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

[redacted]
Ludie M.,[1]
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Capital Metro Area),
Agency.

Appeal No. 0120170459

Hearing No. 410-2013-00218X

Agency No. 4W-047-0003-12

DECISION

On November 8, 2016, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's October 11, 2016 decision concerning 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. The Agency adopted the decision of the EEOC Administrative Judge (AJ).[2] For the following reasons, the Commission AFFIRMS the decision.

ISSUES PRESENTED

1. Is the decision of the AJ supported by substantial evidence regarding a finding of discrimination, in part, with respect to a per se reprisal and a finding, in part, of no discrimination regarding alleged incidents of unlawful harassment?
2. Should the amount of nonpecuniary, compensatory damages be increased?
3. Is Complainant entitled to an award of attorney's fees on the finding of per se reprisal?

[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.
[2] The AJ issued one decision on the merits of the complaint and another which decided remedies and attorney's fees.

BACKGROUND

At the time of this complaint, Complainant worked as a Mail Recovery Clerk at the Agency's Mail Recovery Center in Atlanta, Georgia. Complainant also served as a Union Steward during the relevant time period.[3] Between March 2001 and September 2012, Complainant filed seven discrimination complaints, including the present complaint. Management officials who are named as having discriminated against Complainant were named as responsible management officials in one or more of Complainant's prior EEO complaints and acknowledge being aware of Complainant's protected activity during the relevant time period.

Complainant's last day in a pay status with the Agency was August 5, 2013, and she has not worked for the Agency since August 2013 and has retired. A March 23, 2016 letter from the Office of Personnel Management disclosed that the commencing date of her retirement annuity was August 22, 2015, with a gross monthly amount of $1,089 for the first 12 months. The letter also disclosed that Complainant was still receiving workers' compensation benefits in the amount of $2,719; that she could elect which benefits she wanted to continue to receive; and that she did not have to make an election if she wanted to continue workers' compensation benefits. Complainant appears to have experienced medical conditions from 2009 related to a workers' compensation claim.

On September 15, 2012, Complainant filed a discrimination complaint alleging that the Agency discriminated against her on the basis of reprisal for prior protected activity when:

1. On May 25, 2012, Complainant was threatened, yelled at, and put out of the Agency's facility;

2. On June 19, 2012, Complainant was issued a 14-day suspension for improper conduct;

3. On June 27, 2012, Complainant was issued a 14-day suspension for attendance;

4. On June 28, 2012, Complainant was placed on emergency placement off duty; and

5. On July 19, 2012, Complainant was issued a 14-day suspension for improper conduct.

During the hearing process, Complainant amended her complaint to add another claim.

6. The Agency subjected Complainant to reprisal per se through a letter issued by the Manager on July 10, 2012.

[3] A medical progress report, dated October 19, 2012, indicates that Complainant became a union steward in 2001 and her stress began then. A July 8, 2014 Office of Workers' Compensation Programs letter to Complainant discloses that Complainant had a work injury in December 2009. The diagnosis was generalized anxiety disorder and major depression.

At the conclusion of the investigation, Complainant timely requested a hearing. The AJ held a hearing from March 22, 2016 through March 24, 2016. On July 6, 2016, the AJ issued a decision on the merits finding discrimination only with regard to claim 6, finding per se reprisal. On September 29, 2016, the AJ issued a decision on damages and attorney's fees.[4] The AJ awarded compensatory damages but denied the payment of attorney's fees. In a September 29, 2016 Order Entering Judgment, the AJ entered judgment on his July 6, 2016 decision on the merits and his decision on damages and attorney's fees. In its October 11, 2016 Notice of Final Action, the Agency adopted the AJ's decisions.

AJ's Decisions

Decision on merits

On July 6, 2016, the AJ issued a decision finding that the Agency did not subject Complainant to a retaliatory hostile work environment. The AJ found, however, that the Agency had engaged in per se reprisal regarding a letter sent to Complainant.

