



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Maria D.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2021001182

Hearing No. 460-2019-00010X

Agency No. BOP-2017-0978

**DECISION**

Following its December 8, 2020, final order, the Agency filed an 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. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. For the following reasons, the Commission REVERSES the Agency's final order and REMANDS the matter for further processing.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Senior Officer Specialist (officer), GS-7, at the Agency's Federal Correctional Complex in Beaumont, Texas.

On November 11, 2017, Complainant filed an equal employment opportunity (EEO) complaint alleging that the Agency discriminated against her based on sex (female) when, as defined by the

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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.

Agency: she received a rating of Satisfactory in all elements for the past two consecutive rating periods; she further alleges male officers are rated higher than female officers.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an AJ. Complainant requested a hearing. After the Agency moved for summary judgment, the AJ assigned to the case determined *sua sponte* that Complainant may be entitled to a decision without a hearing and, after reviewing the Agency's objections, issued a decision by summary judgment in favor of Complainant.

The AJ found that Complainant was one of a group of seven officers (Comparison Group). Two of the seven officers in the Comparison Group were women, including Complainant. The annual performance evaluation period at issue took place from April 1, 2016 through March 31, 2017, and consisted of four progress reviews followed by a final evaluation. The final evaluation was based upon the ratings officers received in the four prior progress reviews. Several different first-level supervisors (Lieutenants) evaluated the Comparison Group for the first two progress reviews, but one Lieutenant (L1) completed all of the officers' third and fourth progress reviews, as well as their final evaluations. The possible ratings were "Unsatisfactory," "Minimally Satisfactory," "Satisfactory," "Excellent," and "Outstanding." Complainant and a coworker (CW), who was the other female officer in the Comparison Group, both received "Outstanding" for the first progress review, while the five male officers received either "Satisfactory" or "Excellent." All seven officers in the Comparison Group received "Excellent" ratings for the second progress review. After this point, L1 conducted all reviews for all seven officers. For the third and fourth progress reviews, all five male officers in the Comparison Group received "Excellent," while both Complainant and CW (the only two women in the Comparison Group) received "Satisfactory." L1 rated Complainant "Satisfactory" for her final evaluation, and rated all other officers in the Comparison Group, including CW, as "Excellent."

The AJ found that the Agency had articulated two legitimate, nondiscriminatory reasons for Complainant's drop in ratings after L1 began evaluating the Comparison Group: "(1) Complainant's underlying job performance only warranted Satisfactory ratings from [L1], and (2) Complainant's failure to submit a list of her accomplishments to [L1] further limited [L1] from potentially rating her more highly." The AJ then turned to the question of whether these reasons were pretextual, and found, by a preponderance of the evidence, that the Agency's articulated reasons were pretext for discrimination based on Complainant's sex.

The AJ reasoned that the only record evidence that supported the Agency's position that Complainant deserved a "Satisfactory" rating were "conclusory statements to that effect" made by L1<sup>2</sup> in the progress review paperwork and to another supervisor, which the AJ found were in stark contrast with Complainant's and CW's first and second progress review ratings earlier in

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<sup>2</sup> The record shows that L1 had retired by the time the investigator contacted him, and L1 "stated that he did not want to testify in the instant [c]omplaint." L1 therefore did not submit an affidavit in this case.

the same ratings period from a Lieutenant other than L1. The AJ concluded that the written narratives L1 used to justify the “Excellent” ratings for the male officers of the Comparison Group “were the same as the narratives used to justify Complainant’s lower” ratings and lacked specific examples of Complainant’s work that needed improvement. The AJ therefore concluded that the “very subjective and general language” in the performance appraisals was “entirely devoid of value.” The AJ also found the argument that Complainant deserved a “Satisfactory” rating inconsistent with a review conducted of Complainant’s 2016-2017 job performance by the Warden of the Federal Correctional Complex (the Warden) and another Lieutenant (L2). Both the Warden and L2 found that Complainant deserved an “Excellent” final performance rating. Lastly, the AJ concluded that the ratings of the Comparison Group reflected a clear sex-based bias, wherein L1 rated all five male officers as “Excellent” for the third and fourth progress reviews and the final evaluation, while Complainant and CW received “Satisfactory” ratings for the third and fourth progress reviews (after both received “Outstanding” or “Excellent” ratings for the first two progress reviews), and Complainant received a “Satisfactory” final evaluation.

