



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Nancey D.,¹
Complainant,

v.

William P. Barr,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2019005600

Hearing No. 530-2014-00133X

Agency No. BOP-2010-08065

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 August 7, 2019 final order addressing compensatory damages 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.

BACKGROUND

During the period at issue, Complainant worked as a Remote Operational Accountant, GS 11 at the Agency's Federal Correctional Institute in Ft. Dix, New Jersey.

On June 21, 2013, Complainant filed a formal EEO complaint claiming that she was repeatedly harassed on the bases of her race (African-American), sex (female), and in reprisal for prior protected EEO activity when she was subjected to sexual comments, gestures, and emails, as well as rumors of a sexual nature.

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.

Following an initial investigation, Complainant received a copy of the Report of Investigation and timely requested a hearing before an EEOC Administrative Judge (“AJ”). Complainant filed a motion with the AJ on March 27, 2014, claiming that the Agency inadequately investigated her claim of sexual harassment by restricting the time period of the investigation to December 17, 2012 to January 31, 2013. The assigned AJ issued an Order, dated August 21, 2015, directing the Agency to conduct a supplemental investigation addressing Complainant’s alleged incidents of harassment occurring from January 2010 to December 2012. The Agency concluded the supplemental investigation on September 9, 2015.

Subsequently on February 6, 2016, Complainant submitted a Statement of Issues where she clarified that the claims at issue were as follows:

1. whether Complainant was subjected to sexual harassment from 1999 to 2013 by the Associate Warden (“AW”);² and
2. whether Complainant was subjected to reprisal for her prior protected EEO activity when the AW verbally abused Complainant and assigned her tasks with nearly impossible deadlines in an attempt to set her up for failure.

On February 16, 2016, in response to Complainant’s Statement of Issues, the AJ issued an Order clarifying that Complainant’s sexual harassment claims would not include incidents occurring prior to 2010, namely the period before AW became Complainant’s supervisor. The AJ reasoned that Complainant raised one sexual harassment claim against the Agency, under the vicarious liability theory for supervisor, and that the alleged incidents occurring from 1999 to April 2010 were “untimely and under the doctrine of laches.” However, the AJ indicated that these prior incidents would be considered as background information to support Complainant’s claim for vicarious liability. Subsequently, the AJ held hearings on February 17-18, 2016, and issued a final decision on March 19, 2018.

In her decision, the AJ found that the Agency was liable for subjecting Complainant to unlawful sexual harassment. However, the AJ determined that Complainant had not successfully proved her reprisal claim. The AJ determined that AW engaged in sexually charged conduct over an approximate three-year period while supervising Complainant and she also considered, as background, AW’s history of inappropriate conduct during the period that Complainant and AW were co-workers.

² The record reflects that AW was Complainant’s co-worker from 1998 to 2010, and AW became Complainant’s second-level supervisor from April 2010 to 2013. The record clarifies that Complainant’s first-level supervisor was located remotely in North Carolina, and therefore, AW was the management official who supervised Complainant’s day-to-day duties, assignments, performance, and AW approved Complainant’s leave.

Specifically, the AJ noted that AW, during the three-year period at issue was responsible for the following actions: uninvited frequent visits to Complainant's office; staring at Complainant while remarking how good she smelled, looked, and fit in her clothes; asking her out on dates and asking her if she wanted to have sex with him; groping his crotch in Complainant's presence until he had an erection; talking to Complainant about his sex life and about sexual dreams he had about Complainant; and on one occasion, offering to pay Complainant for sex or give her his whole paycheck to be with her. The AJ further determined that the record showed that management was aware of AW's behavior during this three-year period but failed to take any corrective action. As such, the AJ concluded Complainant had established, under Title VII, that the Agency was liable for AW's discriminatory conduct.

Among other remedies, the AJ awarded past pecuniary damages in the amount of \$2,877, future pecuniary damages in the amount of \$2,500, and non-pecuniary compensatory damages in the amount of \$80,000. In a separate June 28, 2019 decision on attorney's fees and costs, the AJ awarded \$187,859.29 in attorney's fees and \$11,981.89 in costs.