Regarding claims 1-5 (being threatened, three suspensions, emergency placement off duty), the AJ first found that Complainant failed to establish a prima facie case of retaliatory harassment. He also concluded that none of the five acts of alleged harassment related to Complainant's prior engagement in protected activity. The AJ further concluded, having addressed each claim individually, that the Agency's actions were the result of Complainant's misconduct in the workplace, attendance and, also were consistent with the Agency's zero tolerance policy regarding workplace violence. The AJ also noted that the fact that Complainant had not been disciplined before for attendance violations after having engaged in protected activity numerous times over the course of a decade, combined with the fact that co-workers were similarly disciplined around the same time that she was disciplined for similar infractions indicated the absence of a retaliatory motive. The AJ also found that Complainant was not similarly situated as to other co-workers because the co-workers, unlike Complainant, did not have prior disciplinary action imposed and therefore were not subject to the Agency's progressive discipline policy.

Addressing claim 6, the AJ determined that the Agency had engaged in per se reprisal. In so concluding the AJ addressed a July 10, 2012 letter which was issued in response to Complainant's June 7, 2012 letter to the Manager. In the July 10, 2012 letter, the Manager denied Complainant's specific allegations of mistreatment and reprisal and the AJ pointed to excerpts from the letter, addressing Complainant's various complaints, as follows:

> Mrs. [Complainant], I have not allowed you or any employee to be subjected to improper behavior. Nor will I allow you to bully this staff and attempt to intimidate us with as you mentioned Grievance[s], NLRB local charges, Threat Assessment teams, Congressional complaints, calls to the OIG, Local authorities, HQ's, or any office in which you want to

[4] The parties agreed to submit their arguments and evidence related to damages and attorney's fees and costs in writing, in lieu of a hearing.

> call on in your defense for your improper conduct. I will continue to welcome it anytime with an honest and unbiased response that continues to include my true integrity as a manager.
> …
> I understand as you mentioned you have to do what you have to do. But to continue to slander the names of management with infinite untrue stories to deter the real issue and it is you and your conduct is downright unconscious able [sic] and disturbing.
> …
> My only wish is if you would put as much effort as you mentioned "forced action to defend my rights," in coming to work and following the simple rules you outlined in your letter and following your instructions you would not or any employee would not have to worry about any actions[.] I will guarantee it.

The AJ determined that although the letter was not direct evidence of discrimination, it constituted a per se violation of Title VII, noting that comments that on their face discourage an employee from participating in the EEO process violate the letter and spirit of the EEOC regulations and evidence a per se violation of the law. The AJ noted that the letter does not specifically reference EEO complaints, as distinguished from grievances, congressional complaints, Office of Inspector General complaints and so forth. However, the letter stated that the Manager would not permit Complainant to "bully" or "intimidate" his management team through her practice of filing various complaints; and that he believed her complaints "slander the names of management with infinite untrue stories" which the Manager described as unconscionable and disturbing. The letter warned that if Complainant spent more time working and less time filing complaints, she "would not…have to worry about any actions…." The AJ concluded that taken together the language on its face could reasonably be interpreted to discourage employees and Complainant, in particular, from utilizing the EEO process.

Noting that there is a "very fine line between an expression of frustration with a complainant's alleged abuse of the EEO process and comments or statements that serve to intimidate and deter" the filing of EEO complaints, the AJ found that the Manager's letter had "crossed the line" and that it violated the letter and spirit of Title VII and, as a result, evidenced a per se violation.

Damages

In his September 29, 2016 decision regarding Complainant's request for relief, the AJ noted that Complainant requested $300,000 in compensatory damages, to include at least $100,000 in nonpecuniary damages, at least $200,000 in future pecuniary damages, and $43,381.75 in past pecuniary damages; and back pay in an unspecified amount to compensate her for her use of approximately 170 hours of leave that she contended she would not have taken but for the per se violation.

The AJ awarded Complainant $4,500 in nonpecuniary compensatory damages based on her depression, stress, and back and shoulder pain.

