



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

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

v.

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

Appeal No. 2020003815

Hearing No. 430-2017-00292X

Agency No. 2004-0659-2016103957

**DECISION**

On June 3, 2020, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 4, 2020 final order concerning an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

**BACKGROUND**

During the period at issue, Complainant worked as a Federal Police Officer, Grade GS-6, at the Agency's medical facilities in North Carolina. Beginning in November 2013, pending formal training at the Agency's police academy, Complainant was a probationary police officer candidate at the medical center in Asheville, North Carolina. After Complainant graduated from the police academy in September 2014, Complainant was assigned to the Agency's medical center in Salisbury as a sworn Agency police officer. Beginning in February 2016, the Complainant worked in the Agency's newly-constructed Kernersville Health Care Center which was a satellite facility under the Salisbury Medical Center.

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

On June 16, 2016, Complainant contacted an EEO counselor regarding various matters he claimed to be discriminatory. The parties were unable to reach an informal resolution. On September 7, 2016, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him because of his disabilities<sup>2</sup> and/or reprisal for prior EEO protected activities when:

1. On November 6, 2015, a co-worker who was also a police officer, spread a false rumor that Complainant had been removed from being a purchase card holder;
2. On February 18, 2016, Complainant's direct supervisor at Kernersville, who was police lieutenant (LT), told Complainant in a threatening manner that he didn't want to be accused of having a negligent discharge;<sup>3</sup>
3. On February 18, 2016, Complainant overheard LT call him a "punk-ass" to a mailman;
4. On February 18, 2016, LT humiliated Complainant when LT yelled: "What the fuck are they (Kernersville Police Department) doing here?";
5. On February 18, 2016, LT issued Complainant a verbal counseling for making a judgment error and called him a professional embarrassment to the VA Police;
6. On March 1, 2, 21 and June 9, 2016, Complainant made management aware he noticed a hidden surveillance camera over his desk recording him as he conducted his work;
7. On March 23, 2016, LT insinuated Complainant was not being a team player when Complainant met with his union representative;
8. On May 1, 2016, the Salisbury deputy police chief (Deputy) denied Complainant's request to attend the Prevention and Management of Disruptive Behavior (PMDB) Train-the-Trainer session;
9. On May 10, 2016, management denied Complainant the opportunity to serve in a volunteer position assisting the Training Sergeant;
10. On June 15, 2016, the police chief (Salisbury Chief), denied Complainant's request to attend the PMDB Training, although LT had approved the request;

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<sup>2</sup> Complainant testified that he suffered a traumatic brain injury in 2006 or 2007, which resulted in chronic migraines and tinnitus. He also indicated he had neuropathy in both legs, as well as Post Traumatic Stress Disorder (PTSD).

<sup>3</sup> During the hearing, Complainant articulated that he interpreted these words a veiled threat from the LT that LT intended to shoot Complainant.

11. In September 2016, the Salisbury Chief directed Complainant's supervisor (at that time) to mark Complainant Absent Without Leave (AWOL);
12. On October 5, 2016, the Salisbury Chief ticketed Complainant's privately-owned vehicle while ignoring other vehicles that were illegally parked; and
13. On October 28, 2016, the Salisbury Chief interfered with a job offer for Complainant [as a police officer at the Agency's medical center in Durham] by stating Complainant lacked integrity and that Complainant's training was not up to date.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing beginning on February 5, 2020.

On March 23, 2020 the AJ issued a decision finding that even assuming Complainant had a disability under the Rehabilitation Act (or that his managers regarded him as having a disability), there was no evidence whatsoever of a connection between his medical conditions and his allegations of discrimination. The AJ also determined that Claims 1 through 7 described untimely discrete acts and concluded that there was no evidence of a retaliatory motivation regarding Claims 8 - 12.

However, regarding Claim 13, the AJ found evidence of unlawful retaliatory motivation concerning the negative job reference. The AJ determined that the proffered reasons for providing Complainant the negative reference were pretextual. The AJ concluded that the Agency was liable for unlawful retaliation when the Salisbury Chief gave Complainant the negative reference on October 28, 2016. The AJ noted Complainant's prior history of EEO-protected activities up to seven weeks before the negative reference, when Complainant filed his formal EEO complaint in the present case.

On May 4, 2020, the Agency issued a final order accepting the AJ's finding and remedial awards.

Through legal counsel, Complainant had sought \$300,000 in damages and \$21,881.09 in attorney fees. Instead, the AJ awarded Complainant \$15,000 in compensatory damages and \$4,907.77 in attorney fees. The AJ clarified that compensatory damages were limited Complainant's rescinded job offer in Ashville as specified in Claim 13. Based on EEOC decisions that had heard similar testimony, the AJ reasoned that \$15,000 was an appropriate compensatory damages award.

