



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Roxane C.,¹
Complainant,

v.

Jennifer M. Granholm,
Secretary,
Department of Energy,
Agency.

Appeal No. 2019004254

Agency No. 150037HQFE

DECISION

On May 29, 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 April 29, 2019, final decisions on compensatory damages and attorney's fees and costs concerning her equal employment opportunity (EEO) complaint. For the following reasons, the Commission MODIFIES the Agency's final decision.

ISSUE PRESENTED

The issue presented concerns whether the Agency's calculation of compensatory damages and attorney's fees and costs was correct.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Program Analyst, GS-0343-15, at the Agency's Office of Management and Field Operations, Office of Fossil Energy in Washington, D.C.

On March 23, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), color (dark skinned), age

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.

(over 40), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 when:

1. On October 24, 2014, she received a performance appraisal with a “Meets Expectations” overall rating, which did not fairly reflect her higher level of performance;
2. On or about October 24, 2014, S1 (first level supervisor) counseled Complainant for sending an email to S1 and S2 (second level supervisor) on October 21, 2014, that stated that she did not want to work with a coworker because the coworker was racist and involved in her pending EEO complaint;
3. On December 4, 2014 and April 20-21, 2015, she was not placed in charge of the Office of Management and Field Operations when her manager was absent;
4. On December 10, 2014, she was denied the opportunity to attend training at Harvard University;
5. On February 6, 2015 and February 13, 2015, her supervisor required her to come into the office to meet with him, although she was schedule to work from home and other employees outside of her protected classes were not required to come in;
6. On March 3, 2015, her position description was changed to reflect budget and procurement assignments that were outside of her areas of expertise;
7. On March 11, 2015, and March 12, 2015, the Contracting Officer Representative falsely accused her of calling the Project Manager a racist, bigot, and asshole;
8. On April 8, 2015, she received a Letter of Reprimand for sending inappropriate emails; and
9. On May 4, 2015, she was denied eight hours of annual leave.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. Complainant subsequently appealed the Agency’s final decision to the Commission.

On August 24, 2018, the Commission issued a decision, partially modifying the Agency’s decision.² While the Commission affirmed the Agency’s finding of no discrimination on claims 1, 3 - 7, and 9, the Commission found that the underlying allegations in claims 2 and 8 constituted discrimination on the basis of reprisal. With regard to claim 2, concerning Complainant’s allegation that S1 engaged in reprisal by counseling her after she told S1 by email on October 21, 2014, that she did not want to work with a coworker (C1), the Commission agreed with Complainant that the counseling, on its face, did indeed constitute discrimination on the basis of reprisal.

² See Roxane C. v. Dep’t of Energy, EEOC Appeal No. 0120170551 (Aug. 24, 2018), req. for recons. denied, EEOC Request. No. 2019000087 (Jan. 28, 2019).

In reaching this conclusion, the Commission cited to an email dated November 19, 2014, wherein Complainant's second level supervisor (S2) asked S1 how he responded to Complainant's October 21, 2014, email. S1 responded to S2 by stating the following:

I met with [Complainant] on October 30th to discuss this email. The purpose of the meeting was to counsel [Complainant] on the unprofessional and inappropriateness of the email. Specifically, I addressed the references to race and racially motivated actions, calling another employee a racist, or a bully, referencing her pending EEO complaint and making accusations of inappropriate conduct or illegal activities. I let her know that this was unprofessional and inappropriate response to my email about the work assign and future emails of this nature would be not be tolerated.

The Commission concluded that a finding of discrimination based on reprisal was warranted because "counseling Complainant for referencing race and her pending EEO activity [would be] reasonably likely to deter a reasonable person from engaging in EEO activity." Given this finding, the Commission also concluded that Agency engaged in reprisal with regard to claim 8, when S1 issued Complainant a Letter of Reprimand on April 8, 2015, for sending the emails referenced in claim 2. To remedy the findings of discrimination, the Commission ordered the Agency to conduct a supplemental investigation into Complainant's entitlement to compensatory damages, provide EEO training to S1 and S2, consider taking disciplinary action against S1, expunge the Letter of Reprimand, and post a notice of the finding of discrimination.

In accordance with the Commission's directive, the Agency conducted a supplemental investigation into Complainant's entitlement to damages. During the investigation, Complainant requested the following pecuniary compensatory damages: \$12,692.66 for interest on loans taken to pursue three separate EEO complaints; and \$1,182.68 for costs associated with hair loss (medical copays and hair loss products). As for nonpecuniary compensatory damages, Complainant requested damages in the amount of \$5,000.00 for mental anguish and emotional distress, as she was constantly stressed and allegedly on the verge of bankruptcy due to the mounting legal costs associated with litigating her EEO complaint.

