



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

████████████████████  
Fidelia F.,<sup>1</sup>  
Complainant,

v.

Mike Young,  
Acting Secretary,  
Department of Agriculture  
(Forest Service),  
Agency.

Appeal No. 0120150584

Agency No. FS-2012-00672

**DECISION**

The Commission accepts Complainant's appeal from the Agency's September 30, 2014, final decision concerning her claim for compensatory damages stemming from her 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Public Affairs Specialist at the Agency's Ouachita National Forest in Hot Springs, Arkansas. On September 26, 2012, Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of sex (female) and age when on June 5, 2012, she learned that she was not selected for the GS-1035-11/12, Public Affairs Specialist position advertised under Vacancy Announcement No. 2-08090000-0657G-DB.

After the investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

Opportunity Commission Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In the September 30, 2013, final decision, the Agency determined that the record showed that in view of Complainant's superior qualifications and experience directly related to the advertised position, management was unable to articulate why she was not selected for the position over the lesser-qualified selectee. As a result, the Agency found that management had discriminated against Complainant based on her sex and age when she was not selected for the Public Affairs Specialist position. To remedy the discrimination, the Agency was ordered to consider taking disciplinary action against the Agency official found to have discriminated against Complainant; pay attorney's fees; determine whether Complainant was entitled to compensatory damages and back pay; and to post a notice.

On December 23, 2013, Complainant submitted her request for damages. Complainant requested \$5,648.00 for back pay; \$165,000.00 in front pay; \$70,000.00 in lost retirement benefits; \$300,000.00 in non-pecuniary compensatory damages; and \$1,480.00 in attorney's fees. On September 30, 2014, the Agency issued its final decision regarding Complainant's request for compensatory damages and attorney's fees. In the decision, the Agency awarded Complainant back pay and recalculated retirement benefits (with the amounts to be determined by the appropriate Agency/government entities). It awarded \$740.00 in attorney's fees, with the requested fee reduced due to the inability to award attorney's fees for the successful age claim. In addition, the Agency determined that Complainant was entitled to \$5,000.00 in non-pecuniary compensatory damages. In so finding, the Agency noted that Complainant had submitted no medical documentation or witness testimony in support of her request for compensatory damages. Nonetheless, the Agency acknowledged that Complainant stated that she experienced humiliation, helplessness, a lowered sense of self-worth/esteem, increased weight gain, high blood pressure, and seizures because of the Agency's discrimination. Accordingly, the Agency awarded Complainant \$5,000.00 in non-pecuniary compensatory damages. The instant appeal followed.

#### CONTENTIONS ON APPEAL

On appeal, Complainant contends that she is only challenging the Agency's award of non-pecuniary damages. Complainant argues that the Agency placed too much weight on the fact that her testimony was not accompanied by medical testimony or other supporting evidence. Complainant submits new evidence in support of her compensatory damages claim including affidavits from her co-workers who detailed the changes in her personality following the discriminatory non-promotion. Complainant cites numerous cases that she claims support an increase in the compensatory damages award. Finally, Complainant contends that the Agency's decision failed to consider that she was subsequently forced to retire and find another job to supplement her retirement benefits. Accordingly, Complainant requests that the Commission increase the award for non-pecuniary compensatory damages in the range of \$25,000.00 to \$50,000.00 and award additional attorney's fees for work on this appeal.

### ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that the Commission “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law”).

When discrimination is found, the Agency must provide the Complainant with a remedy that constitutes full, make-whole relief to restore her as nearly as possible to the position she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this “make whole” relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 119 S.Ct. 1906 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

#### *Non-Pecuniary Damages*

Non-pecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See EEOC Notice No. 915.302 at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the Agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be “monstrously excessive” standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from complainant concerning her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

Statements from others including family members, friends, health care providers, other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. Id. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

Here, Complainant's only evidence in support of her request for compensatory damages was a statement from her attorney detailing the effects of the discrimination on her. Therein, Complainant claimed that she experienced mental anguish and humiliation after not receiving the promotion. Complainant stated that she felt helpless, suffered diminished self-esteem and self-worth, and experienced exacerbation of her epilepsy condition. Complainant claimed that she developed migraines, elevated blood pressure, and weight gain. Additionally, on appeal, Complainant submitted several new statements from her co-workers in support of her request for additional compensatory damages. The Commission notes that as a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available previously. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 9, § VI.A.3 (Aug. 5, 2015). Because Complainant did not make such a showing, we decline to consider the new evidence submitted on appeal that was not part of the record when the Agency made its decision on relief.

The Commission finds that an award of \$7,500.00 is more appropriate than the \$5,000.00 awarded by the Agency. The Commission finds that this award is supported by the evidence, is neither "monstrously excessive" nor the product of passion or prejudice, and is consistent with prior Commission precedent. See Adams v. Dep't of Veterans Affairs, EEOC Appeal No. 01A43938 (Apr. 7, 2005) (\$7,000.00 in non-pecuniary compensatory damages based on complainant's statements about experiencing humiliation, low self-esteem, increased anxiety, and hopelessness); Robinson v. Dep't of the Army, EEOC Appeal No. 01A31123 (May 26, 2004) (\$7,500.00 in non-pecuniary compensatory damages based on complainant's testimony about mental anguish, emotional stress, lowered professional status, a reduction in his ability to advance his career, humiliation, embarrassment, and intimidation); Butler v. Dep't of Agric.,

EEOC Appeal No. 01971729 (Apr. 15, 1999)(\$7,500.00 in non-pecuniary damages based on complainant's testimony regarding his emotional distress).

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, the Commission MODIFIES the Agency's final decision and REMANDS this matter for further processing in accordance with this Decision and the Order below.

### ORDER

The Agency is ordered to take the following remedial action, to the extent it has not already done so:

1. Pay Complainant \$7,500.00 in non-pecuniary compensatory damages within 30 days from the date this decision is issued, minus any amounts already paid, if any.
2. Pay Complainant the appropriate amount of back pay, interest, retirement benefits, and other benefits pursuant to 29 C.F.R. § 1614.501(c), which was lost as a result of Complainant not being selected for the GS-1035-11/12, Public Affairs Specialist position. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within 120 (one hundred and twenty) calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

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.

### ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations - within thirty (30) calendar days of the date this decision is issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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 (M0416)

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 Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. The requests may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. 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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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 (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the

time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



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Carlton M. Hadden, Director  
Office of Federal Operations

April 11, 2017  
Date