



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

[REDACTED]
Sanora S.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services,
Agency.

Appeal No. 0120171305

Agency No. HHS-IHS-0355-2009

DECISION

On February 23, 2017, 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 January 27, 2017, final 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. For the following reasons, the Commission MODIFIES the Agency's final decision regarding compensatory damages.

ISSUE PRESENTED

The issue presented is whether the Agency erred in only awarding Complainant non-pecuniary compensatory damages in the amount of \$1,500.00, and pecuniary damages in the amount of \$50.00.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Medical Support Technician, GS-06 at the Agency's Quentin N. Burdick Memorial Health Care facility in Belcourt, North Dakota. On August 20, 2009, Complainant filed a formal complaint alleging that the Agency discriminated against her on the basis of reprisal for prior protected EEO activity with respect to five claims.

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.

On December 18, 2015, the Equal Employment Opportunity Commission (EEOC), issued a decision which found that Complainant proved that she was subjected to reprisal with respect to claims one and two of the five claims.² Among other things, the EEOC ordered the Agency to conduct an investigation into Complainant's entitlement to compensatory damages relative to the retaliatory conduct.

The Agency issued a final agency decision (FAD), regarding Complainant's compensatory damages claim. The FAD addressed the following issues:

1. Whether Complainant established that she suffered harm when the Agency disclosed her records and she was subjected to an investigation on June 8, 2009: and
2. If Complainant established that she was harmed when the Agency disclosed her records and subjected her to an investigation, what was the appropriate remedy.

The Agency noted that Complainant submitted evidence to support her claim for both pecuniary damages in the form of costs associated with the processing of her complaint and nonpecuniary damages based on psychological harm. The FAD found that with regard to nonpecuniary damages, Complainant described incidents that occurred as far back as the 1990s and progressed to the present. Complainant explained that as a result of the Agency's discriminatory actions since 2000 she suffers from stress, anxiety, depression, panic attacks and PTSD. She indicated that her suffering has included having nightmares, waking up terrified, wetting the bed, and having uncontrollable negative thoughts. She indicated that she still suffers from these conditions.

Further, Complainant submitted medical documentation which showed that she was prescribed medication in July 2002 for anxiety and depression. In 2003, Complainant was described as having Major Depressive Disorder with Recurrent, Moderate. In 2009, Complainant's medication was increased and it was noted that she had an EEOC hearing in the near future. In July 2009, she followed up with her doctor for stress and depression. A significant weight gain was also noted.

In December 2009, Complainant fell at work and fractured her left wrist. She filed for Workers' Compensation. In February 2010, she was diagnosed with PTSD, Anxiety Disorder and Major

² In Complainant v. Dep't of Health and Human Services, EEOC Appeal No. 0120121845, (Dec. 18, 2015), Complainant alleged that she was subjected to discrimination when: 1. on or about June 8, 2009, an Agency EEO official provided copies of documents used in the investigation of her prior complaints to another official in Belcourt, North Dakota, in order to get her into trouble; 2. On May 26, 2009, the Deputy Area Director, Field Operations, accused her of sending more than 1,000 e-mails to those outside of her chain of command; 3. On May 7, 2009, the Aberdeen Area Director accused her of engaging in an "e-mail war;" 4. On or about April 29, 2009, the Manage Care Supervisor and the Contract Health Supervisor harassed her by questioning her use of the fax machine and retaining an original "read" receipt of her fax transmission; and 5. On a continuing basis since in or about February 2009, through or after June 8, 2009, the HIS Director, Diversity Management Equal Employment Opportunity and an Agency EEO official harassed her by mishandling her EEO complaints in an effort to sabotage her cases.

Depressive Disorder. On March 2010, Complainant's condition was defined as Major Depressive Disorder, recurrent, mild, Generalized Anxiety Disorder and PTSD. On September 2, 2010, Complainant's medical documentation reflected chronic stress.

Complainant maintained that the Agency's actions in exposing her EEO documents to management has caused her to experience additional stress, and caused her to fear retaliation, fear losing her job, and to question how she has and will be treated in the future.