The AJ found that Complainant had presented evidence that connected the July 10, 2012 letter to certain health symptoms that she experienced at or around the time that she received the letter. The AJ noted that three months prior to her receipt of the letter, Complainant's symptoms included depression, anxiety, sleep disturbance, crying spells, concentration and memory deficits, fear of being mistreated at work, reliving her workplace trauma, worry, lethargy, short temper, low libido, motivational deficits, indecisiveness, and gastro-intestinal disturbance. The AJ found that Complainant's prescription for Bupropion for depressive disorder, stress, back and shoulder pain occurred sufficiently proximate in time to her receipt of the July 10, 2012 letter to establish a causal connection. The AJ also found that the remaining outcomes, symptoms and medication changes which occurred between April 2013 and June 2014 were not causally connected to the July 10, 2012 letter, taking into account the nature, number and duration of her many pre-existing conditions, many of which were evident years before receipt of the letter, and subsequent acts of alleged discrimination which occurred in April 2013 and May 2014.

With respect to Complainant's claim for past and future pecuniary damages, the AJ determined that they were unsupported by the record. The AJ found that she had not shown that she was entitled to future pecuniary damages for loss of future earning capacity. The AJ specifically found that she had not shown that the per se violation so "significantly impacted" her that she is entitled to future pecuniary damages for loss of future earning capacity. The AJ found that the evidence indicated that Complainant suffered to a limited extent from worsening depression, stress, and related pain in the month or two following her discovery of the letter, but the evidence did not establish that the letter's effects were particularly severe or long lasting. The AJ noted that Complainant's past pecuniary damages request involved expenses incurred between August 2013 and November 2015, long after the July 10, 2012 letter.

The AJ also addressed Complainant's request for compensation for leave taken for doctor's visits and illnesses between October 25, 2012 and December 28, 2012 which she claimed would not have been taken except as a result of the July 10, 2012 letter. The AJ recounted that Complainant requested 163.55 hours of leave without pay (LWOP) during that time period, plus 8 hours of sick leave. The Agency awarded Complainant compensation for 171.55 hours of LWOP and sick leave taken between October 25, 2012 and December 28, 2012, together with interest and other benefits due.

Attorney's fees

Complainant sought $44,715.00 in attorney's fees and $65.59 in costs.

The AJ found that Complainant was not a prevailing party for purposes of entitlement to attorney's fees and costs in this matter. In so finding, the AJ reasoned that Complainant did not raise the per se violation in her complaint or as one of the alleged discriminatory actions constituting discriminatory harassment; that it was not until after his informal settlement discussion with the parties during which he suggested that the July 10, 2012, letter may come close to constituting direct evidence of discriminatory intent that Complainant first treated the letter as an independent basis of recovery; and that Complainant's success was merely technical or de minimis, noting that

the factual basis for the per se violation was not a primary focus of the complaint. The AJ also noted that the letter was referenced for the first time during the hearing as proof of the Agency's retaliatory motivation.

Order of relief

The AJ ordered that the Agency pay Complainant nonpecuniary, compensatory damages in the amount of $4,500; calculate and pay Complainant the monetary equivalent of 171.55 hours of leave at her October-December 2012 salary, together with interest and any other benefits due; and that the Agency provide two hours of training to the management official who wrote the letter with emphasis on the prohibition against retaliation and employees' rights to engage in protected activity and agency obligations regarding these rights. The Agency was also ordered to consider taking appropriate disciplinary action against the Manager who wrote the July 10, 2012 letter and to post a notice indicating that Agency was found to have discriminated against Complainant.

CONTENTIONS ON APPEAL

Complainant argues that the AJ's finding that an unlawfully hostile work environment did not exist should be rejected; challenges the AJ's credibility findings; contends that the per se violation finding evidences a retaliatory animus; and challenges the amount of compensatory damages awarded as inconsistent with the record and not in accord with other Commission awards. She maintains that she is entitled to an award of attorney's fees.

Complainant challenges: 1) the AJ's basis for awarding Complainant $4,500 in nonpecuniary damages; 2) the AJ's determination that Complainant's compensatory damages should be limited to two (2) months although the evidence of record showed that Complainant suffered various harms that were ongoing in nature; 3) the AJ's decision not to award damages for loss of future earning capacity; 4) the AJ's determination that Complainant is not entitled to reasonable attorney's fees even though the claims are interrelated and each involve legal theories based on retaliatory motives; and 5) the AJ's determination that attorney's fees should not be awarded even though Complainant's attorney made the per se violation argument on the record, at the appropriate time, and in the appropriate manner.

