



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

████████████████████  
Amina W.,<sup>1</sup>  
Complainant,

v.

Dan Brouillette,  
Secretary,  
Department of Energy,  
Agency.

Appeal No. 0120181366

Agency Nos. 97-183-HQDP, 98-093-HQDP

**DECISION**

On March 13, 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 February 9, 2018, 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**

The issue presented herein is whether the Agency properly determined Complainant's award of back pay and compensatory damages in compliance with the Commission's decision in EEOC Request No. 0520160143 (Oct. 12, 2017).

**BACKGROUND**

During the relevant time, Complainant worked as an Administrative Support Specialist, GS-301-09. Following her assignment to a position in the Agency's Human and Administrative Resources Group of Defense Programs (DP), located in Washington, D.C., management determined that Complainant required additional training at the Agency's Germantown, Maryland facility.

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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.

While en route to the Germantown facility, in an Agency shuttle bus, Complainant sustained a head injury during a bus accident. Complainant required one month of convalescence and was diagnosed with a concussion, with cognitive residuals. Thereafter, Complainant believed that her first-line and second-line supervisors subjected her to unlawful discrimination. Complainant filed two formal EEO complaints, on August 1, 1997 and May 28, 1998, based on race, national origin, color, disability, age, and prior EEO activity.

The Agency processed the two formal complaints separately and issued two final decisions, finding no discrimination. Complainant appealed both decisions to the Commission. See EEOC Appeal Nos. 01A05045 and 01A04592 (June 14, 2002). The Commission found that Complainant's claims alleged a pattern of discrimination, and the Agency erred in failing to consolidate all the complaints. Eventually, the Agency was ordered to conduct a supplemental investigation of the consolidated claims, including a Reduction in Force (RIF) claim and a 1996 performance rating claim. See EEOC Request No. 05A20614 (June 14, 2002).

In December 2005 and April 2006, the Agency again issued two separate decisions, finding no discrimination. On appeal, the Commission determined that the Agency failed to "re-adjudicate" the complaints as a consolidated matter, and instead repeated its earlier opinion that the Agency had engaged in improper fragmentation. See EEOC Appeal No. 0120062364 (Sept. 12, 2007), request for reconsideration denied, EEOC Request No. 0520080074 (Nov. 15, 2007). Specifically, we noted that "no attempt was made to combine the two complaints and investigate them as a consolidated claim of harassment." The Commission found that no new witnesses were interviewed, no new medical evidence regarding the progress of Complainant's cognitive abilities was sought, and no efforts were made to intermingle the events identified in the separate complaints. See id. While reluctant to do so, the Commission yet again remanded the matter to the Agency. The Agency was notified that failure to comply with EEOC's orders could result in an adverse inference against it, including issuing a decision fully or partially in Complainant's favor. See id.

Following an investigation on remand, Complainant timely requested a hearing before an EEOC Administrative Judge (AJ). A hearing was held. Subsequently, on May 9, 2011, the AJ issued a bench decision finding no discrimination. The Agency issued a final order fully implementing the AJ's decision. Complainant filed an appeal.

In response to Complainant's filing, the EEOC Office of Federal Operations (OFO) requested that the Agency submit the complete record in a letter dated August 30, 2011. The Agency partially complied. Thereafter, on May 7, 2015, OFO issued a "Notice to Show Good Cause Why Sanctions Should Not be Imposed" (hereinafter "Notice"). The Notice emphasized the absence of the hearing transcript. Further, the Agency was notified that failure to produce the entire record within twenty days could result in sanctions. The Agency did not respond.

In light of the Agency's repeated failure to comply with Commission orders in this case, the absence of any explanation for its failure to provide the complete complaint file, the Commission's inability to properly review the AJ's determination, and Complainant's resulting

prejudice, the Commission found that the most appropriate sanction was a default judgment in Complainant's favor with regard to her race, color and reprisal claims concerning her 1998 non-selection to two GS-11 positions advertised in Vacancy Announcements 98-DP-00-288 and 98-DP-00-303. See EEOC Appeal No. 0120113823 (Nov. 17, 2015). The Agency was ordered to take the following remedial actions: offer Complainant a retroactive promotion to the position of Management Analyst, GS-343-11, or a substantially equivalent position; determine the appropriate back pay due to Complainant; conduct a supplemental investigation on Complainant's entitlement to compensatory damages; and provide a minimum of eight hours of training to its EEO managers and staff.

