



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

[REDACTED]
Lauralee C.,¹
Complainant,

v.

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

Appeal No. 2020000598

Agency No. 20DR00102015104647

DECISION

Complainant timely appealed to the Equal Employment Opportunity Commission (“EEOC” or “Commission”), pursuant to 29 C.F.R. § 1614.403, from an August 21, 2019 Final Agency Decision (“FAD”) concerning an 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency, through its Presidential Management Fellow (“PMF”) appointment program, as a Health System Specialist, GS-12, in the Agency’s Office of Strategic (“OSPA”), Policy Planning and Analysis Service in Washington, D.C.

In September 2015, Complainant filed a formal EEO complaint alleging that the Agency subjected her to discrimination and harassment on the basis of sex (female) when:

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.

Claim A: On or about August 4, 2015, she was issued a Letter of Admonishment for allegedly making false statements about her second-level supervisor (“S2”);

Claim B: On October 15, 2015, she was unwillingly placed on administrative leave; and

Claim C: On October 15, 2015, she was informed that she was not recommended for conversion from her PMF appointment to a full-time career conditional position.²

The Agency conducted an investigation into the complaint. The evidence gathered during the investigation showed Complainant began her PMF appointment on July 13, 2013. After two years, the Agency had the option to convert her appointment to a permanent career conditional position. A decision not to convert would have the same effect as removal. Complainant was granted a 120-day extension of her appointment, making her scheduled end date November 14, 2015.

In May 2014, Complainant sent a letter to the Agency Secretary alleging that S2 was subjecting her to harassment and discrimination on the basis of sex. Among other things, she alleged that S2 would not assign her meaningful work and advised her that she needed to be more “submissive” in order to succeed. Complainant had raised the same allegations earlier that month and in April 2014, by filing a complaint with the Agency’s dispute resolution team and notifying her third level supervisor (“S3”). Complainant told S3 that she believed S2’s actions were “rooted in sexual harassment.” S3 investigated and concluded that there was insufficient evidence to support Complainant’s allegations.

S1, S2, and S3 were aware of Complainant’s allegations, as well as her letter to the Secretary. The record contains a December 12, 2014, email from S2 to Complainant accusing her of “libel” and “defamation of character,” referring to her allegations of discrimination and harassment (among many other things) to the Secretary, and other management officials. The Agency conducted an internal investigation of Complainant’s statements in her letter to the Secretary, which were ultimately determined to be false, according to the June 10, 2015 investigative report.

On August 4, 2015, Complainant was issued a Letter of Admonishment, which charged her with making a false statement. Specifically, the Letter stated, that on “May 11, 2015, you made a false/unfounded statement which was slanderous and defamatory about OSPA leadership to Agency Management.” The record reflects that the Letter was preceded with a lengthy June 18,

² Complainant initially included allegations that she was subjected to harassment. However, these were dismissed in the Agency’s FAD and affirmed on appeal. EEOC Appeal No. 0120170883 (Feb. 29, 2019).

2015 request to reprimand Complainant, from S2 to Management, referencing the June 10, 2018 investigative findings. Complainant disputed making false statements.

On October 15, 2015, Complainant was advised that her temporary position would not be converted to a permanent career conditional position. Complainant was placed on administrative leave that day. She remained in a paid duty status until November 14, 2015.

At the conclusion of its investigation, the Agency provided Complainant with a copy of the report of investigation (“ROI”) and notice of her right to request a FAD or a hearing before an EEOC Administrative Judge (“AJ”). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b). The FAD concluded that Complainant failed to establish discrimination as alleged.

