



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Angelo P.,<sup>1</sup>  
Complainant,

v.

Alejandro Mayorkas,  
Secretary,  
Department of Homeland Security  
(Federal Emergency Management Agency),  
Agency.

Appeal No. 2020000286

Agency No. HS-HQ-26642-2016

**DECISION**

On August 22, 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 March 27, 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. For the following reasons, the Commission MODIFIES the Agency's final decision.

**ISSUE PRESENTED**

The issue presented is whether the Agency properly determined Complainant's entitlement to compensatory damages.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Director at the Agency's Response Division, Region X facility in Bothell, Washington.

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<sup>1</sup> 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.

On July 27, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. On May 25, 2016, an interview panel did not recommend Complainant for an interview with the Assistant Secretary/Deputy Assistant Secretary because a named management official gave negative feedback about Complainant; and
2. On July 27, 2016, a named management official and Complainant's first-level supervisor damaged his chances for selection for the position of Regional Director, National Protection and Programs Directorate (now known as the Cybersecurity and Infrastructure Security Agency or CISA) in Seattle, Washington.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant proved that the Agency subjected him to discrimination as alleged.

The Agency ordered CISA to take the following remedial measures:

- a. Retroactively place Complainant in a Regional Director, CISA position, or to a substantially equivalent GS-15 position, retroactive to the date CISA placed the Selectee in the Regional Director position Vacancy Announcement Number FS-1555227-AV16. CISA also shall award Complainant any necessary relocation expenses.
- b. In the future, provide a neutral reference to any further inquiries regarding Complainant's performance while employed by the Agency. Any reference provided shall include the dates of Complainant's employment, duty station, position (including series, grade and title), duties performed, as well as a description of his most recent performance appraisal.
- c. Determine and award Complainant the appropriate amount of back pay with interest and other benefits that Complainant would have received had Complainant been selected for the Regional Director, CISA position, pursuant to Title 29 of the Code of Federal Regulations (C.F.R.) § 1614.501(b).
- d. Provide EEO training to the Chief, Protective Security, Federal Region VII and the Supervisory Program Analyst for Infrastructure Security Compliance Division, Office of Infrastructure Protection. The training would specifically focus on retaliation.
- e. Consider taking disciplinary action against Chief, Protective Security, Federal Region VII for the reprisal against Complainant.

- f. Post a notice of finding of discrimination to employees in the CISA, Seattle, Washington Office consistent with the requirements of 29 C.F.R. § 1614.501(a) for a period of sixty (60) days.
- g. Report to the Office for Civil Rights and Civil Liberties (CRCL) on the status of the implementation of the ordered relief.
- h. Complainant was to submit his request for compensatory damages and attorneys' fees and costs, if any, to CRCL.

On October 8, 2018, Complainant submitted his petition for compensatory damages and documentation in support of his claim for compensatory damages. Complainant requested \$57,573.63 for pecuniary damages, which included 17 sessions of psychotherapy, prescriptions, taxes paid on his medical expenses, travel costs, and leave restoration with taxes. Complainant requested an additional \$147,493.10 for future pecuniary damages, and \$171,970.67 for front pay. He requested an additional \$300,000.00 for non-pecuniary losses.

On March 27, 2019, the Agency issued a Decision on Compensatory Damages, finding that pecuniary compensatory damages were not appropriate. The Agency determined that Complainant did not demonstrate that his medical expenses were the result of his non-selection and pecuniary damages were therefore not appropriate. The Agency further noted that even if Complainant had established causation for pecuniary damages, the Commission has held that complainants are not entitled to an award of tax liability for compensatory damages as Complainant requested. Regarding non-pecuniary damages, the Agency awarded Complainant \$20,000.00. With respect to Complainant's request for leave restoration or compensation for leave, the Agency stated that leave restoration is not an equitable remedy and not part of a compensatory damages award.

### CONTENTIONS ON APPEAL

On appeal, Complainant argues that the Agency has failed to implement all of the ordered remedies and that he experienced additional harm based on the Agency's non-compliance. According to Complainant, the Agency improperly dismissed his claim for pecuniary damages because proximate cause exists between the deterioration of his emotional condition and the Agency's discriminatory conduct. Complainant asserts that the non-pecuniary damages that the Agency awarded are inconsistent with Commission precedent and should be adjusted to \$300,000.00. Complainant adds that the Agency failed to make him whole when it did not include 339 hours of leave restoration or compensation for medical leave and front pay for medical leave.

