



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Thomasina B.,<sup>1</sup>  
Complainant,

v.

Merrick B. Garland,  
Attorney General,  
Department of Justice  
(Federal Bureau of Prisons),  
Agency.

Appeal No. 2020002975

Agency No. BOP-2016-00294

**DECISION**

On March 11, 2020, 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 February 11, 2020 final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Commission's review is de novo. For the following reasons, the Commission MODIFIES the Agency's final decision.

**BACKGROUND**

Complainant, a Health Information Technician, GS-0640-07 at the Devens Federal Medical Center in Ayer, Massachusetts, filed a formal EEO complaint alleging that the Agency discriminated against her based on race/national origin (Hispanic) and sex (female) when, on December 8, 2015, she became aware that her supervisor (S1) provided a negative reference to the Public Health Service (PHS) and Complainant believes this reference prevented the PHS from hiring her.

Following an investigation, the Agency issued a final decision on August 8, 2017, in which it concluded that Complainant failed to prove that she was discriminated against as alleged. Complainant appealed, and in Thomasina B. v. Dep't of Justice, EEOC Appeal No. 0120173008

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

(Feb. 27, 2019), the Commission reversed the Agency's finding of no discrimination. In reaching its conclusion, the Commission stated:

The evidence shows that the PHS position would have resulted in a promotion for Complainant. She would have remained working at the prison facility, although no longer a subordinate of S1, but in a position of equal or greater authority than S1. These facts support Complainant's assertion that S1 intentionally sabotaged her from gaining a promotion within the prison facility as she did not want Complainant, a Hispanic woman, to potentially serve as her superior. As there is no legitimate explanation for the negative reference provided by S1, we are left to conclude that discriminatory animus played a role in its issuance. As such, we find that Complainant has established her claim of discrimination.

To remedy the discrimination, the Commission ordered the Agency to designate a management official other than S1 to provide needed references for Complainant in any future applications; conduct a supplemental investigation into Complainant's entitlement to compensatory damages; provide training to and consider disciplining S1; pay attorney's fees; and to post a notice.

In a memorandum dated April 14, 2020, the Agency reported to the Commission that it had fully complied with the Commission's order for relief.

In its final decision on remedies, the Agency explained that Complainant was additionally entitled to back pay covering the four-month interval between the date of the discriminatory reference and the date of her voluntary resignation equaling \$8,332.51. The Agency emphasized that Complainant never filed a constructive discharge claim. Complainant admitted in her affidavit that she had resigned on March 9, 2016 because she had accepted a job as an Administrative Assistant with another agency at a salary higher than she had been receiving from the Agency but lower than the salary she would have received had she been Commissioned by the PHS. The Agency also rejected Complainant's claim for front pay for the same reason – that there was never a finding of constructive discharge.

As to Complainant's claim for compensatory damages, the Agency initially noted that Complainant did not submit any documentation of out-of-pocket medical expenses or other evidence of pecuniary losses. She admitted that she refused to seek medical attention because she still held out hope that she might eventually be able to join the PHS and, in her own words, "didn't want to ruin the opportunity by being treated or diagnosed with or given medications for depression." As for Complainant's claim for nonpecuniary compensatory damages, the Agency awarded Complainant \$30,000 based primarily on its assessment that, "there was no evidence from either Complainant, or a medical provider or counselor regarding the duration of the harm or any other long-term consequences due to [the Agency's] discriminatory conduct."

### CONTENTIONS ON APPEAL

Initially, Complainant maintains that she is entitled to a larger back pay award than the Agency had given her. Next, Complainant reiterates that she is owed front pay because placement into the PHS Commissioned Corps is not possible due to circumstances entirely beyond her control. Third, Complainant contends that the \$30,000 in nonpecuniary compensatory damages was inadequate, and that she is entitled to an award that ranges from \$90,000 to \$157,000, although she does not specify an exact amount. In particular, she pointed out that it had been her career ambition to serve in the PHS, that in the 10 years she had worked for the Agency, the PHS had opened recruitment for Health Information Management Specialists only once during her entire tenure, and that Complainant's age precluded her from applying for a position with the PHS ever again. Accordingly, Complainant requests that the Commission modify the Agency's final decision.

The Agency argued, among other things, that its \$30,000 award of nonpecuniary compensatory damages was proper because Complainant did not submit any medical evidence showing that she was diagnosed with depression, anxiety, insomnia, or any other psychological disorder as the result of any workplace events. Accordingly, the Agency requests that the Commission affirm its final decision.

### ANALYSIS AND FINDINGS

When discrimination is found, an agency must provide a complainant with a remedy that constitutes full, make-whole relief to restore the complainant as nearly as possible to the position she would have occupied absent the discrimination. See e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Lazaro G. v. Dep't of Commerce, EEOC Appeal No. 0120170802 (May 17, 2019), req. for recon. den. EEOC Request No. 2019004115 (Sept. 17, 2019); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). In addition, Section 102 (a) of the Civil Rights Act of 1991, codified as 42 U.S.C. § 1981a, authorizes an award of compensatory damages as part of the "make whole" relief for intentional discrimination. Josephine S. v. U.S. Postal Serv., EEOC Appeal No. 0120151286 n.2 (May 2, 2017).

