



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

[REDACTED]  
Dalton E.,<sup>1</sup>  
Complainant,

v.

Dr. Benjamin S. Carson, Sr., M.D.,  
Secretary,  
Department of Housing and Urban Development,  
Agency.

Appeal No. 0720170038

Hearing No. 570-2016-00714X

Agency No. HUD-00129-2013

DECISION

Following its September 15, 2017, final order, the Agency filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. §1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) default judgment in favor of Complainant, and 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.* The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. For the following reasons, the Commission REVERSES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an EEO Complaints Division Director, GS-15, at the Agency's facility in Washington, D.C. On December 28, 2013, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of his race (African-American), sex (male), and in reprisal for prior protected EEO activity when:

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

1. Since in or around 2012, Complainant's supervisor, Director, Office of Departmental Equal Employment Opportunity (S1) gave him work outside the normal scope of his duties;
2. Since in or around 2012, S1 excluded him from meetings including, but not limited to, budget meetings;
3. Since in or around 2012, S1 undermined Complainant's ability to manage his program by criticizing him and his staff, having an outside agency conduct a climate assessment, scheduling training without Complainant's input, meeting with Complainant's staff for assignments/caseloads and productivity without Complainant being present, and managing EEO complaints within Complainant's area of responsibility;
4. On or around August 7, 2013, S1 allowed a lower graded detailee to manage Complainant's performance;
5. On or around September 6, 2013, Complainant was denied a request for diversity and inclusion training, but was required to attend an introductory training course on acceptance and dismissal;
6. On September 6, 2013, S1 issued him a letter of counseling for alleged insubordination;
7. On an unspecified date, Complainant was issued a poor performance appraisal which included false and misleading statements;
8. On an unspecified date, Complainant was not selected for the position of Deputy Director under vacancy announcement number HQ-12-MP953342-MS;
9. On March 6, 2014, Complainant was directed to change his job title from Division Director to EEO Manager; and
10. On January 8, 2016, the Agency failed to process his formal complaint.

On December 13, 2013, at the conclusion of the informal counseling stage, Complainant was issued a Notice of Right to File a Formal Complaint. The record shows that Complainant timely filed his formal complaint on December 28, 2013. Complainant subsequently requested a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). On March 2, 2016, the AJ initially assigned to the case ordered the Agency to produce the Report of Investigation (ROI) within 15 days or risk sanctions. When the Agency failed to produce the ROI or otherwise respond to the order, the AJ to whom the case was then assigned issued default judgement against the Agency, dated June 1, 2016.

On August 7, 2017, the AJ issued her decision on liability and relief. By way of remedies, the AJ denied Complainant's request for backpay, frontpay, training expenses, and performance bonuses. The AJ also, however, ordered the Agency to: (1) pay Complainant \$60,000.00 in nonpecuniary, compensatory damages; (2) pay \$16,800.00 in attorney's fees; (3) provide at least four hours of training to all supervisors and managers of the Agency's Office of Departmental Equal Employment Opportunity; and (4) post a Notice regarding the AJ's decision. On appeal, the Agency argues that the AJ erred in issuing default judgment and incorrectly calculated the award of compensatory damages. The Agency also argues that Complainant's attorney's fees statement is unreasonable, and that the Commission lacks authority to impose damages as a sanction for failure to comply with an AJ's orders absent a finding of intentional discrimination.

In his response, Complainant reiterates his contention that he is entitled to frontpay, backpay, performances bonuses, and an increase in the amount of compensatory damages. He also requests that the Commission affirm the AJ's default judgment.

### ANALYSIS AND FINDINGS

#### *The AJ's Imposition of Sanctions*

The Commission notes that Commission regulations and precedent provide AJs with broad discretion in matters relating to the conduct of a hearing, including the authority to issue appropriate sanctions, including a default judgment. See 29 C.F.R. § 1614.109(e); EEO MD-110, at Ch. 7 (Aug. 5, 2015); Matheny v. Dep't of Justice, EEOC Request No. 05A30373 (Apr. 21, 2005). An AJ must distinguish between conduct that does not warrant the imposition of a sanction and conduct which does.

