



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

[REDACTED]
Hayden K.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of Defense
(Department of Defense Education Activity),
Agency.

Appeal No. 2018000020

Agency No. PE-FY12-065

DECISION

On September 21, 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 August 15, 2018, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the Agency's award of compensatory damages was appropriate.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Teacher at the Agency's CT Joy Elementary School at a Naval station in Chinhae, South Korea. Complainant was hired on September 3, 2010, and had a two-year probationary period.

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.

On May 24, 2012, Complainant filed an EEO complaint wherein he claimed that the Agency discriminated against him on the bases of his race (Caucasian), sex (male), and in reprisal for his prior protected EEO activity under Title VII when he was terminated from his position on March 23, 2012, during his probationary period.

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 EEOC Administrative Judge (AJ). Complainant timely requested a hearing. The AJ held a hearing by video conference on November 12-13, 2014, and issued a decision on December 9, 2014.

The AJ found that no discrimination occurred. The Agency subsequently issued a final action adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Complainant appealed the Agency's final action to the Commission. In EEOC Appeal No. 0120151347 (Jan. 24, 2018), the Commission determined that the AJ erred. We found that Complainant set forth a prima facie case of race and sex discrimination with regard to his termination. The decision found that the Agency explained that Complainant was terminated based on deficiencies in his job performance.

The decision turned to Complainant to establish that the Agency's reasons were pretext for discrimination based on his race. The decision found that it was evident that several factors contributed to the Principal's animus toward Complainant. The decision found that the record indicated that the Principal's leadership style did not tolerate opposition and that Complainant's status as the faculty representative represented actual and potential confrontation. The Principal and Complainant represented different teaching philosophies. This added to the Principal's disapproval over time of Complainant's teaching methods. However, the difference in their approach to teaching does not explain why the Principal was intent on terminating Complainant before she became familiar with Complainant's teaching style. We found that sufficient persuasive testimony was presented to establish that the Principal was biased against Complainant based on his race and that the reasons she articulated for Complainant's termination were pretext intended to hide discriminatory motivation.

The decision also noted that the Principal's clear display of favoritism toward African-Americans was demonstrated in several contexts, citing favoritism on display in Germany in her treatment of African-American children as opposed to Caucasian children and when she stated that white people should not be allowed to adopt black children. A teacher in Germany testified that the Principal had conflicts with nearly every Caucasian woman within weeks of her arrival. The Principal's favoritism continued in South Korea when the Principal invited only African-American coaches or enlisted members to social events; offered cake to only the African-American coaches; and a resignation by a Caucasian teacher in South Korea after the first week of school based on the Principal's treatment. The decision noted that an Ombudsman testified that the Principal stated after that resignation "one down, two to go." Complainant was one of those two employees that the Principal intended to target, and she did so in several ways.

The District President of the Teacher's Association testified that the Principal treated the other staff equally and that it was clear she targeted Complainant. The decision held that the Principal pursued any actual or fabricated deficiency in Complainant's teaching methods that she could detect or create. Accordingly, the decision found that Complainant established his claim that he was terminated based on his race.

As for remedy, the Agency was ordered to conduct a supplemental investigation on compensatory damages, including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. The Agency engaged in the supplemental investigation from March 7 to April 11, 2018. Complainant provided an affidavit in support of his claim for pecuniary and non-pecuniary damages. Complainant included several statements from friends, colleagues, family, and church officials indicating that he suffered great harm following his termination. Complainant noted that when he was terminated from his position in South Korea, he had to return to the United States with his wife and child. The forced move negatively impacted him. Further, he noted that he was diagnosed with anxiety, depression, and Post-traumatic Stress Disorder (PTSD). He sought counseling.

Complainant also submitted 20 claims for pecuniary damages due to increased expenses, car rental, loss of food and property due to moving his family from Korea back to the United States, loss of allowances, fitness center, and loss of medical benefits. He also detailed 3 claims of future pecuniary losses for medical monitoring, loss of food and property, and loss of teaching property. Complainant provided some receipts in support of his claims. However, he provided bank statements showing that he made payments to stores or companies without also providing the itemized receipts. Complainant also provided information on medications he had been prescribed. Complainant provided statements and medical codes for medical expenses incurred to address the mental anguish and trauma he experienced. Again, however, Complainant did not provide evidence of actual out-of-pocket costs.