Complainant's attorney also filed two separate requests for reimbursement of attorney's fees and costs. In her petition dated September 21, 2018, Complainant's attorney sought reimbursement in the amount of \$33,964.20 to cover 58.10 hours of work from December 12, 2014 to September 21, 2018. Complainant's attorney also sought \$177.75 in costs. In submitting the September 21, 2018 petition, Complainant's attorney submitted a statement attesting to the accuracy of the petition. Complainant's attorney subsequently submitted another request on February 28, 2019 seeking an additional \$4,738.50 for 13.50 hours of work performed between September 24, 2018 to February 28, 2019. She also sought \$20.66 in costs. This time, however, Complainant's attorney did not submit an affidavit verifying the attorney's fees statement.

On April 29, 2019, the Agency issued two separate final decisions addressing Complainant's entitlement to compensatory damages and attorney's fees and cost.

With regard to Complainant's request for pecuniary compensatory damages, the Agency found that Complainant was not entitled to recoup \$12,692.66 in interest fee payments because Complainant had only requested attorney's fees and had not submitted "any itemization of any additional attorney's fees and costs that she had to pay directly to her counsel related to the instant complaint." The Agency emphasized that without any proof that Complainant directly paid for the attorney's fees and costs, the Agency could not award her interest fees paid in relation to the attorney's fees and costs. Thus, the Agency denied Complainant's request for recoupment of interest fees. The Agency also denied Complainant's request for \$1,182.68 in costs related to her hair loss because the record did not contain any evidence showing that the claimed hair loss was directly related to the findings of discrimination.

As for Complainant's request for nonpecuniary compensatory damages, the Agency concluded that Complainant was not entitled to any nonpecuniary compensatory damages because the record failed to show that the alleged harm was causally related to the actions found to be discrimination. Furthermore, the Agency found that the medical records provided by Complainant failed to establish that Complainant's medical conditions of sleep apnea, anxiety, and hair loss were related to the discrimination. In so finding, the Agency emphasized that the comment where Complainant's dermatologist advised Complainant to reduce stress was not conclusive evidence that the stress that Complainant experienced was related to findings of discrimination. Thus, the Agency did not award Complainant any nonpecuniary compensatory damages.

With regard to Complainant's combined request for a total of \$38,901.11 in attorney's fees, the Agency initially deducted 41 billing items totaling \$14,966.10 because those charges related to work performed during the hearing process. From the remaining \$23,935.01, the Agency then deducted an additional \$4,759.16 related to Complainant's February 28, 2019, fee statement because Complainant's attorney failed to attest to the accuracy of the fee statement. After subtracting this amount, the Agency applied a 50% across the board reduction because the Agency determined that the two claims that Complainant had prevailed on were fractionable from her other seven unsuccessful claims. In applying the 50% reduction, the Agency noted that the Commission had also applied a 50% reduction in another case, where Complainant had prevailed on four out of 32 claims. The Agency ultimately awarded Complainant a total of \$9,587.93 in attorney's fees and costs. This appeal followed

CONTENTIONS ON APPEAL

Through her attorney, Complainant requests that the Commission reject the Agency's final decision, which denied her request for pecuniary and nonpecuniary compensatory damages. We will discuss the specifics of her contentions, *infra*.

The Agency did not file any contentions in response to the appeal.

ANALYSIS AND FINDINGS

When discrimination is found, an agency must provide a remedy that constitutes full, make-whole relief to restore a complainant as nearly as possible to the position he or she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). To receive an award of compensatory damages, a complainant must demonstrate that he or she has been harmed by an agency's discriminatory conduct; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsideration denied, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

Compensatory Damages

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to the discriminatory act or conduct. See EEO MD-110 at Chapter 11, § VII (citing Carey v. Piphus 435 U.S. 247, 254 (1978) (purpose of damages is to "compensate persons for injuries caused by the deprivation of constitutional rights")). Types of compensatory damages include damages for past pecuniary loss (out-of-pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm). See EEO MD-110 at Chapter 11, § VII.B; and Goetze v. Dep't. of the Navy, EEOC Appeal No. 01991530 (Aug. 23, 2001).

