee 2, these comments were made directly to her, and she did not believe that there were any witnesses.

Texts to Employee 2

Employee 2 told us about two specific text messages from Mr. Branham that she felt were inappropriate or not professional. We downloaded all the text messages between her and Mr. Branham.

In the first text exchange, Employee 2 texted Mr. Branham that she was sick and implied that she would not go to work that day. Mr. Branham replied, "Take care of yourself. Hope you feel better by Monday. Have a good weekend and rest." Employee 2 replied, "Thx u r the best." Mr. Branham replied, "Was going to offer to provide some warmth, but did not know if it would help." Employee 2 told us that she interpreted Mr. Branham's offer to provide warmth as a comment of a sexual nature.

In the second text exchange, Employee 2 texted Mr. Branham, "Sir, I [redacted] have to leave. See u in the a.m." Mr. Branham replied, "You can send me sweet nothings." Employee 2 told

us that Mr. Branham was not her "love interest" and that "[Mr. Branham] is not that kind of person that you can reply to in any manner because he takes it out of context and thinks oh, it's okay. I'm coming on to her, and she's accepting it."

Employee 3

Employee 3 told us that Mr. Branham rubbed her shoulders and would tell her and others a story that included a sexual innuendo. Employee 3 told us that she felt terrible when Mr. Branham rubbed her shoulders, and she felt "grossed out" by the story.

Shoulder Rubs for Employee 3

Employee 3 told us that Mr. Branham rubbed her shoulders about 8 to 10 times. As an example of Mr. Branham's behavior, Employee 3 told us that Mr. Branham rubbed her shoulders as she worked with him on a work-related product. Employee 3 told us:

> So, he'd [Mr. Branham] come around my desk and look at the spreadsheet with me. And so, then he'd start rubbing my shoulders. And I'd just sort of wiggle away, and, … sort of change the physical environment. So, he wouldn't be … able to do that. Let me jump up, let me go print this off. You know, do something like that to change the scenario.

Employee 3 told us that Mr. Branham would "come up behind [her] chair over top of [her], and put one hand on each shoulder." Employee 3 told us that Mr. Branham would start to move up to her neck, with each instance ranging from 30 seconds to more than a couple of minutes. Employee 3 told us, "I hated it, but I'm trying to get a job done. So, I'd sort of wiggle away … and change the environment … until the time I finally said, okay, stop, I can't even think about what I'm doing when you're doing that. … So, I made it perfectly clear."

Employee 3 told us that after she told Mr. Branham to stop rubbing her shoulders, she "got ... the cold shoulder" from Mr. Branham. When asked how Mr. Branham's shoulder rubs made her feel, Employee 3 told us, "Terrible, icky. … I'm not at work to do that, you know? … I'm a person very dedicated to getting the job done. And with the volume of work, that's, you know, I'm stressed over trying to get the work done. Get off of me, you know?"

Employee 3 told us that she did not know of anyone who witnessed Mr. Branham rubbing her shoulders.

Comments to Employee 3

Employee 3 told us that Mr. Branham would tell her a story about two people having sex with a punchline in which the man in the story was "standing up in" the woman in the story. Employee 3 told us that hearing Mr. Branham tell that story "just made me sick." Employee 3 said that Mr. Branham told her this story about two to five times and that another AFRH employee was present on one occasion. We asked the other AFRH employee about the story, and the other employee told us that he did not recall Mr. Branham telling this story or any other sexually related story.

Employee 3 told us that Mr. Branham made another inappropriate comment to her while they were standing near a photocopier. Employee 3 said that she did not recall the topic of conversation but that she and Mr. Branham were laughing when Mr. Branham said, "I bet you just want to kiss me right now." Employee 3 said that she told him no, and Mr. Branham said, "[O]h, I

guess I shouldn't have said that." Employee 3 told us that there was nothing sexual about their conversation and that "something was funny, but that didn't mean I wanted [Mr. Branham] to kiss me. I don't know where he gets that from, you know what I mean? It comes out of nowhere." Employee 3 told us that Mr. Branham "finds himself to be attractive or something, and … he comes across, like, always trying to flirt."

Employee 3 told us that when she "wasn't as cooperative with him as he might have liked me to be, … I found myself being completely ignored." Employee 3 told us that after she put her foot down about Mr. Branham's sexual innuendos and flirtatious behavior towards her, "all of a sudden I … felt like I was sidelined."

Other Information Concerning Employee 3's Relationship With Mr. Branham

We reviewed e-mail exchanges between Mr. Branham and Employee 3 and did not find any indication or references to sexually explicit comments, stories, or shoulder rubs. The e-mails we reviewed seemed to indicate a friendly relationship between Employee 3 and Mr. Branham. We found only a few e-mails with what could be described as collegial banter, including the following.

- Employee 3 wrote to Mr. Branham that she missed him. Mr. Branham replied, "You have to know it's mutual. Want a hug, but thinking I need to be careful with your [injury]… ." Employee 3 replied, "I am a broken woman - Ha!" and Mr. Branham responded, "Would be happy to mend you."

- Mr. Branham wrote to Employee 3 in an e-mail that she was "sweet as always."

- Mr. Branham e-mailed Employee 3 and wrote, "Missed you, but hoping you had a wonderful, great time!"

Other Witness Comments

We interviewed six other AFRH employees we believed might have relevant information about the events described in this report. Five of those employees had frequent contact with Mr. Branham. Four of the six employees told us that the allegations surprised them. The fifth employee said that the allegations were "hard to believe," and the sixth employee called the allegations "preposterous."

Some of these employees told us that they heard Mr. Branham tell jokes or make funny comments. However, none of them heard Mr. Branham tell a joke that contained sexual innuendo.

We asked the six employees if they ever saw Mr. Branham hug or massage another employee. Five of the employees said that they neither hugged nor saw Mr. Branham hug, massage, or have any other physical contact with another employee. The sixth employee described herself as a "hugger" and said that she initiated hugs with Mr. Branham, and she also told us that Mr. Branham did not do anything to make her feel uncomfortable. The sixth employee also told us that she never saw Mr. Branham hug anyone else.

Efforts to Secure an Interview With Mr. Branham

As part of our normal procedures, we contacted Mr. Branham and requested an interview with him. During our initial discussions with Mr. Branham to arrange an interview, we interviewed Employee 1. On November 9, 2021, within a few weeks after our interview with Employee 1,

Mr. Branham resigned from his position at the AFRH. After his resignation, we repeated our efforts to interview Mr. Branham, but he did not consent to an interview with our investigators.

Conclusions About Mr. Branham's Actions

We substantiated the allegation that Mr. Branham engaged in an overall course of conduct in which he sexually harassed subordinate female employees.

Specifically, Mr. Branham initiated, pursued, and engaged in an intimate, personal, and "physical" relationship over several months with a subordinate female employee (Employee 1)—[redacted]. Employee 1 described feeling uncomfortable and awkward when Mr. Branham asked her out on a date, because she did not think she could say no since he [redacted]. Employee 1 also described the relationship with Mr. Branham as inappropriate and wrong.