On August 7, 2019, the Agency issued a final order fully adopting the AJ's decision and award of remedies.

The instant appeal from Complainant followed.

On appeal, Complainant, through counsel, requests an increase in the damage awards. Specifically, Complainant requests \$34,854.36 in past pecuniary damages (covering past prescriptions and counseling) and \$16,000 in future pecuniary damages (covering future counseling sessions). Complainant reasons that her award for past pecuniary and future pecuniary damages should have included the full price for the medical expenses and not limited to the co-payments for the medical expenses.

Regarding her request for an increase in non-pecuniary damages, Complainant reasons that the AJ's \$80,000 award should be increased to \$100,000 to conform with the Commission's prior damages decisions at the present-day value. Alternatively, Complainant argues that her non-pecuniary damages award should be increased to \$190,000 to compensate for sexual harassment she endured from 1998 to 2010 during the period that she and AW were co-workers. Therefore, Complainant argues that the AJ incorrectly limited her sexual harassment claims to the period that AW was her supervisor and did not account for AW's sexually-charged conduct that occurred twelve years before 2010.

ANALYSIS AND FINDINGS

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. National Labor Relations Board, 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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

Following the hearing, the AJ found that Complainant's testimony was highly credible and was corroborated by testimony from Complainant's co-workers. We note that the AJ's credibility determinations are not contested on appeal, and accordingly, we accept her determinations.

On appeal, Complainant has only challenged the amount of the AJ's award of monetary damages. As such, we will only address the issue of past and future pecuniary damages, and non-pecuniary compensatory damages.

Past Pecuniary Damages

Pecuniary damages are quantifiable out-of-pocket expenses incurred due to 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.

The record reflects that Complainant submitted documentation for payments she incurred for counseling sessions and medical prescriptions. The record further reflects that the AJ awarded Complainant a total of \$2,877 in past pecuniary damages which Complainant asserts only included the co-payments for these medical expenses instead and failed to include the full charge for these medical expenses.

We acknowledge that the Commission held in Clark v. Dept. of Veterans Affairs, EEOC Appeal No. 0120092454 (Dec. 20, 2010) that a federal Agency is required to pay a Complainant's medical bills without regard to whether health insurance paid for any part of the medical bills. See also Yonker v. Dept. of Transportation, EEOC Appeal No. 01A05979 (Jan. 9, 2001) (Complainant is entitled, pursuant to the collateral source rule, to the full amount of the pecuniary damages, even if some, or all, of the expenses were paid by her health insurance).

Here, however, the documentation Complainant provided regarding her medication prescription expenses consisted of handwritten notes by one of Complainant's attorneys with no foundation established as to how the full charges for these prescriptions were formulated. We further note that, on appeal, Complainant acknowledges that she was unable to obtain from her medical provider the full charged amount for her prescribed medications.

Therefore, we find in this instance, because there is no adequate supporting evidence of the full charges, the AJ appropriately reduced the past pecuniary damages claim to Complainant's prescription co-pay amounts, rather than the full cost of the prescriptions.

We further find that the Complainant provided receipts for charges she received for her counseling sessions. We note that the charges provided on this document are very difficult to read. The document includes a total summary chart at the bottom indicating "a pay/adj "of negative \$291.00, "charges" of \$7,946.00, and a "total" of \$6,225.00. Complainant reasons on appeal that she seeks payment for the \$6,225 counseling service fee. However, it is unclear from the record how this fee was computed, and therefore, we cannot grant Complainant's request.

For these reasons, we affirm the AJ's past pecuniary damages award of \$2,877.

Future Pecuniary Damages

Future pecuniary damages are losses likely to occur after the resolution of the complaint. MD-110 at 11-23 (citing EEOC Damages Guidance). A copy of a May 14, 2014 counseling note from Complainant's treating therapist determined that Complainant required an additional one to two years of counseling sessions. Complainant asserts on appeal that the AJ reached the \$2,500 award by calculating 100 additional counseling sessions at \$25 co-pay per session instead of calculating the full charge for each session.

