



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

[REDACTED]
Gerald L.,¹
Complainant,

v.

Bill Johnson,
President and Chief Executive Officer,
Tennessee Valley Authority,
Agency.

Appeal No. 0120171266

Agency No. 0420-2009040

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 2, 2016, final decision concerning his entitlement to compensatory damages.

BACKGROUND

During the period at issue, Complainant worked as a Maintenance Coordinator at the Agency's facility in Paducah, Kentucky.

The record reflects the following chronology of events.

On April 20, 2009, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of race (African-American) when in February 2009, he was not selected for the position of Maintenance Supervisor at the Shawnee Plant.

Complainant later requested that the Agency amend his complaint to include a claim that he was unlawfully retaliated against when he was removed from his Coordinator position and reassigned to another position within days of management being notified that he was pursuing EEO Counseling concerning his non-selection.

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.

The Agency failed to amend Complainant's non-selection complaint to include the retaliation/reassignment claim.

In a September 30, 2009, final decision, the Agency found no discrimination concerning Complainant's non-selection, but did not address his reassignment claim.

Complainant filed an appeal with the Commission's Office of Federal Operations (OFO). OFO reversed the Agency's final decision and found that Complainant had been subjected to discrimination based on race when he was not selected for the Maintenance Supervisor position. Complainant v. Tennessee Valley Admin., EEOC Appeal No. 0120100344 (Dec. 14, 2011), req. for recons. den., EEOC Request No. 0520120244 (Nov. 9, 2012). OFO ordered the Agency to take various actions including to pay compensatory damages.²

OFO in EEOC Appeal No. 0120100344 also found that the Agency did not properly amend the complaint to include a separate claim regarding a reassignment. This claim was sent back and the Agency was ordered to investigate and further process it.

The Agency issued a final decision on February 7, 2013, finding no discrimination regarding Complainant's reassignment. Complainant appealed the Agency's decision and in EEOC Appeal No. 0120131406 (Sept. 25, 2015), we found that the reassignment was due to unlawful retaliation. We ordered the Agency to take various actions including to conduct a supplemental investigation and issue a final decision on complainant's entitlement to compensatory damages.

In a final decision, dated December 2, 2016, the Agency awarded Complainant \$7,500.00 in non-pecuniary compensatory damages pertaining to his reassignment.³ In reaching this award, the Agency, in its final decision, noted that "Complainant's testimony and his wife's statement demonstrated that he suffered emotional harm when he was reassigned to a less desirable place to work for approximately two years. The Agency's discriminatory actions caused him to be humiliated, anxious, lose sleep, stressed resulting in marital and family strain and Complainant displayed a disagreeable negative personality change." Final Agency Decision at 4.

The instant appeal followed. On appeal, Complainant through his attorney, is seeking \$100,000 in non-pecuniary compensatory damages. Complainant, on appeal states that "after being forced to work [at the new position], which was known to have a high concentration of cancer causing limestone dust, [Complainant] did develop lung cancer, which required hospitalization and surgery. While the cancer, cannot be conclusively tied to [Complainant's] time being forced to work in that environment, ...it is difficult to deny the connection." Finally, Complainant asserts

² In EEOC Appeal No. 0120133385 (Sept. 15, 2015), OFO awarded Complainant \$35,000 for the discriminatory non-selection.

³ The Agency, in its December 2, 2016 final decision, found that Complainant did not provide evidence that he was entitled to pecuniary damages. Complainant does not expressly contest this determination on appeal. Thus, we decline to address it further herein.

that the Agency's award of \$7,500 is not sufficient to compensate him based on the severity and nature of the harm.

In response, the Agency requests that we affirm its final decision awarding Complainant \$7500 in non-pecuniary compensatory damages. The Agency asserts that there is no objective evidence that the retaliatory reassignment caused Complainant's cancer. Specifically, the Agency states that Complainant did not present any medical evidence to establish such a connection. The Agency further states that Complainant is not entitled to double recovery. Specifically, the Agency states that much of Complainant's testimony concerning the emotional harm he experienced "as a result of the retaliatory reassignment concerns the same emotional harm during the same timeframe that he previously attributed to his non-selection claim for which he has already been compensated." Agency Brief at 7.

