



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

████████████████████
Karin C.,¹
Complainant,

v.

Sonny Perdue,
Secretary,
Department of Agriculture
(Rural Development),
Agency.

Appeal No. 2019000821

Agency No. RD-2013-00184

DECISION

On September 28, 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 23, 2018 final decision concerning her entitlement to damages following a finding of reprisal 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 order.

ISSUE PRESENTED

Did the Agency correctly determine the proper amount of compensatory damages Complainant is entitled to receive as a result of the Agency subjecting her to reprisal discrimination?

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Area Specialist, GS-11, at the Agency's Mississippi Rural Development Office in Jackson, Mississippi.

On November 18, 2013, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Caucasian), sex (female), age, and in reprisal for

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.

prior protected EEO activity under Title VII when: on October 15, 2012, she learned she was not selected for the GS-0301-12/13 position of Assistant to the State Director (ASD), advertised under Vacancy Announcement Number MS-2012-0010.

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). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). On September 15, 2014, the Agency issued a final Agency decision (FAD) finding that it did not discriminate against Complainant when she was not selected for the position.

Finding of Discrimination

Complainant appealed the FAD. In EEOC Appeal No. 0120150231 (March 14, 2017), the Commission issued a decision modifying the Agency's FAD and finding that Complainant demonstrated she was retaliated against when the Selectee testified that the State Director informed Selectee that Complainant filed an EEO complaint. We found that the disclosure of Complainant's EEO activities in the manner described by the Selectee would be reasonably likely to deter Complainant and others, including the Selectee, from engaging in protected EEO activity. Based on this finding, OFO ordered the Agency to conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and to afford Complainant an opportunity to establish a causal relationship between the Agency's retaliation and her pecuniary or non-pecuniary losses, if any.

Complainant's Statement for Damages

In response to the Agency's supplemental investigation, Complainant submitted her statement for compensatory damages, dated September 5, 2017, along with witness statements. Therein, Complainant contended that the discrimination she suffered resulted in anxiety, increased stomach issues, weight gain, hair loss, and poor sleep. Complainant further maintained that absent the discrimination, she would have remained in federal service for an additional three years, rather than forfeiting a potential GS-12 salary in the calculation of her "high 3." Complainant estimated that her future wage losses totaled \$279,192.00. Complainant submitted a spreadsheet indicating that from October 7, 2010 through June 13, 2017, she incurred medical expenses in the amount of \$1,612.83. Complainant provided additional documentation in support of non-pecuniary damages but did not include a proposed amount.

Agency's Decision on Compensatory Damages

The Agency subsequently issued its final decision regarding Complainant's entitlement to compensatory damages on August 23, 2018. Therein, the Agency awarded Complainant \$3,000.00 in non-pecuniary damages. The Agency denied Complainant's requests for pecuniary losses and loss of future income.

In reaching an award of \$3,000.00 in non-pecuniary damages, the Agency considered the statements and documents Complainant provided. The Agency noted that while compelling, the evidence did not show that Complainant's harm was caused solely by the retaliatory statements made by the responsible management official. The Agency stressed that throughout Complainant's request, Complainant treated her allegations of harassment, non-selection, and retaliation as interchangeable and attributed the majority of her emotional distress to events other than the statement the responsible management official made to the Selectee about Complainant filing EEO complaints.

Regarding pecuniary losses, the Agency determined that Complainant failed to establish a connection between her medical expenses and the Agency's discriminatory act. The Agency highlighted the fact that the documents submitted by Complainant, personalized self-summaries of her prescription medication, explanations from WebMD, Explanations of Benefits, and Patient Medical Expenses, standing alone, did not establish a causal connection. Moreover, the documents revealed that Complainant's symptoms predated the September 18, 2012 vacancy announcement.

In denying Complainant's request for future pecuniary losses, the Agency asserted that Complainant's request represented a front pay request, which was not an ordered remedy.

CONTENTIONS ON APPEAL

On appeal, Complainant maintains that the Agency's award of \$3,000.00 in non-pecuniary damages is not a just and adequate settlement. Complainant adds that she further disagrees with the decision to deny pecuniary losses and losses of future income. Complainant contends that in rendering a decision, the Commission should consider that she met all deadlines during the pendency of this matter while the Agency did not. Complainant avers that she could not establish a causal connection to the statements of the responsible management official and the harm she experienced because she "suffered in silence." Complainant reiterates her request for \$300,000.00 in non-pecuniary losses, \$1,612.83 in pecuniary losses, and \$279,192.00 in future losses.

In response, the Agency asserts that the FAD was correct, and that a de novo review will not change the outcome of the FAD with respect to compensatory damages. The Agency argues that the FAD correctly found that Complainant failed to submit evidence to establish a causal connection between the retaliatory statement and her claim for damages. The Agency maintains that the appellate decision only found the Agency liable for retaliation due to the responsible management official's communication to the Selectee that Complainant had filed an EEO complaint. The Agency contends that none of the documents submitted by Complainant show a causal connection between the retaliatory communication and Complainant's medical condition, and that Complainant did not allege any such connection. Rather, Complainant attributed a great deal of her increased stress, loss of sleep, hair loss, weight changes, and damage to harassment. The Agency stresses that Complainant's documents show that her conditions pre-existed the discriminatory act.

