



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Tasia C.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of Defense
(Defense Commissary Agency),
Agency.

Appeal No. 2020002945

Agency No. DeCA-00151-2016

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 March 12, 2020 final order addressing compensatory damages concerning 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

During the period at issue, Complainant worked as a Lead Store Associate at the Agency's Hunter Army Air Field (AAF) Commissary in Savannah, Georgia.

On October 13, 2016, Complainant filed a formal EEO complaint claiming that the Agency discriminated against her based on race (Black), sex (female), and age (born 1958) when:

1. On June 18, 2016, Complainant's supervisor ("S1") made reference to white superiority by extending her hand (as in a Nazi salute), stating, "white power."

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. On July 16, 2016, S1 told Complainant that S1's grandson was "all white," after Complainant showed S1 a picture of her grandchild who was biracial or of multiracial heritage.
3. S1 referred to Complainant and other black female co-workers as "bitch" or "stupid."
4. In January 2016, S1 stated that she wished one of the co-workers would get into a wreck and die and, in April 2016, she hit another co-worker on the head. S1 visibly favored the sole male employee in the department, especially with regard to time and attendance issues, leave, and the schedule.
5. On April 25, 2017, S1 questioned Complainant as to whether she was recording a conversation S1 was having with a co-worker, wanted someone to look at Complainant's phone, and kept the phone locked in the produce office.

The Agency initially dismissed the formal complaint on procedural grounds. In Tasia C. v. Dep't of Defense, EEOC Appeal No. 0120170911 (March 31, 2017), we reversed the Agency's dismissal decision and remanded the complaint for investigation. Following the investigation, Complainant requested a final decision. On December 5, 2017, the Agency issued a final decision finding that Complainant had been subjected to discriminatory harassment as alleged. For remedies, the Agency indicated that it would take action to ensure a workplace free from discrimination and harassment and conduct mandatory EEO/Prevention of Harassment training for S1.

Complainant then appealed the Agency's final decision and sought compensatory damages for anxiety and stress that resulted from the hostile work environment and harassment caused by S1. On appeal, the Commission determined that Complainant's appeal was not ripe for appellate review because the Agency had not yet issued a determination on what compensatory damages Complainant was entitled to. Therefore, the Commission remanded the matter to the Agency for further processing. See Tasia C. v. Dep't of Defense, EEOC Appeal No. 0120180732 (Aug. 13, 2019).

On March 12, 2020, the Agency issued the instant final decision and awarded Complainant \$6,000 in non-pecuniary compensatory damages. The Agency did not elaborate on how it calculated the \$6,000 amount other than to state that it determined that a review of the documents and case law supported the awarded amount.

The instant appeal followed.

On appeal, Complainant argues that the compensatory damages award should be increased. Specifically, Complainant asserts that the amount does not adequately cover the emotional harm she endured, and the amount does not cover her past and future medical costs for medications and therapy related to the discriminatory harassment.

ANALYSIS AND FINDINGS

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.

We note the Agency did not include any discussion in its decision on a past pecuniary damage award. However, we construe Complainant's statements on appeal as a request for reimbursement for therapy co-payments and medication purchases. We address each of these requests below.

Co-payments

The record includes a May 1, 2017 physician's note indicating that Complainant had been treated since March 9, 2017 for "excessive stress and anxiety related to her work environment." A therapist's March 2, 2018 letter also indicates that "[Complainant's] depression and anxiety stem from her interactions with her supervisor," and consequently, Complainant participates in ongoing therapy sessions. The medical payment history included in the record covering the period November 2017 through March 2018 supports a determination that the treatment Complainant received during this period was related to the Agency's discriminatory actions even though the treatments occurred after the last discriminatory incident at issue.

A copy of an Explanation of Benefits, reflects that Complainant was charged two \$12 co-payments on November 13 and 28, 2017. The record includes a receipt for the November 28, 2017 co-payment as well as receipts for a \$20.00 co-payment made on March 2, 2018 and an \$8.00 co-payment made on March 5, 2018. Thus, we find that Complainant is entitled to reimbursement of \$52.00 for co-payments incurred for her therapy visits. Therefore, we grant Complainant's request for a past pecuniary damage award of \$52.00.

