



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

████████████████████  
Matilde M.,<sup>1</sup>  
Complainant,

v.

Nancy A. Berryhill,  
Acting Commissioner,  
Social Security Administration,  
Agency.

Appeal No. 0120172543

Hearing No. 541-2013-00006X

Agency No. DEN120109-SSA

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 June 27, 2017 final decision addressing compensatory damages on an equal employment opportunity (EEO) complaint claiming 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

During the period at issue, Complainant worked as a Service Representative, GS-8, at the Agency’s Colorado Springs District Office in Denver, Colorado. Complainant’s first-line supervisor (“S1”) was the Operations Supervisor, her second-line supervisor (“S2”) was the Assistant District Manager, her third-line supervisor (“S3”) was the District Manager, and her fourth-line supervisor (“S4”) was the Area Director.

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant’s name when the decision is published to non-parties and the Commission’s website.

On February 29, 2012, Complainant filed a formal EEO complaint claiming that the Agency subjected her to harassment (non-sexual) and discrimination based on her disability (mental), age (50), and reprisal for prior protected EEO activity when:

1. on October 28, 2011, Complainant received a level "3" rating in all elements of her PACS appraisal;
2. starting in July 2011 to the present, management failed to honor medical documentation that limited Complainant's hours of work to six hours a day, five days a week. Even though Complainant was working 30 hours a week, management continued to give Complainant assignments as if she was working a full-time schedule and expected her to complete the work given; and
3. the Area Office has not approved Complainant's doctor's July 2011 recommendation for her to be reassigned due to stress.

Complainant subsequently requested to amend her EEO complaint claiming that the Agency subjected her to harassment (non-sexual) and discrimination based on religion (Christian), disability (mental), age (50), and in reprisal for prior protected EEO activity when:

4. on February 29, 2012, management confiscated unprocessed returned mail from Complainant's cubicle, which Complainant felt was in retaliation for her participating in an EEO matter on February 28, 2012. Complainant's request for a receipt for the box full of unprocessed returned mail was not granted. Complainant felt that management's retaliatory act is to justify a potential suspension or termination. Further, Complainant claimed that management did not confiscate unprocessed returned mail from any other employee;
5. on March 23, 2012, S1 interrupted a work-related conversation between Complainant and a coworker. S1 advised the coworker not to talk to Complainant and that any questions she may have should come through S1. Complainant cited the following additional incidents of harassment:
  - a. on April 12, 2012, S1 interrupted a work-related conversation between Complainant and a coworker, and Complainant was ordered to complete the training on systems violations immediately, even though Complainant had until the close of business to do so. S1 denied Complainant's request to allow her time to complete the assignment she was currently working on. Complainant claims that she cannot talk to anyone in the office without S1 questioning what the conversation is in regard to, or telling her to get back to work;
  - b. on April 13, 2012, Complainant arrived at work to find that someone had ransacked her desk and left it in total disarray;

- c. on April 13, 2012, S2 sent an email to Complainant advising her that her representative could not send emails requesting EEO official time on Complainant's behalf and that all requests needed to come from Complainant;
  - d. on April 16, 2012, S2 sent Complainant an email requesting the status of a 721 (Death Alert) even though she previously provided S2 with the status on April 12, 2012; and
  - e. on May 3, 2012, S1 subjected Complainant to an unauthorized desk audit shortly before her mid-year PACS review.
6. on May 6, 2012, S3 asked Complainant to take home a "Crown of Thorns," a Christian symbol of the suffering of Jesus Christ, that was on her desk, because it upset the other employees. Complainant claims that no other employees were asked to remove religious items from their desks. Subsequently, on May 9, 2012, Complainant's bag was searched for a potential weapon due to S3's interpretation of the Crown of Thorns being a potential weapon;
  7. on May 8, 2012, Complainant was advised during her mid-year PACS review that an Opportunity to Perform Successfully plan would be initiated if there was no sign of improvement. A physical altercation ensued between Complainant and S1 after the discussion. The incident resulted in Complainant sustaining scratch marks on her chest; and
  8. starting on May 10, 2012, management constantly "bombarded" Complainant with request to work certain workloads without informing her of their priority. Management was aware that Mondays and Wednesdays are Complainant's adjudicative/down days and that she is out of the office for at least two hours and 15 minutes to attend therapy sessions, which cuts into her time to work her lists, while other employees have time on their down days to complete their work.

