



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

[REDACTED]
Stanton S.,¹
Complainant,

v.

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

Appeal Nos. 2019005938 and 2020002226

Agency No. 200H06462015104577

DECISION

Complainant filed appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 3, 2019, and September 18, 2019 final decisions addressing compensatory damages and attorney's fees 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.²

BACKGROUND

During the period at issue, Complainant worked as a Plumber, WG-9, at the Agency's Oakland Medical Center in Pittsburgh, Pennsylvania.

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.

² In EEOC Appeal No. 2019005938, Complainant has appealed both the Agency's August 3, 2019 final decision on compensatory damages and the Agency's September 18, 2019 final decision on attorney's fees even though Complainant later filed a subsequent appeal, EEOC Appeal No. 2020002226, only concerning the Agency's September 18, 2019 determination on attorney's fees. Because both decisions involve the instant formal complaint, we have consolidated the appeals and will address both in this decision.

In Stanton S. v. Department of Veterans Affairs, EEOC Appeal No. 0120170582 (April 16, 2019), this Commission determined that Complainant had established a violation of Title VII when he had been subjected to a pattern of racial harassment at the hands of several coworkers which management failed to take appropriate steps to stop. The decision found that Complainant was the only African American plumber at the facility and two of his Caucasian coworkers (C1 and C2) engaged in a pattern of conduct designed to humiliate him due to his race. Complainant established that for months his coworkers took his toolbox, took the tools out, and left negative notes in the toolbox that said that African-Americans did not have the skill set to be plumbers. Complainant established that in May 2015, his two coworkers attempted to restrain Complainant in a chair with a metal hose clamp. Complainant testified that when during the struggle that ensued he broke free, his coworkers urged the other plumbers to “jump” him and said, “let’s get him, boys.” Complainant further testified that in June 2015, C1 told him that there was a beam in the “penthouse” that said, “Black people smell like goat,” and he took a picture of the beam on his phone and showed it to Complainant. He stated that all that week, C1 referred to him as a goat and said African-Americans smell like goat, which made his other coworkers laugh. Complainant also established that on June 11, 2015, C1 and C2 duct-taped and restrained him to a chair and took pictures of him that were used as computer screensavers. The evidence further established that although Complainant continued to report these incidents of harassment to supervisors, management officials, management failed to take immediate and corrective action after the harassment was initially reported. The Commission ordered, among other remedies, the Agency to conduct a supplemental investigation on Complainant’s entitlement to compensatory damages.

On August 8, 2019, following its supplemental investigation, the Agency issued a final decision on compensatory damages. The Agency denied Complainant’s request for an award of \$300,000 in non-pecuniary compensatory damages and awarded Complainant \$110,000 in non-pecuniary compensatory damages. In reaching this amount, the Agency determined that the awarded amount was similar to the amount of damages awarded in similar cases. The Agency also awarded Complainant \$350 in past pecuniary damages for out-of-pocket medical expenses and determined that Complainant provided sufficient documentation to support these costs.³

On September 18, 2019, the Agency issued a final decision on attorney’s fees in response to Complainant’s request for \$6,075 in attorneys’ fees for 13.5 hours of work performed billed at the rate of \$450 per hour.⁴ The Agency found that the billable rate of \$450 per hour was a reasonable rate. However, the Agency determined that Complainant’s attorney billed 8.7 hours for preparation of the fee petition which the Agency reasoned was “excessive.”

³ As Complainant does not dispute the past pecuniary award on appeal, we need not address it further in our decision.

⁴ The Agency initially indicated in its August 8, 2019 decision on compensatory damages that it did “not dispute Complainant’s attorney’s fees in the amount of \$6,075” and acknowledged that as of the date of its decision, it had not received a petition for attorney’s fees.

Consequently, the Agency reduced the number of billable hours for this service to four hours.⁵ As a result, the Agency determined that Complainant was entitled to legal fees in the amount of \$3,960 at the rate of \$450 per hour for a total of 8.8 hours of legal representation.

The instant appeal followed.

On appeal, Complainant, though counsel, asserts that the Agency failed to provide him a copy of the supplemental investigation. Specifically, Complainant indicates that the Agency's decision on compensatory damages states that the supplemental investigation closed on July 10, 2019. However, Complainant explains that his attorney submitted the majority of his medical records, including Complainant's July 14, 2019 declaration and a declaration from Complainant's therapist on July 19, 2019. Complainant acknowledges that the Agency indicated in the decision that it had received a copy of Complainant's July 17, 2019 psychological evaluation, but Complainant is uncertain as whether the Agency considered all documents submitted after supplemental investigation closed on July 10, 2019.

Complainant also disputes the Agency's award of non-pecuniary compensatory damages and the Agency's award of attorney's fees. Complainant argues that he is entitled to \$300,000 in non-pecuniary compensatory damages. In reaching this amount, Complainant argues that the cases the Agency used to reach a \$110,000 award did not account for the physical assault on Complainant on two occasions by his co-workers, and therefore, an award of \$110,000 is inadequate.

Regarding attorney's fees, Complainant argues that the Agency incorrectly determined that Complainant's attorney billed 8.7 hours for preparation of the fee petition, and instead billed 0.2 hours (\$90) for this service. Nevertheless, Complainant does not dispute the Agency's determination that four hours is a reasonable amount of time for Complainant's attorney to have used to prepare the fee petition. Therefore, Complainant requests that the requested \$6,075 attorney's fee award be increased by \$1,710,⁶ for a total attorney's fee award of \$7,785.

