



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

[REDACTED]
Joshua F.,¹
Complainant,

v.

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

Appeal No. 2020003749

Agency No. 200J06092017101967

DECISION

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 April 7, 2020, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

BACKGROUND

In October 2016, Complainant applied for the position of Motor Vehicle Operator (MVO), WG-07, under Announcement Number MRN-MPA-16-1842369-BU, in the Agency's Health Administration Service at the VA Medical Center (VAMC) in Marion, Illinois.

On May 25, 2017, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the basis of perceived disability (color perception deficiency) when, on January 24, 2017, the Human Resources Officer (HR1) rescinded a tentative offer of employment for an MVO position following Complainant's pre-employment medical examination.² The Agency accepted Complainant's claim for EEO investigation.

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.

² Complainant's pre-employment physical was on January 5, 2017.

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 failed to prove that the Agency subjected him to discrimination as alleged.

Complainant filed an appeal from the Agency's April 7, 2020 final decision.³ In EEOC Appeal No. 0120181309 (August 30, 2019), the EEOC reversed the Agency's final decision and found the Agency violated the Rehabilitation Act when it did not perform an individualized assessment of how his color depth deficiency would actually affect his performance as an MVO. The Agency was ordered to reinstate its tentative offer to Complainant and to perform an individualized assessment to determine if hiring him into the MVO position would pose a significant risk of substantial harm to the health or safety of himself or others which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. Our decision also awarded Complainant backpay if the Agency eventually hired him for the position and ordered the Agency to conduct an investigation to determine his entitlement to compensatory damages.

The Agency conducted a supplemental investigation on compensatory damages. The supplemental investigation contains Complainant's November 18, 2019 submission for compensatory damages including an affidavit from his wife, bank account withdrawals in the amount of \$85,688.46 for claimed living expenses due to the lost job, and withdrawals from an annuity account in the amount of \$45,625 for claimed living expenses. Complainant also sought additional medical insurance costs of \$4,536 to cover him under his wife's medical plan, additional dental costs of \$5,575 "because Federal dental plan is better than the plan covering" his wife, \$30,000 for the premature sale of his lake house and overpayment of a new, less expensive house. Moreover, Complainant requested payment for emotional losses from 5,000 to \$100,000. Finally, Complainant requested a \$500 per month pension from his current age of 62 until his estimated life expectancy of 80 years old in the amount of \$90,000.

The supplemental investigation notes that "[t]estimony from [Complainant] was included in the response from complainant's representative; however, it was removed from the submitted document and appears below as Exhibit 2-2." However, we note that under Exhibit 2-2 there is only a copy of the affidavit from Complainant's wife. No affidavit from Complainant is contained in the supplemental investigative report.

Thereafter, the Agency issued a final decision on April 7, 2020. The Agency found with regard to the claim for financial losses of increased dental expenses due to having been on his wife's insurance, losses from the premature sale of his home, bank and annuity withdrawals for living expenses, and increased medical insurance costs, he has not shown that the rescission of the tentative job offer was responsible for those losses.

³ The Agency also issued a separate decision on attorney's fees relating to the same underlying complaint. Complainant filed an appeal from the attorney's fees decision which is currently pending before the Commission under EEOC Appeal No. 2021000615.

The Agency noted Complainant was not dependent on a salary from the Agency as he had not been formally hired by the Agency, and the cited losses appear to be due to his inability to find employment, rather than the rescission of the tentative offer. Thus, the Agency awarded no pecuniary damages.

The Agency noted Complainant requested \$100,000 for nonpecuniary losses and that he provided an affidavit from his wife to support his claim. The Agency stated Complainant's wife notes that he was "devastated" and "suffered pain" due to the Agency's conduct but did not provide any other specific information regarding the existence and nature of his emotional harm. The Agency stated that "Complainant provided an affidavit from his wife but did not provide his own statement" in support of his claim for nonpecuniary damages. However, the Agency found, after a review of his wife's statement, Complainant provided objective evidence to support his claim that he suffered emotional harm as a result of the Agency's conduct. The Agency stated that evidence showed Complainant's emotional stress was caused in part by factors other than the Agency's conduct. Complainant's wife stated that he was particularly "devastated" by the sale of their lake house and his inability to find work. The Agency determined the evidence warranted an award of \$3,500 in nonpecuniary damages.

On appeal, Complainant argues he is entitled to pecuniary damages arguing the rescission of the tentative job offer was the direct and proximate cause of his "inability to find employment." Regarding his claim for nonpecuniary damages, Complainant states the Agency's assertion that he did not submit his own statement in support of his claim is false. He notes he submitted his own affidavit and the Agency received it. Complainant provides a copy of the October 11, 2019 affidavit and an October 21, 2019 email from an EEO Specialist in the Office of Resolution Management, Office of Investigation & Contracting Team to Complainant's attorney indicating she received a copy of Complainant's affidavit. Complainant requests the maximum amount of compensatory damages. He further notes that the Agency has not paid him back pay and benefits.

