



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

[REDACTED]
Gwendolyn G.,¹
Complainant,

v.

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

Appeal No. 2021001396

Hearing No. 430-2018-00343X

Agency No. BOP-2017-0456

DECISION

Following its December 22, 2020, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of 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 REVERSES the Agency's final order.

ISSUES PRESENTED

The issues presented on appeal concern whether the AJ properly found that the Agency subjected Complainant to discrimination based on reprisal when management made inappropriate comments towards her and reassigned her to another facility.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Medical Officer (General Practice), GS-0602-15/10, at the Agency's Federal Correctional Complex (FCC) in Butner, North Carolina. She joined the Agency in 2012 and remain employed until her resignation on June 2, 2017.

The year prior to her resignation, Complainant filed an EEO complaint on July 14, 2016, alleging that the Agency discriminated against her on the bases of race (Black), national origin (Puerto Rico), religion (Islam), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when from January 2017 to April 24, 2017, she was subjected to a hostile work environment in the form of harsh supervision, denial of adequate staff assistance, daily intimidation, differential treatment, inappropriate schedule changes, and desecration of her religious practices.

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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing. Following discovery, the Agency filed a motion for a decision without a hearing, which Complainant timely opposed.

On February 7, 2020, the AJ assigned to the matter issued an order granting the Agency's motion with regard to the following allegations: harsh supervision/schedule changes; denial of adequate assistance; and desecration of religious practices. The AJ, however, denied the Agency's motion with respect to Complainant's claims of intimidation and differential treatment on the basis of reprisal. The AJ concluded that such matters should be resolved at a hearing and subsequently held a hearing on October 20-21, 2020, to resolve these matters. The AJ revised the accepted claim to reflect the following issue: whether Complainant was subjected to reprisal-based daily intimidation, differential treatment, and hostile work environment from January 2017 to June 2, 2017 (the date of her separation).

Following the hearing, the AJ issued a decision on November 18, 2020, which was partially in Complainant's favor. In this regard, the AJ found that Complainant had persuasively shown that she had been subjected to reprisal when management told her that she was "the problem" and "the one causing all of the drama" and that "problems always surround her." The AJ also found that Complainant had been subjected to reprisal when management reassigned her to the Federal Medical Center (FMC) after she complained about harassment. However, the AJ found no evidence of discrimination with regard to the following hostile work environment allegations: vandalization of Complainant's office; scrutiny of attendance; undermining of Complainant's orders/recommendations; sabotaging of career; threat assessment investigation; and derogatory conduct. To remedy the finding of unlawful retaliation, the AJ awarded Complainant nonpecuniary compensatory damages in the amount of \$10,000.00 and ordered the Agency to post notice of the finding of discrimination.

On December 22, 2020, the Agency issued a final order rejecting the AJ's finding of liability with regard to the reprisal claim on the grounds that there was no corroborating evidence that the comments found to be retaliatory were made precisely in the manner alleged. The Agency emphasized that Complainant's own statements suggested that the Warden's comments were not about Complainant's EEO activity, but rather about the "drama" caused by Complainant's behavior and performance deficiencies. Given this context, the Agency concluded that the AJ's finding of discrimination was improper.² In accordance with 29 C.F.R. § 1614.110(a), the Agency filed an appeal with the Commission simultaneously with its rejection of the AJ's decision. Complainant subsequently filed a separate Notice of Appeal/Petition, opposing the Agency's appeal.

CONTENTIONS ON APPEAL

On appeal, the Agency presents numerous arguments as to why the Commission should affirm its rejection of the AJ's finding of liability. While we certainly acknowledge the Agency's arguments, we note that the Agency filed its brief on Friday, January 15, 2021, approximately 24 days after filing its appeal on December 22, 2020. Under our regulations, any statement or brief on behalf of the Agency in support of its appeal must be submitted within 20 days of filing the notice of appeal. See 29 C.F.R. § 1614.403(g).³ As the Agency failed to provide any justification whatsoever for filing an untimely brief, we will not consider the Agency's contentions on appeal. See Destin v. Dep't of Homeland Sec., EEOC Appeal No. 07A00051 (Sept. 26, 2003) (declining to consider agency's untimely brief); see also Stan G. v. Soc. Sec. Admin., EEOC Appeal No. 2020004534 (May 19, 2021) at fn. 4 (declining to consider brief that was filed after the 20-day regulatory period).