Following the investigation, the Agency issued its final decision determining Complainant's entitlement to compensatory damages and attorney's fees and costs. We note that the Agency found that Complainant was entitled to \$29,500.00 in attorney's fees and costs. The Agency stated that it would have awarded Complainant \$22,500 for the out-of-pocket expenses for his therapy sessions and his mediations, however, it did not as Complainant failed to provide proof of the expenses. The Agency noted that Complainant provided evidence that he experienced work-induced stress and anxiety based on the Principal's harassment, with statements from his therapists. The Agency provided Complainant with future pecuniary expenses of teaching materials noting that due to the nature of Complainant's termination and limited window to pack things, he showed that he was forced to leave his teaching materials in South Korea. Accordingly, the Agency awarded him \$1,500 for teaching materials and supplies. Similarly, the Agency allowed Complainant's claim for \$1,650 for lost food and housing supplies. Complainant needed to replace items he could not take with him from Korea due to the termination. Finally, the Agency provided Complainant with \$1,000 for bankruptcy services, noting that Complainant experienced a drastic reduction in income and could not meet his debt obligations due to the termination and had to file for bankruptcy.

Complainant provided documentation for the services. As such, the Agency provided Complainant with the expenses for which he provided receipts. The Agency awarded a total of \$4,150.00 in pecuniary damages.

As for Complainant's claim for non-pecuniary damages, Complainant sought over \$600,000. The Agency noted that Complainant indicated that he suffered severe anxiety and depression during the six years that followed the termination. He also noted that the termination affected his family as he had to quickly uproot his family and the belongings he could grab to return to his home in the United States on such short notice. He indicated that his house was in disrepair. Further, Complainant explained how his anxiety slipped into every aspect of his life resulting in his withdrawal from life and fears of retaliation. It also impacted his marriage and his relationships with friends. Complainant provided letters from three doctors and several individuals in his life who provided support for Complainant's assertions that he sought counseling repeatedly over the six years and that his personal and professional relationships were impacted. The Agency found that Complainant's evidence entitled him to \$25,000 in non-pecuniary damages.

CONTENTIONS ON APPEAL

Complainant appealed, asserting that the Agency's award of compensatory damages was not appropriate. Specifically, Complainant argues that the Agency's award of nonpecuniary damages was insufficient. Without specifically requesting an amount, Complainant pointed to several other Commission cases in which the Commission awarded \$40,000 to \$110,000 in non-pecuniary damages. Complainant clearly believes that the non-pecuniary damages did not reflect the harm incurred based on the termination action he experienced. Further, as to the Agency's determination regarding pecuniary damages, Complainant asserts that the Investigator stated that he could just provide his bank statements. However, despite the findings of the Agency, Complainant has not provided any additional receipts.

The Agency provided the Commission with the complaint record and supplemental investigation regarding Complainant's entitlement to compensatory damages and attorney's fees and costs.

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").

We note that Complainant did not appeal the Agency's calculation of attorney's fees and costs. As such, we shall not review this portion of the Agency's decision.

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to the discriminatory act or conduct. See EEO MD-110 at Chapter 11, § VII (citing Carey v. Phipps 435 U.S. 247, 254 (1978) (purpose of damages is to "compensate persons for injuries caused by the deprivation of constitutional rights")). Types of compensatory damages include damages for past pecuniary loss (out-of-pocket loss), future pecuniary loss, and non-pecuniary loss (emotional harm). See EEO MD-110 at Chapter 11, § VII.B; and Goetze v. Dep't. of the Navy, EEOC Appeal No. 01991530 (Aug. 23, 2001).

