



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

[REDACTED]
Lewis L.,¹
Complainant,

v.

Kristi L. Noem,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2023000007

Hearing No. 520-2018-00382X

Agency No. HS-CBP-02518-2017

DECISION

On October 3, 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 September 30, 2022 decision regarding his entitlement to compensatory damages and attorney's fees 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. and 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 AFFIRMS the Agency's final decision.

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

Whether the Agency correctly determined that Complainant was entitled to \$10,000.00 in compensatory damages and \$8,791.25 in attorney's fees following the Commission's finding of liability on two incidents of per se reprisal.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Customs and Border Protection Officer (CBPO), at the Agency's John F. Kennedy International Airport in Jamaica, New York.

On November 2, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of race (Caucasian), disability (association – use of Family Medical Leave Act (FMLA)) and in reprisal for prior protected EEO activity as evidenced by several incidents.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing but subsequently withdrew his request. The AJ remanded the complaint to the Agency, and the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). In the decision, the Agency found that Complainant was not subjected to discrimination as to eight allegations. However, the Agency found that management subjected Complainant to reprisal based on the following allegations:

1. On October 19, 2017, the Assistant Chief (AC) issued Complainant a Memorandum of Instruction (MOI) relating to Complainant's informal complaint of discrimination; and
2. On October 19, 2017, after being issued the MOI, during a meeting with the Port Director (PD) and the Assistant Port Director (APD), the PD asked Complainant to discuss what happened relating to his allegations of harassment; however, Complainant said he had an attorney representing him and was advised not to discuss the complaint. At that time, the PD became visibly upset and told Complainant "You have already taken this formal, now we cannot even talk about it," "Well good luck [Complainant]!" and "I approve

all the FMLA applications at this port and I think we do a very good job with them. [Complainant], you had better start adhering to the regulations of the FMLA directive, and you have not been doing so. You are not to call the permits office."

The Agency ordered the following remedies: an opportunity for Complainant to submit additional evidence and argument in support of compensatory damages (including pecuniary and nonpecuniary damages), the opportunity to submit a request for attorney's fees and costs, EEO training for the responsible management officials, consideration of disciplinary action against the responsible management officials, and to post a notice of the finding of discrimination.

Complainant appealed. In Lewis L. v. Dep't of Homeland Sec., EEOC Appeal 2021000951 (May 16, 2022), the Commission affirmed the Agency decision and remanded the matter for compliance with the remedies ordered.

Following the remand, on June 15, 2022, Complainant requested \$35,000.00 in compensatory damages and provided the Agency with documentation in support of his request for damages. Complainant stated he suffered "irreparable harm done to his reputation, emotional harm, and physical harm which caused his blood pressure to increase and had to be controlled." His only supporting evidence was his doctor's note that states "Due to multiple stress factors in the patient's environment, [Complainant] was being monitored for labile hypertension from June 2017 to February 2018."

The Agency issued a decision regarding Complainant's entitlement to compensatory damages and attorney's fees and costs. The Agency first determined that Complainant was not entitled to pecuniary compensatory damages because he did not submit a request for past and/or future out-of-pocket expenses. Next, the Agency awarded Complainant \$10,000.00 in non-pecuniary compensatory damages. The Agency reasoned that Complainant provided no personal statement, witness statements, bills for medical care, or other objective evidence linking expenses and distress to the reprisal in this case. The only supporting evidence provided by Complainant was a doctor's note that stated "[d]ue to multiple stress factors in the patient's environment, [Complainant] was being monitored for labile hypertension from June 2017 to February 2018." This doctor's note only established that Complainant was monitored for hypertension or high blood pressure for less than a year due to multiple stress factors. The Agency found that there was no clear nexus established between the two instances of reprisal on October 19, 2017, and his high blood pressure condition.

In fact, the high blood pressure appears to have been monitored beginning in June 2017, which was approximately four months before the reprisal at issue occurred. As a result, the Agency determined that an award of \$10,000.00 was appropriate.

In addition, the Agency granted \$8,791.25 in attorney's fees, which was the amount Complainant's counsel requested.

Complainant filed the instant appeal without submitting any new contentions or arguments in support.