In response, the Agency maintains that compensatory damages are not appropriate because Complainant failed to produce evidence proving that the Agency's retaliatory conduct caused any loss or injury. As such, the Agency argues, any compensatory damage award would be based on speculation.

The Agency asserts that Complainant is requesting damages for alleged ongoing harassment that is pending in separate proceedings. The Agency further contends that nearly all medical documentation that Complainant provided was triggered by his FEMA workplace and did not involve his non-selection.

### 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 (EEO MD-110), 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”).

### ANALYSIS AND FINDINGS

When discrimination is found, the Agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore him as nearly as possible to the position he 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). 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 this “make whole” relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 212 (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).

#### *Pecuniary Compensatory Damages*

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 EEO MD-110 at Chapter 11, § VII.B (internal citations omitted).

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. The agency is only responsible for those damages that are clearly shown to be caused by the agency's discriminatory conduct.

Here, Complainant requested \$8,175.31 for medical visits, \$361.75 for medication, \$138.60 for travel, and \$2,776.21 for taxes on medical expenses. We agree with the Agency that the medical documentation included in the record fails to show that all the requested expenses were incurred as a result of the retaliatory non-selection. Complainant alleged that he sought treatment immediately after the retaliatory action and the record indicates that Complainant sought treatment in June 2016, and did not seek treatment again until January 2017. Billing records indicate that Complainant did not incur out-of-pocket expenses for his June 2016 medical treatment. Additional treatment notes indicate that Complainant complained of ongoing workplace stressors rather than the retaliatory non-selection in the visits that began in January 2017. Likewise, the requested medication and travel requests are not supported by the record because they relate to Complainant's allegations of ongoing workplace harassment rather than the retaliatory non-selection at issue. Therefore, we find that the record is insufficient to support an award of pecuniary damages for those expenses.

#### *Leave Restoration*

Regarding Complainant's request for \$34,940.73 for 339 hours of leave restoration, and \$11,181.03 for taxes on the leave restoration, we note that the Agency was ordered to determine and award Complainant the appropriate amount of back pay with interest and *other benefits* that Complainant would have received had Complainant been selected. While the Agency argues that Complainant is not entitled to leave restoration, the Commission construes "benefits" broadly to include annual leave, sick leave, health insurance, and retirement contributions. Vereb v. Dep't of Justice, EEOC Petition No. 04980008 (Feb. 26, 1999).

To be entitled to leave restoration, a complainant must demonstrate a causal nexus between the discrimination and the need to take leave. Evans v. Dep't of Justice, EEOC Appeal No. 0120080335 (June 22, 2012) (ordering agency to restore two weeks of sick leave to complainant where complainant's psychiatrist wrote letter to agency stating that complainant experienced emotional stress because of supervisor's actions, that having to draft a memorandum describing supervisor's actions exacerbated the stress, and that complainant should be excused from work for a reasonable period), request for recon. denied, EEOC Request No. 0520120522 (Dec. 11, 2012). Therefore, Complainant is only entitled to leave restoration for the leave that he took as a result of the non-selection. To that end, Complainant has not shown that he took 339 hours of leave directly related to the non-selection. While Complainant asserts that his treatment providers recommended that he take leave, the accompanying documentation indicates that the recommended leave was for workplace stressors and fails to address the non-selection.

Accordingly, we find that Complainant has not demonstrated that he is entitled to the requested leave restoration.

### *Nonpecuniary Compensatory Damages*

Nonpecuniary 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 EEOC Notice No. 915.302 at 10 (July 14, 1992). 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 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).

An award of nonpecuniary compensatory damages should reflect the extent to which the Agency's discriminatory action directly or proximately caused the harm as well as the extent to which other factors also caused the harm. See Johnson v. Dep't of the Interior, EEOC Appeal No. 01961812 (June 18, 1998). It is the complainant's burden to provide objective evidence in support of his claim and proof linking the damages to the alleged discrimination. See Papas v. U.S. Postal Serv., EEOC Appeal No. 01930547 (Mar. 17, 1994); Mims v. Dep't of the Navy, EEOC Appeal No. 01933956 (Nov. 23, 1993).

