



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

[REDACTED]
Donna B.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2020001394

Hearing No. 560-2014-00291X

Agency Nos. 2003-0657-2012104828; 2003-0657-2014102137

DECISION

On December 2, 2019, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 5, 2019 final agency decision (FAD) concerning Complainant's entitlement to nonpecuniary compensatory damages following the Commission's finding of the Agency's violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. in Dixie B. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170175 (Mar. 26, 2019). For the reasons set forth below, we MODIFY the FAD on compensatory damages.

BACKGROUND

Complainant worked as a Medical Technician, GS-0645-04, at the Agency's Medical Center in St. Louis, Missouri. On January 8, 2013, Complainant filed an EEO Complaint (Agency No. 2003-0657-2012104828 (Complaint 1)) in which she alleged that the Agency discriminated against her on the bases of race (Caucasian), disability (degenerative disc disease and major depression & anxiety) and reprisal (prior EEO activity) as evidenced by multiple incidents occurring between March 2012 and August 2013. In one incident (incident (6)), she alleged that in or around September 2012, several of her coworkers accessed her medical records and discussed her medical information with other coworkers.

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.

On April 9, 2014, Complainant filed a second EEO complaint (Agency No. 2003-0657-2014102137 (Complaint 2)) in which she alleged that the Agency discriminated against her on the bases of race (Caucasian), disability (degenerative disc disease and major depression & anxiety) and reprisal (prior EEO activity) as evidenced by eight additional incidents that occurred between November and December 2013. In one incident (incident (4)), Complainant alleged that in November 2013, the Chief of the Pathology and Laboratory Service (S3) accused her of misusing her leave and required her to recertify her Family and Medical Leave Act (FMLA) leave every 30 days.

The Agency consolidated both complaints for investigation. Following the investigation, Complainant initially requested a hearing before an EEOC Administrative Judge (AJ) but later withdrew that request. The AJ remanded the matter to the Agency and the Agency issued a final decision finding that Complainant was not subjected to discrimination as alleged.

In Dixie B. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170175 (Mar. 26, 2019), the Commission affirmed the Agency's findings of no discrimination with respect to 29 of the 31 allegations. With respect to incident (6) of Complaint 1 and incident (4) of Complaint 2, the Commission found that the Agency had committed per se violations of the Rehabilitation Act. As to incident (6), the Commission found that the Health Technician Supervisor (S1) and four of Complainant's coworkers accessed her confidential medical records and that the access was neither job-related nor consistent with business necessity. As to incident (4), the Commission found that Complainant had provided sufficient information for the Agency to be fully apprised of her condition and restrictions, and consequently, that S3 was not justified in seeking additional documentation to continue accommodating her condition. The Commission also found that S3 had reversed himself after consulting with the Human Resources Office and told Complainant that she did not need to provide additional medical documentation after all. As relief, the Commission ordered the Agency to conduct a supplemental investigation into Complainant's entitlement to compensatory damages; provide training to the responsible employees (S1, S3, and the four coworkers who accessed Complainant's confidential medical information); consider disciplining the responsible employees; and to post a notice.

The Agency conducted the required supplemental investigation and issued its final decision regarding compensatory damages on October 31, 2019. Therein, the Agency found that Complainant was entitled to an award of \$2,000 in nonpecuniary compensatory damages. On appeal, Complainant submits numerous documents in support of her request for additional damages.

ANALYSIS AND FINDINGS

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under the Rehabilitation Act 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. 2012 (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 she suffered harm that was caused by 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.

Regarding pecuniary damages, Complainant submitted numerous documents regarding various claimed expenses or costs. Complainant failed to provide any evidence, however, connecting these expenses to the confidential medical disclosures at issue. Thus, we agree with the Agency that Complainant did not establish that she was entitled to pecuniary damages because she has not shown that any such damages were caused by the discrimination at issue.

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 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 “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.

Complainant requested \$90,000 for nonpecuniary losses, but the Agency awarded only \$2,000. Specifically, the Agency found:

Complainant and all three of her witnesses attributed Complainant's harm to the discriminatory and retaliatory hostile work environment to which Complaint was allegedly subjected at the Agency, not to the fact that the Agency failed to protect her private medical information or make an impermissible medical inquiry. In fact, Complainant testified that "the impermissible medical inquiry was just a small piece" of the harassment she endured at the agency. Complainant and her witnesses also attributed Complainant's stated harm to the Agency's alleged failure to provide an effective accommodation for Complainant's disability and to the alleged retaliation she faced from agency officials. Complainant and her witnesses testified that Complainant's harm was due to the abusive treatment to which she was subjected on a daily basis at work. Complainant and her witnesses' provided testimony established that little of Complainant's harm was due to the violations found by EEOC to have been committed by the Agency in this case.

FAD, p. 6. The Agency then cited several prior Commission decisions in which we awarded \$2,000 for emotional distress related to an agency's breach of confidential medical information. Each of those prior decisions involved either a single unauthorized disclosure of confidential medical or at most several unauthorized disclosures that were inadvertent or accidental. In Complainant's situation, however, the violations were much more numerous and may have been deliberate. In her affidavit, Complainant testified as follows:

Q5: [P]lease explain in detail how the Agency failing to protect your confidential medical records and making an impermissible medical inquiry affected you.

A: This has caused me a great deal of stress and discomfort and ties directly into the emotional symptoms that I have experienced and continue to experience.

