



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

████████████████████
Orlando O.,¹
Complainant,

v.

Andrew Wheeler,
Administrator,
Environmental Protection Agency,
Agency.

Appeal No. 0120182452

Agency No. 2012-7371-HQ

DECISION

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 final decision concerning his equal employment opportunity (EEO) complaint alleging employment 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 MODIFIES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Special Agent, GS-13, at the Agency's Office of Criminal Enforcement Forensics and Training (OCEFT) in Washington, D.C.

On June 11, 2012, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of reprisal for prior protected EEO activity when:

On April 10, 2012, he learned that Special Agents in Charge (SACs) filed complaints against him with the Environmental Protection Agency's Office of Inspector General (OIG) for statements he made to an elected official and testimony he gave while participating in the EEO process.

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.

Following 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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing but subsequently withdrew his request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

Agency's Finding of Discrimination

In its July 26, 2017, final decision, the Agency found that Complainant established that he was subjected to reprisal discrimination, as he alleged. The Agency specifically found that Complainant engaged in protected EEO activity when he filed an EEO complaint and provided deposition testimony in support of his case. The Agency also found that Complainant's two letters to members Congress opposing employment discrimination constituted protected opposition activity. The Agency determined that management's initiation of the investigation against Complainant constituted an adverse action because the action was one that would deter a reasonable person from opposing discrimination or participating in the EEO process. In finding a causal link between Complainant's protected EEO activity and the adverse action, the Agency observed that two SAC's reported Complainant to the OIG because of his EEO deposition statements. The Agency further noted that both SACs forwarded to the OIG copies of Complainant's letters to Congress and requested an OIG investigation regarding the letters. The Agency ultimately found direct evidence of reprisal discrimination, as there was no dispute that the SACs referred Complainant to the OIG due to his EEO activity.²

Complainant's Statement and Affidavit for Damages

In response to the Agency's finding of discrimination, Complainant, through his attorney, subsequently submitted his statement and affidavit for compensatory damages dated September 12, 2017. Therein, Complainant contended that the discrimination he suffered resulted in severe damage to his reputation, damage to his professional relationships, and damage to his family, among other things. Complainant further maintained that the discrimination affected his ability to pursue post-retirement employment in a law enforcement capacity. Complainant stated that he was forced to retire early due to the discrimination, forfeiting years of salary at \$130,000 per year and losing approximately \$1,500 per year in his pension. Complainant requested pecuniary damages totaling \$680,000 for the loss of his salary and pension. Complainant further requested \$20,000 in non-pecuniary, compensatory.

Agency's Decision on Compensatory Damages

The Agency subsequently issued its final decision regarding Complainant's entitlement to compensatory damages on June 5, 2018. Therein, the Agency awarded Complainant \$2,000 in non-pecuniary, compensatory damages but found that Complainant was not entitled to an award of pecuniary damages.

² Complainant did not appeal the Agency's July 26, 2017, final decision to the Commission.

In reaching \$2,000 in non-pecuniary damages, the Agency considered that the OIG investigation against Complainant lasted approximately nine to ten months and Complainant experienced damage to his professional reputation. The Agency noted, however, that aside from Complainant's affidavit and his attorney's statement that he experienced physical and emotional ailments, he did not submit any supporting documentation addressing his claim for compensatory damages. The Agency observed that Complainant did not submit any statements from his family or friends, medical bills, or any other documentation showing that there was damage to his reputation. The Agency moreover denied Complainant's request for pecuniary damages related to the loss of his salary and pension, finding he failed to show that he was subjected to a constructive discharge.

The Agency also noted that Complainant's attorney submitted an unverified claim for fees in the amount of \$7,500, which was characterized as a retainer. The Agency noted that Complainant's attorney did not submit an affidavit itemizing each expense comprising the attorney's charges for legal services. The Agency noted that it gave Complainant's attorney the opportunity to cure the defect, but Complainant's attorney emailed the Agency saying that he was withdrawing his claim for fees. According to the Agency, it accepted the attorney's request to withdrawal his application for attorney's fees, and therefore it made no award in fees or costs as a result.