We also determined that Mr. Branham's pattern of inappropriate behavior extended to similar but unwelcome physical contact and inappropriate sexually charged comments or innuendo with Employee 2 and Employee 3. Mr. Branham rubbed Employee 2's and Employee 3's shoulders without their permission and sent texts or made comments to Employee 2 and Employee 3 that made them feel uncomfortable.

In his response to our tentative conclusions, Mr. Branham stated that he agreed with our conclusion that he engaged in an inappropriate relationship with Employee 1. However, he disagreed with some of our conclusions.

Mr. Branham believed that his relationship with Employee 1 was consensual and did not constitute sexual harassment. We disagree. Mr. Branham initiated, pursued, and engaged in an intimate relationship with a subordinate employee [redacted] The subordinate employee told us that she felt uncomfortable and awkward and did not think she could say no.

Mr. Branham agreed that his written communications to Employee 2 and Employee 3 were unprofessional and regretted that the communications made these employees feel uncomfortable. He also stated that he should not have written those comments to Employee 2 and Employee 3. However, Mr. Branham denied making other inappropriate comments to Employee 2 and Employee 3.

After considering Mr. Branham's response to our preliminary conclusions and re-examining our evidence, we did not change our report and we stand by our conclusions.

Mr. Branham's overall course of conduct interfered with the individual performance of subordinate female employees within his organization and created an intimidating, hostile, and offensive work environment that made these female employees uncomfortable or caused them distress. We find his behavior particularly egregious given his position as the AFRH COO and the authority he held over the subordinate female employees.

B. EMPLOYEE 2'S ALLEGATION OF WHISTLEBLOWER REPRISAL

Investigation of Reprisal Allegations

In this section, we analyze whether Mr. Branham reprised against Employee 2 for making protected disclosures to him about Mr. Branham's sexual harassment.[3]

The DoD OIG employs a two-stage process in conducting whistleblower reprisal investigations. The first stage focuses on the alleged protected disclosures, personnel actions, and the subject's knowledge of the protected disclosures. The second stage focuses on whether or not the subject would have taken or failed to take, or threatened to take or fail to take a personnel action against the employee absent the protected disclosures.

To progress to the second stage of the analysis, sufficient evidence, based on a preponderance of the evidence, must be available to make three findings.

1. Employee 2 made a protected disclosure.
2. Employee 2 received a personnel action.
3. The protected disclosure was a contributing factor in the personnel action.

If a preponderance of the evidence supports these three findings, the analysis will proceed to the second stage. In the second stage, we weigh together three factors.

1. The strength of the evidence in support of the personnel action.
2. The existence and strength of any motive to retaliate on the part of the officials who were involved in the decision.
3. Any evidence that the subject took similar actions against similarly situated employees who did not make protected disclosures.

Unless clear and convincing evidence indicates that Mr. Branham would have taken or failed to take, or threatened to take or fail to take a personnel action against Employee 2 absent her protected disclosures, a preponderance of the evidence establishes that Mr. Branham took the personnel actions in reprisal.

Whistleblower Protection for DoD Civilian Appropriated Fund Employees

The DoD OIG conducts whistleblower reprisal investigations involving civilian appropriated fund employees of the DoD under section 7 of the "Inspector General Act of 1978," as amended (5 U.S.C. App.). Furthermore, under DoD Directive 5106.01, "Inspector General of the Department of Defense," April 20, 2012 (Incorporating Change 2, Effective May 29, 2020), the DoD OIG receives and investigates such complaints of reprisal in a manner generally in accordance with 5 U.S.C. §§ 1221(e) and 2302.

[3] [redacted]

Findings

Protected Disclosures

Section 2302, title 5, United States Code, paragraph (b)(8), states that any employee who has the authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority:

- take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of:
  - any disclosure of information by an employee or applicant that the employee or applicant reasonably believes evidences:
    - a violation of any law, rule, or regulation, or
    - gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

    if such disclosure is not specifically prohibited by law and if such information is not specifically required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; and
  - any disclosure to the Special Counsel, or to the inspector general of any agency or another employee designated by the head of the agency to receive such disclosures of information that the employee or applicant reasonably believes evidences:
    - any violation—other than a violation of 5 U.S.C. § 2302—of any law, rule, or regulation; or
    - gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The test for determining whether Employee 2 had a reasonable belief is whether a reasonable person with knowledge of the essential facts known to and readily ascertainable by Employee 2 could conclude wrongdoing occurred.

"Disclosure" means a "formal or informal communication or transmission" per 5 U.S.C. § 2302(a)(2)(D).

Overview of Alleged Protected Disclosures

According to Employee 2, [redacted], she repeatedly rebuffed Mr. Branham's sexual advances, thereby disclosing to him his own abuse of authority with respect to her. An abuse of authority is "[a]n arbitrary and capricious exercise of authority that is inconsistent with the mission of the Department of Defense."[4] A preponderance of the evidence established that these disclosures were protected under 5 U.S.C. § 2302.

Alleged Protected Disclosures

Employee 2 told us that she repeatedly rebuffed or ignored Mr. Branham's sexual harassment throughout her time [redacted]. We focus on the specific occasions she described to us, which occurred from August 2018 through March 2020, as follows.

[4] Section 4701, title 10, United States Code, paragraph (g)(6); *Smolinski v. MSPB*, F.4th 2022 WL 164013 (Fed. Cir. 2022) (applying this definition of "abuse of authority" under 5 U.S.C. § 2302, which does not itself define the phrase).

- Mr. Branham told Employee 2 that she should travel with him and that he would take her out to drink margaritas. She told us that she replied, "I don't cross the boundaries of [redacted]." Mr. Branham responded, "[W]ell, we'll have to do something about that," to which Employee 2 replied, "[S]ir, I just don't do it."

- When Mr. Branham offered to give Employee 2 a massage, Employee 2 replied, "[N]o, thank you. I'll leave that to the professionals."

- When Mr. Branham massaged Employee 2's shoulders, she shrugged her shoulders multiple times to communicate to Mr. Branham that he should remove his hands.

- In response to Mr. Branham telling her about his relationship with his former girlfriend and asking Employee 2, "[D]on't you like someone to hold … ?" Employee 2 said to Mr. Branham, "I don't like people to bother me," "I don't like people manhandling me," "I don't like people touching me and grabbing me," and "I like to be left alone."

Our investigation did not uncover any witness to these incidents.

Analysis of Alleged Protected Disclosures

We considered what knowledge a reasonable person would have if she or he had the same knowledge of the essential facts as Employee 2. A reasonable person similarly situated to Employee 2 would know that Mr. Branham's words and behavior toward Employee 2 were inappropriate. As discussed in Section A, Mr. Branham engaged in a pattern of conduct that interfered with Employee 2's individual performance and created an intimidating, hostile, and offensive work environment that made her and other female employees uncomfortable or caused them distress. Furthermore, this behavior was particularly egregious given his position as the AFRH COO and the authority he held over Employee 2 and the other subordinate female employees. Therefore, a reasonable person could interpret that Mr. Branham's words and behavior on these occasions could have constituted an abuse of authority.