The Agency urges in its brief that the decision of the AJ on discrimination, damages, and attorney's fees be affirmed.

STANDARD OF REVIEW

All post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. 29 C.F.R. § 1614.405(a). 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.

ANALYSIS AND FINDINGS

Credibility

Initially, we turn to Complainant's credibility argument. Having reviewed the record, as a whole, we do not find evidence in the record which would undermine the AJ's determination that Complainant was not a credible witness. 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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

Disparate treatment/hostile work environment/reprisal

Complainant contends that she was treated disparately; subjected to a retaliatory hostile work environment and, also subjected to reprisal as to each of her individual claims.

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). She must generally establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with where the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

A hostile work environment claim is analyzed under Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993); Enforcement Guidance on Harris v. Forklift Systems, Inc., (Enforcement Guidance on Harris) EEOC Notice No. 915.002 (Mar. 8, 1994). Harassment is actionable if it is "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create a hostile or abusive working environment." See also Oncale v. Sundowner Offshore Services. Inc., 523 U.S. 75 (1998). An alteration to an employee's working conditions exists if a tangible, discrete employment action is taken, e.g., hiring, firing, transfer, promotion, non-selection, or the agency's actions were sufficiently severe or pervasive to create a hostile work environment. The harasser's conduct is evaluated from the objective viewpoint of a reasonable person in a complainant's circumstances.

Whether the harassment is sufficiently severe to trigger a violation of Title VII must be determined by looking at all of the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris, 510 U.S. at 23; Enforcement Guidance on Harris at 3, 6.

Although petty slights and trivial annoyances are not actionable, adverse actions such as reprimands, threats, negative evaluations, and harassment are actionable. Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.00s at II.B (Aug. 25, 2016). "Retaliatory harassing conduct is actionable if it is sufficiently material to deter protected activity, even if it is insufficiently severe or pervasive to create a hostile work environment." Id. at II.B.3. Adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation.

An agency is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See Burlington Industries. Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

Agencies are obligated to ensure that managers and supervisors perform in such a manner as to "insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity." 29 C.F.R. § 1614.102(a)(5); Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998)(statement made by manager "rather than encouraging the realization of equal employment opportunity in the workforce, served to have a potentially chilling effect on the ultimate tool that employees have to enforce equal employment opportunity").

EEOC Regulation 29 C.F.R. §1614.101(b) provides that no person shall be subject to retaliation for opposing any unlawful discriminatory practice or for participating in any stage of the EEO complaint process.

"When a supervisor's behavior has a potentially chilling effect on use of the EEO process – the ultimate tool that employees have to enforce equal employment opportunity – the behavior is a per se violation." Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), request to reconsider denied, EEOC Appeal No. 0520090654 ((Dec. 15, 2010).[5] Central to a finding of per se reprisal is that the conduct is reasonably likely to have a chilling effect on deterring the complainant or a reasonable employee from engaging in, or pursuing, protected activity. Christeen H. v. U.S. Postal Serv., EEOC Appeal No. 0120162478 (June 14, 2018).

Upon review, we find that the AJ's conclusion that disparate treatment based on reprisal and a retaliatory hostile work environment did not exist is based upon substantial evidence of record.

[5] In accord: Candi R. v. Envtl. Prot. Agency, EEOC Appeal No. 0120171394 (Sept. 24, 2018); Ivan V. v. Dep't of Veterans Aff., EEOC Appeal No. 0120141416 (June 9, 2016).

The Agency articulated legitimate, nondiscriminatory reasons for its actions for which Complainant has failed to show pretext.

Regarding claims 1-5, the AJ found that Complainant engaged in prohibited conduct and had attendance deficiencies; the misconduct prompted the Agency's disciplinary actions; and the discipline issued was consistent with Agency policy and progressive discipline policies. Also with regard to claim 1, we have found that not every unpleasant or undesirable act which occurs in the workplace constitutes a discrimination violation. See Epps v. Dep't of Transportation, EEOC Appeal No. 0120093688 (Dec. 19, 2009).