CONTENTIONS ON APPEAL

On appeal, Complainant, through his attorney,³ maintains that he should be awarded compensatory damages for emotional distress and suffering, and attorney fees, as well as any other appropriate equitable relief. Complainant requests compensatory damages in excess of the \$2,000 which the Agency awarded him.

In response, the Agency argues that it correctly found that Complainant was entitled to \$2,000 in non-pecuniary compensatory damages. The Agency maintains that Complainant failed to provide objective, detailed evidence to support his request for compensatory damages. The Agency specifically asserts that Complainant did not explain the nature, severity, or duration of his injuries due to the discrimination. The Agency argues, moreover, that Complainant has failed to show that the OIG investigation proximately caused his injuries, and that being subjected to such an investigation is generally not degrading or humiliating.

ANALYSIS AND FINDINGS

When discrimination is found, the respondent Agency must provide the employee with a remedy that constitutes full, make-whole relief to restore the employee as nearly as possible to the position he or she would have occupied absent 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). The Commission is authorized to award compensatory damages as part of the "make whole" relief for intentional discrimination.

³ Complainant is represented by a different attorney on appeal.

Pecuniary Compensatory Damages

We note Complainant requested pecuniary, compensatory damages related to the impact his early retirement had on his salary and pension. Complainant specifically maintained that he was forced to retire early due to the discrimination he suffered. We however remind Complainant that the Agency did not find discrimination involving a claim of constructive discharge, and he did not appeal the Agency's decision to the Commission. Furthermore, the Agency did not provide Complainant with reinstatement to his prior position, front pay, or back pay as remedy in its final decision dated July 26, 2017. As such, we deny Complainant's request for pecuniary damages related to his early retirement.

Non-Pecuniary, Compensatory Damages

Non-pecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See EEOC Notice No. 915.002 at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the Agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be "monstrously excessive" standing alone, but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from complainant concerning his emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

In the instant case, Complainant stated that as a result of being referred to the OIG for investigation due to his EEO activity, he suffered severe damage to his professional reputation and professional relationships as a Law Enforcement Officer. Complainant stated he broke down several times emotionally as a result of being subjected to the investigation, and that management destroyed his once stellar career. According to Complainant, he became physically ill, experienced sleeping issues, and family problems, among other things, due to the stress of being subjected to the investigation.

In considering the harm Complainant suffered, we find that his request for \$20,000 in non-pecuniary, compensatory damages is in line with Complainant's harm and the Commission's case law. The Commission finds that Complainant has experienced damages similar to that suffered by employees in Complainant v. U.S. Postal Service, EEOC Appeal No. 0720070001 (Mar. 26, 2009) (\$25,000 in non-pecuniary damages awarded where complainant provided testimony that as a result of discrimination he suffered from stress, low self-esteem, difficulty sleeping and weight gain); Reid v. Dep't of Veterans Affairs, EEOC Appeal No. 0720070077 (Nov. 13, 2009) (\$20,000 in non-pecuniary damages awarded where complainant suffered damage to her professional reputation and emotional distress that affected her family due to the discrimination). The Commission also finds that \$20,000 is not “monstrously excessive” standing alone and is not the product of passion or prejudice.⁴

CONCLUSION

We MODIFY the Agency’s final decision regarding compensatory damages and the Agency shall comply with the Order herein.

ORDER

To the extent that the Agency has not already done so, within 60 days of the date this decision is issued, the Agency shall pay Complainant \$20,000 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). Further, the report must include supporting documentation that the corrective action has been implemented.

ATTORNEY'S FEES (10/19)

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.

⁴ We note that the record contains an email from Complainant’s attorney withdrawing his request for attorney’s fees. As Complainant, through his attorney, does not address this withdrawal on appeal, we decline to award Complainant attorney’s fees. We nevertheless note that as Complainant is a prevailing party with respect to the instant appeal, he is accordingly entitled to submit a petition for attorney's fees and costs incurred in relation to the instant appeal.

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 C.F.R. § 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 10, 2019

Date