



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Charlie K.,¹
Complainant,

v.

Charlotte A. Burrows,²
Chair,
Equal Employment Opportunity Commission,
Agency.

Appeal No. 2020002546
Agency No. 2017-0020

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 December 12, 2019, final 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. and 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 AFFIRMS the Agency's final decision in part and REMANDS the matter to the Agency for further consideration of Complainant's entitlement to compensatory damages and equitable relief.

ISSUES PRESENTED

- 1) Whether Complainant was subjected to retaliatory harassment when the Agency distributed the electronic posting ordered in Appeal No. 0120142315 with Complainant's real name, rather than the pseudonym provided by the appellate decision; and

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 In the present matter, the Equal Employment Opportunity Commission (EEOC) is both the respondent Agency and the adjudicatory authority. The Commission's adjudicatory function is separate and independent from those offices charged with in-house processing and resolution of discrimination complaints. For the purposes of this decision, the term "Commission" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to the respondent party in this action. The Chair has abstained from participation in this decision.

- 2) Whether Complainant is entitled to equitable relief and compensatory damages in excess of the Agency's award.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Equal Opportunity Investigator, GS-1860-12/09, at the Agency's Denver Field Office (DENFO) in Denver, Colorado.

On April 13, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (Latino³), national origin (Hispanic), sex (male, non-LGBT), disability (physical), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973 when, on or about February 23, 2017, pursuant to the order of the Commission's Office of Federal Operations (OFO), the Agency emailed a notice of the EEO violation to all employees at the DENFO, which contained a PDF attachment titled with Complainant's real surname,⁴ rather than the pseudonym used in the underlying appellate decision.⁵

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final agency decision (FAD) pursuant to 29 C.F.R. § 1614.110(b).

With regard to Complainant's reprisal claim, the Agency found no evidence that the disclosure was intentional or taken because of Complainant's protected characteristics. However, citing to Candi R. v. Env't. Prot. Agency, EEOC Appeal No. 0120171394 (Sept. 14, 2018), the Agency reasoned that even "the inadvertent nature of the EEOC's disclosure of Complainant's name in the electronic posting email did not negate the fact that revealing the name of a complainant in a confidential EEO complaint to PHODO personnel is reasonably likely to deter other EEOC employees from engaging in EEO activity and has a potentially chilling effect on the EEO process." The Agency therefore concluded that the disclosure constituted *per se* retaliation.

As for Complainant's hostile work environment claim, the Agency acknowledged that its EEO Office "failed to perform due diligence to ensure that the document was properly named."

³ The Commission considers the term "Latino" to denote a national origin rather than a race. The legal analyses for race and national origin discrimination are the same.

⁴ The attachment was titled, "SIGNED POSTING ORDER [COMPLAINT'S SURNAME] V. EEOC."

⁵ In the underlying appellate decision, the Commission found that the Agency subjected Complainant to reprisal when Complainant's first-level supervisor jokingly told Complainant that managers discussed his EEO complaint at a management meeting. See Charlie K. v. Equal Emp't Opportunity Comm'n, EEOC Appeal No. 0120142315 (Jan. 24, 2017), req. for recons. den., EEOC Request No. 0520170235 (Dec. 19, 2017).

However, the Agency concluded that such failure did not amount to a hostile work environment because “this incident, standing alone, was neither severe nor pervasive, and there was no evidence of discrimination based on any of his protected bases.”

To remedy the finding of discrimination, the Agency awarded Complainant \$500.00 in nonpecuniary compensatory damages “based on the Agency’s estimate of compensatory damages Complainant suffered for work absence related to this claim.” In assessing the award, the Agency relied on Ciera B. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120161961 (Sept. 20, 2018),⁶ where the Commission affirmed the Administrative Judge’s (AJ) award of \$500.00 in nonpecuniary compensatory damages for two incidents of reprisal. This appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant reiterates his contention that the Agency subjected him to reprisal by labeling the attachment with his real surname rather than the pseudonym listed on the Commission’s prior decision. He asserts that the Agency’s failure to use his pseudonym caused him to suffer retaliatory harassment when his “coworkers began asking him about the posting notice with his name on it since he is the only [Complainant’s surname] in the Denver Field Office where the notice itself mentioned the Denver Field Office as the place [of] the discrimination.” Complainant maintains that his life has been forever altered, and that he has anxiety, lives in fear, has insomnia, and suffers chest pains that necessitated his use of leave. He requests that the Commission restore the leave that he used as a result of the discrimination. He also seeks additional nonpecuniary compensatory damages in excess of the Agency’s award of \$500.00, which he deems to be “something less [than a] nuisance value.”

The Agency opposes Complainant’s appeal and requests that the Commission affirm the FAD in its entirety. In this regard, the Agency argues that the finding of *per se* reprisal is well-supported under Candi R., *supra*, as the inclusion of Complainant’s real surname had a potentially chilling effect on the EEO process. The Agency, however, strenuously maintains that a finding of harassment is unwarranted because “[n]o reasonable person could conclude that the single, accidental inclusion of [Complainant’s] surname in the posting notice created an abusive working environment.” Furthermore, the Agency emphasizes that the ROI contains no evidence whatsoever that the alleged harassment was based on Complainant’s membership in a protected class and/or his prior EEO activity. As such, the Agency contends that the award of \$500.00 is appropriate under the circumstances and consistent with prior Commission precedent in Ciera B., *supra*. The Agency also cites to Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120101454 (Dec. 16, 2010), for the proposition that “[a]n award of \$500 [for reprisal] meets the goals of not being motivated by passion or prejudice, not being ‘monstrously excessive’ standing alone and being consistent with the amounts awarded in similar cases.”