Here, the Commission notes that because Complainant engaged in protected activity, this fact does not immunize her from appropriate disciplinary action nor does it prove that the Agency disciplined her because she participated in protected activity. "[P]articipation in the EEO process does not shield employees from uniformly applied standards of conduct and performance; nor are the statutory anti-retaliatory provisions a license for employees to engage in misconduct." Berkner v. Dep't of Commerce, EEOC Petition No. 0320110022 (June 23, 2011). See Martinez v. General Svcs. Admn., EEOC Appeal No. 0120122326 (Nov. 15, 2012) (mere fact that complainant engaged in protected activity does not immunize her from appropriate disciplinary action); Hobbs v Dep't of Agriculture, EEOC Appeal No. 0120073032 (Mar. 25, 20l0) (where complainant was charged with absence without leave, placed on leave restriction, and suspended for one day, Commission found that complainant did not follow leave procedures and record lacked discriminatory animus).

We note that the AJ found no discriminatory animus regarding harassment. A finding of a hostile work environment is precluded by the determination that Complainant failed to establish that any of the actions taken by the Agency were motivated by discriminatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

Regarding claim 6, that of per se reprisal, the Agency accepted the AJ's finding that the July 2012 letter sent to Complainant constituted per se reprisal. Therefore, we do not address it.[6]

Damages

[6] We note that it is not necessary for a complainant to demonstrate that she was actually deterred from filing a complaint. See Complainant v. Internat'l Boundary & Water Comm., EEOC Request No. 0520130669 (Feb. 11, 2014)(rejected argument that an adverse action can only be retaliatory if it actually deterred complainant or others from engaging in protected activity; test is whether the action is reasonably likely to deter protected activity by complainant or other employees); Matt A. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120161100 (Aug. 17, 2016)(claim of per se reprisal not defeated because complainant filed a complaint); Boyd v. Dep't of Transportation, EEOC Appeal No. 01955276 (Oct. 10, 1997)(mere fact that complainant filed a complaint does not defeat a claim of unlawful interference with the EEO process); Johnson v. Dep't of the Army, EEOC Request No. 05921027 (Mar. 18, 1993) (merely because the complainant filed an EEO complaint despite the EEO Office's lack of assistance does not mean that the complainant is no longer aggrieved).

The AJ ordered that the Agency pay Complainant nonpecuniary, compensatory damages in the amount of $4,500; and that it calculates and pay Complainant the monetary equivalent of 171.55 hours of leave at her October-December 2012 salary, together with interest and any other benefits due. The Agency adopted the AJ's decision regarding these conclusions.[7]

When an agency or the Commission finds that the agency has discriminated against a complainant, the complainant is entitled to remedial relief. The 1991 Civil Rights Act authorizes compensatory damage awards in Title VII cases. 42 U.S.C. § 1981a. The U.S. Supreme Court has held that a complainant may recover compensatory damages in the administrative process. See West v. Gibson, 527 U.S. 212, 213 (1999). A precise measurement cannot always be used to remedy the wrong inflicted; nonetheless, the burden of limiting the remedy rests with the agency. See Davis v. U.S. Postal Service, EEOC Petition No. 04900010 (Nov. 29, 1990).

Compensatory damages may be awarded for past pecuniary (out-of-pocket) losses, future pecuniary (likely future out-of-pocket) losses, and non-pecuniary losses that are directly or proximately caused by the Agency's discriminatory conduct. See Enforcement Guidance: Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991, (Guidance) EEOC Notice No. 915.002, at 8 (July 14, 1992).

Title VII does not require that complainants be granted a windfall, but only requires an award of "make whole" relief. Haskins v. United States Department of Army, 808 F .2d 1192, 1200 (6th Cir. 1987). Thus, the agency must provide a complainant with full, make-whole relief to restore the complainant as nearly as possible to the position that she would have occupied, absent the discrimination. See Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976); Emmett W. v. Dep't of Agriculture, EEOC Appeal No. 0120143098 (May 3, 2016); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994).

