



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

[REDACTED]
Carol W.,¹
Complainant,

v.

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

Appeal No. 2020001521

Hearing No. 560-2016-00047X

Agency No. 2003-0657-2015102295

DECISION

On December 5, 2019, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 12, 2019 final order 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.

At the time of events giving rise to this complaint, Complainant worked as a Registered Nurse, VN-0610-I/3, at the Agency's VA Healthcare System, Jefferson Barracks Medical Center in St. Louis, Missouri. On May 1, 2015, Complainant filed a formal complaint in which she alleged that the Agency subjected her to reprisal for prior protected EEO activity when:

1. On February 9, 2015, the Nurse Manager, who was her immediate supervisor (S1), gave her a rating of low satisfactory on her annual proficiency report;
2. On February 13, 2015, the Deputy Associate Director for Patient Care Services, her third-line supervisor (S3), denied her request for reassignment to another campus; and

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.

3. On June 9, 2015, she was given an overall rating of satisfactory on her annual proficiency report.

At the conclusion of the ensuing investigation, the Agency provided Complainant with a copy of the investigative report and notified her of her right to request a hearing before an EEOC Administrative Judge (AJ). The AJ assigned to the matter issued a summary judgment decision finding in Complainant's favor with respect to incident (1) and in the Agency's favor with respect to incidents (2) and (3). To remedy the reprisal, the AJ ordered the Agency to pay Complainant \$2,000 in nonpecuniary compensatory damages; pay Complainant \$17,620 in attorney's fees and costs; change Complainant's performance rating for July 2013 to July 2014 to "Satisfactory;" and to post a notice. The Agency subsequently issued a final order fully implementing the AJ's decision and the relief ordered. On appeal, Complainant challenges the AJ's finding of no reprisal with respect to incident (2). She also contends that the award of \$2,000 for nonpecuniary compensatory damages is inadequate.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

We first address Complainant's contention that the AJ erred in finding in the Agency's favor on summary judgment with respect to incident (2). To warrant a hearing on her reprisal claim arising from that incident, Complainant must raise a genuine issue of material fact with respect to the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Her first step would generally be to establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of retaliation. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed in this case, however, since S3 articulated a legitimate and nondiscriminatory reasons for denying Complainant's request for reassignment. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983).

According to S3, Complainant reported that she was having issues with a coworker who she believed was threatening her security, and that in response to her concerns, S3 had Complainant move to a different shift and then to a different building so that she would not have to interact with the coworker in question. She was eventually transferred to the desired facility in April or May 2015. Investigative Report, Exhibit B4, pp. 13-14.

To move forward with a hearing, Complainant must also raise a genuine issue of material fact as to whether the Deputy's explanation for denying Complainant's reassignment request is a pretext for reprisal. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). Questions of pretext can be raised by showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. Opore-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007), req. for recon. den'd EEOC Request No. 0520080211 (May 30, 2008). Other than her own assertion that S3 was motivated by unlawful considerations of her previous EEO activity, Complainant has presented neither affidavits, declarations or unsworn statements from witnesses other than herself nor documents that contradict or undercut S3's explanation for moving her to a different building on the same campus rather than transfer her to a different campus, or which call into question S3's veracity as a witness. We therefore agree with the AJ that Complainant has not raised a genuine issue of material fact with regard to her claim of reprisal in connection with incident (2).

Nonpecuniary Compensatory Damages

We turn now to Complainant's contention regarding the adequacy of the Agency's \$2,000 award for nonpecuniary compensatory damages. 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 "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 Security, 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 (Apr. 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 recon. den. 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.

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.

In a supplemental affidavit submitted in support of her request for damages, Complainant claimed that as a result of having received the low satisfactory rating, she suffered injury to her professional standing as a nurse in that she was blocked from advancement from Nurse 1 to Nurse 2. She also stated that she suffered harm to her self-esteem in that the rating left her feeling ashamed and like a failure as a nurse. She also averred that she had gained 30 pounds, had been diagnosed with diabetes, and had suffered a minor stroke.

However she attributed these symptoms to the stress she suffered as a result of having been previously terminated in October 2013, including a fear of being homeless, the prospect of her daughter having to move in with her after being evicted, and the abuse she allegedly received from peers and supervisors after she was reinstated in 2014. Complainant's Supplemental Affidavit on Damages dated November 24, 2018, pp. 1-5.

In light of the foregoing principles, we find that an award of \$2,500 is appropriate under the particular circumstances presented in this case. See 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); Barbie W. v. Dep't of the Army, EEOC Appeal No. 0120171302 (Apr. 9, 2019) (\$2,000 awarded where complainant experienced physical and psychological distress as a result of retaliation but submitted minimal medical documentation in support); Pamila R. v. U.S. Postal Serv., EEOC Appeal No. 0120182822 (Nov. 6, 2019) (complainant awarded \$2,000 for stress and sleeplessness supported only complainant's affidavit); Onie R. v. Dep't of Def., EEOC Appeal No. 0120141870 (June 16, 2016) (\$3,000 award appropriate where employee provided evidence that the agency's reprisal resulted in anxiety, feelings of intimidation and disrespect, despondence, sleep loss, fatigue, difficulty in concentrating, hypersensitivity, and feelings of guilt).

Moreover, Complainant herself admitted that a great deal of her mental and emotional distress resulted not from the low satisfactory rating but from previous incidents involving her termination and the difficulties being experienced by her daughter during that same time frame, all of which weaken the necessary causal connection between the discriminatory act and the harm suffered. Consequently, we find that an award of \$2,500 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.

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 AFFIRM that part of the final order with regard to incident (2) and to MODIFY that part of the final order awarding Complainant damages.

ORDER

To the extent it has not already done so, the Agency is ordered to take the following remedial action:

1. Within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant nonpecuniary compensatory damages in the amount of \$2,500.
2. Within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant \$17,260 in attorney's fees.
3. Within 30 calendar days of the date this decision is issued, the Agency shall change the rating on Complainant's performance appraisal for the rating period of July 10, 2013 through July 10, 2014, from low satisfactory to satisfactory.
4. Within 90 calendar days of the date this decision is issued, the Agency shall provide a minimum of four hours of interactive or in-person EEO training to the Agency officials identified as the Nurse Manager at the Jefferson Barracks Campus and the Nurse Manager at the John Cochran Campus in St. Louis, Missouri. The training shall have a special emphasis on reprisal and the obligation not to restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings under, the Federal equal employment opportunity laws.
5. Within 60 calendar days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the Agency officials identified as the Nurse Manager at the Jefferson Barracks Campus and the Nurse Manager at the John Cochran Campus in St. Louis, Missouri. The Commission does not consider training to be disciplinary action. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
6. Within 30 calendar days of the date this decision is issued, the Agency shall post the notice in accordance with the Order below.

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.

POSTING ORDER (G0617)

The Agency is ordered to post at its VA Healthcare System, Jefferson Barracks Medical Center in St. Louis, Missouri copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall

remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).


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

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

July 7, 2021
Date