



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

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Chere S.,<sup>1</sup>  
Complainant,

v.

Emily W. Murphy,  
Administrator,  
General Services Administration,  
Agency.

Appeal No. 0720180012

Hearing Nos. 520-2014-00435X; 520-2014-00466X

Agency Nos. GSA-12-R2-FAS-SJ-17; GSA-13\_R2-Q-0094

DECISION

Following its January 19, 2018, 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 an EEOC Administrative Judge's (AJ) entry of default judgment in favor of Complainant and consequent 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.

ISSUES PRESENTED

Whether the AJ abused her discretion in entering default judgment against the Agency in her decision dated June 30, 2017.

Whether the AJ's award of \$180,000 in non-pecuniary compensatory damages in her decision on remedies dated December 13, 2017 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.

Whether the AJ properly awarded Complainant's Counsel \$31,207.80 in attorney's fees and \$874.50 in costs in her decision on remedies dated December 13, 2017.

### BACKGROUND

Complainant worked as a Procurement Analyst, GS-1102-13, at the Agency's Federal Acquisition Service Center in New York, New York. In a memorandum dated November 8, 2011, the Deputy Director of the Office of Supply Operations, then Complainant's first-line supervisor, notified Complainant that she was proposing to remove Complainant from her position. The reason for the proposed removal was neglect of duty. Specifically, Complainant was detailed to the Agency's Digitization Project in February 2011, and was expected to serve as the lead on that project. According to the proposed removal, the project remained uncompleted as of September 20, 2011, with interns having to be pulled from their training and contractors having to be hired.

Complainant's second-level supervisor, the Director of the Northeast Supply Operations Center, sustained the proposed removal and notified Complainant that she would be removed, effective January 12, 2012. The Director notified her that she could either file a grievance or file an appeal to the Merit Systems Protection Board. On January 25, 2012, Complainant filed a Step-2 grievance on the decision to terminate her. In the grievance, the Union contended that the removal was not carried out in accordance with procedures. In the last sentence of the final paragraph of the grievance, the union stated,

“Remedy is to make the Grievant entirely whole and payment for costs due to employment disruptions and harm and compensatory damages that the Grievant had endured. Alleged is a mixed case with a discriminatory motive.”

After the Agency denied the grievance, the matter went to arbitration. The issue decided by the Arbitrator was whether the Agency violated Article 32 Section 3 of the Collective Bargaining Agreement (CBA) by removing Complainant, ostensibly for neglect of duty, and if so, what would be the appropriate remedy. In a detailed opinion and award dated July 16, 2012, the Arbitrator concluded that the removal was not supported by the weight of the evidence and that the Agency did violate Article 32 Section 3 of the CBA, and in so doing, imposed an unwarranted, unduly harsh, arbitrary, and capricious disciplinary action upon Complainant by terminating her. As an award, the Arbitrator sustained the grievance and ordered that Complainant be reinstated within 72 hours of the date his opinion was issued. The Arbitrator ordered that Complaint recover the full extent of pay, allowances, differentials and other remuneration or reimbursements she would have been entitled to from the date of her removal to the date of her return to employment, plus interest, and less interim earnings. The Arbitrator also stated that he would retain jurisdiction over the grievance for the purpose of determining entitlement to attorney's fees. The Arbitrator did not address the issue of discriminatory motive, and consequently, the arbitration opinion makes no mention of compensatory damages.

In an email dated August 10, 2012, Complainant initially contacted the EEO office in connection with her termination. Complainant stated that she was unlawfully harassed and her reputation ruined when the Director of the Northeast Supply Operations Center ordered her removal. She stated that she had received notice, per the Arbitration decision dated July 16, 2012, that she was removed “with malice,” and that she “suffered as no one could imagine throughout this ordeal.”