Regarding per se reprisal, the Commission has held that per se violations do not necessarily entitle complainants to individual relief. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009) (citing Binseel v. Dep't of the Army, EEOC Request No. 05970584 (October 8, 1998)). In Washington v. Dep't of the Treasury, EEOC Appeal No. 07A40044 (Oct. 26, 2004), the Commission emphasized that for compensatory damages to be appropriate in the case of a per se violation, the action giving rise to the damages need only be "intentional" in nature.

[7] The Commission notes that the record contains Time Analysis forms signed by Complainant and submitted to the Office of Workers' Compensation Programs for the period from October 25, 2012 to December 28, 2012 in which Complainant made claims for LWOP. Forms for the periods November 9, 2012 to December 4, 2012 and for December 7, 2012 to December 28, 2012, Complainant made claims for eight hours of sick leave. These leave claims totaled 171.55 hours.

a. Nonpecuniary compensatory damages

Nonpecuniary losses are losses that are not subject to precise quantification. They constitute sums necessary to compensate the injured party for actual harm, even where the harm is intangible. Such losses include, but are not limited to, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health. Carter v. Dep't of Veterans Affairs, EEOC Appeal No. 0120122266 (Oct. 18, 2012).

b. Pecuniary Losses

The amount to be awarded for past pecuniary (out-of-pocket) losses can be determined by receipts, records, bills, cancelled checks, confirmation by other individuals, or other proof of actual losses and expenses. The Commission requires documentation in support of these expenses, typically in the form of receipts, bills, or physicians' statements. See Minardi v. U.S. Postal Service, EEOC Appeal No. 01981955 (Oct. 3, 2000); Gause v. Soc. Sec. Admn., EEOC Appeal No. 01972427 (Mar. 8, 2000). The Commission has held that pecuniary damages will not be awarded without documentation. Valentine v. Dep't of Justice, EEOC Appeal No. 07A30098 (Dec. 10, 2003), request for reconsideration denied, EEOC Request No. 05A40372 (Feb. 27, 2004).

Future pecuniary losses are losses that are likely to occur after the resolution of a complaint. Alvina S. v. Environmental Protection Agency, EEOC Appeal No. 0120151681 (Jan.17, 2018). These damages include reimbursement for medical expenses, job hunting expenses, moving expenses, and other quantitative out-of-pocket expenses. The Commission has also previously awarded future pecuniary damages for the loss of future earning capacity. Finlay v. U.S. Postal Service, EEOC Appeal No. 01942985 (Apr. 29, 1997).

Wage earning capacity represents a loss in one's future earning power. An award for the loss of future earning capacity considers the effect that a complainant's injury will have on her ability in the future to earn a salary comparable with what she earned before the injury. McKnight v. General Motors Corp., 973 F.2d 1366, 1370 (7th Cir. 1992); Williams v. Pharmacia Inc., 956 F. Supp. 1457, 1467 (N.D. Ind. 1996); Brinley v. U.S. Postal Serv., EEOC Request No. 05980429 (Aug. 12, 1999); Carpenter v. Dept. of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995). An award of damages for lost earning capacity comports with Title VII's goal of providing make whole relief to the victims of discrimination. Williams, 956 F. Supp. at 1466 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-19 (1975)).

In Carpenter, supra, the Commission stated:

> Damages for loss of future earning capacity are generally awarded in personal injury cases, but also have been awarded in employment discrimination cases. Proof of entitlement to loss of future earning capacity involves 'evidence suggesting that [an individual's] injuries have narrowed the range of economic opportunities available to him.' Such evidence need not prove that the injured party will, in the near future, earn less than s/he did previously, but that 'his injury has caused a diminution in his ability to earn a living.'