Documentation in the record reflects that Complainant had 30 counseling sessions after the May 14, 2014 therapist note, with the last documented counseling session occurring on April 30, 2015. We also note that the 30 counseling sessions occurred within the "one to two year" period of additional counseling sessions the therapist determined on May 14, 2014, Complainant would need. Additionally, Complainant testified at the hearing on February 17, 2016, that she had stopped her counseling sessions when she moved to Maryland in March 2015, but she had since resumed having counseling sessions, per her therapist's recommendation, on a weekly basis "because [she] was not coping well." Complainant also testified that her out-of-pocket expenses for her counseling services was a \$30 co-payment, as her co-payment had increased to \$30 in 2016. We find that the record reflects that Complainant had a continued need for counseling sessions. As there is inadequate documentation to support actual charges for the counseling services, we find no need to disturb the AJ's decision to award \$2,500 in future pecuniary damages.

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).

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)).

As an initial matter, we agree that the AJ properly limited Complainant's harassment claim to the period covering 2010 to 2013, and properly determined that alleged incidents that occurred before 2010 could be considered as background in reaching the liability determination. Although Complainant indicated in the March 28, 2013 EEO Counselor's report that she had “been subjected to sexually explicit comments from [AW] for several years,” there is no indication that the sexual harassment occurred before 2010. The AJ determined that there was “no credible evidence that Complainant made any complaints to management against [AW's] sexually-charged conduct” from 1998 to April 2010 when AW and Complainant were co-workers. In the case of co-worker harassment, as at issue during 1998 to April 2010, an agency is responsible for acts of harassment in the workplace where the agency (or its agents) knew or should have known. Therefore, even if the AJ had determined that Complainant was subjected to sexual harassment from 1998 to April 2010, there would have been no basis for imputing liability to the Agency.

The AJ awarded \$80,000 in non-pecuniary damages. We find, however, that that an award of \$100,000 is more consistent with the amounts awarded in similar cases. The record reflects that Complainant was diagnosed with Post-Traumatic Stress Disorder (PTSD) and Severe Depression as a result of AW's harassment during the three-year period he was her supervisor. The record further reflects that these conditions required treatment through medications and counseling sessions. Complainant also testified that she suffered humiliation, anger, panic attacks, withdrawal, weight fluctuation, migraines, erratic sleeping patterns, and frequent crying spells.

We concur with the AJ that the weight of the evidence identifies the harm Complainant suffered and adequately ties that harm directly to the AW's actions. Based on Complainant's representations of harm, we find that the weight of our prior decisions supports an award of \$100,000 in non-pecuniary compensatory damages. See Yasko v. Department of the Army, EEOC Appeal No. 01A32340 (Apr. 21, 2004) (awarding complainant \$100,000 in non-pecuniary compensatory damages after being subjected to sexual harassment resulting in depression, post-traumatic stress disorder, anxiety, severe intermittent insomnia, weight gain and stress); Winkler v. Department of Agriculture, EEOC Appeal No. 01975336 (June 7, 2000) (awarding \$110,000 in non-pecuniary compensatory damages for emotional distress after being subjected to sexual harassment and experiencing major depression, excessive sleeping, social withdrawal, anxiety, irritability, weeping, increased suicidal ideation, fright, shock, humiliation, loss of marital harmony and loss of enjoyment in life).

Therefore, we modify the Agency's award of non-pecuniary compensatory damages to \$100,000.

CONCLUSION

We AFFIRM the AJ's March 19, 2018 determination on past and future pecuniary damages. We MODIFY the AJ's determination on non-pecuniary compensatory damages. These matters are REMANDED to the Agency for further processing in accordance with the ORDER below.

ORDER

To the extent that it has not already done so, the Agency is ORDERED to take the following actions:

1. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$2,877 in past pecuniary damages.
2. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$2,500 in future pecuniary damages.
3. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$100,000 in non-pecuniary damages.

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 (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).

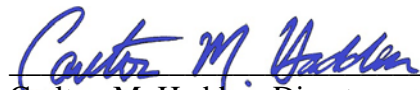
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

September 14, 2020

Date