ANALYSIS AND FINDINGS

With respect to non-pecuniary compensatory damages, these are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for non-pecuniary damages claims includes statements from Complainant and others, including family members, co-workers, and medical professionals. See id.; see also Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Non-pecuniary 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); EEOC Guidance at 13. 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 Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

As part of the supplemental investigation, Complainant, in a sworn statement, stated that the duties of his new position were out of his comfort zone. Specifically, he stated that most of the duties were mechanical whereas his experience was in electrical work. Report of Investigation (ROI) at 23. Complainant stated that he felt overwhelmed with the new responsibility and had issues sleeping. ROI at 24. Complainant further stated that he became withdrawn which put strain on his marital relationship and his relationship with his children. ROI at 25. Complainant stated he was in the position at issue for approximately two years. ROI at 24. In addition, the record contains a statement from Complainant's wife that he has been affected greatly. Specifically, Complainant's wife stated that he does not want to be disturbed and gets angry when asked to do anything. ROI at 30.

After analyzing the evidence which establishes the harm sustained by Complainant, with note of the serious nature and duration of his suffering, and upon consideration of damages awards reached in comparable cases, we find that Complainant is entitled to \$25,000. We concur with the Agency that the record is devoid of medical evidence indicating that Complainant's cancer was the result of his new work environment. However, the record indicates that his new position was located in an undesirable environment.⁴ We further concur that Complainant should not receive double recovery with respect to his award of non-pecuniary compensatory damages. However, the record reflects that Complainant experienced specific negative consequences due to the unlawful reassignment. Complainant stated that the position contained new duties which he was not accustomed to and which caused him to feel overwhelmed. He stated that he had to rely on others at the worksite and that he had difficulty sleeping because he worried that someone at the worksite would get injured. Complainant also testified that the new work environment was undesirable.

We find that this case is analogous to Complainant v. Dep't of Energy, EEOC Appeal No. 01A24738 (Dec. 12, 2003) in which OFO awarded \$15,000 in non-pecuniary damages when the complainant was subjected to unlawful retaliation when the Agency initiated action to change her classification series. The complainant stated that she was overwhelmed by feelings of anxiety, sadness, and helplessness. In EEOC Appeal No. 01A24738, Complainant's spouse also provided testimony that the Agency's action had a detrimental effect on their family and marriage. The Commission when determining an award of non-pecuniary damages may consider the present-day value of comparable awards. Lara G. v. U.S. Postal Serv., EEOC Request No. 0520130618 (June 9, 2017). Given the nearly 15-year interval between the comparable award in EEOC Appeal No. 01A24738, we find it appropriate to increase Complainant's award to \$25,000.

Based on a thorough review of the record, we MODIFY the Agency's final decision and REMAND this matter to the Agency in accordance with the Order below.

ORDER

The Agency is ORDERED to take the following actions:

1. Within sixty (60) calendar days from the date this decision is issued the Agency shall pay Complainant \$25,000 in non-pecuniary compensatory damages.
2. The Agency shall pay Complainant for the attorney's fees incurred with this appeal in accordance with the paragraph below entitled "Attorney's Fees."

⁴ Regarding his new work environment, Complainant stated that the "[b]ig thing was the dust. Limestone dust on everything and then the plant itself ...was a lot of coal dust, extremely dirty...you could walk by and touch something and dust would fall on your head or ash, limestone or coal, it was very hot and it was miserable out in the plant area." ROI at 24.

The Agency is further directed to submit a report of compliance as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

ATTORNEY'S FEES (H1016)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (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 (R0610)

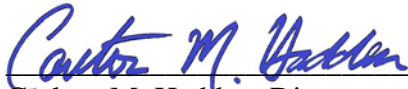
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

A handwritten signature in blue ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

October 23, 2018

Date