> Courts require evidence that the impairment of earning capacity 'be shown with reasonable certainty or reasonable probability and there must be evidence which will permit the [fact finder] to arrive at a pecuniary value for the loss.' (citations omitted)

Having reviewed the record and considered Complainant's arguments, we find that the AJ's award of compensatory damages in the amount of $4,500 was based on substantial evidence. The award is not monstrously excessive and is consistent with the awards given in similar cases. See Eleni M. v. Dep't of Transportation, EEOC Appeal No. 0720160021 (July 25, 2018) (award of $5,000 where there was a retaliatory issuance of letter of counseling, complainant suffered depressed mood, anxiety, sleeplessness, suicidal thoughts, crying episodes, withdrawal and isolation, increased irritability, loss of trust and had exhibited some of same symptoms before discrimination); Kathy D. v. Dep't of Homeland Security, EEOC Appeal No. 0720100011 (Oct. 15, 2015) ($4,500 in compensatory damages awarded where complainant claimed emotional harm); Complainant v. Dep't of the Veterans Affairs, EEOC Appeal No. 0120120536 (Aug. 18, 2014) ($5,000 in nonpecuniary compensatory damages awarded where complainant suffered mental symptoms such as depressed mood, anger, stress, difficulty sleeping, and loss of interest in activities).

The record discloses that Complainant had been suffering the same and similar symptoms for a work-related workers' compensation claim since at least 2009. The symptoms caused by the per se reprisal were limited in duration. The Agency is responsible only for loss that is caused by the alleged discrimination. The substantial evidence of record does not support a finding that the continuing medical conditions were caused by the July 2012 letter. Regarding the claim for wage earning capacity, the AJ properly concluded based on the substantial evidence of record that Complainant failed to prove entitlement to loss with evidence which would have established that her conditions narrowed the range of economic opportunities available to her. Specifically, Complainant has not provided evidence to demonstrate with reasonable certainty or reasonable probability that her earning capacity has been impaired. See Carpenter, supra; Stokes v. Dep't of Homeland Sec., EEOC Appeal No. 0120071802 (Dec. 10, 2008); Hernandez v. U.S. Postal Service, EEOC Appeal No. 07A30005 (July 16, 2004).

Regarding damages for the per se reprisal, the AJ found that Complainant made no showing that the Agency subjected her to any form of adverse treatment related to the July 10, 2012 letter. The AJ also found that none of the five acts of alleged harassment that formed the basis of the complaint bore any relationship to the per se reprisal.

Attorney's Fees

Complainant submitted a fee petition to the AJ requesting attorney's fees in the amount of $44,715.00 and costs in the amount of $65.99. The AJ denied the request. Complainant maintains that she is entitled to her request. The Agency opposes the request.

To establish entitlement to attorney's fees, a complainant must first show that she is a prevailing party. See Buckhannon Bd. and Care Home, lnc. v. West Virginia Dep't of Health and Human Resources, 532 U.S. 598 (2001). A prevailing party for this purpose is one who succeeds on any significant issue and achieves some of the benefit sought in bringing the action. See Davis v. Dep't of Transp., EEOC Request No. 05970101 (Feb. 4, 1999) (citing Hensley v. Eckerhart, 461 U.S. 427, 433 (1983)).

The Commission's EEO-MD-110, at Ch. 11(VI)(B)(1) provides that to qualify as a "prevailing party" for purposes of an award of attorney's fees and costs a complainant must have "succeeded on any significant issue that achieved some of the benefit the complainant sought in filing the complaint." A complainant may make such a showing by satisfying the following two-part test: (1) did the complainant substantially receive the relief sought, and (2) was the complainant a catalyst motivating the agency to provide the relief. Id. "A purely technical or de minimis success is insufficient to confer 'prevailing party' status." Id.

A finding of discrimination raises a presumption of entitlement to an award of attorney's fees. 29 C.F.R. § 1614.501(e)(1). The Commission recognizes a strong presumption towards the award of attorney's fees for a complainant who prevails in whole or in part on a claim of discrimination. Eve E. v. Dept. of Homeland Security, EEOC Appeal No. 0120161392 (May 24, 2016).

The AJ denied the attorney's fee request and costs in its entirety on the grounds that Complainant was not a prevailing party. In addressing his denial, the AJ noted that Complainant did not raise a per se violation in her formal complaint and she only referenced the July 2012 letter for the first time at the hearing and even then, only as proof of retaliatory motivation. He also noted that it was not until after an informal settlement discussion that Complainant first treated the letter as an independent basis of recovery. The AJ also found that Complainant failed to succeed on any significant issue raised in her complaint and per se reprisal because it was not the real catalyst in achieving limited relief and, also, that her success was merely technical or de minimis.