As for the Agency’s articulated reason that Complainant failed to provide a report of her accomplishments to L1, the AJ likewise found it pretextual. The AJ determined that there was no evidence in the record showing that any of the male officers in the Comparison Group submitted their accomplishments to L1 and that, even if they had, it was L1’s responsibility to rate Complainant fairly based on her performance. In sum, the AJ found that “[t]he overwhelming evidence in the record, and most notably [L2’s] and [the Warden’s] determinations that Complainant earned an Excellent rating, compels the conclusion that [L1] incorrectly rated Complainant during the relevant time period, and that he did so on the basis of sex.”

Thereafter, the AJ held a hearing on damages. After the hearing, the AJ awarded Complainant \$1,000, which he determined she would have received as an award from the Agency if she had been correctly rated “Excellent” for the 2016-2017 rating year. The AJ found that, although only one member of the Comparison Group received a \$1,000 performance award for the 2016-2017 rating year, such awards “must be initiated by the rating official” and that “the vast majority of employees . . . who receive ratings of ‘Excellent’ or ‘Outstanding’ receive them as a matter of course, provided that there were no budgetary restrictions in place.” An Agency witness from Human Resources testified that no such restrictions were in place during the relevant time period. Therefore, the AJ found that “it was unusual for only one of the six [officers] supervised by [L1] to receive a performance-based award.” The AJ further found that “evidence presented during the hearing revealed that a class of Agency employees at Complainant’s [facility] who received ‘Excellent’ and ‘Outstanding’ final ratings for the 2016-2017 rating period filed a [union] grievance asserting” that the Agency was not properly recommending performance awards consistent with Agency policy. The AJ found that the grievance was settled, and, as part of the settlement, performance awards “were approved for several if not all of the class members.” The AJ concluded that Complainant was not part of the class partly because her “Satisfactory” final rating made her ineligible.

Therefore, the AJ reasoned that “but for the Agency’s discrimination and the Agency’s separate but related failure to properly recommend and issue performance awards” for officers who received or should have received final ratings of “Excellent” or higher, “Complainant would have received a performance award comparable to the one received by” the other officer in the Comparison Group.

As to the issue of nonpecuniary, compensatory damages, the AJ found, based on Complainant’s and other witnesses’ testimony, that Complainant presented limited but persuasive evidence that “she suffered from stress, insomnia, and relationship/marital problems as a result of the discrimination.” Based on his assessment of the evidence, and in light of awards made in similar cases, the AJ found that Complainant was entitled to nonpecuniary compensatory damages in the amount of \$7,000. The AJ also found Complainant was entitled to corrective action, and ordered the Agency to modify Complainant’s third and fourth progress review ratings from “Satisfactory” to “Excellent,” to modify Complainant’s final evaluation from “Satisfactory” to “Excellent,” and to post “copies of a notice indicating that it has been found to have discriminated against an employee in violation of the Commission’s regulations and Title VII,” after being signed by the Agency’s duly authorized representative, for 60 consecutive days, in conspicuous places at the Federal Correctional Complex in Beaumont.

The Agency subsequently issued a final order on December 8, 2020, rejecting the AJ’s finding that Complainant proved that the Agency subjected her to discrimination as alleged. Based on its conclusion that the finding of discrimination was improper, the Agency also objected to the relief granted by the AJ. Complainant did not file an appeal from the AJ’s decision.

