



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

[REDACTED]  
Ileana H.,<sup>1</sup>  
Complainant,

v.

Jeff B. Sessions,  
Attorney General,  
Department of Justice  
(Federal Bureau of Investigation),  
Agency.

Appeal No. 0720170016

Hearing No. 420-2013-00064X

Agency No. FBI-2011-00261

**DECISION**

The Commission accepts the Agency's timely appeal following its November 8, 2016, final order. On appeal, the Agency requests that the Commission affirm its rejection of part of an Equal Employment Opportunity Commission Administrative Judge's (AJ) determination of relief 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 reprisal for prior protected EEO activity and **MODIFIES** the Agency's final order regarding compensatory damages.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as an Investigative Operations Analyst at the Agency's Montgomery Resident Agency in Montgomery, Alabama. In September 2010, Complainant filed a formal EEO complaint of discrimination alleging race discrimination, reprisal, and a hostile work environment based on events occurring over a one-year period from December 2009 through December 2010. Complainant identified her former supervisor (S1-1) and her then-supervisor (S1-2) as the responsible management officials.

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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.

S1-1 subsequently retired in December 2010. In March 2011, the EEO Investigator interviewed Complainant, her co-worker (CW-1), and S1-1. After her interview, CW-1 called S1-1 and self-reported allegations of misconduct from 10 years earlier that also implicated Complainant. The allegations included claims that CW-1 and Complainant looked through a former Supervisory Senior Resident Agent's desk and briefcase and planted a recorder in or near her office.

Both CW-1 and S1-1 advised the EEO Investigator of the allegations. The EEO Investigator informed his supervisor, who directed him to draft an electronic communication regarding the matter. The EEO Investigator drafted the electronic communication regarding Complainant's alleged misconduct and forwarded it to the Acting Assistant Director of the Office of Equal Employment Opportunity Affairs. The matter was then forwarded to the Agency's Inspection Division.

In June 2011, the Agency's Inspection Division initiated an internal investigation into the allegations that Complainant had taken documents from the former Supervisory Senior Resident Agent's briefcase and placed a recording device either in or near her office in violation of several Agency policies. In February 2012, the matter was referred to the Agency's Office of Professional Responsibility. The Office of Professional Responsibility subsequently concluded that the preponderance of the evidence established that Complainant had violated several Agency rules and policies including Lack of Candor/Lying – Under Oath.

On February 23, 2012, the Section Chief, Internal Security Section, Security Division, issued Complainant a letter informing her that her "Top Secret" security clearance had been suspended. As a result, Complainant was not allowed to access Agency space, could not fulfill the duties and responsibilities of her position, and could not represent herself as an employee of the Agency while her security clearance was suspended. On February 24, 2012, the Section Chief, Employee Services Section, Human Resources Division, issued Complainant a letter advising her that she had been suspended indefinitely from duty and pay as a result of her security clearance suspension.

On August 19, 2011, Complainant filed a formal complaint alleging that the Agency discriminated against her in reprisal for prior protected EEO activity when allegations of misconduct were made against her, thereby resulting in an internal investigation being initiated on June 8, 2011, and then her indefinite suspension on February 24, 2012.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The AJ held a hearing on April 4 – 6, 2016, and issued a decision on August 22, 2016.

In her decision, the AJ determined that the Agency had articulated legitimate, non-retaliatory reasons for Complainant's suspension from duty and pay. The suspension was precipitated by

the Security Division's suspension of Complainant's security clearance in connection with the Office of Professional Responsibility's referral. However, the AJ determined the evidence demonstrated that both S1-1 and CW-1 were motivated by retaliation when they initially reported the 1999 allegations during the March 2011 EEO investigation. With respect to CW-1's retaliatory motive, the AJ noted that the allegations were over a decade old when she divulged them and she reported them subsequent to her March 2011 interview with the EEO Investigator. At the hearing, CW-1 testified that she recalled the 1999 allegations based on Complainant "filing falsely racial discrimination when there was none shown" and that she "felt like [she] needed to self-report it." The AJ concluded that the suspicious timing of CW-1's reporting of the allegations after the EEO interview, her reference to "false" claims of race discrimination, and lack of any other reason why she was motivated to report 10-year old allegations combined to demonstrate that CW-1 was motivated by reprisal when she reported the allegations.