Medication Purchases

The record does not contain receipts for medication expenses Complainant stated that she incurred. Therefore, we find that Complainant is not entitled to past pecuniary damages award for medication purchases.

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)).

The Agency awarded \$6,000 in nonpecuniary damages. We find however, that an award of \$25,000 is more consistent with the amounts awarded in similar cases. Complainant states on appeal that she had been “tormented” while working for S1. In her March 1, 2018 statement, Complainant explained that she experiences stress, anxiety attacks, depression, and high blood pressure. Complainant clarified that she did not have these conditions before the discrimination occurred and she no longer is the person she used to be. Complainant indicated that due to her medical conditions, she has trouble sleeping, she withdraws from her social activities, her conditions have placed a strain on her marriage, and she has had to continuously seek care of a medical doctor and psychiatrist.

While not mandatory for recovery of compensatory damages for emotional harm, the record nevertheless includes medical documents and physician letters indicating that the emotional harm Complainant suffered was directly related to the harassment she incurred from S1. Medical records dated March 9, 2017 and April 24, 2017 indicate that Complainant had sleep disturbances, decreased concentration, and difficulties breathing and sitting still for an approximate two-year period. These medical records attribute a “toxic supervisor” as the onset factor of these conditions. As far as the severity of these conditions, the medical records indicate that Complainant “can still function, although difficult.” Additionally, a May 1, 2017 physician’s note confirms that Complainant had been treated for excessive stress and anxiety related to her work environment since March 9, 2017, and a May 4, 2017 physician’s note further confirmed that Complainant had been receiving treatment for the past two years for severe anxiety. A March 2, 2018 therapist note also indicates that Complainant’s anxiety stems from her interactions with her supervisor and Complainant receives ongoing therapy focusing on mental strategies to get through the work day and destress after work.

The medical records included in the record reflect that Complainant was diagnosed and treated for anxiety from November 2, 2016 through October 16, 2017 and again on January 19, 2018. However, the medical records indicate that Complainant was diagnosed with high blood pressure as early as February 3, 2009 which was identified as an “isolated elevation.”

As previously discussed, Complainant’s testimony identifies the type of harm she suffered and adequately ties that harm directly to the Agency’s actions. Based on Complainant’s representations of harm, we find that the weight of our prior decisions supports an award of \$25,000 in non-pecuniary compensatory damages. See Mindy O. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120160586 (May 31, 2017) (awarding \$25,000 in non-pecuniary

compensatory damages based on complainant's assertion that she suffered emotional distress, anxiety, panic attacks, high blood pressure, withdrawal from social activities, lack of trust and marital problems and medical records supported that complainant experienced increased blood pressure and exacerbation of medical conditions).

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). Complainant asserts on appeal that she has continues to incur ongoing medical expenses for medications and therapy visits to treat her anxiety and stress. Complainant's therapist indicated in the March 2, 2018, letter that Complainant participates in "ongoing therapy sessions." The therapist also noted that he was "concerned about ["Complainant's"] emotional well-being while [at work]" and Complainant's ongoing sessions focus on providing Complainant mental strategies as to how to get through the work day. However, there is no indication from the therapist as to the frequency of the additional visits needed to treat Complainant's condition. Aside from Complainant's assertion, the documentation in the record supports that Complainant last received therapy visits in March 2018. Absent documentation to support the frequency of additional therapy visits, we deny Complainant's request for future pecuniary damages.

CONCLUSION

We MODIFY the Agency's March 12, 2020 Agency's determination on non-pecuniary compensatory damages and past pecuniary 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 \$25,000 in nonpecuniary damages.
2. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$52.00 for incurred medical co-payment costs.

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

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 (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the complainant or the agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.**

A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted together with the 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).

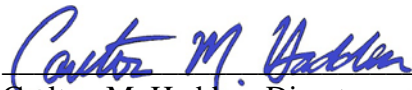
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

October 6, 2020

Date