#### CONTENTIONS ON APPEAL

On appeal, the Agency argues that the AJ erroneously concluded that it subjected Complainant to sex discrimination due to L1’s ratings. Taking a different posture than it did before the AJ, the Agency on appeal concedes that Complainant “is entitled to receive an overall annual performance rating of ‘excellent’ . . . for the 2016-2017 rating period,” even accepting the “Satisfactory” ratings she received for the third and fourth progress reviews, because “an employee is entitled to an annual rating of ‘excellent’ if half or more of that employee’s interim ratings [*i.e.*, progress reviews] for the rating period in question were at ‘excellent’ or higher, and if the employee had no interim ratings below ‘successful.’” Admitting that Complainant qualified for an “Excellent” overall rating during the year at issue, the Agency now argues that Complainant did not suffer an adverse action at all. Rather, even if the “Satisfactory” ratings she received for the third and fourth progress review were incorrect, “poor interim ratings do not ordinarily rise to the level of a colorable harm for purposes of Title VII,” since Complainant would have received an “Excellent” rating overall anyway. Therefore, the Agency argues, Complainant can only show an adverse action if she can prove she should have received a rating higher than “Excellent.” The Agency made no such argument in opposition to the AJ’s notice of intent to grant summary judgment in favor of Complainant.

In addition, the Agency, for the first time on appeal, paints L1's performance evaluations during the relevant time period as "perfunctory and slap-dash," "clearly not accurate," and having been "made with an eye toward his pending retirement date." The Agency claims that in light of the fact that L1 was a "lackadaisical manager who rushed through the composition of his evaluations for subordinates he barely knew, knowing that he was soon to retire," there is no basis to assume that L1's evaluations were made with discriminatory intent. As evidence of this, the Agency points to the fact that CW received the same third and fourth progress review ratings as Complainant, but received an "Excellent" final evaluation, indicating that Complainant's final evaluation rating of "Satisfactory" was merely a careless oversight on the part of L1.

Regarding the AJ's legal conclusions, the Agency contends that the AJ's determination that "there was no evidence to show that [C]omplainant performed at a lower level than her male co-workers" "misstates the burden of proof" because "[i]t is always the obligation of the [C]omplainant and the investigative record as a whole to establish that prohibited discrimination occurred" (emphasis in original). Because Complainant cannot show she was entitled to a higher rating than "Excellent," the Agency argues, Complainant failed to meet that burden. As to the argument that L1's third and fourth progress review ratings were in stark contrast to what Complainant and CW received for their first and second progress reviews, the Agency maintains that Complainant's past ratings did not entitle her to positive future ratings. In response to the AJ's conclusion that L1's written narratives were devoid of value, the Agency on appeal agrees that L1's comments "were so broad and vague that they were largely worthless," but argues that the "evaluations have little probative value, and cannot reasonably serve as a basis for finding that [C]omplainant would have been rated higher on her interim evaluations but for her sex." Lastly, the Agency argues that the male/female disparity in L1's progress review ratings of the officers in the Comparison Group "is not enough to warrant a finding of" discrimination "[g]iven how small this group is, and for how short a time [L1] supervised them."

Regarding relief, the Agency in its brief on appeal argues that even if we find Complainant is entitled to relief, that the amount of damages the AJ awarded "should be significantly reduced." Initially, with regard to the \$1,000 award, the Agency argues that the accepted issues in this case "did not include an allegation that the Agency failed to properly recommend and issue performance awards" and that "Complainant did not even raise any claims tangential to this assertion." Therefore, the Agency argues, "whether the Agency properly recommended or issue[d] such awards is not at issue in this case." Furthermore, the Agency contends that because only one member of the Comparator Group received a \$1,000 performance award for the 2016-2017 rating period, despite six members receiving an overall rating of "Excellent," such an award "exceeds make-whole relief." The Agency also requests that we reject the AJ's analysis regarding the class grievance settlement, because it argues that the underlying grievance was related only to the 2015-2016 rating year and is therefore inapplicable.

As to the AJ's award of \$7,000 in nonpecuniary, compensatory damages, the Agency argues such an amount is excessive and that damages in similar cases support a lower figure. They contend that damages not exceeding \$2,200 would be appropriate and in line with other cases should we find Complainant entitled to relief.

