



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

████████████████████  
Alena C.,<sup>1</sup>  
Complainant,

v.

James N. Mattis,  
Secretary,  
Department of Defense  
(Defense Logistics Agency),  
Agency.

Appeal No. 0120152806  
Agency No. DLAN-14-0135

**DECISION**

Complainant filed an appeal with the Commission from an Agency decision dated June 30, 2015, concerning an award of compensatory damages which was awarded after a finding of employment discrimination. For the following reasons, we **AFFIRM** the Agency's award of compensatory damages.

**BACKGROUND**

Complainant filed the instant complaint on June 6, 2014, alleging discrimination based on sex (female), age (over 40), disability (lung disease), and in reprisal for prior EEO activity when she was subjected to harassment in that: on February 18, 2014, her medical information she provided to management to facilitate her request for reasonable accommodation was shared improperly with a hiring official, Human Resources (HR), and possibly others; and, on February 18, 2014, she was required to take a pre-employment physical after tentative selection for Support Services Specialist, GS-0342-11, position under JOA DLADist-14-027512-MP.<sup>2</sup>

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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.

<sup>2</sup> We note that although Complainant also raised a claim regarding her supervisor's April 30, 2014 email concerning her work performance, the Agency dismissed this claim on June 20, 2014, for failure to raise the claim during EEO counseling.

At the conclusion of the investigation, Complainant requested a final Agency decision. On April 8, 2015, the Agency issued its final decision finding no harassment, no disparate treatment based on age, sex, or disability, and no retaliation as alleged. The Agency did find that Complainant was subjected to a per se violation of the Rehabilitation Act when her medical information was disclosed and as a result, she was subjected to a pre-employment physical. For damages, the Agency asked Complainant to submit statements of compensatory damages and attorney's fees and costs as a result of the discrimination. Complainant did not appeal the Agency's April 8, 2015 final decision to the Commission.

On April 22, 2015, Complainant submitted her statement to the Agency claiming that she was entitled to \$300,000.00 in compensatory damages. She also submitted three statements from family members and a friend in support of her request for compensatory damages. She claimed no attorney's fees or costs. On June 30, 2015, the Agency issued its decision finding that Complainant was entitled to \$5,000.00 in compensatory damages. Complainant appealed from the June 30, 2015 decision.

#### ANALYSIS AND FINDINGS

Initially, we note that in the instant appeal, Complainant may possibly be attempting to appeal the findings of no discrimination in the Agency's April 8, 2015 decision. If so, we find that such an appeal is beyond the 30-day time limit, is therefore untimely (Complainant admits receiving the decision on April 11, 2015), and is dismissed pursuant to 29 C.F.R. §1614.403. Furthermore, to the extent that Complainant is attempting to raise new claims of discrimination, such claims are also not properly at issue in this decision. Complainant must contact an EEO Counselor pursuant to 29 C.F.R. §1614.105 (we do not address whether such claims would be considered timely raised).

The record indicates that on July 1, 2013, Complainant, while she was employed as a Management Analyst, GS-09, at the Agency, requested to telework for two days per week to accommodate her conditions. At that time, Complainant submitted medical documentation indicating that: she suffered from chronic obstructive pulmonary disease and asthma necessitating the continuous use of several inhalers, which only partially controlled her cough and shortness of breath; and exposure to mold, dust, fumes, environmental temperatures and humidity caused worsening of her condition. The Agency ultimately granted Complainant one day of telework per week.

In January, 2014, Complainant applied for the Support Services Specialist, GS-11 position at issue. During the selection process, Complainant's second level supervisor disclosed the medical documentation Complainant had submitted in her accommodation request to her third level supervisor and Human Resources Specialists. On February 18, 2014, Complainant was notified that she was tentatively selected for the position provided she pass her physical examination at issue, including security clearance and drug testing. Complainant claimed that the physical examination around February 28, 2014, involved a blood test and a chest x-ray that were invasive. The record indicates that Complainant passed the examination,

Complainant was ultimately selected for the GS-11 position in March, 2014.