The Agency accepted claims 1 through 8 for investigation. After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant initially requested a hearing but subsequently withdrew the request. The Agency issued a final decision, pursuant to 29 C.F.R. § 1614.110(b), finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Complainant filed an appeal from the Agency's final decision.

On appeal, the Commission affirmed the Agency's finding of no discrimination for claims all claims except for claim 6 (the "Crown of Thorns" matter). Regarding claim 6, the Commission

found that the Agency violated the Rehabilitation Act when it removed the Crown of Thorns “based on alleged perceptions by coworkers which directly related to Complainant’s disability.”

The Commission ordered the Agency to conduct a supplemental investigation regarding Complainant’s entitlement to compensatory damages as well as other remedies. Complainant v. Social Security Administration, EEOC Appeal No. 0120140147 (Jan. 17, 2017).

On June 27, 2017, the Agency issued a decision relating to the supplemental investigation on compensatory damages awarding Complainant \$10,000 in nonpecuniary compensatory damages. In reaching this amount, the Agency reasoned that Complainant’s testimony was compelling that she suffered stress based on the Crown incident even though Complainant’s testimony included events the Commission did not find to be discriminatory.

The Agency denied Complainant’s request for pecuniary damages of \$196,002.00 for lost wages incurred between 2012 and 2017 because lost wages are statutorily excluded from compensatory damage awards. See 42 U.S.C. § 1981a(b)(2), 1991.

The Agency also denied \$272,859.00 for future pecuniary damages. The Agency reasoned that Complainant failed to provide evidence to support a direct or proximate cause between the May 6, 2012 Crown of Thorns incident and Complainant’s future lost wages, given that Complainant returned to work on November 10, 2014. The Agency further reasoned that Complainant’s pre-existing conditions – depression, Post Traumatic Stress Disorder (“PTSD”) – “were progressing since 2010, well before the discriminatory incident at issue,” and the “subsequent deaths of Complainant’s husband and mother were intervening and additional causes for Complainant’s emotional distress” after the Crown of Thorns incident.

The Agency denied \$36.00 in pecuniary damages for obstetrics and gynecology medical visits because the Agency determined that there was “no evidentiary support that the discriminatory incident was the direct or proximate cause for Complainant’s need for a complete hysterectomy.”

The Agency, however, granted \$103.16 in pecuniary damages to cover medical visits occurring during the discriminatory period.

The instant appeal followed. On appeal, Complainant requests, through her attorney, \$250,000.00 in non-pecuniary damages, \$139.16 in past pecuniary damages, \$50,100.00 in future pecuniary damages, plus attorney’s fees. Complainant argues that an “insufficient and incomplete investigation” failed to “uncover critical evidence” supporting that the Crown of Thorns incident was not an isolated one. Complainant contends that the Crown of Thorns incident resulted in Complainant’s placement on involuntary Administrative Leave on August 24, 2012 and subsequent termination from the Agency on November 21, 2012. Complainant contends that she incurred a 2-year unemployment and 25-month absence from the Agency until she returned to work on November 10, 2014, as ordered by an Administrative Law Judge.

In support of her assertions, Complainant submits an affidavit, dated August 24, 2017, attesting to these events. The affidavit states that the basis for Complainant's November 21, 2012 termination was "the May 6, 2012 Crown of Thorns incident, the alleged mishandling of mail improperly, and alleged interference with [her] supervisor." The affidavit further states that Complainant left the Agency on March 1, 2017 to be closer to family.

Complainant also argues that the investigation failed to adequately quantify future out-of-pocket medical expenses. Complainant explains that the psychiatric evaluation indicates that Complainant would benefit from "13-20 visits over 7-20 weeks and up to 50 sessions of individual psychotherapy if progress in being made." Complainant attaches an addendum, dated August 24, 2017, from the psychiatrist stating that 13-20 sessions of psychotherapy would cost \$2,000 - \$3,000 and 50 sessions of psychotherapy would cost \$7,500.

Finally, Complainant argues that this case is similar to a wrongful termination and the nonpecuniary should be increased to \$250,000.

We limit our discussion to the damages Complainant challenges on appeal.