## ANALYSIS AND FINDINGS

### *Summary Judgment Decision on the Merits*

The Commission’s regulations allow an AJ to grant summary judgment when she or he finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is “genuine” if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is “material” if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ’s legal and factual conclusions, and the Agency’s final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a) (stating that a “decision on an appeal from an Agency’s final action shall be based on a *de novo* review. . .”); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), at Chap. 9, § VI.B. (as revised, August 5, 2015) (providing that an AJ’s determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

Here, we find that no genuine issues of material fact exist, and that the AJ properly granted summary judgment in favor of Complainant. The record shows that Complainant received a “Satisfactory” rating for the third and fourth progress reviews and for her final evaluation; that the male officers in the Comparison Group received higher ratings; that the Warden and L2 correctly determined that Complainant should have received a rating of “Excellent”; and that the Agency’s stated reasons—that Complainant’s performance deserved a “Satisfactory” and that her rating was the result of not submitting a list of her accomplishments—lacked evidentiary support. L1’s written narratives supporting his ratings contained no specificity, were subjective and overbroad, and, as the Agency now agrees, were essentially worthless. In addition, there is no record evidence showing that the male officers in the Comparison Group—who were all rated “Excellent”—submitted their accomplishments to L1. The Agency’s argument on appeal that the rating for Complainant “have little probative value” is perilously close to an admission that there was no legitimate, nondiscriminatory reason for the rating. Even if the Agency’s “reasons” were legitimate and nondiscriminatory, we find that the AJ correctly found that both legitimate, nondiscriminatory reasons articulated by the Agency were pretextual. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); and St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Moreover, the Agency has admitted on appeal that Complainant deserved a final evaluation rating of “Excellent,” which was part of the question squarely before the AJ. That the Agency now concedes the point in order to raise a new argument on appeal—that Complainant would need to prove she deserved *more* than an overall rating of “Excellent” to show she suffered an adverse employment action—does not cast doubt on the AJ’s decision, and in fact directly contradicts the arguments the Agency made before the AJ in opposition to summary judgment.

The Agency cannot now articulate a new legitimate, nondiscriminatory reason, including L1's then-pending retirement and supposed "slovenly attitude towards details," on appeal; it should have done so before the AJ.

Addressing the Agency's other arguments, we find that the Agency failed to show the AJ's finding of discrimination was improper. First, the Agency's contention that the AJ misstated Complainant's burden of proof when he said "there was no evidence showing Complainant performed at a lower level than" the male officers in the Comparison Group, and that it was Complainant's "burden to show she was entitled to higher quarterly ratings than what she received," is unavailing. The AJ did not misstate Complainant's burden; if the evidentiary record failed to establish that Complainant's performance was worse than her male coworkers' performance, then the Agency's articulated legitimate reasons for her "Satisfactory" ratings were more likely to be pretextual. As the AJ concluded, the record shows that Complainant deserved a rating of "Excellent," and the Agency admits as much on appeal.<sup>3</sup> Complainant's burden of proof before the AJ did not require her to show that her performance exceeded "Excellent," as the Agency now argues. As explained above, just because the Agency admits after the fact that Complainant should have received a final rating of "Excellent" does not mean the AJ erred in applying Complainant's evidentiary burden at the time, which was to show beyond a preponderance of the evidence that the reasons for her "*Satisfactory*" ratings were pretext for discrimination.

The Agency argues that Complainant's past ratings for the first and second progress reviews ("Outstanding" and "Excellent," respectively) did not entitle her to similar ratings in the future and therefore are of limited evidentiary value. We find that the AJ gave the proper consideration to Complainant's prior ratings. These ratings were relatively close in time to Complainant's "Satisfactory" ratings, occurring within the same rating year, and could reasonably create, in addition to other evidence in the record, an inference that Complainant's subsequent ratings were the result of sex-based discrimination. Similarly, the Agency argues that L1's evaluation narratives have no probative value and that the AJ improperly relied on them in reaching his decision. This argument actually supports the AJ's decision, because the AJ reasoned that the narratives' vagueness called Complainant's lower ratings into question.

