



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

[REDACTED]
Ralph B.,¹
Complainant,

v.

Kirstjen M. Nielsen,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 0120161451

Agency No. HS-CBP-01898-2011

DECISION

Complainant timely filed an appeal from an Agency's final decision dated March 15, 2016, concerning an award of compensatory damages and attorney's fees which was awarded after a finding of employment discrimination. For the following reasons, we AFFIRM the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Border Patrol Agent, GS-1896-11, Office of Border Patrol, Big Bend Sector, Presidio Station, in Presidio, Texas. On November 16, 2011, Complainant filed his complaint alleging discrimination in reprisal for prior EEO activity when:

- (1) On July 13, 2011, a coworker made an unfavorable comment to him;
- (2) On August 1, 2011, someone (possibly a coworker) manually deflated a tire on his personal vehicle;

¹ 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.

- (3) On September 13, 2011, he learned that he was the subject of an investigation regarding non-criminal misconduct stemming from statements about a Supervisor, Border Patrol Agent (SBPA2) that he made in his prior EEO complaint in November 2010;
- (4) On November 2, 2011, management issued him a proposed one-day suspension letter for damage to an Agency vehicle;
- (5) On December 12, 2011, management intimidated and coerced a coworker, also Border Patrol Agent, into falsely asserting in a memorandum the allegation that he, in his union representative capacity, improperly advised the coworker to delay submitting his military leave request; and
- (6) In December 2011, he learned he was not selected for a temporary detail assignment to the position of Lead Border Patrol Agent, assigned to the Big Bend Sector Intelligence Center.

On February 20, 2013, the Agency issued its final decision finding no discrimination regarding the complaint. Complainant appealed. The Commission, in EEOC Appeal No. 0120131595 (September 25, 2015) affirmed the Agency's finding of no discrimination regarding claims (1), (2), (4), and (5), but reversed its finding of no discrimination regarding claims (3) and (6).

Specifically, regarding claim (3), the Commission found that SBPA2 initiated the September 13, 2011 investigation claiming that Complainant exhibited "lack of candor" solely because Complainant named SBPA2 as a responsible management official in a pending EEO complaint. Regarding claim (6), the Commission found that the nonselection for a temporary detail assignment in December 2011, was the direct and proximate result of SBPA2's retaliatory animus and the initiation of a lack of candor investigation.

As relief, the Commission ordered the Agency to take the following remedial actions within 120 days:

1. The Agency shall offer Complainant the opportunity to be temporarily assigned to the position of Lead Border Patrol Agent at the Big Bend Sector Border Intelligence Center (or other mutually agreeable location) for the same duration that the selectee of the detail at issue remained in such position (SE). Complainant shall be given a minimum of 30 calendar days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the time period set by the Agency will be considered a rejection of the offer, unless Complainant can show that circumstances beyond his control prevented a response within the time limit;
2. If applicable, the Agency shall determine and pay Complainant back pay (with interest, if applicable) and other benefits due Complainant pursuant to 29 C.F.R. 1614.501. The Agency's determination shall be based on a comparison with those benefits received by SE;

3. The Agency shall remove any referral to the “lack of candor” investigation referenced above which may exist in any form from Complainant’s official personnel file or any other agency records;
4. The Agency shall conduct a supplemental investigation to determine the amount of compensatory damages, if any, suffered by Complainant for being the subject of the “lack of candor” investigation referenced above and/or for not being selected for the detail to the position of Lead Border Patrol Agent on December 1, 2011. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days from 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;”
5. The Agency shall provide training to the Agency personnel responsible for the reprisal, mainly, SBPA2, placing special emphasis on an employer’s obligation not to take retaliatory action against an employee because of their opposition or participation in protected activity, such as the memorandum from Complainant alerting his superiors of alleged harassment and retaliation;
6. The Agency shall consider taking appropriate disciplinary action against the Agency supervisors involved in the retaliation. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not impose discipline. If any of the responsible management officials have left the Agency’s employ, the Agency shall furnish documentation of their departure date(s); and
7. 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.

The Commission also ordered the Agency to award attorney’s fees and costs. On March 15, 2016, the Agency issued its decision on compensatory damages and attorney’s fees and costs pursuant to the Commission’s order. The Agency stated that on November 19, 2015, it received Complainant’s petition for attorney’s fees and on January 14, 2016, it received his request for compensatory damages. The Agency stated that based on his submission, Complainant was entitled to \$10,000 in nonpecuniary, compensatory damages and \$12,690 in attorney’s fees.

Complainant appealed from this decision on compensatory damages and attorney's fees, but did not file a brief.

ANALYSIS AND FINDINGS

Initially, we note that the Agency's final decision does not address the items set forth in the Commission's order in EEOC Appeal No. 0120131595 other than its awards of compensatory damages and attorney's fees. We also note that Complainant does not contest the Agency's noncompliance of the Commission's order. Thus, we will not address such herein.² In this case, we note that Complainant did not file an appeal brief and does not contest the Agency's decision awarding him \$10,000 in nonpecuniary, compensatory damages and \$12,690 in attorney's fees. Under the circumstance, we will address herein whether the Agency's decision for such was proper.

