



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

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

v.

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

Appeal No. 0120172736

Hearing No. 490-2010-00007X

Agency No. 200L05642009102184

**DECISION**

On August 7, 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 July 12, 2017, final decision concerning his 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a GS-7 Certified Respiratory Therapist at the Agency's Medical Center facility in Fayetteville, Arkansas.

On April 23, 2009, Complainant filed an EEO complaint alleging that the Agency discriminated against him:

- A. On the bases of race (Black) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

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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.

1. On February 5, 2009, Complainant's co-worker (Co-worker) (white) referred to Complainant in the comment, "This is our token Black."
  2. On February 12, 2009, the Co-worker told Complainant "Happy Black History Month."
  3. On March 1, 2009 through April 25, 2009, Complainant was scheduled to work every weekend.
  4. On March 11, 2009, the Supervisor sent an email to all night shift employees stating that effective March 29, 2009, Complainant would be working every weekend.
  5. On March 13, 2009, Complainant was wearing brown scrubs and the Co-worker said to him, "Boy, I thought you were naked."
  6. On March 16, 2009, Complainant was disapproved for leave he had requested for March 22, 2009.
  7. On March 17, 2009, a staff therapist (Therapist) falsified and back dated a Report of Contact stating that Complainant had poor decision making skills and work ethics. The Therapist wrote a note to the Supervisor stating that he should keep a copy of the old work schedule in case "fair play" comes up.
  8. On April 1, 2009, Complainant went to the Supervisor to receive his 90-day evaluation. He was told coworkers alleged that he was sleeping on duty, he did not work well with others, and was not a team player. He did not receive a written copy of his 90-day evaluation.
- B. On the bases of race and retaliation when effective April 6, 2009, Complainant resigned during his probationary period from his position stating that the harassment and hostile work environment provided him no alternative but to resign.
- C. A claim of a violation of the EEOC's anti-retaliation regulations when on April 1, 2009, the Supervisor discussed Complainant's EEO complaint with him during a performance evaluation.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing but the AJ denied the hearing request as a sanction levied against Complainant. On July 1, 2016, the AJ remanded the complaint to the Agency, and the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

On September 29, 2016, the Agency issued its final decision finding that Complainant failed to establish his claim of harassment alleged in claim (A) and his claim of constructive discharge with respect to claim (B). However, the Agency found that Complainant established that he was subjected to impermissible retaliation when the Supervisor and Assistant Supervisor discussed Complainant's EEO complaint during his 90-day performance evaluation and found that this action was be reasonably like to deter Complainant and others from engaging in protected

activity. Specifically, the supervisors indicated to Complainant that he should drop his EEO issues and could start fresh.

Based on the finding solely on the retaliation violation, the Agency remanded the matter for an investigation regarding Complainant's entitlement to compensatory damages. The Agency also noted that Complainant was entitled to fees and costs if Complainant was represented by an attorney. In addition, the Agency determined that it would provide training to and consider disciplinary action for the Supervisor and Assistant Supervisor. Finally, the Agency issued an order to post a notice in the relevant facility indicating that a violation of Title VII occurred there. Complainant did not appeal the Agency's decision.

The Agency conducted a supplemental investigation beginning March 31, 2017, regarding Complainant's entitlement to compensatory damages. Complainant requested \$1,624.44 in pecuniary damages. In support of his claim for pecuniary damages, he provided copies of his airline ticket receipt, truck rental receipt, storage receipts, and a federal express receipt. Complainant asserted that he needed to resign and move away from the Agency's facility and its discriminatory environment. Complainant also sought \$300,000 in non-pecuniary damages. Complainant indicated that he sought medical treatment for anxiety, depression, and insomnia. He also said he experienced major depression, suicidal thoughts, anxiety, stress, excessive fatigue, humiliation, and marital/family strain. Complainant has not been employed since resigning the Agency. As a result of financial issues, Complainant indicated that his marriage dissolved. He stated that he has been disabled since resigning from the Agency.

On July 12, 2017, the Agency issued its final decision regarding Complainant's entitlement to compensatory damages. The Agency noted that Complainant sought reimbursement for costs associated with his move from the facility which Complainant stated was "racially charged." The Agency found discrimination with respect to claim (C) only involving Complainant's claim of retaliation. The Agency held that Complainant provided no connection between his move and the discriminatory action raised in claim (C). Therefore, the Agency denied Complainant's request for reimbursement for the airline ticket, the truck rental receipt, and the storage facilities. The Agency found that the receipt from Federal Express were for mailing costs associated with his EEO complaint. As such, the Agency granted Complainant's request for \$ 16.38 for that expenditure.