Regarding S1-1's retaliatory motivation, S1-1 testified that she reported CW-1's allegations to the EEO Investigator because she wanted him to "have all the information that [she] had on the case, besides thinking that this was a frivolous lawsuit with no merit" and that she believed that Complainant was a "security risk." Thus, the AJ determined that S1-1, like CW-1, cited Complainant's "frivolous" EEO claims in explaining her motivation for reporting the allegations to the EEO Investigator. The AJ concluded that the overreaching nature of S1-1's testimony and her clear disdain for what she deemed Complainant's "frivolous" EEO claims demonstrated that S1-1 was motivated by retaliation when she reported the allegations.

The AJ found that, in contrast to S1-1 and CW-1, there was no evidence that the EEO Investigator or any official in the Office of Equal Employment Opportunity Affairs were motivated by retaliatory animus in forwarding the allegations to the Agency's Inspection Division. The AJ determined that those officials were simply following the required Agency policies. Finally, the AJ concluded that there was no evidence that Agency officials in the Inspection Division or Office of Professional Responsibility were motivated by retaliation in their handling of the allegations.

The AJ found that Complainant's suspension from duty and pay was motivated by both lawful and unlawful factors. The AJ determined that, under a mixed-motive analysis, the Agency was unable to show that it would have taken the same actions without the retaliatory factor. More specifically, without the retaliatory reporting of the over-a-decade-old allegations, the Agency most likely never would have known about them. Accordingly, the AJ found that Complainant had shown by preponderant evidence that she was retaliated against as alleged.

Turning to relief, the AJ ordered the Agency to pay Complainant back pay; expunge the suspension from all personnel and Agency-associated records; pay Complainant \$75,000.00 in non-pecuniary compensatory damages; provide training to all employees in the Montgomery Resident Agency; and to post a notice.

On November 8, 2016, the Agency issued a final order. In the final order, the Agency accepted the AJ's finding of reprisal and agreed to implement the AJ's order of back pay; attorney's fees and costs; EEO training for Agency officials; and expungement of the suspension. The Agency, however, did not agree to implement AJ's non-pecuniary compensatory damages award of \$75,000.00. Instead, the Agency argued that an award of \$20,000.00 was more appropriate. The Agency simultaneously filed the instant appeal.

### CONTENTIONS ON APPEAL

On appeal, the Agency contends that the AJ erred in awarding Complainant \$75,000.00 in compensatory damages. The Agency argues that there are no statements in the record from friends, co-workers, family members or health care professionals regarding the effects of the retaliation on Complainant. The Agency claims that Complainant failed to demonstrate that she was harmed by the Agency's retaliatory actions, or to provide specific evidence regarding the extent, nature, severity, and duration of the harm which affects the amount of compensatory damages to which she is entitled. The Agency contends that the cases cited by the AJ to support her award of non-pecuniary compensatory damages are clearly distinguishable from the instant case in that the cases involved a high level of proven harm and significant evidence to support the claim of harm. The Agency argues that cases more closely analogous to Complainant's case awarded \$20,000.00 in non-pecuniary compensatory damages. Accordingly, the Agency requests that the Commission affirm its final order reducing the AJ's compensatory damages award.

In response, Complainant argues that she has been completely decimated by the deliberate and illegal acts of reprisal by the Agency. Complainant notes that the Agency has delayed granting her the remedies ordered by the AJ and accepted in the Agency's final order. Complainant requests that the Commission sanction the Agency for its delay by assessing a penalty of \$100.00 per day for any further delays and award her additional attorney's fees and costs.

### 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. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether 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. See 29 C.F.R. § 1614.405(a).

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 for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

### ANALYSIS AND FINDINGS

At the outset, the Commission notes that it has the discretion to review only those issues specifically raised in an appeal. EEO MD-110 at 9-10. Neither party specifically challenges the AJ's finding of reprisal, or the ordered remedies except for the amount of the AJ's non-pecuniary compensatory damages award. The Agency's final order accepted the AJ's finding of reprisal-based discrimination; however, its appellate brief questioned the finding of liability. If the Agency wished to challenge the AJ's liability finding, it should not have implemented the AJ's decision finding reprisal in its final order. As the final order only disputed the amount of non-pecuniary compensatory damages awarded, this decision will only address that matter. Therefore, the Commission declines to address the Agency's arguments regarding its liability.