Complainant also submitted statements from her sisters. They maintained that managements' actions caused Complainant to have anxiety panic attacks, wet the bed, have nightmares, and worry about being fired over the years. They maintained that management took her documents and shared them in order to "make our sister [Complainant] more afraid and try and stop her from filing against them." They claimed that the Agency's actions took away her character, her strength, her safety, her confidence, her enjoyment of life, and her marriage, as she and her husband divorced during this period. They also reported that Complainant was harassed and bullied all of the time. A coworker also maintained that when Complainant was detailed to the pharmacy, she had to perform pharmacy duties even though those duties were not a part of her position description. She also noted that Complainant was harassed and bullied all of the time, and, indicated that Complainant's medical condition that required daily care was not accommodated.

The Agency found that the record was clear that Complainant suffered from depression, anxiety, and PTSD. However, it was also clear that her pain and suffering began long before the incident of sharing her documents had occurred. The Agency surmised that Complainant's condition was a pre-existing condition that had not gotten any worse as a result of the 2009 records incident. The Agency also found that there were other major stressors in Complainant's life. Moreover, the Agency found that there was no medical documentation to show that her emotional pain increased after the discriminatory act. The Agency found that Complainant's testimony and that of her sisters related to 30 years of work stress and not the disclosure of her EEO documents.

The Agency further found that, with the exception of the two issues where discrimination was found, there has never been other findings of discrimination nor that a hostile work environment was created with regard to Complainant. The Agency maintained that there was no support for Complainant's assertion that her emotional harm was exclusively caused by the Agency's discriminatory actions. According to the Agency, an award of non-pecuniary compensatory damages should reflect the extent to which an agency's discriminatory action directly or proximately caused the harm as well as the extent to which other factors also caused the harm. Therefore, the Agency argued, Complainant was not entitled to non-pecuniary damages for the part of her depression, anxiety, PTSD, harm to family relations that was based on actions that occurred prior to June 2009, nor did her medical history show that its conduct caused anything more than a minimal exacerbation of her medical conditions; rather they remained remarkably consistent. Consequently, the Agency maintained that Complainant was only entitled to \$1,500.00 in nonpecuniary damages and pecuniary damages in the amount of \$50.00 for postage costs associated with processing her complaint, even though she did not provide documentation.

CONTENTIONS ON APPEAL

On appeal, Complainant contends, among other things, that the Agency's decision erred in finding that her testimony related to pre-existing conditions, and, that she did not demonstrate that her conditions were exacerbated by the Agency's actions. Complainant maintains that her current conditions were due to the Agency's actions, and that once her records were disclosed she feared continued retaliation, she feared losing her job, she began to doubt herself because her records contained all of her proof of the discrimination that she was subjected to, and she questioned how and what management would say and think about her. She also argues that all of her symptoms related to stress are ongoing. Complainant is also upset because the management official who disclosed her information had left the Agency and therefore will not be punished. Finally, she argues that her symptoms were not pre-existing conditions but were symptoms that she suffered everyday due to management's discriminatory behavior.

ANALYSIS AND FINDINGS

Standard of Review

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").

Compensatory Damages

Pursuant to section 102(a) of the Civil Rights Act of 1991, a Complainant who establishes his or her claim of unlawful discrimination may receive, in addition to equitable remedies, compensatory damages for past and future pecuniary losses (i.e., out of pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish). 42 U.S.C. § 1981a(b)(3). For an employer with more than 500 employees, such as this agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000.00. *Id.* In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that the Commission has the authority to award compensatory damages in the federal sector EEO process.

The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in EEOC's Enforcement Guidance, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (July 14, 1992) (Guidance). Briefly stated, Complainant must submit evidence to show that the Agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. *Id.* at 11-12, 14; Rivera v. Dep't. of the Navy, EEOC Appeal No. 01934157 (July 22, 1994).

The amount awarded should reflect the extent to which the Agency's discriminatory action directly or proximately caused harm to Complainant and the extent to which other factors may have played a part. Guidance at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to Complainant, and the duration or expected duration of the harm. Id. at 14.

In Carle v. Dep't. of the Navy, the Commission explained that 'objective evidence' of non-pecuniary damages could include a statement by the complainant explaining how he or she was affected by the discrimination. EEOC Appeal No. 01922369 (January 5, 1993). Statements from others, including family members, friends, and health care providers could address the outward manifestations of the impact of the discrimination on the complainant. Id. The complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. Id. However, evidence from a health care provider is not a mandatory prerequisite to establishing entitlement to nonpecuniary damages. Sinnott v. Dep't of Defense, EEOC Appeal No. 01952872 (September 19, 1996).