Here, the AJ sanctioned the Agency for its lengthy delay in issuing the report of investigation, and its failure to respond to the order to produce or other attempts at communication. EEOC Regulation 29 C.F.R. § 1614.108(b) requires, in part, that the Agency develop an impartial and appropriate factual record upon which to make findings on the claims raised in the complaint. One purpose of an investigation is to gather facts upon which a reasonable fact finder may draw conclusions as to whether a violation of the discrimination statutes has occurred. Id.; EEO MD-110, at Ch. 6, § IV.B. An investigation must include “a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the Complainant’s group as compared with the treatment of similarly situated employees...and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant.” Id. at § IV.C. Also, an investigator must identify and obtain “all relevant evidence from all sources regardless of how it may affect the outcome.” Id. at § VI.D.

In an attempt to provide an explanation for its failure to timely respond to the AJ's order to produce the report of investigation, the Agency states that because, during the period at issue, Complainant held the position of Manager of the Agency's EEO Division, his complaint was processed by the Department of the Treasury in order to avoid a conflict of interest. The Agency contends that, despite Complainant filing his formal complaint on December 28, 2013, it did not become aware that his complaint had been filed until May 6, 2015. The Agency argues that this was the cause of its failure to produce the report of investigation when ordered. We note, however, that the Agency received the AJ's order to produce the investigation on March 15, 2016, more than 180 days after the Agency claims it first became aware that Complainant filed his formal complaint. We also note that the Agency failed to provide any response to the AJ's order or to otherwise respond to telephone inquiries by the AJ. The regulations found at 29 C.F.R. § 1614.108(b) squarely place the responsibility for an accurate, complete investigation, completed within 180 days, upon the Agency. Based on the Agency's failure to develop a complete factual record, the Commission finds that the AJ properly determined that sanctions were appropriate. See Jeremy S. v. Department of Veterans Affairs, EEOC Appeal No. 0120142917 (Feb. 9, 2017).

### *Determination of Sanction*

The Commission's sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Several factors are considered in tailoring a sanction and determining if a particular sanction is warranted: (1) the extent and nature of the non-compliance, and the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice; and (4) the effect on the integrity of the EEO process. Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (Mar. 1, 2007). If a lesser sanction would suffice to deter the conduct and to equitably remedy the opposing party, it may constitute an abuse of discretion to impose a harsher sanction. See Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000).

The Commission concludes that the AJ's sanction of default judgment in favor of Complainant was not an abuse of discretion. Default judgment is an appropriate sanction for the Agency's failure to provide the report of investigation. In other appeals of default judgments issued by AJs for failure to comply with the requirements of the 29 C.F.R. Part 1614 process, the Commission has affirmed the default judgments, in the interest of protecting the integrity of the EEO process. See Complainant v. Dep't of the Air Force, EEOC Appeal No. 0720090009 (June 5, 2015); Royal v. Dep't of Veterans Affairs, *supra*; Reading v. Dep't of Veterans Affairs, EEOC Appeal No. 07A40125 (Oct. 12, 2006); Lomax v. Dep't of Veterans Affairs, EEOC Appeal No. 0720070039 (Oct. 2, 2007), req. for recon. den., EEOC Request No. 0520080115 (Dec. 26, 2007); Elston v. Dep't of Transp., EEOC Appeal No. 07A50019 (Oct. 18, 2005), req. for recon. den., EEOC Request No. 05A60283 (Jan. 5, 2006); Rhinesmith v. Dep't of the Treasury, EEOC Appeal No. 07A10103 (Jan. 28, 2003), req. for recon. den., EEOC Request No. 05A30509 (May 13, 2003).

### *Entitlement to Relief*

Next, despite the Agency's argument on appeal, after deciding to issue default judgment for a complainant, the Commission must exercise its authority to determine if there is evidence that establishes complainant's right to relief. One way to show a right to relief is to establish the elements of a prima facie case. See Royal, EEOC Request No. 0520080052; see also Matheny v. Dep't of Justice, EEOC Request No. 05A30373 (April 21, 2005).

In order to prevail on a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13.

Here, the record reveals that Complainant has established a prima facie case of race discrimination. Specifically, Complainant belongs to a protected class by virtue of being African-American and he alleged that he was subjected to numerous adverse actions by S1, who identifies as White. He also established a prima facie case of sex discrimination with respect to claims (4) and (8), as the lower level detailee he alleged was given authority to manage his work, and was subsequently selected for the Deputy Director position, is female.

