



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

[REDACTED]  
Pasquale D.,<sup>1</sup>  
Complainant,

v.

Kirstjen M. Nielsen,  
Secretary,  
Department of Homeland Security  
(Immigration and Customs Enforcement),  
Agency.

Appeal No. 0120160892

Agency No. HS-10-ICE-00443

**DECISION**

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 8, 2015, final decision concerning the compensatory damages awarded following a finding that the Agency subjected him to unlawful 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.* For the following reasons, the Commission MODIFIES the Agency's final decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Immigration Enforcement Agent, GA-1801-11 at the Agency's facility in Burlington, Massachusetts. On December 10, 2009, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of his race (African-American) when on September 8, September 28, and October 5, 2009, management failed to select him for the position of Deportation Officer, GS-12, as advertised under vacancy announcement number LAG-DRO-265002-LLP-165.

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 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). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. In Appeal No. 0120112237 (July 25, 2014), the Commission reversed the Agency's final decision and found that Complainant established that he was subjected to discrimination. Specifically, we found that Complainant established that the Agency's articulated reasons for not selecting him for the positions at issue were a pretext for unlawful race discrimination. By way of remedies, we ordered the Agency, in part, to conduct a supplemental investigation into Complainant's entitlement to compensatory damages.<sup>2</sup>

The Agency subsequently issued a decision on December 8, 2015, awarding Complainant \$30,000 in nonpecuniary, compensatory damages.<sup>3</sup> With respect to pecuniary damages, the Agency found that Complainant failed to show that the losses alleged were caused by its discriminatory actions. On appeal, Complainant requests that the Commission award him \$200,000 in nonpecuniary, compensatory damages for the harm and potential loss of income he suffered as a result of the Agency's discriminatory actions. As to pecuniary damages, Complainant contends that the Agency's actions caused him to become negligent with his finances and led to his selling both his primary and rental properties. Complainant requests \$70,324.38 in pecuniary damages to cover the debt owed after the sale of those homes.

#### 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, 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 EEOC "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").

In a claim for compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, the harm suffered as a result of the Agency's discriminatory action; the extent, nature, and severity of the harm suffered; and the duration or expected duration of the harm. Complainant v. Dep't of the Navy, EEOC Appeal No. 01934156 (July 22, 1994); Complainant v. Dep't of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995). Objective evidence in support of a claim for nonpecuniary damages claims includes statements from the

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<sup>2</sup> The Agency's request for reconsideration was denied in EEOC Request No. 0520140537 (March 13, 2015).

<sup>3</sup> The Agency's decision also states that Complainant is not entitled to attorney's fees as he did not request them. Complainant does not raise this issue on appeal, therefore we shall not address this issue further herein.

complainant and others, including family members, coworkers, and medical professionals. See Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. N915.002 (July 14, 1992) (hereafter referred to as “Notice”); Complainant v. Dep't of the Navy, EEOC Appeal No. 01922369 (January 5, 1993). Nonpecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency's discriminatory actions. See Carter v. Duncan-Higgans, Ltd., 727 F.2d 1225 (D.C. Cir. 1994); Notice at 13. A proper award should take into account the severity of the harm and the length of time that the injured party suffered the harm. Additionally, 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 Complainant v. United States Postal Service, EEOC Appeal No. 01972555 (April 15, 1999), (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)). Finally, we note that in determining nonpecuniary, compensatory damages, the Commission has also taken into consideration the nature of the Agency's discriminatory actions. See Utt v. United States Postal Service, EEOC Appeal No. 0720070001 (March 26, 2009); Brown-Fleming v. Dep't of Justice, EEOC Appeal No. 0120082667 (October 28, 2010).

Here, the record reflects that Complainant suffered both emotional and physical distress as a result of the Agency's actions. Specifically, the statements provided by Complainant show that he experienced anxiety attacks, mood swings, nightmares, insomnia, difficulty concentrating, loss of self-esteem, alcohol dependency, weight gain, paranoia, and diminishment of self-worth. He also experienced an exacerbation of his pre-existing conditions such as hypertension and severe back pain. As such, we conclude that an award of \$60,000 in nonpecuniary, compensatory damages more appropriately compensates Complainant for the harm caused by the Agency. We find this amount is more consistent with the amount awarded in similar cases. See Complainant v. Department of Transportation, EEOC Appeal No. 0720140022 (Sept. 16, 2015) (\$60,000 awarded where Complainant suffered sleeplessness, anxiety, stress, and depression, as well as an exacerbation of her existing symptoms, as a result of the Agency's discriminatory actions); Lula N. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120113346 (March 21, 2014) (\$65,000 in nonpecuniary damages where complainant acknowledged that she experienced health problems prior to the discrimination, but provided documentation indicating that her health worsened due to discrimination. Complainant experienced anxiousness, depression, crying, headaches, insomnia, and high blood pressure); Nia G. v. Dep't of Justice, EEOC Appeal No. 0120123467 (April 3, 2015) (\$50,000 in nonpecuniary damages where Complainant testified that she suffered stress, shock and humiliation, which manifested itself in absences from work, headaches, rashes, weight fluctuations, depression, anxiety, insomnia, and nightmares); Complainant v. Social Security Admin., EEOC Appeal No. 0720130013 (Aug. 14, 2014) (Complainant awarded \$60,000 where Agency's discrimination resulted in exacerbation of post-traumatic stress disorder, depression, stress, and elevated blood pressure).

We find this amount takes into account the severity of the harm suffered, and is consistent with prior Commission precedent. Finally, we find this award is not “monstrously excessive” standing alone, is not the product of passion or prejudice, and is consistent with the amount awarded in similar cases.

Next, with respect to Complainant’s request for pecuniary damages, pecuniary losses are out-of-pocket expenses incurred due to an employer’s unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. Past pecuniary losses are the pecuniary losses that are incurred prior to the resolution of a complaint. The Commission, however, requires documentation in support of these expenses, typically in the form of receipts, bills, or physician’s statements. See Complainant v. United States Postal Service, EEOC Appeal No. 01981955 (October 3, 2000); Complainant v. Social Security Administration, EEOC Appeal No. 01972427 (March 8, 2000). We agree with the Agency’s decision to not award pecuniary damages in the instant matter. Although Complainant contends that the Agency’s actions caused him to become financially irresponsible, we find that Complainant has not established a causal connection between the pecuniary damages requested and the Agency’s discriminatory actions.

#### CONCLUSION

We MODIFY the Agency’s final decision. The Agency is directed to comply with the ORDER herein.

#### ORDER

Within 60 days from the date this decision is issued, to the extent that the Agency has not yet done so, the Agency shall pay Complainant \$60,000.00 in nonpecuniary, compensatory damages.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include evidence that the corrective action has been implemented.

#### IMPLEMENTATION OF THE COMMISSION’S DECISION (K0617)

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 in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (M0617)

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. 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. Complainant's request 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 agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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).

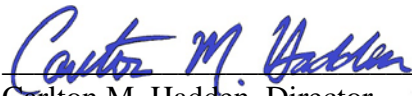
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **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:



Carlton M. Hadden, Director  
Office of Federal Operations

April 12, 2018

Date