### ANALYSIS AND FINDINGS

#### Preliminary Matters

We address Complainant's argument that the supplemental investigation was insufficient and/or incomplete. Our review of the record indicates that Complainant was granted an extension to provide additional documentation by April 14, 2017. However, Complainant submitted the documents (an economic assessment of Complainant's lost wages; a psychiatric evaluation; and copies of additional pharmacy expenses and billing documents) to the investigator on May 16, 2017, a period after the investigation had closed. We note that these documents were considered in the Agency's decision and we have considered these documents in our discussion below. Therefore, we find no impropriety in how the supplemental investigation was conducted.

We also address Complainant's argument that this case is similar to a wrongful termination. There is no evidence in the record that Complainant was wrongfully terminated from the Agency aside from Complainant's affidavit, dated August 24, 2017, submitted on appeal. There are no copies of a Notification of Personnel Action or copies of Agency letters to support that Complainant was placed on administrative leave on August 24, 2012, and was terminated from employment on November 21, 2012, as alleged on appeal. Further, there is no indication that a claim for wrongful termination was accepted for investigation or previously adjudicated. Therefore, we will not address that claim here.

### Past Pecuniary Damages

Pecuniary damages are quantifiable out-of-pocket expenses incurred as a result of the Agency's discriminatory actions. Damages for past pecuniary damages will not normally be granted without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals of actual loss and expenses.

We acknowledge that the record contains a bill for obstetrics and gynecology office visits reflecting a total amount of \$36.00 for medical services received in November and December 2016. The bill also indicates that Complainant underwent a total hysterectomy on December 8, 2016. We concur with the Agency that the record is devoid of evidence that the \$36.00 obstetrics and gynecology office visits provided to Complainant in November and December 2016 were due to the Agency's removal of the Crown of Thorns on May 6, 2012. In her supplemental affidavit, Complainant simply states that her "menstrual cycle was affected" after the Crown of Thorns incident but does not indicate that this incident directly related to Complainant's need to undergo a total hysterectomy. Thus, we find the Agency properly denied Complainant's request for past pecuniary damages to cover the medical visits at issue.

### Non-Pecuniary Damages

Non-pecuniary compensatory damages 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)).

When a Complainant has a pre-existing condition, the Agency is liable only for the additional harm or aggravation caused by the discrimination. If 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 is on the Agency to establish the extent of these offsets. Wallis v. U.S. Postal Serv., EEOC Appeal No. 01950510 (Nov. 13, 1995) (citing Maurer v. United States, 668 F.2d 98 (2d Cir. 1981)); Finlay v. U.S. Postal Serv., EEOC Appeal No. 01942985 (Apr. 29, 1997). The Commission notes, therefore, that Complainant is entitled to recover damages only for injury, or

additional injury, caused by the discrimination. See Terrell v. Dep't of Housing and Urban Dev., EEOC Appeal No. 01961030 (October 25, 1996): EEOC Notice No. N 915.002 at 12.

The Agency awarded \$10,000.00 in nonpecuniary damages. We find, however, that an award of \$15,000.00 is more consistent with the amounts awarded in similar cases. The psychiatric medical evaluation indicates that Complainant had “significant work-related stresses beginning in 2009,” two years after Complainant started employment with the Agency. These stresses included “anxiety, depression, panic attacks, insomnia, and recurrent dreams about her workplace.” The evaluation clarified that Complainant sought mental health treatment for the first time as a result of these stresses.<sup>2</sup> The evaluation further indicates that these work-related stresses resulted in Complainant’s diagnoses of adjustment disorder and recurrent major depression on June 28, 2010, panic attacks in November 2011, severe major depression on January 10, 2011, PTSD on October 18, 2011, and worsening chronic depression on December 5, 2011. Complainant also sought psychotherapy twice a week and was prescribed several medications to treat her stress work-related diagnoses.

Considering these stresses, the psychiatric evaluation states that Complainant considered the Crown of Thorns as her “protection, [her] shield” and the item provided her “solace when she was feeling stressed at work.” The evaluation further states that Complainant felt “naked and vulnerable” when management removed the item. The psychiatrist contends that the removal and Complainant’s sustained injuries from an alleged physical altercation with her supervisor on May 8, 2012,<sup>3</sup> exacerbated Complainant’s preexisting conditions and “resulted in increased functional and occupational impairment.”