On November 19, 2012, Complainant filed an EEO complaint (Agency No. GSA-12-R2-FAS-SJ-17, Hearing No. 520-2014-00435X) (hereinafter designated as “the first complaint”). In the first complaint, Complainant alleged that the Director and the Deputy Director had discriminated against her on the bases of race (African-American), sex (female) and age (41) by terminating her on January 11, 2012. On December 13, 2012, the Agency issued a final decision in which it dismissed the complaint as having been rendered moot by the Arbitrator’s July 2012 opinion and award in her favor.<sup>2</sup> Complainant’s appealed the Agency’s dismissal of the first complaint, and in Complainant v. Gen. Servs. Admin., EEOC Appeal No. 0120132057 (Dec. 6, 2013), we reversed the dismissal and ordered the Agency to continue processing the complaint. In that decision, we noted Complainant’s assertions that she endured pain and suffering as a result of being unemployed for seven months and facing uncertainty about her future. We stated that “a fair reading of Complainant’s statement reflects a claim for compensatory damages. We further noted that since the issue of compensatory damages was not addressed in the grievance, dismissal of the complaint on the ground of mootness was improper. The Agency filed a request for reconsideration, but withdrew its request by letter dated January 22, 2014.

Complainant returned to work as a Program Specialist Coordinator, GS-0301-13. On May 22, 2013, she contacted an EEO counselor concerning additional incidents of alleged discrimination. On August 13, 2013, Complainant filed a second EEO complaint (Agency No. GSA-13-R2-Q-0094, Hearing No. 520-2014-00466X) (hereinafter designated as “the second complaint”). She alleged that the Director, the Deputy Director and the Interim Director of Business Development discriminated against her on the bases of race, sex, and in reprisal for prior protected EEO activity when:

1. On November 14, 2011, management deactivated her smart card which resulted in her having to take off her shoes in front of her co-workers and security guards;
2. On April 17, 2013, she learned that other employees maintained their contracting officer’s warrant while her warrant was taken away after she was reassigned; and
3. On April 22, 2013, during a meeting, the Director of Global Supply stated “he felt the decision to fire you was a correct decision” and in reply, a Union Representative stated, “clearly from an Arbitrator’s order, your removal was done with malice.”

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<sup>2</sup> The Agency did not raise the issue of untimely contact with an EEO counselor in its December 13, 2012 dismissal of the first complaint.

By letter dated September 25, 2013, the Agency informed Complainant that it had accepted all three incidents comprising the complaint for investigation. With regard to the first incident, the Agency noted that, in fairness to Complainant, the first incident would be accepted because it inadvertently did not address that incident in the first complaint.<sup>3</sup>

In due course, the Agency completed its investigation of the first and second complaints and in accordance with Complainant's request, referred both complaints to an EEOC AJ for a hearing. The AJ issued a scheduling order dated August 21, 2014, in which she stated that although the two complaints were not formally consolidated, they were to be encompassed in any settlement discussions and that the cases would be litigated separately if there was no resolution.

On July 24, 2015, the Agency filed a motion for a protective order requesting that the venue for certain depositions scheduled to be taken in the office of Complainant's Counsel in Queens be moved to the Agency's facility in Manhattan. On August 5, 2015, while the motion for the protective order was pending, the Agency filed a motion to dismiss the first complaint on the ground of untimely contact with an EEO counselor. This was the first time the issue of timeliness had been raised since the first complaint was filed.

In an order dated November 22, 2016, the AJ denied both motions and ordered the parties to complete discovery no later than January 30, 2017. Concerning the protective order, the AJ stated that conducting the depositions in Queens rather than Manhattan was not disruptive, costly, or burdensome, and that the Agency's argument to the contrary was baseless. Regarding the Agency's motion to dismiss for untimeliness, the AJ pointed out that the Agency made no objection when it accepted the first complaint, conducted an investigation of the first complaint, received a hearing request and the AJ's Acknowledgement and Order, engaged in discovery and moved for a protective order requiring that Complainant's noticing depositions be taken in Manhattan. The AJ further stated that it was only when Complainant opposed the Agency's motion for the protective order, almost three years after she had contacted the Agency's EEO Office, that the Agency claimed that Complainant's initial contact with the EEO counselor was untimely. The AJ also noted the Agency's previous attempt to dismiss the complaint for mootness, which was rejected in EEOC Appeal No. 0120132057. The AJ included the following language in her order:

There will be no further written motions, other than dispositive motions; if either party wishes to make another motion, it must confer and in good faith attempt to resolve the dispute. Only if the issue remains unresolved may the moving party submit several proposed dates and times, mutually agreed upon by the parties, for a conference during which the dispute will be discussed. However, the parties are on notice that frivolous motions which waste the time of the court and the other party are subject to sanctions.

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<sup>3</sup> This incident was designated third in the September 25, 2013 acceptance letter. However, for ease of readability, we have re-ordered the incidents chronologically.

