



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

[REDACTED]
Refugia S.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services
(Indian Health Service),
Agency.

Appeal No. 2019004769

Hearing No. 443-2018-00123X

Agency No. HHS-IHS-0025-2018

DECISION

On June 5, 2019, 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 May 7, 2019, final decision concerning her 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. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

BACKGROUND

During the relevant time, Complainant worked as a Public Health Nurse at the Agency's Pine Ridge Service Unit in Pine Ridge, South Dakota. Believing that she was subjected to discrimination and harassment, based on her disability (Multiple Sclerosis, Pars Planitis, Depression), race (Native American), and in reprisal for her prior protected EEO activity, Complainant filed a formal complaint on November 30, 2017.

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.

The Agency framed the claims as follows:

1. Since 2010, Complainant's last outbreak of her chronic medical condition, and continuing to the present, Complainant has not been allowed to earn overtime;
2. Since January 2017, and continuing to the present, Director of Public Health Nursing [hereinafter "Director"] has been rude to Complainant, spread rumors about Complainant, and posted entries on Facebook regarding Complainant;
3. In April 2017, [Director] issued Complainant a Performance Management Appraisal Program rating with a lowered score;
4. On May 18, 2018, [Director] issued Complainant a Counseling Memorandum;
5. On June 6, 2017, the Agency failed to accommodate Complainant when it denied her request for reasonable accommodation;
6. On October 27, 2017, Complainant was issued a Letter of Reprimand;
7. On November 20, 2017, the Agency failed to accommodate Complainant when it denied her request for reasonable accommodation; and,
8. On November 28, 2017, Complainant was temporarily detailed, for up to one hundred and twenty days, to a Case Manager position.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In its November 30, 2017 decision, the Agency concluded that Complainant was subjected to discrimination as alleged in claims (5), (7) and (8).² The Agency was found to have failed to provide Complainant with a reasonable accommodation on June 6, 2017 (claim (5)) and on November 20, 2017 (claim (7)). Her temporary detail to a Case Manager position (claim 8) was in retaliation for her prior protected EEO activity. However, it concluded Complainant failed to prove she was discriminated against in claims (1) through (4) and claim (6).

² The findings were based upon disability and race, regarding claims (5) and (7). Claim (8) was found to be retaliatory.

On December 12, 2018, the Agency informed Complainant of her opportunity to submit evidence establishing her claim of compensatory damages. Complainant did so, on January 10, 2019. In her request, Complainant sought: \$50,000 for “pain and suffering”; \$150,000 for “harassment, psychological and emotional injury, reprisal”; \$16,000 for “lost income”; and \$9,167 for “expenses incurred”. Complainant also requested \$10,000 in attorney’s fees.

On May 7, 2019, the Agency issued a final decision regarding compensatory damages. It awarded Complainant \$9,000 in non-pecuniary compensatory damages; \$1,000 in pecuniary damages, and \$10,000 in attorney’s fees. Complainant filed the instant appeal.

On appeal, Complainant argues that the Agency’s award is “wholly inadequate” as it does not “provide for damages actually sustained”.³ In support of this assertion, Complainant provides two letters from family members, three articles regarding the impact of stress on MS, as well as a recent letter from her physician describing Complainant’s need to make a transition to more sedentary tasks at work.

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, 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., 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).

³ Complainant does not dispute the Agency’s award of attorney’s fees, declining to pay \$650 in sales tax purportedly imposed on legal services rendered (\$10,000.00). Therefore, we shall not address attorney’s fees on appeal.

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).

As noted above, Complainant requested \$9,167.00 in various expenses related to travel. Not only does Complainant seek reimbursement for traveling to four counseling appointments, but also for the travel expended to obtain medical documents and meet with her attorney. Additionally, she seeks payment for the approximately 60 hours (at a rate of \$15/hr) she spent working on her EEO complaint.

Complainant has not provided any receipts or other documentation in support of these expenses. Instead, she merely provides estimates for the mileage of each trip (at 54 cents/mile) and her time. Aside from an award of official time, Complainant is not entitled to payment for the time spent on her EEO complaint, including her time meeting with counsel. Moreover, we agree with the Agency that Complainant could have reasonably obtained the necessary medical documentation from her health care providers by phone, fax, or email. She did not have to spend the time or travel going to the medical offices.

With respect to Complainant's request for \$16,000.00 of "lost income" due to her lower performance ratings and lack of overtime, Complainant did not prevail on these claims. Complainant has not shown a nexus between the denial of a reasonable accommodation or the retaliatory detail and her salary.

Therefore, based on the instant record, we find that the Agency's award of \$1,000.00 in pecuniary damages was appropriate.

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). 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 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 was denied reasonable accommodations and detailed to another position in reprisal for requesting the accommodations. In order to accommodate her MS flare-ups and her eye condition, Complainant requested: a flexible work schedule, the ability to earn compensatory time and overtime, polarized glasses, cooler temperature in the office, and consideration of her disabilities when evaluating her performance. Director was only willing to provide polarized glasses for Complainant, stating that the remaining accommodations would create an undue hardship for the Agency. In its decision, the Agency determined that the undue hardship argument was not supported by the record, particularly in light of management's "lack of engagement in the interactive process." Instead, the record showed that Complainant had previously been permitted to earn compensatory time and overtime, tasks such as entering patient data and "charting" could be completed via telework, and the temperature of the office could have been resolved with further discussion. While management cited conduct that occurred months earlier as the reason for the detail, this was not presented in the record. Instead, the detail occurred within close temporal proximity of the request for an accommodation.