Complainant opposes the Agency's appeal and requests that the Commission reverse the Agency's final order. She requests nonpecuniary compensatory damages in the amount of \$10,000.00 or more; however, she concedes that the AJ's award of \$10,000.00 "would make-whole relief in this case."

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. Nat'l Labor Relations Bd., 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.

² Notably, the Agency did not address the AJ's finding of discrimination with regard to Complainant's reassignment to the FMC.

³ We find that the Agency was fully aware of this regulation, as the Agency's final order transmittal letter to Complainant noted that, "Under EEOC Regulations, BOP will have 20 days from the day the appeal was filed to submit a brief in support of its position."

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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

ANALYSIS AND FINDINGS

Preliminary Matters – AJ's Finding of Reprisal Based on Reassignment

As the Agency's final order did not specifically accept or reject the AJ's finding of discrimination with regard to Complainant's reassignment to FMC and did not timely address that claim on appeal,⁴ we find that the Agency, by virtue of its inaction, accepted the AJ's finding of discrimination.⁵ See Riddick v. Dep't of Veterans Affairs, EEOC Appeal No. 0720110011 (Nov. 18, 2011) ("Based on the Agency's failure to address this matter [*i.e.*, AJ's finding of discrimination], pursuant to 29 C.F.R. § 1614.109(i), we rule that this finding of discrimination was accepted by the Agency as [part] of its final order."), req. for recons. den., EEOC Request No. 0520120196 (May 10, 2012).⁶

AJ's Finding of Reprisal Based on Inappropriate Comments

We turn now to the merits of Complainant's remaining reprisal claim. As a general matter, we note that the statutory anti-retaliation provisions prohibit any adverse treatment that is sufficient to dissuade a "reasonable person" from making or supporting a charge of discrimination. See Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). Although petty slights and trivial annoyances are not actionable, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. Id.

Given the importance of maintaining "unfettered access to [the] statutory remedial mechanisms" in the anti-retaliation provisions, we have found a broad range of actions to be retaliatory. For

⁴ While we are mindful that the Agency's final order concluded that Complainant was not entitled to remedial relief because the Agency "disagree[d] with all of the AJ's findings regarding liability," given that the Agency's final order solely addressed the retaliatory comments and is devoid of any analysis on Complainant's reassignment, we conclude that the Agency's disagreement relates solely to the retaliatory comments claim.

⁵ We note that the Agency's untimely appellate brief dated January 15, 2020, addressed the reassignment claim. However, as discussed above, we note that the Agency failed to appeal that claim within 40 days of the AJ's November 18, 2020 decision.

⁶ Given our decision, we find Complainant's contentions regarding this claim to be moot.

example, we have held that a supervisor threatening an employee by saying, “What goes around, comes around” when discussing an EEO complaint constitutes reprisal. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), req. for recons. den., EEOC Request No. 0520090654 (Dec. 16, 2010). We have also found reprisal when a supervisor accused a subordinate employee of lying to the EEO Office, as such accusations could “potentially chill an employee from participating in the EEO complaint process.” See Celine D. v. U.S. Postal Serv., EEOC Appeal No. 0120150178 (Mar. 2, 2017), req. for recons. den., EEOC Request No. 0520170258 (June 15, 2017).

Here, the AJ found that Complainant had persuasively shown that she had been subjected to reprisal when management told her that she was “the problem” and “the one causing all of the drama” and that “problems always surround her.” Having reviewed the record, we find that there is substantial evidence in the record to uphold the AJ’s decision. In reaching this conclusion, we are mindful that the Agency, in its final order, found that the record did not establish that the comments found to be retaliatory were made precisely in the manner alleged and that the AJ misunderstood the context of the communications between Complainant and the Warden; however, we note that the AJ carefully listened to Complainant’s hearing testimony and ultimately credited her version of events. We note that the Warden did not testify at the hearing, as he had retired from the Agency. As we find that a reasonable person could reasonably view the communications between Complainant and the Warden to be retaliatory (i.e., accusing Complainant of causing drama/problems and being dramatic), we shall defer to the AJ’s judgment. Accordingly, we shall reverse the Agency’s final order and reinstate the finding of discrimination.

