



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

[REDACTED]
Miquel G.,¹
Complainant,

v.

Elaine L. Chao,
Secretary,
Department of Transportation
(Research and Innovative Technology Administration)²,
Agency.

Appeal No. 2019002129

Hearing No. 570-2015-00410X

Agency No. 2014-25727-RITA-02

DECISION

Following its March 11, 2019, 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ, including backpay, compensatory damages, and attorneys' fees. For the following reasons, the Commission REVERSES the Agency's final order.

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

² Pursuant to a departmental reorganization completed on January 17, 2014, the Research and Innovative Technology Administration (RITA) became the Office of the Assistant Secretary for Research and Technology.

ISSUES PRESENTED

Whether the AJ's findings and conclusions that the Agency subjected Complainant to ongoing acts of harassment because of his sex, age, and previous EEO activity, including a successful effort to thwart his bid for promotion and efforts to have him disciplined or fired, is supported by substantial evidence of record, along with an award for past pecuniary compensatory damages in the amount of \$154,607.49 and an award of future pecuniary/non-pecuniary compensatory damages in the amount of \$300,000, as well as attorney's fees.,

PROCEDURAL BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Air Safety Investigator-Instructor, GS-1815-14, at the Transportation Safety Institute (TSI) in Oklahoma City, Oklahoma. On August 24, 2014, Complainant filed an EEO complaint in which he alleged that the Agency had discriminated against him on the bases of sex (male), age (54), and in reprisal for prior protected EEO activity when on April 28, 2014, he learned that he was not selected for the position of Supervisory Transportation Specialist, advertised under Vacancy Announcement No. RITA.TSI-2014-0001.

The Agency investigated the complaint and thereafter provided Complainant with a copy of the investigative report (IR)³ and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing and the AJ assigned to the matter held a hearing between October 27 and 28, 2015. On December 17, 2018, the AJ issued a decision finding that Complainant proved that the Agency subjected him to discrimination as alleged and awarded Complainant compensatory damages and equitable remedies. On the issue of damages, the AJ held a separate hearing on August 22, 2018. The Agency subsequently issued a final order declining to implement the AJ's decision and filing the instant appeal.

FACTUAL BACKGROUND

The TSI is housed in the Mike Moroney Aeronautical Center in Oklahoma City, Oklahoma. Each program division within TSI was headed by a GS-15-level manager. Complainant was assigned to the Aviation Safety Division (ASD) along with two other male investigator-instructors over 50 (CW1 and CW2). All three men were course managers responsible for preparing and conducting training in aircraft accident investigations and aviation safety. All three were considered subject matter experts in these areas.

³ Other references to the record are as follows: Liability Hearing Transcript (LHT); Damages Hearing Transcript (DHT); Hearing Exhibit (HE); Damages Hearing Exhibit (DHE); [Complainant] – Exhibits and Pleadings (EP); and [Complainant] – CD25727 – EEOC (CD). Page numbers in the EP and CD documents are identified electronically in Adobe Acrobat Reader).

They were the only three male employees of the ASD. Female ASD employees included a Program Analyst (PA) and an Administrative Assistant (AA).

In late 2012 or early 2013, the previous ASD Manager had retired and was not immediately replaced. TSI had an acting director at the time, a female (RMO1) who would later be named in EEO complaints filed by CW1 and Complainant. At times, RMO1 served simultaneously as TSI Director and ASD Manager. At other times prior to 2014, Complainant, CW1 and CW2 all rotated into the ASD Manager position, with Complainant having served a six-month detail. In December 2012, the Acting ASD Division Manager was appointed to the position. According to Complainant, this individual had no aviation background at all. LHT 228, 431-32, 492. Complainant testified that while RMO1 was his immediate supervisor, she had given him performance appraisal ratings of either "Outstanding" or "Exceeding Expectations." LHT 284, 432-33. He also stated that he was recognized as a national resource, a highly reputable subject matter expert in his field. LHT 443-44, 450.

Complainant testified that in March 2013, while he, CW1 and CW2 were in South Africa conducting an accident investigation course, CW1 mentioned that he was being singled out by RMO1 and PA and was going to file an EEO complaint against RMO1. Complainant stated that he and CW2 were also being abused, but not quite as badly as CW1. DHT 48-49. Shortly after their return from the trip, CW1 had filed his EEO complaint in which he alleged that RMO1 fostered and promoted a hostile work environment characterized by bullying, age discrimination, and sex discrimination in which the women in the ASD, particularly RMO1, PA, and AA were pitted against the men. LHT 314. Complainant testified that because he had experienced the same harassment as CW1 over the previous two to three years, he was listed as a witness in CW1's complaint. IR 73-74; LHT 305, 315-16, 330, 462. He also testified that after CW1 had filed the complaint, things "really went south." DHT 48-49.

Complainant and CW1 averred that starting around Spring 2013, RMO1 actively discouraged them from seeking promotion to ASD Manager, telling them that they were too old to be managers and would be better off without the burdens of management, and that they and CW2 were well paid. IR 74-75; LHT 304, 461-62. CW1 stated that while RMO1 framed her statements to him in a lighthearted manner, she clearly conveyed a message of no promotion and no advancement. IR 125-26. According to CW1, PA and AA would, with the backing and encouragement of RMO1, make incessant demands that he, CW2 and Complainant buy them travel gifts, delay or deny their requests for travel-related reimbursement, and subtly remind them that their presence was barely tolerated. IR 126-29. CW1 averred that RMO1 and PA had been slandering the three of them, causing them to be viewed by people in the other TSI divisions as troublemakers, and that Complainant had suffered "grave retaliation" for supporting him. IR 127-28.

At some point in late-Spring or early-Summer 2013, Complainant, CW1 and CW2 first reported their situation to the Director of Office of Research, Development, and Technology (RMO2), who was based at the Agency's headquarters in Washington, D.C. LHT 13.

Complainant averred that as a result, RITA commissioned an organizational climate survey which was conducted at TSI throughout Summer 2013. IR 73-74; LHT 17, 232; 330-31, 473. The results of the survey were released on August 30, 2013. Those results revealed three areas of concern: trust in leadership; lack of communication; and fear of reprisal by management. IR 26-27, 73-74.

According to Complainant, information resulting from the climate survey and the investigation of CW1's EEO complaint was conveyed to RMO2, the Assistant Secretary for Research and Technology (ASRT) and RITA's Civil Rights Director. IR 74. In a letter addressed to RMO2 and ASRT dated October 24, 2013, Complainant reiterated his allegations regarding RMO1's and PA's hostility toward him, CW1 and CW2. He wrote that the situation had deteriorated to the point where he and CW2 had been looking for jobs outside the Agency, and that the three of them needed RMO2's help in resolving the situation because RMO1 and the previous ASD Manager were the source of the problem. IR 25. At the hearing, Complainant testified that the hostility and bullying by RMO1 did not start during the spring of 2013 but had been escalating for several years and was out of control by the time he wrote the October 24th letter. LHT 463. CW1 testified that he had sent a similar letter on October 22, 2013. LHT 312, 320.

Complainant testified that at around 10:00 a.m. on October 30, 2013, the prior acting ASD Manager convened an all-hands "emergency" meeting at which he started talking about conflict resolution, emotional intelligence, and communication, the same issues that the climate survey had unearthed. According to Complainant, RMO1, who appeared to be "ashen-faced" took over the meeting and repeated that "you guys," meaning himself, CW1 and CW2, made a lot of money and needed to "straighten up and get the job done." Complainant characterized RMO1's statement as an implied threat, meaning that they needed to put up with what was going on at TSI or there would be repercussions. LHT 481-82. CW1 testified that the purpose of the all-hands meeting was for RMO1 to publicly scold him, CW2 and Complainant for sending the October 24th letter to RMO2. LHT 309-11, 321, 325; HE B.

