



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Maxie S.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2020004012

Hearing No. 480-2018-00454X

Agency No. HS-TSA-00005-2018

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 10, 2020, 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. For the following reasons, the Commission AFFIRMS the Agency's final order.

**ISSUES PRESENTED**

The issues are whether the Agency's appeal is proper; and substantial evidence supports the Administrative Judge's determination to award Complainant \$17,000.00 in non-pecuniary compensatory damages for the Agency's unlawful sexual harassment and retaliation.

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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.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Transportation Security Officer at the Agency's Long Beach Airport in Long Beach, California. On November 11, 2017, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination and harassment on the bases of race (Hispanic),<sup>2</sup> sex (female), and color (Fair) when:

1. On or around September 8, 2017, management did not take adequate action to remedy Complainant's report about a coworker (CW) massaging her neck and shoulders;
2. On or around September 8, 2017, management did not take adequate action to remedy Complainant's report that CW made inappropriate comments to her; and
3. On or around September 11, 2017, management informed Complainant that it was closing her case and moving forward.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on November 21, 2019, and she issued a decision on March 13, 2020. The AJ determined that Complainant was subjected to sexual harassment when CW massaged her neck and shoulders. The AJ then found that the Agency was liable because, while it took prompt action in response to Complainant's report of CW's conduct, it failed to thoroughly investigate the allegation, which led to management's inaccurate understanding of the incident; failed to separate Complainant and CW during the pendency of the investigation; and inappropriately delayed its instruction to CW to stop touching Complainant or other employees.

The AJ added retaliation as a basis to the claim and found the Agency liable when a management official repeatedly counseled Complainant to act in a professional manner with CW after she reported CW's conduct. However, the AJ found that the evidence did not show that Complainant was discriminated against based on her race or color.

As part of the remedies, the AJ awarded Complainant \$17,000.00 in non-pecuniary compensatory damages based on Complainant's description of her emotional harm from CW's conduct and management's response to her harassment allegation, which Complainant provided in her investigative affidavit and hearing testimony. In support of the award, the AJ cited to three Commission cases: Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120123393 (Feb. 25, 2015) (complainant was awarded \$15,000.00 for two acts of coworker harassment over a span of ten days and the agency's failure to take prompt corrective action); Woolf v. Dep't of Energy,

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<sup>2</sup> The Commission notes that the term "Hispanic" typically denotes national origin rather than race. However, herein the Commission acknowledges Complainant's self-identification of her race as Hispanic.

EEOC Appeal No. 0120083727 (June 4, 2009)<sup>3</sup> (complainant was awarded \$15,000.00 for stress, anxiety, depression, and other emotional harms from a single act of physical contact, which was deemed to be sexual harassment, and retaliation when the complainant was told that her complaint would “polarize the office”); McKinney v. U.S. Postal Serv., EEOC Appeal No. 07A00049 (May 2, 2003), (complainant was awarded \$12,500.00 for sadness, stress, tearfulness, anxiety, difficulty concentrating, and other symptoms for a single incident of sexually harassing conduct followed by a retaliatory act). The AJ noted that the Commission may make upward adjustments to past awards to account for inflation when comparing awards, and she determined that an appropriate award was \$17,000.00 for the emotional distress experienced by Complainant caused by the sexual harassment and retaliation.

The Agency subsequently issued a final order fully adopting the AJ’s decision. Complainant filed the instant appeal and submitted a statement in support of her appeal. The Agency opposed Complainant’s appeal.

### CONTENTIONS ON APPEAL

Through her non-attorney representative, Complainant requests an increase of the non-pecuniary compensatory damages in an amount between \$30,000.00 and \$85,000/\$100,000.00.<sup>4</sup> In support of her appeal, Complainant provided a list of prior Commission decisions, in which the complainants were awarded non-pecuniary compensatory damages ranging from \$30,000.00 to \$85,000.00.

The Agency argues that substantial evidence does not support a finding that Complainant was subjected to a hostile work environment or retaliation, and the Agency requests that the Commission reopen the record and enter a finding of no discrimination.

Regarding the non-pecuniary compensatory damages, the Agency asserts that the AJ’s determination was not erroneous. The Agency states that the cases that Complainant cited do not support her request for an increased award. For example, in several of the cases, the complainants were subjected to several discriminatory acts, including lengthy periods of harassment, while other cases included allegations that were of a completely different nature than the sole incident of sexual harassment relevant to this case.

The Agency notes that only Complainant testified at the hearing about the alleged pain and suffering she went through due to CW’s conduct, and that Complainant provided very limited testimony about her alleged stress and anxiety; admitted that she did not seek any medical attention for her physical symptoms, such as headaches, stomachaches, and sleeplessness; and

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<sup>3</sup> We note that this case citation is for the original appellate decision, and that the decision on compensatory damages is Woolf v. Dep’t of Energy, EEOC Appeal No. 0120101756 (Aug. 10, 2010).

<sup>4</sup> Complainant provided both figures at different parts of her appeal brief.

did not take any medication for her symptoms. The Agency also states that there was no evidence that Complainant was humiliated in front of her peers due to this incident, or that the Agency made her information public; and that the harassment did not in any way affect Complainant's career with the Agency.

### STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chapter 9 at § VI.B. (Aug. 5, 2015). In this case, the AJ found that Complainant credibly testified during the hearing and we note that the Agency did not challenge Complainant's credibility. As such, we accept the AJ's credibility determination.

