



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

[REDACTED]
Davida L.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 0120172609

Agency No. 200H-V103-2014103751

DECISION

On July 25, 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 June 29, 2017 final decision concerning an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

During the relevant time, Complainant worked as a Risk Manager (Nurse IV) at the Agency's Veterans Administration Medical Center (VAMC) in Northport, New York.

Believing that she was subjected to a hostile work environment based on her age and in reprisal for prior protected EEO activity, Complainant filed a formal complaint on October 10, 2014. The formal complaint included, in relevant part, the following allegations:

3. On July 29, 2014, during a meeting between the Chief of Staff [hereinafter "Chief"], the Chief's Administrative Assistant and the Medical Center Director [hereinafter "Director"], the Director told the Chief and his administrative assistant that Complainant had filed an EEO complaint, that

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.

she was concerned about her pay grade, and that her position was not classified and she could lose her grade IV status.

4. On July 30, 2014, and after learning of her EEO complaint, Director told Complainant “If you pursue, this someone will come down here and you could be demoted,” and “Your PD is not classified for a Nurse IV”, which Complainant viewed as a veiled threat involving her pursuit of her EEO complaint.
5. On August 4, 2014, the EEO Program Manager advised Complainant that he had spoken with some friends at the Veterans Integrated Service Network (VISN) and reiterated that her pay and grade could be changed when the Medical Center Director left the facility, which Complainant found inflammatory as she felt the EEO Manager was acting as an agent for the Director.

Following 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). In accordance with Complainant’s request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In its June 22, 2016 decision, the Agency found that Complainant had not shown that she was subjected to a hostile work environment based on age or reprisal. The Agency, however, found that the record did establish a per se violation of the anti-retaliation regulations. The Agency found that the discussions on July 29, 30, and August 4, 2014 “were meant to intimidate Complainant and discourage her from filing an EEO complaint. [Director] and the EEO Manager associated Complainant’s EEO activity with increased scrutiny of her Nurse IV grade and projected a possible demotion as a result of her EEO activity.” The statements not only “violated the letter and spirit of EEO law which requires agencies to promote and support the full realization of equal employment opportunity,” but also “violated Title VII because they were likely to deter protected activity by Complainant or other employees.” Consequently, a supplemental investigation regarding compensatory damages was ordered.

Following the completion of the Compensatory Damages Report of Investigation, the Agency issued a final decision on June 29, 2017. The Agency concluded that Complainant was entitled to \$5,000.00 in non-pecuniary compensatory damages. Complainant filed the instant appeal.

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

When discrimination is found, the agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore her as nearly as possible to the position she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive 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) as part of this "make whole" relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3)

To receive an award of compensatory damages, a complainant must demonstrate that he or she has been harmed because of the agency’s discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep’t of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), *req. for reconsideration denied*, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

Pecuniary Damages

Pecuniary damages are quantifiable out-of-pocket expenses incurred because of the Agency’s discriminatory actions. Damages for past pecuniary damages will not normally be sought without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals of actual loss and expenses. Compensatory and Punitive Damages available Under Section 102 of the Civil Rights Act of 1991 (July 14, 1992) (available at www.eeoc.gov.)

Complainant initially requested \$9,096.88 for past pecuniary damages, comprised of the estimated cost of mileage (\$4,579.40) for driving to numerous hospitals for approximately 200 visits, dental care resulting from grinding her teeth (\$4,440.00), and prescribed medications (\$77.48). In its June 29, 2017 decision, the Agency denied all past pecuniary damages.

Specifically, the Agency determined that Complainant did not provide sufficient explanation for the many hospital visits, except to make vague references to dialysis, cataract surgery, and upper endoscopy. It appeared that the visits were related to her husband's renal failure and dialysis. The Agency reasoned that if the other procedures were performed on Complainant, there was no evidence they were related to the discrimination. Regarding the dental expenses, Complainant's documentation reflected that the treatments were provided between January and October 2016, several years after the reprisal events at issue occurred in July and August 2014. The Agency found no evidence connecting Complainant's dental bills to the reprisal. Regarding prescription drugs, the Agency found no evidence indicating whether the medications were for Complainant, her husband, or her daughter. For example, there was no doctor's note linking the prescriptions to Complainant's medical conditions or to the reprisal.