Complainant testified that on the morning of the following day, October 31, 2013, he, CW1 and CW2 were having a conversation in CW2's office about their anticipated meetings with RMO2, who would be arriving from Washington later that day. Complainant testified that during the meeting, he opened the door and observed RMO1 darting across the hallway, leading him to believe that she had been eavesdropping on their conversation and had learned about their meeting with RMO2. RMO1 had prepared a document entitled, "security statement," that she transmitted to the Civil Rights Director on November 5, 2013, in which she reported that she stood in the hall outside CW2's office and heard the three of them engaged in a conversation about her that was hostile in tone. RMO1 further stated that she heard her name being mentioned with such "hatred and evil" that she was taken aback, that they had stated that they had wanted to get rid of her, and that the volume of their conversation was increasing. LHT 234-39; 475-79; HE K.

Later that day, Complainant, CW1, and CW2 met with RMO2 and the Civil Rights Director, both individually and as a group. CW1 testified that RMO2 had expressed alarm over the climate survey results. LHT 332-34. He and Complainant further testified that during their meetings, they discussed the bullying, hostile environment, and discrimination with RMO2 and the Civil Rights Director, who had responded that they were investigating the EEO issues raised by Complainant in his October 24th letter. LHT 331-32, 468, 473. In the afternoon of October 31, 2013, RMO2 conducted another all-hands with TSI personnel in order to brief them on the results of the climate survey. LHT 332.

CW1 testified that shortly after these meetings, he withdrew his EEO complaint, but reinstated it on November 19, 2013, after determining that the relief from the hostile environment he and the others had been seeking would not be forthcoming. CW1 had asked for a 120-day detail out of TSI while the reinstated complaint was being investigated. Complainant was again named as a witness. LHT 306-07, 335-336.

Complainant testified that he met with RMO2 one-on-one for a second time on November 23, 2013 and for a third time on January 29, 2014. Complainant stated that he had prepared a second letter that served as the subject of their conversation. In that letter, he stated that the hostile work environment, bullying, and sex discrimination fostered by RMO1 and PA had gone from bad to worse. He reminded RMO2 that RMO1 had urged him to retire several years before. LHT 493-494. He testified that RMO1 and PA were telling the acting ASD Manager what to do in terms of how he treated him and CW2, succumbing to pressure by RMO1 to make life difficult for him and CW2. Complainant reiterated that he, CW1, and CW2 had no trust in TSI's leadership and that he and CW2 were being punished by RMO1 for the allegations that they brought to light through the organizational climate survey and CW1's EEO complaint. He further stated in the letter that RMO1 had accused CW2 of bringing a gun to work. He also inquired as to when the ASD Manager position would be posted for bid and whether he would be retaliated against if he tried to bid for the position. IR 32-33; LHT 483-84. He testified that RMO1 and the PA unilaterally added five to seven more courses to his and CW2's workload, knowing that the ASD would be short one instructor while CW1 was on detail. LHT 486-87. In addition, he testified that the accusations against CW2 regarding the firearm were baseless, as no gun was ever found. LHT 487-89. Finally, he testified that RMO2 assured him that he would get a "fair shake" if he applied for the ASD Manager position. LHT 492-93.

In early February, just before the ASD Manager vacancy opened, RMO2 was appointed TSI Director and relocated to its facility in Oklahoma. RMO1, who had been serving as acting TSI Director assumed a senior leadership position that, according to Complainant, did not entail any managerial oversight. IR 73-74.⁴ RMO2's first priority upon taking over the leadership of TSI was to permanently fill the ASD Manager vacancy. IR 74.

⁴ Although Complainant alleged that RMO1's management responsibilities were taken away from her because of her discriminatory conduct toward him, CW1, and CW2, RMO1 and RMO2 responded that she was merely vacating the Acting TSI Director position since RMO2 was the new permanent TSI Director. IR 74; LHT 231.

He appointed RMO1, the Highway Safety Division Manager, the Transit Safety and Security Division, and the FAA's Moroney Center HR Director to the panel that would review applications, conduct interviews, and recommend which candidates to select. IR 99; LHT 495.

Between February 4 and February 5, 2014, email correspondence took place between RMO1 and a Human Resources (HR) Specialist located at the Volpe facility. The correspondence concerned language to be added to the position description for the ASD Manager vacancy regarding the "ideal candidate." On February 4, the HR Specialist suggested adding the language, "previous experience collaborating with FAA Flight Standards would be helpful." RMO1 responded, "how about 'previous experience within the FAA Flight Standards Agency is preferred' – what do you think, since it is on the ideal candidate wish list?" On the morning of February 5, the HR Specialist responded that he would forward RMO1's suggestion. The HR Specialist acknowledged that the "previous experience within FAA preferred" language would constitute a higher standard than "collaboration with FAA helpful," and confirmed that the phrase "previous experience within the FAA Flight Standard Agency is preferred," was RMO1's suggested language for the ideal candidate statement of the ASD Manager vacancy announcement. LHT 53-55, 130-32, 134; HE D; CD, pp. 1108, 1111.

The vacancy opened on February 10, 2014 and remained open until February 24, 2014. The vacancy announcement described the core duties of the position as developing and delivering high-quality aircraft accident investigation and aviation safety training and educational programs and providing technical assistance to the public and private sector. The vacancy announcement specifically stated:

The *ideal candidate* is an experienced professional with expert knowledge of aviation safety and aircraft accident investigation and has the ability to manage a diverse workgroup. In addition, the ideal candidate has knowledge and skill in developing, planning, evaluating, and modifying training programs related to aviation safety, and is proficient in conducting aviation safety and accident investigations. *Previous experience within the FAA Flight Standards agency is preferred.* [Emphasis supplied.]

The announcement further specified that applicants had to have at least one year of specialized experience in providing oversight and technical expertise in the field of aircraft accident investigation and aviation safety; experience in applying technical, managerial, and administrative oversight in aviation, aircraft accident investigation and aviation safety. IR 133-34; LHT 56-57, 365-66.

Complainant and the Selectee both testified that there were two basic requirements to the position: subject matter expertise in aircraft accident investigation (AAI) and aviation safety (AS); and subject expertise in AAI and AS training for the FAA's aviation safety inspectors. IR 74; LHT 366. Among the application scoring criteria was an item identified as "technical 2" which was described as the ability to respond to inquiries from field inspectors, aircraft accident investigators and managers regarding aircraft accident investigation and aviation safety.

The evaluation standard specified three years or more of related experience, including performed duties as an FAA aviation safety inspector. LHT 134.

Complainant, CW1 and CW2 all applied for the position. The panel interviewed 11 candidates, including Complainant, CW2, and the eventual Selectee, an aviation safety inspector from the FAA. CW1 was not among those interviewed because he did not reach the minimum qualifying score of 50 points. Complainant had received a total combined score of 72.6. CS2 had a combined score of 71.25. The selectee had a combined score of 131.5. Complainant had 31 years of AAI and AS experience and almost 20 years of experience in AAI and AS training but was only ranked eighth by the panel. For this experience, the panel awarded Complainant only five points. The Selectee, on the other hand, had only two years and eight months of AAI and AS experience and only nine months of AAI and AS training, yet he was given the maximum score of twenty points for this experience. The Selectee had done 20 aircraft accident investigations whereas Complainant had done 300 field investigations and over 1,000 laboratory investigations. The sixth ranked candidate had zero years of experience in AAI and AS experience and training but was still ranked two spots ahead of Complainant. Of all the candidates, Complainant had the most experience in the two basic areas required by the position. Several of the panelists stated that when answering interview questions, Complainant tended to ramble on. IR 57-61, 72-74, 246-47, 249, 254, 257; LHT 441, 517-18, 520; HE F. A number of panel members also stated that the Selectee had experience in unmanned aerial systems, and that this experience had set him apart from the other candidates. However, unmanned aerial systems experience was not a requirement set forth in the job announcement. LHT 67-68.

After completing its review of the application packages and conducting interviews, the panel recommended the selectee and one other candidate. IR 269. On April 28, 2014, RMO2, who was the Selecting Official, notified Complainant that he had not been selected for the position. IR 76; LHT 495. Despite the fact that the Selectee had only two years and eight months of experience in aircraft accident investigations, the Selectee received 20 points from the panel while Complainant, who had 31 years of experience in aircraft accident investigations, received only five points. LHT 135-36. According to the HR Specialist who corresponded with RMO1 regarding the FAA selection criteria, prior to this particular selection, the mission statement of the position never included the requirement of FAA experience. LHT 124. As to training experience, the HR Specialist acknowledged that Complainant, CW1, and CW2 all had worked under RMO1 as course managers who were responsible for developing courses in aviation safety and aircraft accident investigations. LHT 125.

