



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

[REDACTED]
Letitia C.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs (VA),
Agency.

Appeal No. 2020000230

Hearing No. 420-2016-00031X

Agency No. 200I-0679-2015104283

DECISION

On August 30, 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 16, 2019 final order 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 Medical Support Assistant, GS-05, at the Agency's VA Medical Center (VAMC) in Tuscaloosa, Alabama.

On August 19, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female), religion (Baptist), and age (48) when, on June 16, 2015, the Agency referred Complainant but did not select her for the position of Peer Support Specialist, GS-6 (under Vacancy # TUS-15-MH-016-OC1324283BU). The Agency accepted Complainant's complaint for EEO investigation.

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 the EEO 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). Complainant timely requested a hearing. On December 6, 2018, the assigned AJ issued a Decision on Liability and, on April 3, 2019, held a Limited Scope Hearing on compensatory damages.² On April 24, 2019, the assigned AJ issued an Order Entering Judgment for Complainant, finding the Agency discriminated against Complainant based on sex when it failed to select her for the Peer Support Specialist position. The AJ found that the Agency failed to articulate legitimate, nondiscriminatory reasons for not selecting Complainant. However, the AJ also found that Complainant failed to establish discrimination based on religion or age as the selectee, who is male, is the same religion as Complainant and older than she is.

As remedial relief, the AJ ordered Complainant's placement in the Peer Support Specialist position or a substantially equivalent position with backpay, and \$5,000 in nonpecuniary, compensatory damages. Regarding nonpecuniary losses, the AJ stated that Complainant asserted that her symptoms increased during the latter part of 2015. However, the AJ concluded that medical documentation did not show that it was attributed to her non-selection. The AJ also ordered training for the responsible management officials regarding sex discrimination with an emphasis on hiring and the posting of a notice of the finding of discrimination,

The Agency subsequently issued a final order adopting the AJ's finding, in its entirety, that Complainant proved that the Agency subjected her to discrimination as alleged. The Agency ordered remedial relief, including \$5,000 in nonpecuniary damages. The instant appeal followed from Complainant.

² During the limited scope hearing, Complainant stated that she attempted to amend the instant complaint with an allegation of discriminatory constructive termination, but the AJ denied her request as unrelated. Hence, Complainant filed a subsequent EEO complaint alleging constructive termination and asserting additional emotional distress. Complainant stated that she is unsure the amount of damages related to her non-selection and the amount related to her constructive termination. She was unemployed at the time of the damages hearing. The AJ stated that constructive discharge was not part of the instant complaint so damages related to it would not be considered.

Our database shows that Complainant filed an appeal with the Commission regarding an EEO complaint alleging discriminatory harassment in 2016 and constructive retirement in March 2017. The Commission docketed the appeal as EEOC Appeal No. 2019003646. On September 23, 2020, the Commission issued a decision for Appeal No. 2019003646, affirming the Agency's finding of no discrimination based on an AJ's summary judgment decision.

Complainant stated that she was designated 100% disabled by VA in August 2016. She stated that she receives military benefits and, as of 2018, disability retirement.

On appeal, Complainant alleges that the AJ's award of \$5,000 in nonpecuniary, compensatory damages was improper and she requests \$75,000 instead. Complainant stated that the Agency caused the emotional injury she suffered. Complainant stated that she provided medical documentation from her Psychiatrist (P1) and VA Mental Health Nurse Practitioner (MHNP) to support her mental health claim.³ Complainant stated that she experienced trouble sleeping, irritability, humiliation, harm to her professional reputation, fear, severe anxiety, distress, forgetfulness, fatigue, anger, depression, paranoia, panic, self-doubt, loss of spirit, social withdrawal, feelings of hostility, loss of libido, digestive problems, aggravation of her preexisting Post Traumatic Stress Disorder (PTSD) symptoms, all of which caused a break up of her marriage. Complainant stated that she experienced months of harm. Complainant explained that she experienced PTSD during her military service and was recovering well with therapy until the Agency failed to select her for a position for which she was vastly qualified. Complainant stated that she was in the military 1989 to 1991 and suffered sexual assault and rape during that time. (She worked 23 years at VA following her military service.) Complainant stated that being overlooked for the position and being isolated after she filed the instant complaint brought back feelings from her military trauma. Complainant stated that the position was important to her so that she could help others who had issues similar to hers. Complainant stated that she takes medication for anxiety and depression, and visits the Tuscaloosa VAMC two to four times per week for physical therapy and a Veteran-to-Veteran peer program.