The AJ issued a revised schedule on December 12, 2016, with the final date for a hearing set for March 7, 2017. On January 12, 2017, the Agency filed another motion to dismiss the first complaint, which it labeled as a “dispositive motion.” The Agency argued in this motion that the Arbitrator’s opinion and award dated July 16, 2012 had a res judicata effect that precluded any re-litigation of the January 2012 termination. It stated that although the CBA excluded discrimination complaints from negotiated grievance procedures, it nevertheless allowed allegations of discrimination to be raised as an affirmative defense to a removal action.

On February 21, 2017, Complainant filed an opposition to the Agency’s motion to dismiss and at the same time moved for sanctions. Complainant argued that the Agency unsuccessfully attempted to dismiss the complaint on three different occasions under three different grounds: mootness, untimely counselor contact, and res judicata. Complainant further argued that the only reason the Agency filed the July 2015 motion for a protective order was to further delay discovery and the hearing. In addition, Complainant argued that in filing its motion to dismiss on res judicata grounds, the Agency flagrantly disregarded the AJ’s order of November 22, 2016, and in so doing, caused yet another delay in the process.

On June 30, 2017, the AJ issued an order denying the Agency’s January 12, 2017 motion to dismiss on res judicata grounds and granting Complainant’s February 21, 2017 motion for sanctions. The AJ based her order on findings that the sole issue decided by the Arbitrator was the Agency’s violation of the CBA, that the CBA did not allow for discrimination allegations, and that the Agency failed to show that the affirmative defense provision in the CBA prevented Complainant from pursuing an EEO complaint under the 1614 process. The AJ characterized the Agency’s motion as an “eleventh hour, last-ditch attempt” to dismiss the complaint by trying to reinterpret ambiguous language in its own negotiated CBA. The AJ further noted the warning that she had issued to the Agency regarding frivolous motions in her order dated November 22, 2016, the procedure she had ordered the parties to undertake in order to resolve procedural conflicts, the Agency’s disregard of the November 2016 order in filing the January 2017 motion to dismiss, and the delay in the hearing caused by the Agency’s conduct. In granting Complainant’s motion for sanctions, the AJ stated:

I issue an ORDER for default judgment in favor of Complainant. Although not necessary under case precedent to have established a prima facie case of discrimination before issuing a default judgment in favor of Complainant, I find that there is sufficient evidence to raise an inference of discrimination. The appropriate sanction shall be a decision fully in favor of Complainant. I find that default judgment in this case, with compensatory damages \* \* \* is both proper and appropriate here where the Agency was put on notice and warned of sanctions for filing frivolous motions in a previous order, yet disregarded this with impunity.

The AJ entered default judgment on both complaints. In an order dated December 13, 2017, the AJ ordered the Agency to award Complainant non-pecuniary compensatory damages in the amount of \$180,000, attorney’s fees in the amount of \$31,207.80, and costs in the amount of \$874.50. In its final order issued on January 19, 2018, the Agency declined to implement the AJ’s order and filed the appeal that is now before us.

## ANALYSIS AND FINDINGS

### *The AJ's Imposition of Sanctions – Default Judgment*

The Commission's regulations confer upon its AJs very broad responsibility for adjudicating an EEO complaint once a complainant's hearing request has been granted. 29 C.F.R. §1614.109(a). This responsibility gives the AJ wide latitude in directing the terms, conduct, or course of EEO Administrative hearings. 29 C.F.R. §1614.109(e); Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chapter 7, Section III(D) (Aug. 5, 2015). See also e.g. Douglas F. v. Equal Emp't Opportunity Comm'n, EEOC Appeal No. 0120122183 (Dec. 4, 2015); Andy B. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120131912 (Oct. 28, 2015); Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120122616 (June 23, 2015); Turner v. U.S. Postal Serv., EEOC Request No. 0520110239 (Apr. 12, 2011); Ponisciak v. Soc. Sec. Admin., EEOC Appeal No. 0120082062 (April 23, 2010); Clarke v. Dep't of the Army, EEOC Appeal No. 01A33392 (May 25, 2004); Bey v. U.S. Postal Serv., EEOC Appeal No. 01A15147 (Dec. 12, 2002); Duff v. Dep't of Housing and Urban Dev., EEOC Appeal No. 01A15239 (Dec. 21, 2001). Given the scope of the AJ's discretion, a party charging an AJ with abuse of that discretion invariably faces a very high bar. William G. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120162273 (Sept. 26, 2018); Romaine H. v. Dep't of Homeland Sec., EEOC Appeal No. 0120162083 (Dec. 15, 2017); Herb S. v. Dep't of Agric., EEOC Appeal No. 0120141055 (Feb. 28, 2017); Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016); Kenyatta S. v. Dep't of Justice, EEOC Appeal No. 0720150016 (June 3, 2016).