Complainant also sought \$1,200.00 in future pecuniary damages, estimating \$100 per month for a year of counseling. The Agency rejected the request, noting that Complainant had not provided any documentation regarding the need for such future counseling. Moreover, the Agency found that the costs were speculative and Complainant had not previously sought counseling.

Complainant, who is represented by counsel on appeal, has not challenged the denial of pecuniary damages. The Commission has discretion to review only the issues specifically raised on appeal. Equal Employment Opportunity Commission Management Directive for 29 C.F.R. § 1614 (EEO MD-11), at 9-10 (Nov.9, 1999). Therefore, we shall not review the Agency's denial of pecuniary damages in our decision.

Non-pecuniary Damages

Non-pecuniary losses 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 EEOC Notice No. 915.002 at 10 (July 14, 1992). There are no precise formulae for determining the amount of damages for nonpecuniary losses. In Carle v. Department 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. Non-pecuniary damages must be limited to the sums necessary to compensate the injured party for the actual harm and should take into account the severity of the harm and the length of the time the injured party has suffered from the harm. See Carpenter v. Department of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995).

Complainant requested \$100,000 in non-pecuniary damages. In support of her claim, Complainant submitted an affidavit as well as numerous letters from the former Chief of Staff, a representative, siblings, and her daughter. Prior to the discrimination, Complainant contends she had no emotional or physical health problems. Complainant asserts that, thereafter, she suffered from panic attacks, insomnia, high blood pressure, irritability, headaches, and feelings of isolation. The Chief of Staff worked with Complainant daily for years. He described watching “a well-adjusted dedicated employee descend into extreme emotional distress” between 2010 and 2015. Family members observed, beginning in 2010, a “dramatic change in her appearance”, noting her chronic insomnia, fatigue, tension headaches, and nervousness. Complainant’s daughter stated that her mother “became preoccupied with problems at work,” leaving her anxious and depressed.

In its June 29, 2017 decision, the Agency noted that most witnesses described changes in Complainant’s emotional health that began in 2010, when Complainant transferred to the position of Risk Manager. The Agency determined that Complainant did not identify a new physical or emotional harm that began due to the retaliatory remarks. The Agency, however, did find that Complainant established a “casual link between the per se reprisal and some amount of emotional harm.” Therefore, it believed Complainant was entitled to \$5,000 in non-pecuniary compensatory damages.

The Commission acknowledges that most of Complainant’s documentation refers to harm that began in 2010 through 2015, and not simply the retaliatory actions that occurred in 2014. However, the parties agree, and the record reflects, a nexus between the Agency’s discriminatory reprisal and Complainant’s emotional harm. Even if Complainant had pre-existing conditions, there is little doubt that the Agency’s reprisal aggravated those conditions. Therefore, the Commission finds that an award of \$10,000.00 for non-pecuniary, compensatory damages is appropriate. This amount takes into consideration the severity of the harm suffered and is consistent with prior Commission precedent. See Complainant v. United States Postal Service, EEOC Appeal No. 07A30028 (Sept. 3, 2003) (\$10,000 in non-pecuniary damages for stress, vomiting, trouble sleeping and eating after ordered to clock out early based on sex and race); Roundtree v. Department of Agriculture, EEOC Appeal No. 01941906 (July 7, 1995) (\$8,000.00 in non-pecuniary damages where medical evidence testimony was provided regarding complainant's emotional distress, but the majority of complainant's emotional problems were caused by factors other than the discrimination); Eberly v. U.S. Postal Serv., EEOC Appeal No. 07A30085 (May 20, 2004) (\$10,000.00 in non-pecuniary damages awarded for reprisal causing complainant to experience depression, sleeplessness, anxiety, low self-esteem, and nightmares, but the majority of symptoms were due to prior, unrelated incident); and Rowan v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120070384 (June 19, 2009) (Commission awarded complainant \$10,000 for non-pecuniary damages where complainant established that at least some of the exacerbation of his stress, humiliation, anxiety, sleeplessness, fears of termination, and depression were attributable to the Agency's discriminatory conduct).

Attorney's Fees and Costs

Title VII and the Commission's regulations authorize the award of reasonable attorney's fees and costs to a prevailing complainant. 29 C.F.R. § 1614.501(e); see also EEO Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 11-1 (Aug. 5, 2015). Fee awards are typically calculated by multiplying the number of hours reasonably expended times a reasonable hourly rate, an amount also known as a lodestar. See 29 C.F.R. § 1614.501(e)(ii)(B); Blum v. Stenson, 465 U.S. 886, 899 (1984); Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

All hours reasonably spent in processing the complaint are compensable, but the number of hours should not include excessive, redundant or otherwise unnecessary hours. EEO MD-110 at 11-14. A reasonable hourly rate is based on prevailing market rates in the relevant community for attorneys of similar experience in similar cases. Id. 11-14. An application for attorney's fees must include a verified statement of attorney's fees accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. Id. 11-17.

