



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

██████████,
Complainant,

v.

Eric K. Shinseki,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 0120121222

Hearing Nos. 430-2009-00403X, 430-2010-00322X

Agency Nos. 2004-0637-2009102001, 2004-0637-2010101037

DECISION

On January 4, 2012, Complainant filed an appeal from the Agency's November 30, 2011, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission **AFFIRMS** the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Lead Human Resources Specialist (Staffing Specialist) at the Agency's Charles George Veterans Affairs Medical Center located in Asheville, North Carolina.

Complainant filed two EEO complaints on April 13, 2009, and January 26, 2010, alleging that the Agency discriminated against him. Specifically, Complainant alleged:

1. Complainant was subjected to discrimination in reprisal for prior protected EEO activity on February 2 and 12, 2009, when management assigned him Merit Systems Protection Board cases without providing formal training on how to handle cases.
2. Complainant was subjected to discrimination in reprisal for prior EEO activity when he was subjected to harassment/hostile work environment when the following events occurred:

- a. On March 16, 2009, management allegedly instructed Complainant “not to communicate work request(s) or other significant information with senior staff without prior discussion with the supervisory staff.” Complainant alleges that coworkers were not held to the same standard;
 - b. On March 9, 2009, and February 26, 2009, management denied Complainant's request to expunge derogatory documents from his official personnel file (OPF) to include: a letter of reprimand and a proposed suspension action; and
 - c. On February 2 and 12, 2009, management assigned Complainant Merit Systems Protection Board (MSPB) cases without providing formal training on how to handle such cases.
3. Complainant was subjected to discrimination on the bases of age (over 40), sex (male), and in reprisal for prior EEO activity when on November 12, 2009, Complainant received a fully successful performance rating. Complainant alleged he was rated unfairly as his peers were rated exceptional and he was not.
 4. Complainant was subjected to discrimination on the bases of age (over 40), sex (male), and in reprisal for prior EEO activity when on November 27, 2009, Complainant did not receive a 16-hour time off award as given to his coworker.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on August 15, 2011, and issued a decision on November 10, 2011.

In her decision, the AJ found Complainant failed to prove that he was subjected to discrimination or harassment with regard to issues (1), (2), or with regard to his claim of age discrimination. However, the AJ found Complainant established discrimination based on his sex and in reprisal for his prior protected EEO activity with regard to issues (3) and (4). As relief for the finding of discrimination, the AJ awarded Complainant: a \$650 cash award; \$5,000 in non-pecuniary, compensatory damages; \$11,812.50 in attorney's fees and \$489.95 in costs; ordered the Agency to change Complainant's rating to “Excellent” on his performance evaluation for the period October 1, 2008, to September 30, 2009; ordered training for the responsible management officials; and ordered the Agency to post a notice of the finding of discrimination.

The Agency subsequently issued a final order on November 20, 2011. The Agency's final order fully implemented the AJ's decision, including the finding that Complainant proved the Agency subjected him to discrimination on the bases of sex and in retaliation for his protected EEO activity and the relief as ordered by the AJ.

On appeal, Complainant claimed that the award of \$5,000 in compensatory damages was insufficient and requested an award of \$50,000. Complainant claimed that the lower

performance rating he was given damaged his career and reputation. In particular, he stated that the lower rating interfered with his ability to seek promotions during the relevant time period and that he and his coworkers knew the rating was lower than that given to other employees with less exemplary performance. Complainant cites four cases in which the EEOC awarded damages ranging from \$2,500 to \$125,000.

In response to Complainant's appeal, the Agency notes that Complainant cites no cases to support an award of \$50,000. Additionally, the Agency argues that Complainant did not show he suffered harm analogous to the four cases he cited. The Agency states that during the hearing, Complainant testified that his stress and anxiety were caused by the harassment he perceived. The Agency notes Complainant stated that he was afraid the harassment he suffered would culminate in his termination. The Agency notes, however, that the AJ did not find unlawful discrimination with respect to his claim of harassment; thus, Complainant is not entitled to compensatory damages with respect to the claim of harassment.

Similarly, the Agency notes Complainant testified that as a result of being assigned an MSPB case, he felt management was setting him up to fail. The Agency argues that the AJ did not find unlawful discrimination with respect to this claim; and consequently, Complainant is not entitled to an award of compensatory damages with respect to this claim.

The Agency notes that Complainant prevailed with only his claim that he received a fully successful rating on his November 2009 performance appraisal and consequently he did not receive a \$650 performance award. The Agency notes that Complainant testified that the performance award was "not a big item" to him, because it was a small amount of money. The Agency claims that with respect to the psychological harm caused by the performance appraisal, Complainant testified that he stopped coming to work on the weekends because he felt that his work was not appreciated.

Finally, the Agency argues that the cases cited are not analogous to Complainant's case. Rather, the Agency claims that the award of \$5,000 in non-pecuniary, compensatory damages was appropriate.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the

testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (November 9, 1999).

The Commission notes that the Agency implemented the AJ's finding of discrimination, and that finding is affirmed herein. We note that on appeal Complainant does not challenge the AJ's finding of no discrimination with regard to the remaining issues in his complaint. The Commission has the discretion to review only those issues specifically raised in an appeal. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, 9-10 (November 9, 1999). Accordingly, we will not address the findings of no discrimination in this decision.

