



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

[REDACTED]

Sonia B.,¹
Complainant,

v.

Bill Johnson,
President and Chief Executive Officer,
Tennessee Valley Authority,
Agency.

Appeal No. 2019004252

Agency No. TVA 2014-0080

DECISION

On May 21, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from an Agency final decision, dated April 22, 2019, concerning an 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. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

BACKGROUND

During the relevant time, Complainant worked for the Agency as a Management Assistant at the Agency's Central In-Processing (CIP) Center in Hollywood, Alabama.

Complainant was part of a pool of administrative assistants who worked for different managers and vice-presidents on a rotating basis. As part of the administrative pool, Complainant frequently changed positions. One of her assignments was to work for the Nuclear Operations Manager (hereinafter "Harasser"). In December 2014, Complainant filed an EEO complaint alleging discrimination based on sex when, beginning in mid-2014, she was subjected to harassment (sexual and non-sexual) her manager. The complaint was comprised of nineteen allegations.

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 August 30, 2016, the Agency issued a decision finding that, with respect to a majority of the claims, Complainant established that she was subjected to unlawful harassment. Specifically, the Agency found that Harasser would, on an almost daily basis take the following actions: hover over Complainant, sit close to her and touch his crotch area, say her name and then “adjust” himself when she looked, and use her computer instead of his own. Additionally, he called and offered her a ride to work, commented to the staff that she was “pretty and perfect,” and grabbed her personal phone. These events were corroborated by witnesses. Noting that there was no evidence Harasser engaged in such behavior with male subordinates, the Agency found that Complainant established a nexus with her protected basis. The “nearly 18 months” of Harasser’s conduct was considered sufficiently pervasive to alter Complainant’s working conditions.

Complainant appealed the decision to the Commission, arguing she was entitled to compensatory damages. The Commission, however, dismissed the appeal as premature because the Agency had not yet issued a decision on damages.² See Complainant v. Tennessee Valley Authority, EEOC Appeal No. 0120170189 (October 31, 2018).

Following an investigation into Complainant’s entitlement to compensatory damages, the Agency issued a decision on April 22, 2019. Since Complainant had not claimed pecuniary damages, the Agency did not grant her any. As for non-pecuniary damages, the Agency noted that Complainant described low energy, chronic migraine headaches, upset stomach, nausea, vomiting, tense muscles, hair loss, anxiety, and insomnia as a result of the harassment. Further, her migraines continue, which requires her to work from home. Complainant’s physician wrote that Complainant developed “a significant amount of anxiety during the time of the work-related incident,” which manifested as frequent migraine headaches, fatigue, and associated anxiety and depression. The doctor prescribed medication and a “change in work environment”, and specifically believed that “harassment at work directly contributed to the medical issues.” While noting that Complainant’s chiropractor did not include a source of the stress, he described treating Complainant for “migraines, back pain and neck issues” from August 2013 through September 2016. The Agency reasoned that an award of \$60,000 in non-pecuniary compensatory damages was appropriate.

Complainant filed the instant appeal. Complainant argues that the Agency’s award is inadequate compensation for the severe emotional distress she suffers. While acknowledging the \$300,000 limit on such awards, Complainant’s attorney contends that her suffering exceeds that amount and therefore a sum significantly higher than \$60,000 is warranted. Citing prior Commission cases, as well as Alabama District Court cases, Complainant’s attorney argues Complainant is entitled to \$10,000 for each of the months she was harassed. At minimum, Complainant’s attorney asserts, Complainant should be awarded \$200,000.

² Nonetheless, the Agency was ordered to post a notice regarding the finding of discrimination, provide training to the responsible officials, restore Complainant’s leave, and conduct a supplemental investigation regarding compensatory damages. See EEOC Appeal No. 0120170189 (October 31, 2018).

ANALYSIS AND FINDINGS

Standard of Review

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, 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”).

Compensatory Damages

When discrimination is found, an agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore her as nearly as possible to the position she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 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). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this “make whole” relief. 42 U.S.C. § 1981a(b)(3). Compensatory damages do not include back pay, interest on back pay, or any other type of equitable relief. 42 U.S.C. § 1981a(b)(2). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000, 42 U.S.C. § 1981a(b)(3)

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); 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.

Pecuniary Compensatory Damages

Pecuniary losses include quantifiable out-of-pocket expenses that are incurred as a result of the discriminatory conduct.

To recover damages, the complaining party must prove that the employer's discriminatory act or conduct was the cause of his loss. Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (Enforcement Guidance), EEOC Notice No. 915.002, at 8 (July 14, 1992).

