



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

████████████████████
Foster M.,¹
Complainant,

v.

Rick Perry,
Secretary,
Department of Energy,
Agency.

Appeal No. 0120182008

Agency No. 14-0013-AL

DECISION

On May 21, 2018, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 26, 2018, final decision concerning Complainant's entitlement to compensatory damages for a violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a NV-0084-01 Federal Agent (Nuclear Materials Courier) in the Amarillo, Texas Agent Operations Central Command (AOCC), within the Office of Secure Transportation (OST), within the National Nuclear Security Administration (NNSA). On November 5, 2013, Complainant filed an EEO complaint alleging that the Agency subjected him to discrimination and harassment based on disability (regarded as having a heart condition), genetic information (family history of heart condition), age (44), and reprisal for prior protected EEO activity when:

1. On September 23, 2013, while on a convoy road trip he was relieved in a humiliating manner from Nuclear Explosives Duties (NED) which include transporting nuclear

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

- materials, and, after being directed while on the trip to the emergency room, he incurred medical expenses which the Agency did not pay;
2. As of September 23, 2013, the unauthorized release of his medical history and condition is common knowledge in his organization, and coworkers have stated that they do not want to work with him because of his perceived heart condition;
 3. For the period of September 24, 2013, to November 26, 2013, he was required to complete additional medical testing at his personal expense, and required to use annual and sick leave for related medical appointments and medical tests;
 4. His NED duties remained suspended for failure to meet the neurological medical standards for the Human Reliability Program (HRP) and were not restored until February 5, 2014, even though non-Agency physicians determined he was fit for duty;
 5. After another convoy trip (February 23, 2014 trip), his first line supervisor (S1), whose duty station is in Amarillo, attempted to negatively influence the rating for Complainant's performance thereon by Complainant's Coworker (CW1) (Lead Convoy Commander); and
 6. During a March 24, 2014, meeting, S1 attempted to elicit a negative reaction from him to negatively affect his HRP status.

On May 18, 2015, the Agency issued a final decision finding no discrimination. Complainant appealed the Agency's final decision to the Commission. The Commission found that the Agency had stored confidential employee medical records in an unsecured binder kept on an administrative assistant's desk at the Amarillo AOCC and that none of the limited exceptions permitting access to confidential medical information maintained by the Agency applied. Foster M. v. Dep't of Energy, EEOC Appeal No. 0120152280 (Dec. 27, 2017). The Commission concluded that the Agency committed a per se violation of the Rehabilitation Act. The Commission ordered various remedies, including ordering the Agency to ensure its Amarillo, Texas AOCC complied with the confidentiality requirements of the Rehabilitation Act and to conduct a supplemental investigation concerning Complainant's entitlement to compensatory damages and issue a final decision on compensatory damages.

The Agency investigated Complainant's entitlement to compensatory damages by providing him with the opportunity to submit documentation and statements demonstrating his entitlement to compensatory damages. Complainant submitted a statement, a letter from a physician (MD1), a letter from a licensed clinical social worker (SW1), and various medical records. Complainant stated that he suffered from sleep apnea, anxiety, injury to professional standing, adjustment disorders with hand tremors, sexual dysfunction, and interpersonal issues as a result of the Agency's violation of the Rehabilitation Act. Complainant averred that he took medication for anxiety and sleeplessness. Complainant alleged that he was forced to file for bankruptcy as a result of the Agency's actions. Complainant requested pecuniary damages in the form of reimbursement for medical expenses, such as copays for prescriptions and costs associated with therapy. Complainant also requested non-pecuniary damages in the amount of \$200,000 for anxiety, stress, depression, sleep issues, adjustment disorder, panic attacks, humiliation, and damage to his credit as a result of filing for bankruptcy.

According to the medical records, Complainant was diagnosed with sleep apnea in March 2011, he reported symptoms including fatigue and sleeping poorly in September 2013, reported a tingling sensation in his toes and fingers and tremors in both hands in July 2014, and complained of continuing tremors and extreme fatigue in October 2014. In September 2015, Complainant reported worsening anxiety, as well as ongoing tremors and insomnia, and MD1 prescribed Complainant medication for anxiety. The record contains a February 2, 2018, letter from MD1, which states that Complainant began experiencing symptoms of an adjustment disorder with anxiety “due to stressful work conditions” and that Complainant will need treatment for the adjustment disorder for the foreseeable future. A February 2, 2018, letter from SW1 states that Complainant sought counseling to deal with the “fallout” after his coworkers “falsely accused him of experiencing health issues” and he was assigned to desk work. SW1 indicates that Complainant declared bankruptcy because of the large medical bills required to be reinstated to his position of his record. According to SW1, Complainant experiences severe anxiety, manifested by panic attacks, tremors, difficulty sleeping, and interpersonal issues, including strain on his marriage.