Complainant timely appealed to the Commission. In EEOC Appeal No. 0120170883 (Feb. 28, 2019), the Commission issued a decision modifying the Agency’s FAD and concluded Complainant was subjected to unlawful retaliation for engaging in protected EEO activity. In our Decision, we determined that the Agency erred in its interpretation of the anti-retaliation provisions of Title VII. Specifically, we discussed the “participation clause,” which makes it unlawful to discriminate against an individual because they made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII, the ADEA, the EPA, the ADA, the Rehabilitation Act, or GINA. The Commission has broadly interpreted the participation clause to include all EEO participation regardless of whether an individual has a reasonable, good faith belief that the underlying allegations are, or could become, unlawful conduct. EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice 915.004 (Aug. 25, 2016) (“Retaliation Guidance”). We also emphasized our position that an employer can be liable for retaliation if it takes it upon itself to impose consequences for actions taken in the course of participation. *Id.*

We concluded that regardless of whether an investigation determined Complainant’s statements were untrue, the statements she made in April and May 2014, alleging that S2 subjected her to discrimination and harassment, as well as her May 2014 letter to the Secretary, were protected activity under Title VII’s participation clause. While acknowledging that “[there is] no question that the record contains justification for the Agency to have removed Complainant for performance-based reasons,” the Commission also emphasized that the direct evidence of retaliatory motivation and bias against Complainant had to be considered under Title VII.

Such direct evidence included S2’s December 12, 2014 and June 18, 2015 communications, as well as the documents giving rise to Claims (A), (B), and (C). The August 4, 2015 Letter of Admonishment charged Complainant with making false statements and warned Complainant that her action “threatens the integrity and cohesion of the team and is a serious matter that cannot be tolerated.” The October 15, 2015 Notice to Complainant informing her that her appointment would not be converted and placing her on involuntary leave explains that Complainant’s non-conversion is due to S1’s statements on an OPM Form 1303, and concurrences by S2 and S3.

The referenced OPM Form 1303 includes references Complainant's protected activity, revealing that she "received a formal admonishment for false/unfounded statements which were slanderous and defamatory about a federal official."

The Commission applied a "mixed motive" analysis of Claims (A), (B), and (C), as the evidence reflected that the Agency's actions in were motivated by both lawful and unlawful reasons. To prevail, the Agency had the burden to prove, by clear and convincing evidence, that it would have taken the same action even if it had not considered the discriminatory factor. See Price Waterhouse v. Hopkins, 490 U.S. 228, 249, 258 (1989), Tellez v. Dep't of the Army, EEOC Request No. 05A41133 (Mar. 18, 2005). The Agency was unable to meet this burden because the record revealed other indicia of retaliatory motive. For instance, S2 made comments about not converting Complainant's appointment to another employee, and discussed the issue with S1 and S3, actions that were reasonably likely to deter others from engaging in the EEO process. Citing Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998) (any adverse treatment based upon a retaliatory motive and reasonably likely to deter a complainant or others from engaging in protected activity is a prohibited act of reprisal, including instances where a supervisor acts to intimidate an employee and interfere with their EEO activity in any manner). The Commission concluded, "[w]e cannot say...that the Agency would have taken the same action, i.e., non-conversion...absent the retaliatory motivation of Complainant's managers."

The Commission modified the Agency's FAD, finding that the Agency's actions toward Complainant in Claims (A), (B), and (C) constituted unlawful retaliation in violation of Title VII. Among other things, the Commission ordered the Agency to expunge the August 4, 2015, Letter of Admonishment from Complainant's records, offer to reinstate Complainant to a permanent version of her former PMF appointment position (or its substantial equivalent), and pay Complainant backpay, including benefits, plus interest, from November 15, 2015 through the offer of reinstatement.

The Agency was further ordered to conduct a supplemental investigation on the amount of compensatory damages to award Complainant, then issue a decision appealable to this Commission. It is this issue of compensatory damages that is currently the subject of the instant appeal.

Complainant's Claim for Compensatory Damages

In accordance with the Commission's order, the Agency provided Complainant with the opportunity to submit evidence to support an award of pecuniary and non-pecuniary damages for harm arising from the Agency's retaliatory actions in Claims (A), (B), and (C).

In her brief supporting her claim for damages, Complainant reveals that she was hired as a consultant with a \$95,000 annual salary, with benefits, by Enterprise Resource Performance, Inc. ("ERPi"), a government contractor that had a contract with the Agency. Complainant provides supporting documentation in the form of a November 10, 2015 "Contingent Employment Offer" from ERPi, and a November 25, 2015 email exchange between Complainant and her ERPi supervisor indicating that she passed the background checks, as her official start date was the following Monday. However, she also provided a transcript from a January 2016 voicemail from

her ERPi supervisor, stating, in pertinent part: “we are going to need to separate with you as an employee from ERPi. So [that] you know, on Monday we were asked by the government to remove you from our contract, which the government has the contractual right to do.” The voicemail states that ERPi was unable to find another contract position at that time but would provide a week of severance pay through January 15, 2016.