As an initial matter, we note that our appellate decision did not award back pay or front pay and Complainant did not file a request to reconsider our decision regarding those remedies. The Agency independently awarded Complainant back pay but determined that Complainant was not entitled to front pay. Since our appellate decision awarded neither, we can find no basis to disturb the Agency's decision in that regard.

#### *Compensatory Damages*

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq, or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 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 “make whole” relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 202 (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); Wilda M. v. Dep’t of Homeland Sec., EEOC Appeal No. 0120142660 (Dec. 2, 2016).

In a claim for compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, that she suffered harm that was caused by the Agency's discriminatory action; the extent, nature, and severity of the harm suffered; and the duration or expected duration of the harm. Pasquale D. v. Dep’t of Homeland Sec., EEOC Appeal No. 0120160892 (April 12, 2018); Archie G. v. Dep’t of Justice, EEOC Appeal No. 0120141305 (Nov. 30, 2016); Rivera v. Dep’t of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for recon. den’d EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, (Guidance on Damages) EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

### Pecuniary Damages

Pecuniary losses are out-of-pocket expenses that are incurred as a result of the employer's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. Guidance on Damages at 14. Both Complainant and her husband stated that she refused to seek medical treatment, be diagnosed, or take medications because she still held out hope that she could join the PHS and did not want to disqualify herself. Consequently, she did not incur any reimbursable out-of-pocket medical expenses or any other expenses that would qualify as pecuniary losses nor is she likely to in the future. We therefore agree with the Agency that Complainant had not suffered any pecuniary losses as a result of S1s negative reference.

### 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 at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep’t of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the Agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or “monstrously excessive” standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep’t of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

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

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

The Agency appears to have based its \$30,000 award on Complainant's emotional reactions to the negative reference from S1 that led to her application to the PHS being closed. By the Agency's own admission, it was that reference that short-circuited her application, which negatively affected her career prospects with the PHS and resulted in her experiencing prolonged emotional trauma. In written statements dated April 30, 2019 and June 20, 2019, Complainant described how emotionally devastated she was when she found out that her application to the PHS had been cancelled due to S1's negative reference. She stated that she had become depressed, had lost weight, had cried on a daily basis, and had locked herself in her bedroom for most of the day. In a letter dated May 3, 2019, Complainant's husband, who was also her pastor, stated that Complainant would cry every day, spend much of her time at home lying in bed with the doors closed, and looked as though she had "lost her purpose in life." He also stated that Complainant's emotional state took a toll on their family, especially their sons, who had a difficult time dealing with seeing their mother in a state of depression. In another letter dated May 3, 2019, Complainant's eldest son described how important being in the PHS was to her, and how devastated Complainant was when her application had been closed, how Complainant felt robbed, and how she had been completely reduced to tears. He described his mother as being "in a hole," and how she would cook dinner and retreat to her room without eating. Finally, in an undated letter, one of Complainant's colleagues described how Complainant was so upset at having lost her opportunity to join the PHS that she was unable to concentrate on her job and had to move to a different building in order to avoid being in close proximity to S1. We will now assess the adequacy of the Agency's nonpecuniary compensatory damages award of \$30,000 in light of our precedent.

In Angelo P. v. Dep't of Homeland Sec., EEOC Appeal No. 2020000286 (May 24, 2021), the agency found that the complainant had been discriminated against when several management officials, including his immediate supervisor, put out information that resulted in his nonselection for a regional director position and awarded him \$20,000 in nonpecuniary compensatory damages. The complainant provided statements from himself and his wife that he experienced depression, stress, anger, frustration, humiliation, sleep disturbance, migraine headaches, paranoia, suicidal ideations, social withdrawal, marital strife, and a decline in his family relationships. The complainant also stated that his symptoms were exacerbated by feelings of being "trapped" after the nonselection. The Commission found the Agency's award was insufficient and determined that an award of \$50,000 would be more appropriate. Similarly, in Ira P. v. Dep't of Transp., EEOC Appeal No. 0720180007 (Dec. 11, 2018), the Commission awarded \$65,000 in nonpecuniary compensatory damages for a retaliatory negative reference that resulted in the complainant fearing that his reputation was tarnished, withdrawal from his family, weight gain, depression, and sleeplessness as evidenced by testimonial along with medical evidence.

Turning to the instant case, we find that the testimonial evidence of the nature and extent of the harm suffered by Complainant as a result of S1's negative reference falls squarely within the parameters established by Commission precedent supporting an award of \$50,000. Complainant's own statements, together with those from her family members and her colleagues are more than sufficient to establish that because of the negative reference and the profound impact it had on her career, Complainant had gone into a prolonged depression, had lost weight, experienced near-constant crying fits, and had lost interest in her relationships, preferring to spend her days locked in her bedroom, alone. Complainant had suffered and apparently still continues to suffer severe emotional distress. Accordingly, we find that Complainant has established that she is entitled to \$50,000 in nonpecuniary compensatory damages.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we MODIFY the Agency's final decision as set forth in our order below.

### ORDER (D0617)

To the extent it has not already done so, the Agency is ordered to take the following remedial action:

1. Within 60 days of the date the decision is issued, the Agency shall pay Complainant \$50,000 in nonpecuniary 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). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

### 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 is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

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



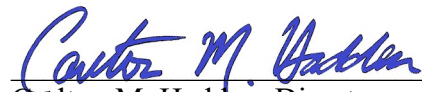
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

September 9, 2021  
Date