



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

[REDACTED]

Jess P.,¹
Complainant,

v.

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

Appeal No. 0120180553

Hearing No. 480-2014-00338X

Agency No. PE-FY13-063

DECISION

On November 27, 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 October 25, 2017, final order 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. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUE PRESENTED

Whether substantial evidence in the record supports the Administrative Judge's award of \$15,000 for non-pecuniary compensatory damages.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Human Resources Assistant at the Agency's Pacific Human Resources Division, Pacific Area Office, in Okinawa, Japan. Complainant's second line supervisor was the Acting Chief (AC) (Pacific Asian Islander/Hawaiian, brown) of the Pacific Human Resources Division. Report of Investigation (ROI) at pgs. 167, 179.

On June 28, 2013, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), color (Black), and in reprisal for prior protected EEO activity arising under Title VII when:

1. on March 18, 2013, his performance standards were changed;
2. on July 23, 2013, AC issued him a Memorandum for Record of Pre-Action Investigation Meeting; and
3. on September 17, 2013, AC threatened him by stating, "if you don't get the work done it is your fault," and that he would make sure that Complainant suffered consequences.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. The AJ held a hearing on October 7-8, 21, and November 9, 2015, and issued a decision on September 28, 2017.

The AJ found that Complainant had not established by a preponderance of the evidence that his race, color, or prior EEO activity were factors in the decision to change his position description and performance standards, or when AC made the statement to Complainant about getting his work done.

However, the AJ found that Complainant was harassed based on his race, color, and retaliation when AC issued the memorandum to Complainant on July 23, 2013. The AJ determined that the memorandum was sufficiently severe to create a hostile work environment because AC falsely stated that Complainant "consistently remarks that he cannot and will not get ahead because he is a Black man." As such, the AJ determined that Complainant was entitled to non-pecuniary compensatory damages for the discrimination.²

Complainant and his wife provided testimony to establish that he had difficulty sleeping; gained weight; suffered depression; feared losing his job; and they had marital issues.

² The AJ did not award pecuniary compensatory damages because Complainant did not provide evidence of pecuniary damages; and the AJ did not award attorney's fees because Complainant's representative at the time was not a licensed attorney.

The AJ noted that Complainant's sleep problems began in October or November 2012, and that his weight gain began in March to June 2013, which was prior to the discrimination. Additionally, the AJ noted that some of Complainant's emotional and physical distress was caused by his earlier EEO complaint; the changes in his position description and performance standard, and the comment made at the September 2013 meeting; and other interactions with AC. After considering other Commission decisions, and the facts of the instant case, the AJ determined that Complainant was entitled to \$15,000 in non-pecuniary compensatory damages.

The Agency subsequently issued a final order fully adopting the AJ's decision. Complainant filed the instant appeal and submitted a brief in support of his appeal on January 17, 2018.³ The Agency filed an opposition brief on February 14, 2018.

CONTENTIONS ON APPEAL

Complainant's contentions

On appeal, Complainant, through his attorney,⁴ argues that the AJ's award of \$15,000 is too low due to "several legal and factual errors." Complainant asserts that the evidence established that he experienced severe physical and emotional harm from July 2013, through the hearing in October 2015, which is more than 25 months. Complainant argues that the AJ's decision failed to mention his headaches, back pain, shooting pain down his legs, and mental anguish. Additionally, Complainant states that his sleep problems worsened after July 2013.

Complainant also claims that he suffered from long-lasting harm, beyond the 25 months. Complainant argues that the AJ's decision does not provide a specific factual finding regarding the duration of Complainant's harm, and it relies on cases that involve much shorter periods of harm. Complainant also states that he suffered deeply and persistently, and that given the severity of the harm, a substantial award of damages is warranted.

Complainant cites to many decisions issued by the Commission, and other courts, and argues that the Commission has routinely increased damages on appeal. Complainant requests an increase of the non-pecuniary compensatory damages award to an amount between \$50,000 and \$150,000. Complainant also noted that the Commission recently decided that compensatory damages are to be adjusted to account for inflation, citing Lara G. v. U.S. Postal Service, EEOC Request No. 0520130618 (Jun. 9, 2017).