Complainant’s requests for pecuniary and nonpecuniary damages both factor in harm resulting from her termination from ERPi. She alleges that S2 personally instructed ERPi to terminate her employment when he learned that she was on the contract. She also alleges that the Agency effectively “blackballed” her from further employment either as a government employee or contractor, stating that she applied for 300 jobs without success.

For pecuniary damages, Complainant sought \$349,800 plus benefits, for lost wages between January 2016 and April 2019 based on her terminated employment with ERPi. She sought an additional \$950,000, plus benefits, for 10 years of future earnings, until she reached retirement age of 63. Complainant also sought federal benefits and approximately 120 vacation days from her non-conversion in November 2015 through April 9, 2019, as well as an unspecified amount of “cost of living adjustments” for the Washington, DC Metropolitan Area. Complainant’s additional claims for pecuniary damages included a \$6,442.61 mortgage payment, \$3,774 in late fees and fines from her homeowner’s association (“HOA”), \$6,000 in attorney’s fees, and the cost of an inpatient stay at a rehabilitation facility based on the rate defined by CMS/Medicare, \$15,000 to \$27,000 for 30-45 days. For all payments of damages, including for non-pecuniary compensatory damages, Complainant requested that she be awarded interest.

For non-pecuniary damages, Complainant asserted that she was entitled to \$300,000 for mental and emotional stress and \$500,000 in “past and future pain and suffering.” Elsewhere in the record she sought over \$1,000,000 in non-pecuniary damages.

Complainant provided medical documents, and a personal statement establishing that prior to her employment with the Agency, she was diagnosed with post-traumatic stress disorder (“PTSD”) having survived, as well as high stress assignments. Her PTSD manifested as severe depression, difficulty sleeping, inability to think clearly, inability to enjoy life, and at her lowest point, in 2010, she seriously contemplated suicide. Complainant explained that when retaliatory acts in Claims (A), (B), and (C), occurred, they triggered emotions she associated with her military sexual trauma (“MST”) in 1994 perpetrated by a supervisor, and caused a major flare-up of her PTSD. Following her non-conversion, and subsequent termination from ERPi, Complainant felt hopeless about her future employment, she became severely depressed, and was often unable to get out of bed. Her mental health difficulties were exacerbated by the financial difficulties accompanying unemployment.

In addition to her own detailed account, and financial documentation, Complainant provided statements from three witnesses. Two witnesses (“W1” and “W2”) provided accounts of Complainant during her appointment. W1 was Complainant’s coworker for a year, they worked in the same office and Complainant confided in her during the time frame of the Agency’s

retaliatory actions. W1 recalled that Complainant exhibited great anxiety and distress regarding S2, and shared her allegations of sexual harassment and discrimination, as well as her belief that S2 used his influence to insure that she was converted to a permanent position, and to remove her from the contract ERPi was working on as retaliation for reporting him. W2 was one of the team members who interviewed and selected Complainant for the PMF position in 2013. W2 testified that she observed Complainant's demeanor decline from highly enthusiastic about her PMF appointment, to exhibiting clear indications of someone "struggling." In W2's opinion, Complainant exhibited symptoms of depression. W2 confirmed that environment of the Office of Policy and Planning likely caused Complainant stress because it was fast paced, and because there was an attitude "imparity" regarding female employees. W2, who had since sought and accepted a lateral transfer, recalled that in an incident similar to that of Complainant, S2 instructed her to be more "humble," indicating an impact on whether he would recommend her for promotion.

The third witness, ("W3") an Addiction Therapist of the Substance Abuse Recovery Program treated Complainant for a severe Substance Use Disorder ("SUD") between July 2016 and September 2016, that her discrimination harassment case created an enormous amount of stress and it was a struggle to recover, she referred her for inpatient care. The medical documents provided demonstrate that Complainant was prescribed a number of medications to treat her multiple mental health conditions, as well as regular therapy between April 2018 to October 2018. They also reflect inpatient hospitalization for complex PTSD from August 16, 2018 to September 26, 2018. Complainant describes feeling lost and incomplete in every way, unable to maintain a relationship, and attributes her two stays in inpatient treatment programs to her financial and emotional harm arising from the Agency's retaliatory actions.