Here, Complainant provided statements from himself and his wife that he experienced, among other things, depression, stress, anger, frustration, humiliation, sleep disturbance, migraines, paranoia, suicidal ideations, social withdrawal, marital strife, and a decline in his family relationships. Although the Agency correctly pointed out that many of Complainant's symptoms were present based on his actual work environment, the record indicates that Complainant's symptoms were exacerbated by feelings of being “trapped” following the non-selection. Complainant asserted that he immediately sought medical treatment following his non-selection due to “anguish and anxiety” that exacerbated his health conditions. As such, we are persuaded that the retaliatory non-selection significantly exacerbated Complainant's symptoms and his hopes of escaping what he felt was an intolerable work environment.

After a thorough review of the record, and given the severity, nature, and duration of the distress experienced by Complainant as a result of the discrimination, we find that the Agency's award of \$20,000 is not sufficient. Instead, we determine that an award of \$50,000.00 in nonpecuniary compensatory damages is appropriate. We find that this amount is not motivated by passion or prejudice, is not “monstrously excessive” standing alone, and is consistent with the amounts awarded in other cases. See Alena C. v. Dep't of Veterans Affairs, EEOC Appeal No. 0720180003 (Apr. 12, 2018)(awarding \$50,000.00 following discriminatory non-selection where

complainant began to experience pain, muscle spasms, and headaches, and became socially withdrawn); Cavanaugh v. U.S. Postal Serv., EEOC Appeal No. 07A20102 (Nov. 12, 2003)(\$50,000.00 for discriminatory non-selection which led to exacerbation of depression and caused irritability, sleeplessness, and tension headaches); Woodard v. Dep't of Labor, EEOC Appeal No. 01A11604 (Oct. 11, 2002)(awarding \$40,000.00 to complainant in a non-selection case who experienced mood swings, loss of sleep, weight loss, and loss of enjoyment of life; complainant sought treatment from a doctor and social worker for depression, however, there was evidence of other contributing factors); Devin H. v Dep't of Homeland Sec., EEOC Appeal No. 0120171868 (Mar. 21, 2019)(\$50,000.00 in non-pecuniary damages awarded where complainant who was not selected for position demonstrated he experienced anxiety, insomnia, loss of self-esteem, feelings of humiliation, weight gain, high blood pressure, deterioration of home life, and severe acid reflux that affected what he was able to eat and digest); Harvey D. v. Dep't of State, EEOC Appeal No. 0120171079 (Aug. 23, 2018)(\$50,000.00 in nonpecuniary damages awarded where the agency discriminated against complainant on the basis of disability when he was denied an appointment to a higher-level position); Complainant v. Dep't of Justice, EEOC Appeal No. 0120123467 (Apr. 3, 2015)(\$50,000.00 in nonpecuniary damages awarded where complainant testified that she suffered stress, shock and humiliation, which manifested itself in weight fluctuations, depression, anxiety, insomnia, and nightmares as a result of denied promotion). As such, after considering the awards in similar cases, and Complainant's evidence, we find that Complainant is entitled to nonpecuniary compensatory damages in the amount of \$50,000.00. We find that this amount meets the goal of not being "monstrously excessive" and being consistent with the amounts awarded in similar cases.

### 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 decision and remand this case to the Agency to take remedial action in accordance with the Order below.

### ORDER<sup>2</sup>

Within 45 calendar days of the date this decision is issued, the Agency shall pay Complainant \$50,000.00 in nonpecuniary compensatory damages, to the extent it has not done so already.

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<sup>2</sup> The issue herein deals solely with the amount of compensatory damages to which Complainant is entitled, as the decision at issue was limited to determining whether compensatory damages were appropriate. To the extent Complainant contends that the Agency has not complied with the remedies ordered in the Agency's FAD, we remind Complainant that our regulations provide that if a complainant believes that the agency has not complied with the terms of the final decision, a complainant shall notify the Agency EEO Director, in writing, within 30 days of the date on which the complainant knew or should have known of the noncompliance. 29 C.F.R. § 1614.504. If Complainant does not receive a response or is not satisfied with said response, a complainant may appeal to the Commission for a determination as to whether the agency is in compliance. 29 C.F.R. § 1614.504(b).

### 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).

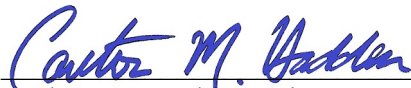
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

May 24, 2021

Date