



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

Vilma E. Alejandro a/k/a
Angeles C.,¹
Complainant,

v.

Thomas J. Vilsack,
Secretary,
Department of Agriculture
(Food and Nutrition Service),
Agency.

Appeal Nos. 2022004959; 2023001466

Agency Nos. FNCS-CF-2018-00240; FNCS-CF-2018-00258

DECISION

On September 2, 2022, 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 two final decisions, dated August 3, 2022, concerning the Agency's denial of compensatory damages and attorney's fees. Both appeals pertained to her remedial relief following a partial finding in Complainant's favor on her equal employment opportunity (EEO) complaints 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 decisions.

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.

ISSUES PRESENTED

1. Whether the Agency correctly determined that Complainant is not entitled to any compensatory damages following the Commission's finding of liability on one incident of per se reprisal.
2. Whether Complainant waived her right to recovery of the attorney's fees and costs incurred by failing to timely submit an adequate, verified statement of attorney's fees within 30 days of receipt of the Commission's decision.

BACKGROUND

At the time of events giving rise to her complaints, Complainant worked as a Human Resources Director at the Agency's Office of Management, Human Resources Division in Alexandria, Virginia.

On February 5, 2018, Complainant filed two EEO complaints which were consolidated for processing alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (Afro Latina/Black Latina), national origin (Panamanian), sex (female), and in reprisal for prior protected EEO activity as evidenced by multiple incidents from December 2017 to 2019.

At the conclusion of the investigation, the Agency issued a final decision finding that Complainant was not subjected to discrimination or reprisal as alleged.

In Angeles C. v. Dep't of Agric., EEOC Appeal No. 2020001072 (July 22, 2021), the Commission affirmed the Agency's final decision in part. Most relevantly, the Commission found the Agency committed a per se violation of Title VII when, on December 4, 2017, a contract consultant commented to Complainant that "it is better for you to try to resolve this issue [through the climate assessment], instead of the EEO process because the process is long and furthermore it will be difficult under this Administration since this Administration does not care about EEO." To remedy the violation, the Commission ordered the Agency to, among other things, conduct a supplemental investigation into Complainant's entitlement to compensatory damages. The decision also stated that Complainant may be entitled to attorney's fees and that Complainant should submit a verified statement of attorney's fees to the Agency within 30 days of the decision.

The Commission denied the Agency's request for reconsideration in Angeles C. v. Dep't of Agric., EEOC Request No. 2021004653 (Mar. 2, 2022).

After remand, Complainant claimed that the Agency never reached out to her to obtain her statement, despite her attorney's effort to discuss the matter with the Agency. The Agency disputes this. The Agency asserted that, on April 13, 2022, it requested Complainant submit all objective and other evidence of pecuniary and non-pecuniary damages connected to the Commission's finding of reprisal. Additionally, the Agency included a document titled Guidelines on Submission of Evidence Related to Compensatory Damages to assist Complainant.

On May 11, 2022, Complainant submitted her evidence in support of her damages claim. Complainant claimed that she was entitled to compensatory damages in the amount of \$471,346.82. She claimed that amount included damages for her emotional distress. She stated she suffered significant emotional distress and depression, including sleeplessness throughout 2017 and 2018. She also sought recovery of her loss of salary between February 2018 and November 2018 in the amount of \$123,555.83. In addition, she sought reimbursement for her withdrawals in the amount of \$53,846.46 that she made from her Thrift Savings Plan, which were losses she said she incurred due to her unemployment from February 2018 to November 25, 2018.

The record shows she sought therapy through the Agency's Employee Assistance Program (EAP), which her attorney claimed was directly related to the Agency's treatment during December 2017 and January 2018. She resigned on February 2, 2018.

In support of her request for compensatory damages, Complainant offered the affidavit of her roommate who attested to Complainant's poor state of well-being, her headaches and stomach pains, lack of zeal, and her dread of going to work, which the witness stated was not her character. Her roommate also stated that she attended one of the EAP therapy sessions in December 2017 so that she could relay her observations of the change in her behavior to the counselor.

In addition, Complainant's most recent attorney sought the recovery of \$13,698.75 for the legal fees she incurred. She did not submit an itemized list showing the dates and items upon which she worked. There was no delineation showing that the time was related to the Commission's single finding of the per se reprisal violation.

