



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

[REDACTED]
Sharolyn S.,¹
Complainant,

v.

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

Appeal No. 2019002895

Agency No. 200P05932017102650

DECISION

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 January 17, 2019, final decision addressing compensatory damages on an equal employment opportunity (EEO) complaint claiming 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.

BACKGROUND

During the period at issue, Complainant worked as a Civilian Payroll Technician, GS-6, at the VA Medical Center ("VAMC") in Las Vegas, Nevada.

On June 28, 2017, Complainant filed a formal EEO complaint claiming that the Agency that alleged discrimination on the basis of race (Asian/Black) when:

1. On January 9, 2017, her supervisor denied her request to use annual leave in lieu of sick leave.
2. On March 3, 2017, she became aware that her supervisor shared her private medical information related to her reproductive health with one of her coworkers.

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.

3. Between August 2015 and March 2017, her supervisor subjected her to racial harassment that included rating her as Fully Successful before changing it to Excellent; making inappropriate racial comments; refusing Complainant assistance; not answering her door when Complainant knocked; not communicating with Complainant; giving Complainant bad job references; and making comments like, “that bitch [referring to Complainant] thinks this is over, this isn’t fucking over,” and “I’m going to make that bitch stay and work for me.”

On September 19, 2018, following an investigation into the complaint, the Agency’s Office of Employment Discrimination Complaint Adjudication (“OEDCA”) issued a final decision concluding that the named Payroll Supervisor (“S1”) subjected Complainant to racial harassment, as well as violating the privacy provisions of the Rehabilitation Act when she disclosed to Complainant’s co-worker (“CW1”) that Complainant had a specified medical procedure. For relief, the OEDCA required, in pertinent part, that the Agency restore all leave taken because of the Agency’s discriminatory actions and ordered a supplemental investigation to make a proper determination on damages.

On January 17, 2019, the Agency issued a final decision on compensatory damages. The Agency rejected Complainant’s request for \$200,000 in nonpecuniary compensatory damages. Instead, the Agency awarded Complainant \$10,000 in nonpecuniary compensatory damages. In reaching this amount, the Agency reasoned that Complainant had established, through her own testimony and that of CW1, that she had suffered emotional distress, including anxiety, stress, paranoia, sleeplessness, and depression which resulted in a weight gain of 30 pounds. However, the Agency noted that the record did not include any medical documentation to supporting her claim and the record was unclear regarding the duration of Complainant’s medical conditions. The Agency further noted that Complainant’s emotional harm was also attributed, in part, to the medical procedure itself. Accordingly, the Agency reasoned that there was not enough evidence of record to justify increasing Complainant’s compensatory damages award above \$10,000.

The Agency denied Complainant’s request for pecuniary damages of \$7,259.81 for costs related to Complainant’s move to South Carolina for a new position. The Agency determined that Complainant did not allege and the OEDCA’s September 19, 2018 final decision did not address whether Complainant was constructively discharged from her position as a result of the harassment and unlawful disclosure. Therefore, the Agency reasoned that Complainant could not seek costs for her relocation expenses because these costs were not related to the Agency’s discriminatory conduct.

The instant appeal followed. On appeal, Complainant, through her attorney, did not submit additional statements or briefs.

ANALYSIS AND FINDINGS

Past Pecuniary Damages

Pecuniary damages are quantifiable out-of-pocket expenses incurred as a result of the Agency's discriminatory actions. Damages for past pecuniary damages will not normally be granted without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals of actual loss and expenses.

Here, the Agency denied Complainant's request for pecuniary damages of \$7,259.81 for costs associated with Complainant's move to South Carolina for a new position. The Agency reasoned that these costs should be denied because OEDCA's September 19, 2018 decision did not include a determination that Complainant had been constructively discharged from her position.

Our review of the record indicates Complainant seeks reimbursement for expenses she incurred from transferring from her position at the Las Vegas VAMC to another Agency medical facility located in Charleston, South Carolina. Complainant indicated in her affidavit that she incurred the following expenses for her move: \$2,079.81 to break her apartment lease; \$2,730 to hire movers to transport her belongings;² and a TSP loan in the amount of \$2,450 to cover other expenses related to her move to Charlestown, South Carolina. Complainant further indicated that she took Leave Without Pay from July 11 – 18, 2017 for the days needed to complete her move to South Carolina which resulted in her receiving a reduced pay amount of \$511.73 for pay period 17. In support of these expenses, Complainant provided a copy of a banking statement reflecting these charges and payments of \$2,450 from the TSP Treasure and \$511.73 from DFAS – Cleveland.

Contrary to the Agency's assertions, we find that at least some of these expenses are related to the Agency's discriminatory actions. We note that the September 19, 2018 OEDCA decision required that the Agency take the following action:

restore all leave (annual, sick, or leave without pay) taken because of the discriminatory actions found to have occurred in this Decision, i.e., the unlawful disclosure of Complainant's medical procedure related to her reproductive health and [S1's] harassing conduct.

Accordingly, the days in July 2017 when Complainant took LWOP to relocate to Charleston, South Carolina in order to escape working for S1 must be restored.

² Complainant noted that half of these costs were paid on her debit card while the remaining charges were paid in cash.