The evidence demonstrates that at the time of these disclosures, a reasonable person could conclude that Employee 2's disclosures in response to Mr. Branham's unwelcome physical contact and inappropriate sexually charged comments or innuendo communicated to Mr. Branham that he was abusing his authority with respect to Employee 2. Consequently, Employee 2's disclosures to Mr. Branham are protected under 5 U.S.C. § 2302.

In his response to our tentative conclusions, Mr. Branham challenged our determination that Employee 2 made protected disclosures to him that he was abusing his authority under 5 U.S.C. § 2302. His narrow interpretation of the statute is contrary to the statute's plain language and legislative history, as well as court decisions regarding protected disclosures. First, 5 U.S.C. § 2302(f)(1)(A) expressly provides that a disclosure shall not be excluded from protection on the grounds that it was made to a supervisor or to a person who participated in the alleged wrongdoing. Second, the express purpose of the Whistleblower Protection Enhancement Act

of 2012 was to amend 5 U.S.C. § 2302 to both strengthen and broaden whistleblower protections and overrule previous decisions that restricted them.[5]

Mr. Branham further contended that Employee 2's physical gestures rejecting his sexual advances could not constitute a disclosure to him that he had engaged in an abuse of authority. Again, Mr. Branham is incorrect. Her gestures were, by definition and under the circumstances described, disclosures to Mr. Branham: they made known to him that his advances were unwelcome, inappropriate, and clearly implicated an identifiable violation of law, rule, or regulation. Moreover, a supervisor's sexual harassment of a subordinate employee is, *per se*, an abuse of authority. Furthermore, a disclosure need not be made verbally to be protected. Non-verbal acts that are purposive and effective in communicating an employee's opposition to unlawful activity are protected disclosures. It is uncontroverted that when Employee 2 repeatedly shrugged Mr. Branham's hands off her shoulders, he commented to her that he would stop touching her because he was making her feel uncomfortable. His reaction to her non-verbal communication revealed that said communication was both purposive and effective.

Accordingly, we did not amend our conclusion that Employee 2's disclosures to Mr. Branham are protected under 5 U.S.C. § 2302.

Personnel Actions

Section 2302, title 5, United States Code, prohibits any employee who has authority to take, direct others to take, recommend, or approve a personnel action from taking or failing to take, or threatening to take or fail to take such action as a reprisal for making a protected disclosure.

Section 2302, title 5, United States Code, defines "personnel action" as:

- an appointment;
- a promotion;
- an action under 5 U.S.C. §§ 7501-7543 or other disciplinary or corrective action;
- a detail, transfer, or reassignment;
- a reinstatement;
- a restoration;
- a reemployment;
- a performance evaluation under 5 U.S.C. §§ 4301-4315 or under title 38;
- a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
- a decision to order psychiatric testing or examination;
- the implementation or enforcement of any nondisclosure policy, form, or agreement; and
- any other significant change in duties, responsibilities, or working conditions.

[5] The Senate Report accompanying the Whistleblower Protection Enhancement Act, S. Rep. No. 112-155 at 4 (2012), states: "Unfortunately, in the years since Congress passed the WPA [Whistleblower Protection Act], the MSPB [Merit Systems Protection Board] and the Federal Circuit narrowed the statute's protection of 'any disclosure' of certain types of wrongdoing, with the effect of denying coverage to many individuals Congress intended to protect. Both the House and Senate committee reports accompanying the 1994 amendments criticized decisions of the MSPB and the Federal Circuit limiting the types of disclosures covered by the WPA …. To address these concerns, the Whistleblower Protection Enhancement Act makes clear, once and for all, that Congress intends to protect 'any disclosure' of certain types of wrongdoing in order to encourage such disclosures. It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions."

Overview of Alleged Personnel Actions

Employee 2 alleged that Mr. Branham took four personnel actions against her in reprisal for her protected disclosures. A preponderance of the evidence established that Mr. Branham took three personnel actions against Employee 2 in April 2020, July 2020, and August 2020. All three actions are personnel actions as they qualify as significant changes in Employee 2's working conditions. The first two personnel actions occurred when Mr. Branham did not allow Employee 2 to isolate and quarantine by teleworking for two 14-day periods related to then-applicable protocols for exhibiting COVID-19 symptoms or managing COVID-19 exposure. The third personnel action occurred when Mr. Branham did not allow Employee 2 to telework for a full day that he previously approved as a telework day. The fourth alleged personnel action occurred from October 2020 through March 23, 2021, when Mr. Branham assigned [redacted] duties to Employee 2. A preponderance of the evidence established that the fourth action did not constitute a significant change in Employee 2's duties, responsibilities, or working conditions; accordingly, it did not qualify as a personnel action.

Context for the Telework-Related Personnel Actions

A. THE ONSET OF THE COVID-19 PANDEMIC

The World Health Organization declared the COVID-19 outbreak a public health emergency of international concern on January 31, 2020.[6] Washington, D.C., announced its first COVID-19 case on March 7, 2020.[7] The World Health Organization declared COVID-19 a pandemic on March 11, 2020, and 2 days later, former President Donald J. Trump declared a nationwide emergency.[8] Various states began to close public schools, restaurants, and other public spaces on March 15, 2020, to prevent the spread of COVID-19.[9] By April 13, 2020, most states reported widespread infection, and by May 28, 2020, the U.S. death toll due to COVID-19 surpassed 100,000.[10]

In the first several months of the pandemic, testing availability was minimal throughout the United States, and the limited supply of tests typically was reserved only for hospitalized individuals or those experiencing a fever or a new loss of taste or smell. However, according to the Centers for Disease Control and Prevention (CDC), people with COVID-19 have reported a wide range of mild to severe symptoms, including:

- fever or chills,
- cough,
- shortness of breath or difficulty breathing,
- fatigue,
- muscle or body aches,
- headache,
- new loss of taste or smell,
- sore throat,

[6] CDC, "CDC Museum COVID-19 Timeline" (no date available).
[7] D.C. Policy Center, "A timeline of the D.C. region's COVID-19 pandemic," March 24, 2020.
[8] CDC, "CDC Museum COVID-19 Timeline" (no date available).
[9] CDC, "CDC Museum COVID-19 Timeline" (no date available).
[10] CDC, "CDC Museum COVID-19 Timeline" (no date available).