The HR Specialist pushed back on the notion that RMO1 had exerted undue influence on the other members of the recommendations panel. LHT 118. However, this official acknowledged that because TSI was located in an FAA facility, RMO2 could have used FAA senior subject matter experts to sit on the panel rather than RMO1. LHT 120. When the Selectee subsequently had to fill vacancies, he relied on FAA subject matter experts to sit on review panels. LHT 120-121, 407-08.

The Selectee became Complainant's new supervisor on May 19, 2014. LHT 523. Complainant averred that he had trained the Selectee in AAI when the Selectee was hired by the FAA in 2009 as an Aviation Safety Inspector. IR 77. The Selectee testified that he had attended courses in AAI given by Complainant and acknowledged Complainant's status as a subject matter expert in AAI and AAI training. He further testified that he had personally sought Complainant's recommendations on a particular case and that he considered Complainant to be his mentor and that he, the Selectee, would need to rely on Complainant due to his expertise in AAI and AS. IR 77; LHT 355-56, 520, 523. The Selectee considered Complainant's performance under his tenure to be outstanding and had put Complainant in for a performance award. IR 93; LHT 408-09.

Complainant averred that on October 2, 2014, the Selectee informed him that RMO1 had expressed the desire to "run him, CW1 and CW2 off." IR 76-77. The Selectee testified extensively, corroborating the testimony of Complainant and CW1 that a hostile environment existed between RMO1 and the male members of the ASD. He testified that he heard RMO1 and his predecessor, the former Acting ASD Manager say on several occasions that not only Complainant but all three male members of the ASD "needed to go." He stated that the motives of RMO1 and the former Acting ASD manager was to "get rid of" Complainant, CW1 and CW2. The Selectee described several incidents in which RMO1 pressured him to discipline or fire Complainant, or otherwise drive him out of the organization. IR 93; LHT 372-73, 375-77.

In one incident, Complainant had brought the Selectee a document that he had inadvertently signed and wanted it corrected. He asked PA, who ordinarily signs such documents to take care of the matter. But instead of doing so, PA berated Complainant and took the matter to RMO1, who called him and also berated Complainant in what the Selectee saw as an attempt by RMO1 to get Complainant into trouble. IR 93-94; LHT 377-78.

In another incident, Complainant informed the Selectee that one of the contract instructors had complained that he was not getting paid enough and was threatening to quit teaching. Complainant apprised the Selectee that losing that instructor would be detrimental to the ASD's training program. The Selectee brought the matter to PA, who was also the Division's Contract Officer Representative. PA pushed back, accusing Complainant and the contractor of conspiring to get more money and questioning the contractor's qualifications, which she was in no position to do. The Selectee did a market survey and determined that the contractor's claims were valid. He took the matter to RMO1, who was the acting ASD Director at the time. He testified that RMO1 sided with PA without taking an objective look at the situation and threatened him in a manner that prompted him to take the matter to RMO2, who remedied the situation right on the spot. IR 94; 379-381, 386-89.

In a third incident, Complainant, CW1 and CW2 had brought up issues about not being treated fairly when it came to working maxi-flex hours and accruing compensatory time and credit hours. The Selectee testified that he investigated the matter and found this to be true. He further testified that he remedied the situation by affording everyone in the division the same opportunities to attain these benefits, with the approval of RMO2.

He also stated that RMO1 threatened to overturn his decision in part because it involved an issue over which RMO1 and CW1 were having a conflict. IR 94-95; LHT 384, 393-95. In a fourth incident, the Selectee described how RMO1 would undertake detailed scrutiny of the time, attendance, and travel records of Complainant and CW1 in yet another attempt to get them into trouble. In a fifth incident, he testified that RMO1 was trying to get him to discipline Complainant for using his personal travel card on government business because Complainant had left his wallet at home. The Selectee characterized this as nothing more than a minor policy infraction. LHT 394-98. In addition to all this, there was testimony that RMO1 had initiated inspector general investigations against CW1 for his involvement with a professional society and, as previously noted, against CW2 for bringing a gun to work in what turned out to be a baseless charge. LHT 77-80, 82, 487-89.

The Selectee testified that he had never observed such favoritism that made it appear as if people were being set up to be pushed out the door. He testified that if one did not side with RMO1 and PA, the environment would become “very scary” for that person. He reiterated that the ASD was dysfunctional due to the animosity from RMO1 toward Complainant, CW1 and CW2. It had reached the point that all three were either looking for other jobs or considering retirement. IR 93-95-96; LHT 369, 74, 383. Complainant retired from the Agency on January 3, 2015. LHT 81; HE H. He attributed his decision to retire entirely to the actions of RMO1 and the acquiescence of RMO2. DHT 72-74.

The Selectee testified that RMO1 continually attempted to undermine his leadership by trying to force him into taking punitive action against Complainant. He stated RMO1 had threatened to have an Inspector General’s investigation launched against him, but that RMO2 intervened in his favor, reassuring him, “you don’t work for her.” LHT 383-384, 389-90. Nevertheless, the Selectee left TSI in 2017 and returned to FAA, citing RMO1 as the reason for his departure. The ASD Manager position was re-advertised and filled by CW1 on July 23, 2017. This time, RMO1 did not sit on the recommendation panel. LHT 89-90, 281, 302, 304, 343.

ADMINISTRATIVE JUDGE’S DECISION

Nonselection

The AJ concluded that Complainant presented sufficient evidence to establish that he was subjected to discrimination based on his age and prior protected EEO activity, but not his sex, when he was not selected for the Division Manager position on April 28, 2014. The record established that RMO1 harbored a bias against Complainant and two other older men who reported to her: Complainant, CW1 and CW2. Prior to the nonselection, Complainant, CW1 and CW2 lodged numerous specific and detailed allegations against RMO1, including one that was submitted to RMO2 12 days before the vacancy was announced. RMO1 therefore knew of Complainant’s prior EEO activity when he applied for and was not selected for the position. RMO1’s testimony to the contrary was not found credible.

The AJ further found that RMO1 had injected herself into the selection process and carefully guided the selection process to Complainant's detriment. Based on the interview notes and scores, the AJ concluded that the panel members jointly selected scores and that the interview process was problematic and unreliable. Despite RMO2's knowledge of Complainant's experience and the complaints against RMO1, RMO2 took no action to seriously and independently investigate the decision-making process of the selection panel to determine whether RMO1 tainted the selection and recommendation process, which were fraught with inconsistencies.

The AJ determined RMO2 failed to uphold his management responsibility to ensure a fair selection process by placing RMO1 on the panel and failing to investigate the integrity of the recommendation process. Complainant's qualifications were plainly superior to those of the Selectee. Complainant had performed over 300 field investigations and over 1000 laboratory investigations of aircraft accidents and was consulted for his expertise in aircraft accidents. The Selectee, by contrast, had only conducted 20 field investigation and zero laboratory investigations of aircraft accidents. The single most important mission of the Air Safety Division was to train other individuals and organizations on how to conduct aircraft accident investigations. The AJ concluded that Complainant was not selected for the position at issue because of his age and because he engaged in prior protected activities under both Title VII and the ADEA. The AJ pointed out that had RMO1 not been a part of the selection process, Complainant would have been chosen over the Selectee.

Harassment

The AJ ascertained that in Complainant's prehearing report, Complainant sought to include a hostile work environment claim. The claim was denied because Complainant had not filed a motion to amend. However, after the testimony was heard, the AJ more closely reviewed the formal EEO complaint, in which Complainant clearly stated and identified that he was also being subjected to a hostile work environment and discrimination. The AJ found that the same language was included in his EEO Counselor's Report. In its acceptance letter, the Agency appeared to address the incidents of harassment as background evidence. The AJ concluded, however, that Complainant's formal complaint had clearly put the Agency on notice that he had intended to bring forth a claim of harassment as well. The AJ vacated her previous ruling and proceeded to address Complainant's claim of a retaliatory hostile work environment. AJ Decision, p. 4.