Pecuniary losses are out-of-pocket expenses incurred because of the agency's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other such quantifiable expenses. Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination, or a voluntary settlement, whereas future pecuniary damages are those likely to occur after the resolution of the complaint. See EEOC MD-110 at Chapter 11, § VII.B.

In a claim for pecuniary compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, the harm suffered because of the agency's discriminatory action. Objective evidence in support of a claim for pecuniary damages includes documentation showing actual out-of-pocket expenses with an explanation of the expenditure. An agency is only responsible for those damages that are clearly shown to be caused by its discriminatory conduct. To recover damages, a complainant must prove that the agency's discriminatory actions were the cause of the pecuniary loss. Id.

Nonpecuniary damages are losses that are not subject to precise quantification, including emotional pain and injury to character, professional standing, and reputation. Id. 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 to punish the agency for the discriminatory action. 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 (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 a complainant concerning his or her 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 her 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.

Complainants have the burden of proving the existence, nature and severity of the alleged emotional harm and must also establish a causal relationship between the alleged harm and the discrimination. Absent such proof of harm and causation, a complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. The Commission has held that evidence of emotional distress should include detailed information on physical or behavioral manifestations of the distress, if any, and any other information on the intensity of the distress, information on the duration of the distress, and examples of how the distress affected appellant both on and off the job. Carle v. Dep’t of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). In addition to a detailed statement by the individual claiming emotional distress damages, other evidence of such damages could include statements by health care professionals, such as physicians, psychologists, psychiatrists, therapists or counselors, as well as friends, family or coworkers who could attest to the existence, nature and severity of appellant’s distress, its duration and causation.

In considering such cases, the Commission relies on the principle that “a tortfeasor takes its victims as he or she finds them.” Wallis v. U.S. Postal Serv., EEOC Appeal No. 01950510 (November 13, 1995), citing Williamson v. Handy Button Machine Co., 817 F.2d 1290, 1295 (7th Cir. 1987). There are two exceptions to this general rule, however.

First, when a complainant has a preexisting condition, the agency is liable only for the additional harm or aggravation caused by the discrimination. Second, if the complainant's preexisting 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. Wallis, supra, citing Maurer v. U.S., 668 F.2d 98, 99-100 (2d Cir. 1981).

Pecuniary Compensatory Damages

We begin with the Agency's denial of Complainant's request for pecuniary compensatory damages. On appeal, Complainant initially contends that the Agency improperly denied her request for reimbursement of the accrued interest on the loans that she had taken out to pursue her EEO claims. In this regard, Complainant asserts that the Agency's stated rationale for denying her request, *i.e.*, failure to provide any proof that Complainant directly paid for the attorney's fees and costs, was incorrect because the Agency, at no point, requested this information from her. She submits this information for the Commission's review. Furthermore, Complainant clarifies that she is only seeking to recoup \$1,251.85 in interest loan payments, which she claims is directly attributable to the instant EEO complaint. Having reviewed the record, including Complainant's affidavit and statement of payments, we find that Complainant is entitled to recoup \$1,251.85 in interest loan payments, as she has persuasively shown that these fees were attributable to the loans that she took out to pursue this EEO complaint. See Arreola v. Dep't of Justice, EEOC Appeal No. 01A03342 (January 17, 2002) (awarding complainant a total of \$2,511.60 in credit card and loan interest that he accrued as a result of his removal); see also Denese L. v. Dep't of the Interior, EEOC Appeal No. 0120170716 (May 2, 2019) (affirming agency's award of \$150 for penalty/interest fees related to a personal loan that complainant took out as a result of the discrimination, but denying recoupment of other loan related fees due to lack of documentation). Accordingly, we grant's Complainant's request for \$1,251.85 in interest loan payments.

We turn now to Complainant's request for reimbursement of the expenses that she incurred to treat her hair loss. She seeks reimbursement in the amount of \$1,182.68, reflecting \$75/visit medical copays and multiple purchases of over the counter hair loss products. On appeal, Complainant contends that the Agency erroneously concluded that no evidence connected her hair loss to actions found to be discriminatory. To the contrary, Complainant asserts that her hair loss began in early 2015, soon after S1 subjected her to continued harassment. Furthermore, Complainant notes that a dermatologist opined that her loss was due to stress. She emphasizes that her stress was indeed related to the harassment that she suffered at the hands of S1.

While we acknowledge Complainant's contentions regarding her hair loss, we agree with the Agency that the probative evidence fails to persuasively establish a causal relationship between Complainant's hair loss and the Agency's actions.

