



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

[REDACTED]
Mafalda H.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2020001497

Agency No. HS-TSA-23946-2015

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's October 24, 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUE PRESENTED

The issue is whether the Agency appropriately awarded Complainant \$1,500.00 in non-pecuniary compensatory damages for its discrimination.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Senior Federal Air Marshal at the Agency's Field Office in Pittsburgh, Pennsylvania. On July 8, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and age when she was not selected for a Transportation Security Inspector-Surface

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.

position. 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. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant did not prove that the Agency subjected her to discrimination as alleged. Complainant appealed the Agency's final decision.

The Commission reversed the Agency's decision, finding that Complainant established a prima facie case of discrimination based on sex and age, and showed that the Agency's reasons for her non-selection were pretexts for discrimination. Specifically, the Commission found that Complainant's qualifications were plainly superior to that of the selectee, and that the proffered explanations for Complainant's supposedly poor interview were suspiciously thin and vaporous, and not supported by the record. As part of the remedies, the Commission ordered the Agency to conduct a supplemental investigation pertaining to Complainant's entitlement to compensatory damages under Title VII, but not the ADEA, and issue a final decision on Complainant's compensatory damages. Mafalda H. v. Dep't of Homeland Sec., EEOC Appeal No. 0120170996 (Jul. 27, 2018); request for recon. denied, EEOC Request No. 2019000052 (Jan. 28, 2019).

On October 24, 2019, the Agency issued a final decision and awarded Complainant \$1,500.00 in non-pecuniary compensatory damages and \$2,039.81 in attorney's fees and costs.² Regarding the non-pecuniary compensatory damages, the Agency noted that Complainant submitted a request for an unspecified amount of damages for depression. While Complainant requested damages for her involuntary separation due to a workplace injury, the Agency found that Complainant did not present evidence that the Agency's discrimination caused her separation. The Agency also found that Complainant did not provide any medical documentation or objective evidence to support her testimony, and that her limited personal testimony did not detail the existence, nature, or severity of her harm. However, the Agency awarded Complainant \$1,5000.00 in non-pecuniary compensatory damages based on other similar cases in which complainants provided non-specific evidence of harm.

Complainant filed the instant appeal. In support of her appeal, Complainant submitted a more comprehensive statement on her claim for compensatory damages and two supporting statements from friends. The Agency did not respond to Complainant's appeal.

² The Commission has the discretion to review only those issues specifically raised in an appeal. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § IV.A.3 (Aug. 5, 2015). On appeal, Complainant did not contest the amount of the Agency's award for attorney's fees and costs; as such, we will not address them in the instant decision.

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 Chap. 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

New Evidence of Appeal

As a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to or during the investigation. See Id. at Chap. 9. Here, Complainant has not provided arguments or evidence to show that these new materials were not available during the supplemental investigation, or any explanation as to why they were not provided to the Agency during the supplemental investigative stage. Accordingly, the Commission declines to consider this new evidence submitted for the first time on appeal.

Non-Pecuniary Compensatory Damages

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

An award of non-pecuniary 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. 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 her claim and proof linking the damages to the alleged discrimination. 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).

We find that the Agency appropriately awarded Complainant \$1,500.00 in non-pecuniary compensatory damages. In her statement, Complainant noted that she was involuntarily separated from the federal government in June 2015 when the Federal Air Marshal office in Pittsburgh closed, and that she was being treated for depression resulting from the involuntary separation. Complainant also stated that in June 2015, she sustained an on-the-job injury, which resulted in a medical retirement in June 2016.³

We note that while Complainant stated that she suffered from depression, she specified that it was the result of her involuntary separation. Complainant asserted that her involuntary separation was a result of the Agency's discrimination, and had she transferred, she would not have sustained her injury. However, we find that Complainant has not shown that the Agency's discrimination directly caused her injury and it is not evident that the injury resulted in Complainant's involuntary separation from federal service because she also stated that she was involuntarily separated with the closing of the Pittsburgh office.

³ The Agency noted that Complainant provided evidence that she retired in June 2015, not June 2016.

As such, we find that Complainant did not present evidence to establish that the Agency's discriminatory non-selection caused her depression.

Furthermore, we find that the Agency's award of \$1,500.00 in non-pecuniary compensatory damages is in line with similar decisions. See Complainant v. Dep't of Agric., EEOC Appeal No. 0120131546 (June 10, 2015) (complainant awarded \$2,000.00 in non-pecuniary compensatory damages based on minimal evidence that he suffered emotional or physical distress due to the Agency's unlawful and retaliatory termination. The complainant submitted no affidavits or statements from family members, physicians, or clergy; and his own statement provided little evidence as to how the discrimination affected him); Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120133316 (Sept. 4, 2014) (complainant was awarded \$250.00 in non-pecuniary compensatory damages when she raised matters in her affidavit that were not found to be discriminatory or postdated the Agency's discrimination, and there was no evidence in the record concerning either short or long term medical problems caused by the discrimination); Seda v. U.S. Postal Serv., EEOC Appeal No. 0720050090 (Mar. 20, 2007) (complainant was entitled to \$1,500.00 in non-pecuniary compensatory damages for reprisal discrimination where complainant provided only limited and non-descriptive testimony concerning emotional pain). Accordingly, we find that the Agency properly determined an award of \$1,500.00 in non-pecuniary compensatory damages.

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 decision to award Complainant \$1,500.00 in non-pecuniary compensatory damages and REMAND the matter in compliance with the ORDER below.

ORDER

Within sixty (60) calendar days of the date this decision is issued, the Agency shall, to the extent it has not done so already, pay Complainant \$1,500 in compensatory damages.

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 (S0610)

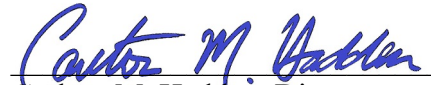
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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 29, 2021
Date