Compensatory Damages

When discrimination is found, an agency must provide a remedy that constitutes full, make-whole relief to restore a complainant as nearly as possible to the position he or 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); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). To receive an award of compensatory damages, a complainant must demonstrate that he or she has been harmed by an agency’s discriminatory conduct; 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 recons. den., EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

Nonpecuniary damages 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).

Here, in awarding Complainant nonpecuniary compensatory damages, the AJ noted that Complainant testified that she felt humiliated by the Agency’s actions and felt that she was placed “in a very harmful” position when she was reassigned to the same building and floor as her prior supervisor whom she had previously complained about. Citing to Gaye A. v. Dep’t of Defense, EEOC Appeal No. 2019005924 (May 21, 2020) and Marybeth C. v. Dep’t of Def., EEOC Appeal No. 0120180749 (Aug. 20, 2019), the AJ determined that an award of \$5,000.00 was warranted for the retaliatory comments from the Warden. As for the retaliatory reassignment, the AJ relied on Mohammadi v. Dep’t of Veterans Affairs, EEOC Appeal No. 0720110019 (Nov. 15, 2011), where the Commission awarded the complainant \$7,000.00 based on complainant’s testimony that the reassignment felt like a punishment and experienced emotional distress as a result. The AJ ultimately determined that Complainant in this case was only entitled to \$5,000.00 in nonpecuniary compensatory damages for the retaliatory reassignment because “she provided no testimony on [the] physical manifestations of her emotional distress.” In total, the AJ awarded Complainant \$10,000.00 in nonpecuniary compensatory damages.

On appeal, Complainant agrees with the AJ’s award of \$10,000.00 in nonpecuniary compensatory damages and concedes that the award constitutes make-whole relief; however, she nevertheless requests damages of \$10,000.00 or more for the harm that she suffered.

Having reviewed the record, we find the AJ’s award of \$5,000.00 in nonpecuniary compensatory damages for the retaliatory comments and \$5,000.00 for the retaliatory reassignment to be consistent with our prior decisions in similar cases and not “monstrously excessive” given the facts in this case. See Ludie M. v. U.S. Postal Serv., EEOC Appeal No. 0120170459 (May 9, 2019) (affirming AJ’s award of \$4,500.00 in nonpecuniary compensatory damages for pain and suffering caused when complainant’s supervisor sent complainant a letter accusing her of bullying and intimidating management); Eleni M. v. Dep’t of Transp., EEOC Appeal No. 0720160021 (July 25, 2018) (affirming AJ’s award of \$5,000.00 in nonpecuniary compensatory damages where complainant had been subjected to reprisal); see also Mohammadi, supra (affirming AJ’s award of \$7,000.00 for retaliatory reassignment); and Brooks v. U.S. Postal Serv., EEOC Appeal No. 01996915 (October 12, 2001) (awarding complainant \$6,000 in nonpecuniary, compensatory damages for harm caused by the agency’s decision to discriminatorily reassign him based on race and reprisal, which caused complainant chronic depression, anger, aggravation of high blood pressure, and had adverse effects on his family life). In awarding Complainant a total of \$10,000.00 in nonpecuniary compensatory damages, we have taken into account the present-day value of our prior decisions; however, like the AJ, we have modified our award to reflect the limited evidence that is available before us regarding the extent

of harm that Complainant suffered. See Lara G. v. U.S. Postal Serv., EEOC Request No. 0520130618 (June 9, 2017).

In summary, we conclude that Complainant is entitled to \$10,000.00 in nonpecuniary compensatory damages.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final order and direct the Agency to comply with the ORDER below.

ORDER

Within **one hundred twenty (120) calendar days** from the date this decision is issued, the Agency shall:

1. Pay Complainant a total of \$10,000.00 in nonpecuniary compensatory damages, minus any payments already made;
2. The Agency shall provide eight hours of interactive EEO training to the Warden.⁷ The required training shall address the Warden's responsibilities with regard to eliminating discrimination in the workplace particularly regarding reprisal;
3. The Agency shall consider taking disciplinary action against the Warden for his role in making inappropriate comments about Complainant and reassigning Complainant to the FMC. The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Commission and specify what, if any, action was taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline; and
4. The Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

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 Butner Federal Correctional Complex facility, 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

⁷ The Warden is identified on page 120 of the ROI.

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).

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 (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

October 18, 2021

Date