Accordingly, the Agency must provide 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 nonpecuniary 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). In so finding, however, we concur with the AJ’s finding that Complainant failed to establish that he is entitled to frontpay, backpay, or performance bonuses. The record shows that Complainant is no longer employed by the Agency. Complainant has not asked for any additional relief beyond frontpay, backpay, and performance bonuses (for which we see no justification) and therefore we shall not grant Complainant any additional relief.

#### *Nonpecuniary, Compensatory Damages*

Nonpecuniary 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: Compensatory and Punitive Damages Available under § 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 nonpecuniary, 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.

Here, the AJ awarded Complainant \$60,000.00 in nonpecuniary, compensatory damages, finding that Complainant established that he suffered both emotional and physical distress as a result of the Agency’s actions. Specifically, the AJ found that the statements provided by Complainant show that he experienced insomnia, migraine headaches, extreme weight gain, diminished self-worth, and that he isolated himself and withdrew from his family and friends. His wife provided affidavit testimony stating that as a result of the Agency’s actions Complainant became depressed and moody, emotionally unavailable to both her and their young children, and that she and Complainant are now separated.

Upon review of the record, the Commission is unpersuaded by the Agency’s arguments on appeal. The Commission finds that an award of \$60,000.00 is appropriate under the circumstances. We find this amount takes into account the severity of the harm suffered, and is consistent with prior Commission precedent. Finally, we find 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 Pasquale D. v Dep’t of Homeland Security (Immigration and Customs Enforcement), EEOC Appeal No. 0120160892 (April 12, 2018) (Complainant awarded \$60,000.00 where Agency discrimination resulted in anxiety attacks, mood swings, nightmares, insomnia, difficulty concentrating, loss of self-esteem, alcohol dependency, weight gain, paranoia, and diminishment of self-worth.); Irvin W. v. Dep’t of State, EEOC Appeal No. 0120141773 (Oct. 28, 2016) (\$60,000.00 awarded where complainant experienced anxiety, irritability, headaches, social withdrawal, and exacerbation of pre-existing conditions); and Complainant v. Department of Transportation, EEOC Appeal No. 0720140022 (Sept. 16, 2015) (\$60,000.00 awarded where Complainant suffered sleeplessness, anxiety, stress, and depression, as a result of the Agency’s discriminatory actions).

*Attorneys' Fees and Costs*

By federal regulation, the agency is required to award attorney's fees for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 29 C.F.R. § 1614.501(e)(1)(H). To determine the proper amount of the fee, a lodestar amount is reached by calculating the numbers of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

The record shows that Complainant submitted a verified statement of attorney's fees, dated May 3, 2017, for the amount of \$18,160.00. Upon review, the AJ concluded that the number of hours charged for legal research on July 6 and 8, 2018, should be reduced from 7.2 hours to 4 hours. The AJ, therefore, determined that Complainant was entitled to \$16,880.00 in attorney's fees (40 hours x \$400/hour fee). We find the hourly rate and number of hours determined by the AJ to be reasonable to be correct. We discern no reason to modify the AJ's award of attorney's fees.

CONCLUSION

We REVERSE the Agency's final order and REMAND the matter to the Agency in accordance with the ORDER herein.

ORDER

To the extent it has not already done so, the Agency shall take the following actions:

1. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$60,000.00 in nonpecuniary, compensatory damages.
2. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$16,880.00 in attorney's fees.
3. Within 90 days of the date this decision is issued, the Agency shall provide at least four hours of training to all supervisors and managers in its Office of Departmental Equal Employment Opportunity regarding the Agency's obligations under EEOC Management Directive 110, Title VII, and 29 C.F.R. Part 1614 Regulations regarding complaint processing.
4. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against the responsible EEO officials still employed by the Agency. The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Commission and specify what, if any, action was taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Washington, D.C. 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 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 (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).

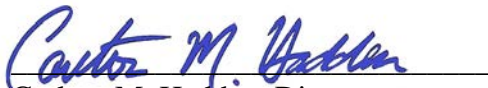
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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:



Carlton M. Hadden, Director  
Office of Federal Operations

November 30, 2018

Date