Therefore, we now address the issue of compensatory damages. Section 102(a) of the 1991 Civil Rights Act authorizes an award of compensatory damages for post-Act pecuniary losses, and for non-pecuniary losses, such as, but not limited to, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health. See West v. Gibson, 527 U.S. 212 (1999). In this regard, the Commission has authority to award such damages in the administrative process. Compensatory damages do not include back pay, interest on back pay, or any other type of equitable relief authorized by Title VII. To receive an award of compensatory damages, complainant must demonstrate that he or she has been harmed as a result of the agency's discriminatory action, the extent, nature and severity of the harm and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), request for reconsideration denied, EEOC Request No. 05940927 (December 11, 1995); EEOC's Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 at 11-12, 14 (July 14, 1992) ("Guidance").

Non-pecuniary damages are available to compensate an injured party for actual harm, even where the harm is intangible. Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984). Emotional harm will not be presumed simply because complainant is a victim of discrimination. Guidance at 5. The existence, nature, and severity of emotional harm must be proved. Id. We note that for a proper award of non-pecuniary damages, the amount of the award should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (March 4, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 848 (7th Cir. 1989)). Finally, we note that in determining non-pecuniary compensatory damages, the Commission has also taken into consideration the nature of the Agency's discriminatory actions. See Utt v. U.S. Postal Service, EEOC Appeal No. 0720070001 (March 26, 2009).

In Carle v. Dep't of the Navy, the Commission explained that evidence of non-pecuniary damages could include a statement by complainant explaining how she was affected by the discrimination. EEOC Appeal No. 01922369 (January 5, 1993). Complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. Id. However, evidence from a health care provider is not a mandatory pre-

requisite to establishing entitlement to non-pecuniary damages. Sinnott v. Dep't of Defense, EEOC Appeal No. 01952872 (September 19, 1996).

At the outset, we note Complainant is not requesting pecuniary damages and we see no evidence in the record of any pecuniary damages. Thus, we only address Complainant's entitlement to non-pecuniary, compensatory damages.

Based on the record, the Commission finds that the award of \$5,000 in non-pecuniary, compensatory damages is sufficient to remedy the harm that the Agency's actions caused Complainant. Specifically, we note that Complainant is only entitled to compensatory damages resulting from the discriminatory performance appraisal and the denial of award. During the hearing, Complainant stated that he was upset about his performance evaluation because he felt he had performed as well as his coworkers. Complainant also stated that he was upset because he was the only one of the Staffing employees who did not receive some kind of award. In addition, Complainant stated that "For the money part, it's not a big item to me. By the time the taxes are taken out there's not much there." Complainant also stated that previously he had worked weekends and that after the low performance appraisal, he did not come in on the weekends anymore since he felt that he was not appreciated.

Taking into account the evidence of non-pecuniary damages submitted by Complainant, we find the Agency's award of non-pecuniary, compensatory damages in the amount of \$5,000 to be adequate, which takes into account the nature of the discriminatory actions and the severity of the harm suffered, and is consistent with prior Commission precedent. See Hairston v. Dep't of Education, EEOC Appeal No. 0120103308 (January 4, 2013) (awarding \$5,000 in non-pecuniary damages for retaliatory low performance appraisal where complainant provided limited testimony that he experienced stress and anxiety that caused disruptive sleep patterns, headaches, and other physical problems), request for reconsideration denied, EEOC Request No. 0520130245 (October 25, 2013); Smith v. Dep't of Defense, EEOC Appeal No. 01984888 (December 22, 2000) (granting \$6,000 in non-pecuniary damages for retaliatory low performance appraisal where limited testimony established emotional pain and suffering which caused complainant to seek counseling). An award of \$5,000 meets the goals of not being motivated by passion or prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases.

CONCLUSION

Accordingly, the Agency's final order is **AFFIRMED**. The Agency is directed to implement the following corrective actions in accordance with the **ORDER** herein.

ORDER

To the extent it has not already done so, the Agency shall take the following remedial actions:

1. Within 60 days of the date this decision becomes final, the Agency shall pay Complainant \$5,000 in non-pecuniary, compensatory damages.
2. Within 60 days of the date this decision becomes final, the Agency shall pay Complainant \$650 for the cash award.
3. Within 60 days of the date this decision becomes final, the Agency shall change records to reflect that Complainant received a rating of "Excellent" on his performance evaluation for the period of October 1, 2008, to September 30, 2009.
4. Within 120 days of the date this decision becomes final, the Agency shall provide the responsible management officials with eight hours of training in EEO law with a focus on sex discrimination and retaliation.
5. Within 60 days of the date this decision becomes final, the Agency shall consider taking disciplinary action against the responsible management officials who discriminated and retaliated against Complainant. The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Commission and specify what, if any, action was taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline.
6. Within 60 days of the date this decision becomes final, the Agency shall pay the sum of \$11,812.50 to Complainant in attorney's fees and \$489.95 in costs.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G0610)

The Agency is ordered to post at its Asheville, North Carolina facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted by the Agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

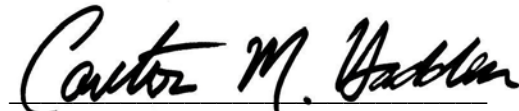
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

March 20, 2014
Date