Complainant's Nurse Practitioner, MHNP, stated that she started providing trauma-based therapy to Complainant in 2012. She stated that Complainant came to her with a diagnosis of Major Depressive Disorder, and she diagnosed her with PTSD due to sexual trauma during military service. MHNP stated that she prescribed Complainant antidepressant and anti-anxiety medications. MHNP stated that a person's inability to manage stressors can exacerbate PTSD and, in this instance, the non-selection was the stressor. MHNP stated, from late 2015 to the time of hearing, she met with Complainant every three months for depression, anxiety, intrusive thoughts, nightmares, flashbacks, and paranoia. She stated that there has been some improvement such that Complainant manages the depression and anxiety. MHNP stated that she did not recall Complainant talking to her about her non-selection. MHNP stated there were times prior to 2015 that she conducted therapy with Complainant on a weekly basis or met with her monthly as needed.

Complainant's Psychiatrist, P1, stated that she first met with Complainant in December 2016, at which time Complainant presented with Major Depression and anxiety. P1 stated that Complainant expressed concern about harassment and stress at work. P1 stated that Complainant's condition is chronic in nature and so anything can "deteriorate" her condition. P1 stated, "I'm not sure if it's related to job or not." P1 stated that her sessions with Complainant are only 20 minutes so she focuses on Complainant's symptoms rather than details on the cause. P1 stated that she did not make a recommendation about Complainant stopping work.

³ P1 works at the Birmingham, Alabama VAMC and MHNP works at the Tuscaloosa VAMC.

ANALYSIS AND FINDINGS

The sole issue before us is whether the Agency decision (implementing an EEOC AJ's decision) properly awarded Complainant \$5,000 in nonpecuniary, compensatory damages related to her June 16, 2015 non-selection. Complainant requested \$75,000 in nonpecuniary, compensatory damages.

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).

Where a complainant has a pre-existing emotional condition, and that condition deteriorates as a result of the Agency's discriminatory conduct, the Commission applies the principle that 'a tortfeasor takes its victims as it finds them. Wallis v. U.S. Postal Service, EEOC Appeal No. 01950510 (November 13, 1995) (quoting Williamson v. Handy Button Machine Co., 817 F.2d 1290, 1294 (7th Cir. 1987)). 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 a reduction in damages reflecting the extent to which the condition would have worsened even absent the discrimination; the burden of proof being on the Agency to establish the extent of this entitlement. Wallis, EEOC Appeal No. 01950510 (citing Maurer v. United States, 668 F.2d 98 (2d Cir. 1981)); Finlay v. U.S. Postal Service, EEOC Appeal No. 01942985 (April 29, 1997).

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's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. 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. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

During the hearing for compensatory damages, Complainant requested \$75,000 in compensatory damages for non-pecuniary losses. Complainant stated that she experienced PTSD from sexual assault and rape during her military service in the early 1990s, she worked for the Agency for 23 years after that and was recovering well using therapy, and that the June 2015 non-selection made her feel violated and exacerbated her PTSD symptoms. Complainant stated that she experienced trouble sleeping, irritability, humiliation, harm to her professional reputation, fear, severe anxiety, distress, forgetfulness, fatigue, anger, depression, paranoia, panic, self-doubt, loss of spirit, social withdrawal, feelings of hostility, loss of libido, digestive problems. Complainant stated that the symptoms caused the break-up of her marriage. Complainant stated that she experienced months of harm. Complainant stated that she takes medication for anxiety and depression, and visits the Tuscaloosa VAMC, which is where she worked, two to four times per week for physical therapy and a Veteran-to-Veteran peer program.