Among the powers of the AJ that are specifically enumerated in the Commission's regulations is the power to impose sanctions upon a party that fails to comply with her orders, including a full or partial judgment in favor of the complying party, i.e., a default judgment. 29 C.F.R. §1614.109(f)(3)(iv); EEO MD-110, *supra*, item 10(d); Candance C. v. Gen. Servs. Admin., EEOC Appeal No. 0720160013 (Aug. 8, 2016); Complainant v. Dep't of the Air Force, EEOC Appeal No. 0720090009 (June 5, 2015); Matheny v. Dep't of Justice, EEOC Request No. 05A30373 (April 21, 2005); Rountree v. Dept. of the Treasury, EEOC Appeal No. 07A00015 (July 17, 2001). The AJ's discretion to impose sanctions is not without its limits, however.

In general, sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. A sanction may be used to both deter the non-complying party from similar conduct in the future, as well as to equitably remedy the opposing party. If a lesser sanction would serve this purpose, an AJ may be abusing his or her discretion to impose a harsher sanction. A more severe sanction might be appropriate however if the AJ considers the conduct in question to constitute an attack on the integrity of the EEO process.

We commence our discussion with the Agency's contention that the AJ abused her discretion by failing to issue an order to show cause before entering the default judgment against it. The non-complying party must be put on notice that it could be sanctioned for its conduct.

This is typically accomplished via an order to show cause, the purpose of which is to notify the non-complying party that its conduct could be sanctioned, inform the party of the potential sanctions that could be imposed, and give the party the opportunity to explain why the sanction should not be imposed. Show cause orders are unnecessary, however, where a party has filed a motion for specific sanctions and the non-moving party has had an opportunity to respond. See e.g. Council v. Dep't of Veterans Affairs, EEOC Appeal No. 0120080321 (April 9, 2010) (show cause order not necessary because the employee was previously placed on notice of the sanctions that could be imposed for failure to timely submit a pre-hearing statement); Vandesande v. U.S. Postal Serv., EEOC Appeal No. 07A40037 (Sept. 28, 2004). Commission precedent has established that as long as the offending party is provided with notice of a possible imposition of a sanction and type of sanction, and the opportunity to explain why that sanction should not be imposed, the particular form in which the party receives that notice does not matter.

In her order of November 22, 2016, the AJ specifically warned the Agency that any further attempt to dismiss the first complaint on procedural grounds years after it had accepting the complaint, processed it, and referred it for a hearing would be subject to sanctions as a frivolous motion practice. Thus, the AJ made it very clear in that order what conduct would be sanctioned. The AJ even specified an alternative course of action for resolving procedural disputes: a conference with Complainant and her Counsel. This was sufficient to establish the first prerequisite to the imposition of sanctions. Despite that prohibition against frivolous motions, however, the Agency went ahead and filed a second motion to dismiss, this time on grounds of res judicata, in direct defiance of the AJ's order to engage with Complainant. On February 21, 2017, the opposing party moved for a specific sanction: the entry of default judgment in Complainant's favor. This was enough to satisfy the second prerequisite that the type of sanction being contemplated be identified. Despite the lack of a formal show cause order, the two notice prerequisites were fulfilled by the AJ. As to the third prerequisite, the Agency argues that it was not invited to respond to Complainant's motion for sanctions and therefore did not have an opportunity to explain its conduct. To the contrary, we find, as did the AJ, that the Agency was given over four months to respond to Complainant's motion as to why it should not be sanctioned, but failed to do so between February 21 and June 30, 2017. We therefore find that the AJ did not abuse her discretion in issuing the default judgment without first issuing a show cause order.