³ Complainant requested an extension to file his appeal brief. The Commission granted the extension through January 17, 2018.

⁴ Complainant obtained new representation for his appeal.

Agency Contentions

The Agency argues that the AJ's award of \$15,000 was appropriate because Complainant only prevailed on one of three claims, and he provided very limited evidence proving causation and his damages. Further, the Agency argues that the AJ's determination that Complainant "presented limited evidence regarding any emotional or physical distress he experienced as a result of the discrimination" is supported by substantial evidence in the record.

The Agency states that Complainant did not present evidence to establish a causal connection between the one prevailing claim and his damages, and that the AJ correctly found that the majority of Complainant's harm began prior to July 23, 2013. The Agency also noted other incidents or factors that were related to Complainant's harm. For example, the Agency asserts that Complainant's wife testified that she believed that Complainant engaged in an extramarital affair during the relevant time period, which likely explains issues in their marriage.

The Agency argues that none of the testimony shows any harm specifically caused by, or exacerbated by, the July 23, 2013 memorandum. With regards to the time frame of the harm, the Agency states that Complainant did not show that he suffered any long-lasting harm, and that the 25 months was merely the time it took to get to a hearing. The Agency argues that the AJ made a well-supported factual determination that the discriminatory act caused Complainant stress during the relevant time period. The Agency further argues that the cases that the AJ relied upon were appropriate, and requests that the Commission affirm its final order.

ANALYSIS AND FINDINGS

Standard of Review

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

The AJ found that Complainant's testimony was highly credible, while AC was not a credible witness because he was combative and evasive, and there were inconsistencies between his

testimony and other evidence in the record. We note that the AJ's credibility determinations are not contested on appeal, and accordingly, we accept his determinations.

Additionally, we note that Complainant has only challenged the amount of the AJ's award of non-pecuniary compensatory damages on appeal. The Commission has the discretion to review only those issues specifically raised in an appeal. See id. at § IV.A. As such, the instant decision will only address the issue of non-pecuniary compensatory damages.

Non-Pecuniary Compensatory 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 Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.302 at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm, and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice, or be "monstrously excessive" standing alone, but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from complainant concerning his emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

In this case, we find that there is substantial evidence in the record to support the AJ's award of \$15,000 for non-pecuniary compensatory damages. At the hearing, Complainant and his wife provided testimony evidence describing his harm. Complainant testified that the "biggest part" was a sleep issue; he gained weight due to stress; his depression worsened; and he feared losing his job. Hearing Transcript (HT) at pgs. 258-259. Complainant's wife testified that Complainant had trouble sleeping; suffered from back and leg pain; experienced stress and frustration; gained weight; feared losing his job; and they experienced marital problems. HT at pgs. 190-192, 199-201.

An award of non-pecuniary compensatory damages should reflect the extent to which the agency's discriminatory action directly or proximately caused the harm, as well as the extent to which other

factors also caused the harm. Johnson v. Dep't of the Interior, EEOC Appeal No. 01961812 (June 18, 1998).

It is the complainant's burden to provide objective evidence in support of his claim and proof linking the damages to the alleged discrimination. Papas v. U.S. Postal Serv., EEOC Appeal No. 01930547 (Mar. 17, 1994); Mims v. Dep't of the Navy, EEOC Appeal No. 01933956 (Nov. 23, 1993).

On appeal, Complainant alleges that the AJ erred in not accounting for his harm of back pain and a shooting pain down his legs. With regards to Complainant's back pain, we find that the evidence does not support that Complainant's back pain was caused by AC's discriminatory act of issuing a memo on July 23, 2013. We note that Complainant did not testify that he suffered from any back pain, and Complainant's wife stated that the back pain began four months prior to the hearing. HT at pg. 196. We are not persuaded that Complainant has shown that the discrimination, which occurred in July 2013, is the cause of his back pain almost two years later. Additionally, Complainant's wife did not specify when the leg pain started, and Complainant did not testify that he suffered from leg pain. As such, we find that the evidence does not establish that the discrimination caused Complainant's leg pain.

