



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

[REDACTED]  
Sana I.,<sup>1</sup>  
Complainant,

v.

Xavier Becerra,  
Secretary,  
Department of Health and Human Services  
(Food and Drug Administration),  
Agency.

Appeal No. 2023001281

Agency No. HHS-FDAORANE-050-20

**DECISION**

On December 21, 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 November 23, 2022, final decision concerning her 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 AFFIRMS the Agency's final decision.

**ISSUE PRESENTED**

Whether Complainant has demonstrated entitlement to future pecuniary damages as a result of a discrimination finding on her complaint that she was not selected for an Assistant Special Agent in Charge position in the Agency's Office of Criminal Investigations, New York Field Office.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Criminal Investigator/Special Agent at the Agency's Office of Criminal Investigations New York Field Office in Newark, New Jersey.

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

On April 9, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Hispanic), national origin (Puerto Rican), sex (female), color (Brown), age (YOB: 1969), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when, inter alia, on July 13, 2020, Complainant was informed by the Special Agent in Charge that she was not selected for the Assistant Special Agent in Charge position in the Office of Criminal Investigations, New York Field Office (Vacancy Announcement Number FDA-ORA-20-MP-10828846-JS).

Complainant stated that due to the emotional distress she suffered as a result of the discrimination, she retired from the Agency effective February 22, 2022, even though prior to that, she had initially planned to continue working until she reached the age of 57 (in 2026).

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b) on July 28, 2022. The decision found that although Complainant did not establish that she was subjected to unlawful harassment, the evidence in the record established that Complainant was subjected to discrimination for the non-selection claim based on her race, color, sex, and reprisal.<sup>2</sup> The decision found that Complainant was entitled to be retroactively promoted to the GS-14 Assistant Special Agent in Charge position effective July 13, 2020, and that she was entitled to back pay and compensatory damages.

Thereafter, Complainant submitted a claim for damages, seeking non-pecuniary compensatory damages in the amount of \$75,000 and future pecuniary damages in an unspecified amount for the loss of future earning capacity, citing her earlier-than-planned retirement from the Agency and the loss of earning capacity which the non-selection had on her ability to obtain supervisory positions outside the Agency because she did not have the supervisory experience to obtain such a position. In a decision dated November 23, 2022, the Agency found Complainant entitled to non-pecuniary compensatory damages in the amount of \$50,000, but was not entitled to future pecuniary damages for lost earning capacity because she did not establish with reasonable certainty that the Agency's discrimination actually resulted in any diminished earning capacity.<sup>3</sup>

The instant appeal from Complainant followed.

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<sup>2</sup> The decision found, however, that the evidence was not sufficient to establish that she was not selected due to her national origin or her age.

<sup>3</sup> The decision noted that because Complainant voluntarily retired prior to the Agency's issuance of its final decision finding that she was discriminated against with respect to the non-selection, she was not entitled to reinstatement, but she was entitled to backpay with interest for the time she continued in her employment at the Agency after the discriminatory non-selection up until the date of her retirement.

### CONTENTIONS ON APPEAL

Complainant stated on appeal that she was challenging only the Agency's denial of future pecuniary damages.<sup>4</sup>

In response, the Agency contends that its decision correctly found Complainant was not entitled to future pecuniary damages because there was no evidence beyond self-serving statements from Complainant and her family and friends to support her intentions to retire at the age of 57 and further Complainant has not provided any evidence to support that she would be unable to find another position either in the federal government or outside of it.

### ANALYSIS AND FINDINGS

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").

Compensatory damages may be awarded for the past pecuniary losses, future pecuniary losses, and non-pecuniary losses which are directly or proximately caused by the agency's discriminatory conduct. Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, (Enforcement Guidance) EEOC Notice No. 915.002 (July 14, 1992), at 8.