We next address the Agency's other argument regarding abuse of discretion – the AJ's inclusion of the second complaint within the scope of her default judgment order notwithstanding that the Agency's motion to dismiss filed in January 2017 dealt only with the first complaint. In effect, the Agency appears to be arguing that by encompassing the second complaint within the scope of the default judgment order, the AJ improperly tailored the default judgment sanction, and that this also constitutes an abuse of discretion on the AJ's part. Factors pertinent to "tailoring" a sanction, or determining whether a sanction is, in fact, warranted, include: (1) the extent and nature of the non-compliance, including 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, if any; (4) the number of times the party has engaged in such conduct; and (5) the effect on the integrity of the EEO process as a whole.

Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009); Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (Mar. 1, 2007); Voyses v. Soc. Sec. Admin., EEOC Appeal No. 01A35340 (Jan. 18, 2005).

In support of its contention, the Agency places great weight on the fact that the two complaints were never formally consolidated. This argument too betrays the Agency's lack of understanding of the scope of the discretion that can be exercised by AJs as they adjudicate the complaints that come before them. The regulation governing sanctions defines a default judgment as a full or partial entry of judgment entered in favor of the opposing party. 29 C.F.R. § 1614.109(f)(iv). While Complainant in her February 21, 2017 motion did not specifically ask that default judgment on both complaints be entered in her favor, the AJ made it clear in her order that she issued the default judgment on both complaints in response to the Agency's non-compliance with her November 22, 2016 order. In terms of the tailoring factors listed above, the Agency argues that it had filed only three motions over a span of 28 months. These three motions, however, had the cumulative effect of delaying the processing of the complaint on multiple occasions. In attempting to justify its violation of the AJ's November 2016, the Agency's attorneys contend that they were merely acting as zealous advocates for their client. This argument disregards the fact that the motions to dismiss the first complaint had no reasonable chance of being granted after the Agency had already accepted and processed that complaint. The Agency's January 2017 motion caused yet another delay in the process just as discovery was about to be completed and the hearing scheduled to commence shortly thereafter, thereby compromising the EEO process with procedural maneuvers that accomplished nothing other than to clog the pipeline.

The AJ's order dated June 30, 2017 contains a thorough discussion of the circumstances that led to her issuance of the default judgment in Complainant's favor, including the motions filed by the parties as well as their responses or lack thereof. The AJ stated that the sanction of default judgment was warranted because the Agency had repeatedly delayed the start of the hearing due to its repeated attempts to have the complaint dismissed on procedural grounds when such motions were not considered a reasonable possibility, which, as previously noted, had the effect of bottlenecking the administrative process, which was, in the AJ's words, "already quite burdened to keep cases timely heard."

In its second, third and fourth contentions on appeal, repeats its arguments that the first complaint should be dismissed on grounds of res judicata and Complainant's untimely contact with an EEO counselor. It also argues, for the first time, that the second complaint should be dismissed because the incidents specified therein are untimely and fail to state a claim. The Commission's regulations specify that prior to a request for a hearing in a case, the agency shall dismiss an entire complaint that fails to state a claim or states the same claim that is pending before or has been decided by the Agency or Commission. 29 C.F.R. § 1614.107(a)(1). They also specify that prior to a request for a hearing in a case, the agency shall dismiss an entire complaint that fails to comply with applicable time limits. 29 C.F.R. § 1614.107(a)(2). Once a hearing request is accepted and the AJ assumes control over the adjudication of the complaint, however, the decision to procedurally dismiss a complaint becomes discretionary.



See 29 C.F.R. § 1614.109(b) (Administrative judges **may** dismiss complaints pursuant to § 1614.107, on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint) (emphasis added). Consequently, the only way for the Agency to prevail on this issue is to show that the AJ abused her discretion in denying the Agency's two motions to dismiss the first complaint. As was noted above, the Agency accepted and processed both complaints, referred them for a hearing, undertook discovery and were close to convening the hearing when the Agency short-circuited the process by filing its January 2017 motion to dismiss in defiance of the AJ's November 22, 2016 order. The AJ properly exercised her discretion and declined to dismiss the first complaint.

We note that the Agency attempts to dismiss the second complaint for the first time on appeal. We reject this contention because the Agency had the opportunity to dismiss the second complaint prior to filing its appeal, and in fact was required to do so before Complainant requested a hearing thereon, but did not avail itself of that opportunity. See e.g. Janda v. U.S. Postal Service, EEOC Appeal No. 07A10018 (Mar. 4, 2002) (agency's various arguments raised for the first time on appeal regarding what it contends were legal errors in the granting of complainant's motion to compel discovery could have been raised either in opposition to the motion to compel discovery, in a motion for reconsideration with the Administrative Judge at the time the motion was granted, in opposition to complainant's motion for sanctions, or in response to the order to show cause, but the agency failed to utilize any of these opportunities). Overall, we can find no abuse of discretion on the part of the AJ and find that the AJ's issuance of default judgment in favor of Complainant was proper.

