



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

[REDACTED]
Celinda L.¹
Complainant,

v.

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

Appeal No. 2020002892

Hearing No. 560-2016-00119X

Agency No. 2003-0785-2015100957

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 January 28, 2020, final decision regarding her entitlement to compensatory damages based on its August 21, 2019, final decision finding that she was subjected to sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the Agency properly determined Complainant's entitlement to compensatory damages.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Retail Salesclerk, Patriot Retail Store, at the Agency's Jefferson Barracks Medical Center in St. Louis, Missouri. On March 11, 2015, Complainant filed a formal complaint alleging that the Agency subjected her to a hostile work environment and discriminated against her on the bases of sex (female) and reprisal for prior protected EEO activity 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.

1. in July 2014, the Assistant Canteen Manager (male, unknown EEO activity), told Complainant, "if you will be my girlfriend, I will get you a full-time job."
2. from July 2014 through November 2014, the Assistant Canteen Manager made a threat to kill Complainant,² forced himself on Complainant, and groped Complainant while at work;
3. in November 2104, the Food Service Worker, and the Cashier, belittled Complainant when they reported to the Assistant Chief of Retail Store (female, unknown EEO activity), that she, Complainant, sent naked pictures;
4. in November 2014, the Food Service Worker, the Prosthetics Service Clerk, and a second cashier, threatened Complainant when they stated, "You're a dumb whore.....meet me in the parking lot...don't eat in the cafeteria because it would be a shame if something happened to your food....you only got this job because you have been fucking [the Assistant Canteen Manager] the whole time that you have worked here;"
5. in November 2014, the Prosthetics Service Clerk threatened Complainant when she stated, "I am not the one.... you got me fucked up.... I don't play games. . . I will meet you in the parking lot;"
6. in November 24, 2015, the Assistant Canteen Manager³ choked Complainant during a conversation away from work;
7. on November 30, 2014, The Food Service Worker threatened Complainant when she stated "I would not eat the soup here if I were you;"
8. on December 1, 2014, the Cashier belittled Complainant when she stated "there has been a bet between the Assistant Canteen Manager and the Chief of Canteen Service (male, unknown EEO activity), and the Education Technician, on who could have sex with you first;"
9. on December 1, 2014, the Food Service Worker belittled Complainant when she stated, "you are nothing but a dumb whore and a bat;" and

² The record indicated that on October 12, 2014, the Assistant Canteen Manager followed Complainant home from work, and threatened to kill her if he was fired or arrested. He then purportedly choked Complainant and said, "I'll fucking kill you bitch!"

³ On November 5, 2014, the Assistant Canteen Manager resigned effective November 19, 2014, and was not an Agency employee at the time of this incident, which occurred at a private residence.

10. on February 20, 2015, the Assistant Chief of Retail Store issued Complainant a letter of termination during her probationary period, effective March 6, 2015.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing, but subsequently withdrew her request. Consequently, on August 21, 2019, the Agency issued a final Agency decision (FAD) pursuant to 29 C.F.R. § 1614.110(b).

The FAD concluded that Complainant had established by a preponderance of the evidence that she was subjected to sexual harassment and a hostile work environment based on her sex by her coworkers and management. However, the Agency determined that Complainant had failed to establish that she was retaliated against regarding her termination. Accordingly, the Agency ordered that Complainant be provided with the following equitable relief: 1) restoration to a position where she would have been were it not for the unlawful discrimination; 2) restoration of all leave taken as a result of the discriminatory actions; and, 3) commitment in writing that the Agency would provide a work place free from hostility, offensive conduct or abuse, and that no reprisal would be taken against Complainant. The Agency ordered compensatory damages, following a report by Complainant of such damages, and, attorney's fees if applicable. The Agency also ordered EEO training and consideration of disciplinary action of the involved individuals and management officials. Lastly, a Notice was ordered to be posted at the facility.

Upon the finding, Complainant submitted documentation asserting entitlement to \$300,000 in compensatory damages and \$41.60 for pecuniary damages. In support of her claim, Complainant submitted detailed affidavits from her husband and herself; various medical documentation; and, an invoice for the pecuniary damages. Complainant asserted that as a result of the discriminatory conduct, she has sought treatment for anxiety, depression, Post-Traumatic Stress Disorder (PTSD), sleeplessness, headaches, nightmares, vomiting, severe weight gain, and other symptoms.