Agency Finding on Compensatory Damages

The Agency, citing the Commission's decision in Bates v. Department of the Air Force, determined that it was not liable for any claimed damages arising from Complainant's termination from ERPi because Complainant had not demonstrated that her termination from ERPi was directly or proximately caused by the retaliatory actions at issue in Claims (A), (B), and (C). EEOC Appeal No. 01985401 (Oct. 31, 2000) (discussing proof necessary to obtain relief: "the complainant must submit evidence to show that the agency's discriminatory conduct directly or proximately caused the losses for which damages are sought... the amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part") citations omitted. Therefore, the Agency denied Complainant's claim for lost wages and benefits between January 2016 and April 2019.

The Agency determined that Complainant's other claims for pecuniary damages were either unsupported by documentary evidence or the evidence Complainant offered was insufficient. Regarding Complainant's claim of future earnings, the Agency noted that there was no documentary or testimonial evidence, aside from Complainant's own assertions, to show that she was unable to obtain employment with the Agency. In particular, the Agency referenced the lack of documentation to support that she unsuccessfully applied to over 300 positions in the past

several years. Although elsewhere in its decision, the Agency references Complainant's two inpatient hospital stays, it determined that she was not entitled to pecuniary damages because she did not submit any evidence of the expense. While Complainant provided evidence that she owed Mortgage and HOA payments, the Agency determined that Complainant failed to establish that these debts were directly or proximately caused by the Agency's retaliatory acts. Ultimately, the Agency concluded that Complainant was not entitled to any pecuniary damages.

With respect to non-pecuniary damages, the Agency determined that Complainant successfully established a causal connection between the Agency's retaliatory actions in Claims (A), (B), and (C) and severe emotional harm, as exhibited by Complainant's worsening financial situation, alcohol dependence and risk of suicide. The Agency reasoned that it was "compelled to consider the intervening factor of Complainant's termination from ERPi." The Agency identified alternate causes of emotional harm, such as the death of Complainant's stepfather in March 2014, and financial stress, including delinquent mortgage payments, that predated its retaliatory actions. The Agency also noted the gap in time between Complainant's diagnosis with depression and PTSD in 2010, and the next recorded date of treatment in November 2016, a year after her appointment with the Agency ended. Similarly, bulk of the medical documents Complainant offered, including inpatient treatment, were dated three years after the retaliatory actions.

In reviewing Complainant's evidence to support compensatory damages, The Agency determined that W1 and W2 provided "only general statements that Complainant appeared to be suffering from distress and anxiety during her year as a PMF," that neither statement offered "detailed information on the physical and behavioral manifestations of Complainant's emotional distress and the intensity of the distress." The Agency emphasized that W1 and W2 offered no indication of how Complainant was impacted on a day-to-day basis, and their testimony is based on Complainant's account of the Agency's actions, not firsthand information as to the cause of the distress. The Agency concedes that W2 described an atmosphere where female employees were treated with "imparity."

Reviewing W3's and Complainant's statements, the Agency found that Complainant's mental health began declining in January 2016, following her termination from ERPi. While it attributes some harm to the termination from ERPi, the Agency accepted Complainant's retaliatory non-conversion as a cause of Complainant's financial difficulties and as a cause of her depression and exacerbated PTSD symptoms. The Agency acknowledged that Complainant was treated at an inpatient facility from August 16, 2018 through September 26, 2018, for complex PTSD, alcohol use disorder, hypertension, knee pain, and osteoarthritis, if found these treatments occurred too late to be attributed to its retaliatory actions.

On August 21, 2019, the Agency issued a FAD awarding Complainant \$95,000 in non-pecuniary compensatory damages, based on the severity and duration of Complainant's emotional harm that it attributed to its retaliatory actions. The Agency did not award any amount of pecuniary damages. The instant appeal followed.

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”).