### ANALYSIS AND FINDINGS

#### *Agency's Appeal*

EEOC regulations state that an agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the administrative judge's decision and notify the complainant whether or not the agency will fully implement the decision of the administrative judge. If the final order does not fully implement the decision of the administrative judge, then the agency shall simultaneously file an appeal in accordance with § 1614.403 and append a copy of the appeal to the final order. 29 C.F.R. § 1614.110(a).

Here, the Agency timely issued a final order on April 10, 2010, fully adopting the AJ's decision. The Agency did not challenge the AJ's findings of discrimination until July 14, 2020, over three months later, when it filed its opposition brief and requested that the Commission reopen the record and enter a finding of no discrimination. We note that the Agency did not address its prior final order which fully adopted the AJ's decision, and we find that the Agency's appeal of the AJ's decision is untimely. Accordingly, we AFFIRM the AJ's finding that Complainant established that the Agency subjected her to sexual harassment and retaliation.

#### *Non-Pecuniary Compensatory Damages*

Non-pecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See EEOC Notice No. 915.302, Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be “monstrously excessive” standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from Complainant concerning her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

Statements from others including family members, friends, health care providers, other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. Id. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

An award of non-pecuniary compensatory damages should reflect the extent to which the agency's discriminatory action directly or proximately caused the harm as well as the extent to which other factors also caused the harm. Johnson v. Dep't of the Interior, EEOC Appeal No. 01961812 (June 18, 1998). It is the complainant's burden to provide objective evidence in support of her claim and proof linking the damages to the alleged discrimination. Papas v. U.S. Postal Serv., EEOC Appeal No. 01930547 (Mar. 17, 1994); Mims v. Dep't of the Navy, EEOC Appeal No. 01933956 (Nov. 23, 1993).

We find that substantial evidence supports the AJ's decision to award Complainant \$17,000.00 in non-pecuniary compensatory damages. During the hearing, Complainant testified that she immediately began to suffer from stress, depression, and anxiety, and that she had trouble sleeping because she would think about how she had to go to work the next day and work with CW. Complainant specified that she started to suffer from sleep issues, anxiety, and depression on September 8, 2017, and that she was still suffering from sleep deprivation two years later. Complainant also stated that she suffered from physical symptoms of headaches, migraines, and stomach pains. Complainant noted that she did not consult a physician or take medication for these physical pains. Complainant stated that while at work, she worried about performing her duties because CW was there; she felt lonely because her concerns were disregarded; and she feared CW because he had touched her body. Regarding her personal life, Complainant stated that she lost interest in social activities with her friends and family because the harassing incident was constantly on her mind. Hearing Transcript at 65-73.

On appeal, Complainant provided a list of seven prior Commission decisions in support of her request for an increased award for non-pecuniary compensatory damages. However, Complainant only noted the nature of the complainants' harms, and we find that these cases are distinguishable from Complainant's case. For example, in Complainant v. Dep't of the Interior, EEOC Appeal No. (Sept. 18, 2015), the complainant was awarded \$75,000.00 in non-pecuniary compensatory damages for harassing incidents which occurred over the course of approximately ten months. The complainant provided evidence showing that she saw several medical health providers for five years, and she was prescribed medication for her high levels of anxiety and depression. The complainant also provided additional testimony from her sister, friend, and deacon. In this case, Complainant did not provide any supporting statements, and she testified that she did not seek medical attention, nor take any medication, for her conditions.

In McTier v. Dep't of the Navy, EEOC Appeal No. 07A30016 (Mar. 2, 2004), the complainant was awarded \$85,000.00 in non-pecuniary compensatory damages following the agency's admission of liability for seven incidents of discrimination and harassment over the course of almost one year and eight months. We find that the nature and severity of the harms differed because the complainant's harm included constant crying and thoughts of hurting herself. The complainant provided additional evidence from two medical experts regarding the nature and duration of her condition, and the complainant's son testified that she cried all the time and would not go out, and that he "pretty much [did] everything for her."

We also find that Complainant's case differs from Miles v. U.S. Postal Serv., EEOC Appeal No. 07A30016 (Feb. 27, 2004), in which the complainant was awarded \$75,000.00 in non-pecuniary compensatory damages for her harms suffered after she was sexually assaulted. Unlike Complainant, the complainant provided testimony from her psychiatrist and psychologist stating that she was diagnosed with Major Depression, Post Traumatic Stress Disorder, and Adjustment Disorder with Anxious Mood, and she suffered from suicidal ideations.

We note that in this case, Complainant relied solely on her own testimony, and while that is sufficient to support an award for non-pecuniary compensatory damages, the absence of supporting evidence may affect the amount of damages. Upon review of Complainant's testimony evidence, we find that the AJ's award of \$17,000.00 in non-pecuniary compensatory damages is supported by substantial evidence and is consistent with the prior Commission decisions cited by the AJ. As such, we AFFIRM the Agency's final order adopting the AJ's award of \$17,000.00 in non-pecuniary compensatory damages.<sup>5</sup>

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order adopting the AJ's decision finding that Complainant established that she was subjected to sexual harassment and retaliation and awarding her \$17,000.00 in non-pecuniary compensatory damages.

### 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>

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<sup>5</sup> The Agency provided evidence showing that it paid Complainant \$17,000.00 on April 30, 2020.

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

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

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

#### RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.**

The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



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Carlton M. Hadden, Director  
Office of Federal Operations

August 5, 2021

Date