As for Complainant's claim for \$ 300,000 in non-pecuniary damages, the Agency found that Complainant's request was excessive. The Agency noted that Complainant stated that he became "totally and permanently disabled" due to his resignation from the Agency. Complainant provided extensive information about his medical condition. However, the Agency held that there were other factors beyond the retaliation he experienced which cause his symptoms. Considering the extent of Complainant's emotional distress and Complainant's own attribution to factors other than the unlawful retaliation, the Agency determined that Complainant was entitled to \$ 1,000 in non-pecuniary damages. As such, the Agency awarded Complainant a total of \$1,016.38 in compensatory damages.

Complainant appealed asserting that he should be entitled to two years of salary because he could not be restored to his position with the Agency. He also stated that he is entitled to additional damages beyond the \$1,016.38 he was awarded by the Agency.

### 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”).

#### *Front Pay*

We note that on appeal, Complainant asserted that he should have been awarded front pay for two years as the Agency was not able to return him to his former position. We remind Complainant that the Agency did not find discrimination with respect to claim (B) involving his claim of constructive discharge. Furthermore, the Agency did not provide Complainant with reinstatement to his prior position or back pay as remedy in its final decision dated September 29, 2016. Complainant did not appeal the Agency’s September 29, 2016 decision. As such, we determine that Complainant is not entitled to front pay or pay in lieu of reinstatement to his prior position.

#### *Legal Standards for an Award of 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 the agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. *Id.*

The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in EEOC Notice No. 915.002, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (July 14, 1992). Briefly stated, the 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 the complainant and the extent to which other factors may have played a part. EEOC Notice No. N 915.002 at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the 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 (Jan. 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.* 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. *Carpenter v. Dep't of Agric.*, EEOC Appeal No. 01945652 (July 17, 1995).

#### *Nexus Between Alleged Harm and Discrimination*

Upon review, the Commission finds that Complainant failed to establish a nexus between his past pecuniary damages and the Agency's discriminatory action. Complainant provided the Agency with copies of receipts for an airline ticket, the truck rental, and the rental of two storage facilities. Complainant asserted that he moved because of the "racially charged" workplace he experience. However, we note that the Agency did not find discrimination with respect to his claims of racial harassment and/or constructive discharge. As such, we find Complainant failed to establish requisite nexus between the alleged harm and the unlawful retaliation. Accordingly, we find that complainant is not entitled to additional past pecuniary damages beyond the Agency's award for costs associated with mailing. Therefore, we affirm the Agency's award of \$ 16.38 in pecuniary damages.

#### *Calculation of Damages Payable*

Complainant has claimed that he should be awarded \$300,000.00 in non-pecuniary compensatory damages. Complainant provided testimony that he has been under care for his medical conditions including anxiety, depression, and stress. He stated that he was forced by to resign his position with the Agency and move to another area. He noted that because he no longer could provide for his family, it resulted in his marriage ending in 2013. He also averred that he is no longer able to work due to the Agency's harassment. Although Complainant alleged that he had experienced emotional harm, it appears that most of Complainant's problems have been caused by factors other than the single retaliatory act determined to have occurred by the Agency. We again remind Complainant that the Agency determined that the evidence did not support a finding of discriminatory harassment or a constructive discharge, and therefore, he is not entitled to relief for these matters.

Taking into account the evidence of non-pecuniary damages submitted by the Complainant, we find his request for \$300,000 to be excessive. Rather, the Commission finds that the Agency correctly determined that Complainant is entitled to non-pecuniary damages in the amount of \$ 1,000. This amount takes into account the severity of the harm suffered, and is consistent with prior Commission precedent. See Nadene M. v. Dep't of Justice, EEOC Appeal No. 0720150018 (May 20, 2016) (awarding \$ 1,000.00 for finding of reprisal and religious discrimination where the Agency's action exacerbated Complainant's preexisting anxiety and depression); Harry E. v. U.S. Postal Serv., EEOC Appeal No. 0120123142 (March 20, 2015) (awarding \$500 in a finding of sex, national origin and retaliatory discrimination where the record indicated that Complainant experienced emotional harm that had been ongoing since 2001 but the finding of discrimination was limited to two incidents in 2010); Clemente M. v. Dep't of the Army, EEOC Appeal No. 07201400015 (March 16, 2017) (awarding Complainant \$2,000 for emotional harm suffered due to sex, race, retaliation discrimination).

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision. As such, we REMAND the matter in accordance with the ORDER below.

### ORDER (C0618)

To the extent the Agency's has not done so already, the Agency is ordered pay Complainant \$1,016.38 in compensatory damages within forty-five (45) calendar days of the date of this decision.

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 of the Agency's calculation of back pay and other benefits due Complainant, including 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.

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).

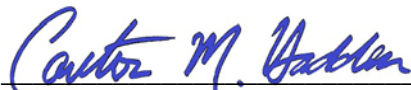
COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (S0610)

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

December 7, 2018

Date