New Claim of Retaliation

As a preliminary matter, Complainant’s allegation that S2, or other Agency management officials, retaliated against her for engaging in protected EEO activity by causing ERPi to terminate her employment, is a new claim of discrimination. As this matter has not been investigated and was not part of the EEO complaint underlying the compensatory damages award at issue, we have not considered this allegation beyond the fact that the termination likely contributed to Complainant’s emotional harm. If Complainant wished to pursue this new claim of retaliation, she should have contacted an EEO Counselor pursuant to 29 C.F.R. § 1614.105. See Hall v. United States Postal Serv., EEOC Appeal No. 0120031342 (Apr. 24, 2003).

Compensatory Damages

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. § 2000e et seq., may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this “make whole” relief. 42 U.S.C. § 1981a(b)(3). Compensatory damages do not include back pay, interest on back pay, or any other type of equitable relief. 42 U.S.C. § 1981a(b)(2). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000, 42 U.S.C. § 1981a(b)(3).

To receive an award of compensatory damages, a complainant must demonstrate that he or she has been harmed as a result of the agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsideration denied, EEOC Request No. 05940927 (Dec. 11, 1995), Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

Pecuniary Damages

Pecuniary losses include quantifiable out-of-pocket expenses that are incurred as a result of the discriminatory conduct. To recover damages, the complaining party must prove that the employer's discriminatory act or conduct was the cause of his loss. Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 ("Enforcement Guidance"), EEOC Notice No. 915.002, at 8 (July 14, 1992).

The Agency properly denied Complainant's claim of lost wages and future wages for lack of documentation to support her claims that she was blackballed from employment with the Agency, or that due to the emotional harm she suffered as a result of the Agency's retaliatory actions, Complainant was unemployable. We also point out that per our February 28, 2019 Order, the Agency formally offered to reinstate Complainant in the position of Health System Specialist, GS-12, a permanent position, which she declined on May 7, 2019.

The Agency reasoned that the December 1, 2016 document Complainant provided from her mortgage company indicating she owed \$6,442.61, was insufficient evidence because it did not identify "what the exact charges were, what was actually paid, what amounts were not paid, when any of the amounts were due, when payments were made, when payments were not paid, what or when late charges and fees were incurred." As for the HOA costs, Agency determined that a spreadsheet from Complainant's HOA, establishing monthly missed payments and fees from September 1, 2017 through March 16, 2019 amounting to \$3,774 was "so vague that we are unable to evaluate whether the charges are attributable to the Agency's discriminatory conduct" since the earliest date was nearly two years after the retaliatory actions.

The Agency also properly declined to pay Complainant's claim of \$6,000 in attorney fees. Complainant furnished a document from an attorney regarding a \$6000 fee, stating that \$2000 had been paid. There is no indication that Complainant paid the full amount, or that the legal services are attributable to the Agency's retaliatory actions. Moreover, Complainant states throughout the record that she is *pro se* in the instant complaint. Complainant asserts that she liquidated her retirement ("FERS") and estimates that she is entitled to \$3,297 in FERS restoration. Complainant offered documentation of withdrawing her military retirement earnings, but these predate the alleged discriminatory acts by about two years.³

³ In Brown-Fleming, the Commission found that the agency's unlawful termination of the complainant caused her severe financial harm based on documentation establishing that she liquidated her retirement to pay off her car note. Brown-Fleming v. Dep't of Justice, EEOC Petition No. 0420080016 (Oct. 28, 2010) (petition for enforcement of order on compensatory damages EEOC Appeal No. 0120045121 (Dec. 20, 2006)). Specifically, the complainant's documentation included receipts and statements including the amount withdrawn, broker's fees, tax penalties, and lost interest.