We also find that substantial evidence supports the AJ's determination that other factors caused Complainant's harm. Complainant's wife testified that Complainant was frustrated because he felt "stuck" at his job when he did not get other jobs that he applied for; and that during the summer of 2013, Complainant endured a high volume of work, which was stressful. HT at pgs. 191-192, 195-196. Complainant's wife also stated that she questioned Complainant if there was "anybody else" in his life when they had marital issues during the relevant period. Additionally, Complainant's wife responded affirmatively when asked if the stress of filing Complainant's EEO complaint affected their relationship. HT at pg. 199. We note that compensatory damages are not available for stress from pursuing an EEO complaint. See Appleby v. Dep't of the Army, EEOC Appeal No. 01933897 (Mar. 4, 1994).

While the AJ did not specify the duration of Complainant's harm, even considering that the duration of his harm was 25 months, we find that the \$15,000 award is consistent with prior Commission decisions. For example, Complainant's harm is similar to the complainant's harm in Complainant v. Dep't of the Treasury, EEOC Appeal No. 0120123017 (Apr. 24, 2015). The complainant suffered from embarrassment, hurt feelings, headaches, sleep issues, stress, anxiety, mood and behavioral changes, and a fear of losing her job for over two years. Further, like Complainant, there were additional causes of her harm, and the Commission awarded the complainant \$10,000 in non-pecuniary compensatory damages. See also Riedel v. United States Postal Serv., Appeal No. 01964606 (Oct. 16, 1998) (affirming an AJ's award of \$10,000 to a complainant who, due to the agency's discriminatory actions, developed an aversion to utilizing the postal service; suffered from depression, emotional distress and mental anguish; and gained weight); and Mike G. v. Dep't of Agriculture, EEOC Appeal No. 0120152027 (Sept. 8, 2016) (awarding \$10,000 in non-pecuniary damages based on exacerbation of depression, anxiety, and post-traumatic stress disorder; and weight gain, and sleeplessness).

While keeping in mind the need to adjust for inflation, we find that Complainant's award of \$15,000 is consistent with earlier awards of \$10,000. Accordingly, we find that substantial evidence supports the AJ's award of \$15,000 in non-pecuniary compensatory damages.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that substantial evidence in the record supports the AJ's award of \$15,000 in non-pecuniary compensatory damages and AFFIRM the Agency's final order fully adopting the AJ's decision.

ORDER

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

1. Within sixty (60) days of the date this decision is issued, pay Complainant \$15,000 in non-pecuniary compensatory damages.
2. Within sixty (60) days of the date this decision is issued, pay Complainant reasonable costs, subject to Complainant submitting to the Agency acceptable documentation of his costs for copying, postage, parking, and other recoverable costs.
3. Within ninety (90) days of the date this decision is issued, provide no less than four (4) hours of appropriate in-person or interactive EEO training to AC. The training shall emphasize AC's obligation not to harass employees; and his obligation not to retaliate, either actively or passively, against employees who exercise their rights to file EEO complaints and engage in protected EEO activity.
4. Within sixty (60) days of the date this decision is issued, consider taking appropriate disciplinary action against AC. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If AC has left the Agency's employ, the Agency shall furnish documentation of his departure date.
5. Immediately post a notice in accordance with the paragraph below.

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 payment of compensatory damages to Complainant, and other evidence showing that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Pacific Human Resources Division Office in Okinawa, Japan 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)

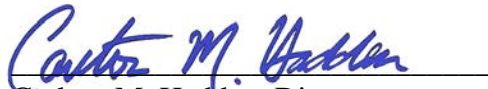
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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:

A handwritten signature in blue ink that reads "Carlton M. Hadden". The signature is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

May 31, 2019

Date