



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

[REDACTED]
Vena H.,¹
Complainant,

v.

Patrick M. Shanahan,
Acting Secretary,
Department of Defense
(Defense Commissary Agency),
Agency.

Appeal No. 0120172589

Agency No. DECA-00157-2016

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 July 5, 2017, final concerning 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 Store Worker at the Agency's Hunter Army Airfield Commissary in Georgia.²

On October 14, 2016, Complainant filed a formal complaint alleging that the Agency discriminated against her based on race (African-American), disability, age (61), and in reprisal for prior protected EEO activity.

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 record reflects that Complainant retired effective February 27, 2017.

By letter dated October 25, 2016, the Agency accepted the formal complaint for investigation and determined that the formal complaint was comprised of the following two claims:

1. On or about June 1, 2016, Complainant learned her supervisor (S1) commented (in January 2016) that she hated Complainant and wished she would get into a car accident and die. On September 22, 2016, [S1] confirmed making this statement.
2. [S1], on a continuing basis, belittles, nit-picks, and nags Complainant causing her to have anxiety attacks.

As part of claim (2), Complainant alleged that S1, when working with one of Complainant's co-workers and putting a bag of potatoes on the shelf, wrote the word "white" on a bag of white potatoes, laughed and said, "white power" while extending her arm out, as if making a salute.

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 requested a hearing before an EEOC AJ.

By Order of Dismissal dated July 19, 2018, the AJ dismissed Complainant's request for a hearing reasoning that Complainant initially requested a final decision.³

In a final decision, dated July 5, 2017, the Agency found that Complainant was subjected to a hostile work environment based on her race and prior protected activity. The Agency awarded \$4,000 in non-pecuniary compensatory damages noting that Complainant did not like to come to work anymore and that the work environment resulted in her having elevated blood pressure. The Agency also ordered anti-harassment training.

The instant appeal followed. On appeal, Complainant asserts that she felt forced to voluntarily retire ...and "could no longer work in that hostile environment."⁴ Complainant states that her

³ Complainant, on appeal, does not expressly contest the AJ's July 19, 2018 Order of Dismissal which remanded her claims to the Agency for a final decision. Thus, we decline to address further herein the AJ's Order of Dismissal.

⁴ We note that the instant matter does not include constructive discharge as an accepted claim. In addition, we note that the record is devoid of evidence that Complainant requested that her complaint be amended to include a constructive discharge claim. Thus, we decline to address the issue of constructive discharge herein. We further note that in her declaration under penalty of perjury, Complainant asserts that she had back problems and arthritis and could not perform the duties of her position. Report of Investigation at 110-111. The record is also devoid of evidence that Complainant requested to amend her formal complaint to include a denial of a reasonable accommodation claim. Thus, we decline to address this matter herein.

stomach hurt when she went to work and that she has seen a doctor due to anxiety and depression. Complainant, on appeal, also submits medical documentation from September-October 2016 related to the stress she was experiencing.

ANALYSIS AND FINDINGS

Based on our review of the record we affirm the Agency's finding of discrimination and will limit our review to whether the Agency awarded the appropriate remedies. 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)).

The Agency awarded \$4,000 in the instant matter. We determine, however, that an award of \$6,000 is more consistent with the awards given in similar cases and is not monstrously excessive. In the instant matter, Complainant, in her declaration under penalty of perjury, asserts that she felt depressed, stressed, and had elevated blood pressure due to the environment at work. Complainant further states that she has had to seek medical attention. In an attachment to her formal complaint, Complainant states that her stomach hurt her when she went to work due to the hostile environment. The record also contains medical documentation from September-October 2016 indicating that Complainant sought medical assistance due to stress from her work environment and due to S1's behavior towards her. Based on the foregoing, we find a reward of \$6,000 is proper. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120141347 (July 24, 2014) (awarding Complainant \$6000 who was subjected to unlawful harassment and experienced depression, anxiety, increased blood pressure and sought medical treatment for her depression).⁵

⁵ We do not award Complainant pecuniary damages because Complainant has not presented documentation such as receipts or bills indicating proof of her actual expenses.

ORDER

To the extent, it has not already done so, the Agency is ORDERED to take the following actions:

1. Within sixty (60) calendar days from the date this decision issued, the Agency shall pay Complainant \$6,000 in non-pecuniary compensatory damages.
2. Within ninety (90) calendar days from the date his decision is issued, the Agency shall provide at least eight (8) hours of in-person EEO training to the responsible management official (S1) with an emphasis on the area of harassment.
3. Within sixty (60) days from the date this decision is issued, the Agency shall consider taking disciplinary action against the responsible management official (S1). The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Commission and specify what, if any action was taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline.
4. Within thirty (30) calendar days from the date this decision is issued, 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 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.

POSTING ORDER (G0617)

The Agency is ordered to post at the Hunter Army Airfield Commissary in 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 (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 8, 2019

Date