



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

[REDACTED]
Ricardo K.,
Complainant,

v.

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

Appeal No. 0720170030

Hearing No. 460-2014-00045X

Agency No. BOP-2013-0610

DECISION

The Equal Employment Opportunity Commission (EEOC or Commission) accepts the Agency's timely appeal following its May 18, 2017, 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final order regarding compensatory damages.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Facility Manager at the Federal Penitentiary facility in Bryan, Texas. On April 29, 2013, Complainant filed a formal EEO complaint in which he alleged that from April 15 through April 24, 2013, several senior management officials subjected him to a hostile work environment because of his race (Caucasian), sex (male), and disability (hearing loss). Specifically, Complainant alleged that he was subjected to harassment in the form of jokes, comments, and ridicule with regard to his hearing impairment. Complainant identified the Warden, the Unit Manager in his capacity as

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.

Acting Assistant Warden, the Supervisor of Education, and the Human Resources Manager as his harassers.

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 EEOC AJ. Complainant timely requested a hearing. The AJ held a hearing on October 4, 2016, and issued a decision on April 6, 2017. During the hearing, the AJ granted the Agency's motion to dismiss Complainant's claims of race and sex discrimination after Complainant acknowledged that no comments were made to him regarding his race or sex. AJ Decision, pp. 10-11.

The AJ found that the evidence submitted by Complainant at the hearing supported a finding of hostile work environment on the basis of disability. She determined that the responsible management officials were aware of his hearing impairment, and that Complainant was repeatedly subjected to jokes and comments about that impairment by the Warden and several department heads. The AJ noted in particular that the Warden not only condoned the discriminatory behavior but actively participated in it. AJ Decision, pp. 11-13. The AJ also found that other department heads stopped speaking to Complainant after he filed his EEO complaint, and that the Warden tried to get Complainant to withdraw his complaint.²

The AJ ordered the following as part of Complainant's relief:

1. The Agency shall compensate Complainant non-pecuniary damages (mental anguish, pain and suffering, etc.) in the amount of \$75,000 within sixty (60) calendar days of the date on which this decision becomes final;
2. The Agency shall calculate and compensate Complainant all interest on the non-pecuniary damages which he is awarded accruing at the maximum legal rate from April 27, 2013 through the date that the Agency pays all the damages awarded; ...

AJ Decision, p. 23.³ In taking final action, the Agency adopted the AJ's finding of discriminatory harassment on the basis of disability. Memorandum Explaining the Final Order (MEFO), pp. 5-8. As explained more fully below, the Agency contests the AJ's findings with respect to non-pecuniary compensatory damages and interest thereon.

CONTENTIONS ON APPEAL

With regard to the AJ's decision to award Complainant \$75,000 in non-pecuniary compensatory damages, the Agency contends that the award was excessive in light of comparable cases

² We note that Complainant did not claim reprisal for protected EEO activity as a basis of discrimination in his complaint.

³ Other elements of relief included: restoration of annual and sick leave; posting of notice, training for all wardens, associate wardens, and department heads, including for anyone acting in those positions. AJ Decision, p. 23. The Agency does not contest any of these relief elements.

involving similar harm for a similar length of time, and that the AJ harbored a prejudice against the Warden who was named in the complaint. According to the Agency, the cases cited by the AJ in support of the \$75,000 award involved employees who were unable to return to work or perform comparable jobs due to the discriminatory environment. The Agency also pointed out that the length of time that the harassing conduct had occurred in the cases cited by the AJ was markedly longer than the period established in the instant case. It further contends that given the type, extent, and duration of the harm suffered by Complainant, a more reasonable non-pecuniary award would fall between \$30,000 and \$35,000 but for the aggravating factor of senior management's involvement. Ultimately, the Agency maintains that \$45,000 in non-pecuniary damages is appropriate.

On the issue of interest on the non-pecuniary damages award, the Agency contends that the AJ did not cite to any legal authority in support of this provision in her order for relief.

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 EEOC Management Directive 110, Chapter 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 challenges the AJ's finding of discriminatory harassment on the basis of disability or the ordered remedies except for the amount of the AJ's non-pecuniary damages award of \$75,000 and the AJ's order to pay interest on that award accruing from April 27, 2013 to the date that the damages award is paid to Complainant. Accordingly, we will limit the scope of our appellate review to items (1) and (2) set forth in the AJ's order for relief dated April 6, 2017.

When discrimination is found, the Agency must provide the Complainant with a remedy that constitutes full, make-whole relief to restore him as nearly as possible to the position he would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). Pursuant to section 102(a) of

the Civil Rights Act of 1991, a Complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this “make whole” relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

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 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.

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 his 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.

During the hearing, Complainant testified that during that 10-day time frame in April 2013, he had been harassed repeatedly by the Warden and other senior officials because of his hearing loss. Investigative Report (IR) 80-81; Hearing Transcript (HT) 18, 20. He testified that he was shunned by some of the department heads. HT 62-63. At the hearing and in a set of interrogatories to which he responded on June 15, 2014, Complainant stated that he continued to suffer from the effects of the harassment, including emotional distress, anxiety, post-traumatic stress disorder, depression, humiliation, embarrassment. He testified that he had to take personal sick days to alleviate some of the pressure he felt, that he could no longer go out to dinner or to social events, that his fiancée had left him because of his need to move out of the area as a result of the harassment, and that as of the date of the hearing, which took place over three years after the occurrence of the harassment, he was still struggling with the trauma. HT 63, 72, 84-85, 89-90.