Addressing Complainant's hostile work environment claim on the merits, the AJ concluded that Complainant was indeed subjected to retaliatory harassment by RMO1, pointing out that a nonselection was a tangible employment action for which employers are subject to vicarious liability for unlawful harassment by supervisors. In addition, the AJ concluded that Complainant was subjected to further acts of retaliatory harassment when, after he filed the instant EEO complaint under Title VII and the ADEA, RMO1 launched a campaign to get him, CW1, and CW2 fired. The AJ found that RMO1 unreasonably combed through Complainant's time and attendance and leave records trying to find errors.

The AJ further found that RMO1 continually pushed the Selectee to have Complainant disciplined or fired and that the Selectee made Complainant aware of what RMO1 was doing. The AJ concluded that the actions of RMO1 were so harmful as to dissuade a reasonable person from making or supporting a claim of discrimination, and in fact had made Complainant wish he had never filed his complaint. AJ Decision, p. 54.

The AJ ordered the Agency to award the following relief:

- Backpay with interest and all other appropriate benefits covering the period from May 18, 2014, the effective date of the job offer to the Selectee, to January 3, 2015, the effective date of Complainant's retirement.
- Non-pecuniary compensatory damages in the amount of \$290,000.
- Past pecuniary compensatory damages in the amount of \$154,607.49.
- Attorneys' fees and costs in the amount of \$56,230.00
- Provide at least eight hours of in-person training to all supervisors, managers, and senior leaders locating and working at TSI in Oklahoma City, with special emphasis to be placed upon retaliation.
- Consider taking disciplinary action against RMO1 and any other manager or senior employee involved in this action and report the results of its decision in its compliance report to the Commission.
- Post a notice at TSI offices in Oklahoma City, Oklahoma.

CONTENTIONS ON APPEAL

In its appeal, the Agency objects to the AJ's finding of retaliatory harassment on two grounds. First, Complainant never sought to amend his complaint. Second, the Agency was never put on notice either prior to, or at the hearing, that retaliatory harassment was part of the case. Appeal Brief, p. 27.

As to the nonselection, the Agency contends that Complainant was not subjected to discrimination. The Agency maintains that RMO1 was unaware of Complainant's complaints about her. As to the selection process itself, the other panel members testified that RMO1 did not say anything inappropriate regarding Complainant and did not otherwise attempt to improperly influence them in their assessment of the candidates' qualifications. The agency also raised arguments, *inter alia*, regarding the AJ's findings on credibility, the qualifications of the Selectee, and the make-up of the interviewing panel

On the issue of remedies, the Agency contends that Complainant had a pre-existing heart condition that the AJ failed to consider when deciding upon the sum of non-pecuniary compensatory damages to award. The Agency also contends that the non-pecuniary damages award of \$290,000 was excessive, and that, if discrimination was found, a more appropriate award would fall between \$15,000 and \$106,000. Appeal Brief, pp. 34-35.

ANALYSIS AND FINDINGS

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.

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), Chapt. 9, at § VI.B. (Aug. 5, 2015).

AJ’s Abuse of Discretion

In essence, the Agency is challenging the propriety of the AJ’s decision to accept and rule on a harassment claim at the close of testimony, after initially deciding to reject that claim on account of Complainant’s failure to file a motion to amend his complaint. To be successful in that challenge, the Agency must prove that the AJ failed to put it on notice that it would have to defend a hostile work environment claim and that doing so constitutes an abuse of discretion.

According to the report of an EEO Counselor dated August 4, 2014 the narrative section of the counseling report indicated that Complainant claimed that the Contract Officer Representative (COR) had been creating a hostile work environment for the division as retaliation for RMO1’s removal from her leadership position. IR 46.

In Section 15 of his formal EEO complaint dated August 24, 2014, the narrative in Part C of Section 15 stated, “over the course of the past 2-3 years, RMO1 had fostered and promoted a hostile work environment, bullying, sex discrimination (girls against the boys), and age discrimination.” IR 11-13.

In its acceptance of the formal complaint dated September 16, 2014, the Agency stated that, based on a thorough review of the complaint, the EEO Counselor's report and related documents, the Agency accepted for investigation the claim of whether Complainant was discriminated against based on sex, age, and previous EEO activity when, on April 28, 2014, he learned that he was not selected for the position of Supervisory Transportation Specialist.

According to the AJ, after she received the case, Complainant sought to include a harassment claim in his prehearing report dated July 6, 2017. AJ Decision, p. 4.

The AJ then went on to make extensive factual findings regarding harassment that followed the nonselection. Many of these findings were based upon the hearing testimony of the Selectee who, as previously noted, had become Complainant's first-line supervisor. Those findings are set forth in "Findings of Fact," ¶¶ 72-97, which can be found on pages 26 to 32 of the AJ's decision and set forth numerous instances of alleged harassing conduct that RMO1 tasked the Selectee to engage in.

The AJ clearly relied upon an extensive factual record documenting instances of RMO1 harassing Complainant by pressuring his supervisor to fire him. Although Complainant did not check the harassment boxes in the Counselor's report or the formal complaint, he made it clear in both documents, his affidavit, and his hearing testimony that he was referring to a pattern of harassment by RMO1 that began in Spring 2013, when he became a witness in CW1's EEO complaint and continued until he retired in January 2015.⁵ The AJ's referral to the nonselection as a "tangible employment action" reflects that the AJ considered that action as a part of the ongoing harassment, not separate from it. Contrary to the Agency's appeal contentions, we find the extensive documentation of Complainant's harassment claim more than sufficient to put the Agency on notice that it would have to defend against that claim.

The EEO investigator and the AJ share the responsibility for ensuring a complete factual record. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the complainant's group as compared with the treatment of other similarly situated employees, if any; and any policies and/or practices that may constitute or appear to constitute discrimination, *even though they have not been expressly cited by the complainant* [emphasis supplied]. EEO MD-110, Chapt. 6, § IV(C). The hearing completes the process of developing a full and appropriate record. *Id.* at Chapt. 7, § I.

⁵ Forced retirement or retirement under duress is the essence of constructive discharge. As the AJ correctly noted, however, constructive discharge is a discrete claim, meaning that Complainant would have had to raise it separately by either contacting an EEO counselor or by amending his complaint to include a constructive discharge allegation. Complainant did neither of those things, and as a result, we agree with the AJ that he cannot be awarded any remedies associated with constructive discharge, such as front pay or reinstatement retroactive to his retirement date. *See* AJ Decision, p. 33 n. 8.

Thus, the standard governing the investigative process carries over to the hearing, meaning that the AJ must undertake as thorough a review of all the circumstances under which the alleged discriminatory acts took place as that undertaken by the EEO investigator earlier in the process.

The AJ's decision to accept Complainant's harassment claim after initially denying it was grounded in an extensive evidentiary record of hostile conduct by RMO1 toward Complainant and others in his protected groups that RMO2 and other managers were clearly aware of, notwithstanding the Agency's assertions to the contrary. We therefore find that the AJ did not abuse her discretion in deciding to adjudicate Complainant's hostile work environment claim. The AJ merely carried out her responsibility to ensure that the evidentiary record in the case before her was thoroughly developed, even if Complainant did not expressly check the harassment boxes in the counselor's report or the formal complaint. It was clear that Complainant had been trying to raise a harassment claim right from the beginning. Accordingly, the Commission finds no abuse of discretion by the AJ regarding this matter.

Disparate Treatment

Upon careful review of the AJ's decision and the evidence of record, as well as the Agency's arguments on appeal, we conclude that substantial evidence of record supports the AJ's determination that Complainant has proven that he had been discriminated against on the bases of age and reprisal by the Agency when he was not promoted to the position of ASD Manager in the Spring of 2014. We therefore see no reason to disturb the AJ's findings and conclusions on the failure-to-promote claim.