The instant appeal followed. On appeal, Complainant's Counsel contends that the AJ's compensatory damages award should be increased. Counsel asserted that \$15,000 was insufficient because testimony from Complainant and his wife showed Complainant had suffered more than just loss of the prospective position in Durham. Counsel emphasized both the severity

of the reprisal and the harm that it caused Complainant. Counsel stated the Agency had wrongfully impugned Complainant's integrity and devastated his reputation as a law enforcement professional. Counsel characterized the retaliatory negative reference as extreme, because Agency management willfully damaged Complainant's career. Counsel argues that, the Agency told Complainant that he had been tentatively selected for the opportunity in Durham and even had told family and made plans around this expectation before the selection decision was revoked. Counsel stated the AJ had not fully accounted for the level of Complainant's emotional trauma as demonstrated by testimonial evidence from the hearing. Counsel cited prior decisions dated from the late 1990s to the present, where the Commission had awarded compensatory damages of \$125,000, \$105,000 and \$30,000.

### ANALYSIS AND FINDINGS

As an initial matter, we find the Agency's equivocation in its response to Complainant's appeal perplexing. The Agency's final order has already fully implemented the AJ's decision and even contained a statement that the AJ's findings were supported by substantial evidence. The Agency's final order also concurred with the AJ's compensatory damages award and accepted it. However, now in its response to Complainant's appeal, the Agency asks this Commission to reverse the AJ's finding of unlawful retaliation on Complainant's Claim 13. We must reject the Agency's appellate position. The Agency no longer has standing to challenge the AJ's decision once it has issued its final order accepting the decision and failed to file an appeal of its own pursuant to 29 C.F.R. § 1614.110(a). Therefore, the sole issue on appeal is Complainant's challenge to the AJ's compensatory damages award.

When discrimination is found, the Agency must provide Complainant with a remedy that constitutes full, make-whole relief to restore him as nearly as possible to the position he would have occupied but for the discrimination. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). In accordance with Section 102(a) of the Civil Rights Act of 1991, Complainant 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 equitable relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Commission has authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit for compensatory damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

To receive an award of compensatory damages, Complainant must have been harmed as a result of the Agency's discriminatory action. EEOC may consider the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsideration denied, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-14. In determining damages, the Commission also applies the general principle that "a tortfeasor takes its victims as it finds them."

Nevertheless, if Complainant has a preexisting condition, then the Agency is only liable for additional harm or aggravation caused by the discrimination. Wallis v. U.S. Postal Serv., EEOC Appeal No. 01950510 (Nov. 13, 1995)

Compensatory damages may be awarded for the past pecuniary losses, future pecuniary losses, and non-pecuniary losses which are directly or proximately caused by the agency's discriminatory conduct. EEOC Notice No. 915.002 at 8. 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 nonpecuniary losses that are incurred as a result of the discriminatory conduct. Statements from others, including spouses, 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. Evidence from a health care provider or other expert is not a prerequisite for recovery of compensatory damages for emotional harm. Complainant's own testimony, along with the circumstances of the case, may suffice to sustain his burden. The more inherently degrading or humiliating the discriminatory action is, the more reasonable it is to infer Complainant would suffer humiliation or distress from that action. Absence of supporting evidence, however, may reduce the amount of compensatory damages that are appropriate. Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996).

The AJ found that medical evidence Complainant presented was mainly related to other harassment claims and not to retaliation in Claim 13. Accordingly, he only considered Complainant's psychological diagnoses as background evidence. During the hearing, Complainant's spouse testified that Durham was a more desirable location because they had close family there. Complainant and his family had made plans to move to Durham. They had expected Complainant would enjoy a better work environment in Durham. Complainant's spouse testified that, after Complainant received the Agency letter revoking selection for the position in Durham, Complainant felt helpless. The witness described Complainant as trapped by management's thwarting in his efforts to improve his employment situation. Following the rescinded selection, she stated that Complainant felt he had no future with the Agency or in law enforcement. She stated the Agency's notification was especially hurtful because it implied that Complainant was ineligible to work as a police officer. In reality, the AJ clarified that the Complainant did not lose his police qualification, rather he was administratively detailed to logistics so that the Agency could investigate hostility in his police work environment. The Salisbury Chief had purposely created this false perception regarding Complainant's employment status.

The record revealed that having the employment opportunity taken away had a profoundly harsh impact on Complainant. The rescission letter was worded in a manner that suggested that Complainant lacked training, experience and integrity necessary to continue in his career as an Agency police officer. Understandably, Complainant believed he was a victim of character assassination. Complainant testified he lost his identity.