Though Complainant contends that her hair loss was related to stress, we note that records dated January 14, 2016, from Complainant's family physician attributed Complainant's hair loss to the cholesterol lowering medication, Lipitor.³ Given this evidence, we are inclined to agree with the Agency's decision to deny Complainant's request for \$1,182.68 related to the treatment of her hair loss. Thus, we affirm the Agency's decision with regard to issue.

We ultimately conclude that Complainant is only entitled to an award of \$1,251.85 in interest for loan payments, which she has persuasively shown to be causally related to the Agency's discriminatory actions.

Nonpecuniary Compensatory Damages

Next, we turn to Complainant's request for nonpecuniary compensatory damages. On appeal, Complainant disagrees with the Agency's decision to not award her any nonpecuniary compensatory damages. In this regard, Complainant maintains that the Agency's decision is contrary to the law. She seeks nonpecuniary damages in the amount of \$5,000 for the harm that she suffered, namely fatigue, anxiety, insomnia, depression, and loss of reputation.

Having reviewed the record, we find that Complainant is entitled to nonpecuniary compensatory damages in the amount of \$5,000. In so finding, we recognize that the Agency denied Complainant's request on the basis that Complainant's medical records fail to show that her medical conditions of sleep apnea, anxiety, and hair loss were related to the discrimination. However, we note that evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence, supra. We are inclined to believe Complainant's statements regarding her symptoms, particularly with regard to her claimed fatigue, anxiety, and depression. Moreover, we note that Complainant claimed to be near bankruptcy due to the financial toll of having to take out a high interest personal loan and home equity loan to pursue her claims. Our review of the Commission's case law shows that awards in the range of \$4,500 to \$5,000 are appropriate for similar cases involving similar harm.

For example, in Ludie M. v. U.S. Postal Serv., EEOC Appeal No. 0120170459 (May 9, 2019), complainant's supervisor sent complainant a letter accusing her of attempting to bully and intimidate management by filing various complaints that allegedly slandered the names of management. The AJ assigned to the case found that such comments amounted to a violation of Title VII because the letter, on its face, would reasonably discourage employees from participating in the EEO process.

³ Complainant's family physician made the following notation: Loss of hair seeing derm. off lipitor because it can contribute to hair loss. Derm was not opposed to her trying another cholesterol med. Will check labs before resuming meds [Spelling, grammar, and capitalization in original]. See Complainant's Appellate File at 173.

Complainant claimed that due to this letter, she experienced the following symptoms: depression, anxiety, sleep disturbance, crying spells, concentration and memory deficient, fear of being mistreated at work, reliving her workplace trauma, worry, lethargy, short temper, low libido, motivational deficient, indecisiveness, and gastro-intestinal disturbance. The AJ awarded complainant a total of \$4,500 for pain and suffering. The Commission ultimately affirmed the AJ's award.

Similarly, in Eleni M. v. Dep't of Transp., EEOC Appeal No. 0720160021 (July 25, 2018), the Commission upheld an AJ's award of \$5,000, where the complainant had been subjected to reprisal. There, complainant claimed that the reprisal caused her to experience depression, anxiety, sleeplessness, suicidal thoughts, crying episodes, withdrawal and isolation, increased irritability, loss of trust, and avoidance of interaction with the alleged perpetrator. The Commission concluded that the award of \$5,000 sufficiently compensated complainant for the harm that she suffered as a result of the reprisal.

As Complainant here has reported similar harm as the complainants in Ludie M., *supra* and Eleni M., we will grant Complainant's request for \$5,000 in nonpecuniary compensatory damages. We find that such award takes into account the nature, severity, and duration of Complainant's suffering, is consistent with other non-pecuniary compensatory damages awards given in similar cases and is not "monstrously excessive" standing alone or derived from passion or prejudice.

Attorney's Fees and Costs

The Commission's regulations require federal agencies to award attorney's fees and costs for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 29 C.F.R. § 1614.501(e)(1)(ii). Attorney's fees are calculated by determining the lodestar, which consists of the number of hours reasonably expended multiplied by a reasonable hourly rate. All hours reasonably spent to process the complaint are compensable; however, the number of hours should not include excessive, redundant, or otherwise expenditures of time. Attorney's fees are also not recoverable for work on unsuccessful claims. Blum v. Stenson, 465 U.S. 886 (1984); and Hensley v. Eckerhart, 461 U.S. 424 (1983).