The AJ found Complainant to be a credible witness. See AJ's Decision, p. 16 (Complainant "eloquently explained the effect of the harassment he suffered" and "explained that this chain of events was unlike any he had ever experienced previously.") The Agency did not put forward any affidavits, declarations, hearing testimony, or unsworn statements or documents that contradict Complainant's self-assessment of the harm he had suffered as a result of being harassed or which call into question his veracity or credibility as a witness. Accordingly, we see no reason to disturb the AJ's credibility findings insofar as they pertain to Complainant's hearing testimony on his entitlement to damages.

We must now determine whether a \$75,000 non-pecuniary compensatory damages award is justified. To do so, we first consider whether Complainant's testimony is sufficient to support such an award without accompanying statements from family members, friends, coworkers or health care providers. In Ileana H. v. Dept. of Justice – FBI, EEOC Appeal No. 0720170016 (Apr. 21, 2017), the Commission awarded \$75,000 in non-pecuniary damages for harassment notwithstanding that there were no statements in the record from friends, coworkers, family members, or health care professionals. We noted that the employee presented credible testimony that she suffered fear of job loss, emotional stress, and stress-related stomach disorders. Similarly, Complainant's hearing testimony, deemed credible by the AJ, constitutes enough evidence to document the severity and duration of the harm he suffered. Statements from health care providers, family members, friends or coworkers, which undoubtedly would have been helpful, were not necessary to justify the size of award in light of Complainant's hearing testimony.

The Agency also argued that the award should be reduced because Complainant had not shown that he was unable to return to work or perform comparable jobs. Whether or not the employee could return to work was not an issue in the determination of the \$75,000 award in Ileana H. and is likewise not a determining factor here. In addition, the Agency contends that the length of time that the harassment had occurred was not enough to justify an award of \$75,000. While the duration of the discriminatory conduct is a factor in determining the extent of the harm suffered, so too is the duration of the harm itself. In Complainant v. Dept. of the Interior – National Park Service, EEOC Appeal No. 0120131110 (Sept. 18, 2015), we found that an award of \$75,000 for

non-pecuniary compensatory damages was appropriate even though the emotional harm to the employee lasted only seventeen months. Here, the harm suffered by Complainant had lasted over three years, and there were no indications in the record that it had abated. See also, e.g. 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 over a period of several years).

We therefore agree with the AJ that an award of non-pecuniary compensatory damages in the amount of \$75,000 is entirely appropriate under the circumstances presented in this case. This award takes into account the severity of the harm that Complainant suffered, and is consistent with prior Commission precedent. Finally, despite the Agency's protestations to the contrary, 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)).

We now turn to the Agency's contention that the AJ improperly ordered the payment of interest on Complainant's non-pecuniary compensatory damages award. In this regard, the Agency is correct. Section 717(d) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(d), as amended by section 114(2) of the Civil Rights Act of 1991, provides that "the same interest to compensate for delay in payment shall be available [to federal employees] as in cases involving nonpublic parties. The Commission has noted that courts frequently award interest on claims of compensatory damages to make the wronged party whole by compensating the wronged person for being deprived of the money and the use of the money. April v. Dept. of Agriculture, EEOC Appeal No. 01963775 (June 5, 1997). Consequently, the Commission has upheld interest awards because of an Agency's delay in paying proven compensatory damages. Cleland v. Dept. of Veterans Affairs, EEOC Petition Nos. 04A10023 (Nov. 28, 2001). Such interest does not begin to accrue, however, until the Agency actually incurs the underlying liability. Hogeland v. Dept. of Agriculture, EEOC Appeal No. 01976440 (June 14, 1999). Since the amount of the liability is the subject of this appeal, the Agency will not incur liability for interest unless payment of Complainant's non-pecuniary damages award is delayed past the time frame set forth in our order below. See id. As long as the Agency complies with our order to award damages in a timely manner, no interest will accrue on its obligation.

CONCLUSION

After a review of the record in its entirety, including consideration of all statements submitted on appeal, the Commission MODIFIES the Agency's final order regarding remedial action. The Agency shall fully implement the AJ's April 6, 2017 decision and its remedies as slightly modified herein.

ORDER (C0610)

The Agency is ordered to take the following remedial action to the extent that it has not already done so:

1. Within sixty (60) calendar days of the date this decision is issued, issue a check to Complainant in the amount of \$75,000 for non-pecuniary damages.
2. Within sixty (60) calendar days of the date this decision is issued, restore 90 hours of sick leave and 99.5 hours of annual leave to Complainant.
3. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive training to all responsible management officials at the Federal Penitentiary Complex in Bryan, Texas, regarding their responsibilities under EEO laws, particularly with respect to disability discrimination, discriminatory harassment, and retaliation for protected EEO activity.
4. Within sixty (60) calendar days of the date this decision is issued, to the extent that any of the responsible management officials identified in Complaint No. BOP-2013-0610 are still employed at the facility, consider taking appropriate disciplinary action against these 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 (G0617)

To the extent that it has not already done so, the Agency is ordered to post at its Federal Penitentiary Complex in Bryan, Texas 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 is 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).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he 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 (K0617)

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 in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (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 (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:



Carlton M. Hadden, Director
Office of Federal Operations

October 12, 2017

Date