- congestion or runny nose,
- nausea or vomiting, or
- diarrhea.[11]

CDC guidance instructs individuals who are sick or who have COVID-19 to isolate from others, and cautions that symptoms may appear 2 to 14 days after exposure to the virus.[12] While current CDC guidance is very precise in its use of the term "isolation" as the proper action when one exhibits sickness or symptoms of COVID-19 and "quarantine" as the proper action when one has been or may have been exposed to someone with COVID-19, these terms have at times been used interchangeably over the course of the pandemic.[13]

In addition, specific groups of people have a higher risk for severe illness if they contract the disease. For example, age is a known COVID-19 risk factor for hospitalization and death. According to the CDC, when compared to 18- to 29-year-olds who contract COVID-19, due to the disease:

- 50- to 64-year-olds are 3 times more likely to be hospitalized and 25 times more likely to die,
- 65- to 74-year-olds are 5 times more likely to be hospitalized and 65 times more likely to die,
- 75- to 84-year-olds are 8 times more likely to be hospitalized and 140 times more likely to die, and
- 85-year-olds and older individuals are 10 times more likely to be hospitalized and 340 times more likely to die.[14]

The CDC warns that in particular, due to age and community transmission rates, older adults living in congregate settings are at high risk of being affected by respiratory and other pathogens, such as COVID-19.[15] Due to the increased risk of residents and other factors, COVID-19 reporting requirements for nursing homes became effective on May 8, 2020.[16]

B. FEDERAL GUIDANCE RELATED TO ISOLATION AND QUARANTINE PROTOCOLS

The U.S. Office of Personnel Management (OPM) published guidance on March 7, 2020, stating:

> For an employee covered by a telework agreement, ad hoc telework arrangements can be used as a flexibility to promote social distancing and can be an alternative to the use of sick leave for exposure to a quarantinable communicable disease for an employee who is asymptomatic or caring for a family member who is asymptomatic. An employee's request to telework from home while responsible for such a family member may be approved for the length of time the employee is free from care duties and has work to perform to effectively contribute to the agency's mission. The Telework Enhancement Act of 2010 requires agencies to incorporate telework into

[11] CDC, "COVID-19 Symptoms," (no date available).
[12] CDC, "COVID-19 Symptoms" and "COVID-19 Quarantine and Isolation" (no dates available).
[13] CDC, "COVID-19 Quarantine and Isolation" (no date available).
[14] CDC, "COVID-19 Hospitalization and Death by Age," November 30, 2020.
[15] CDC, "COVID-19 Nursing Homes and Long-Term Care Facilities" (no date available).
[16] CDC, National Healthcare Safety Network, "Nursing Home COVID-19 Data Dashboard" (no date available).

> their continuity of operations plan. Agencies should have written telework agreements in place with as many employees who are willing to participate and communicate expectations for telework in emergency situations.
>
> [Paragraphs omitted]
>
> An employee who is quarantined under the direction of health care authorities should not be reporting to the normal worksite. The employee's supervisor should offer the quarantined employee the option of ad hoc telework to the maximum extent possible.[17]

The President's Coronavirus Guidelines for America, issued on March 16, 2020, stated, "If you feel sick, stay home. Do not go to work. Contact your medical provider."[18] CDC guidance for people who thought they might have COVID-19 was, "Do not leave your home, except to get medical care. Do not visit public areas."[19]

C. AFRH TELEWORK POLICIES

The AFRH telework policy in place before and at the beginning of the COVID-19 pandemic, AFRH Agency Directive 4-5A, "AFRH Hours of Work," stipulated that "[t]elework is not an employee right," and "[a]n employee's Telework arrangement may be temporarily withdrawn or modified by a supervisor based upon the need to have the employee in the office for a specific period of time."[20] It also stated that it is the COO's responsibility to establish the policy and oversee its provisions and implementation.[21]

In response to COVID-19, on March 16, 2020, the AFRH issued supplemental telework guidance through a memorandum for AFRH personnel and residents entitled, "Guidance to AFRH during the COVID-19 Pandemic." That memorandum, signed by the deputy chief operating officer (DCOO), stipulated:

> Telework capable employees with agreements in place are strongly encouraged to telework in coordination with supervisors. Supervisors are directed to extend maximum telework flexibility in accordance with the Office of Personnel Management guidelines.
>
> Personnel, including contractors, who develop fever and cough, symptoms of COVID-19, or are notified by health authorities of exposure to COVID-19, or are otherwise at risk for COVID-19 infection, are directed not to enter AFRH premises, to immediately seek medical care and to contact their supervisor for further instructions. Personnel may be directed to remain off AFRH premises for 14 days or more, until free of fever for more than 24 hours. Negative COVID-19 test results may be requested as part of a fitness for return to duty exam. Workplace flexibilities may be available in accordance with Federal and AFRH human resources guidance.

[17] U.S. Office of Personnel Management, "U.S. Office of Personnel Management Questions and Answers on Human Resources Flexibilities and Authorities for Coronavirus Disease 2019 (COVID-19)," attachment to U.S. Office of Personnel Management Memorandum #2020-05, March 7, 2020.
[18] The President's Coronavirus Guidelines for America, "30 Days to Slow the Spread," March 16, 2020.
[19] CDC, "What to Do if You Are Sick," April 2, 2020. This guidance was first published on March 11, 2020, and remained constant on the CDC website at least through August 2020.
[20] AFRH Agency Directive 4-5A, "AFRH Hours of Work," July 11, 2012, "AFRH Telework Policy," sections 2.b(2) and 5.c.
[21] AFRH Agency Directive 4-5A, "AFRH Hours of Work," July 11, 2012, section 7.

D. EMPLOYEE 2'S TELEWORK ARRANGEMENT

Employee 2 did not have a telework arrangement before the onset of COVID-19. The [redacted] contacted several telework-eligible employees, including Employee 2, on March 16, 2020, to offer the option of telework. Employee 2 signed the telework agreement that day and discussed an arrangement with Mr. Branham. While this investigation identified [redacted] who were extended the option to telework full time after the onset of COVID-19, Mr. Branham and Employee 2 arranged for her to regularly telework 2 days of her choosing per week. Employee 2 began teleworking on March 18, 2020.

First Personnel Action: Did Not Allow Employee 2 to Telework for Full April 2020 14-Day Isolation Period

Employee 2 started feeling unwell on Tuesday, March 31, 2020, so she teleworked that full day and took leave the next day. Employee 2 returned to working in the office on Thursday, but partway through the day, [redacted] noticed that Employee 2 was sniffling and recommended that she go home. With Mr. Branham's approval, Employee 2 went home and teleworked for the rest of the workday and all of the following day—a Friday.

