



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

████████████████████
Jackqueline G.,¹
Complainant,

v.

Loretta E. Lynch,
Attorney General,
Department of Justice
(Federal Bureau of Investigation),
Agency.

Appeal No. 0720160022

Hearing No. 480-2014-00025X

Agency No. FBI-2013-00067

DECISION

Following its July 22, 2016 final order, the Agency filed an appeal with the Commission. On appeal, the Agency requests that the Commission affirm its rejection of the relief ordered by an Equal Employment Opportunity Commission Administrative Judge's (AJ) following a finding of 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 finding discrimination in retaliation for prior protected EEO activity and **MODIFIES** the Agency's final order regarding remedial actions.

BACKGROUND

The record indicates that Complainant, an Intelligence Analyst, GS-13, at the Agency's Las Vegas Division at Headquarters City office in Las Vegas, Nevada filed her complaint on January 12, 2013, alleging discrimination in reprisal for prior EEO activity (involving Title VII issues) when on October 12, 2012, she received a "poor" rating on her annual Performance Appraisal Report (PAR) and on January 24, 2013, her Alternative Work Schedule

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.

(AWS) was rescinded.² Under her AWS, Complainant worked four days per week (Tuesday – Friday), ten hours per day.

At the conclusion of the investigation, Complainant requested a hearing and the AJ held a hearing on May 14 and 15, 2015, and on June 11, 2015. On April 8, 2016, the AJ issued a decision finding that Complainant established that the Agency subjected her to unlawful discrimination in reprisal for prior EEO activity as alleged. In order to make Complainant whole, the AJ ordered the following remedies:

1. The Agency shall monetarily compensate Complainant for all Monday leave that she had to take spanning the date of the AWS rescission until she completed her Master's program. [L]ost pay and benefits are as follows per case. Such make whole relief, shall be remunerated by the Agency within 45 calendar days of this Decision being final.
2. Prejudgment interest shall also be paid on lost back-pay and benefits, at the annual percentage rate or rates established by the U.S. Secretary of the Treasury under 26 U.S.C. 6621(a), and 5 C.F.R. 550.806(d) and (e). Interest shall be paid from the dates Complainant was eligible or entitled to such additional compensation to the date that the monetary amount is paid by the Agency. (See, EEO-MD-110, Section 9-19). Also, interest on compensatory damages, begins to accrue on the date that this decision becomes final.
3. Within 45 calendar days from the date this Decision becomes final, the Agency shall provide Complainant with a detailed statement of the Agency's calculations regarding Complainant's loss back-pay, other applicable loss employment benefits and expenses, and interest.
4. Compensatory Damages: The Agency shall pay Complainant nonpecuniary damages in the amount of \$65,000.00 and pecuniary damages in the amount of \$1,073.10.
5. Attorney's fees and costs: Complainant shall file her fee petition by April 22, 2016 and the Agency shall file its responsive brief by April 29, 2016.
6. Training and Discipline:
 - (a) Within 45 calendar days from the date this Decision becomes final, the Agency shall take appropriate action against [two named responsible officials] for discriminating against Complainant, and train them as to the requirements of Title VII and its duties towards its employees who have engaged in EEO protected activity. Such training shall be at least two hours in duration.

² The AJ noted that although Complainant also alleged discrimination based on sex (female) in her complaint, she withdrew this basis during her pre-hearing conference report.

- (b) Within 45 calendar days from the date this Decision becomes final, the Agency shall inform all Headquarters City Managers and Supervisors, including [a named responsible official], in writing, that any reprisal action due to protected EEO activity, including complaints in other forums that implicate discrimination allegations can result in disciplinary action, including but not limited to suspension, demotion, or termination.

- (c) Posting Order: Within 45 calendar days from the date this Decision becomes final, the Agency is ordered to post at its Headquarters City locations where Complainant has worked a notice that advises employees of the following: (i) An EEOC Administrative Judge found that illegal reprisal action occurred at the Agency's Headquarters City facility, arising from an employee's discrimination allegations; (ii) The Agency was ordered to pay the employee back pay and benefits and compensatory damages as well as conduct EEO training for the responsible official and other supervisors and managers regarding anti-reprisal obligations, and; (iii) The Headquarters City facility will ensure that managers and supervisors will abide by all federal equal opportunity laws and will not retaliate against employees who oppose discrimination and/or participate in or file EEO complaints.

On April 22, 2016, Complainant, via her attorney, filed her petition requesting \$142,058.48 in attorney's fees and costs, representing \$136,000 in attorney's fees (the sum of 272 hours of attorney work at a rate of \$500 per hour), and \$6,058.48 in attorney's litigation costs. On April 29, 2016, the Agency filed its opposition to the petition. After a review of the documents submitted by the parties, on June 13, 2016, the AJ issued an order awarding Complainant \$81,600.00 in attorney's fees and \$6,058.48 in costs, totaling \$87,658.48. On June 15, 2016, Complainant's attorney submitted his letter asking the Agency to accept the AJ's April 8, 2016 decision and her corrective action contained therein.