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, 119 S.Ct. 1906 (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).

#### *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. 915.302 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 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 her 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.

Statements from others including family members, friends, health care providers, and other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. Id. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

Here, the AJ awarded Complainant \$75,000.00 in non-pecuniary compensatory damages finding that Complainant presented credible testimony establishing that she experienced fear for her and her family's economic security through loss of employment, mental anguish, stomach disorders, emotional distress, and stress because of the Agency's retaliatory conduct. The Agency disagreed and argued that Complainant was only entitled to \$20,000.00 based on its belief that Complainant failed to provide sufficient evidence regarding the extent, nature, severity, and duration of the harm.

Based on the record evidence, the Commission finds that the AJ properly determined that Complainant suffered harm because of the Agency's retaliatory conduct, and finds that Complainant has provided sufficient evidence to justify the \$75,000.00 awarded by the AJ in this case. See, e.g., Banks v. Social Sec. Admin., EEOC Appeal No. 0720100014 (Apr. 27, 2012) (\$65,000.00 in non-pecuniary, compensatory damages awarded when complainant testified that she incurred sleeplessness, concern for job safety, muscular pain, and anxiety/depression because of the agency's actions); Hames v. U.S. Postal Serv., EEOC Appeal No. 07A20042 (June 11, 2003) (complainant awarded \$75,000.00 where complainant experienced severe emotional harm, mental anguish, loss of enjoyment of life, anxiety, depression, and relationship strains with his family and friends); Kathleen P. v. Dep't of Homeland Sec., EEOC Appeal No. 0720150036 (Sept. 26, 2016) (\$75,000 awarded where complainant experienced emotional distress, stress, and emotional disturbance over losing her livelihood). The Commission finds that this amount takes into account the severity of the harm suffered, and is consistent with prior Commission precedent. Finally, the Commission finds

this award is not “monstrously excessive” standing alone, is not the product of passion or prejudice, and is consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (Apr. 15, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

Finally, the Commission will address Complainant’s arguments regarding the Agency’s implementation of the relief accepted in the final order. Complainant filed correspondence with the Commission requesting that the Commission sanction the Agency for its delay in implementing the relief it accepted in the final order. The Agency responded stating that it had held implementation of the relief in abeyance pending the Commission’s decision as it would be questioning its liability before the Commission. As discussed above, if the Agency wished to challenge the AJ’s finding of reprisal, it should not have implemented the AJ’s decision on liability. Nonetheless, the Commission declines to issue sanctions against the Agency for its delay in fully implementing the AJ’s ordered relief, which it accepted. Instead, the Commission orders the Agency to take the remedial action previously ordered by the AJ and to submit a report of compliance as instructed below.

### CONCLUSION

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

### ORDER

Within **sixty (60) calendar days** of the date this decision is issued, the Agency is ordered to take the following remedial action to the extent that it has not already done so:

1. Determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount. Complainant may petition for clarification or enforcement of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled “Implementation of the Commission's Decision.”
2. Expunge Complainant’s suspension from duty and pay from all personnel and associated Agency records.
3. Pay Complainant \$75,000.00 in non-pecuniary compensatory damages.

4. Pay \$65,013.00 in attorney's fees and \$2,869.25 in costs.
5. Provide at least eight (8) hours of training to all employees in the Agency's Montgomery Resident Agency, Mobile Division, regarding their responsibilities under EEO laws particularly with respect to reprisal and Title VII.
6. Consider taking appropriate disciplinary action against the responsible management officials. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. 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 the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure dates.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

#### POSTING ORDER (G1016)

The Agency is ordered to post at its Montgomery Resident Agency Office in Montgomery, Alabama 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.

#### ATTORNEYS FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within **thirty (30) calendar days** of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.



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:



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Carlton M. Hadden, Director  
Office of Federal Operations

April 21, 2017

Date