In response to the decision in EEOC Appeal No. 0120113823, the Agency filed a request for reconsideration. In EEOC Request No. 0520160143 (Oct. 12, 2017), the Commission denied the Agency's request for reconsideration. However, the decision clarified the remedial orders. The Agency represented in its request that Complainant was terminated from the Agency in May 2002. The record indicated that Complainant may have challenged this decision in the United States District Court for the District of Columbia, Civil Action No. 07-901 (RBW), which subsequently dismissed the case in December 2011. In our prior decision, our remedial orders did not consider this termination. Therefore, in EEOC Request 0520160143, we modified our back pay order to allow the Agency to consider whether or not it can establish that the termination was not a result of the unlawful discrimination or retaliation. The Commission's order stated that "the Agency may establish that the back pay period should end with Complainant's 2002 termination. To do so, it must issue a final decision on back pay, citing to evidence of record that establishes that the termination was unrelated to the two non-selections that formed the basis of the default judgment of discrimination/retaliation already found."

In compliance with the Commission's decisions, on December 19, 2017, the Agency asked Complainant, through her representative (Representative), to submit her supporting documentation regarding her claims for back pay and compensatory damages. In response, on January 11, 2018, the Representative submitted a statement. As for back pay, the Representative asserted that Complainant was entitled to back pay beyond her termination in 2002. The Representative stated that Complainant was removed following her indefinite sick leave. The Representative provided copies of Complainant's W-2 forms.

Further, the Representative sought \$300,000 in nonpecuniary compensatory damages. The Representative asserted Complainant was under the care of physicians for continued headaches, tension, sleeping issues, concentration issues, and continued retaliation. He also asserted that Complainant took medications for her recurring pain and suffering, which she experienced daily. She was also treated for a rapid heart rate and given sleeping pills. The Representative also stated that Complainant incurred medical expenses due to the Agency's discriminatory actions and harassment. However, the Representative failed to provide any documents to substantiate such expenses. The Representative did provide medical notes from 2001, as well as a letter from Complainant's Psychologist dated August 26, 1996. The Representative stated that Complainant had out-of-pocket expenses such as copays for doctor visits. However, he claimed that the records were no longer available.

On February 9, 2018, the Agency issued its final decision regarding Complainant's entitlement to back pay and compensatory damages. The Agency noted that the Commission's decisions limited Complainant's award of back pay to May 2002, the date of her termination from the Agency. The Agency noted that Complainant had filed a civil action and an appeal with the Merit Systems Protection Board (MSPB) regarding her termination. She withdrew her matters prior to the issuance of a decision either by the District Court or the MPSB. As such, the Agency argued that providing her with back pay beyond her termination would not be appropriate. The Agency pointed out that the non-selections occurred in 1998 while Complainant was in the Office of Defense Programs. However, Complainant was issued a Performance Improvement Plan in 2001 and terminated in 2002, by a different organization within the Agency, namely the Energy Information Administration. The Agency indicated that the officials involved with the 2001 and 2002 events were not the same employees who engaged in the discriminatory actions from 1997 and 1998. Accordingly, the Agency limited its calculation of Complainant's back pay from Pay Period 7 in 1998 to Pay Period 10 in 2002, when she was terminated from employment with the Agency. The Agency determined that it owed Complainant \$25,308.08 plus any interest in back pay.

As for compensatory damages, the Agency noted the documents the Representative provided in response to the Agency's request for documentation. The Agency first addressed Complainant's request for pecuniary damages. The Agency noted that the Representative indicated that Complainant incurred out-of-pocket expenses but failed to provide supporting documentation. In addition, the Agency reviewed the record, which included Complainant's prior Attorney's statement indicating that Complainant had paid \$1,815 in physician bills. However, again, there was no documentation to support the expense. As such, the Agency concluded that there was insufficient documentation support Complainant's request for pecuniary damages.

As for Complainant's claim for \$300,000 in non-pecuniary damages, the Agency found that Complainant's supporting documentation did not warrant such a high award of damages. The Agency noted that the discriminatory events occurred in 1998. However, Complainant provided several references to an unrelated accident which happened in 1996. In addition, the medical documentation dated back to 2000. Most of the documentation provided by Complainant referenced distress she experienced due to the 1996 accident. Therefore, the Agency found that Complainant had not shown that all of her depression and anxiety were connected to her two non-selections. Therefore, the Agency determined that Complainant was entitled to \$15,000 in non-pecuniary damages.