On July 22, 2016, the Agency issued its final order and simultaneously filed its appeal before us. Therein, the Agency agreed with the AJ's finding of discrimination, but partially disagreed with her corrective actions. Specifically, the Agency stated that: Complainant should be awarded restoration of all her Monday leave at issue and not be compensated monetarily since she did not claim that she was denied compensation for leave taken on Mondays at issue; her nonpecuniary damages award should be \$45,000.00; she had no lost pay or income as a result of the Agency's retaliatory actions and thus, she was not entitled to backpay or benefits or interest or pre-judgment interest; and the AJ improperly ordered the Agency issue individual notices to inform "all Headquarters City Managers and Supervisors" in writing that any reprisal action due to protected EEO activity could result in disciplinary action, described under the AJ's order 6(b). The Agency does not dispute the AJ's awarding of \$81,600.00 in Complainant's attorney's fees. As to Complainant's attorney's costs, the Agency stated that Complainant's interest payment on a loan she incurred in order to pay her attorney's fees should be deducted from attorney's costs. Complainant did not file an appeal from the Agency's final order and did not oppose the Agency's appeal.

ANALYSIS AND FINDINGS

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 EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

In this case, the Agency agrees with the AJ's finding of discrimination when on October 12, 2012, Complainant received a poor rating on her PAR and on January 24, 2013, her AWS was rescinded. Thus, we need not discuss the AJ's finding of discrimination. Once discrimination is found, Complainant is entitled to “make whole” relief or that relief which places her as near as possible to the position she would have occupied but for the discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975).

Leave

The AJ awarded Complainant monetarily for all Monday leave that she had to take spanning the date of the AWS rescission until she completed her Master's program. The AJ determined that Complainant presented credible testimony that she had to take leave on the Mondays at issue she would have had off under her rescinded AWS. Although the Agency argues that Complainant did not need to take leave for her Master's program on those Mondays, we find substantial evidence supports the AJ's finding in this regard. We note that but for the discrimination, Complainant would not have been working on the Mondays in question. We do agree with the Agency, however, that to allow monetary compensation for leave already taken would amount to an impermissible double recovery. Therefore, we find that Complainant should be awarded restoration of her Monday leave, annual or sick, at issue and not monetary compensation for that leave.

Lost Pay and Benefits, including Backpay, Interest, and Prejudgment Interest

We note that despite the AJ's award of backpay, interest, and prejudgment interest, the AJ specifically found that other than taking Monday leave, “Complainant did not, otherwise, demonstrate loss of income or additional compensable benefits attributable to the reprisal.” Thus, we find that the AJ's awarding Complainant backpay and benefits other than for Monday leave (and the AJ's noting the date to start calculation of interest on compensatory damages), was improper.

Compensatory Damages

We note that damage awards for emotional harm are difficult to determine and that there are no definitive rules governing the amount to be awarded in given cases. A proper award must meet two goals: that it not be “monstrously excessive” standing alone, and that it be consistent with awards made in similar cases. See Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989). Section 102(a) of the 1991 Civil Rights Act authorizes an award of compensatory damages for all post-act pecuniary losses, and for nonpecuniary losses, such as, but not limited to, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health.

To receive an award of compensatory damages, Complainant must demonstrate that she has been harmed as a result of the Agency’s discriminatory action; the extent, nature and severity of the harm; and the duration or expected duration of the harm. Complainant v. Department of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), request for reconsideration denied, EEOC Request No. 05940927 (December 8, 1995); EEOC’s Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 at 11-12, 14 (July 14, 1992) (“Guidance”). Complainant is required to provide objective evidence that will allow an agency to assess the merits of her request for damages. See Complainant v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993). Furthermore, the award should take into account the severity and duration of the harm. Complainant v. Department of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995). In determining compensatory damages, the Commission strives to make damage awards for emotional harm consistent with awards in similar cases.

In this case, the AJ awarded Complainant \$65,000.00 in nonpecuniary, compensatory damages, finding that Complainant presented credible testimony and the evidence, including medical documents, to establish her emotional harm and mental anguish, including stress, anxiety, nervousness, fear for her economic security through loss of employment, and increased intensity and frequency of migraines which caused temporary vision and speech loss and numbness in her hands and tongue. The AJ also found that the evidence also showed that: Complainant experienced loss of enjoyment of life, withdrew from her family and friends, lost motivation to get out of bed, pay her bills and engage in her hobbies; she lost her work related social connections when coworkers were fearful of being associated with her if they spoke to her; and she suffered emotionally and physically due to the Agency’s discriminatory conduct.