On September 2, 2022, the Agency issued its final decision on compensatory damages finding that Complainant was not entitled to any monetary relief. The Agency reasoned that she was not entitled to any non-pecuniary compensatory damages, because she offered insufficient documentation. The Agency determined that the record was “devoid of sufficient evidence causally connecting Complainant’s alleged harm to the contract consultant’s alleged comment.” The Agency also concluded that her request for compensatory damages exceeded the statutory cap and was “monstrously excessive” given the facts in this case.

On the same date that it issued its compensatory damages decision, the Agency issued a separate decision concluding that Complainant was not entitled to attorney’s fees or costs because the Agency determined that the attorney failed to submit a verified statement of fees and also deemed the petition as untimely submitted.

Complainant filed the instant appeals.

CONTENTIONS ON APPEAL

On appeal, Complainant asserts the final decision trivializes Complainant’s suffered harm, ignored the proffered evidence, and states that the Agency is attempting to relitigate the Agency’s objection to the Commission’s finding of per se reprisal. Complainant maintains that the Agency provided no information about the steps the Agency took to comply with the Commission’s order to conduct a supplemental investigation. Complainant states that at no time did the Agency request to speak with Complainant, despite the counsel’s numerous efforts to reach out to the Agency. Consequently, Complainant’s counsel asks the Commission to award compensatory damages and attorney’s fees. Complainant contends that, if the Agency’s final decisions are affirmed, the Agency will bear no consequence for the per se reprisal violation which the Commission found.

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

When discrimination is found, an agency must provide a remedy that constitutes full, make-whole relief to restore a complainant as nearly as possible to the position he or she would have occupied absent the discrimination. See e.g., Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co., v. Moody, 422 U.S. 405, 418-419 (1975). The award is intended to be remedial, and not punitive.

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e 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 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 \$300,000.00. 42 U.S.C. § 1981a(b)(3).

Pecuniary Damages

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. Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), 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.

Complainant is seeking damages for loss of salary because of her resignation from the Agency on February 2, 2018, and compensation between the time she resigned and the time she started a new job with the Commonwealth of Virginia on November 25, 2018. Further, Complainant is seeking additional compensation for the difference of salary between her former job with the Agency and her new job, and missed performance pay. Finally, Complainant is seeking reimbursement for her TSP withdrawals that she was forced to take because of her unemployment. The Agency maintains that Complainant did not identify any expenses which she incurred because of the discrimination.

We agree with the Agency that Complainant is not entitled to the recovery of the losses that occurred after she resigned on February 2, 2018, due to her unemployment. We did not rule in her favor on a constructive discharge claim or any actions other than the comment that was made on December 4, 2017. Therefore, we find that the Agency's decision finding that she is not entitled to the claimed pecuniary compensatory damages is supported by the record.

Non-Pecuniary Compensatory Damages

Nonpecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See EEOC Notice No. 915.302, Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, at 10 (July 14, 1992).

There is no precise formula for determining the appropriate 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 “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 a complainant concerning their 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 the 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 appropriate amount of damages in specific cases. Id.

An award of non-pecuniary compensatory damages should reflect the extent to which the Agency's discriminatory action directly or proximately caused the harm as well as the extent to which other factors also caused the harm. See Johnson v. Dep't of the Interior, EEOC Appeal No. 01961812 (June 18, 1998). It is the complainant's burden to provide objective evidence in support of his or her claim and proof linking the damages to the alleged discrimination. See Papas v. U.S. Postal Serv., EEOC Appeal No. 01930547 (Mar. 17, 1994); Mims v. Dep't of the Navy, EEOC Appeal No. 01933956 (Nov. 23, 1993).

The Agency explained that other than a single letter stating that Complainant experienced stress, there was no other information provided, or available, to support her claim for compensatory damages.

However, in this case, we find that Complainant provided sufficient evidence that the Agency's reprisal on December 4, 2017, contributed to her deteriorating condition. Our review of the record also shows that she sought medical help in the form of seeking EAP therapy in December 2017. The record references the limited medical documentation that includes a visit December 2017, which coincides with the date of the found discrimination.

We further find that the record contains Complainant's evidence that the Agency's reprisal resulted in anxiety, loss of self-esteem, increased stress and depression, impairment of her social relationships, and reduced social interaction. Complainant's own affidavit referenced her "anger, frustration and disappointment." Her appeal submission included a witness statement, that stated she was very distraught about the statement discouraging her from filing an EEO complaint and that the witness had encouraged Complainant to file a complaint. Complainant is entitled to compensation for the harm she experienced because of the per se reprisal. Moreover, here, we find that she sufficiently showed that the Agency's action on December 4, 2017, was a direct or proximate cause of the harm.

