



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

[REDACTED]  
Brenton W.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2020002329

Agency No. 200H-0523-2017101072

**DECISION**

On January 29, 2020, 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 December 23, 2019, compensatory damages decision concerning his 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. For the following reasons, the Commission MODIFIES the Agency's compensatory damages decision.

**ISSUE PRESENTED**

The issue presented is whether the Agency appropriately awarded Complainant \$10,000 in nonpecuniary compensatory damages is appropriate.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Nuclear Medicine Technologist at the Agency's VA Medical Center (VAMC) facility in West Roxbury, Massachusetts.

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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.

On January 17, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American) and national origin (Liberian) when:

1. On or about September 1, 2011, a management official degraded Complainant when she referred to him as a “little monkey” as she was assisting her in a gastrointestinal scan;
2. On November 7, 2016, Complainant was made aware that his coworkers used racial slurs and made derogatory remarks about him when he was shown, on an Agency computer, a Facebook conversation between two of his coworkers. One of the coworkers wrote, in reference to Complainant, “Him and all his African home boys with their lazy nigga shit drives me insane; I know that’s racial but I am sick of the home boy shit”;
3. On November 8, 2016, when Complainant reported the Facebook conversation to management, he was advised that there was “nothing management could do, as the statements were made on private Facebook accounts”;
4. On December 8, 2016, a management official pressured Complainant on three separate occasions to provide her the name of the individual who showed him the Facebook messages or his workplace harassment case would be “hanged and there would be no case,” characterized the Facebook messages as “private,” and equated reviewing the messages to “breaking into their private email”; and
5. On December 17, 2016, during a regularly scheduled staff meeting, the staff was notified that Complainant had submitted a work-related complaint that was being reviewed by Human Resources.

At the conclusion of 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). In accordance with Complainant’s request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant proved that the Agency subjected him to discrimination.

Specifically, the Agency found that Complainant established that he was subjected to harassment based on race and national origin as alleged in incidents (2) through (5) and that the Agency was liable for the harassment. The Agency found that the alleged harassment in incident (1), which occurred five years before the other instances of harassment, was insufficiently severe or pervasive by itself to constitute harassment.

Pursuant to the finding of discrimination, the Agency ordered various forms of relief, including the restoration of leave taken by Complainant as a result of the harassment, a supplemental investigation concerning Complainant’s entitlement to compensatory damages, payment for any attorney’s fees and costs, EEO training, consideration of discipline, and posting a notice. The Agency also ordered that, within 15 calendar days of the issuance of the January 31, 2019, final decision, the Agency must reassign the harasser, identified in the final decision as Coworker 3, “to a work area where she will not encounter Complainant.

Or, if preferred by Complainant, he may designate a work area away from [Coworker 3], and the agency will reassign him there, in the same or similar position he now encumbers.”<sup>2</sup>

Complainant requested \$300,000 in nonpecuniary compensatory damages. Complainant submitted a June 12, 2019, psychologist evaluation, which stated that Complainant exhibited signs of post-traumatic stress disorder (PTSD) from childhood experiences fleeing civil war in Liberia and living in a violent refugee camp in the Ivory Coast. According to the psychologist, Complainant had been functioning well until the harassment at work, which triggered significantly worse PTSD symptoms. Complainant told the psychologist that, after the 2016 harassment, he experienced significant stress and anxiety at work and had several episodes of chest pain and elevated heart rate, which Complainant’s physician attributed to stress. The psychologist noted that Complainant attempted to deal with the PTSD through increased alcohol consumption and exhibited negative alterations in cognitions, an irritable, depressed mood, and an increase in reactivity. Complainant experienced sleep disturbances and problems with concentration, was irritable with his wife and children, and loss interest in activities he once enjoyed, such as playing the keyboard at his church. The psychologist stated that Complainant was quite afraid of workplace violence or retribution for reporting the harassment, which led him to hypervigilant around his coworkers and install cameras around his home. Complainant stated that he was afraid of physical violence from Coworker 3, who told Complainant that he had invaded her privacy by looking at the Facebook conversation and threatening to hire an attorney to go after Complainant.

In an affidavit, Complainant’s wife stated that, in November 2016, she began noticing that Complainant was very stressed out and worried. Complainant’s wife stated that, as a result of Complainant’s stress and anxiety, he became a different person, raising his voice to her and their children and drinking more. Complainant’s friend of more than 20 years stated in an affidavit that, after experiencing racism at work, Complainant became withdrawn, lost weight, and had to go to the hospital for chest pain. Complainant’s friend averred that what Complainant experienced at work brought back brutal childhood memories of the Liberian civil war. According to Complainant’s friend, Complainant would call him in the morning on the way to work to talk about feeling anxious being around his coworkers.

On December 23, 2019, the Agency issued its decision on compensatory damages. The Agency awarded Complainant \$10,000 in nonpecuniary compensatory damages. The Agency determined that this award was appropriate because “the harassment concerned an isolated event” and Complainant continued to work during the harassment and did not require extensive medical or psychiatric treatment.

The instant appeal followed.

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<sup>2</sup> Based on the record, it appears that Complainant and Coworker 3 may still be in contact with each other in the workplace. We remind the Agency that not separating Complainant and the harasser could result in future liability for the Agency.