In denying the fee request, the AJ relied on the Commission's decision in Washington v. Dep't of the Treasury, supra, in which the Commission upheld an AJ's determination that a complainant did not qualify as a "prevailing party" for purposes of determining entitlement to attorney's fees and costs under similar circumstances.[8] In Washington, the AJ noted that complainant prevailed only on a per se violation that was not raised in the complainant's formal complaint; that the factual basis for the per se violation was offered into evidence only for the purpose of showing a supervisor's discriminatory animus; and the per se violation was merely technical in nature. The AJ reasoned that the Commission distinguished Washington from other per se violation cases warranting an award of attorney's fees and costs by emphasizing that the per se violations in those cases were a "primary focus" of those complaints. Like Washington, the AJ reasoned that in the instant case, the per se violation was not a primary focus of the complaint.

[8] See also Washington v. Dep't of the Treasury, EEOC Appeal No. 0120061889 (Apr. 4, 2008).

The Agency, which adopted the AJ's decision on attorney's fees, continues to contend, as it did in its opposition and rebuttal to Complainant's fee request submitted to the AJ, that Complainant was not entitled to any attorney's fees and costs. If anything, the Agency alternatively asserts that Complainant is entitled to no more than a few hours on the brief concerning whether compensatory damages and attorney's fees are available. In this regard, the Agency argues that Complainant's prior and current counsel never alleged a per se violation in the informal complaint, formal complaint, pre-hearing statements, opening statements, or in her affidavit which Complainant submitted with a pre-hearing statement, or during the first two days at the hearing.

The Agency asserts that Complainant did not argue a per se violation as a theory of the case until after the AJ tried to settle the case at the end of the second day of the hearing when the AJ raised the issue of a per se violation. The Agency also noted that Complainant's counsel did not cross-examine about the July 10, 2012 letter until the last day of the hearing. The Agency did acknowledge that counsel addressed a per se violation in her closing argument. The Agency also contends that if a fee is awarded, the award should be minimal and for two hours only on the per se violation.

Complainant maintains on appeal that she is entitled to her request for payment of attorney's fees and costs. She argues, contrary to the AJ's finding, that she is a prevailing party for the purposes of an attorney's fee award. Complainant asserts that the issue of per se reprisal was woven into the presentation of her case and that she drove the point of a per se violation, including case citations, during her closing arguments and identified the conduct which amounted to per se reprisal. She denies that the issue of a per se violation was an afterthought, and that she made an effort to draw the AJ's attention to the per se violation during the course of the hearing, specifically during closing arguments.

Upon review of the record, we agree that the AJ's decision on attorney's fee award is proper. Complainant was not a prevailing party for purposes of demonstrating entitlement to a fee award and costs; she did not succeed on any significant issue raised in her complaint and it was not until the AJ discussed the July 2012 letter at the hearing, that Complainant first treated the letter as an independent basis of recovery.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed or referenced herein, we AFFIRM the AJ's award of compensatory damages, the finding of per se reprisal, and denial of an award of attorney's fees and costs.

ORDER

To the extent that the Agency has not already done so, the Agency is ordered to take the following remedial actions within sixty (60) days of the date this decision is issued:

1. The Agency shall pay Complainant non-pecuniary compensatory damages in the amount of $4,500 with interest thereon.

2. The Agency shall calculate and pay Complainant for 171.55 hours of leave at her October-December 2012 salary, together with interest and any other benefits due.

3. The Agency shall provide two hours of training to the management official who wrote the July 2012 letter. The training should have an emphasis on the legal prohibition against retaliation under Title VII and, also, the employees' right to engaged in protected activity and the Agency's obligations with respect to this right. Training is not considered discipline.

4. The Agency shall consider taking appropriate disciplinary action against the management official who discriminated against Complainant. The Agency shall report its decision. 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 for its decision not to impose discipline. If the Manager has left the Agency, the Agency shall provide the date of separation.

5. The Agency is required to post a notice in accordance with the paragraph entitled "Posting Order"

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 supporting documentation of the actions taken, including evidence that corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Mail Recovery Center in Atlanta, Georgia, 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 as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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 (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

May 9, 2019
Date