Hostile Work Environment

To establish a claim of harassment Complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his statutorily protected classes; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

When asked why he believed that his age, sex, and participation in CW1's EEO complaint were factors in his nonselection and RMO1's subsequent efforts to get him fired, Complainant gave a number of reasons. First, he testified that RMO1 allowed PA and AA to bully him, CW1 and CW2 by withholding administrative support. Second, he testified that RMO1 attempted to justify the Selectee's selection on the basis of the Selectee's experience in unmanned aerial systems which was not a core requirement or otherwise mentioned in the vacancy announcement.

Third, he testified that the Selectee had revealed to him that RMO1 had expressed a desire to get rid of him, CW1, and CW2. Fourth, he testified that he, CW1 and CW2 had met with RMO2 and had sent him two letters documenting RMO1's conduct toward them. Fifth, he testified that RMO2 had put RMO1 on the selection panel knowing that RMO1 had harbored hostility toward him, CW1 and CW2, and that when he told the EEO Director that RMO2 had appointed RMO1 to the panel, the EEO Director advised him to go ahead and file a complaint and ask for a nonsupervisory GS-15 because RMO1 should not have been appointed to the panel. IR 77-84; LHT 521-24; DHT 51-66.

In her sworn statement dated November 3, 2014, and in her hearing testimony, RMO1 denied suggesting to Complainant that he retire because of his age. IR 99; LHT 228-29. She denied having subjected Complainant, CW1, and CW2 to a hostile work environment because of their age, sex, and prior EEO complaint from CW1. LHT 229-30, 247. She denied that CW1 had filed complaints against her but contradicted herself by admitting that CW1's EEO Complaint was against the Agency and that she was a witness. LHT 230-31, 254. RMO1 testified that she did not see the climate survey and that she could not recall the purpose of the survey. LHT 232, 242. Likewise, when asked about the all-hands meeting that she and the acting ASD Manager had convened on October 30, 2013, ostensibly in response to the results of that same climate survey, RMO1 again replied that she could not recall. LHT 232. But RMO1 was able to recall the all-hands meeting with RMO2 that was held on October 31, 2013, LHT 239. In addition, RMO1 denied knowing anything about CW1's reactivation of his EEO complaint against her on November 19, 2013. LHT 244.

As to the nonselection, when RMO1 was asked if she had weighted the interview questions heavily toward FAA experience, she replied that she did not recall. LHT 254. However, the email correspondence between her and the HR Specialist clearly establish that she had effectively added experience with the FAA as a primary selection criterion despite it not having been a requirement previously. RMO1 did this knowing full well that neither Complainant, CW1, or CW2 possessed that experience. RMO1 herself admitted that Complainant had more experience in the two subject matter areas required by the position than any other candidate. LHT 225, 227-28.

RMO1's statements that she could not recall the events that led to the filing of this complaint are riddled with inconsistencies. They also contradict the sworn statements given by the HR Specialist and the Selectee. We find that Complainant's affidavit and hearing testimony, together with the testimony of the HR Specialist, and the Selectee is more than sufficient to establish the existence of a discriminatory motivation on the part of RMO1.

The evidentiary record likewise establishes that RMO1 engaged in conduct so severe and pervasive that anyone in Complainant's position would have found that conduct to be abusive. Primarily, RMO1 sabotaged Complainant's bid for promotion to ASD Manager by inserting the unnecessary selection criteria of experience with the FAA into the position description knowing full well that Complainant lacked that particular experience.

Rather than question RMO1's moves, RMO2 acquiesced to both RMO1's self-insertion onto the selection panel and her addition of the FAA-experience selection criterion to the vacancy announcement. That FAA experience was never a legitimate requirement for the position is further supported by the fact that after the Selectee departed and the ASD Manager position once again left vacant, CW1 was selected for the position despite not having FAA experience and RMO1 was not on the selection panel.

Beyond thwarting Complainant's promotion, RMO1, either directly or through her female subordinates repeatedly berated Complainant for minor matters, tried to get Complainant into trouble, and tried to force the Selectee to discipline him. The severity and pervasiveness of RMO1's conduct is made apparent by Complainant's retirement which, as noted above, the Selectee tried to talk him out of without success.

An employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). When the conduct complained of results in a tangible employment action, such as a failure to promote, the Agency is strictly liable for harassment and no affirmative defense is available. Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 § IV (June 18, 1999). That is exactly what happened in this case. Starting in Spring 2013, RMO1 fostered an atmosphere of hostility between the sexes, with Complainant, CW1 and CW2 on one side being pitted against RMO1, the PA, and the AA on the other. This "battle of the sexes" was the motivation for RMO1 including herself on the review panel for the ASD Manager selection so that she could manipulate the selection criteria in order to ensure that none of the three men in the ASD would be selected as that division's manager. In view of RMO2 allowing RMO1 to serve on the panel knowing about the animosity between RMO1 and Complainant, and essentially letting the discriminatory nonselection happen, we agree with the AJ that the Agency is liable for the Spring 2014 nonpromotion as a tangible employment action on the bases of sex and reprisal against Complainant for having been a witness in CW1's previous EEO complaint against RMO1.

The harassment did not end there, however. RMO1, either directly or her female subordinates, continued to subject Complainant to a hostile work environment until he retired in January 2015. Where harassment by a supervisor creates an unlawful hostile environment, the Agency can raise an affirmative defense where the conduct complained of is not a tangible employment action by showing that it exercised reasonable care to prevent and correct promptly any harassment and that Complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Agency or to avoid harm otherwise. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994); Marielle L. v. Soc. Sec. Admin., EEOC Appeal No. 0120162299 (Mar. 29, 2018); Joel P. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120162383 (Mar. 5, 2018). The same is true for harassment by a coworker or other non-supervisor.

Whether the Agency's corrective action is appropriate depends upon "the severity and persistence of the harassment and the effectiveness of any initial remedial steps." Taylor v. Dep't of the Air Force, EEOC Appeal No. 05920194 (July 8, 1992); Owens v. Dep't of Transp., EEOC Appeal No. 0590824 (Sept. 5, 1996). Appropriate agency corrective action is that which is reasonably calculated to stop the harassment. Parker v. Dep't of the Navy, EEOC Appeal No. 0120100303 (Jul. 20, 2012).

The evidentiary record substantially supports the AJ's findings and conclusions that Complainant was indeed subjected to a hostile work environment. The problems began in March 2013 and worsened for Complainant, CW1 and CW2 after CW1 had initially filed his complaint against RMO1. RMO1 would encourage and back the PA and the AA when they would do things like deny or delay Complainant's CW1's and CW2's reimbursements for travel expenses. RMO1 used an all-hands meeting to publicly berate Complainant and the others for causing the climate survey to be initiated. RMO1's hostility toward Complainant only increased after the Selectee became Complainant's supervisor in May 2014, and much of the evidence corroborating Complainant's allegations came from the Selectee. We find particularly compelling the hearing testimony from the Selectee that RMO1 had openly expressed the desire to run "the three amigos," meaning Complainant, CW1, and CW2 out of TSI, that RMO1 had repeatedly tried to force the Selectee to discipline Complainant for minor infractions like using his personal travel card for government business when he forgot his wallet, that RMO1 kept looking through Complainant's time, attendance and travel records in order to find a justification for disciplining Complainant, and that RMO1 repeatedly took sides with PA and AA in their disputes with Complainant without even bothering to get Complainant's side of the story. We also note RMO1's attempts to disadvantage Complainant in the use of maxi-flex, compensatory time, and credit hours. According to Complainant, RMO1's conduct toward him over the previous two years was the reason he retired in January 2015 despite the Selectee's pleas for him to stay.