### Compensatory Damages

The Commission notes that damage awards for emotional harm are difficult to determine and that there are no definitive rules governing the amount to be awarded in given cases. A proper award must meet two goals: that it not be "monstrously excessive" standing alone, and that it be consistent with awards made in similar cases. See Cygnar v. City of Chicago, 865 F.2d 827, 848 (7<sup>th</sup> Cir. 1989). Section 102(a) of the 1991 Civil Rights Act authorizes an award of compensatory damages for all 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. To receive an award of compensatory damages, Complainant must demonstrate that 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. Complainant v. Department of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), request for reconsideration denied, EEOC Request No. 05940927 (December 8, 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"). Complainant is required to provide objective evidence that will allow an agency to assess the merits of her request for damages. See Complainant v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993). The award should take into account the severity and duration of the harm. Complainant v. Department of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995).

Here, Complainant did not ask for any pecuniary damages or attorney's fees or costs as a result of the discrimination. In determining nonpecuniary, compensatory damages, the Commission strives to make damage awards for emotional harm consistent with awards in similar cases. In this case, Complainant indicated that: the physical examination at issue was invasive; and her hand swelled and bruised and was in pain after drawing her blood. She also submitted three letters from her friend, her sister, and her daughter indicating that: she no longer came over to family dinners; she was distraught, upset, angry, embarrassed, disappointed, feeling of violation; and she called her daughter in tears for having to take the x-ray. Complainant provided no medical documentations to support her claim for damages.

After a review of the record, we find that while Complainant apparently suffered stress from the discrimination, the harm was not severe or long term. The record indicates that in February, 2014, the Agency discriminatorily released her medical information which caused her to take the pre-employment physical examination; and in March, 2014, she was ultimately selected for the GS-11 position. After considering the awards in similar cases and all of the relevant factors discussed in this decision, we agree with the Agency that \$5,000.00 was a reasonable award of nonpecuniary, compensatory damages to Complainant for her emotional stress she suffered as a direct result of the Agency's discriminatory conduct. Complainant v. Department of Homeland Security, EEOC Appeal No. 0120142758 (November 4, 2016) (\$5,000.00 in nonpecuniary, compensatory damages for exacerbation of depression and stress,

without any medical evidence, for a pre-employment medical examination which led to a nonselection); Complainant v. United States Postal Serv., EEOC Appeal No. 0720070058 (November 13, 2009), request for reconsideration denied, EEOC Request No. 0520100159 (May 28, 2010) (\$5,000.00 in nonpecuniary, compensatory damages for harm caused by requiring a second physical examination for a new position).

On appeal, Complainant, other than merely stating that the amount of \$5,000.00 was insufficient to compensate her for her damages, provides no evidence to support an increase in the award of damages. We shall restate the order of remedies in our Order herein.

### CONCLUSION

Accordingly, the Agency's final decision awarding Complainant \$5,000.00 compensatory damages is **AFFIRMED**. The Agency shall comply with the Order herein.

### ORDER

The Agency shall take the following actions if it has not already done so:

1. The Agency, within 60 days of the date this decision is issued, shall pay Complainant an award of \$5,000.00 in nonpecuniary, compensatory damages.
2. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against responsible Agency officials found to have discriminated against Complainant. The Agency shall report its decision to the Commission. If the Agency decides to take disciplinary action, then it shall identify the action taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline.
3. Within 60 days of the date on which this decision is issued, the Agency shall provide training to all responsible Agency officials found to have discriminated against Complainant, regarding their responsibilities to maintaining confidential medical records and the proper procedures under the Rehabilitation Act for administering pre-employment medical examinations.

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 all of the corrective action has been implemented.

### POSTING ORDER (G1016)

The Agency is ordered to post at its Defense Logistics Agency, Richmond, Virginia facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the

Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 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 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 (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 (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 (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

March 9, 2017  
Date