



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Norberto G.,¹
Complainant,

v.

Chris Miller,
Acting Secretary,
Department of Defense
(Defense Logistics Agency),
Agency.

Appeal No. 2020000231

Agency No. DLAR-15-0018

DECISION

On August 28, 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 30, 2019 final decision concerning his 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as the Supply Relationship Program Manager, GS-1101-13 at the Agency's Aviation facility in Richmond, Virginia. Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him on the bases of sex (male), disability (paralyzed and utilizes a wheelchair for mobility), age (52), and in reprisal for his prior protected EEO activity by not selecting him for the position of Supervisory Strategic Sourcing Chief, GS-1101-14.

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.

He became aware of the nonselection on October 6, 2014. In Norberto G. v. Dep't of Defense, EEOC Appeal No. 0120160311 (Sept. 14, 2018), req. for reconsid. den'd EEOC Request No. 2019000251 (Apr. 5, 2019), the Commission found that Complainant's qualifications for the position were clearly superior to those of the selectee, and ultimately, that the Agency's articulated reasons for not selecting him were a pretext for reprisal for an earlier EEO complaint in which he had prevailed. Relief ordered included retroactive placement into the position, back pay with interest, benefits, and compensation for adverse tax consequences, a supplemental investigation on compensatory damages, training for the responsible management officials, consideration of disciplinary action against the responsible management officials, posting a notice, and attorney's fees.

The Agency conducted its compensatory damages supplemental investigation and issued a decision awarding Complainant \$11,000 in non-pecuniary compensatory damages and \$52,091.61 in attorney's fees.² The Agency submitted payment to Complainant in the amount of \$11,000 on August 23, 2019. On appeal, Complainant contests only the amount of the compensatory damages award.

Complainant submitted a supplemental affidavit pertaining to the issue of compensatory damages in which he averred that since his unsuccessful bid for promotion in October 2014, he had suffered from insomnia, anxiety, and periods of severe depression. He further claimed that his mental and emotional state had deteriorated to the point where he was struggling to set up appointments with his treating psychologist. He also stated that his pre-existing condition of post-traumatic stress disorder (PTSD) had been made worse and that for over a year he felt extremely embarrassed at having to answer questions from colleagues about why he did not get the promotion. Finally, he stated that his failure to get the promotion had harmed his professional reputation to such an extent that he felt uncomfortable socializing with his coworkers. Overall, Complainant asserted that as a result of the nonselection, he had lost his enthusiasm for his job. Supplemental Investigative Report (SIR) 2-3. Complainant's father, his sister, three of his friends and a coworker all attested to the fact that after the nonselection, Complainant no longer expressed any enthusiasm for his job and had likewise lost interest in social engagements. SIR 5-12. Records of Complainant's visits to his psychologist's office indicate that Complainant had incurred \$7,520 in expenses for those visits, of which only \$10 remained unpaid as of June 8, 2017. On June 5, 2014, several months before the nonselection at issue, Complainant was prescribed Alprazolam, a medication used to treat anxiety and panic disorders. SIR 13-19.

² On May 10, 2019, Counsel submitted Invoice # 01279 in the amount of \$52,091.61 for fees in the amount of \$50,670.00 for 195.50 hours of legal work plus costs, referred to as expenses in Complainant's itemized fee petition, of \$1,421.61. According to documentation submitted by the Agency in an interim compliance report, the Agency paid Complainant's attorney exactly \$52,091.61 on August 7, 2019. While Complainant did timely submit a notice of appeal, he did not provide any statement or brief challenging the propriety or sufficiency of the attorney's fees award. We therefore find that the Agency fully complied with our order in EEOC Appeal No. 0120160311 pertaining to attorney's fees.

ANALYSIS AND FINDINGS

Standard of Review

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

Compensatory Damages

Pursuant to section 102(a) of the Civil Rights Act of 1991, a Complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq, or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of “make whole” relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 202 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3); Wilda M. v. Dep’t of Homeland Sec., EEOC Appeal No. 0120142660 (Dec. 2, 2016).

In a claim for compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, that he suffered harm as a result of the Agency's discriminatory action; the extent, nature, and severity of the harm suffered; and the duration or expected duration of the harm. Pasquale D. v. Dep’t of Homeland Sec., EEOC Appeal No. 0120160892 (April 12, 2018); Archie G. v. Dep’t of Justice, EEOC Appeal No. 0120141305 (Nov. 30, 2016); Rivera v. Dep’t of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsid. den’d EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, (Guidance on Damages) EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14. The size of a compensatory damages award will be governed by the severity and duration of the harm suffered and the documentation of both the harm and the causal connection to the Agency’s acts of discrimination. In general, the more severe the harm, the longer its duration, the stronger its connection to the Agency’s discriminatory acts, and the more thorough its documentation, the higher the award will be. In this case, Complainant established, through his own statements as well as statements from family members, friends, and a coworker, that he became extremely upset and embarrassed at having not been promoted, and that his enthusiasm for work and for engaging with his colleagues, friends and family had markedly deteriorated.

Although he had suffered from anxiety before the discriminatory nonselection, his symptoms of depression became apparent after October 2014. This is sufficient to establish the necessary causal connection between Complainant not being promoted and the depression he suffered. While Complainant states that his PTSD was exacerbated by the nonselection, there is no medical evidence to corroborate that assertion.