The Commission applies the principle that 'a tortfeasor takes its victims as it finds them.' Wallis v. U.S Postal Service, EEOC Appeal No. 01950510 (November 13, 1995) (quoting Williamson v. Handy Button Machine Co., 817 F.2d 1290, 1295 (7th Cir. 1987)). The Commission also applies two exceptions to this general rule. First, when a complainant has a pre-existing condition, the agency is liable only for the additional harm or aggravation caused by the discrimination. Second, if the complainant's pre-existing condition inevitably would have worsened, the agency is entitled to a reduction in damages reflecting the extent to which the condition would have worsened even absent the discrimination; the burden of proof being on the Agency to establish the extent of this entitlement. Wallis, EEOC Appeal No. 01950510 (citing Maurer v. United States, 668 F.2d 98 (2d Cir. 1981); Finlay v. U.S. Postal Service, EEOC Appeal No. 01942985 (April 29, 1997)).

Non-pecuniary damages are available to compensate the injured party for actual harm, even where the harm is intangible. Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984). Emotional harm will not be presumed simply because the complainant is a victim of discrimination. See Guidance at 5. The existence, nature, and severity of emotional harm must be proved. Id. Although there is no precise formula by which to calculate nonpecuniary damages, the method for computing non-pecuniary damages should typically be based on a consideration of the severity and duration of harm. Carpenter v. Department of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995); Guidance at 8. We note that for a proper award of non-pecuniary damages, 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 Ward-Jenkins v. Department of the Interior, EEOC Appeal No. 01961483 (March 4, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)).

Based on the review of the evidence in light of Commission cases regarding non-pecuniary compensatory damages awarded for emotional harm, the Commission finds that the Agency's award of \$1,500.00 is insufficient to remedy the harm experienced by Complainant.

While we agree that Complainant cannot be awarded damages for her *prior* pain and suffering, we find that Complainant has established that the Agency's discriminatory actions in the instant case exacerbated her pre-existing conditions resulting in increased stress, weight gain, withdrawal from family, fear of being fired, the end of her marriage, and an increase in medication use. Given the nature, severity and duration of Complainant's harm, we find that an award of \$20,000.00 is more appropriate.

The Commission finds that Complainant has experienced damages similar to that suffered by employees in Utt v. U.S. Postal Service, EEOC Appeal No. 0720070001 (Mar. 26, 2009) (\$25,000 in non-pecuniary damages awarded where complainant provided testimony that as a result of discrimination he suffered from stress, low self-esteem, difficulty sleeping and weight gain); Reid v. Dep't of Veterans Affairs, EEOC Appeal No. 0720070077 (Nov. 13, 2009) (\$20,000 in non-pecuniary damages awarded where complainant suffered damage to her professional reputation and emotional distress that affected her family due to discriminatory nonselections); and Flowers v. U.S. Postal Service, EEOC Appeal No. 01A43114 (Oct. 7, 2004), req. for recon. den'd, EEOC Request No. 05A50243 (Jan. 11, 2005) (\$20,000 in non-pecuniary damages; awarded where the agency's failure to hire complainant resulted in sleeplessness, depression, emotional distress, anxiety, loss of enjoyment of life and strained family relationships). The Commission also finds that \$20,000 is not "monstrously excessive" standing alone, is not the product of passion or prejudice.

Finally, as the Agency does not contest the \$50.00 in pecuniary damages Complainant sought for mailing the instant complaint, we will not address it further. Accordingly, Complainant is entitled to an award of \$20,000.00 in nonpecuniary compensatory damages and \$50.00 in pecuniary damages.

CONCLUSION

As set forth above, we MODIFY the Agency's final decision with regard to the Complainant's entitlement to compensatory damages. The Agency will comply with the ORDER below.

ORDER

The Agency is ordered to take the following remedial actions **within one hundred and twenty (120) calendar days** of the date this decision is issued:

The Agency shall issue a check to Complainant in the amount of \$20,050.00 for nonpecuniary and pecuniary 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 supporting documentation evidence that the corrective action has been implemented.

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.

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she 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.

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

December 21, 2018

Date