We also agree with the AJ that the record fails to support the Agency's attempt to invoke an affirmative defense with respect to RMO1's acts against Complainant before and after the nonselection that did not rise to the level of a tangible employment action. RMO2 had been made aware of the situation as far back as the Summer and Fall of 2013, when Complainant, CW1, and CW2 met with him, the Civil Rights Director and the ASRT. Discrimination aside, despite the fact that the climate survey identified RMO1 as the source of the dysfunctionality within the TSI, RMO2 allowed her to remain in a position where she could still create problems for the three male members of the ASD and undermine the Selectee's leadership of that division. Ultimately, the AJ was correct in finding that Complainant took advantage of every avenue available to try and resolve the problems, and that the Agency essentially did nothing after being made aware of situation in TSI. While the Agency disputes the AJ's findings and conclusions on the merits, it has not presented testimonial or documentary evidence sufficient to contradict those findings and conclusions or which cause us to question the AJ's credibility determinations regarding Complainant and the other witnesses who testified on his behalf. Ultimately, we find that the AJ's determination of the Agency's liability for a discriminatory hostile work environment against Complainant is supported by substantial evidence of record.

REMEDIES

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 this case, while Complainant request to be reinstated, and the AJ's decision does not address reinstatement, he may nevertheless be entitled to an offer of reinstatement or front pay as explained below. We will begin our discussion of equitable relief with Complainant's entitlement to backpay and all benefits associated therewith.

Backpay

Backpay shall include all forms of compensation and must reflect fluctuations in working time, overtime rates, penalty overtime, Sunday premium and night work, changing rate of pay, transfers, promotions, and privileges of employment to which Complainant would have been entitled but for the discrimination. Potter v. Dep't of Agric., EEOC Appeal No. 0720120029 (Sept. 10, 2013), req. for recon. den. EEOC Request No. 0520140083 (May 9, 2014). It must also include subsequent career-ladder promotions that a complainant likely would have received if she or he had been selected for the position in the first instance. See, e.g., Clay W. v. Dep't of the Army, EEOC Appeal No. 0120161031 (June 21, 2018) (noting that backpay determination should consider that complainant "would have received all step increases and all career ladder promotions to which a fully successful employee was entitled. In addition, it must include all benefits that otherwise would have accrued absent the discrimination, including, but not limited to, sick or annual leave, health insurance, Thrift Savings Plan and retirement contributions, awards, training, and step increases. Kelly A. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120171256 (March 19, 2019). And where appropriate, it must include enough to cover any additional tax liability that arose from receiving a lump-sum payment in a single tax year that put Complainant in a higher tax bracket for that year. Isabell G. v. Dep't of Justice, EEOC Petition No. 0420170026 (Dec. 8, 2017) & Israel F. v. Dep't of Homeland Security, EEOC Petition No. 0420120010 (Aug. 3, 2016) citing Emerson S. v. U. S. Postal Serv., EEOC Petition No. 0420130026 (Nov. 20, 2015).

In support of his claim for backpay, Complainant submits the salary tables from the website of the Office of Personnel Management for calendar years 2011 through 2014. EP, pp. 1334-63; AJ Decision, pp. 57-58. Complainant appears to be contending that he would have been promoted to GS-15 step 5 on April 28, 2011, and consequently would have been entitled to the difference between pay at GS-15 Step 5 and GS-14 Steps 7 and 8 between April 28, 2011 and April 28, 2014, an amount totaling \$41,923. EP, p. 1362; DHT 98-102. He also contends that he would have been entitled to an annual performance award during calendar years 2011-2014 in the amount of 2% of his base salary at GS-15 Step 5, for a total award of \$10,338 over those three years, for a gross backpay subtotal of \$52,261. EP, p. 1362.

In addition, Complainant stated that he would incur an additional tax liability of 27.5 % on a gross back pay award of \$52,261 or \$1,275 for three years for a total award of \$66,632. EP, p. 1362.

We disagree with Complainant's claim for backpay, as did the AJ, not as to Complainant's entitlement to backpay but rather as to the manner in which Complainant calculated his award, the time period for which he claims entitlement, and the amount of the claimed award. In the first place, the Selectee was offered the ASD Manager's job on May 18, 2014. That is the date upon which the backpay period begins, as the AJ correctly pointed out. AJ Decision, p. 56. The backpay period must end on January 3, 2015, the date that Complainant retired, because Complainant had not raised the issue of constructive discharge. See supra n.5. The AJ properly directed the Agency to calculate the amount of backpay owed beginning on that date and ending on January 3, 2015, the effective date of Complainant's retirement. Complainant would therefore have presumably been paid at grade GS-15 Step (5) from May 19, 2014 until January 3, 2015. Accordingly, Complainant's base backpay award will consist of the difference between what he would have been paid at GS-15 and what he was actually paid at GS-14. In accordance with our preceding discussion, Complainant would also be entitled to any step increases he might have received during that time frame as well as any accruing benefits such as sick leave, annual leave, health insurance, Thrift Savings Plan contributions, retirement contributions, and compensation for any tax liability that might arise from having received a lump-sum payment in a single tax year. With regard to Complainant's retirement contributions, the AJ found that Complainant's pension was \$25,000 per year less than it would have been had he remained employed as a GS-15 until his chosen retirement date. AJ Decision, p. 60. We will enter an order directing the Agency to calculate Complainant's backpay award and to address all of these elements as part of that award within 60 calendar days of the date this decision is issued.

Reinstatement

The AJ found that had Complainant been selected for the position of ASD Manager in May 2015, he would have worked for many more years as the Supervisory Transportation Specialist, "not because [he] was interested in increasing his pension, rather he would have done so because he loved his job." The AJ went on to describe how Complainant had a palpable passion for his work and was deeply committed to the mission of the Agency – making air travel for the public as safe as possible by providing quality training to aircraft accident investigators. AJ Decision, p. 59. This raises the question of whether Complainant could be entitled to an offer of reinstatement. Commission regulations provide that full relief includes an unconditional offer to an identified victim of discrimination of placement in the position the person would have occupied absent the discrimination or a substantially equivalent position. 29 C.F.R. § 1614.501(a)(3). A substantially equivalent position is one with compensation, promotional opportunities, job responsibilities, working conditions, and job status which are similar to the position discriminatorily lost. Hernandez v. Soc. Sec. Admin., EEOC Request No. 05A60218 (Dec. 29, 2005). citing Myers v. U.S. Postal Serv., EEOC Petition No. 04950028 (May 2, 1996) & Kerschner v. Dep't of Labor, EEOC Appeal No. 01933023 (March 15, 1994).

Due to the passage of time and for the health-related reasons discussed below in our analysis of Complainant's claim for compensatory damages, reinstatement is no longer a viable option

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. 212 (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 Security, EEOC Appeal No. 0120142660 (Dec. 2, 2016).

In a claim for compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, that he suffered harm as a result of 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); 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.

The size of a compensatory damages award will be governed by the severity and duration of the harm suffered and the documentation of both the harm and the causal connection to the Agency's acts of discrimination. In general, the more severe the harm, the longer its duration, the stronger its connection to the Agency's discriminatory acts, and the more thorough its documentation, the higher the award will be.

Harm

Complainant testified that he had been experiencing a hostile work environment starting in March 2013, continuing through his nonselection and ending when he retired in January 2015. DHT 47-51. He further testified that prior to 2013, he had been an avid runner, having participated ten marathons and fifteen half-marathons over the years. He also testified that he engaged in yardwork and other activities around the house requiring physical exertion DHT 96. When asked on cross-examination whether he had experienced any symptoms prior to October 2013. Complainant replied that he was asymptomatic, pointing out that he did not have high blood pressure prior to that time, and "did not even take aspirin." DHT 103-04.

Complainant testified that he began training for a half-marathon in May 2013 but began to experience shortness of breath and a rapid heartbeat, that he could not complete eight miles, and that he would have to stop and rest before finishing the course. Complainant visited his personal physician in October 2013, who referred him to a Cardiologist. IR 69-70. The cardiologist saw Complainant for an initial consultation on November 26, 2013. On December 5, 17, and 18, 2013, Complainant underwent electrocardiogram stress tests which required him to run on a treadmill. DHT 89-95. He described running on the treadmill as “almost killing him.” Complainant underwent a cardiac catheterization procedure and put on blood thinners on January 17, 2014. DHT 70-71. The Cardiologist noted in a follow-up report dated June 9, 2014, that Complainant was still experiencing work-related stress. DHT 79. Complainant testified that he had a heart attack while on his way to work on November 26, 2014. He was sent immediately to the emergency room and was ultimately diagnosed with coronary artery disease. DHT 67-69, 80-83. He has been under the Cardiologist’s care since. DHT 107-15.