Q6(b)(3): Please explain the symptoms of any emotional losses you have experienced:

A: Severe emotional pain and distress, mental anguish, including severe depression, suicidal ideations, irritability, anger/rage, outbursts/yelling at spouse and children, low energy, humiliation, uncontrollable crying spells. Difficulty concentrating, frequent panic attacks, poor self-esteem, stomach disturbances (pain and diarrhea when becoming extremely upset), embarrassment, fear for my safety, *** nightmares, and insomnia. In addition, I experienced substantial loss of enjoyment of life, my relationships with family and friends were profoundly expected. *** My spouse and I experienced periods of voluntary separation and we nearly divorced, my relationships with my children were impacted. I experience dramatic weight gain and worsening of my depression and anxiety. ***

Q8: Please explain why you believe the harms identified above are related to the Agency not protecting your confidential medical records and making an impermissible medical inquiry.

A: The violations of my privacy were excessive (34 times) and the actions of my coworkers were blatant and malicious *** My direct supervisor was engaged in the behavior! The unauthorized access to my medical records were used as a tool to harass me, berate me, humiliate/embarrass me, cause damage to my reputation, insult, gossip, and make derogatory statements. I reported these disclosures multiple times, as more and more people brought to my attention that my private medical business was being spread around the [facility].

Complainant's Damages Affidavit (June 7, 2019), pp. 2, 5, 7-8. Complainant's account is corroborated by a statement from her husband as well as documentation establishing that on August 4, 2014, Complainant requested a copy of her own medical records. She discovered that five of her coworkers accessed her private medical records without authorization 34 times between July 2010 and April 2012. Four of those coworkers received suspensions ranging from one to three days, as noted above. No action was taken against the fifth coworker because she left the Agency in July 2013. The fact that the Agency believed that the violations of Complainant's privacy were serious enough to warrant disciplinary action lends support to Complainant's assertion that the actions of her coworkers were deliberate. We therefore agree with Complainant that \$2,000 is not sufficient to compensate her for the harm she suffered as a result of her coworkers' violation of her privacy through accessing her medical records without authorization.

Complainant requested \$90,000 in nonpecuniary compensatory damages. Complainant's affidavit and the statement from her husband are sufficient to establish that the harm she experienced was both severe and long lasting.

We note in particular that Complainant was still experiencing her symptoms as of the date of her affidavit, which was June 7, 2019, over seven years after the last incident of unauthorized access to her medical records. The Agency does not contest the nature of Complainant's symptoms or the extent of their severity. Rather, the Agency argues that the proximate cause were the numerous incidents comprising her claim that were not found to be discriminatory, as opposed to the violation of her privacy occasioned by her coworkers accessing her medical records without authorization. The Agency is correct that the proximate cause of Complainant's emotional distress cannot be pinned precisely to any one of the incidents listed in her two complaints. But unlike the \$2,000 cases cited by the Agency in its FAD, which as noted above involved occasional and inadvertent trespasses, Complainant's privacy was violated 34 times over a 20-month time span, and deliberately so. Therefore, the probability of those violations being a significant cause of the harm suffered by Complainant is far more than it would have been for a single incident or group of isolated incidents.

Taking these factors into consideration, along with the severity and duration of the stress and related symptoms experienced by Complainant over her ordeal, we find that \$40,000 is an appropriate award that takes into account the nature and extent of Complainant's harm and the strength of the causal connection between that harm and the multiple intrusions upon her private medical records. See Refugia S. v. Dep't of Health & Human Serv., EEOC Appeal No. 2019004769 (Aug. 10, 2020) (\$40,000 awarded where statements from the complainant's friends and relatives indicated a nexus between the discrimination and the complainant's harm, but the medical documentation the complainant submitted did not validate that connection). Here, although Complainant requested \$90,000 in nonpecuniary compensatory damages, the medical documentation she submitted, a letter from a psychiatrist dated April 3, 2013 indicating her continuing need for FMLA leave, did not attribute her psychiatric condition to the Agency's unauthorized accessing of her medical records. This, as well as the presence of numerous other incidents in her claim weakens the causal connection to the multiple Rehabilitation Act violations otherwise established by Complainant's affidavit and the statements from her spouse and the other witnesses. See also e.g. Complainant v. Dep't of the Army, EEOC Appeal No. 0120120446 (Nov. 14, 2014) (\$40,000 in nonpecuniary compensatory damages awarded where the complainant provided his own testimony that over three years, he suffered embarrassment, humiliation, deterioration of his relationships with his family and coworkers as well as weight gain, exacerbation of hypertension, insomnia and loss of libido).

In this case, the Rehabilitation Act violations ended in 2012 but Complainant was still experiencing her symptoms as late as 2019. Accordingly, the Commission finds that the record establishes that Complainant is entitled to \$40,000 in non-pecuniary compensatory damages. We find that this amount is not motivated by passion or prejudice or "monstrously excessive" standing alone and that it is also consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

CONCLUSION

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity Commission to MODIFY the Agency's decision awarding Complainant nonpecuniary compensatory damages in accordance with this decision and our order below.

ORDER (C0618)

Within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant \$40,000 in 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). 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.

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).

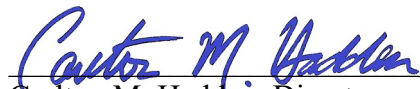
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

August 3, 2021
Date