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<sup>3</sup> The Agency also argues that Complainant's "Satisfactory" progress reviews (as opposed to her final overall rating) "may have been warranted" because Complainant's performance "was less than ideal" during the relevant time period. In support of this, the Agency points to unsworn statements L1 made to the EEO Counselor during the complaint process. These will not be considered. See Complainant v. Gen. Servs. Admin., EEOC Appeal No. 0120130973 (Apr. 22, 2015) (Commission held that it would not examine statements of witnesses in the EEO Counselor's report, finding that "the EEO Counselor's Report is not as persuasive evidence as an affidavit because it is not actual statements by the witnesses."). The Agency also points to an email written by L1 to Complainant where he claimed she told him, "I am not going to be here long so it does not matter" after she received one of her "Satisfactory" progress reviews. Even if Complainant said this, such a statement is not relevant to the question of whether L1 subjected Complainant to discrimination in issuing that rating.

Their very worthlessness as evaluation narratives made them relevant to the AJ in determining whether the Agency's articulated reasons were pretext for discrimination.

The Agency also argues that the sex-based disparity of ratings within the Comparison Group is "not enough to warrant a finding of prohibited discrimination" due to the group's size and the short time L1 supervised the group. In the first place, comparisons to similarly situated employees outside of a complainant's protected status (here, her sex) is a fundamental way for complainants to create an inference of discrimination. That the Comparison Group in this case includes only five similarly situated male officers is of no moment. Even just one similarly situated employee may help establish a prima facie case of discrimination. Regardless, the AJ did not rely solely on the disparity within the Comparison Group in reaching his decision. The AJ found the disparity meaningful when coupled with the other evidence in the case, "most notably [L2's] and [the Warden's] determinations that Complainant earned an Excellent rating."<sup>4</sup>

Even construing any inferences raised by the undisputed facts in favor of the Agency, a reasonable factfinder could not find in the Agency's favor. Upon careful review of the AJ's decision and the evidence of record, as well as the arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence established that Complainant was discriminated against by the Agency on the basis of sex when she received the "Satisfactory" ratings.

#### *Hearing Decision on Damages and Other Relief*

As an initial matter, we note that Complainant does not contest the AJ's damages decision. The Agency disputes the AJ's award of damages and argues that even if Complainant is entitled to relief, that any monetary relief not exceed \$2,200. The Agency has not specifically challenged the nonmonetary relief the AJ awarded. This included modifying Complainant's "Satisfactory" ratings to "Excellent" ratings and posting copies of a notice of the finding of discrimination at the relevant Agency facility.

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<sup>4</sup> On appeal, the Agency argues that even though the Warden and L2's determination that Complainant deserved an "Excellent" overall rating was correct, this "does not establish that [L1] acted with prohibited discriminatory intent based on sex." The Agency also contends that both the Warden and L2 "stated they had no independent knowledge of the quality of Complainant's work at the applicable time." The Agency cannot have it both ways. It admits now that the Warden and L2 were correct in their determination that Complainant deserved a rating of "Excellent." Whether they had direct personal knowledge of Complainant's job performance or not, they were correct in their conclusion after investigating the matter, which is what the AJ found significant in his summary judgment decision. In advancing these new arguments, the Agency again takes a different stance than it did before the AJ, when it argued that the Warden's conclusion was "unsupported by the evidence" and that had he conducted a more thorough review of the matter, "his conclusion would not have been the same." The Agency's shifting position in fact supports the AJ's reliance on the Warden's and L2's conclusion which is ultimately agreed to by the Agency on appeal.

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. NLRB, 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 factfinder would not credit it. See EEO MD-110, Chapter 9, at § VI.B. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.C provides that on appeal to the Commission, the burden is squarely on the party challenging the AJ’s decision to demonstrate that the AJ’s factual determinations are not supported by substantial evidence. See id. In this case, this means that the Agency has the burden of pointing out where and why the AJ’s findings are not supported by substantial evidence.