In addition, despite that fact that Complainant did not raise an allegation of constructive discharge as she remained in the employment of the Agency, we conclude that her decision to transfer to another facility to escape the ongoing harassment of her supervisor was directly related to that discrimination. Consequently, the travel expenses Complainant incurred to transfer to the Charleston VAMC are also covered because they were a direct result of the Agency's discriminatory actions. Complainant stated in her supplemental affidavit that that she "accepted [the] job [in South Carolina] to get away from supervisor [because she] didn't know what was going to happen." We further note that S1 was not removed until August 10, 2017, for "conduct unbecoming of a supervisor," approximately one month *after* Complainant had transferred to South Carolina. Given the facts and circumstances surrounding this case, view Complainant's transfer as a means to avoid the hostile work environment she endured by S1.

We determine that Complainant has provided adequate documentation for costs she incurred from breaking her apartment lease, hiring a moving company, and taking a TSP loan which total \$7,259.81. With respect to Complainant's LWOP taken in July 2017, Complainant is also entitled to restoration of this leave if the Agency has not already complied with this equitable relief ordered in the OEDCA's September 19, 2018 decision.

Therefore, the Agency's final decision on past pecuniary damages is reversed.

Non-Pecuniary Damages

Non-pecuniary compensatory damages 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: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for non-pecuniary damages claims includes statements from Complainant and others, including family members, co-workers, and medical professionals. See id.; see also Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Non-pecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency's discriminatory actions. See Carter v. Duncan-Higgans, Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance at 13. Additionally, the amount of the award should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)).

The Agency awarded \$10,000 in nonpecuniary damages. We find, however, that that an award of \$25,000 is more consistent with the amounts awarded in similar cases. Complainant testified in her supplemental affidavit that the hostile work environment caused her stress, depression, anxiety, paranoia, sleepless nights, fear, and a weight gain of 30 pounds, and fear. Complainant further testified that she sought help from a VA counselor and clarified that her depression began in September 2015, one month after she started at the Agency.

Additionally, Complainant's co-worker ("CW1") testified that S1 assigned Complainant an "impossible workload" and was extremely mean toward Complainant. CW1 further testified that Complainant became nervous, depressed, and cried frequently at her desk.

We concur with the Agency that the award should only encompass the harm Complainant sustained by the discriminatory acts at issue (hostile work environment and disclosure of medical information). In this case, the record reflects that Complainant had a private medical procedure in October 2015. Complainant stated in her supplemental affidavit, in pertinent part, that

Until I can close this chapter in my life and put this behind me. This is a constant reminder of [S1's] cruelty and hostile environment no one should have to endure. Most importantly I'm constantly reminded of the procedure. I just want to lock it up in a box and put it away.

However, the record reflects that the emotional harm Complainant endured from being reminded of this medical procedure was also attributed to S1. In the initial report of investigation, Complainant testified that S1 pressured Complainant to complete the procedure and drove to the clinic to ensure that the procedure was performed. Thus, S1 was the only person at the office who had known about Complainant's procedure and Complainant stated that after she found out that S1 had disclosed this information to CW1, she cried at her desk and could not concentrate on her work. We note that CW1 acknowledged in the supplemental investigation that Complainant was "ashamed of her procedure." CW1 testified that Complainant was unsure whether she wanted to have the procedure, but S1 told Complainant, "you know what you gotta do!" and drove her to the clinic. CW1 further stated that Complainant "would not walk about the hospital because she did not know who else [S1] told about [her] procedure." Given these circumstances, the record reflects that S1 was actively involved in Complainant's decision to have the private medical procedure and S1 exacerbated Complainant's emotional distress when she disclosed to CW1 that Complainant had had the medical procedure.

Regarding the Agency argument that Complainant failed to provide medical documentation to support her emotional distress, we note that 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 Service, EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Department of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from a complainant concerning 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.*

As previously discussed, Complainant's testimony identifies the type of harm she suffered and adequately ties that harm directly to the Agency's actions. Based on Complainant's representations of harm, we find that the weight of our prior decisions supports an award of \$25,000 in non-pecuniary compensatory damages. See Utt v. U.S. Postal Service, EEOC Appeal No. 0720070001 (Mar. 26, 2009) (\$25,000 in non-pecuniary damages awarded where

complainant provided testimony that as a result of discrimination he suffered from stress, low self-esteem, difficulty sleeping and weight gain).

CONCLUSION

We REVERSE the determination on past pecuniary damages and MODIFY the determination on compensatory as stated in the Agency's January 17, 2019 final order. The matter is REMANDED to the Agency for compliance with the following ORDER.

ORDER

To the extent that it has not already done so, the Agency is ORDERED to take the following actions as set forth in VA Case No. 200P-0593-2017102650 as modified herein:

1. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$25,000 in nonpecuniary damages.
2. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$7,259.81 in past pecuniary damages.
3. Within sixty (60) calendar days from the date this decision is issued, the Agency shall reinstate the LWOP leave Complainant requested from July 11 – 18, 2017.
4. The Agency shall pay reasonable attorney's fees for the processing of this complaint, including this appeal as set forth in the paragraph below entitled "Attorney's Fees."

The Agency is further directed to submit a report of compliance, as provided, in the statement entitled "Implementation of the Commission's Decision."

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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)

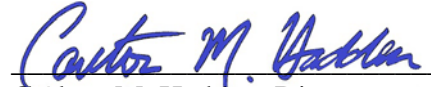
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from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

July 30, 2020
Date