#### *Entitlement to Relief*

After deciding to issue a default judgment for a complainant, the Commission must determine if there is evidence that establishes the 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 (Apr. 21, 2005).

With regard to the first complaint, Complainant would need to demonstrate that she 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); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 & n. 13 (1973). Complainant showed that she was removed from her position as a GS-13 Procurement Analyst in January 2012 and remained out of work until she was reinstated in August 2012 as the result of an Arbitrator's opinion in July 2012. When asked why she believed that the removal action was discriminatory, Complainant averred that two other black females were fired, and that no white females were given details that she characterized as "bogus," "impossible to complete," and "at a location where they could not converse with their peers." Report of Investigation for the first complaint, pp. 88-89, 91, 229-230, 239-241. This is sufficient for Complainant to establish a prima facie case of race and sex discrimination with respect to the first complaint. The AJ did not make a similar finding with respect to the second complaint.

Even if Complainant failed to establish the elements of a prima facie case in either complaint, the absence of such a finding would not preclude Complainant's right to relief on a default judgment. Michale v. Dep't of the Interior, EEOC Appeal No. 0120143043 (Apr. 20, 2018) (A complainant may be entitled to compensatory damages as a prevailing party despite failure to establish a prima facie case of discrimination). In other words, establishing a prima facie case is not the only way to entitle a complainant to relief. The effect of default judgment against the Agency is a finding of discrimination in favor of Complainant. Montes-Rodriguez v. Dep't of Agric., EEOC Appeal No. 0120080282 (Jan. 12, 2012), req. for recon. den'd, EEOC Request No. 0520120295 (Dec. 20, 2012). Consequently, even if Complainant failed to establish a prima facie case, the Commission still has the inherent power to protect its administrative processes from abuse by any party and must ensure that both complainants and agencies follow its regulations. Id. citing Lomax v. Dep't of Veterans Affairs, EEOC Appeal No. 07A40125 (Oct. 12, 2006) (awarding complainant non-pecuniary compensatory damages without indicating whether the record supported a finding of discrimination after issuing a default judgment against the agency as a sanction for the agency's failure to conduct a timely investigation). Therefore, regardless of whether Complainant established a prima facie case with respect to either complaint, the default judgment, in and of itself, is enough of a basis on which to authorize an award of compensatory damages and other relief. Consequently, we find that the AJ's finding that Complainant is entitled to relief following entry of default judgment against the Agency does not constitute prejudicial error.

### REMEDIES

#### *Non-Pecuniary Compensatory Damages*

Next, the Commission will determine whether the AJ's award of \$180,000 in non-pecuniary compensatory damages was appropriate. The Agency's sixth contention on appeal is that the award was excessive, based on a flawed calculation, and punitive. The Agency also contends that \$20,000 was the appropriate amount to be awarded. Complainant did not address the AJ's award in her response to the Agency's appeal.

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, Complainant must demonstrate that she has been harmed as a result of the Agency's discriminatory action; the extent, nature and severity of the harm; and the duration or expected duration of the harm.

Complainant v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for recon. den'd, EEOC Request No. 05940927 (Dec. 8, 1995); EEOC's Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 at 11-12, 14 (July 14, 1992) ("Guidance"). Complainant is required to provide objective evidence that will allow an Agency to assess the merits of her request for damages. See Complainant v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Furthermore, the award should take into account the severity and duration of the harm. Carpenter v. Dept. of Agric., EEOC Appeal No. 01945652 (July 17, 1995).

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

Non-pecuniary losses 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).

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 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.

Complainant has the burden of proving the existence, nature and severity of the alleged emotional harm. Man H. v. Dep't of Homeland Sec., EEOC Appeal No. 0120161218 (May 2, 2017).

Complainant must also establish a causal relationship between the alleged harm and the discrimination. Id. Absent such proof of harm and causation, a Complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. Id. See also e.g. Wilda M. v. U.S. Postal Serv., EEOC Appeal No. 0120141087 (Jan. 12, 2017) (awards for emotional harm are warranted only if Complainant establishes a sufficient causal connection between the Agency's illegal actions and her injury).