The next Tuesday, April 7, 2020, Employee 2 could not reach one of her managers by phone, so she called [redacted] to communicate that she was feeling worse. According to Employee 2, after discussing Employee 2's telework arrangement, [redacted] told Employee 2, "[W]e're just going to have to start furloughing people." Employee 2 told us that she understood [redacted] to be communicating that even though she was sick, she might be furloughed because she was not going into the office.[22]

Employee 2 attended a virtual medical appointment and obtained a doctor's note, dated April 7, 2020, which said, "Patient does not meet the criteria for Covid testing. She should telework for 14 days. She has no clinical evidence of Covid." Employee 2 sent the note to Mr. Branham the same day, asking to continue teleworking.[23] Mr. Branham replied, "We don't let the Drs determine teleworking. They either say you're sick and shouldn't go to work, or they say your okay to go to work. I'm okay with some telework, but it shouldn't be tied to how you're feeling." After sending this e-mail, Mr. Branham called Employee 2 to discuss the situation. Employee 2 told us, "He just shot it down and said doctors are not going to dictate to us." When we asked Employee 2 if she was able to isolate at all as a result of her doctor's note, she stated, "Oh, I begged him. I had to say please, can I just telework for a couple days to feel better, and I'll come in Monday." Ultimately, after 3 additional days of telework, Employee 2 returned to the office on Monday, April 13, 2020, which was the 7th day of the 14-day period her doctor advised. When we asked Employee 2 if Mr. Branham denied the 14-day period, she responded, "Sure did."

Mr. Branham did not allow Employee 2 to telework for the full 14-day period, even though Employee 2's April 7, 2020 doctor's note stated that Employee 2 should telework for 14 days. Although OPM and AFRH protocols required that the chief medical officer evaluate each potential COVID-19 exposure on a case-by-case basis, we found no evidence indicating that Mr. Branham sought such counsel when deciding not to allow Employee 2 to telework on this occasion. Mr. Branham's decision constituted a significant change in Employee 2's working conditions,

[22] [redacted]

[23] Employee 2's e-mail to Mr. Branham that attaches her doctor's note reads, "With your approval, I would like to continue to telework." Based on all available evidence, we understand that she asked to "continue" to telework because she had teleworked the last day she performed work—Friday, April 3, 2020.

because it changed the location of Employee 2's worksite, requiring her to enter the office while potentially symptomatic, possibly exposing other AFRH employees and the AFRH's high-risk resident population to COVID-19 during a global pandemic and nationwide emergency.[24]

Mr. Branham's decision contradicted the OPM guidance issued the prior month, which specified that an employee who isolates or quarantines under the direction of health care authorities should not report to the normal worksite and should be offered ad hoc telework to the maximum extent possible. As an internist Doctor of Medicine, Employee 2's doctor had a valid medical reason to prescribe that she telework for 14 days. Even though Employee 2's doctor noted that she did not display clinical evidence of COVID-19 as it was understood at that time and did not meet the criteria for testing, the cited CDC guidance supports the conclusion that Employee 2 should have isolated for 14 days. Her doctor reached the same conclusion, clearly communicating that what he observed in Employee 2 was significant enough to prescribe the standard isolation period of 14 days.

Finally, the AFRH supplemental telework guidance issued less than a month before directed supervisors to extend maximum telework flexibility in accordance with OPM guidelines, and noted that employees with COVID-19 symptoms could be directed to remain off AFRH premises for 14 days or more.

A preponderance of the evidence demonstrated that Mr. Branham significantly changed Employee 2's working conditions by not allowing her to isolate by teleworking for a 14-day period. Consequently, this denial constitutes a personnel action as defined by 5 U.S.C. § 2302.

Second Personnel Action: Did Not Allow Employee 2 to Telework for Full July 2020 14-Day Quarantine Period

During air travel returning [redacted] on Sunday, July 12, 2020, Employee 2 traveled through multiple airports and had a layover in Houston, Texas, a known COVID-19 hotspot at the time. That evening, Employee 2 texted Mr. Branham, asking whether she should report to the AFRH nursing department the next day for testing and then go home until her test result was available.[25] Mr. Branham replied, "Have to run it by [the chief medical officer]. All will probably get tested Tues, but maybe you can be tested tomorrow ... . Then you should be in your office by yourself unless [the chief medical officer] says go home, and [redacted] probably will." Employee 2 went to work the next day and was tested for COVID-19 in the afternoon.

The chief medical officer advised Mr. Branham via e-mail on July 13, 2020, that Employee 2 needed to quarantine for 14 days, stating:

> Common carrier has been considered a risk factor for COVID transmission as is exposure to crowds, which occurs in airports. Additionally, Houston continues to surge with cases. This has been well publicized. It has been one of the most heavily hit areas by COVID for some time, and even yesterday, there was news relating to COVID in Houston. [Employee 2] reports her flight out was [*sic*] DC area through [redacted] with a layover, than [*sic*] on to [redacted]. She reports her flight back was from [redacted] through Houston with a layover there in Houston. She states she was off the plane in the airport at Houston about an hour. Then the flight back was to the DC area.

[24] According to Employee 2's position description, her position required her to regularly interact with AFRH residents, who were mostly senior citizens and thus, considered high-risk.

[25] As a residential care facility, AFRH maintained an onsite nursing department. By July 2020, the nursing department had access to COVID-19 tests and the ability to test staff and residents and obtain test results within a couple of days.

> The most prudent action is to have [Employee 2] in a remote location from others to self-quarantine and/or to telework. She should not be in the office … with her door opened … for the next 14 days, after 7/12/2020 when she flew common carrier and de-planed for a layover through Houston, a well described and well published hotspot for COVID.

Despite receiving that e-mail, Mr. Branham did not approve Employee 2 to telework for the remainder of the day. Similarly, Mr. Branham did not approve Employee 2 to telework the next day, in spite of receiving an e-mail from the chief human capital officer, who was drafting employee quarantine notifications, asking Mr. Branham whether he had yet made a decision about Employee 2. On the morning of July 15, 2020, the chief medical officer e-mailed Mr. Branham again. [redacted] stated that [redacted] had learned that instead of directing Employee 2 to quarantine at home, leadership was trying to find somewhere in the office building where Employee 2 could work in isolation, thinking that might meet the quarantine objective. [redacted] then made it very clear that [redacted] recommendation was that Employee 2 quarantine at home. A review of Mr. Branham's e-mail records established that Mr. Branham did not respond to that e-mail.

Within 4 hours, on Employee 2's third day in the office after travel, the chief human capital officer issued Employee 2 a memorandum directing her to self-quarantine and telework for 14 days, and stated that she may not return to the office until July 27, 2020. Employee 2 did as instructed. Given Employee 2's exposure to a COVID-19 hotspot on July 12, 2020, her quarantine (and telework) should have begun on July 13, 2020 and ended on July 27, 2020. Instead, it began midway through the day on July 15, 2020. Therefore, she was only able to quarantine by teleworking for a period of 11½ days, not a full 14 days as stated in the memorandum.

Mr. Branham's decision contradicted the OPM guidance that specified that an employee who is quarantined under the direction of health care authorities should not report to the normal worksite and should be offered ad hoc telework to the maximum extent possible.

Finally, the AFRH supplemental telework guidance directed supervisors to extend maximum telework flexibility in accordance with OPM guidelines. A witness informed us that Mr. Branham questioned whether Employee 2 intentionally added the layover in Houston because it was a known COVID-19 hotspot and whether she de-planed there on purpose so that she could telework for 2 weeks or get 2 weeks of leave to quarantine, in effect "gaming the system."