In response to Complainant's appeal, the Agency notes Complainant submitted one affidavit and various paperwork regarding his home sale and withdrawals in support of his damages claims. The Agency states that Complainant submitted dental bills without a concurrent showing the comparative costs of the plans or that the procedures were necessary. They merely surmise that the federal dental plan is "better." The Agency notes Complainant submitted withdrawals, but no itemized accounting of how they were spent, his income, what other financial resources he had and how this related to the Agency's actions. The Agency contends there is no support for any pecuniary, compensatory damages other than backpay noted in our prior decision. The Agency states if Complainant is entitled to nonpecuniary, compensatory damages, the award should be no more than \$3,500. Further, the Agency notes Complainant has already been paid \$3,500 in compensatory damages.

ANALYSIS AND FINDINGS

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, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

Pecuniary damages are quantifiable out-of-pocket expenses incurred as a result of the Agency’s discriminatory actions. Damages for past pecuniary damages will not normally be granted without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals of actual loss and expenses.

Damages are only appropriate if they are directly or proximately caused by the Agency's discrimination. In Complainant's case, we find that he did not persuasively establish that the Agency's discriminatory actions were the cause of the claimed withdrawals, sale of his lake house, dental bills, or medical costs. Thus, find that Complainant has not shown that the Agency’s discrimination caused any pecuniary loss, we shall not award any pecuniary damages.

Nonpecuniary, compensatory damages 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 Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for non-pecuniary damages claims includes statements from Complainant and others, including family members, co-workers, and medical professionals. See id.; see also Carle v. Dep’t of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Nonpecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency’s discriminatory actions. See Carter v. Duncan-Higgans, Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance at 13. Additionally, the amount of the award should not be “monstrously excessive” standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)).

At the outset, we find Complainant established that he submitted his affidavit in support of compensatory damages to the Agency by October 21, 2019. On appeal, the Agency does not contest that it received his affidavit prior to the conclusion of the supplemental investigation on compensatory damages.

However, a review of the Agency's final decision reveals that it did not consider Complainant's affidavit when determining compensatory damages. In this decision, we consider Complainant's October 11, 2019 affidavit in addition to the other information he submitted during the supplemental investigation on compensatory damages.

In his affidavit, Complainant explained that losing out on the MVO job put him under "continuing stress worrying about money." He stated his sense of self-worth was adversely affected, felt sadness and depression, sometimes had pain in his gut, and an inability to enjoy the things he once enjoyed. He stated that some of his emotional losses have been caused by the stress of poverty and he explained the loss of his lake house as devastating. The affidavit from Complainant's wife confirmed the pain and devastation Complainant felt after rescission of the job offer.

In the present case, the Agency awarded Complainant \$3,500 in nonpecuniary, compensatory damages. After a thorough review of the record, and given the severity, nature, and duration of the distress experienced by Complainant as a direct result of the discrimination, we find that an award of \$10,000 in nonpecuniary, compensatory damages to be more appropriate. This takes into account a reduction as the record shows that some of Complainant's emotional distress was caused by non-EEO matters. We find that this amount is not motivated by passion or prejudice, is not "monstrously excessive" standing alone, and is consistent with the amounts awarded in other cases. See Ralph B. v. Dep't of Homeland Security, EEOC Appeal No. 0120161451 (April 25, 2018) (\$10,000 in nonpecuniary, compensatory damages awarded where the complainant submitted his own statement that he suffered from stress, anxiety, depression, and emotional withdrawal along with medical report that did not include data pertaining to the discriminatory incidents); Poquiz v. Dep't of Homeland Security, EEOC Appeal No. 0720050095 (April 10, 2008) (\$9,000 in nonpecuniary, compensatory damages awarded where testimony from the complainant and his brother established complainant's emotional pain, suffering, loss of self-esteem, mental anguish, loss of enjoyment of life, and marital strain was caused by the discrimination), req. for recons. den., EEOC Request No. 0520080524 (June 19, 2008)).

CONCLUSION

We MODIFY the Agency's final decision on compensatory damages and REMAND the matter to the Agency for further action in accordance with the ORDER herein.

ORDER

To the extent it has not already done so, the Agency shall, within 60 days of the date this decision is issued, pay Complainant \$10,000 in nonpecuniary, compensatory damages. If the Agency has paid some amount of these damages already, then it may subtract that amount from the \$10,000 award.

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 28, 2021
Date