On January 28, 2020, after reviewing the submitted documentation, the Agency issued its determination on compensatory damages for Complainant. The Agency awarded Complainant \$75,000 in compensatory damages and \$41.60 for pecuniary damages. In reaching this number, the Agency concluded that Complainant had provided objective evidence to support her claim that she suffered emotional harm as a result of the Agency's discriminatory conduct. The Agency determined the evidence sufficiently detailed the emotional distress, the intensity of such distress, and how it had impacted her daily life. While the Agency acknowledged that Complainant suffered from the discriminatory actions, it noted that Complainant stopped medical treatment in August 2015, approximately one year after the discriminatory actions. The Agency noted that the duration thus factored into its decision. The Agency further noted that Complainant had a history of depression and anxiety and that it could only be liable for the exacerbation of Complainant's pre-existing conditions, and not all of her emotional harm.

Based on this, and in researching prior award amounts that ranged from \$45,000 to \$110,000, the Agency found its award of \$75,000 to be reasonable, not motivated by passion or prejudice, and consistent with amounts awarded in similar cases. On February 18, 2020, the Agency processed a payment of \$75,041.60 to Complainant's attorneys.

CONTENTIONS ON APPEAL

On February 28, 2020, Complainant filed the instant appeal. Complainant, through counsel, noted that the appeal solely concerned the Agency's computation of compensatory damages. Complainant asserts that years later, she continues to suffer the harmful effects of the harassment and violent threats she endured by the Assistant Canteen Manager. Complainant noted the severe impact of being threatened with death by the Assistant Canteen Manager and having been choked by him. Complainant notes that she had previously provided fifty-four pages of medical records supporting her claims of compensatory damages, and that she provided a declaration from herself and her spouse detailing how she still suffers five-plus years later. Complainant notes that she continues to suffer from anxiety, depression, severe weight gain, nightmares, severe headaches, paranoia, mood swings, bouts of spontaneous vomiting, and Post-Traumatic Stress Disorder (PTSD) as a result of the death threats and sexual harassment. Complainant asserts that the Agency has accepted responsibility for the pain and suffering and yet the amount awarded, \$75,000 was wholly insufficient and that it should be increased to \$300,000.

In response, the Agency asserts that it appropriately considered all documentation and that \$75,000.00 was a fair and reasonable amount for compensatory damages. The Agency requests that the Commission uphold its determination.

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, (EEO MD-110) 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

Compensatory Damages

To receive an award of compensatory damages, Complainant must demonstrate that 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 (EEOC Notice No. 915.002) (July 14, 1992), at 11-12, 14. Compensatory damages may be awarded for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) which are directly or proximately caused by the agency's discriminatory conduct. EEOC Notice No. 915.002 at 8. 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. Id. at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. Id. at 14, see Goetze v. Dep't. of the Navy, EEOC Appeal No. 01991530 (Aug. 23, 2001).

Non-Pecuniary Compensatory Damages

This decision solely concerns the Agency's decision to award Complainant \$75,000.00 for non-pecuniary compensatory damages. Non-pecuniary losses are losses that are not subject to precise quantification, including emotional pain and injury to character, professional standing, and reputation. Id. 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).

In Carle v. Dep't of the Navy, the Commission explained that “objective evidence” of non-pecuniary damages could include a statement by the complainant explaining how he or she was affected by the discrimination. EEOC Appeal No. 01922369 (Jan. 5, 1993). Statements from others, including family members, friends, and health care providers could address the outward manifestations of the impact of the discrimination on the complainant. Id. Complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. Id.

Non-pecuniary damages must be limited to the sums necessary to compensate the injured party for the actual harm and should take into account the severity of the harm and the length of the time the injured party has suffered from the harm. Carpenter v. Dep't of Agric., EEOC Appeal No. 01945652 (July 17, 1995).

Here, Complainant requested non-pecuniary compensatory damages of \$300,000.00 for the harm caused by the Agency's discriminatory actions. In support of her damages request, Complainant provided numerous medical documentation demonstrating her mental health treatments and diagnoses/recurring symptoms of generalized anxiety disorder, recurrent depression, PTSD, severe weight gain, severe nightmares, paranoia, hypervigilance, severe shame, shortness of breath, anger outbursts, as well as the various medications that she has been prescribed to combat such diagnoses and symptoms. Complainant also provided detailed affidavits from her spouse and herself detailing the effects of the discriminatory actions on her life several years later.

The Agency noted that while Complainant had submitted documentation demonstrating the effects of the discriminatory actions, it took into consideration her prior mental health treatments and that she stopped seeking mental health treatment approximately one year after the incidents occurred. We note that 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 a 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.