Based on the evidence of the record, we find that the AJ’s award of \$65,000.00 is proper and not monstrously excessive. See, e.g., Complainant v. Social Security Admin., EEOC Appeal No. 0720100014 (April 27, 2012) (\$65,000.00 in nonpecuniary, compensatory damages awarded when complainant testified that she incurred sleeplessness, concern for job safety, and muscular pain and anxiety/depression as a result of the agency’s actions) (citing Complainant v. United Postal Serv., EEOC Appeal No. 01A14246 (June 20, 2002) (\$65,000.00 in nonpecuniary, compensatory damages awarded when complainant stated that she suffered

fatigue, insomnia, marital strain, anxiety, loss of self-esteem, depression, and withdrawal due to harassment)); Complainant v. United Postal Serv., EEOC Appeal No. 0720150020 (May 6, 2016) (\$70,000.00 in nonpecuniary, compensatory damages awarded when complainant testified she experienced anxiety attacks and worsening depression, headaches, insomnia, light headedness and dizziness, social impairment due to harassment).

The AJ awarded \$1,073.10 in pecuniary damages for Complainant's medical expenses. The parties do not dispute \$1,073.10 in Complainant's pecuniary, compensatory damages; thus, we need not discuss the pecuniary damage award.

Attorney's Fees and Costs

The parties do not dispute the AJ's awarding of \$81,600.00 in Complainant's attorney's fees. Thus, we need not discuss this. The AJ awarded \$6,058.48 in Complainant's attorney's costs. In her petition for her attorney's fees and costs, Complainant sought \$6,058.48 for her attorney's costs which consisted of \$2,016.30 for transcript deposition costs, \$1,637.00 for the attorney's travel costs, \$47.18 for the attorney's mailing costs, and \$2,358.00 for her interest payment on the loan she took out to pay her attorney's fees at issue.³ After a review of the record, we find that Complainant is not entitled to \$2,358.00 for her attorney's costs. We find that Complainant had the opportunity to request the interest payment at issue for pecuniary, compensatory damages from the AJ. Complainant failed to do so and makes no such argument on appeal. We find that Complainant is entitled to \$3,700.48 (which includes \$2,016.30 for transcript deposition costs, \$1,637.00 for the attorney's travel costs, and \$47.18 for the attorney's mailing costs) for her attorney's costs.

Training and Discipline

We find the AJ's order concerning training and discipline was proper. Furthermore, we find that the AJ properly ordered the Agency to "inform all Headquarters City Managers and Supervisors, including [a named responsible official], in writing, that any reprisal action due to protected EEO activity, including complaints in other forums that implicate discrimination allegations can result in disciplinary action, including but not limited to suspension, demotion, or termination." The Agency argues that the "individual notices" requirement is improper. We find that the AJ did not mandate individual notices. For instance, a memorandum to all Headquarter City Managers and Supervisors (including the named responsible official) would satisfy this order. Under the circumstances of this case, this requirement that Agency management in the relevant office be informed of EEO law is not an undue burden on the Agency.

³ As the Agency notes on appeal, the AJ mistakenly indicated Complainant sought \$606.69, instead of \$2,358.00, for her interest payment at issue.

CONCLUSION

After a review of the record in its entirety, including consideration of all statements submitted on appeal, we AFFIRM the Agency's final order finding discrimination in retaliation for prior protected EEO activity and MODIFY the Agency's final order regarding remedial actions. The Agency shall comply with the Order herein.

ORDER

The Agency shall take the following actions if it has not already done so:

- 1 The Agency, within 30 calendar days of the date this decision is issued, shall restore Complainant for all Monday leave that she had to take spanning the date of the AWS rescission until she completed her Master's program.
- 2 The Agency, within 30 calendar days of the date this decision is issued, shall pay Complainant \$65,000.00 in nonpecuniary, compensatory damages and \$1,073.10 for pecuniary, compensatory damages.
- 3 The Agency, within 30 calendar days of the date this decision is issued, shall pay Complainant \$81,600.00 for her attorney's fees and \$3,700.48 for her attorney's costs.
4. The Agency, within 30 calendar days of the date this decision is issued, shall: (i) take appropriate action against the two responsible officials named by the AJ found to have discriminated against Complainant, and train them, at least two hours in duration, as to the requirements of Title VII and its duties towards its employees who have engaged in EEO protected activity (if no action is taken, the Agency shall supply reasons for that determination); and (ii) inform all managers and supervisors, including a responsible official named by the AJ, at U.S. Department of Justice, Federal Bureau of Investigation, Las Vegas Division at Headquarters City office in Las Vegas, Nevada, in writing, that any reprisal action due to protected EEO activity, including complaints in other forums that implicate discrimination allegations, can result in disciplinary action, including but not limited to suspension, demotion, or termination.

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 all of the corrective action has been implemented.

POSTING ORDER (G1016)

The Agency is ordered to post at its Las Vegas Division at Headquarters City office in Las Vegas, Nevada facility 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 at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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 (M0416)

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 or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. 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. The requests 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 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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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:

A handwritten signature in black ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

January 11, 2017

Date