Mr. Branham did not allow Employee 2 to telework for a full 14-day period, in spite of approximately 10 other AFRH employees, including Mr. Branham on three occasions, being directed to quarantine immediately following domestic travel, and all such employees who were telework-eligible being allowed to telework for the duration of their quarantine periods. Mr. Branham not allowing Employee 2 to telework for the full 14-day period resulted in her being present in the office for nearly 3 full days immediately following air travel and potential exposure to COVID-19, in direct conflict with the chief medical officer's advice and Federal and AFRH guidance. Mr. Branham's decision constituted a significant change in Employee 2's working conditions. His decision violated the guidance from the OPM, AFRH, and chief medical officer, all of whom determined that the appropriate place for Employee 2 to work in this scenario was at her home. Moreover, his decision required her to enter the office immediately after potential exposure to COVID-19, possibly exposing other AFRH employees and the AFRH's high-risk resident population to COVID-19 during a global pandemic and nationwide emergency.

A preponderance of the evidence demonstrated that Mr. Branham significantly changed Employee 2's working conditions by not allowing her to quarantine by teleworking for a 14-day period. Consequently, this denial constitutes a personnel action as defined by 5 U.S.C. § 2302.

Third Alleged Personnel Action: Did Not Allow Employee 2 to Telework for a Full Day on August 17, 2020

Employee 2 submitted a request to Mr. Branham on Friday, August 14, 2020, for approval to telework on Monday and Tuesday, August 17 and 18, 2020. Mr. Branham approved the request that same morning. That afternoon, however, after learning that an upcoming inspection would occur sooner than originally planned, Mr. Branham sent an e-mail and calendar invitation to Employee 2 and three other AFRH employees, scheduling a 9:30 a.m. meeting in his office on August 17, 2020, to prepare for the inspection.

According to Employee 2, upon receiving the meeting invitation, she confronted Mr. Branham, reminded him that he had already approved her request to telework on Monday, and requested approval to attend the meeting virtually. Mr. Branham told Employee 2 that she needed to attend in person but could telework afterward. Employee 2 told us that none of the other three invitees attended the August 17, 2020 meeting, and the meeting lasted approximately 10 minutes. Employee 2's official time and attendance records show that she worked 3 ½ hours at the office and teleworked 4 ½ hours on that day. Based on Employee 2's [redacted], she most likely left the office at 10:00 a.m.—30 minutes after the meeting started, which supports Employee 2's recollection that the meeting did not last long, and she did not need to work in the office that day, as Mr. Branham told her that she could leave after the meeting.

The AFRH telework policy in place at the beginning of the COVID-19 pandemic noted that employee telework arrangements could be modified based on the need to have the employee in the office for a specific period. In this instance, Mr. Branham modified Employee 2's previously approved telework day on August 17, 2020, when he told her she needed to come into the office for a meeting with him and three other employees to prepare for an inspection. However, according to Employee 2, and in spite of Mr. Branham's contention that they needed to meet to prepare for an inspection, she was the only employee at the meeting, and the meeting lasted only 10 minutes.

Mr. Branham's decision to not allow Employee 2 to telework the morning of August 17, 2020, constituted a significant change in Employee 2's working conditions. It changed the location of Employee 2's worksite, requiring her to enter the office during a global pandemic and nationwide emergency after she was already approved to telework, to participate in a meeting that the other invitees did not attend. Additionally, AFRH policy noted that all telework-capable employees with an agreement in place were strongly encouraged to telework, and supervisors were directed to extend maximum telework flexibility in accordance with OPM guidelines. While this investigation identified other employees and [redacted] who were extended the option to telework full time after the onset of COVID-19, Mr. Branham did not allow Employee 2 to telework on this preapproved occasion.

A preponderance of the evidence demonstrated that Mr. Branham significantly changed Employee 2's working conditions by not allowing her to telework the morning of August 17, 2020. Consequently, this denial constitutes a personnel action as defined by 5 U.S.C. § 2302.

Fourth Alleged Personnel Action: [redacted] Duty Assignment

Mr. Branham assigned Employee 2 the duty of [redacted] in late July 2020, after the previous [redacted], [redacted] in the AFRH [redacted] office, resigned. Historically, the [redacted] duty was assigned to Employee 2's position, but was transferred to an employee in the [redacted] office before Employee 2 joined AFRH. Employee 2 was assigned her first [redacted] in October 2020 and processed [redacted] in total. [redacted] Employee 2 estimated that she took 2 weeks to complete all [redacted] tasks. This duty ended on March 23, 2021, when Employee 2 went on a detail.

In determining whether Mr. Branham's assignment of these [redacted] duties qualified as a significant change to Employee 2's duties, responsibilities, or working conditions, we began by reviewing her position description as [redacted]. Employee 2's position description states, "[redacted]." This description of Employee 2's [redacted] responsibilities is broad enough to encompass the collateral duty of [redacted]. In making this determination, we also considered that this duty had been assigned to Employee 2's position before her employment with AFRH, and that Mr. Branham only assigned this duty to Employee 2 temporarily in response to the departure of the employee who performed this function before that point in Employee 2's employment.

Particularly considering that Employee 2 only spent 2 weeks of the approximately 34 weeks she held this responsibility working on [redacted], a preponderance of the evidence demonstrated that Mr. Branham did not significantly change Employee 2's duties, responsibilities, or working conditions. Consequently, this assignment does not constitute a personnel action as defined by 5 U.S.C. § 2302.

Summary of Personnel Actions

A preponderance of the evidence demonstrates that Mr. Branham took three personnel actions against Employee 2 in April 2020, July 2020, and August 2020.

Analysis

The available evidence establishes that Employee 2's protected disclosures were contributing factors in Mr. Branham's decisions to not allow Employee 2 to telework in the identified scenarios. Discussion of the factors weighed together follows the factor-by-factor analysis below, as appropriate.

Knowledge and Timing

Mr. Branham knew of the Complainant's protected disclosures because she made each of the disclosures directly to him in person. Employee 2 made her protected disclosures from August 2018 through March 2020. Mr. Branham took three personnel actions against Employee 2 from April 2020 through August 2020.

Mr. Branham's knowledge of the protected disclosures, along with the close proximity in time between learning of the protected disclosures and his decisions to not allow Employee 2 to

telework in the identified scenarios, establishes that Employee 2's protected disclosures were contributing factors in the personnel actions.

Strength of the Evidence

Stated Reasons for Taking Three Personnel Actions

Because Mr. Branham refused to be interviewed by us, we do not have his stated reasons for taking these three personnel actions against Employee 2.

Motive to Retaliate

Evidence for motive generally exists when protected disclosures allege wrongdoing that, if proven, would adversely affect the subject. In this case, Employee 2's protected disclosures reflected poorly on Mr. Branham because she rebuffed his sexual harassment. Employee 2's protected disclosures, if shared with anyone else, could have resulted in disciplinary action against Mr. Branham. In addition to the potential damage to Mr. Branham's employment and reputation, Employee 2's consistent rejection of his sexual advances and disclosures of his sexual harassment reasonably would have caused Mr. Branham to feel rejection, embarrassment, or humiliation.