#### CONTENTIONS ON APPEAL

Complainant appealed. The Representative argued that Complainant's back pay should not have been limited by her termination in 2002. The Representative argued that the Agency officials who issued her termination were aware of her prior EEO activity. Therefore, he asserted that they were influenced by the officials who subjected Complainant to unlawful discrimination. The Representative did not otherwise challenge the Agency's calculation of back pay.

As for the Agency's award of \$15,000 in non-pecuniary damages, the Representative contended that Complainant has submitted ample documentation over the decades establishing her entitlement to \$300,000.

The Agency asked that the Commission reject Complainant's arguments and affirm its final decision.

### 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 (EEO MD-110), 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").

#### *Back Pay*

We note that the Representative does not challenge the Agency's calculation of back pay. He merely argued that the Agency should not have limited back pay to the date Complainant was terminated from her employment with the Agency. The Representative asserted that the termination was related to the two discriminatory non-selections. He argued that the discriminatory and retaliatory events which occurred in the Office of Defense Programs carried over into the Energy Information Administration. The Representative claimed that the reasons provided by the Energy Information Administration supervisors were pretext for unlawful retaliation.

Upon review of the record, we find that Complainant and the Representative asserted that the events were connected, but failed to provide supporting evidence. The record demonstrated that the officials involved in the discriminatory non-selections were not the same officials who terminated Complainant. Further, the record indicated that Complainant was reassigned pursuant to a reduction-in-force which the Representative noted was not an issue in the instant matter. Despite the Representative's assertions that the termination was in retaliation for Complainant's protected EEO activity, we find nothing to support any connection between the discriminatory actions and the termination. As the Representative did not challenge the Agency's calculations, we discern no reason to modify the Agency's award of \$25,308.08 plus any interest to Complainant for back pay.

### *Compensatory Damages*

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes his or her claim of unlawful discrimination may receive, in addition to equitable remedies, 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). 42 U.S.C. § 1981a(b)(3). 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. Id.

The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in EEOC Notice No. 915.002, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (July 14, 1992). Briefly stated, the complainant must submit evidence to show that the agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. Id. at 11-12, 14; Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994). 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. EEOC Notice No. N 915.002 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.

In Carle v. Dep't 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. Complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. Id. Non-pecuniary damages must be limited to the sums necessary to compensate the injured party for the actual harm and should take into account the severity of the harm and the length of the time the injured party has suffered from the harm. Carpenter v. Dep't of Agric., EEOC Appeal No. 01945652 (July 17, 1995).

After careful consideration of the evidence of record, we find that Complainant provided evidence that following the Agency's discriminatory actions, she experienced anxiety, sleep problems, and sadness. We find that Complainant's request for \$300,00.00 is not consistent with the Commission's prior cases. Instead, we agree with the Agency's determination that an award of \$15,000 for nonpecuniary, compensatory damages is appropriate. This amount takes into consideration the severity of the harm suffered, the length of time Complainant suffered the harm, and is consistent with prior Commission precedent. See generally, Complainant v. Dep't. of Justice, EEOC Appeal No. 0120142526 (July 26, 2016) (awarding \$15,000 in nonpecuniary damages for retaliatory harassment to complainant who experienced humiliation in front of coworkers, anxiety attacks, sleep problems, withdrawal from family); Norte v. Dep't of Energy, EEOC Appeal No. 01A24738 (Dec. 12, 2003) (awarding \$15,000 in nonpecuniary damages for reprisal which left complainant feeling humiliated, demeaned, degraded, and had overwhelming

feelings of dread, foreboding, anxiety, sadness, helplessness, and hopelessness); Jones v. Dep't. of Commerce, EEOC Appeal No. 01A13671 (May 2, 2002) (awarding \$15,000 for unlawful retaliation to complainant who experienced depression, stomach pains, nausea, headaches, dizziness, and problems with family relationships, where complainant's emotional distress caused in part not only by the agency's retaliation but by nondiscriminatory work incidents as well). Accordingly, we conclude that an award of \$15,000 will adequately compensate Complainant for the harm she experienced as a result of the Agency's discriminatory actions.

### 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 and REMAND the matter in compliance with the ORDER below.

### ORDER

To the extent it has not already done so, the Agency, within 30 days of the issuance of this decision, shall take the following actions:

1. Pay Complainant \$15,000 in non-pecuniary, compensatory damages.
2. Pay Complainant \$25,308.08 plus any interest in back pay.

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 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 (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

February 25, 2020

Date