



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

[REDACTED]
Darrell K.,¹
Complainant,

v.

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

Appeal No. 2020001975

Agency No. HS-TSA-02435-2017

DECISION

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from an Agency decision, dated December 10, 2019, concerning an award of compensatory damages and the denial of attorney's fees regarding an equal employment opportunity (EEO) complaint claiming 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.

ISSUES PRESENTED

The issues presented are: 1) whether the Agency properly determined that Complainant was entitled to \$35,000 in non-pecuniary compensatory damages; and 2) whether the Agency properly found that Complainant's attorney was not entitled to attorney's fees and costs for work performed during the compensatory damage portion of the EEO process.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Transportation Security Officer at the Agency's St. Louis International Airport in St. Ann, Missouri. On October 18, 2017, Complainant filed an EEO complaint alleging that the Agency subjected him to discriminatory harassment on the bases of race (African-American) and color (black) when on August 19, 2017, he observed a stuffed animal hanging from a noose in the workplace.

Following 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). After Complainant did not request a hearing, the Agency issued its final decision finding discrimination in Complainant's favor. The Agency specifically found that the stuffed animal hanging from the noose observed within their facility was a racially charged image which constituted a hostile work environment within the workplace. The Agency also found itself liable for the harassment because management did not take any immediate actions to remove the hanging stuffed animal and because it did not take full corrective actions regarding the matter.

As a result of the finding of the discriminatory hostile work environment, the Agency informed Complainant of his right to submit his request for compensatory damages, attorney's fees, and costs to the Agency. Complainant subsequently submitted his request to the Agency, requesting \$100,000 in non-pecuniary compensatory damages for the mental harm he experienced due to the discriminatory harassment. Therein, Complainant specifically explained that his life changed dramatically since his observation of the hanging stuffed animal from the noose and that he no longer trusts Caucasian employees. Complainant explained that he experienced sleeplessness in the first six months after discovering the hanging stuffed animal, and he continues to experience anger, depression and stress over the incident. Complainant attributed the stress and anger to "returning to a job that hates [him]" and seeing the employees responsible every day at work. He additionally explained that he has isolated himself from his family, friends, and his children, contending that his relationship with his girlfriend has been destroyed with whom he shares a 13-year-old daughter.

Complainant submitted a statement from his girlfriend dated March 4, 2019. She stated that Complainant went from an enjoyable and very outgoing person to someone who became very moody and irritable. She also explained that Complainant became socially withdrawn from his children, preferring to be by himself and to not leave his house. Complainant's ex-girlfriend also indicated that the harassment affected his relationships with his children and that Complainant slept a lot and experienced headaches.

A statement was also submitted by Complainant's Supervisor who similarly explained that Complainant changed over the past couple of years going from an outgoing person to spending time alone. The Supervisor said that Complainant seemed unfocused at work and said that Complainant calls him when he has trouble sleeping at night.

Agency's Decision on Compensatory Damages and Attorney's Fees

The Agency subsequently issued its decision on compensatory damages and attorney's fees. Therein, the Agency considered the nature, duration, and severity of the harm and awarded Complainant \$35,000 in non-pecuniary compensatory damages. The Agency considered damage awards from similar Commission cases in reaching this award amount. With respect to Complainant's request for attorney's fees, the Agency noted that Complainant was not represented by an attorney during the administrative EEO complaint process. The Agency observed, however, that Complainant was represented by an attorney for the preparation of Complainant's request for compensatory damages. The Agency nevertheless denied Complainant's attorney's request for fees because the attorney failed to indicate his requested hourly rate, the number of hours he expended, along with a specific dollar amount. The Agency determined that Complainant's attorney did not submit the necessary documentation to support his request for attorney's fees.

CONTENTIONS ON APPEAL

On appeal, Complainant, through his attorney, maintains that he presented evidence that the discriminatory harassment caused him to experience anger, depression, constant headaches, insomnia, a lack of interest in intimate relationships, and an inability to focus at home and at work. He maintains, moreover, that he lost interest in relationships and displayed unwarranted anger toward his children and girlfriends. Complainant additionally states that his relationship with his girlfriend of over a decade was destroyed, and he now dreads coming to work. Complainant asserts that he suffered more emotional harm than the cases cited by the Agency in its decision on compensatory damages and argues that his situation is substantially similar to cases awarding non-pecuniary compensatory damages of at least \$100,000. Complainant additionally notes that the Commission may take into consideration the age of comparable awards in prior cases and adjust the current award accordingly to take into account inflation.

With respect to attorney's fees, Complainant maintains that his attorney did not begin to represent him until after he received the Agency's final decision finding discriminatory harassment in his favor. Complainant contends that his attorney did not submit a fee petition because the Agency had not yet issued its decision on compensatory damages. Complainant asserts that it is within the Commission's discretion herein to award these attorney's fees not only for work incurred during the damages stage, but also additional hours of work and costs incurred in the instant appeal.