### CONTENTIONS ON APPEAL

On appeal, Complainant contends that he was subjected to harassment that was both severe and pervasive, not an isolated incident, that caused significant emotional distress. Complainant adds that the Agency's failure to properly remedy the harassment in a timely manner greatly contributed to his emotional distress. Complainant contends that he suffered emotional harm similar to cases where the Commission awarded between \$75,000 and \$95,000 in nonpecuniary compensatory damages.

In response to Complainant's appeal, the Agency contends that the evidence does not support an award greater than \$10,000. The Agency notes that the final decision did not find that the "little monkey" comment was part of the hostile work environment and argues that, because Complainant states that his emotional distress began in 2011, his damages should be reduced to reflect that earlier incidents that were not discriminatory contributed to the harm suffered by Complainant. According to the Agency, Complainant also should not be awarded damages for the theoretical future harm that Coworker 3 might seek retribution. The Agency requests that the Commission affirm its compensatory damages award of \$10,000.

### ANALYSIS AND FINDINGS

When discrimination is found, the Agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore him as nearly as possible to the position he would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). 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 nonpecuniary losses (e.g., pain and suffering, mental anguish) as part of this "make whole" relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 119 S.Ct. 1906 (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 nonpecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

Nonpecuniary 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: Compensatory and Punitive Damages Available under § 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 nonpecuniary 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 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.

After a review of the record, it is the decision of the Commission to modify the Agency's award of nonpecuniary compensatory damages. We find that the award of \$10,000 in nonpecuniary compensatory damages is inadequate in light of the severity and duration of the harm and the amount awarded in similar cases.

Complainant compares the emotional harm he suffered to the emotional harm in cases where the Commission awarded between \$75,000 and \$95,000. As a result of the hostile work environment, Complainant stated that he experienced significant stress and anxiety and several episodes of chest pain and elevated heart rate that were attributed to stress. The psychologist stated that the harassment at work triggered Complainant's preexisting PTSD, exacerbating a condition that had previously been under control and brining up memories of fleeing the Liberian civil war and living in a violent refugee camp in the Ivory Coast. Complainant drank alcohol to attempt to cope with these symptoms. Complainant had trouble sleeping, was irritable with his wife and children, and lost interest in activities he had once enjoyed. Complainant was extremely fearful.

However, Complainant did not seek treatment for depression, anxiety, and/or PTSD, and the only medical documentation is from the 2019 psychologist evaluation, which Complainant obtained for the sole purpose of proving compensatory damages. Further, Complainant did not appeal the Agency's final decision finding that he did not establish discrimination with respect to his supervisor calling him a “little monkey” in 2011, so the harassment at issue did not begin until November 7, 2016.

We disagree with the Agency's characterization of the harassment as a single episode. The Agency's final decision found that Complainant was subjected to a hostile work environment based on race and national origin as alleged in incidents (2) through (5). Complainant initially saw the discriminatory Facebook messages on November 7, 2016, and he reported the messages to management the next day.

However, management told Complainant that there was nothing that could be done and pressured Complainant to reveal who had showed him the “private” Facebook messages, comparing viewing the messages on an Agency computer to “breaking into” someone’s personal email account. Further, at a December 17, 2016, staff meeting, it was announced that Complainant had filed a complaint with Human Resources.

Moreover, we also consider the Agency’s failure to address the hostile work environment. The record reflects that Complainant and Coworker 3 continued to interact in the workplace even after Complainant reported the Facebook messages to management, and Coworker 3 accused Complainant of violating her privacy by looking at her Facebook messages and threatened to hire an attorney to “go after” him.

We find it appropriate to award Complainant \$70,000 in nonpecuniary compensatory damages. This award is neither “monstrously excessive” standing alone nor the produce of passion or prejudice, and it is consistent with the amount awarded in similar cases. See Banks v. Soc. Sec. Admin., EEOC Appeal No. 0720100014 (Apr. 27, 2012) (\$65,000 in compensatory damages for sleeplessness, damage to social relationships, loss of self-esteem, concern for job safety, muscle pain, and depression and anxiety); Coffee v. Dep’t of Def., EEOC Appeal No. 0720090012 (Mar. 13, 2009) (\$75,000 awarded where racial harassment caused weight loss, chest pain, mood swings, paranoia, and depression when agency failed to take immediate corrective action once notified of the harassment); Hibbert v. Dep’t of Justice, EEOC Appeal No. 0720070036 (Oct. 25, 2007) (\$60,000 award for racial harassment that caused severe stress, anxiety, frustration, humiliation, embarrassment, and negatively affected complainant’s home life). Therefore, considering the nature and severity of the discrimination, as well as the nature and severity of Complainant’s emotional distress and related symptoms, balanced against sources of stress that were not found to be discriminatory, we find that a nonpecuniary damages award in the amount of \$70,000 is appropriate.

### 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 award of nonpecuniary compensatory damages from \$10,000 to \$70,000.

### ORDER

Within sixty (60) calendar days of the date this decision is issued, the Agency shall pay Complainant nonpecuniary compensatory damages in the amount of \$70,000, less any amount already paid to Complainant as 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, including evidence that the corrective action has been implemented.

#### 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).



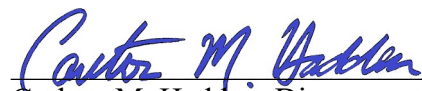
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

August 4, 2021  
Date