



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

[REDACTED]  
Charlie O.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs  
(Veterans Health Administration),  
Agency.

Appeal No. 2020003390

Hearing No. 430-2018-00212X

Agency No. 2004-0590-2017101871

**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 final order 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. For the following reasons, the Commission AFFIRMS the Agency's final order.

**ISSUE PRESENTED**

Whether substantial evidence in the record supports the EEOC Administrative Judge's award of \$15,000 for non-pecuniary compensatory damages.

**BACKGROUND**

During the period at issue, Complainant worked for the Agency as a Nurse II at the Agency's Medical Center in Hampton, Virginia. On March 10, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male) and race (African-

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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.

American) when, on February 13, 2017, Complainant was non-selected for a Nurse III position by the actions of the Nurse Executive of the Nurses Professional Standards Board (NPSB).<sup>2</sup>

Following the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on January 9, 2020 and issued a decision on February 11, 2020. The Agency subsequently issued a final order adopting the AJ's finding that Complainant proved that the Agency subjected him to discrimination as alleged.

The AJ specifically found that Complainant established a prima facie case of discrimination based on his race and sex. However, the AJ determined that the Agency failed to articulate a specific, clear, and individualized explanation for its decision not to promote him. The AJ noted that the only explanation the Responsible Management Official (RMO) provided was the bare assertion that Complainant did not meet the necessary qualifications for promotion, which did not satisfy the Agency's burden of production. The AJ observed, among other things, that the Board elected to promote Complainant to Nurse III, Step 9, but the RMO denied the promotion just days after she promoted a Caucasian female who was deemed ineligible for promotion. The AJ ultimately found that the Agency failed to overcome Complainant's prima facie case of discrimination, and Complainant therefore prevailed without having to prove pretext.

In addressing Complainant's entitlement to non-pecuniary compensatory damages, the AJ observed that Complainant testified that since the denial of his promotion and the attendant circumstances in February 2017, he had lost sleep and lost his appetite, resulting in a weight loss of around 15 pounds. The AJ further noted that Complainant testified that he was not the same jovial person and struggled with his family as a result of the stress from the discrimination. The AJ additionally considered Complainant's wife's testimony that Complainant became hurt, angry, depressed, and only slept about four hours per night due to his denied promotion. The AJ also considered Complainant's wife's testimony that Complainant became withdrawn from his family and experienced behavioral changes due to the discrimination. In considering the evidence in the record, the AJ found that Complainant was entitled to an award of \$15,000 in non-pecuniary compensatory damages. The AJ further ordered the Agency to Promote Complainant to Nurse III, Step 9, effective January 1, 2017, with all pay and benefits retroactive to that date. The AJ additionally ordered the Agency to determine the appropriate amount of back pay, interest, and other benefits due to Complainant, as well as provide Complainant with attorney's fees.

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<sup>2</sup> In Charlie O. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120171906 (July 26, 2017), we reversed the Agency's final decision dismissing Complainant's complaint for failure to state a claim.

### CONTENTIONS ON APPEAL

On appeal, Complainant, through his attorney, contends that the AJ erred in failing to award him a greater amount in non-pecuniary compensatory damages. Complainant maintains that he suffered demonstrable harm to his career and reputation as result of the discrimination he suffered herein. He asserts that he was made to work in a position where promotions were not made available to him, so he even took another position and relocated in order to obtain promotion. Complainant states that, as a result, he was uprooted and placed away from his family at a time when he was struggling with depression related to the cancelation of his promotion. Complainant maintains that he and his spouse both testified that he suffered considerable long-term distress as a result of his non-promotion, including behavioral changes, loss of sleep, and depression. Complainant contends that his case is slightly different than the usual non-selection case as he was already recommended for a promotion, which was ultimately blocked by the RMO. Complainant requests that the Commission increase the amount of non-pecuniary compensatory damages awarded to an amount in excess of \$100,000.

In response to the appeal, the Agency asks that the Commission dismiss the matter.

### STANDARD OF REVIEW

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

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

### ANALYSIS AND FINDINGS

#### *Non-Pecuniary Compensatory Damages*

Non-pecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, 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 to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice, or be “monstrously excessive” standing alone, but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from complainant concerning 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.