Additionally, based on the testimonial and documentary evidence, Mr. Branham exhibited animus toward Employee 2 after she made her protected disclosures. Specifically, a witness testified that Mr. Branham's attitude toward Employee 2 changed from supportive to critical around the time Employee 2 came back [redacted] in July 2020, which was approximately 4 months after Employee 2's last protected disclosure to Mr. Branham. The following documentary evidence confirmed a witness's observation regarding Mr. Branham becoming critical of Employee 2 around July 2020.

- In a July 14, 2020 e-mail to an AFRH employee, during the period when the second personnel action occurred, Mr. Branham stated that he pushed back on Employee 2 and was not in the mood for her "childish attitude."

- Mr. Branham told another employee in a July 17, 2020 e-mail that Employee 2 angered him when she asked him if her quarantine would end early because her COVID-19 test result was negative.

- Mr. Branham wrote in an August 15, 2020 e-mail that he was tough on Employee 2 the day before, and that as a result, Employee 2 "had a real meltdown … . So she'll probably be pretty volatile Monday … . I seem to have this affect [*sic*] on women."

- A witness testified that Mr. Branham's attitude toward Employee 2 was very aggressive at times, and although the witness could not recall specific dates, [redacted] spoke of these observations in the context of an event that occurred in August 2020.

Disparate Treatment

Mr. Branham treated Employee 2 disparately with regard to the three personnel actions. We found no similarly situated employees [redacted] with whose treatment to compare Mr. Branham's treatment of Employee 2. However, we compared Mr. Branham's treatment of Employee 2 more broadly with how other AFRH employees were

treated by their supervisors, as Mr. Branham, the COO, was ultimately responsible for those decisions, and given that the AFRH is a relatively small agency, with approximately 315 employees.

The evidence established that multiple similarly situated AFRH employees were treated differently than Employee 2 with regard to COVID-19 quarantine-related telework.

- Mr. Branham self-quarantined for 14 days after returning from his ski vacation in March 2020.
- Mr. Branham self-quarantined and teleworked upon arriving at AFRH-Gulfport in December 2020 for a business trip and again after returning to AFRH-Washington.[26]
- Three AFRH-Washington employees traveled to COVID-19 hotspots for personal reasons. They were directed to quarantine after they returned from their travels; the only one of the three who was telework-eligible did telework during the quarantine period, while the other two were unable to telework but did quarantine.
- Five or six AFRH-Gulfport employees traveled to other states for personal reasons. They were directed to quarantine upon returning home. Because of the nature of their positions, they were not able to telework, but still were required to follow quarantine protocols.
- [redacted] at AFRH-Gulfport was quarantined on approximately five separate occasions due to COVID-19 exposures. She was telework-eligible and teleworked during the majority of her quarantine periods.

We also found that multiple similarly situated AFRH employees were treated differently than Employee 2 with regard to telework unrelated to a COVID-19 isolation or quarantine period.

- An AFRH employee was approved to telework full time during the COVID-19 pandemic because she had a health condition and provided a doctor's note.
- [redacted] was approved to telework full time.[27]
- An AFRH employee [redacted] was allowed to telework based on his preference after the onset of the COVID-19 pandemic.
- [redacted] was permitted to telework full time after the onset of the COVID-19 pandemic.

Similarly, Employee 2 was treated differently than [redacted] and colleagues on two other teams during [redacted]. Both Employee 2 and [redacted] drove to work that morning. Then, although OPM had not closed the Government that day, Mr. Branham contacted [redacted], stated that he had attempted to drive to the office but had to turn around due to the bad weather conditions, and advised [redacted] that he and Employee 2 could telework. Mr. Branham did not contact Employee 2 directly to inform her that she could telework. Employees

[26] However, he came into the office periodically during his quarantine period to sign paperwork.

[27] [redacted]

of other departments were advised in advance that they had the option to telework and did not have to drive through what Employee 2 described as a "dangerously bad storm."

We considered how the AFRH consistently responded to every instance of an AFRH employee either traveling or being exposed to COVID-19 by instructing the employee to isolate or quarantine for a 14-day period and, if telework-eligible, to telework during that time. Mr. Branham, as the COO, was ultimately responsible for telework-related decisions for everyone who performed work for the AFRH. Thus, the examples above demonstrate how Mr. Branham allowed other AFRH employees and a contractor to telework full time to accommodate their medical conditions and personal preference, while he did not allow Employee 2 to isolate by teleworking for 14 days despite her submission of a doctor's note that recommended telework for that period. He allowed himself and other employees to quarantine after travel; however, he did not allow Employee 2 to telework for nearly 3 full days after her travel through a documented COVID-19 hotspot.

Therefore, we concluded that Mr. Branham treated Employee 2 disparately with regard to her telework requests.

Conclusions About Mr. Branham's Actions Related to Whistleblower Reprisal

Weighed together, the evidence analyzed in the factors above does not clearly and convincingly establish that Mr. Branham would have taken the same personnel actions absent the protected disclosures.

A preponderance of the evidence shows that Employee 2 repeatedly rebuffed Mr. Branham's sexual advances, in effect disclosing to him his own abuse of authority with respect to her, from August 2018 through March 2020. These disclosures were protected under 5 U.S.C. § 2302. A preponderance of the evidence also shows that Mr. Branham did not allow Employee 2 to telework in April 2020, July 2020, and August 2020 in a way that contradicted Federal and AFRH policies, which constituted significant changes to her working conditions. These telework request denials were personnel actions as defined by 5 U.S.C. § 2302.

Mr. Branham was aware of the protected disclosures because the disclosures were made directly to him. Mr. Branham's knowledge of the protected disclosures, along with the close proximity in time between learning of the protected disclosures and deciding to not allow Employee 2 to telework in the identified scenarios, establishes that Employee 2's protected disclosures were contributing factors in the personnel actions. Because Mr. Branham refused to be interviewed by us, we do not have his stated reasons for taking these three personnel actions against Employee 2. In addition to the potential damage to his employment and reputation, Employee 2's consistent rejection of Mr. Branham's sexual advances and disclosures of his sexual harassment reasonably would have caused Mr. Branham to feel rejection, embarrassment, or humiliation. In addition, based on the testimonial and documentary evidence, Mr. Branham exhibited animus toward Employee 2 after she made her protected disclosures. Finally, the evidence shows that Mr. Branham treated Employee 2 disparately with regard to her telework requests.

We find it essential to consider and appreciate these facts in the extreme circumstances of their historical context. The COVID-19 pandemic has led to approximately 1 million U.S. deaths, with nearly 75 percent occurring in the 65-and-over age group.[28] Also, at no other time in history has a pandemic struck when so many work environments were such that they allowed for the

[28] CDC, "COVID-19 Mortality Overview," April 6, 2022.

opportunity and benefit to employers and employees alike of having employees continue to work while safely isolating and quarantining.