ANALYSIS AND FINDINGS

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 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 this case, Complainant offered his own statement as well as statements from his girlfriend, ex-girlfriend, and his supervisor. As noted above, as a result of the discriminatory harassment, they explained that Complainant experienced anxiety, depression, anger, stress headaches, and sleeplessness, among other things. They additionally stated that Complainant became socially withdrawn from colleagues, friends, and family due to the discriminatory harassment. We find that the Agency's award of \$35,000 in non-pecuniary compensatory damages is consistent with other Commission decisions. See, e.g., Tootle v. Dep't. of the Navy, EEOC Appeal No. 07A40127 (Feb. 10, 2006) (\$35,000 in non-pecuniary compensatory damages awarded after Complainant observed a noose hanging within his workplace, causing complainant to visit his therapist concerning his Post Traumatic Stress disorder, anxiety, and sleep issues).²

² See also Alex W. v. Dep't of Energy, EEOC Appeal No. 0720130030 (Dec. 12, 2014), req. for recons. den'd, EEOC Request No. 0520150214 (May 3, 2016) (\$42,500 in non-pecuniary

However, the Commission has found that an award of non-pecuniary damages may consider the present-day value of comparable awards. Lara G. v. U.S. Postal Serv., EEOC Request No. 0520130618 (June 9, 2017). Given the significant interval between the comparable award in EEOC Appeal No. 07A40127, we find it appropriate to increase Complainant's award from \$35,000 to \$47,417.34.³ See Gerald L. v. Tenn. Valley Auth., EEOC Appeal No. 0120171266 (Oct. 23, 2018). In addition to being consistent with the amount awarded in similar cases, we also find that this award is not “monstrously excessive” standing alone and is not the product of passion or prejudice. As such, we will modify the Agency's decision and award Complainant \$47,417.34 in non-pecuniary compensatory damages.

Attorney's Fees

By federal regulation, an agency is required to award attorney's fees and costs for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 29 C.F.R. § 1614.501(e)(1)(ii). When the agency, administrative judge or the Commission determines an entitlement to attorney's fees or costs, the complainant's attorney shall submit a verified statement of attorney's fees (including expert witness fees) and other costs, as appropriate, to the agency or administrative judge within 30 days of receipt of the decision and shall submit a copy of the statement to the agency. A statement of attorney's fees and costs shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. The agency may respond to a statement of attorney's fees and costs within 30 days of its receipt. The verified statement, accompanying affidavit and any agency response shall be made a part of the complaint file. 29 C.F.R. § 1614.501(e)(2)(i).

Here, we note that Complainant's attorney only began to represent Complainant during the compensatory damage portion of the EEO process, wherein the Agency awarded Complainant \$35,000 in non-pecuniary compensatory damages. Complainant's attorney asserted, on appeal, that he did not submit his request for attorney's fees for the work he performed during the compensatory damage portion of the EEO process because the Agency had not yet issued its decision on compensatory damages. We find that pursuant to 29 C.F.R. § 1614.501(e)(2)(i), the Agency was required to notify Complainant of his right to submit his attorney fee request to the Agency within 30 days of receipt of the Agency's December 10, 2019, decision on compensatory damages. The Agency however did not do so and prematurely found that Complainant's attorney did not submit the proper documentation for his request for fees and costs.

compensatory damages awarded when an agency employee made untrue and malicious statements about complainant and other minority employees to the news media).

³ The increase in amount of damages due to the lapse of time is determined with reference to the U.S. Bureau of Labor Statistics' CPI Inflation Calculator, found at https://www.bls.gov/data/inflation_calculator.htm.

We do affirmatively find that Complainant is entitled to attorney's fees and costs for the processing of his compensatory damages claim and find that the Agency did not properly provide Complainant's attorney with the opportunity to submit his request for fees and costs.⁴

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 December 10, 2019, decision.

ORDER

Within sixty (60) calendar days from the date this decision is issued, the Agency is ordered to take the following remedial actions:

1. The Agency shall pay Complainant a total of \$47,417.34 in non-pecuniary compensatory damages.
2. After the Agency has provided Complainant with the non-pecuniary compensatory award, Complainant shall have sixty (60) calendar days following the end of the tax year in which the final payment is received to calculate the adverse tax consequences of any lump sum award, if any, and notify the Agency. Following receipt of Complainant's calculations, the Agency shall have sixty (60) days to issue Complainant a check compensating her for any adverse tax consequences established, with a written explanation for any amount claimed but not paid.
3. The Agency shall notify Complainant to provide a verified statement of attorney's fees and costs itemizing the charges from her attorney, attesting to the nature of the work performed, the attorney's hourly rate, and the number of hours of work spent on Complainant's request for compensatory damages. Within 30 days of receiving the fee petition, the Agency shall issue a decision on attorney's fees in accordance with 29 C.F.R. § 1614.501(e). Complainant shall be given 30 days, after receipt of the Agency's notification, to respond to the Agency's request for attorney fee information. If Complainant fails to submit this information to the Agency, then the Agency may issue a decision stating that Complainant is not entitled to attorney's fees.

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).

⁴ Complainant is entitled to an additional award of attorney's fees and costs from the Agency incurred in the successful processing of the instant appeal.

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), 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)

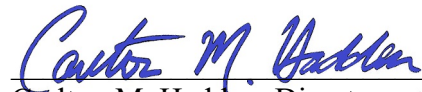
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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

August 2, 2021

Date