We note at the outset, that the Agency did not award Complainant damages for pecuniary losses. Pecuniary losses are out-of-pocket expenses that are incurred as a result of the employer's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. Guidance on Damages at 14. For claims seeking pecuniary damages, such objective evidence should include documentation of out-of-pocket expenses for all actual costs and an explanation of the expense, e.g., medical and psychological billings, other costs associated with the injury caused by the agency's actions, and an explanation for the expenditure. Id. at 9. The agency is only responsible for those damages that are clearly shown to be caused by the agency's discriminatory conduct. Timothy M. v. Dep't of the Navy, EEOC Appeal No. 2019001562 (Feb. 4, 2020). While Complainant did submit a record of transactions with his psychologist from 2014 to 2017, he did not submit a sworn statement from his psychologist or any other health care provider tending to show that those expenses were incurred as a result of the discriminatory nonselection in October 2014. It is unclear from the record whether Complainant's visits and medication prescriptions were for the depression resulting from the nonselection or from his pre-existing anxiety and PTSD. We therefore find that the Agency's decision not to award damages for pecuniary losses was proper.

Non-pecuniary losses 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 Guidance on Damages at 10. There is no precise formula for determining the amount of damages for non-pecuniary 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 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the Agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or "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 (Mar. 4, 1999).

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 Serv., EEOC Appeal No. 01952288 (Apr 18, 1996) citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993).

Objective evidence of compensatory damages can include statements from Complainant concerning his emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

Statements from others including family members, friends, health care providers, other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his burden in this regard. Id. 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.

On page (3) of its appeal brief, the Agency states that Complainant had not submitted evidence supporting his claim for a \$60,000 award. In Dalton E. v. Dep't of Hous. & Urban Dev., EEOC Appeal No. 0720170038 (Nov. 30, 2018), the Commission awarded \$60,000 in non-pecuniary compensatory damages. In Dalton E., an administrative judge entered a default judgment against the Agency in connection with a harassment complaint. The complainant provided statements showing that as a result of discriminatory harassment, he had experienced insomnia, migraine headaches, extreme weight gain, a diminished sense of self-worth, and isolation and withdrawal from his family and friends. The complainant's wife averred that as a result of the agency's actions, the complainant became depressed, moody, and emotionally unavailable to her and their children, and that she and the complainant had separated. In the present case, Complainant has not presented any documents or testimony showing the severe physical symptoms or family break-up that were apparent in Dalton E. We therefore agree with the Agency that the evidentiary record submitted by Complainant does not support a \$60,000 award.

In James R. v. Env'tl. Prot. Agency, EEOC Appeal No. 2019003256 (Sept. 17, 2020) and Dallas D. v. U.S. Postal Serv., EEOC Appeal No. 0120150319 (Mar. 24, 2017), the Commission awarded \$25,000 and \$30,000 in non-pecuniary compensatory damages respectively. In James R., the complainant provided evidence of having experienced significant physical pain resulting from the stress brought on by discriminatory harassment and denial of a reasonable accommodation request. He suffered headaches to such an extent that he needed to have pain mediation with him at all times. The complainant's family situation had deteriorated as well but not to the point of family break-up, as was the case in Dalton E. Similarly, in Dallas D., the complainant presented statements from himself, his wife, and several family members showing that he suffered extreme stress and marital problems, exacerbation of pre-existing conditions, constant abdominal pain attributable to stress, isolation from family and friends, and that he had attempted suicide on at least one occasion as a result of the agency's discriminatory actions.

Again, the symptoms from which the complainants in James R. and Dallas D. suffered were much more severe than the symptoms experienced by Complainant in the instant case. Consequently, an award of \$25,000 - \$30,000 would likewise be excessive.

We find that Karlene G. v. Dep't of the Interior, EEOC Appeal No. 0120141261 (Jan. 24, 2017) is very similar to the case at bar. In Karlene G., the complainant had prevailed in an EEO complaint in which she alleged that she had been terminated due to retaliation. The complainant, her sister, and her daughter testified that after she had been fired, she had been so hurt, humiliated and embarrassed that she had become withdrawn. They also testified that she suffered from stress-related stomach aches, that she had become emotionally fragile due to financial stress, and that as a result, the entire family had suffered. The Commission found the \$11,000 award appropriate because although the complainant had shown that she suffered emotional distress and some physical pain, the duration of her harm did not appear to exceed six months. In the instant case, the record is sufficient to establish that Complainant had suffered from humiliation, embarrassment, and harm to his professional reputation for approximately a year since the discriminatory nonselection. While Complainant did not present evidence of having experienced physical symptoms such as headaches and stomach aches, the depression from which he suffered as a result of being passed over for a promotion for which he was eminently qualified was no less debilitating than those conditions. Thus, after reviewing the evidentiary record in light of our precedent, we are persuaded that Complainant is entitled to an award of non-pecuniary compensatory damages in the amount of \$13,000. Accordingly, we will enter an order directing the Agency to issue Complainant for \$2,000, which represents the difference between the total award and the amount already paid to Complainant on August 23, 2019.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final decision and award Complainant \$13,000 in non-pecuniary damages. The Agency shall take action in accordance with the Order below.

ORDER (C0618)

Within sixty (60) calendar days of the date that this decision is received, the Agency shall pay Complainant an additional sum of \$2,000, which represents the difference between the amount ordered in this decision (\$13,000) and the amount already paid (\$11,000) to Complainant by the Agency on August 23, 2019.

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). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), 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 the date this decision was issued. 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 8, 2021

Date