



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Marie M.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2020001458

Hearing No. 430-2016-00455X

Agency No. 2004-0659-2015104979

**DECISION**

On November 27, 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 October 28, 2019 final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Prosthetic Representative, GS-0672-11, at the Agency's Medical Center in Salisbury, North Carolina.

On November 30, 2015, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination on the bases of sex (female), disability (Post-Traumatic Stress Disorder (PTSD), Anxiety), and in reprisal for prior protected EEO activity when:

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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.

1. On an (unknown date), Complainant was purposely left off the email as a contact for Medical Services;
2. On August 2012 to September 2015, the Chief of Prosthetics (S1) told the staff to bypass Complainant and to address all work-related issues with another employee;
3. On August 2012 to November 2015, Complainant was not informed of any meetings or allowed to attend meetings;
4. On August 2012 — January 2016, Complainant's co-workers were making rude comments regarding Complainant's competency;
5. On July 14, 2015, S1 removed Complainant's title as Assistant Chief of Prosthetics from the organization chart;
6. On July 14, 2015, S1 failed to recommend Complainant for promotion to GS-12;
7. On July 29, 2015, S1 implemented a change to Complainant's assigned duties;
8. On August 16, 2015, S1 took duties from Complainant by restructuring the Prosthetics department responsibilities which systematically downgraded her position;
9. On August 19, 2015, in an attempt to further deny Complainant her position, S1 provided everyone with a copy of the new organizational chart during a meeting;
10. On August 20, 2015, to present, S1 humiliated Complainant when he informed coworkers that Complainant was falsifying her position as Assistant Chief of Prosthetics;
11. On September 4, 2015, Complainant was called into S1's office after Complainant filed her EEO complaint. S1 instructed Complainant not to discuss any of the issues she was having with other people; and
12. On September 4, 2015, Complainant was informed that the Purchasing Agents did not want to work with her.

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 EEOC Administrative Judge (AJ). Complainant requested a hearing, but the AJ remanded the complaint to the Agency, and the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In the decision, the Agency concluded that Complainant proved that Agency management subjected her to reprisal as to her claim that, on September 4, 2015, Complainant was called into her supervisor's (S1) office after she filed her EEO complaint and S1 instructed Complainant not to discuss any of the issues she was having with other people (claim (11)). The Agency found that the evidence demonstrated this incident constituted per se reprisal. The Agency found the evidence did not support a finding of discrimination as to the remaining claims. To remedy the violation, the Agency ordered a supplemental investigation into Complainant's entitlement to compensatory damages.

In support of her claim for compensatory damages, Complainant submitted an affidavit in which she argued that the totality of S1's actions across all 12 claims caused her extreme emotional distress.

Complainant contended that S1's failure to promote her caused past and future pecuniary damages and that S1's actions generally and negatively affected her self-esteem. Complainant asserted that the range of S1's actions caused her to lose the trust of her employees.

In her personal life, Complainant pointed to damaged relationships with family and her inability to progress toward an academic degree. Complainant said that she is generally distrustful of others. Complainant also affirmed that she gained weight, had trouble sleeping, and procrastinates. Complainant provided medical documents in which her medical professionals indicated that her conditions stem from her military service; however, these documents do not reveal a connection between any medical conditions and S1's retaliatory actions.

The Agency subsequently issued a final decision on compensatory damages. Therein, the Agency found Complainant was not entitled to pecuniary damages since she did not demonstrate – through receipts or other evidence – that she incurred any costs as a result of the Agency's actions. The Agency awarded Complainant \$3,500 in non-pecuniary compensatory damages and noted that Complainant offered only a generalized description of damages and did not demonstrate that S1's statements about Complainant's EEO activities caused her damages. The instant appeal follows.

### ANALYSIS AND FINDINGS

As an initial matter, we note that Complainant did not appeal the Agency's initial decision finding that she prevailed on only one of her original claims. Likewise, Complainant did not challenge the portion of the Agency's compensatory damages decision finding that she failed to show that she was entitled to pecuniary damages. Therefore, the only matter before us is the Agency's award of \$3,500 in non-pecuniary damages.

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”).

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 non-pecuniary 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).

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 Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, 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 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 Complainant concerning 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 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.

In this case, Complainant provided some medical records, but they prove only that Complainant experienced complications from certain medical conditions. The medical records do not demonstrate that Complainant's conditions were exacerbated as a result of S1's conducts. Further, Complainant's affidavit offers limited assistance because she connects loss, harm, and damage to several of the allegations in which she did not prevail. A careful reading of Complainant's affidavit fails to reveal an argument that she suffered as a result of S1's per se reprisal against Complainant by telling her not to discuss her complaint with anyone else.

Notwithstanding the lack of evidence in this matter, we note that we have awarded \$3,000 in non-pecuniary damages to a complainant who prevailed on a single claim of per se reprisal. See Onie R. v. Dep't of Def., EEOC Appeal No. 0120141870 (June 16, 2016). Similarly, the complainant in Onie R. had pre-existing conditions that were exacerbated by a supervisor's statement that EEO complaints were worthless and most complainants drop their claims due to lack of evidence. Id. The supervisor added, "EEO people are crazy people." The complainant also provided medical evidence demonstrating she suffered from pre-existing conditions, but "failed to show that the [agency's] actions were either the direct or proximate cause of this harm." The complainant's own testimony of an impaired personal life was sufficient to award \$3,000 in non-pecuniary damages. See also Hugh B. v. Int'l Boundary & Water Comm'n, EEOC Appeal No. 0120170001 (Oct. 11, 2018) (\$3,500 awarded where agency's reprisal led to complainant experiencing depression, anxiety, and feelings of demoralization); Brendon L. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120160256 (Apr. 20, 2018) (\$3,000 awarded where complainant submitted scant evidence supporting exacerbation of physical and emotional conditions due to agency's retaliatory acts); Renato K. v. Dep't of Homeland Sec., EEOC Appeal No. 0120172853 (Nov. 2, 2018) (\$3,500 awarded where agency's reprisal led to complainant experiencing emotional distress, sleeplessness, nightmares and chest pains but with no medical evidence in support).

Consequently, we find that an award of \$3,500 is appropriate. This award is supported by the evidence, consistent with Commission precedent and is neither "monstrously excessive" nor the product of passion or prejudice.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision.

### ORDER

To the extent that it has not already done so, the Agency is ORDERED to take the following remedial action, within 60 days of the date this decision is issued:

The Agency shall pay Complainant non-pecuniary compensatory damages in the amount of \$3,500.00.

### 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

June 7, 2021

Date