As noted above, Complainant retained counsel following receipt of the Agency's June 22, 2016 decision finding per se retaliation and entitlement to compensatory damages. Complainant's counsel seeks an hourly rate of \$350 per hour. We note that the Agency expressly states that it does not dispute the reasonableness of the attorney's rate. Therefore, we shall next consider the hours expended.

In this case, Complainant's attorney has submitted a fee petition requesting 26.75 hours, reflecting a discount of 5.5 hours from a total of 32.25 expended on the matter, for a total sum of \$9,362.50.² While an attorney is not required to record in detail the way each minute of his or her time was expended, the attorney does have the burden of identifying the subject matters on which he or she spent his or her time by submitting sufficiently detailed and contemporaneous time records to ensure that the time spent was accurately recorded. See Spencer v. Dep't of the Treasury, EEOC Appeal No. 07A10035 (May 6, 2003). The attorney requesting the fee award has the burden of proving, by specific evidence, entitlement to the requested fees and costs. Koren v. U.S. Postal Serv., EEOC Request No. 05A20843 (Feb. 18, 2003).

The Agency disputes approximately six entries, of Complainant's attorney's itemization, arguing they are duplicative, excessive, or both. For example, the Agency contends that the time spent on August 8, 2016, is duplicative of the work done on August 2, 2016. For August 2, 2016, Complainant's attorney worked on emails with various individuals as well as "assessment and feedback to letters proving compensatory damages". On August 8, 2016, his work also included an "assessment of [Complainant's] CV" and "analysis of five letters from siblings re: comp

² Although in his declaration Complainant's attorney references a total of 32.5 hours spent on the case and discounts of 6.25 hours (Total: 26.25), the attached exhibit summarizing the hours and work performed reflect a total of 32.25 hours and a reduction of 5.50 hours (Total: 26.75). The Commission shall resolve the inconsistency of .25 hours by relying upon the itemized exhibit, rather than the attorney's declaration.

damages.” The entries for both days also included details for other tasks. The Agency argues that since the attorney did not parse out precisely how much of the two hours on August 2, 2016, he spent reviewing the compensatory damages letters, it is duplicative and excessive. The Commission disagrees. A fee petition must “contain sufficiently detailed information regarding the hours logged and the work done” to permit the determination of whether hours were reasonably expended. Nat'l Ass'n of Concerned Veterans v. Sec. of Def., 675 F.2d 1319, 1327 (D.C. Cir. 1982). In support of his request, the fee applicant need not “record in great detail how each minute of his time was expended.” Hensley, 461 U.S. 424, at n. 12. The Agency reiterates similar reasoning with the other disputed entries: namely whenever Complainant’s attorney describes a task in more than one entry, the Agency argues the work is duplicative. There is no evidence, however to support this interpretation over the reasonable conclusion that the entries simply reflect continued work on the same task on a different day. We find that Complainant’s counsel has sufficiently summarized the work expended.

Finally, we note that the Agency “respectfully disputes the [Complainant’s] request for 32.5 hours in attorney’s fees and would propose a reduction in total hours . . . to 26.25 hours.” While Complainant’s counsel reaches a similar number of hours (26.75) following discounts, rather than the unpersuasive arguments presented by the Agency on appeal, we find the parties’ requests only differ by half an hour. Accordingly, the Commission finds no basis to reduce the requested amount of attorney’s fees of \$9,362.50 (\$350/hr x 26.75).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we **MODIFY** the Agency’s award of relief. The matter is **REMANDED** to the Agency in accordance with the **ORDER** below.

ORDER

Within forty-five (45) calendar days, to the extent it has not already done so, the Agency shall take the following remedial actions:

- (1) pay Complainant non-pecuniary compensatory damages in the amount of Ten Thousand Dollars (\$10,000.00); and,
- (2) pay Complainant Nine Thousand and Three Hundred and Sixty-Two Dollars and fifty cents (\$9,362.50) in 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.” The report shall include supporting documentation verifying the corrective action has been implemented as ordered.

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

February 15, 2019

Date