In support of her claim for non-pecuniary compensatory damages, Complainant presented sworn statements from herself, family members, friends and coworkers detailing the existence of a hostile work environment that began in February 2011, and continued through December 13, 2017, the date that the AJ ordered the Agency to award Complainant damages, and perhaps beyond. In her own affidavit, Complainant described her physical, mental, and emotional states, particularly how what happened to her caused her to feel confused and numb, how she was terrified at the prospect of not being able to feed her children, and how the emotional distress she experienced affected her physically; including headaches, stomach problems, and diarrhea. She averred that her self-esteem had plummeted to such an extent that she had contemplated suicide, and that the only thing that kept her going was the thought of not wanting to leave her children motherless. Complainant's Motion for Compensatory Damages, Exhibit A. Members of her family described her physical and emotional deterioration to the point at which they had to take caring for her two children because of how withdrawn and depressed she was. Id. at Exhibits C, D. Four of Complainant's coworkers also described how she went from being happy and friendly to suffering abrupt mood changes, becoming easily agitated, traumatized, and fearful. Her coworkers also noted that her condition was not alleviated by her reinstatement. Id. at Exhibits E, F, G, H. We find that Complainant's symptoms and condition were severe and lasted for more than six years.

We must now ascertain whether the AJ's award of \$180,000 is consistent with awards made in similar cases. In Lauralee C. v. Dept. of Homeland Security, EEOC Appeal No. 0720150002 (Sept. 25, 2017), an AJ entered default judgment finding the Agency liable for gender-based non-sexual harassment and awarded the employee \$200,000. The default judgment was based on the Agency's failure to timely comply with AJ's order to conduct an expedited supplemental investigation. Factors influencing the size of the award included the employee's constant crying, inability to exercise due to severe anxiety resulting in panic attacks, feelings of exhaustion, helplessness and hopelessness. The employee's constant fear left her unable to leave her house except to visit a doctor or buy groceries. She suffered loss of trust and reliance and other people as well as harm to her reputation. She withdrew from relationships. She experienced stress-related physical symptoms such as insomnia; gastrointestinal distress, pancreatitis, and irritable bowel syndrome. Her condition endured for between one and three years. In addition to affidavits from herself, her family and friends, and coworkers, the employee submitted medical documentation that included a diagnosis of depression and reactivation of post-traumatic stress disorder that she had suffered before the harassment occurred. See also McCormick v. Dep't of Justice, EEOC Appeal No. 0720100040 (Nov. 23, 2011) (awarding \$200,000 in non-pecuniary damages for a complainant who suffered damage to her professional reputation, severe migraines, lack of sleep, and strains on her relationships); Lemons v. Dep't of Justice, EEOC Appeal No. 0120102516 (Nov. 16, 2011) (awarding \$175,000 in non-pecuniary damages for a complainant who suffered

emotional harm, including low energy, insomnia, loss of life enjoyment, and tearfulness, which resulted from sexual assault and harassment). On the basis of the foregoing, we find that the AJ's award of \$180,000 in non-pecuniary compensatory damages was appropriate.

#### *Attorney's Fees and Costs*

Lastly, we will address the AJ's award of attorney's fees and costs. The Agency's seventh, and final contention is that the fees owed to Complainant's Counsel were incorrectly calculated because the AJ improperly utilized the Laffey matrix, which is inapplicable outside of the Washington D.C. commuting area.<sup>4</sup> The Agency maintains that Counsel should have computed the market rate for Astoria, New York, where he maintained his office. Complainant responded that, given Counsel's level of experience and the fact that the case transpired in Manhattan, where partners could bill in excess of \$1,000 per hour, the Laffey matrix was a reasonable method of calculating attorney's fees.

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)(ii). To determine the proper amount of the fee, a lodestar amount is reached by calculating the number 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). Complainant's Counsel provided a lodestar figure in support of his claim for fees. He submitted an invoice dated July 26, 2017, for 60.7 hours of legal work performed on the case between November 12, 2014 and July 26, 2017. In accordance with an order from the AJ directing him to utilize the Laffey matrix to determine his hourly rate, Counsel charged the following rates during the course of his representation of Complainant: \$402 for hours billed between June 1, 2014 and May 31, 2015; \$406 for hours billed between June 1, 2015 and May 31, 2016; \$608 for hours billed between June 1, 2016 and May 31, 2017; and \$636 for hours billed between June 1, 2017 and July 26, 2017. Counsel claimed a total of \$31,207.80 in fees.