In her supplemental affidavit, dated April 14, 2017, Complainant stated that she was “humiliated, devastated, and [her] preexisting mental health conditions . . . worsened” when the Crown of Thorns was removed. Complainant further stated that her condition worsened “because the behaviors of [her] supervisors during and after the incident seemed to repeat what [she] had experienced previously at [her] workplace.” Complainant explained her family was under a “tremendous stress” after she was fired in August 2012 and her husband became the family’s sole financial provider. Complainant stated that her husband suffered a heart attack 16 days after she returned to work on November 10, 2014, and died on January 8, 2015. Complainant further stated she is “not able to go back to work,” she “is unable to see tomorrow,” and the Crown of Thorns incident “had such an impact on her” that she relocated to Maryland on March 1, 2017 to be closer to family.

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<sup>2</sup> The evaluation explains that Complainant did not seek mental health treatment prior to starting at the Agency even though Complainant’s six-year-old son had died in a drowning incident in 1997.

<sup>3</sup> We note that the Commission previously determined that the alleged May 8, 2012 incident was not discriminatory.

The neurological assessment, dated April 25, 2016, further indicates that Complainant has been treated since July 2015 for PTSD symptoms due to “trauma related to her place of employment.” The assessment attributes the May 2012 incident where Complainant was allegedly “physically attacked . . . by her immediate supervisor” as a continued “source of [Complainant’s] anxiety and trauma.”

We concur with the Agency that this award should *only* encompass the harm Complainant sustained by the discriminatory act at issue (removal of the Crown of Thorns) to the extent that this discriminatory act exacerbated Complainant’s preexisting psychiatric diagnoses. In this case, Complainant attributes her worsening condition to actions occurring *before and after* the May 6, 2012 Crown of Thorns incident. Specially, Complainant cites her workplace issues at the Agency beginning in 2009 and the alleged May 8, 2012 assault by her supervisor which the Commission found to be non-discriminatory. However, we note that Complainant’s preexisting mental health conditions were caused by work-related stresses leading up to the removal of the Crown of Thorns. It is evident from the record that the Crown of Thorns helped Complainant cope with significant work-related stresses and Complainant’s preexisting psychiatric conditions only worsened after this item was removed. We find an award of \$15,000 is neither monstrously excessive nor the product of passion or prejudice and is consistent with prior EEOC precedent. See Taber v. U.S. Postal Serv., EEOC Appeal No. 01983780 (July 18, 2001) (Commission awarded \$15,000 where connection established between the disability discrimination and the worsening of his condition, even when partially attributable to other factors); Starr R. v. General Services Administration, EEOC Appeal No. 0120143031 (Jan. 12, 2017) (EEOC affirmed the Agency’s award of \$12,000.00 in nonpecuniary compensatory damages when Complainant experienced more seizures than normal and her health declined even though the evidence suggested that the increased seizures were primarily caused by the stress of processing the EEO complaint and the workplace environment and not the denial of a Complainant’s request for reasonable accommodation).

#### Future Pecuniary Damages

Future pecuniary damages are losses likely to occur after the resolution of the complaint. MD-110 at 11-23 (citing EEOC Damages Guidance). We note that the psychiatric evaluation in the record and the psychiatric evaluation Complainant submits on appeal both recommend that Complainant will require “13-20 psychotherapy visits” and “up to 50 sessions with individual psychotherapy if progress is being made.” The evaluation included in the record indicates that the psychiatrist’s recommendations were based on the Official Disability Guidelines and were not based on Complainant’s specific conditions. While the evaluation submitted on appeal provides the number of sessions Complainant would require, the evaluation fails to include how long Complainant would require these services. Thus, we concur with the Agency’s denial of these future pecuniary damages.



### CONCLUSION

The Agency's June 27, 2017 final decision concerning compensatory damages is hereby MODIFIED. The matter is REMANDED to the Agency for compliance with the following ORDER.

### ORDER

To the extent, it has not already done so, the Agency is ORDERED to take the following actions as set forth in EEOC Appeal No. 0120142904 as modified herein:

1. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$15,000.00 in nonpecuniary damages.
2. The Agency shall pay reasonable attorney's fees for the processing of this complaint, including this appeal as set forth in the paragraph below entitled "Attorney's Fees."

The Agency is further directed to submit a report of compliance, as provided, in the statement entitled "Implementation of the Commission's Decision."

### 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)), 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.

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

February 27, 2019

Date