In the instant case, we find that the AJ's award of \$15,000 in non-pecuniary damages is supported by substantial evidence in the record. In awarding Complainant that amount, the AJ observed that Complainant experienced emotional harm as a result of the cancelation of his promotion, including loss of sleep, loss of appetite, depression, stress, and familial withdrawal. The AJ considered Complainant's and his wife's testimony that Complainant experienced behavioral changes as a result of the Agency's actions. See Queen L. v. Dep't of Agric., EEOC Appeal No. 0120160554 (Mar. 22, 2018) (complainant was found to have been discriminatorily demoted and was awarded \$15,000 in non-pecuniary, compensatory damages for depression, anxiety, chronic diarrhea, nausea, sleeplessness and night sweats); Wilda M. v. U.S. Postal Serv., EEOC Appeal No. 0120141087 (Jan. 12, 2017) (complainant was awarded \$15,000 in non-pecuniary, compensatory damages for crying spells, anxiety, exacerbated arthritis, and feeling depressed, isolated, and loss of her self-esteem); Kristy D. v. Dep't of the Interior, EEOC Appeal No. 0720160003 (Aug. 10, 2016) (the AJ awarded \$15,000 to an employee that had been discriminated against when she was given a compulsory reassignment that resulted in her suffering reputational harm and stress); and Complainant v. Dep't. of Justice, EEOC Appeal No. 0120142526 (July 26, 2016) (awarding \$15,000 in non-pecuniary damages to complainant who experienced humiliation in front of coworkers, anxiety attacks, sleep problems, withdrawal from family).

The record indicates that the Agency paid Complainant \$15,000 in non-pecuniary, compensatory damages, and therefore there is no need to order such payment.

However, there is no dispute that the Agency has not determined the appropriate amount of back pay, interest, and other benefits due to Complainant in accordance with the AJ's decision, which the Agency fully adopted in its final order. Therefore, as ordered below, we instruct the Agency to comply with the AJ's order with regard to Complainant's entitlement to back pay.<sup>3</sup>

In addition, while the AJ did not order the Agency to post a notice regarding the finding of discrimination, nor to conduct EEO training and consider discipline, the Commission nevertheless finds that such orders are required. The Agency is therefore directed to comply with the Posting Order as well as the orders to conduct EEO training and to consider disciplining the RMO, as ordered below.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order. However, we REMAND the matter and instruct the Agency to comply with the ORDERS below.

### ORDER

The Agency is ORDERED to take the following remedial actions, to the extent that it has not already done so, within ninety (90) days from the date of this decision is issued:

1. Promote Complainant to Nurse III, Step 9 effective January 1, 2017.
2. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant, pursuant to 29 C.F.R. § 114.501. The back pay period shall start on January 1, 2017, through the date Complainant is promoted to the Nurse III, Step 9 position. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within 90 calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled, "Implementation of the Commission's Decision."

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<sup>3</sup> On appeal, Complainant maintains that the Agency provided him with the \$15,000 in non-pecuniary compensatory damages and attorney's fees. But he asserts that the Agency has not complied with the AJ's order with regard to back pay. In response, the Agency does not dispute that it has not calculated Complainant's entitlement to back pay, as the AJ ordered.

3. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
4. The Agency shall provide eight hours of in-person or interactive training to the RMO<sup>4</sup> on the requirements of Title VII of the Civil Rights Act of 1964. The training shall be mandatory and conducted by a qualified trainer familiar with EEO instruction.
5. The Agency shall the Agency shall consider taking appropriate disciplinary action against the RMO. The Commission does not consider training to be disciplinary. 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 responsible management official has left the Agency's employ, the Agency shall furnish documentation of his departure date(s);

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Medical Center in Hampton, Virginia 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).

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<sup>4</sup> The name of the RMO is identified on page 70 of the Report of Investigation.

### 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).

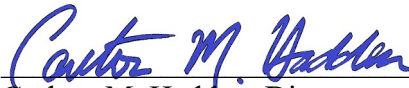
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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:



Carlton M. Hadden, Director  
Office of Federal Operations

September 2, 2021

Date