Complainant's Nurse Practitioner, MHNP, stated that she started providing therapy to Complainant in 2012 and, prior to 2015, she would meet with Complainant on a weekly or monthly basis. MHNP stated that Complainant presented with Depression and she diagnosed Complainant with PTSD. MHNP stated that the inability to manage stressors, such as the 2015 non-selection, can exacerbate PTSD symptoms. (MHNP noted that she did not recall Complainant talking to her about her non-selection.) MHNP stated that she prescribed Complainant antidepressant and antianxiety medications. MHNP stated, from late 2015 to the time of hearing, she meets with Complainant every three months for depression, anxiety, intrusive thoughts, nightmares, flashbacks, and paranoia. She stated that there has been some improvement such that Complainant manages the depression and anxiety.

In December 2016, Complainant began meeting with a Birmingham VAMC Psychiatrist, P1. P1 stated that Complainant presented with Major Depression and anxiety. P1 stated that Complainant expressed concern about harassment and stress at work. P1 stated that Complainant's condition is chronic in nature and so anything can "deteriorate" her condition. P1 stated, "I'm not sure if it's related to job or not." P1 stated that her sessions with Complainant are short so she focuses on Complainant's symptoms rather than details on cause. P1 stated that she did not make a recommendation about Complainant stopping work.

During the limited scope hearing, Complainant stated that she attempted to amend the instant complaint with an allegation of discriminatory constructive termination, but the AJ denied her request. Subsequently, Complainant filed an EEO complaint alleging constructive termination and asserting additional emotional distress. Complainant stated that she was unsure of the amount of damages related to her non-selection or the amount related to her constructive termination. She was unemployed at the time of the damages hearing. The AJ stated that constructive discharge was not part of the instant complaint so damages related to it would not be considered.

The Commission database shows that Complainant filed an appeal with EEOC regarding an EEO complaint alleging discriminatory harassment in 2016 and constructive retirement in March 2017. The Commission docketed the appeal as EEOC Appeal No. 2019003646. On September 23, 2020, the Commission issued a decision for Appeal No. 2019003646, affirming the Agency's finding of no discrimination based on an AJ's summary judgment decision.

Based on review of the evidence and in light of Commission cases regarding non-pecuniary compensatory damages awarded for emotional harm, the Commission finds that the Agency's award of \$5,000 is insufficient to remedy the harm experienced by Complainant.

While we agree that Complainant cannot be awarded damages for her prior pain and suffering or distress related to alleged harassment and constructive retirement, we find that Complainant has established that the instant discriminatory non-selection exacerbated her pre-existing PTSD conditions, resulting in increased stress and depression, paranoia, anxiety, and the end of her marriage. Given the nature, severity and duration of Complainant's harm, we find that an award of \$20,000 is more appropriate. This amount considers the fact that Complainant was unsure of the specific amount of symptoms attributable to her non-selection or subsequent harassment and retirement, and that her medical team recalled her symptoms during a specific time more than the cause.

The Commission finds that Complainant has experienced damages similar to that suffered by employees in Martina S. v. Dep't of Homeland Security, EEOC Appeal No. 0120160001 (January 24, 2017) (\$20,000 in non-pecuniary damages awarded where complainant and daughter provided testimony that Complainant experienced familial strain, stress, anger, frustration, sleep issues, eating issues, and ultimately, an apparent heart attack, due at least in part to the Agency's non-selection of her); Reid v. Dep't of Veterans Affairs, EEOC Appeal No. 0720070077 (November 13, 2009) (\$20,000 in non-pecuniary damages awarded where complainant suffered damage to her professional reputation and emotional distress that affected her family due to discriminatory non-selections); and Flowers v. U.S. Postal Service, EEOC Appeal No. 01A43114 (October 7, 2004), req. for recon. denied, EEOC Request No. 05A50243 (January 11, 2005) (\$20,000 in non-pecuniary damages awarded where the agency's failure to hire complainant resulted in sleeplessness, depression, emotional distress, anxiety, loss of enjoyment of life and strained family relationships). The Commission finds that \$20,000 is not "monstrously excessive" standing alone, and is not the product of passion or prejudice.

CONCLUSION

Accordingly, we MODIFY the Agency's final order awarding \$5,000 in nonpecuniary damages and direct the Agency 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, to the extent that it has not already done so, shall pay Complainant \$20,000 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).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he 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 receipt of this decision. 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 (M0920)

The Commission may, in its discretion, reconsider this appellate decision if 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, a 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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **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

January 11, 2021
Date