Complainant stated it was stressful to inform his parents that he had lost the job in Durham. Complainant had years of military police experience and, on his own initiative, had obtained specialized training certifications relevant to law enforcement. As a result of the Agency's retaliation, Complainant no longer works for the Agency and no longer serves as a police officer.

Here, it appears the Salisbury Chief's negative reference was deceptive, vindictive and unnecessary. While it was reasonable for the Salisbury Chief to resent being named the subject of an investigation, he retaliated by disparaging Complainant to the Durham police chief. For the period ending in September 30, 2016, Complainant had earned an overall "Fully Successful" performance rating as a sworn police officer. At the time of negative reference in October 2016, Complainant's formal EEO complaint was pending. It would have been appropriate for the Salisbury Chief to respond to the Durham police chief by giving a neutral reference or not respond or consult human resources expertise or refer the matter to the Agency's regional legal counsel. In any event, we find, as did the AJ, that when the Durham police chief asked about Complainant, the Salisbury Chief gave answers that were disproportionately negative.

The Chief's act of unlawful retaliation resulted in the intentional infliction of emotional distress upon Complainant. We now turn to recent precedents in order to assess the adequacy of the compensatory damages award of \$15,000. We will focus on recent EEOC decisions where negative references were evidenced to have caused psychological harm attributable to the loss of an important employment opportunity.

In Ira P. v. U.S. Postal Serv., EEOC Appeal No. 0720180007 (Dec. 11, 2018), a retaliating supervisor gave a negative reference that had overstated one tardiness incident while grossly understating complainant's expertise. The complainant was non-selected which resulted in documented psychiatric damage to the complainant. After a hearing devoted on damages, the AJ awarded \$65,000 in non-pecuniary compensatory. This Commission rejected the Agency's appeal and upheld the AJ's award.

In Angelo P. v. Dep't of Homeland Sec., EEOC Appeal No. 2020000286 (May 24, 2021), the agency had issued a decision finding itself liable for discrimination based on reprisal when a manager gave negative feedback about a complainant that convinced selection officials not to hire the complainant. The agency's final decision had originally awarded \$20,000 in nonpecuniary compensatory damages. The complainant appealed that award as insufficient. EEOC increased compensatory damages to \$50,000 because the retaliatory non-selection had significantly exacerbated symptoms of stress, anger, frustration, humiliation by making complainant feel trapped in an intolerable work environment.

In Thomasina B. v. Dep't of Justice, EEOC Appeal No. 2020002975 (Sep. 9, 2021), this Commission reversed an agency's finding of no discrimination. We determined that the complainant's supervisor had actively sabotaged a prospective promotion where complainant would have become the supervisor's superior. The agency decision awarded \$30,000 for nonpecuniary compensatory damages. The complainant appealed the sufficiency of compensatory damages.

The agency argued that \$30,000 was appropriate because the complainant lacked medical evidence of psychological conditions from workplace events. However, this Commission found that the egregious discrimination caused extreme emotional distress which justified increasing compensatory damages to \$50,000. Sworn statements from complainant's family described how, as a result of losing the desired job opportunity, the complainant had "lost her purpose in life" and her emotions were "in a hole." As a prolonged effect of the egregious discrimination, the complainant struggled to focus on her job and moved her workspace to minimize interaction with the supervisor. The EEOC found that the \$50,000 was a more appropriate compensatory damages award for discriminatory denial of an employment opportunity along with testimonial evidence of prolonged mental anguish.

In each of those cases, a complainant had been subjected to discrimination that prevented their them from obtaining better employment. Considering the similarities between the aforementioned decisions and this matter, in addition to evidence attesting of resultant psychic harm, Complainant is entitled to nonpecuniary compensatory damages in the amount of \$50,000.

### CONCLUSION

Based on a thorough review of the entire record and all contentions on appeal, including those not addressed herein, we MODIFY the Agency's final order and REMAND the matter to the Agency for further processing in accordance with this decision and the ORDER below.

### ORDER

Within sixty (60) calendar days of the issuance of this decision, to the extent it has not already done so, the Agency shall:

1. Within sixty (60) calendar days of the date this decision is issued the Agency shall pay Complainant \$50,000.00 in nonpecuniary compensatory damages.
2. The Agency shall pay Complainant reasonable attorney's fees and costs associated with this appeal if he has been represented by an attorney as defined by 29 C.F.R. § 1614.501(e)(1)(iii)). 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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

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

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

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

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

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

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

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition.



See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

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

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

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

#### RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs.

Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



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Carlton M. Hadden, Director  
Office of Federal Operations

October 27, 2021  
Date