In reviewing this matter, the Commission has taken into consideration the evidence submitted by Complainant, other evidence in the record directly related to the finding including the duration, severity, and egregious nature of the discriminatory actions. For example, actions by the Assistant Canteen Manager (violent death threats, inappropriate workplace groping, solicitation of naked photos); threats of physical violence by a variety of Agency employees that was not stopped by management officials; medical documentation showing that Complainant was severely impacted by the harassment; previous history of mental health treatment; and, relevant case law. Additionally, we considered the circumstances here, a consensual sexual relationship⁴ that drastically and violently changed upon Complainant's attempts to end the relationship. We also recognized that while the October 2014 physical assault and death threat (claim 2) occurred at Complainant's residence, the Assistant Canteen Manager was still employed by the Agency at the time. More importantly, while management officials were timely informed of the incident, they did not immediately act.

⁴ The Assistant Canteen Manager and Complainant acknowledged they were in a consensual sexual relationship from July 2014 until late September 2014, when Complainant attempted to end the relationship.

This inaction forced Complainant to continue working alongside a management official who had physically assaulted her by choking her and then threatened to kill her if she reported the matter.

In this matter, the Agency acknowledged that Complainant had demonstrated that she was subjected to unwelcome conduct of sexual nature that was severe and pervasive enough to create a hostile work environment from late September 2014 through October 2014. Based on the record, the Agency determined that \$75,000 was sufficient to compensate Complainant for her non-pecuniary compensatory damages. However, based on the record and the Commission's research, we find the award of \$75,000 to be insufficient. We conclude that an award of \$175,000.00 would better compensate Complainant for the egregious and physical, emotional and mental harm she suffered as a result of the actions. While the duration of the discriminatory actions was short, two months, the egregiousness of the Assistant Canteen Manager's actions (physical assault, violent death threats, workplace groping, solicitation of nude photos, and more); coworkers' harassment of and threat of physical violence towards Complainant; and, the Agency's wholly ineffective response has warranted such an award.

We find that this updated award is consistent with similar awards approved by the Commission. See Lemons v. Dep't Justice, EEOC Appeal No. 0120102416 (Nov. 16, 2011) (awarding \$175,000 in non-pecuniary compensatory damages where management failed to respond over a four to five-month period to complainant's four separate allegations that she was being sexually harassed by an inmate which culminated in a violent sexual assault. Complainant was diagnosed with PTSD and Major Depression suffered physical and emotional harm from the assault including insomnia, vomiting, difficulty concentrating, mood swings, an inability to trust people, had feelings of hopelessness and paranoia); Stanton S., v. Dep't. of Veteran Affairs, EEOC Appeal No. 2019005938 (Sept. 14, 2020) (Agency awarded complainant \$110,000 in compensatory damages. Commission modified this to \$175,000, noting the harmful effects following two physical workplace assaults one month apart); Complainant v. Dep't. of the Navy, EEOC Appeal No. 0120150940 (Apr. 13, 2016) (three complainants each awarded \$110,000 for the suffering, fear, and anxiety endured when it was discovered that a high-ranking government official installed hidden cameras in the restrooms. The hidden cameras were in place for approximately a month, and once discovered the agency moved quickly to rectify the situation. Nonetheless, the video voyeurism determined to have long lasting impacts); Jackson v. Dep't. of the Air Force, EEOC Appeal No. 0720110036 (Mar. 13, 2012) (AJ found Complainant was subjected to sex-based harassment by a supervisor that occurred over approximately 19 months, and that agency failed to promptly and thoroughly investigate or take corrective action. AJ ordered \$125,000 in compensatory damages for emotional harm, mental anguish, loss of enjoyment of life, loss of self-esteem, injury to character and professional standing, marital strain, loss of health, sleep problems, anxiety, stress, depression, and humiliation).

Since the Agency had previously paid Complainant \$75,000 in non-pecuniary damages, Complainant is now entitled to an additional \$100,000.00 in non-pecuniary damages. This brings the total compensation to \$175,000.00. The Commission finds that this amount takes into account the severity and the duration of the harm suffered and is consistent with prior Commission precedent.

Finally, the Commission finds this award is not “monstrously excessive” standing alone, is not the product of passion or prejudice, and is consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (Apr. 15, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REMAND the matter to the Agency in order to comply with the ORDER below.

ORDER

Within sixty (60) calendar days from the date this decision is issued, to the extent it has not already done so, the Agency shall pay Complainant \$175,000.00 in non-pecuniary compensatory damages.

The Agency is further directed to **submit a report of compliance in digital format as provided in the statement entitled “Implementation of the Commission's Decision.”** The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

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 (R0610)


This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **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 2, 2021
Date