



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

[REDACTED]

Ira P.,<sup>1</sup>  
Complainant,

v.

Elaine L. Chao,  
Secretary,  
Department of Transportation  
(Federal Aviation Administration),  
Agency.

Appeal No. 0720180007

Hearing No. 410-2015-00222X

Agency No. 2014-25794-FAA-03

**DECISION**

Following its November 14, 2017, final order, the Agency filed a timely 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 the relief ordered by an EEOC Administrative Judge (AJ) pursuant to 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 REVERSES the Agency's final order.

**ISSUES PRESENTED**

The issues presented are: (1) whether substantial evidence in the record supports the AJ's finding that Complainant established that he was subjected to discrimination based on reprisal when he was not selected for a vacancy; and (2) whether the AJ's award of \$65,000 in nonpecuniary compensatory damages was appropriate.

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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.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Air Traffic Control Specialist, AT-2152-DH, at the Agency's Air Traffic Control Tower (ATCT) in Columbus, Georgia. Complainant's first-level supervisor was an Air Traffic Manager (S1), and his second-level supervisor was the Atlanta, Georgia District Manager (S2).

Complainant averred that he had supported two coworkers (C1 and C2) in their EEO complaints as a witness in 2013 as well as alerting management that he believed that S1 had discriminated against C1 based on his race and against C2 based on her sex. C1's EEO complaint resulted in a finding of discrimination against the Agency.

Complainant stated that he wanted to move to a facility closer to his home in Anderson, South Carolina, so he applied for an Employee Requested Reassignment (ERR) to Asheville, North Carolina. When a vacancy opened in Asheville, the applications of Complainant and eight other candidates were forwarded to the selecting official (SO).

In March 2014, which was after he submitted his bid for reassignment, Complainant called and texted S2 about S1's discriminatory treatment of C1 and C2. On April 20, 2014, the Assistant District Manager (S3) came to Columbus to discuss his concerns with Complainant. After meeting with Complainant, S3 debriefed S1 about Complainant's concerns.

Less than 24 hours after S3's meeting with Complainant, S1 gave a reference to SO for Complainant. SO selected two candidates other than Complainant. According to Complainant, he called the SO on April 30, 2014, to ask why he had not been selected. Complainant averred that SO told him that he was not selected because he had received an unfavorable reference from S1. Specifically, Complainant stated that SO told him that Complainant was consistently late to work on the first day of the work week and that he required direct supervision. Complainant denied being consistently late and noted that he had worked for the Agency for 25 years and trained other employees as an on-the-job instructor. The record indicates that Complainant was late to work on one occasion in 2013. SO testified that he did not select Complainant because of the reference from S1 and because Complainant had failed to certify in radar while training in Greer, South Carolina. SO also stated that Complainant did not make a favorable impression when he toured the Asheville facility.

On October 1, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of reprisal for prior protected EEO activity (opposing discriminatory practices and serving as an EEO witness) when on April 30, 2014, he became aware that he was not selected for a promotion/bid to the Asheville, North Carolina ATCT/Terminal Radar Approach Control (TRACON).

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 Administrative Judge (AJ).

Complainant timely requested a hearing and the first AJ assigned to the case (AJ1) held a hearing on November 30, 2016, and February 10, 2017. At the end of the February 10, 2017, hearing, AJ1 stated on the record that she was “going to find in favor of Complainant in this case.” February 10, 2017, Hearing Transcript (HT) at 34.

On April 12, 2017, AJ1 held a hearing on damages. At the beginning of the damages hearing, AJ1 stated on the record that “what I had found in the hearing was in regards to the negative job reference that was given to [Complainant]’s job application, but that was what I had found to be retaliatory, and so the damages portion of the hearing will be related to that claim and that claim only.” April 12, 2017, HT at 4.

At the damages hearing, Complainant testified that after S1 gave him a negative reference, he believed that his reputation was tarnished and that he would never be able to transfer, so he decided to retire early at the age of 50. Complainant’s wife stated that he was very depressed, could not sleep, and withdrew from his family. According to Complainant’s wife, they sold their house and bought a smaller one to ease the financial strain of Complainant’s early retirement. A psychiatrist and a therapist both stated that Complainant reported gaining 30 to 40 pounds, developing insomnia, having decreased energy and feelings of worthlessness, and they both diagnosed Complainant with major depression and post-traumatic stress disorder.

AJ1 retired from the Commission prior to issuing a decision on liability or relief. The case was assigned to a second AJ (AJ2), who simultaneously issued a decision on liability and a decision on relief on September 28, 2017. AJ2 found that Complainant established that he was subjected to discrimination based on reprisal when he was not selected for the Asheville vacancy. AJ2 found that Complainant established a prima facie case of reprisal. Although AJ2 found that the Agency provided legitimate, nondiscriminatory reasons for its actions, AJ2 found that Complainant established that these proffered reasons were pretextual. Specifically, AJ2 noted that the record indicated that Complainant was only late to work on one occasion and that he was an on-the-job instructor, contradicting S1’s statements that Complainant was frequently late to work and required close supervision. Moreover, while SO indicated that he did not select Complainant because of S1’s negative reference and because Complainant failed to certify in radar, one of the two selectees had never certified in radar. As relief, AJ2 ordered the Agency to pay Complainant \$65,000 in nonpecuniary compensatory damages and to post a notice.

The Agency subsequently issued a final order rejecting the relief ordered by AJ2 pursuant to her finding that Complainant proved that the Agency subjected him to discrimination as alleged.