The March 16, 2020 AFRH policy directed supervisors to extend maximum telework flexibility to employees. The early months of the COVID-19 pandemic were marked by widespread concern about workplace exposure to health hazards and limited testing availability, and preceded the development and distribution of COVID-19 vaccines. In that context, the vast majority of telework-eligible civilian Federal employees were not only permitted to telework, but also were strongly encouraged to do so, to the maximum extent possible. Under these circumstances, approval of a telework-eligible civilian Federal employee's telework is a significant determinant of the employee's working conditions. In pre-pandemic circumstances, decisions affecting telework have not uniformly been found to constitute significant changes in working conditions. However, in this situation, Mr. Branham's decisions with respect to Employee 2's telework constituted a significant change in her working conditions.

Not only was Employee 2 telework-eligible, but the performance of her job was not essential to the functioning of the AFRH residential care facilities, as was not the case with its medical staff. Mr. Branham sexually harassed Employee 2 repeatedly throughout her time [redacted], and treated her differently than other telework-eligible employees when it came to teleworking during the pandemic. Mr. Branham did not allow Employee 2 to follow standard health and safety protocols by teleworking to isolate when displaying COVID-19-related symptoms or to quarantine after traveling through a well-documented COVID-19 hotspot. He also required that she go into the office for a very brief meeting on a pre-approved telework day. In so doing, he not only did not allow Employee 2 to work in an environment safe for herself, but also recklessly and irresponsibly had her work near high-risk elderly citizens living in one of only two residential care facilities for retired U.S. Service members.

In the absence of clear and convincing evidence to the contrary, a preponderance of the evidence establishes that Mr. Branham did not allow Employee 2 to telework in the identified scenarios in reprisal for her protected disclosures.

IV. OVERALL CONCLUSION

We substantiated the allegation that Mr. Branham sexually harassed female employees. Mr. Branham's actions created an intimidating, hostile, and offensive work environment that made these female employees uncomfortable or caused them distress. We also substantiated that Mr. Branham reprised against Employee 2 for her protected disclosures.

V. RECOMMENDATIONS

We make no recommendation regarding remedy for Employee 2 with respect to the reprisal findings, as she has since secured full-time employment elsewhere.

Mr. Branham resigned from Government service. Accordingly, we will forward our report to the Director, Washington Headquarters Services, for inclusion in Mr. Branham's personnel file.

Appendix A: Standards

DOD DIRECTIVE 1440.1, "THE DOD CIVILIAN EQUAL EMPLOYMENT OPPORTUNITY (EEO) PROGRAM," MAY 21, 1987 (INCORPORATING THROUGH CHANGE 3, APRIL 17, 1992, CERTIFIED CURRENT AS OF NOVEMBER 21, 2003)

Section 4.5 prohibits discrimination based on sex. It applies to civilian employees and applicants in the Office of the Secretary of Defense (OSD). It also applies to activities supported administratively by the OSD, the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Unified and Specified Commands, the Defense Agencies, the Army and Air Force Exchange Service, the National Guard Bureau, the Uniformed Services University of the Health Sciences, the Office of Civilian Health and Medical Programs of the Uniformed Services, and the DoD Dependents Schools.

"4.6. Eliminate barriers and practices that impede equal employment opportunity for all employees and applicants for employment, including sexual harassment in the work force and at work sites and architectural, transportation, and other barriers affecting people with disabilities."

ENCLOSURE 2, DEFINITIONS

"E2.1.10. Sexual Harassment. A form of sex discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

E2.1.10.1. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or

E2.1.10.2. Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or

E2.1.10.3. Such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment. Similarly, any military member or civilian employee who makes deliberate or repeated unwelcomed verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment."

DOD INSTRUCTION 1020.04, "HARASSMENT PREVENTION AND RESPONSES FOR DOD CIVILIAN EMPLOYEES, JUNE 30, 2020

Section 3 discusses prohibited harassment.

3.1 Harassment Adversely Affecting the Work Environment. The conduct prohibited by this policy includes, but is broader than, the legal definitions of harassment and sexual harassment. Behavior that is unwelcome or offensive to a reasonable person and that interferes with work performance or creates an intimidating, hostile, or offensive work environment is prohibited. All allegations of harassment must be evaluated under the totality of the circumstances, to include an assessment of the nature of the conduct and the context in which the conduct occurred. In some circumstances, a single incident of harassing behavior is prohibited harassment

whereas, in other circumstances, repeated or recurring harassing behavior may be required to constitute prohibited harassment.

3.2 Prohibited Harassment Behaviors.

a. Harassing behavior may include, but is not limited to:

(1) Unwanted physical contact.

(2) Offensive jokes.

(3) Epithets or name-calling.

(4) Ridicule or mockery.

(5) Insults or put-downs.

(6) Displays of offensive objects or imagery.

(7) Offensive non-verbal gestures.

(8) Stereotyping.

(9) Intimidating acts.

(10) Veiled threats of violence.

(11) Threatening or provoking remarks.

(12) Racial or other slurs.

(13) Derogatory remarks about a person's accent or disability.

(14) Displays of racially offensive symbols.

(15) Hazing.

(16) Bullying.

b. Unlawful harassing conduct may include, but is not limited to:

(1) Unlawful discriminatory harassment.

(2) Sexual harassment.

(3) Stalking.

DOD 5500.07-R, "JOINT ETHICS REGULATION (JER)," AUGUST 30, 1993 (INCORPORATING CHANGES 1-7, NOVEMBER 17, 2011)

The JER provides a single source of standards of ethical conduct and ethics guidance for DoD employees.

Chapter 12, "Ethical Conduct," Section 4, "Ethical Values"

12-401. Primary Ethical Values

"b. Integrity. Being faithful to one's convictions is part of integrity. Following principles, acting with honor, maintaining independent judgment and performing duties with impartiality help to maintain integrity and avoid conflicts of interest and hypocrisy."

"d. Accountability. DoD employees are required to accept responsibility for their decisions and the resulting consequences. This includes avoiding even the appearance of impropriety because appearances affect public confidence. Accountability promotes careful, well thought-out decision-making and limits thoughtless action.

e. Fairness. Open-mindedness and impartiality are important aspects of fairness. DoD employees must be committed to justice in the performance of their official duties. Decisions must not be arbitrary, capricious or biased. Individuals must be treated equally and with tolerance."

TITLE 5 CODE OF FEDERAL REGULATIONS PART 735, "EMPLOYEE RESPONSIBILITIES AND CONDUCT," SUBPART B, "STANDARDS OF CONDUCT," SECTION 735.203, "WHAT ARE THE RESTRICTIONS ON CONDUCT PREJUDICIAL TO THE GOVERNMENT?" (2021)

"An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government."

TITLE 29 CODE OF FEDERAL REGULATIONS PART 1604.11, "SEXUAL HARASSMENT"

(a) Harassment on the basis of sex is a violation of section 703 of title VII. 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.

Whistleblower Protection
U.S. Department of Defense

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Mr. James M. Branham

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