An award of damages for lost earning capacity comports with Title VII's goal of providing make-whole relief to the victims of discrimination. Williams v. Pharmacia Inc., 956 F. Supp. 1457, 1466 (N.D. Ind. 1996) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417- 19 (1975)). Where complainant has shown that her future earning power has been diminished as a result of the agency's discrimination, the Commission has awarded future pecuniary damages for the loss of future earning capacity. See Hernandez v. U.S. Postal Serv., EEOC Appeal No. 07A3005 (July 16, 2004); Brinkley v. U.S. Postal Serv., EEOC Request No. 05980429 (August 12, 1999); Moore v. U.S. Postal Serv., EEOC Appeal No. 0720050084 (March 6, 2007). Proof of entitlement to loss of future earning capacity involves evidence suggesting that an individual's injuries have narrowed the range of economic opportunities available to her.

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<sup>4</sup> We therefore exercise our discretion and decline to address the issue of the amount of Complainant's non-pecuniary compensatory damages. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120120909 (July 24, 2014).

Generally, the party seeking compensation for loss of earning capacity needs to provide evidence to demonstrate with reasonable certainty or reasonable probability that the earning capacity has been impaired and there must be evidence which will permit the fact finder to arrive at a pecuniary value for the loss. See Welker v. Dep't of Agric., EEOC Appeal No. 0120120330 (July 27, 2012).

In support of her request for future pecuniary damages, Complainant submitted a statement from herself, her husband, and two of her former co-workers who stated that to their knowledge, until the discrimination, Complainant had intended to work until the age of 57. We reject Complainant's argument. Complainant has not provided sufficient evidence to establish with any reasonable certainty that her earning capacity was, in fact, impaired. We note that the Agency's final decision did not make a finding of a hostile work environment, nor did Complainant ever raise a claim that her retirement was involuntary (a claim of constructive discharge), nor is such a claim before us now. While Complainant's petition cited to Lovett v. Dep't of Defense, EEOC Appeal No. 0120102682 (Dec. 20, 2011) and Miquel G. v. Dep't of Transp., EEOC Appeal No. 2019002129 (Sept. 23, 2021) to establish her entitlement to future pecuniary damages, neither of those cases are comparable to the instant situation because in both of those cases, the complainants had established that they were subjected to an unlawful hostile work environment which directly contributed to such serious physical and mental health conditions that they were deemed medically unable to return to work. That is not the case here. There is no indication in the notes from either of Complainant's doctors that the Agency's discrimination has resulted in Complainant's suffering lasting physical or mental health problems which would prevent her from working.

Nor has Complainant offered any other evidence to support her assertion that due to her not being selected as an Assistant Special Agent in Charge and her lack of supervisory experience, she is no longer eligible for employment at any other federal Agency or a non-federal position. See Conrad v. Dep't of Justice, EEOC Appeal No. 0120090960 (April 9, 2010) (finding complainant had not established a loss of earning capacity because there was no evidence to indicate that could not have worked in other federal or non-federal jobs). We emphasize that the burden is on Complainant to provide evidence beyond conjecture to demonstrate that her earning capacity has been impaired and which would permit a fact-finder to arrive at a pecuniary value for the loss. Complainant has not done so here.<sup>5</sup> See Fields v. Dep't of Defense, EEOC Appeal No. 01A41857 (July 7, 2005).

#### 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.

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<sup>5</sup> We also note that the Agency did award Complainant back-pay for the months prior to the retirement to compensate her for the loss of the GS-14 salary she should have received had she been selected for the position absent the discrimination.

ORDER (D0617)

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

1. Non-pecuniary, Compensatory Damages. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$50,000 in non-pecuniary, compensatory damages.
2. Back-pay. The Agency shall pay Complainant back pay with interest and other benefits from July 13, 2020, through February 22, 2022 for the salary she would have received had she been selected for the GS-14 Assistant Special Agent in Charge position. The Agency shall determine the appropriate amount of back pay, with interest and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision is issued. The Agency will ensure that all tax consequences are taken into account. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision.

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 (K0124)

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 their 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.

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 (S0610)

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. 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

January 22, 2024  
Date