The reasonable hourly rate is generally determined by the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skill, experience and reputation. Blum, 465 U.S. at 895. We agree with the Agency that the AJ's order to Counsel to determine his hourly rate using the Laffey matrix was improper. Given that the case transpired in New York City, Washington D.C. is clearly not the relevant legal community. We also agree with Complainant that Astoria, New York, a section of Queens, is not the relevant legal community either.

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<sup>4</sup> The Laffey matrix, which has its origins in the case of Laffey v. Northwest Airlines Inc., 572 F. Supp. 354 (D.D.C. 1983), aff'd in part, rev'd in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), is a chart compiled yearly by the United States Attorney's Office in the District of Columbia. It provides a schedule of hourly rates prevailing in the Washington, D.C., area in each year, going back to 1981, for attorneys at various levels of experience. Piper v. U.S. Dept. of Justice, 339 F. Supp. 2d 13, 24 n. 8 (D.D.C. 2004). Ela O. v. National Security Agency, EEOC Appeal No. 0720130021 (Oct. 30, 2015).

For the purpose of determining the prevailing market rate, the relevant legal community is the area where the Agency's facility and the complainant are located. McTier v. Dep't of the Navy, EEOC Appeal No. 07A30016 (Mar. 2, 2004); Cook v. U.S. Postal Serv., EEOC Appeal No. 01A03897 (Mar. 13, 2001); Black v. Dep't of the Army, EEOC Appeal No. 01921158 (Jan. 14, 1993). According to the first complaint, the Agency facility where Complainant worked is located in New York City, i.e., in Manhattan. We have also noted language in federal court cases stating that the relevant community for determination of attorney's fees is generally the forum in which the district court sits. McTier, supra, and Cook, supra, citing Barjon v. Dept. of the Navy, 132 F.3d 496, 500 (9th Cir. 1997). If we were to use that test, the "district court" would be the Commission's district office, which is located at 23 Whitehall Street, also in Manhattan. Moreover, the fact that in its July 2015 motion for a protective order, the Agency asked that the deposition be taken at its facility in Manhattan further supports the notion that the Agency viewed Manhattan as the venue for the case. We therefore find that Manhattan is the relevant legal community for determining Counsel's hourly rate. Since the Agency does not challenge any of the items on Counsel's invoice, we will enter an order directing the Agency to recalculate Counsel's hourly rate using Manhattan as the relevant legal community.

As to costs, Complainant presented an invoice dated January 19, 2017 indicating that Complainant personally paid the cost of a deposition transcript which totaled \$874.50. The Agency did not contest this item. Accordingly, we will include it in our order for relief below.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we REVERSE the Agency's final order and REMAND the matter in accordance with our order below.

### ORDER (C0618)

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

1. Within 60 days of the date this decision is issued, the Agency shall issue Complainant a check in the amount of \$180,874.50, of which \$180,000.00 represents an award of non-pecuniary compensatory damages and \$874.50 represents reimbursement for legal costs incurred as a result of processing the complaints at issue before us.
2. Within 60 days of the date this decision is issued, the Agency shall recalculate Complainant's Counsel's entitlement to attorney's fees based on the 60.7 hours of legal work documented in Counsel's invoice dated July 26, 2017, using Manhattan as the relevant legal community for the purpose of determining those attorney's fees. In calculating Counsel's fees, the Agency shall utilize the appropriate rates charged by attorneys in the legal community of Manhattan for similar services by lawyers reasonably comparable to Counsel in terms of skill, experience and reputation during the following time frames: June 1, 2014 through May 31, 2015; June 1, 2015 through May 31, 2016;

June 1, 2016 through May 31, 2017; and June 1 through July 26, 2017. Thereafter, the Agency shall issue a check to Complainant in the amount of the recalculated fees deducting any amount already paid.

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 Federal Acquisition Service 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)), 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 (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)

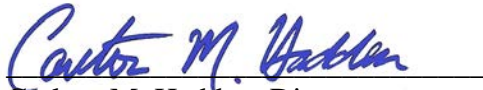
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

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

Carlton M. Hadden, Director  
Office of Federal Operations

November 30, 2018

Date