Pecuniary Damages

Damages for past pecuniary damages will not normally be awarded without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals, or other proof of actual losses or expenses. Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Guidance on Damages), EEOC Notice No. 915.002 at 10 (July 14, 1992). See Margaret L. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120150582 (April 17, 2018); Drew N. v. Dep't of Homeland Sec., EEOC Appeal No. 0120160208 (Jan. 11, 2018); Melina K. v. Dep't of Def., EEOC Appeal No. 0120152834 (Aug. 10, 2017). The Agency denied Complainant's claims for those claims for which Complainant provided no objective evidence in support of his claim. Complainant did not provide any other documentation to support his claim for those out-of-pocket expenses. As such, we discern no basis to alter the Agency's award of \$ 4,150.00 in pecuniary damages.

Non-pecuniary Damages

Non-pecuniary losses are losses that are not subject to precise quantification, including emotional pain and injury to character, professional standing, and reputation. See EEO MD-110 at Chapter 11, § VII.B (Aug. 5, 2015). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be "monstrously excessive" standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr 18, 1996) (citing Carle v. Dep't of the Navy, EEOC. Appeal No. 01922369 (Jan. 5, 1993)).

Objective evidence of compensatory damages can include statements from a complainant concerning his or her 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, 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 his 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 amount of damages appropriate in specific cases. Id.

With regard to a complainant's claim for compensatory damages, complainant has the burden of proving the existence, nature and severity of the alleged emotional harm. A complainant must also establish a causal relationship between the alleged harm and the discrimination. Absent such proof of harm and causation, a complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. The Commission has held that evidence of emotional distress should include detailed information on physical or behavioral manifestations of the distress, if any, and any other information on the intensity of the distress, information on the duration of the distress, and examples of how the distress affected appellant both on and off the job. Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). In addition to a detailed statement by the individual claiming emotional distress damages, other evidence of such damages could include statements by health care professionals, such as physicians, psychologists, psychiatrists, therapists or counselors, as well as friends, family or coworkers who could attest to the existence, nature and severity of appellant's distress, its duration and causation. Upon review, we find that the Agency properly found that Complainant met his burden.

However, we find that the Agency's award of \$25,000 was not appropriate. As noted above, Complainant provided statements from himself, physicians, friends, colleagues, pastors, and family members. The statements indicated that Complainant was terminated and forced to move himself and his family from South Korea to the United States. He explained how the termination and harassment caused his anxiety and depression, which he began to experience from 2012 through the issuance of the Commission's decision in EEOC Appeal No. 0120151347 in January 2018, over a six-year time period. The statements from his friends and colleagues noted the drastic change in his demeanor and personality and how the termination impacted all different aspects of his life and even resulted in filing for bankruptcy. Instead, we find that Complainant is entitled to \$110,000.00 in non-pecuniary, compensatory damages, finding that the discrimination suffered by Complainant. See Donny F. v. Dep't of Homeland Sec., EEOC Appeal No. 0720130035 (Oct. 20, 2015) (awarding \$125,000 to complainant who was subjected

to discrimination based on national origin and experienced panic or anxiety attacks and damage to his professional reputation); Nia G. v. Dep't of Homeland Sec., EEOC Appeal No. 0120160716 (Feb. 6, 2018) (awarding \$110,000 to complainant who was subjected to removal based on her prior protected EEO activity and who experienced mental health issues, felt humiliated, became a "completely different person," continued to be impacted by the termination, and had to live on her savings); Mohar v. U.S. Postal Serv., EEOC Appeal No. 0720100019 (August 29, 2011) (Commission awarded \$100,000 in nonpecuniary, compensatory damages where agency retaliated against complainant, which contributed to severe emotional distress, a complete transformation from an outgoing happy person, anxiety, depression, and self-loathing). As such, we modify the Agency's final decision and determine that Complainant is entitled to \$ 110,000 in nonpecuniary damages.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final order and REMAND the matter in accordance with the ORDER below.

ORDER

To the extent it has not already done so, the Agency shall provide the following remedial relief within sixty (60) calendar days of the date this decision is issued:

1. Pay Complainant \$110,000 in non-pecuniary compensatory damages.
2. Pay Complainant \$ 4,150.00 in pecuniary damages.
3. Pay Complainant \$29,500.00 in attorney's fees and costs.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying 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 (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).


COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

February 11, 2020
Date