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, the Agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore them as nearly as possible to the position they would have occupied absent the discrimination. Doyle S. v. Dep't of the Interior, EEOC Appeal No. 2021003144 (Mar. 17, 2022); Arlette W. v. Dep't of Def., EEOC Appeal No. 2021001994 (Sept. 27, 2022). It must therefore provide a remedy unless it can show, by clear and convincing evidence, that Complainant would not have been entitled to that remedy even if the Agency's discriminatory action, in this case the per se act of reprisal caused by the inadvertent disclosure of his EEO complaint, had not occurred. Id. Here, while the parties agree that Complainant is entitled to relief, they have a substantial difference of opinion as to what that full, make-whole relief should look like.

As an initial matter, Complainant did not raise any arguments regarding the Agency's decision to not award any pecuniary compensatory damages.

As such, we find no reason to disturb the Agency's decision finding that Complainant failed to establish an entitlement to pecuniary compensatory damages. Likewise, Complainant raised no challenges regarding the Agency's award of the full requested attorney's fees. Thus, the Commission finds no basis to disturb the Agency's decision regarding attorney's fees.

Non-Pecuniary Compensatory Damages

In a claim for compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, that: he suffered harm as a result of the Agency's discriminatory action; the extent, nature, and severity of the harm suffered; and the duration or expected duration of the harm. Alissa U. v. Dep't of the Interior, EEOC Appeal No. 2022000423 (Aug. 8, 2024); Miquel G. v. Dep't of Transp., EEOC Appeal No. 2019002129 (Sept. 23, 2021). The size of a compensatory damages award will be governed by the severity and duration of the harm suffered and the documentation of both the harm and the causal connection to the Agency's acts of discrimination. In general, the more severe the harm, the longer its duration, the stronger its connection to the Agency's discriminatory acts, and the more thorough its documentation, the higher the award will be. Id.

Nonpecuniary damages 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. Id. Such awards should not be motivated by passion or prejudice or "monstrously excessive" standing alone but should be consistent with the amounts awarded in similar cases. Id.

Here, Complainant is seeking \$35,000.00 in non-pecuniary compensatory damages. Complainant stated that the basis for the requested amount is "the irreparable harm done to his reputation, emotional harm and physical harm which caused his blood pressure to increase and had to be controlled." We note that we did not rule in his favor on any actions other than the two comments that were made on October 19, 2017. The Agency argued that other than a single statement that Complainant experienced high blood pressure, there was no other information provided, or available, to support his claim for compensatory damages.

Having reviewed the record, we find the Agency's award of \$10,000.00 in non-pecuniary compensatory damages for the retaliatory comments to be consistent with our prior decisions in similar cases and not "monstrously

excessive" See Elvis G. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019005802 (July 22, 2021), req. for reconsid. den'd, EEOC Request No. 2021004425 (Jan. 24, 2022) (\$10,000.00 in non-pecuniary damages awarded for retaliatory proposed five-day suspension based on Complainant's corroborated testimony that he fainted, began having hypertension, and suffered mental anguish due to discrimination); Leora R. v. Dep't of Health & Human Servs. EEOC Appeal No. 2020004621 (Apr. 11, 2022) (\$10,000.00 awarded for four months of harm including stress, anxiety, feelings of hopelessness and dread, depression, migraines; and high blood pressure); Gwendolyn G. v. Dep't of Justice, EEOC Appeal No. 2021001396 (Oct. 18, 2021) (\$10,000.00 awarded --\$5,000.00 for each of two instances of reprisal); Ludie M. v. U.S. Postal Serv., EEOC Appeal No. 0120170459 (May 9, 2019) (\$4,500.00 for a single instance of reprisal); Davida L. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120172609 (Feb. 15, 2019) (awarding \$10,000.00 for reprisal in the form of discussing complainant's EEO claim when complainant suffered from panic attacks, insomnia, high blood pressure, irritability, headaches and feelings of isolation).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision on compensatory damages and attorney's fees.

ORDER

To the extent it has not already done so, the Agency is ordered to take the following remedial actions:

1. Within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant \$10,000.00 in non-pecuniary compensatory damages.
2. Within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant \$8,791.25 in attorney's fees and costs.

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, 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 (R0124)

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 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. **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

February 5, 2025
Date