We note that the Commission has held that one method of addressing the appropriate amount of attorney's fees when a complainant is not completely successful is to take a percentage across-the-board reduction of compensable time billed. Blinick v. Dep't of Hous. and Urban Dev., EEOC Appeal No. 07A20079 (Feb. 3, 2004). Even if a complainant did not prevail on every aspect of his or her complaint, that does not, in itself, justify a reduction in the hours expended where the successful and unsuccessful claims are closely intertwined. *Id.* "Claims are fractionable or unrelated when they involve distinctly different claims for relief that are based on different facts and legal theories." *Id.*

Here, the record reflects that Complainant's attorney requested attorney's fees and costs totaling \$38,901.11. Our review of the record shows that Complainant's attorney filed two separate requests for reimbursement of attorney's fees and costs.

In her first petition dated September 21, 2018, Complainant's attorney sought a total of \$33,964.20 to cover 58.10 hours of work from December 12, 2014 to September 21, 2018. Complainant's attorney also sought \$177.75 in costs. Complainant's attorney subsequently submitted another request on February 28, 2019, seeking an additional \$4,738.50 for 13.50 hours of work performed between September 24, 2018 to February 28, 2019. She also sought \$20.66 in costs. The Agency, however, determined that Complainant's attorney was only entitled to a total of \$9,587.93. In assessing this amount, the Agency excluded \$14,966.10 in attorney's fees and costs because that work was performed at the hearing stage. The Agency found that Complainant's attorney was not entitled to these fees because Complainant subsequently withdrew her hearing request. The Agency also declined to pay Complainant's attorney \$4,759.16 because she failed to include a verified statement attesting to the accuracy of the fee petition. Furthermore, the Agency applied a 50% across the board reduction because the Agency determined that the two claims that Complainant had prevailed on were fractionable from her other seven unsuccessful claims.

Through her attorney, Complainant strenuously maintains that the Agency's decision to reduce her requested attorney's fees and costs is contrary to law and a violation of public policy. As an initial matter, we address Complainant's contention that the work that her attorney performed during the hearing stage was not unnecessary because the evidence obtained in discovery was used to support her complaint. We agree, and we find that the hours and costs that Complainant's attorney expended at the hearing stage were not unwarranted by virtue of Complainant's subsequent decision to withdraw her hearing request. See Harmony E. v. U.S. Postal Serv., EEOC Appeal No. 0120160122 (Jan. 24, 2017) (finding compensable the hours that complainant expended to gather information needed to decide whether to continue the hearing process, as the claimed hours were not unnecessarily expended). We also find that Complainant's attorney is entitled to additional fees as claimed in her February 28, 2019 fee statement, as Complainant's attorney has, on appeal, attested to the accuracy of fee petition. We therefore conclude that Complainant is tentatively entitled to a total of \$38,901.11 in attorney's fees and costs.

Our analysis, however, does not end there. As discussed above, the Agency applied a 50% across the board reduction because the Agency determined that the two claims that Complainant had prevailed on were fractionable from her other seven unsuccessful claims. On appeal, Complainant contends that the Agency erred in reducing the claimed attorney's fees and costs by 50%, as the two claims that she prevailed on are not fractionable from the remaining seven claims.

Having reviewed the record, we find that the Agency properly reduced the claimed attorney's fees and costs by 50%, as we conclude that the two claims that she prevailed on are indeed fractionable from the remaining seven claims. In EEOC Appeal No. 0120170551, we found that the Agency had subjected Complainant to reprisal when S1 counseled Complainant and issued her a Letter of Reprimand for engaging in protected EEO activity.

As the findings of discrimination were based on a materially different legal theory than her unsuccessful claims, we concur with the Agency's decision to reduce the claimed attorney's fees and costs to reflect Complainant's success on two out of the seven claims. See Mario G. v. Dep't of the Air Force, EEOC Appeal No. 0120180942 (June 11, 2019) (affirming the agency's decision to reduce the claimed hours, where complainant prevailed one claim involving a single instance of reprisal). Accordingly, we find that Complainant's attorney is entitled to a grand total of \$19,450.55, minus any payments already made.

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 direct the Agency to comply with the ORDER below.

ORDER

Within one hundred and twenty (120) calendar days from the date this decision is issued, to the extent it has not already done so, the Agency shall:

1. Pay Complainant a total of \$1,251.85 in pecuniary compensatory damages (i.e., interest on loans) and \$5,000.00 in nonpecuniary compensatory damages; and
2. Pay Complainant a total of \$19,450.55 for attorney's fees and costs.

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 (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

July 26, 2021
Date