Accordingly, we find that she is entitled to compensatory damages and that the appropriate amount to remedy Complainant for the harm suffered as a result of the per se reprisal discrimination is \$1,000.00. See Leonardo M. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120172736 (Dec. 7, 2018) (the Commission affirmed an award of \$1,000.00 in nonpecuniary, compensatory damages regarding one incident of reprisal, which occurred when management officials discussed Complainant's EEO complaint during a 90-day performance evaluation); Nadene M. v. Dep't of Justice, EEOC Appeal No. 0720150018 (May 20, 2016) (awarded \$1,000.00 in nonpecuniary, compensatory damages for exacerbated preexisting anxiety and depression after a finding of retaliation); Natalie S. v. Dep't of Veterans Affairs, EEOC Appeal No. 2021000139 (Apr. 27, 2021) (affirming a final agency decision awarding \$1,500.00 in nonpecuniary compensatory damages for preventing union representation while a complainant pursued EEO claims).

Attorney's Fees

Complainant seeks the recovery of \$13,698.75 in attorney's fees. The Commission's regulations require federal agencies to award attorney's fees and costs 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 receive an award of attorney's fees, a complainant must submit: (1) a verified statement of attorney's fees and (2) an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. See 29 C.F.R. § 1614.501(e)(2)(i), EEO MD-110 at Chap. 11 § VI A, at 11-17 (Aug. 5, 2015). Among many other requirements, the verified statement of fees must include a list of services rendered itemized by date, number of hours, and a detailed summary of the task performed. Id. The description of services performed should be of sufficient detail in order to justify the time and work expended.

We note that both prior decisions made clear that if Complainant was represented by an attorney, Complainant was required to submit a verified attorney's fees petition to the Agency within 30 days of our prior decision. Here, the Commission's appellate decision was issued on July 22, 2021. The subsequent denial of the Agency's request for reconsideration was issued on March 2, 2022. Complainant still did not submit a petition for attorney's fees until May 11, 2022, which is more than 30 days after both the Commission's denial of the Agency's request for reconsideration. Thus, Complainant's attorney's fees petition was untimely filed.

Furthermore, we find that the attorney's fee petition must be denied based on the inadequacy of the Complainant's attorney's submission as well. The Commission recognizes that the attorney "is not required to record in great detail the manner in which each minute of his time was expended." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998). However, the attorney does have the burden of identifying the subject matters in which he spent his time, which can be documented by submitting sufficiently detailed contemporaneous time records to ensure that the time spent was accurately recorded. See National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982). Specifically, the attorney must provide a verified statement of fees and costs which includes "a list of services rendered itemized by date, number of hours, detailed summary of the task, rate and attorney's name;" and "documentary evidence of reasonableness of hours, such as contemporaneous time records, billing records, or a reasonably accurate substantial reconstruction of time records." EEO MD-110, at Ch. 11 §VI.G.1.

In the record at hand, Complainant's current attorney provided a statement that indicated that Complainant paid her previous counsel \$7,698.75 and had incurred \$6,000.00 in fees with her. The attorney included an email from Complainant's prior counsel confirming the amount paid.

Neither document, however, specifically documented the work performed, when the work was performed, how many hours were expended, or any other information supporting the requested fees. Instead, the documentation only provides the total amount for fees and costs without any additional details. For these reasons, we AFFIRM the Agency's decision regarding attorney's fees.

CONCLUSION

Accordingly, we MODIFY the Agency's decision regarding nonpecuniary compensatory damages. We AFFIRM the Agency's decision concerning attorney's fees. We REMAND the matter to the Agency for further action in accordance with this decision and the ORDER herein.

ORDER (C0618)

- 1) Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$1,000.00 in non-pecuniary compensatory damages.
- 2) Since Complainant partially prevailed on her appeal, she is entitled to an award of reasonable attorney's fees incurred in the processing of this appeal. 29 C.F.R. § 1614.501(e). The attorney shall submit a certified statement of fees to the agency - - not to the Equal Employment Opportunity Commission, Office of Federal Operations - - within forty-five (45) calendar days of the date of this decision. The agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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.

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 (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision.

If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0124)

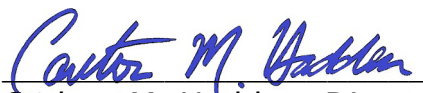
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint.

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 their 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 17, 2024

Date