



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

[REDACTED]
Tyree L.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2019001222

Hearing No. 430-2015-00369X

Agency No. 2004-0318-2015100824

DECISION

Complainant timely 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 October 17, 2018 final order concerning Complainant's entitlement to compensatory damages and other remedies with respect to his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission **AFFIRMS** the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Vocational Rehabilitation Counselor, GS-0101-11, in the Vocational Rehabilitation Division at the Agency's Fort Bragg Soldier Support Center at Fort Bragg, North Carolina.

On December 10, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of race

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.

(African-American), disability (left-sided paralysis), and in reprisal for prior protected EEO activity when:

1. On March 14, 2014, Complainant was informed by a coworker (CW1) that S1a was monitoring his performance;
2. Between June and August 2014, S1a's behavior and comments toward Complainant became personal and unbearable;
3. Between June and August 2014, S1a sent a text message to Complainant to get off his cell phone;
4. In August 2014, S1a berated Complainant in a staff meeting;
5. From September to November 2014, S1a was considered Complainant's mentor, but S1a met with Complainant only twice during that time span;
6. In October 2014, S1a asked probing questions regarding Complainant's satisfaction with the job;
7. On October 9, 2014, Complainant was informed of an unprofessional conversation S1a had with a co-worker regarding his job;
8. On October 17, 2014, S1a contacted Complainant on his cell phone and accused him of wasting government resources when Complainant and a co-worker met with a client simultaneously;
9. On October 22, 2014, Complainant informed S1a that he treated him unfairly and singled him out in front of co-workers;
10. On October 22, 2014, S1a informed Complainant that co-workers had complained about his attitude during a group orientation on September 30, 2014;
11. On October 22, 2014, S1a was monitoring Complainant's arrival and work attendance;
12. On October 23, October 27, and October 28, 2014, S1a failed to acknowledge Complainant's presence at the office during his tour of duty;
13. From October 27, 2014 to November 14, 2014, S1a maintained one of Complainant's Veteran files and instructed the Veteran not to correspond with Complainant. Consequently, a customer service complaint was filed against Complainant;
14. On November 5, 2014, S1b notified Complainant that S1a would no longer be his supervisor;
15. On November 7, 2014, S1b informed Complainant via email that he failed to meet the Program and Data Integrity requirement, one of the critical elements in his performance evaluation; and
16. On April 1, 2015, S1b placed Complainant on a Performance Improvement Plan (PIP).

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 on February 14, 2018 and issued a decision on September 28, 2018.

In the decision, the AJ first found that Complainant failed to demonstrate that he was subjected to a hostile work environment because of his race or disability. However, the AJ found that Complainant had been subjected to reprisal as to the scrutiny of Complainant's attendance and performance and as to placement on the PIP. The AJ rejected the Agency's proffered reasons for its actions regarding these claims. In rejecting the contention that Complainant had performance deficiencies, the AJ found Complainant's testimony to be credible and further credited his background as a vocational rehabilitation counselor. The AJ also noted the suspicious timing of S1a and S1b's actions toward Complainant in relation to his engagement in protected EEO activity and the lack of any prior documented performance deficiencies. Moreover, testimony at the hearing demonstrated that S1a and S1b were in a romantic relationship and eventually married. The AJ also noted that S1a was not available to testify at the hearing because S1b was recently deceased and the Agency could not provide a timeframe for when or if S1a would be available following S1b's death. As a result, the AJ found that the Agency had retaliated against Complainant when it subjected him to unjustified work performance scrutiny and placement on the PIP.

Turning to remedies, the AJ awarded Complainant \$30,000 in compensatory damages. The AJ noted that the retaliation took place for approximately 11 months and Complainant's evidence in support of compensatory damages consisted of his own testimony and that of his spouse. Complainant testified that he spent a lot of time thinking about discrimination, which wore him down "mentally and emotionally." His marital relationship was impacted "in a negative way" and he was "consumed" with the discrimination to the point that he felt he did not spend enough time with his newborn son until he was about a year old. Complainant's spouse testified that Complainant was "consumed" by work "in a negative type of way" and would come home and could not talk about anything but his treatment at work. Complainant's wife further testified that Complainant was not sleeping as much and was preoccupied with the discrimination. Complainant's wife stated that he "went into a shell" and stopped socializing with friends. Since he left the Agency, Complainant's mental state has improved, and he made new friendships, but did not mend the friendships he lost during his employment. Accordingly, the AJ awarded Complainant \$30,000 in non-pecuniary compensatory damages.

In addition, the AJ awarded Complainant attorney's fees in the amount of \$30,315.75, as well as the expungement of the PIP and all documentation referencing Complainant's alleged performance issues.²

The Agency subsequently issued a final order fully implementing the AJ's decision.

CONTENTIONS ON APPEAL

In his brief on appeal, Complainant argues the damages award should be increased to \$300,000, the statutory maximum, and seeks lost pay from his termination with reinstatement.

² The AJ noted that reinstatement or back pay relief was not available because Complainant did not request either as relief and did not offer any evidence or testimony in support of either remedy.