Complainant testified that he experienced another cardiac event on January 10, 2017, two years after his retirement. He testified that he felt tightness in his chest and shortness of breath while moving furniture. He went to the hospital and had another catheterization procedure done the following day and that even after having the stents put in, he did not feel better. DHT 85-87, 116. He testified that the stress he had been experiencing since the discriminatory incidents “never went away,” and caused him “many sleepless nights.” DHT 98. He testified that since he retired, he was afraid to run or otherwise engage in any physical activity for fear that he might have another heart attack. DHT 75. Beyond his physical symptoms, Complainant testified that he was “a wreck” emotionally, that he lost interest in his family life to the point at snapping at his grandchildren, that he could no longer enjoy intimacy with his wife, and that he was “grumpy and lethargic” most of the time. DHT 75, 96-97.

Complainant also testified about the damage done to his reputation and his sense of self-worth. Prior to the harassment, he had been considered a “national resource” by the FAA due to his expertise in aircraft accident investigations and aviation safety. But afterwards, particularly after being passed over for promotion, he could no longer find work beyond intermittent consulting gigs. DHT 75, 89.

The Cardiologist testified extensively that he had been treating Complainant for heart disease since November 2013, that Complainant had experienced a serious coronary episode in November 2014, and that the stress Complainant had been experiencing at work was a significant factor in his condition. DHT 119-27. On cross-examination, the Cardiologist acknowledged Complainant’s family history of heart disease, but maintained that Complainant was asymptomatic prior to experiencing work-related stress starting in 2013. DHT 129-41. A note written by the Physician’s Assistant dated November 26, 2014 confirms that he had called the Cardiologist who “strongly suggested that Complainant go to the ER immediately.” DHE 1. The Cardiologist noted that he had seen Complainant on June 13, 2016, December 22, 2016, and January 10, 2017, and that the latter appointment concerned chest pains that Complainant had been experiencing after he tried to move some furniture. DHE 3.

In an assessment dated August 1, 2017, the Cardiologist noted, “cardiovascular disease, chronic combined systolic and diastolic congestive heart failure, hypertension, hyperlipidemia, and aortic root dilation.” The Cardiologist noted that as of Complainant’s last visit, he continued to experience lack of energy and stamina. DHE 3. In a letter dated February 6, 2018, the Cardiologist opined that the high level of stress associated with work played a major role in causing his chest pains which led to multiple medical visits. DHE 2.

Complainant’s spouse testified that Complainant would come home from work a “nervous wreck” and would often break down crying about what was going on at work. DHT 37-38. She also testified that Complainant became “really depressed,” that he suffered from insomnia and acid reflux, that he would often become grouchy and irritable, that he was unable to run marathons anymore, that he lost interest in his hobbies and outside interests, especially woodworking, and that they no longer had intimacy together as husband and wife. DHT 39-41. She also testified that Complainant frequently experienced shortness of breath and tightness in the chest and had continued to experience those symptoms, which she maintained were due entirely to Complainant’s work-related stress. DHT 41-45. In addition, she testified that Complainant had suffered from anxiety and depression in connection with the loss of his professional reputation. DHT 45-46. When asked if she believed that Complainant was physically, mentally, and emotionally the same person he was before early 2013, she replied, “no way.” DHT 46.

CW1 testified as to how what he characterized as RMO1’s “assaults” on the three investigators had taken a physical and emotional toll upon Complainant. He described how Complainant would have to leave work in the middle of the day to see a doctor about his heart condition. He testified that Complainant often became physically sick and had to quit running marathons. He also testified to Complainant’s ongoing anxiety about the loss of his professional reputation. DHT 20-27. CW2 testified that the work environment that he, CW1 and Complainant had experienced since early 2013 was a climate of fear and harassment, “the likes of which [he] had never seen before,” and that the three of them were being targeted by RMO1. DHT 31-32. He testified that Complainant’s physical appearance had deteriorated as a result of all the work-related stress that the three of them had been experiencing. DHT 32-34. Finally, the Physician’s Assistant from the Agency’s health clinic who had seen Complainant on November 26, 2014 testified that upon examining Complainant that day, he ordered him to go directly to the emergency room, and that he called Complainant’s cardiologist who authorized the trip to the ER. DHT 6, 10-14.

Taken together, the hearing testimony of Complainant, the testimony and medical documentation from the Cardiologist, and the testimony of Complainant’s spouse, CW1, CW2, and the Physician’s Assistant conclusively establishes that Complainant had suffered severe and extensive physical, psychological, and emotional harm which began in the Fall of 2013, continued for several years after his retirement, and will more likely than not continue into the future. The AJ’s findings on the issue of harm suffered by Complainant are thoroughly documented and entirely consistent with the evidentiary record. See AJ Decision, pp. 58-60.

Causation

The AJ found credible the Cardiologist's testimony that the stress suffered by Complainant in the workplace had caused his cardiovascular symptoms. AJ Decision, p. 60. Nevertheless, the Agency challenges the AJ's causation findings.

First, the Agency argues that Complainant's heart problems arose in the Fall of 2013, well before he learned that he was not selected for the position on April 28, 2014. Appeal Brief, p. 29. That is true. However, the nonselection was part of the harassment by RMO1 against Complainant, CW1, and CW2 which began during the Spring of 2013, well before Complainant's symptoms became apparent. There is no question that Complainant was asymptomatic before Spring 2013, when RMO1's bullying of himself, CW1 and CW2 at the hands of RMO1 had started. According to the Cardiologist, Complainant experienced multiple episodes of heart racing when he was in the midst of EEO dealings.

Second, the Agency contends that Complainant had a pre-existing heart condition, as evidenced by his family history of coronary artery disease. Appeal Brief, pp. 28-30. Complainant had testified on cross-examination that his father had died of a heart aneurysm at age 41 and that his mother had died of congestive heart failure at age 83. He further testified that his mother's entire cardiovascular system had been failing and that she had lung issues, but that she had no prior heart conditions that he could recall. In addition, Complainant stated that his parents' conditions were different than what he had and reiterated that he did not have any symptoms prior to 2013. DHT 104-07. The Agency characterizes this testimony as evidence of a pre-existing heart condition, but in doing so, it confuses that concept with genetic predisposition. There may be some evidence that Complainant and his parents share a genetic predisposition toward heart disease. However, not only was Complainant asymptomatic before the bullying started, but his condition was qualitatively distinct from those of his parents. There are no indications in the medical record that Complainant was ever at risk for an aneurysm. His mother lived well into her eighties, and the Agency did not present any evidence suggesting that her congestive heart failure resulted from conditions other than those associated with aging. While Complainant may have had a genetic predisposition toward either condition, there is no evidence tending to establish that he had a preexisting heart condition. The Agency therefore failed to refute the Cardiologist's testimony and the AJ's findings on the same.

Pecuniary Losses

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. For claims seeking pecuniary damages, such objective evidence should include documentation of out-of-pocket expenses for all actual costs and an explanation of the expense, e.g., medical and psychological billings, other costs associated with the injury caused by the agency's actions, and an explanation for the expenditure. *Id.* at 9. See e.g. Elsa S. v. Nat'l Aeronautics & Space Admin., EEOC Appeal No. 0720180021 (Feb. 14, 2020).

The agency is only responsible for those damages that are clearly shown to be caused by the agency's discriminatory conduct. Timothy M. v. Dep't of the Navy, EEOC Appeal No. 2019001562 (Feb. 4, 2020).

Past Pecuniary Losses

The Agency provided a chart tabulating all of Complainant's medical expenses that were incurred between November 4, 2013 and June 25, 2018. These expenses, which include medications; diagnostic procedures, and medical consultations, totaled \$154,607.49. Complainant's health insurance provider covered \$75,906.23 of those expenses, and Complainant contributed copays in the amount of \$5,149.15. EP, pp. 1069-72. The AJ awarded Complainant the entire amount of \$154,607.49 for pecuniary losses that he incurred as a result of being subjected to discriminatory harassment between March 2013 and his retirement in January 2015. AJ Decision, pp. 63-64. The Agency contends that the award should have been offset by the insurance provider's payments.