#### CONTENTIONS ON APPEAL

On appeal, the Agency contends that AJ1 verbally ruled that the Agency was liable for the negative job reference but not the nonselection and that AJ2 improperly disregarded this ruling. According to the Agency, AJ2’s decisions on liability and relief were inconsistent with AJ1’s verbal rulings. The Agency also argues that \$65,000 was an excessive award of nonpecuniary compensatory damages.

In response to the Agency's appeal, Complainant contends that AJ2 correctly found that he was subjected to retaliation and that he should be awarded \$300,000 in nonpecuniary compensatory damages.

### 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.

### ANALYSIS AND FINDINGS

As a preliminary matter, we address the Agency's contention that AJ2 was bound by AJ1's statement on the record that she was going to find discrimination with respect to the negative reference but not with respect to the nonselection. However, AJ1 did not issue a bench decision or any decision at all. Therefore, AJ2 was not bound by AJ1's statement on the record. We note that, upon the appointment of an AJ, the AJ assumes "full responsibility for the adjudication of the complaint." 29 C.F.R. § 1614.109(a); see also Kip D. v. Dep't of Homeland Security, EEOC Appeal No. 0120160180 (Aug. 29, 2017) (finding that a newly assigned AJ has the authority to grant summary judgment even when a previous AJ denied a motion for summary judgment). Therefore, AJ2 was responsible for fully reviewing the record, adjudicating the merits of Complainant's complaint, and ordering relevant relief.

#### *Reprisal*

Complainant can establish a prima facie case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Specifically, in a reprisal claim, and in accordance with the burdens set forth in McDonnell Douglas, Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976), and Coffman v. Dep't of Veteran Affairs, EEOC Request No. 05960473 (Nov. 20, 1997), a complainant may establish a prima facie case of reprisal by showing that: (1) he or she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he or she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, complainant must prove, by a preponderance of the evidence, that the agency's explanation is pretextual.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

We find that AJ2's conclusion that Complainant was subjected to discrimination based on reprisal is supported by substantial evidence in the record. Complainant established a prima facie case of reprisal, as S1 gave him a negative reference within 24 hours of learning of Complainant's opposition to allegedly discriminatory practices. The Agency's legitimate, nondiscriminatory reasons for providing the negative reference were Complainant's frequent tardiness and his need for close supervision, and the Agency's legitimate, nondiscriminatory reasons for not selecting him were the negative reference and his failure to certify in radar. We find that the preponderance of the evidence establishes that the legitimate, nondiscriminatory reasons for the negative reference are pretextual because time and attendance records indicate that Complainant was only marked as tardy one time in 2013 and because his on-the-job instructor status indicates that he was responsible for not only his own work but for developing newer employees. We also find that the reasons for not selecting Complainant were pretextual, as the negative reference was pretextual, and one of the two selectees was not certified in radar. Accordingly, we affirm AJ2's decision finding that Complainant was subjected to reprisal.

#### *Compensatory Damages*

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).

To receive an award of compensatory damages, a complainant must demonstrate that he or 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. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsideration denied, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

Compensatory damages may be awarded for the past pecuniary losses, future pecuniary losses, and non-pecuniary losses which are directly or proximately caused by the agency's discriminatory conduct. EEOC Notice No. 915.002 at 8. Objective evidence of compensatory damages can include statements from the complainant concerning his or 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 nonpecuniary losses that are incurred as a result of the discriminatory conduct. Statements from others, including family members, friends, health care providers, 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. 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).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. A complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his or her burden in this regard. 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. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Lawrence, EEOC Appeal No. 01952288.

AJ2 awarded Complainant \$65,000 in nonpecuniary compensatory damages based on his testimony, his wife's testimony, and the medical evidence, which established that Complainant was fearful that his reputation was tarnished, that he withdrew from his family, that he gained weight, that he could not sleep and felt worthless, and that he was diagnosed with depression and post-traumatic stress disorder. Upon review, we find that AJ2's award of compensatory damages is supported by substantial evidence and is consistent with Commission precedent. See Jacqueline G. v. Dep't of Justice, EEOC Appeal No. 0720160022 (Jan. 11, 2017) (awarding \$65,000 for stress, anxiety, worsening migraines, fear for economic security, and loss of enjoyment of life); Banks v. Social Security Administration, EEOC Appeal No. 0720100014 (April 27, 2012) (awarding \$65,000 for sleeplessness, damage to relationships, decreased confidence at work, a loss of self-esteem, concern for job safety, muscle pain, and anxiety and depression).

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final order rejecting the relief ordered by the AJ and REMAND the matter for further processing in accordance with this decision and the ORDER below.

ORDER

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

1. Within sixty (60) calendar days of the date this decision is issued, the Agency shall pay Complainant \$65,000 in nonpecuniary compensatory damages.
2. The Agency shall pay Complainant reasonable attorney's fees and costs in accordance with the statement entitled "Attorney's Fees."
3. Within ninety (90) calendar days of the date this decision is issued, the Agency shall conduct a minimum of eight hours of in-person or interactive EEO training, with a particular focus on retaliation, for the responsible management officials including S1 and SO.
4. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider discipline against the responsible management officials S1 and SO and report its decision to the Compliance Officer referenced herein. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take any disciplinary action, it shall provide its reasons for not imposing discipline. If the responsible Agency employees have left the Agency's employment, the Agency shall furnish documentation of their departure dates.
5. Within thirty (30) calendar days of the date this decision is issued, the Agency shall post a notice in accordance with the statement entitled "Posting Order."

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 evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Columbus, Georgia and Asheville, North Carolina Air Traffic Control Tower facilities 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)

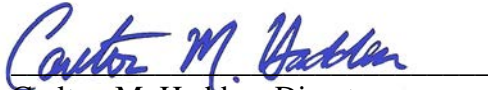
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

December 11, 2018

Date