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 (7th Cir. 1989). Section 102(a) of the 1991 Civil Rights Act authorizes an award of compensatory damages for past and future pecuniary losses, such as, out of pocket expenses, and for nonpecuniary 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 he 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).

² The Agency noted in its decision that the parties are working on Complainant's back pay as ordered by the Commission and the required compliance report will be submitted to the Commission on this matter.

Nonpecuniary Damages

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 did not request a specific amount in nonpecuniary damages. In his statement, Complainant indicated that as a result of the Agency's discriminatory actions, he suffered stress, anxiety, depression, headaches, stomach distress, insomnia, sleeplessness, a weight gain, dependence on sleeping aids, alcohol consumption, cigarette smoking, and emotional withdrawal from his wife, family, and friends, and he feared that he might lose his job. We note that Complainant submitted no medical evidence to support his conditions.

Complainant also submitted a "Vitals Report" which showed data from 2013-2015, concerning his pulse, respiration, blood pressure, weight, and height. However, we note that the report is devoid of any data related to the discriminatory incidents, i.e., concerning the September 13, 2011 investigation and the December 2011 detail assignment. Complainant submitted statements from his coworkers, his sister, and his wife indicating that he suffered depression, was withdrawn from his community, gained weight, and had marital strain in 2010, and 2011, since he and his family moved to Texas from Connecticut, and started to work at the Agency in June 2009. In this regard, we agree with the Agency that Complainant is entitled to compensatory damages only related to its discriminatory actions and not other incidents that were found not to be discriminatory. The Agency noted that Complainant filed a prior EEO complaint which had been pending at the time period at issue.³

After carefully considering all of Complainant's statements described above, we find that an award of \$10,000 in nonpecuniary, compensatory damages is appropriate in this case. We note that this amount 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. We find that the weight of our prior decisions supports an award of \$10,000 in the instant case. See Fidelia F. v. Department of Agriculture, EEOC Appeal No. 0120150584 (April 1, 2017) (\$7,500 in compensatory damages to complainant who developed migraines, suffered from elevated blood pressure, and weight gain after not being promoted); Caneva v. Department of Defense, EEOC Appeal No. 01A32890 (July 15, 2004) (\$10,000 in compensatory damages where complainant became depressed after his nonselection but presented no medical evidence); McManaway v. United States Postal Service, EEOC Appeal No. 01993233 (August 23, 2002) (\$10,000 in nonpecuniary, compensatory damages in nonselection case where complainant experienced aggravation, frustration, humiliation, marital strain, and financial stress). On appeal, Complainant does not specifically contest the \$10,000 award for nonpecuniary, compensatory

³ Our records indicate that on August 26, 2010, Complainant filed his prior EEO complaint, Agency No. HS-CBP-01456-2010, alleging harassment occurring from October 2009, through September 2010; on July 13, 2011, the Agency issued its final decision finding no discrimination. In EEOC Appeal No. 0120113866 (April 10, 2014), the Commission affirmed the Agency's final decision.

damages. Based on the foregoing, we find that the Agency properly awarded Complainant nonpecuniary, compensatory damages in the amount of \$10,000.

Pecuniary Damages

Complainant submitted no evidence for any out-of-pocket expenses that were incurred as a result of the Agency's discriminatory actions. Complainant argued that that he was entitled to future pecuniary losses to his base salary for his entire career in the amounts of \$200,630 from 2012, to 2031 (his potential retirement at the age of 50). The Agency denied any payments for future pecuniary losses. Complainant submits no argument on appeal about pecuniary losses. We find Complainant's arguments speculative and we find that the Agency properly denied Complainant damages for requested future pecuniary losses.

Attorney's Fees

In this case, we find that the Agency properly determined attorney's fees in EEOC administrative proceedings by multiplying a reasonable hourly fee and a reasonable number of hours expended. 29 C.F.R. § 1614.501(e)(2)(ii)(B); Hensley v. Eckerhart, 461 U.S. 424 (1983). The Agency stated that Complainant's attorney submitted a "Time Listing" for work on this case and a statement that he charged an hourly rate of \$300. We note that the Agency does not dispute the hourly rate of \$300. The Agency indicated that the list of 49 entries submitted by the attorney showed that from October 11, 2011, to September 25, 2015, the attorney worked 45.10 hours for total of \$13,530. The Agency stated that it then requested the attorney to clarify a total of 2.8 hours from five billing entries that were found to be not related to the instant case. The attorney however failed to respond to the Agency request for clarification. Complainant does not dispute this on appeal. Thus, the Agency indicated that attorney's fees should be \$12,690 for 42.30 hours with an hourly rate of \$300. On appeal, Complainant does not specifically contest the attorney's fees award of \$12,690. Based on the foregoing, we find that the Agency properly determined Complainant is entitled to the attorney's fees of \$12,690.

Relief Paid

The record shows that the Agency has already paid Complainant \$10,000 for nonpecuniary, compensatory damages and \$12,690 in attorney's fees.

CONCLUSION

Accordingly, the Agency's final decision is AFFIRMED.

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 (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:



Carlton M. Hadden, Director
Office of Federal Operations

April 25, 2018

Date