⁶ We note that the FAD incorrectly referred to Ciera B., *supra*, as Lonny C. v. Def. Intelligence Agency, EEOC Appeal No. 0120161961 (Sept. 20, 2018). See FAD at fn. 3.

STANDARD OF REVIEW

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").

ANALYSIS AND FINDINGS

In order to establish a claim of harassment based on race, national origin sex, or disability,⁷ a complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). In order to meet the requirements of prong 4, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

Here, we find that the alleged discriminatory act, the electronic posting using Complainant's real name instead of the provided pseudonym, is not so severe or pervasive as to alter the conditions of the Complainant's employment.

Compensatory Damages

On appeal, Complainant asserts that he is entitled to additional damages because the Agency's discriminatory act has forever altered his life, and has caused him to experience anxiety, fear, and insomnia. He also asserts that the discrimination caused him to experience chest pains that necessitated his use of leave.

⁷ As the Agency has already admitted *per se* reprisal discrimination, we need not address whether the posting also constituted harassment based on reprisal, as no further remedy would be available.

Here, the Agency found that Complainant was entitled to \$500.00 in nonpecuniary compensatory damages “based on the Agency’s estimate of compensatory damages Complainant suffered for work absence related to this claim.” Upon review, we find that the Agency has not adequately substantiated its reasons for the award. Nonpecuniary compensatory damages are intended to compensate a complainant for intangible injuries such as 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: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, at 10 (July 14, 1992). Here, we are unable to find any evidence in the record showing that the Agency considered these harms. In this regard, we note that the Agency did not conduct a supplemental investigation into Complainant’s entitlement to compensatory damages, which would have allowed the Agency to fully understand the extent of the harm that Complainant suffered. The Agency also did not provide Complainant with any guidance as to the legal standards for compensatory damages or the types of evidence that he could submit in support of his claim. Because the Agency failed to take any of these necessary steps, we find that Complainant was denied a meaningful opportunity to prove his entitlement to full, make-whole relief. See Harold M. v. Dep’t of the Air Force, EEOC Appeal No. 0120162540 (Feb. 22, 2018) (finding award of compensatory damages to be unsupported due, in part, to the agency’s failure to conduct a supplemental investigation into complainant’s entitlement to compensatory damages). To cure this deficiency, we will remand this matter to the Agency for further processing.

Equitable Relief

Complainant contends that he is also entitled to be reimbursed for the leave that he took as result of the discrimination. We note, as a general matter, that a complainant is entitled to restoration of leave that was taken for purposes of avoiding or recovering from discriminatory conduct. In order to be entitled to leave restoration, a complainant must demonstrate a causal nexus between the discrimination and need to take leave. See Reed, supra, citing Velez v. U.S. Postal Serv., EEOC Appeal No. 01902746 (Nov. 16, 1990).

Having reviewed the FAD, we conclude that the Agency erred in addressing Complainant’s claim for leave restoration as part of the calculation on compensatory damages. As discussed above, the Agency awarded Complainant \$500.00 in nonpecuniary compensatory damages “based on the Agency’s estimate of compensatory damages Complainant suffered for work absence related to this claim.” Given that Complainant’s request for leave restoration is equitable in nature and separate from his claim for compensatory damages, the Agency should have considered these matters separately. See Keri C. v. Dep’t of Homeland Sec., EEOC Appeal No. 0120171541 (Apr. 12, 2019) at fn. 2. While we acknowledge that the record contains a number of leave requests that could shed light on the extent of Complainant’s entitlement to leave restoration, we note that these leave request forms are largely illegible. See ROI at 00266-273.

In summary, we will vacate the Agency’s award of nonpecuniary compensatory damages due to the Agency’s failure to properly investigate the matter. We will also expand the remedial relief

that the Agency awarded to include leave restoration to the extent that Complainant can prove his entitlement. To fully remedy the finding of per se reprisal, we will further direct the Agency to provide EEO training to the responsible management officials and consider disciplining them.

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 finding of discrimination on Complainant's reprisal claim. However, we VACATE the Agency's award nonpecuniary compensatory damages and REMAND the matter to the Agency for further processing in accordance with this decision and the Order below.

ORDER

The Agency is ORDERED to take the following actions:

1. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall undertake a supplemental investigation concerning Complainant's entitlement to compensatory damages and equitable relief and determine the amount of compensatory damages and equitable relief owed to Complainant. The Agency shall allow Complainant to present evidence in support of his claimed entitlement. See Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard.
2. The Agency shall issue a final decision on compensatory damages and equitable relief no later than **ninety (90) calendar days** after the date this decision is issued. The Agency shall pay Complainant the compensatory damages, and provide him with equitable relief, as determined by the Agency within 30 days from the date of the Agency's final decision. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein.
3. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall provide a minimum of four hours of in-person or interactive online EEO training to the two responsible management officials (RMOs) identified in the ROI on pages 00011 (i.e., the individual who sent the email) and 00204 (i.e., the individual who named the attachment using Complainant's real surname). The mandatory training should emphasize the prohibition on reprisal and the improper disclosure of EEO activity, including the Commission's policy on anonymity in the EEO process.
4. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall consider disciplining the identified RMOs. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its

decision not to impose discipline. If the identified RMOs have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

5. Within **thirty (30) calendar days** of the date this decision is issued, the Agency shall comply with the section entitled, "Posting Order," below.

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 that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ORDERED to post at its Denver Field Office copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

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:

/s/ Shelley Kahn

Shelley E. Kahn
Acting Executive Officer
Executive Secretariat

October 13, 2021

Date