Complainant contends that he has experienced severe anguish and emotional distress as a result of the Agency's retaliatory actions. Complainant argues that there are no comparable damages cases but compares his situation to that found in Dayle H. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120140883 (Jan. 17, 2017), where the Commission awarded \$65,000 in compensatory damages based on the complainant's testimony that she suffered anxiety and distress resulting from a wrist injury and lack of ergonomic keyboard. Accordingly, Complainant requests that the Commission increase the damages awarded.

STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

ANALYSIS AND FINDINGS

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., or the Rehabilitation Act may receive compensatory damages for past and future pecuniary losses and non-pecuniary losses. 42 U.S.C. § 1981a(b)(3).

When discrimination is found, the agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore him as nearly as possible to the position he would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). To receive an award of compensatory damages, a complainant must demonstrate that he 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); 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. Compensatory damages may be awarded for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) which are directly or proximately caused by the agency's discriminatory conduct. EEOC Notice No. 915.002 at 8.

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. Id. 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.

Non-Pecuniary Compensatory Damages

Non-pecuniary losses are losses that are not subject to precise quantification, including emotional pain and injury to character, professional standing, and reputation. Id. 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.

An award of non-pecuniary, compensatory damages should reflect the extent to which the Agency's discriminatory action directly or proximately caused the harm, as well as the extent to which other factors also caused the harm. See Johnson v. Dep't of the Interior, EEOC Appeal No. 01961812 (June 18, 1998).

It is the complainant's burden to provide objective evidence in support of his claim and proof linking the damages to the alleged discrimination. Papas v. U.S. Postal Serv., EEOC Appeal No. 01930547 (Mar. 17, 1994); Mims v. Dep't of the Navy, EEOC Appeal No. 01933956 (Nov. 23, 1993).

In this case, we find the AJ's award of \$30,000 in non-pecuniary damages was appropriate. We are not persuaded by Complainant's citation to Dayle H. That case involved a 13-month denial of reasonable accommodation, which exacerbated the complainant's condition such that she was forced to retire shortly thereafter. Here, Complainant's evidence consisted of his and his spouse's testimony that he suffered anxiety, became obsessed about discrimination at work, became withdrawn, and lost friendships and time with his baby. However, as soon as Complainant stopped working with the Agency, his mental state improved significantly.

The award in this case is consistent with similar awards approved by the Commission. See Kiara R. v. U.S. Postal Serv., EEOC Appeal No. 0120152620 (Aug. 10, 2017) (\$25,000 where complainant suffered emotional distress, worried, had difficulty sleeping, recurring headaches, weight loss, nausea, and anxiety); Minna Z v. Dep't of the Air Force, EEOC Appeal No. 0720160009 (Mar. 10, 2017) (\$25,000.00 in nonpecuniary damages awarded where Complainant experienced insomnia, depression, migraines, anxiety, humiliation, damage to her professional reputation, diminished quality of life, damage to relationships with friends and family members, and aggravation of her preexisting mental and physical conditions); Elbert H. V. Dep't of Veterans Affairs, EEOC Appeal No. 0120140032 (Nov. 13, 2015) (complainant suffered embarrassment, would avoid other people, including family members, experienced increased blood pressure and weight, and stopped working out); Dallas D. v. U.S. Postal Serv., EEOC Appeal No. 0120150319 (Mar. 24, 2017) (\$30,000 awarded where complainant experienced emotional and mental distress, exacerbation of his pre-existing conditions, anxiety, and isolation from his family and social gatherings). Thus, the Commission finds that substantial evidence supports the AJ's award of \$30,000. This award is not motivated by passion or prejudice, not "monstrously excessive" standing alone, and is consistent with the amounts awarded in similar cases.

Backpay

Finally, Complainant claims that the AJ erred in not awarding damages for loss of employment. Complainant appears to be arguing for back pay. Complainant argues that the AJ erred by failing to award these damages for the loss of employment that flowed directly from the Agency's discriminatory acts. In denying a back pay award, the AJ noted that Complainant presented no evidence or testimony in support of such an award. The Agency argued that Complainant worked under a term appointment and was not guaranteed permanent conversion nor did the AJ find that Complainant's non-conversion was a direct result of the initiation of the PIP at issue. The Commission finds that substantial record evidence supports the AJ's finding that Complainant failed to produce sufficient evidence establishing an entitlement to back pay. Accordingly, the Commission finds that Complainant is not entitled to additional damages in that regard.

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 order and direct it to implement the order for relief as slightly modified below.

ORDER

The Agency shall take the following actions to the extent it has not already done so:

1. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$30,000.00 in non-pecuniary compensatory damages.
2. Within 60 days of the date this decision issued, the Agency shall pay Complainant \$30,115.75 in attorney's fees.
3. Within 60 days of the date this decision is issued, the Agency shall expunge from Complainant's employment record and all official Agency records the April 1, 2015 Performance Improvement Plan as well as all documentation of Complainant's alleged performance issues referenced therein or associated therewith.
4. Within 90 calendar days from the date that this decision is issued, the Agency shall provide at least eight hours of in-person or interactive EEO training to the management official identified as S1a. The training should have an emphasis on the legal prohibition against retaliation under Title VII and, also, the employees' right to engage in protected activity and the Agency's obligations with respect to this right.
5. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against S1a. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

POSTING ORDER (G0617)

The Agency is ordered to post at its Fort Bragg Soldier Support Center at Fort Bragg, North Carolina copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

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 (R0610)


This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by 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. **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

April 29, 2020
Date