The Commission has previously found that a complainant is not entitled to reimbursement of expenses that would have been incurred whether they were discriminated against or not. Brown-

Non-Pecuniary 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 at 10. 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). We note 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. 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.*

Moreover, the Commission has long held that a complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain their burden in recovering compensatory damages for emotional harm. The more inherently degrading or humiliating the agency's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Therefore, somewhat more conclusory evidence of emotional distress will be acceptable

Fleming, citing Lee v. United States Postal Serv., EEOC Appeal No. 01995205 (July 11, 2001). However, the complainant was entitled to reimbursement for foregone interest or penalties on the withdrawals, as she would not have incurred these “but for” the agency’s discrimination. Brown-Fleming citing Mature v. United States Postal Serv., EEOC Appeal No. 07A20065 (Mar. 17, 2003). Because the complainant in Brown-Fleming provided evidence of payment and statements supporting the claimed amount, the Commission ordered the agency to reimburse her for the brokerage fee, penalty fee, premature tax liability, and the foregone interest lost as a result of having to liquidate her retirement account. EEOC Appeal No. 0120082667 (Oct. 28, 2010).

to support an award for emotional damages. See Roman G. v. Dep't of Veterans Affairs, 2019005894 (Aug. 31, 2020) citing Lawrence v. United States Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996).

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. See 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 his claim and proof linking the damages to the alleged discrimination. Papas v United States Postal Serv., EEOC Appeal No. 01930547 (Mar. 17, 1994), Mims v. Dep't of the Navy, EEOC Appeal No. 01933956 (Nov. 23, 1993).

The Agency supported its award of \$95,000 in nonpecuniary compensatory damages by identifying two prior decisions on compensatory damages issued by the Commission which, like the instant case, involved a complainant whose pre-existing health conditions were exacerbated by the discriminatory action and where their emotional harm arose from financial stress proximately caused by the agency's discriminatory termination of their employment. See Emmett W. v. Dep't of Agriculture, EEOC Appeal No. 0120143098) (May 3, 2016) (\$80,000 awarded after discriminatory termination where complainant experienced financial difficulties, including canceled medical insurance and bankruptcy, which caused severe stress and emotional distress, damaging his family relationships, causing humiliation in the community and exacerbating his pre-existing conditions of PTSD and traumatic brain injury ("TBI") which are triggered by high anxiety and stress), and Brown-Fleming v. Dep't of Justice, EEOC Petition No. 0420080016 (Oct. 28, 2010) (petition for enforcement of order to pay compensatory damages for harassment finding in EEOC Appeal No. 0120045121 (Dec. 20, 2006)). (\$150,000 awarded discriminatory termination where the complainant experienced depression, anxiety, stress, insomnia, difficulty concentrating, crying spells, social isolation, damage to her professional reputation, as well as financial difficulties requiring her to liquidate her retirement account, which caused extreme stress exacerbating mental and physical conditions attributable to the stress, including abdominal pain, worsening hypertension, dramatic weight loss and worsening psoriasis). While both cases are instructive, taking into consideration the additional factors contributing to Complainant's emotional distress and the supporting documentation she provided, Complainant's complaint is more similar to Emmitt W. Also, the duration and severity of the discrimination, which included a finding of prolonged harassment by multiple coworkers and supervisors that included racial epithets, as well as sexual harassment, in addition to unlawful termination in Brown-Fleming, supported a much larger award.

Therefore, an award of \$95,000 in non-pecuniary compensatory damages is appropriate in this case. See also Scott K. v. United States Postal Serv., EEOC Appeal No. 0120182127 (Feb. 20, 2020) (\$85,000 awarded where the agency did not attempt to provide the complainant work within his medical restrictions, unlawfully discharging him, resulting in severe depression, change in personality financial stress, exacerbating his condition) citing Billy B. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120132680 (Nov. 19, 2015) (\$85,000 awarded after the agency denied complainant a reasonable accommodation then discharged complainant, which

exacerbated his preexisting condition and caused emotional distress, nightmares, a damaged professional reputation, isolation, weight gain, and paranoia) reconsideration denied, EEOC Request No. 0520160135 (May 12, 2016) other citations omitted, see also, Cher C. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120140445 (Jan. 9, 2017) (\$95,000 awarded where complainant provided medical documentation substantiating that the agency's retaliatory actions and harassment exacerbated her lupus symptoms, and testimony established that she experienced stress, a panic attack, and loss of professional standing).

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 decision on 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>

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).

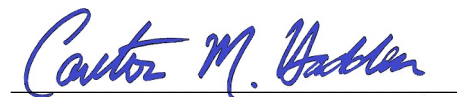
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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:



Carlton M. Hadden, Director
Office of Federal Operations

September 21, 2021

Date