On April 26, 2018, the Agency issued a final decision, which found that Complainant was not entitled to pecuniary or non-pecuniary, compensatory damages because he did not establish a nexus between the alleged harm and the Agency’s failure to safeguard his confidential medical records. The Agency noted that Complainant’s sleep apnea diagnosis predated the binder being accessible to his coworkers and found that Complainant did not establish that his symptoms worsened as a result of the Agency’s actions. Regarding the anxiety, adjustment disorders with tremors, fatigue, injury to professional reputation, interpersonal issues, and filing for bankruptcy, the Agency concluded that these issues stemmed from Complainant being removed from the NED duties of his Federal Agent position pending medical clearance rather than from the Agency’s failure to keep his medical information confidential. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency’s decision denying his request for compensatory damages is unfair. According to Complainant, several of his Federal Agent coworkers did see his medical information and speculated about his fitness for duty, injuring his reputation.

In response to Complainant’s appeal, the Agency contends that Complainant is not entitled to compensatory damages because there is no connection between Complainant’s medical conditions and the Agency’s conduct. The Agency represents that there is no evidence that any employees or supervisors improperly accessed Complainant’s medical information while it was stored in the binder, that any of his medical information was improperly disclosed, or that the Agency’s violation of the Rehabilitation Act was intentional. The Agency also argues that it took some steps to secure the binder.

According to the Agency, because of the lack of evidence of actual disclosure or intent to disclose and because of the steps it took to secure the binder the instant case is distinguishable from Commission decisions that have awarded non-pecuniary damages for violations of the Rehabilitation Act's confidentiality requirements such as Grazier v. Dep't of Labor, EEOC Appeal No. 0120102711 (Sep. 30, 2010) (\$2,000 non-pecuniary damages award for unauthorized disclosure of medical information to union representative) and Grey v. U.S. Postal Serv., EEOC Appeal No. 0120131060 (June 5, 2013) (\$2,000 non-pecuniary damages award where supervisor took complainant's personnel file containing medical records home, where it was unsecured for five years). The Agency requests that the Commission affirm its final decision.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

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 the Rehabilitation Act may receive compensatory damages for past and future pecuniary losses and non-pecuniary losses. 42 U.S.C. § 1981a(b)(3). As a preliminary matter, we address the Agency's contention on appeal that Complainant is not entitled to compensatory damages because the Agency did not intentionally violate the Rehabilitation Act. However, we note that compensatory damages may be awarded in cases even if discriminatory intent has not been established. Section 1981a limits the availability of compensatory and punitive damages to a subset of cases involving intentional discrimination, "that is, cases that do not rely on the 'disparate impact' theory of discrimination." Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 534 (1999); 42 U.S.C. §1981a(a)(1)-(2). Therefore, once an agency violates the Rehabilitation Act, in a non-disparate impact case, it has committed "intentional discrimination" as defined by § 1981a. See Torres v. Dep't of Veterans Affairs, EEOC Appeal No. 0120091384 (July 22, 2009) (disclosure of complainant's medical information in a manner that does not conform to the conditions prescribed in 29 C.F.R. § 1630.14(c) constitutes a per se violation of the Rehabilitation Act and intentional discrimination). According, we will consider whether Complainant has established that he is entitled to 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). To receive an award of compensatory damages, a complainant must demonstrate that he 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 past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) which are directly or proximately caused by the agency's discriminatory conduct. EEOC Notice No. 915.002 at 8. The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part. Id. at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. Id. at 14.

Non-Pecuniary Damages

Complainant requested \$200,000 in non-pecuniary damages for anxiety, stress, depression, sleep issues, adjustment disorder, panic attacks, humiliation, and damage to his credit as a result of filing for bankruptcy. In Carle v. Dept. of the Navy, the Commission explained that "objective evidence" of non-pecuniary damages could include a statement by the complainant explaining how he or she was affected by the discrimination. EEOC Appeal No. 01922369 (Jan. 5, 1993). Statements from others, including family members, friends, and health care providers could address the outward manifestations of the impact of the discrimination on the complainant. Id. The complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. Id.

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 v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Jan. 5, 1993).

The Commission applies the principle that "a tortfeasor takes its victims as it finds them." Wallis v. U.S. Postal Serv., EEOC Appeal No. 01950510 (Nov. 13, 1995).

The Commission also applies two exceptions to this general rule: (1) when a complainant has a pre-existing condition, the agency is liable only for the additional harm or aggravation caused by the discrimination; and (2) if the complainant's pre-existing condition inevitably would have worsened, the agency is entitled to a reduction in damages reflecting the extent to which the condition would have worsened even absent the discrimination; the burden of proof being on the agency to establish the extent of this entitlement. Wallis, EEOC Appeal No. 01950510; Finlay v. U.S. Postal Serv., EEOC Appeal No. 01942985 (April 29, 1997). The Commission notes, however, that complainant is entitled to recover damages only for injury, or additional injury, caused by the discrimination. Terrell v. Dep't of Housing and Urban Development, EEOC Appeal No. 01961030 (Oct. 25, 1996); EEOC Notice No. 915.002 at 12.