We find that the AJ correctly applied the collateral source rule in finding that neither the plan coverage nor the copay amounts could be used to reduce the award for past pecuniary losses. AJ Decision, pp. 62-63. The collateral source rule holds that the Agency was required to reimburse Complainant for all of his out-of-pocket medical expenses, regardless of whether some or all of those expenses were paid by his health insurance provider or some other third party. Shameka M. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120172281 (April 4, 2019) (a federal Agency is required to pay a Complainant's medical bills without regard to whether health insurance paid for any part of the medical bills) citing Clark v. Dep't of Veterans Affairs, EEOC Appeal No. 0120092454 (Dec. 20, 2010). Accordingly, we will issue an order directing the Agency to award Complainant \$154,607.49 for past pecuniary losses.

Future Pecuniary Losses

Future pecuniary losses are losses that are likely to occur after the final resolution of an EEO complaint. Guidance on Damages, supra at 9. Such losses typically consist of medical expenses likely to be incurred after final adjudication or settlement. Id. But they may also include losses resulting from diminished earning capacity. If Complainant is able to show that the injuries he suffered as a result of the Agency's discriminatory conduct had narrowed the range of economic opportunities available to him, he would be entitled to receive future pecuniary damages to compensate him for his loss in future earning capacity. Moore v. U.S. Postal Serv., EEOC Appeal No. 0720050084 (March 6, 2007); Kuepfer, supra, Carmina E., supra.

Complainant testified that he had completed 31 years and 9 months of federal service when he retired, and that had he gotten the ASD Management position he would have continued to work, estimating that he would have completed over 37 years of service. From the extensive medical evidence, it appears that Complainant cannot endure the rigors of conducting aircraft accident investigations or engage in any other activity that requires substantial physical exertion, such as conducting training and field investigations. DHT 98-102.

We therefore find that Complainant's heart condition makes it highly unlikely that he will ever be able to resume his former employment as an aviation accident investigator and aviation safety instructor. Had Complainant not been subjected to a hostile work environment and had he been selected for the ASD Manager position, he would likely have continued to earn a salary and remain in relatively good health. We will therefore enter an order directing the Agency to award Complainant a sum to compensate him for the diminishment in his earning capacity caused by the conduct of RMO1 between March 2013 and January 2015, subject to the \$300,000 statutory limit for future pecuniary and non-pecuniary compensatory damages awards. Kuepfer, supra.

Non-Pecuniary Losses

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 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.

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 his 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.

As noted above, the record contains extensive documentation regarding the nature, severity and permanent duration of the harm suffered by Complainant, the strength of the causal connection between that harm and RMO1's conduct, and the documentation of that harm by the testimony of himself, his wife, the Cardiologist, CW1, CW2 and the Physician's Assistant as well as the various medical notes included among the hearing exhibits. The AJ awarded Complainant \$290,000 in non-pecuniary compensatory damages on the basis of these determinations. AJ Decision, p. 66. The Agency argues, however, that the \$290,000 award was excessive and should be reduced to around \$100,000 if the finding of discrimination is upheld. Appeal Brief. p. 31. We will now assess whether the size of the award is consistent with awards made in cases that present similar factual circumstances with respect to harm and causation.

In Taunya P. v. U.S. Postal Serv., EEOC Appeal No. 0720180022 (Sept. 27, 2019), the Commission upheld and AJ's non-pecuniary damages award of \$250,000. The AJ assigned to that case found that the agency had subjected the employee to a hostile work environment, failed to reasonably accommodate her disability, and failed to honor her work restrictions. Complainant showed that as a result of the agency's discriminatory acts, she suffered nerve damage and exacerbated pain in her back and legs so severe that she did not respond to pain-killing medications. The employee's doctor testified the agency's failure to accommodate her disability resulted in an accident that ultimately rendered her incapable of carrying a pregnancy to term. Since that injury, the employee had continued to suffer pain, spasms, numbness, tingling, burning sensations and urinary difficulties. See also,

Geraldine B. v. Dep't of Agric., EEOC Appeal No. 0720180025 (June 5, 2019) (upheld AJ award of \$250,000 where discrimination caused, the employee to suffer a severe setback in her mental and emotional health and major depression, reputational damage, exacerbation of PTSD);

Augustine S. v. Dep't of Homeland Security, EEOC Appeal No. 0720110018 (October 22, 2015) (the Commission based an award of \$250,000 on the AJ's finding that the employee had suffered psychological as well as physical harm due to the agency's ten-year-long failure to reasonably accommodate his disability, which caused depression, continuous physical pain

We may consider the present-day value of older comparable awards, taking into consideration the age of the comparable awards and adjusting the current award accordingly. Lara G. v. U.S. Postal Serv., EEOC Request No. 0520130618 (June 9, 2017). The Agency agreed with and endorsed this approach, noting that an award in the amount of \$75,000 in 2001 would be worth \$106,000 in 2018, when the AJ's decision was issued. Appeal Brief, p. 35. Using the CPI Inflation Calculator,⁶ we find that the \$250,000 award from February 2001 would be equivalent to \$356,294 today.

After reviewing this extensive evidentiary record in light of Commission precedent, we are persuaded that Complainant is entitled to the maximum statutory award of \$300,000, which includes compensation for his future pecuniary losses as well as for his non-pecuniary losses.

⁶ The CPI Inflation Calculator can be found at <https://data.bls.gov/cgi-bin/cpicalc.pl>.

Attorneys' Fees

By federal regulation, the Agency is required to award attorney's fees for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 29 C.F.R. § 1614.501(e)(1)(ii). To determine the proper amount of the fee, a lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983). The circumstances under which the lodestar may be adjusted are extremely limited and are set forth in EEO Management Directive 110. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 at 11-13 (EEO MD-110) (Aug. 15, 2015). In this case, the AJ authorized an attorneys' fees award in the amount of \$56,230. AJ Decision, pp. 64-66. Neither party raised an objection or otherwise contested this finding on appeal or in response thereto. Accordingly, we will award Complainant's counsel \$56,230 in attorneys' fees and costs.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we REVERSE the Agency's final order and REMAND for corrective action in accordance with our order below.

ORDER (D0617)

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

1. The Agency shall determine the appropriate amount of backpay and all other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than 60 calendar days from the date this decision was issued. The Complainant shall cooperate in the Agency's efforts to compute the amount of backpay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of backpay and/or benefits, the Agency shall make payment to the Complainant via check or direct deposit for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The 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."
2. Within 60 calendar days of the date this decision is issued, the Agency shall award Complainant compensatory damages in the amount of \$454,607.49, of which \$154,607.49 shall constitute an award for past pecuniary losses and the remaining \$300,000 shall constitute an award for future pecuniary losses and non-pecuniary losses.
3. Within 60 calendar days of the date this decision is issued, the Agency is ordered to provide eight hours of in-person or interactive training to the officials in the Transportation Safety Institute identified in the decision as RMO1 and RMO2. The

required training shall cover that official's responsibilities under Title VII of the Civil Rights Act, particularly her responsibility to maintain a workplace free of harassment of any employee. If these officials are no longer employed, the Agency shall provide documentation of their departure dates.

4. The Agency shall consider taking disciplinary action against the official identified as RMO1 to the extent that this individual is still employed by the Agency. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline.

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 backpay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at the Transportation Safety Institute (TSI) 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).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), 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 in the amount of \$56,230 within thirty (30) calendar days of the date this decision is issued. Should Complainant or his attorney claim entitlement to additional fees beyond those already authorized by this decision, 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 the date this decision was issued. The Agency shall then process the new 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](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).

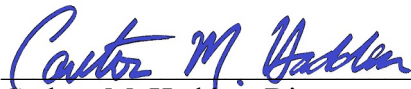
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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 23, 2021

Date