When discrimination is found, the agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore her 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); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under Title VII may receive compensatory damages for past and future pecuniary losses (*i.e.*, out-of-pocket expenses) and nonpecuniary losses (*e.g.*, pain and suffering, mental anguish) as part of this “make whole” relief. 42 U.S.C. § 1981(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.

We do not accept the Agency’s contention that Complainant is not entitled to a performance-based award because she did not raise any claims about the award in her complaint. We find that there is substantial evidence to show that absent the discrimination to which Complainant was subjected, she would have been eligible for a \$1,000 performance award for the 2016-2017 rating period. Such an award is necessary to restore Complainant as nearly as possible to the position she would have been in had she received the proper rating of “Excellent.” That Complainant did not specifically raise the issue of the award in her complaint does not preclude such an award.

The Agency argues that only one member of the Comparison Group received a \$1,000 performance award, even though six officers received a final evaluation of “Excellent,” and therefore such an award goes beyond “make whole” relief.

This relates to the Agency's tangential argument that the AJ erred in his reasoning that the class grievance filed by Agency employees involving performance awards indicates Complainant would have been entitled to a performance award for the 2016-2017 rating period. Again, we find that substantial evidence supports the AJ's conclusion. The Agency witness from Human Resources testified that it was unusual for only one member of the Comparison Group to receive a performance-based award and that there were no budgetary constraints that would have prevented Complainant from receiving the reward had she been rated correctly. In support of its argument regarding the inapplicability of the union grievance settlement, the Agency points out that the filed grievance applied to the rating period ending on March 31, 2016, whereas the rating year at issue here ended on March 31, 2017. We note that on the same page, however, the grievance lists the "[d]ate(s) of violation(s)" as "March 31, 2016 and continuous." Moreover, the actual settlement agreement to which the AJ referred was signed by the president of the union and the Warden on June 12, 2017, after the 2016-2017 rating period had ended. The terms and conditions agreed to in the settlement also included performance awards "for the 2016-2017 rating year." Regardless of what the filed grievance stated, the final grievance settlement agreement supports the AJ's conclusion that Complainant would have been entitled to a performance-based award had she been eligible to join the grievance. Substantial evidence supports the AJ's award to Complainant of \$1,000 as a performance award and we affirm that remedy.

Nonpecuniary losses are not subject to precise quantification, *i.e.*, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for nonpecuniary damages claims includes statements from Complainant and others, including family members, coworkers, and medical professionals. See id.; Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Nonpecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency's discriminatory actions. See Carter v. Duncan-Higgans, Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance at 13. Additionally, the amount of the award should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)).

The AJ found that Complainant testified credibly regarding the emotional toll she experienced due to the "Satisfactory" performance evaluation for the 2016-2017 rating period. Complainant and her supporting witnesses indicated that Complainant was anxious and frustrated after she received what she felt was an unfair evaluation. Complainant indicated that "she suffered from stress, insomnia, and relationship/marital problems as a result of the discrimination at issue." Complainant and her husband testified, credibly according to the AJ, "that she and her husband sought counseling related to the discrimination in mid-2019, approximately two years after the discrimination had occurred."

Complainant testified that her close friendship with another coworker, also a witness during the hearing, “suffered for an extended period after the discrimination ended.” The AJ, in determining the amount of the award, factored the nature, severity, and the duration of the harm caused by the Agency’s actions along with mitigating factors such as the fact that Complainant’s evidence was “limited and somewhat vague.”