⁵ The Agency subtracted 4.7 hours from the total 13.5 hours to reach 8.8 hours of legal representation.

⁶ Complainant explains that the \$1,710 consists of the additional 3.8 hours (4 hours minus 0.2 hours) at the rate of \$450 per hour.

ANALYSIS AND FINDINGS

Non-Pecuniary Damages (EEOC Appeal No. 2019005938)

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)).

The Agency awarded \$110,000 in non-pecuniary compensatory damages. We find, however, that an award of \$175,000 is more consistent with the amounts awarded in similar cases. Complainant testified in his supplemental affidavit that he was diagnosed with PTSD by both his psychiatrist and the Agency's psychiatrist as a result of the harassment he sustained. Complainant explained that he has trouble sleeping at night and he “constantly thinks” about:

when they put the hose clamp over me and, and the gentleman that was holding me in the chair couldn't hold me in the chair much longer and then said, 'let's get him boys,' and that stays in my mind all the time.

Complainant further explained that when he returned to work following the discriminatory incidents at issue, management assigned him back to plumbing – the same division where the harassing incidents took place. Complainant stated that he had to use a computer that “still had the screensaver of a person bound and gagged when [he] returned back to work.” Consequently, Complainant explained that he could only remain at work for an hour and 26 minutes “because [he] couldn't take it anymore.”

In his July 14, 2019 declaration, Complainant stated after the verbal and physical assaults, he has been taking medication and attending regular therapy sessions since July 2015. Complainant indicated that before the discrimination and physical assault, had “always been a positive and happy person,” but he has become a “changed person” after the discrimination and physical assault. Specifically, Complainant indicated that he has suffered from mental and physical symptoms of distress including depressed mood, difficulty sleeping, nightmare, sweats, shortness of breath, lethargy, fatigue, erectile dysfunction, persistent negative thoughts, feeling overwhelmed, humiliation, irritability, loss of enjoyment of life, inability to concentrate, and memory problems.

In addition to being diagnosed with PTSD, Complainant stated that he was also diagnosed with Panic Disorder Without Agoraphobia, Adjustment Disorder with Mixed Anxiety, and Depressed Mood.

Because of these conditions, Complainant explained that he has become less patient, more confrontational and feels estranged from his family, and his intimate relationships have suffered because of his “negative attitude, demeanor, and outlook.” Since the attack, Complainant indicated that he lost interest in regularly going to the gym and he stopped regularly attending church.

The record includes physician visit notes corroborating that Complainant’s conditions, and the described mental and physical symptoms, resulted from the verbal and physical harassment he sustained.

Complainant’s testimony identifies the type of harm he suffered and adequately ties that harm directly to the Agency’s actions. Based on the evidence presented of harm resulting from the discrimination, that included two physical assaults one month apart, we find that prior decisions involving similar harm support an award of \$175,000 in non-pecuniary compensatory damages. See, e.g., Lemons v. Dep’t Justice, EEOC Appeal No. 0120102416 (Nov. 16, 2011) (awarding \$175,000 in non-pecuniary compensatory damages where management failed to respond over a four to five-month period to complainant’s four separate allegations that she was being sexually harassed by an inmate which culminated in a violent sexual assault. Complainant was diagnosed with PTSD and Major Depression suffered physical and emotional harm from the assault including insomnia, vomiting, difficulty concentrating, mood swings, an inability to trust people, had feelings of hopelessness and paranoia).

Therefore, we modify the Agency’s August 3, 2019 final decision on compensatory damages to award \$175,000 consistent with the Order below.

Attorney’s Fees (EEOC Appeal No. 2020002226)

Title VII and the Commission’s regulations authorize the award of reasonable attorney’s fees and costs to a prevailing complainant. 29 C.F.R. § 1614.501(e); see also EEO Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 11-1 (Aug. 5, 2015). Fee awards are typically calculated by multiplying the number of hours reasonably expended times a reasonable hourly rate, an amount also known as a lodestar. See 29 C.F.R. § 1614.501(e)(ii)(B); Blum v. Stenson, 465 U.S. 886, 899 (1984); Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

Here, the record includes a summary of fees submitted by Complainant’s attorney. The summary indicates that Complainant’s attorney billed 0.2 hours at the rate of \$450 per hour (\$90.00) to “prepare declaration in support of fee petition [and] email attorneys regarding request for declarations in support. Consequently, we find that the Agency incorrectly determined that Complainant’s attorney had billed 8.7 hours for this service. We note that neither Complainant nor Agency dispute the \$450 hourly rate.

We further note that Complainant does not dispute the Agency finding that it was reasonable for Complainant's attorney to bill 4 hours for the service at issue. Thus, we agree with Complainant that the attorney's fee should be increased by \$1,710 for the additional 3.8 hours at the rate of \$450.

Therefore, we modify the Agency's September 18, 2019 final decision concerning attorney's fees as indicated in our Order below.

CONCLUSION

The Agency's August 3, 2019 final decision concerning compensatory damages and the Agency's September 18, 2019 final decision concerning attorney's fees is hereby **MODIFIED**. 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**, within sixty (60) calendar days from the date this decision is issued, to pay Complainant \$175,000 in nonpecuniary compensatory damages and \$7,785 in 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 (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