The record reflects that Complainant has not claimed nor submitted evidence of pecuniary damages. Therefore, we agree with the Agency's determination that she is not entitled to pecuniary compensatory damages.

Non-pecuniary Compensatory Damages

Non-pecuniary 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 EEOC Notice No. 915.302, Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, at 10 (July 14, 1992). 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). 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 Complainant concerning his 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.

Moreover, the Commission has long held that a complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his burden in recovering compensatory damages for emotional harm. The more inherently degrading or humiliating the agency's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action.

Therefore, somewhat more conclusory evidence of emotional distress will be acceptable to support an award for emotional damages. See, e.g., Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996).

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).

Here, Complainant describes almost two years “dealing with a harasser on a daily basis made work miserable. Not only the direct stress and humiliation of his actions but trying to work effectively and efficiently.” On the occasions when he picked up her cell phone, “I felt completely helpless and he was purposefully abusing his title/position,” she feared that if she spoke up he would discharge her. The incidents left her “a nervous mess, sick to my stomach, and shaking.” As for Harasser frequently “adjusting” himself, Complainant described these events as the “most repulsive” and leaving her feeling “nauseated, gross, shocked, and violated.” The frequency of his misconduct was noticed and mentioned by co-workers, which caused additional feeling of “pure embarrassment and humiliation.”

When asked for the cause of Complainant’s anxiety, Complainant’s doctor plainly states the following: “There is no other identifiable cause nor trigger of the anxiety other than the harassment.” While Complainant had “rare migraines” before the harassment, she experienced daily headaches and weekly migraines during and after the harassment. Although Complainant’s symptoms have improved with treatment, the physician states she has not had “complete resolution.” She recommended Complainant continue full-time telework as part of her treatment.

Complainant’s chiropractor first treated Complainant in August 2013 and saw her monthly for a year. Thereafter, Complainant’s visits became more sporadic, which the chiropractor noted “may have been the result of her working further away.” While his notes did not indicate a cause of her stress, the chiropractor treated her migraines, back pain, and neck issue.

After careful consideration of the evidence of record, we find an award of \$75,000 for non-pecuniary compensatory damages is appropriate. This amount takes into consideration the nature of the discriminatory acts, the severity of the physical and emotional harm suffered, the length of time Complainant suffered the harm, and is consistent with prior Commission precedent. See Adah T. v. Department of the Interior, EEOC Appeal No. 0120131110 (September 18, 2015) (\$75,000 where complainant suffered emotional harm over 16-17 months); Crear v. Department of Veterans Affairs, EEOC Appeal No. 07A50079 (January 26, 2006) (\$70,000 awarded where complainant experienced anger, worry, embarrassment, feelings of disrespect and degradation, sleep problems, hair loss, and problems with her husband and children); Miles v. U.S. Postal Service, EEOC Appeal No. 07A30019 (February 27, 2004) (\$75,000 awarded where complainant

worked in constant fear for more than three months and became angry, depressed, and distant from her husband); Wiggins v. Social Security Administration, EEOC Appeal No. 07A30048 (January 22, 2004) (\$70,000 awarded where complainant cried frequently for months and experienced stress, depression, insomnia, headaches, embarrassment, loss of self-esteem, increased back pain, and loss of enjoyment of life).

Finally, Complainant argues that, while the Agency failed to address the matter in its decision on compensatory damages, the leave she used during the time of the harassment should be restored (240 hours). Although the Agency's April 22, 2019 compensatory damages decision did not make reference to the restoration of leave, the record reflects that the Agency's earlier August 30, 2016 decision, finding discrimination, included the restoration of leave in its order. The Agency must ensure its compliance with its own August 30, 2016 order with regard to leave restoration. If the Agency and Complainant cannot agree on the amount of leave that should be restored, the Agency shall issue a final decision on the leave restoration issue with appeal rights to this Commission.

CONCLUSION

Based on a thorough review of the record, we **MODIFY** the Agency's decision on compensatory damages. The matter is **REMANDED** to the Agency in accordance with this decision and the **ORDER** below.

ORDER

Within forty-five (45) calendar days of the date this decision is issued, to the extent it has not already done so, the Agency is **ORDERED** to provide Complainant with payment of \$75,000.00 in compensatory damages.

ATTORNEY'S FEES (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she 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 this decision becoming final. 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)

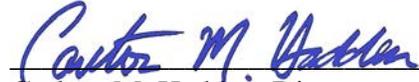
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from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

August 10, 2020
Date