In this case, the Agency failed to safeguard Complainant's confidential medical records as required by the Rehabilitation Act. Complainant stated that as a result of the Agency's actions he experienced anxiety, stress, depression, sleep issues, adjustment disorder, panic attacks, humiliation, and damage to his credit as a result of filing for bankruptcy. We agree with the Agency that the evidence provided by Complainant establishes that he filed for bankruptcy as a result of the medical bills incurred seeking to return to full NED duty. We also acknowledge that Complainant's sleep apnea was a preexisting condition and that the record reflects there was more than one cause of Complainant's anxiety, adjustment disorder, tremors, and interpersonal issues. However, we disagree with the Agency's decision to deny Complainant non-pecuniary damages for aggravation of his sleep apnea and causing, in part, his anxiety, adjustment disorder, loss of professional reputation, and interpersonal issues. The Agency argues that Complainant cannot demonstrate that he was harmed by the Agency's actions because there is no evidence that anyone improperly accessed or disclosed Complainant's medical documentation. However, we note that a Federal Agent stated during the investigation of Complainant's EEO complaint that two coworkers told him about a medication Complainant was taking in or around September 2013. Report of Investigation (ROI) at 436, 438. We also find that Complainant's statement, his medical records, and MD1's note establishes a connection between the Agency's violation of the Rehabilitation Act and his worsening sleep apnea and the onset of his anxiety, adjustment disorder, loss of professional reputation, and interpersonal issues. We further disagree with the Agency's contention that the instant case can be distinguished from the two cases cited by the Agency where we awarded non-pecuniary damages for per se violations of the Rehabilitation Act.

In Grey, EEOC Appeal No. 0120131060, we awarded \$2,000 in non-pecuniary damages where the supervisor in question initially had a legitimate reason for accessing the complainant's medical information but subsequently left it unsecured at his home for five years. Here, the record reflects that the Agency improperly stored confidential medical records in a binder on an administrative assistant's desk for at least four years, as the Agency's April 27, 2018, Compliance Report indicates that the Agency discontinued the practice of using the unsecured medical binder at the Amarillo AOCC on January 8, 2018. Moreover, unlike the supervisor in Grey, there is no indication in the record that the administrative assistant or Agency employees not in Complainant's chain of command ever had a legitimate reason for accessing Complainant's confidential medical records.

In Grazier, EEOC Appeal No. 0120102711, we similarly awarded \$2,000 in non-pecuniary damages where a complainant experienced humiliation, embarrassment, and shame as a result of an improper disclosure of her confidential medical information to a union steward but did not provide medical documentation referencing emotional distress. Here, we find that there is some evidence in the ROI of actual disclosure of Complainant's medical information, and we also find that Complainant has provided documentation of seeking medical treatment for worsening sleep issues, anxiety, and adjustment disorder as a result of the Agency's violation of the Rehabilitation Act.

Accordingly, we find that Complainant is entitled to non-pecuniary damages in the amount of \$2,000. We find that this amount is not motivated by passion or prejudice or "monstrously excessive" standing alone and that it is also consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (March 4, 1999).

Pecuniary Damages

Complainant requested pecuniary damages in the form of reimbursement for medical expenses. Pecuniary losses are out-of-pocket expenses that are incurred as a result of the employer's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. EEOC Notice No. 915.002 at 14. Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination, the issuance of a full-relief offer, or a voluntary settlement. Id. at 8-9. Future pecuniary losses are losses that are likely to occur after resolution of a complaint. Id. at 9. For claims seeking pecuniary damages, such objective evidence should include documentation of out-of-pocket expenses for all actual costs and an explanation of the expense, e.g., medical and psychological billings, other costs associated with the injury caused by the agency's actions, and an explanation for the expenditure. Id. at 9.

We agree with the Agency that Complainant failed to prove his entitlement to pecuniary damages. Complainant requested reimbursement for medical expenses including copays for medication and the cost of therapy. Complainant did not provide any evidence of his out-of-pocket costs for therapy. Complainant provided documentation of his monthly out-of-pocket costs for two prescription medications, but we find that he has not sufficiently demonstrated that his need for these medications is causally linked to the Agency's actions.

CONCLUSION

We MODIFY the Agency's final decision on compensatory damages and REMAND the matter to the Agency for further action in accordance with this decision and the ORDER herein.

ORDER

Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$2,000 in non-pecuniary, compensatory damages.

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).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. §1614.501(e)(1)(iii)), she/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 receipt of this decision. 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 (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 CFR § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint.

If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant’s Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

December 13, 2019

Date