The Agency reasoned that Complainant was only entitled to \$9,000.00 in non-pecuniary damages because the record did not show her emotional harm was exclusively caused by the denial of reasonable accommodation, detail, or hostile work environment. Instead, citing an October 12, 2017 medical document, Complainant's physician noted that Complainant's depressed mood and stress were possibly attributable not only to job-stress, but also her recent divorce and medication for her MS. The Agency concluded that Complainant provided only limited evidence showing a connection between her harm and the discrimination, resulting in a lesser award.

On appeal, as a result of the discrimination, Complainant contends that the stress from work caused her "added anxiety and great shame". Upon returning home from work, she was often so fatigued she would go straight to sleep. She had no energy to care for her children. Letters from family members describe episodes where Complainant was distraught, crying, and unable to function at home. Both individuals describe an increase in Complainant's MS flare-ups, one specifically noting that they became "more frequent and coincide[d] with work-related incidences." One family member described making dinners for Complainant's children when she could not get out of bed due to weakness in her legs. The detail to various areas of the hospital caused Complainant to feel insecure about her job and question her abilities as a nurse.

The Commission applies the principle that "a tortfeasor takes its victims as it finds them." Wallis v. United States Postal Service, EEOC Appeal No. 01950510 (November 13, 1995) (quoting Williamson v. Handy Button Machine Co., 817 F.2d 1290, 1295 (7th Cir. 1987)). However, the Commission also applies two exceptions to this general rule. First, when a complainant has a pre-existing condition, the agency is liable only for the additional harm or aggravation caused by the discrimination. Second, if the complainant's pre-existing condition inevitably would have worsened, the agency is entitled to prove a reduction in damages reflecting the extent to which the condition would have worsened even absent the discrimination. Wallis, EEOC Appeal No. 01950510 (citing Maurer v. United States, 668 F.2d 98 (2d Cir. 1981)); Finlay v. United States Postal Service, EEOC Appeal No. 01942985 (April 29, 1997).

The Commission notes, therefore, that complainant is entitled to recover damages only for injury, or additional injury, caused by the discrimination. Terrell v. Department of Housing and Urban Development, EEOC Appeal No. 01961030 (October 25, 1996); EEOC Notice No. N 915.002 at 12.

In this case, Complainant states she was diagnosed with MS in 2006. The record reflects, and the Agency acknowledges, that the discriminatory actions resulted in the aggravation of her condition. Complainant asserts on appeal that there was no showing that her MS would have inevitably worsened absent the discrimination. Instead, she provides several articles explaining, generally, the relationship between increased stress and MS symptoms. The record contains limited medical documentation. In her request for compensatory damages, Complainant submitted physician notes from October 12, 2017, describing “a definite escalation of band-like pain around her middle chest area” and “increased symptoms on left side of body” that resulted in a 5-day hospital stay. The document, however, did not refer to a cause. Similarly, in a December 11, 2018 letter from Complainant’s doctor, he recorded that *Complainant* “identified stressors including work-related stressors”. On appeal, Complainant submits more recent correspondence from her physician, dated June 20, 2019. Therein, he simply describes a need for Complainant to make a transition to more “sedentary employment activity such as office administration or case management” because the “physical demands of nursing are precluding you from continuing in that capacity.”

We find that, while the statements from Complainant and relatives indicates a nexus between the discrimination and Complainant’s emotional and physical harm, the medical documentation she submits does not validate that connection. Therefore, while we do not find that the sum Complainant seeks for non-pecuniary compensatory is warranted, the Commission does find an increase in the Agency’s award is necessary.

After careful consideration of the evidence of record, we find an award of \$40,000 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 Greg M. v. Dep’t of Veterans Affairs, EEOC DOC 0120160345 (Jan. 31, 2018) (Complainant awarded \$50,000 where denial of reasonable accommodation caused exacerbation of pre-existing condition. Complainant experienced stomach pain, nightmares, panic attacks, and withdrawal from family); Sartini v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120112305 (September 19, 2012) (Commission awarded \$50,000.00 in nonpecuniary, compensatory damages where Agency failed to provide Complainant with a reasonable accommodation which resulted in the aggravation of a pre-existing back injury and severe aggravation and exacerbation of Complainant’s relatively “stable” mental condition in the form of extreme emotional distress, depression, substantial weight gain, anxiety, paranoia, marital trouble, humiliation, and embarrassment); Faustino v. United States Postal Serv. EEOC Appeal No. 0120161783 (Feb. 2, 2018) (\$25,000 awarded where Complainant’s back pain worsened after denial of reasonable accommodation and he experienced stress, humiliation, depression and embarrassment); Minna Z. v. Dep’t of the Air Force, EEOC Appeal No. 0720160009 (March 10, 2017)(award of \$25,000 for failure to engage in the interactive process to find the employee a reasonable accommodation where the employee suffered from

insomnia, depression, migraine headaches, anxiety, harm to her reputation, and aggravation of pre-existing physical and mental conditions).

Finally, we note that in her January 2019 request for compensatory damages, Complainant's first request appears to be reasonable accommodations (i.e. first floor office close to parking and restroom, office with temperature controls or telework, balance of administrative tasks and patient care adjusted to fluctuations in medical condition). The Agency is reminded that its duty to provide a reasonable accommodation is a continuing obligation.

CONCLUSION

Based on a thorough review of the record, we hereby **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

To the extent it has not already done so, the Agency is Ordered to take the following action within forty-five (45) calendar days of the date this decision is issued:

- (1) provide Complainant with payment of \$41,000.00 in compensatory damages; and
- (2) provide Complainant with payment of \$10,000.00 in attorney's fees.

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)

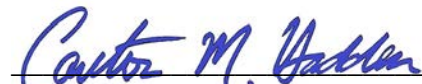
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint.

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