



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

[REDACTED]
Gaye A.,¹
Complainant,

v.

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

Appeal No. 2019005924

Agency No. DD-FY17-021

DECISION

On August 27, 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 July 24, 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a part-time Motor Vehicle Operator, WG-07, within the Agency's Mid-Atlantic Americas School District in Fort Buchanan, Puerto Rico.

On April 5, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female), age (57), and reprisal for prior protected EEO activity (initial contact with EEO Office on December 18, 2016)² when:

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 The basis of reprisal applies to claim (2) of Complainant's complaint only.

1. on November 10, 2016, Complainant learned that management did not select her for a vacant, full-time Motor Vehicle Operator position, and
2. management subjected Complainant to hostile work environment harassment when:
 - (a) on February 16, 2017, Complainant's Supervisor (S1) stated, "If you do a formal complaint that you would waste your time because everything [S1] does his supervisor will know about it and will back it up," and
 - (b) on January 26, 2017, S1 instructed Complainant to drive on a broken tire.³

The Agency accepted Complainant's complaint for EEO investigation. Following an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an EEOC Administrative Judge (AJ) or an immediate final agency decision. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision found no discrimination based on sex or age as to claims (1) or (2). However, the Agency concluded that Complainant proved that the Agency subjected her to retaliation as to claim (2)(a). The Agency found a per se violation of anti-retaliation laws and ordered training for S1, consideration of disciplinary action for S1, posting of a Notice of the finding of discrimination, and consideration of Complainant's entitlement to compensatory damages. The Agency gave Complainant an opportunity to submit documentation to support a request for compensatory damages.

In response, Complainant sent an undated letter to Agency EEO, stating:

I am requesting compensatory damages for non-pecuniary losses including damages for intangible injuries of emotional harm, emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life. In the respon[se,] I have to add the amount of the compensation, which I decided should be \$65,000.00.

Subsequently, in a separate letter, Complainant stated she has seen a doctor for depression. Complainant reiterated generally that S1's retaliation has caused great pain and loss of money, livelihood, and her home, without providing much detail.

The Agency issued a final decision stating that Complainant failed to provide support for her request or to show harm based on the Agency's action in (2)(a). The Agency awarded \$5,000 in nonpecuniary, compensatory damages. The instant appeal from Complainant followed.

³ At the counseling stage, as relief, Complainant asked to retake an English test related to the non-selection in (1) and for the Agency to stop the harassing incidents. During the investigative stage, Complainant requested respect and acknowledgement of good work.

ANALYSIS AND FINDINGS

The primary issue before us is whether the Agency, in its July 24, 2019 final decision, properly decided the amount of compensatory damages due Complainant related to S1's February 16, 2017 comment. Complainant requested \$65,000 in nonpecuniary, compensatory damages. The Agency's decision awarded Complainant \$5,000 in non-pecuniary, compensatory damages.

Nonpecuniary damages are for 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, II.A.2 (July 14, 1992) (Compensatory Damages Guidance). There is no precise formula for determining the amount of damages for nonpecuniary 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 (August 29, 1997). The Commission notes that nonpecuniary, compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Id. 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 (March 4, 1999).

During the supplemental investigation for compensatory damages, Complainant requested "compensatory damages for non-pecuniary losses including damages for intangible injuries of emotional harm, emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life" in the amount of \$65,000.⁴ Complainant further asserted that she has had to seek treatment for depression, although she did not describe the nature of her depression, any details of her treatment such as the number of visits, type of treatment, when it was diagnosed or the prognosis. She also did not provide any type of medical documentation. 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 Service, EEOC Appeal No. 01952288 (April 18, 1996) (citing Carpenter v. Dep't of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995)). Complainant, through her own testimony, along with the circumstances of her particular case, can suffice to prove entitlement to compensatory damages. See Lawrence, EEOC Appeal No. 01952288. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id.

⁴ On appeal, Complainant has argued that she was terminated from her position effective July 20, 2018, on the charge of being absent without official leave. She believes this was in retaliation for the finding of unlawful retaliation by her supervisor. However, Complainant's removal was not at issue in her complaint that resulted in the finding of retaliation. If Complainant wishes to challenge her removal, she needed to have initiated EEO counseling with the Agency in order to file another complaint.

The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id. Complainant has the burden of proving the existence, nature and severity of the alleged emotional harm. Man H. v. Dep't of Homeland Security, EEOC Appeal No. 0120161218 (May 2, 2017). Complainant must also establish a causal relationship between the alleged harm and the discrimination. Id. Absent such proof of harm and causation, a complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. Id. Here, Complainant provided virtually no evidence of her harm.

Based on the foregoing, we find that an award of \$5,000 in nonpecuniary, compensatory damages adequately compensates Complainant for the harm she suffered as a result of a supervisor's single retaliatory comment. Complainant has failed to provide adequate evidence to support her claim of additional damages. The \$5,000 award is not "monstrously excessive" standing alone and is consistent with prior Commission precedent. See Barbie W. v. Dep't of the Army, EEOC Appeal No. 0120171302 (April 9, 2019) (Commission awarded \$2,000 in nonpecuniary, compensatory damages based on a doctor's note of physical and psychological distress, following a finding by an EEOC AJ that the Agency retaliated against the employee by revealing to her coworkers a disciplinary action form that included her personal information); Marcel M. v. U.S. Postal Service, EEOC Appeal No. 0120151062 (May 17, 2017) (Commission awarded \$1,500 in nonpecuniary, compensatory damages for humiliation and embarrassment, after an AJ found that the employee was retaliated against when management refused to remove a letter of warning from his personnel file long after the deadline for doing so had passed); Marcellus M. v. Dep't of Justice, EEOC Appeal No. 0120152864 (May 6, 2016) (Commission awarded employee \$3,500 in nonpecuniary, compensatory damages based on statement of depression, loss of enjoyment of life, stress, anxiety, humiliation, loss of self-esteem, excessive fatigue, and injury to professional standing, following finding that the employee was subjected to reprisal when management made him the subject of an offensive text message to other members of his squad and took his government vehicle away); Webster v. Dep't of Defense, EEOC Appeal No. 0120102276 (September 20, 2011) (Commission awarded \$4,000 in nonpecuniary, compensatory damages for Complainant's statement of embarrassment, frustration, social isolation, and injury to his professional reputation, following a finding of per se reprisal).

While Complainant may feel she is entitled to more, this award considers the nature of the Agency's action, the degree of harm Complainant experienced, and the amount of supporting evidence Complainant offered. The Commission notes that nonpecuniary, compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action.

CONCLUSION

Accordingly, the Agency's final order is **AFFIRMED**. The Agency is directed to implement the following corrective action in accordance with the **ORDER** below.

ORDER

The Agency, within 60 days of the date this decision is issued and to the extent that it has not already done so, shall pay Complainant \$5,000 for nonpecuniary, compensatory damages.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

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).

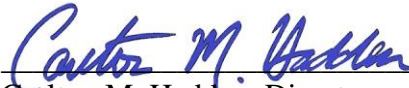
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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. 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

May 21, 2020

Date