In the alternative, the Agency maintains that Complainant sought medical treatment for a multitude of conditions and symptoms other than the causally-connected, pre-existing stress, loss of sleep, hair loss, weight loss, weight gain and damage to reputation, which the FAD determined should be excluded from any pecuniary damages award to Complainant. The Agency notes that it relied on clearly established case law when making the decision to award Complainant \$3,000.00 in non-pecuniary damages. The Agency adds that any medical documentation or witness statements that correspond to treatment of Complainant after June 2016 should not be considered for her recovery because it is attributed to the prosecution of the EEO complaint rather than retaliation. Finally, with respect to the argument that if she had retained counsel, the fees would have been around \$30,000.00, the Agency states that the record is unequivocally clear that Complainant did not secure the services of a member of the Bar and is clearly not entitled to any consideration of such award as a substitute to enhance her damages award.

ANALYSIS AND FINDINGS

Compensatory Damages

When discrimination is found, the respondent Agency must provide the employee with a remedy that constitutes full, make-whole relief to restore the employee as nearly as possible to the position he or she would have occupied absent discrimination. Franks v. Bowman Transp. Co. 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975). The Commission is authorized to award compensatory damages as part of the “make whole” relief for intentional discrimination.

To receive an award of compensatory damages, a complainant must demonstrate that he or she has been harmed as a result of the agency’s discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep’t of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsideration denied, EEOC Request No. 05940927 (Dec. 11, 1995); Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14 (Enforcement Guidance on Compensatory and Punitive Damages).

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. Enforcement Guidance on Compensatory and Punitive Damages at 8. Objective evidence of compensatory damages can include statements from the 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 nonpecuniary losses that are incurred as a result of the discriminatory conduct. 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. 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).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. A complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his or her burden in this regard. 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. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Lawrence, EEOC Appeal No. 01952288.

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 on Compensatory and Punitive Damages 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.

The Agency denied Complainant's claim for past pecuniary damages, finding that Complainant was unable to establish that she suffered any pecuniary loss as a result of the discrimination at issue here. The record reflects that Complainant was previously diagnosed with the complained of medical conditions, and she failed to demonstrate how the discriminatory act at issue exacerbated them in any way. Finding no nexus, we discern no reason to disturb the Agency's denial of these expenses.

Regarding Complainant's request for future pecuniary damages, Complainant maintained that she was forced to retire early due to discrimination. We however remind Complainant that the finding of discrimination did not involve a claim of constructive discharge or an award of front pay. As such, we deny Complainant's request for pecuniary damages related to her early retirement.

Non-pecuniary 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 Enforcement Guidance on Compensatory and Punitive Damages at II.A.2.

There is no precise formula for determining the amount of damages for nonpecuniary 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 nonpecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the Agency for the discriminatory action. Further, compensatory damages should not be “monstrously excessive” standing alone, should not be the product of passion or prejudice, and 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) (citing Cyngar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)). Where a complainant’s emotional harm is due in part to personal difficulties, which were not caused or exacerbated by the discriminatory conduct, the agency is liable only for the harm resulting from the discriminatory conduct. See Enforcement Guidance on Compensatory and Punitive Damages, at II, A.2.

Here, Complainant requests \$300,000.00 in non-pecuniary losses. After a review of the record, we find Complainant presented minimal evidence of her emotional distress caused by the discrimination that would support the requested non-pecuniary damages. However, the Commission finds that \$5,000.00 is an appropriate amount of non-pecuniary damages, as Complainant presented evidence to establish that the Agency’s actions caused at least some of her emotional distress and related symptoms. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120132114 (May 29, 2015) (\$5,000 in nonpecuniary damages where complainant suffered from insomnia, headaches, mood swings, marital issues, and exacerbation of physical symptoms); White v. Dep't of Veterans Affairs, EEOC Appeal No. 01950342 (June 13, 1997) (\$5,000 in nonpecuniary damages where complainant with sparse medical evidence asserted that he experienced emotional distress as a result of harassment); Benson v. Dep't of Agriculture, EEOC Appeal No. 01952854 (June 27, 1996)(\$5,000 in nonpecuniary damages where complainant, his relatives, and coworkers asserted that complainant experienced embarrassment and humiliation due to various incidents of discrimination). We find this is an adequate award to compensate Complainant for the symptoms that she suffered as a result of the discrimination.

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 award of non-pecuniary damages. The Agency is directed to implement corrective action in accordance with the ORDER herein.

ORDER

To the extent that it has not already done so, within sixty (60) days of the date this decision is issued, the Agency shall pay Complainant \$5,000.00 in non-pecuniary damages, less any previous amounts of non-pecuniary damages previously paid to Complainant.

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)

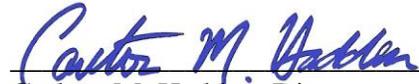
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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 21, 2020

Date