We find that there is substantial evidence in the record to support the AJ’s award of \$7,000 in nonpecuniary, compensatory damages in this case. As noted above, the AJ found the testimony of Complainant and her witnesses to be credible. Other than the Agency’s apparent disagreement with the cases the AJ cited in determining the damages amount, it has not shown that the AJ erred or that the record does not support the AJ’s findings. We note that evidence from a healthcare provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. Complainant v. Dep’t of Defense, EEOC Appeal No. 01952872 (Sept. 19, 1996); Complainant v. Dep’t of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995). A complainant’s own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. Finally, we find that the cases cited by the AJ are consistent with the amount awarded by the AJ here.<sup>5</sup> Additionally, other more recent Commission cases support such an award. See Tyrone D. v. Dep’t of Homeland Sec., EEOC Appeal No. 2019002906 (Aug. 18, 2020) (awarding \$5,000 in nonpecuniary, compensatory damages when Complainant received an improperly low performance evaluation); Cortez J. v. Dep’t of Defense, EEOC Appeal No. 0120182712 (Nov. 29, 2019) (awarding \$8,500 in nonpecuniary, compensatory damages when complainant testified that he suffered from anxiety, stress, loss of appetite, and marital strife, “[e]ven in the absence of more specific evidence”).

We note that the AJ did not order the Agency to consider discipline or conduct EEO training for any managers or supervisors at its Federal Correctional Complex in Beaumont, Texas. The record reveals that Complainant’s supervisor, L1, was the only responsible management official involved in the discriminatory finding. L1, however, retired from the Agency in December 2017. Therefore, because the sole responsible official in this case has since retired, there will be no need for consideration of discipline of L1, and we shall not order any training.

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<sup>5</sup> See Kit R. v. Dep’t of the Army, EEOC Appeal No. 0120140952 (Sept. 23, 2016) (affirming \$8,000 nonpecuniary, compensatory damages award based on complainant’s retaliatory performance appraisal where complainant produced only “scant” and “generalized” evidence linking the retaliatory action to her emotional distress); Hairston v. Dep’t of Education, EEOC Appeal No. 0120103308 (Jan. 4, 2013) (awarding complainant \$5,000 in nonpecuniary, compensatory damages where, as a result of his receipt of a “successful” performance evaluation and rating, complainant suffered stress, anxiety, disrupted sleeping patterns, headaches, other physical problems, and interpersonal relationship problems, the evidence for which lacked detail as to severity and duration); Smith v. Dep’t of Defense, EEOC Appeal No. 01984888 (Dec. 22, 2000) (awarding complainant \$6,000 in nonpecuniary, compensatory damages resulting from a low performance appraisal where the evidence supporting emotional pain and suffering was limited).

Neither party has specifically addressed the remedial action ordered by the AJ that the Agency modify Complainant's third and fourth progress review ratings and her final evaluation for the 2016-2017 rating year "to reflect that she earned 'Excellent' ratings, rather than 'Satisfactory' ratings, and make any other corresponding adjustments and mitigations to her" third and fourth progress review ratings and final evaluation "that may be necessary to ensure internal consistency." Nor has either party addressed the AJ's order for the Agency to post a notice regarding the finding of discrimination at the Beaumont Federal Correctional Complex. We find these remedial actions are proper and affirm the AJ's ordered relief.

### CONCLUSION

We REVERSE the Agency's final order rejecting the AJ's decision finding discrimination. The matter is REMANDED to the Agency for further action in accordance with the Order herein.

### ORDER

To the extent it has not already done so, within 60 days of the date this decision is issued, the Agency shall take the following actions:

1. All Agency records shall reflect that Complainant received "Excellent" ratings on her Third and Fourth Progress Reviews for the 2016-2017 rating period.
2. All Agency records shall reflect that Complainant received an "Excellent" rating on her Final Evaluation for the 2016-2017 rating period. Complainant is entitled to all benefits that she should have received by a person who achieved an "Excellent" rating on her/his Final Evaluation.
3. The Agency shall pay Complainant a \$1,000.00 performance award.
4. The Agency shall pay Complainant \$7,000.00 in nonpecuniary, compensatory damages.

### POSTING ORDER (G0617)

The Agency is ordered to post at its Federal Correctional Complex located in Beaumont, Texas 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 (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency—not to the Equal Employment Opportunity Commission, Office of Federal Operations—within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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

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

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

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0920)

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

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

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

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

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

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

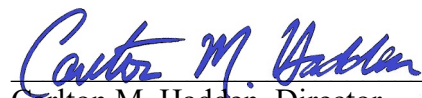
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

December 2, 2021

Date