



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]

Terrie M.,<sup>1</sup>  
Complainant,

v.

Antony Blinken,  
Secretary,  
Department of State,  
Agency.

Appeal No. 2021002279

Agency No. DOS-0057-15

**DECISION**

On February 5, 2021, 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 January 6, 2021, final decision on compensatory damages concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision on compensatory damages.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a FS-04 Foreign Service Officer, Consular Section Chief at the Agency's U.S. Embassy in Tallinn, Estonia.

On March 5, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and disability (pregnancy) when, on October 1, 2014, she was not promoted to FS-03.

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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.

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 Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision on October 22, 2015, finding no discrimination pursuant to 29 C.F.R. § 1614.110(b). Complainant appealed. The Commission found that the investigative record was inadequate to decide on the merits of the complaint and vacated the final decision, remanding the matter for a supplemental investigation. EEOC Appeal No. 0120160555 (May 2, 2018).

Following the conclusion of the supplemental investigation, the Agency issued a final decision on December 20, 2018, finding no discrimination. Complainant timely appealed. The Commission found that, even after the supplemental investigation, the Agency did not provide a specific, clear, and individualized explanation as to why Complainant was not promoted in 2014 and concluded that Complainant established that she was subjected to discrimination based on sex.<sup>2</sup> EEOC Appeal No. 2019002167 (Sep. 22, 2020). The Commission ordered the Agency to retroactively promote Complainant, to pay back pay, to conduct a supplemental investigation concerning Complainant's entitlement to compensatory damages, to provide training to the responsible management officials, and to post a notice.

Complainant requested \$150,000 in nonpecuniary compensatory damages. Report of Investigation (ROI) at 44. In support of her request for compensatory damages, Complainant provided an affidavit, in which she alleged that her non-promotion weighed heavily on her for years. Id. Complainant averred that her peers assumed she was bad at her job or had engaged in misconduct since she remained at the FS-04 level for so long, which negatively impacted bidding on future positions. Id.

Complainant also requested pecuniary damages. Complainant stated that she was earning much less than the colleagues with whom she joined the Foreign Service. ROI at 45. According to Complainant, she was unable to contribute more to her TSP account because she was not promoted. Id. Complainant noted that, if she had added approximately \$3,000 to her TSP account per year, with a rate of return of 8.59 percent, the investment would total \$150,000 after 20 years. Id.

Complainant averred that "corridor reputation" is extremely valuable in the Foreign Service and that derogatory or presumed derogatory information can follow someone for a long time. Id. Complainant stated that she suffered from constant extreme stress, feelings of inadequacy, hives, skin irritation and poor sleep. Id. Complainant averred that in 2018 she was diagnosed with Adjustment Disorder, with Mixed Anxiety and Depressed Mood. Id. According to Complainant, she spent extra time at work to enhance her chances for promotion, losing out on time with her family in the process. Id.

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<sup>2</sup> In light of the finding of sex discrimination, the Commission did not address Complainant's disability discrimination claim, noting that the remedies would be the same.

A Licensed Clinical Psychologist (Therapist-1) provided an undated letter, stating that she saw Complainant for individual therapy since July 30, 2018. ROI at 48. According to Therapist-1, Complainant sought therapy because of work and family stress and was diagnosed with Adjustment Disorder, with Mixed Anxiety and Depressed Mood with symptoms of sleep disturbance, muscle tension, difficulty concentrating, depressed mood, and restlessness. Id. Therapist-1 stated that reassignment to Washington, D.C. in December 2017 was stressful for Complainant, as she was physically separated from her husband, who is not a U.S. citizen. Id. Therapist-1 averred that Complainant's ex-husband was harassing her and filed a motion to modify custody of their two children. Id. Therapist-1 stated that Complainant exhibited adaptive coping mechanisms, that she did not need medication, and that the prognosis was good. Id.

A coworker who entered the Foreign Service in 2007 in the same cohort as Complainant (Coworker-1) provided an undated statement, indicating that the vast majority of their cohort had been promoted to the FS-02 level and that those who had not been promoted had exhibited serious errors in judgment. ROI at 49. According to Coworker-1, because the bidding process relies heavily on reputation, the stigma of remaining at the FS-03 rank after 14 years can affect opportunities. Id. Coworker-1 stated that she saw the mental anguish not being promoted caused Complainant and that Complainant told her that not being promoted caused anxiety, sleep difficulties, and relationship strain. Id.

Complainant's mother provided a statement dated November 2, 2020. ROI at 50-51. According to Complainant's mother, her daughter was always a high achiever, and when she was not promoted despite her hard work, it was distressing mentally, emotionally, physically, and professionally for Complainant. Id. She stated that Complainant began to second guess herself and her work, and the increased mental stress spilled over into her personal life. Id. Complainant's mother stated that Complainant had trouble relaxing, participating in activities she enjoyed, and maintaining self-esteem. Id. According to her mother, Complainant frequently broke out in hives due to stress, started experiencing hair loss, had trouble eating and sleeping, and suffered from anxiety. Id. Complainant's mother averred that Complainant's career was negatively affected, leading to feelings of powerlessness and increased anxiety. Id.

On February 5, 2021, the Agency issued its final decision on compensatory damages. The Agency found that Complainant was not entitled to pecuniary compensatory damages, noting that she provided no evidence of out-of-pocket expenses and her estimate that she would have earned \$150,000 if she had placed \$3,000 per year in her TSP account was speculative. The Agency further noted that lost wages were an equitable remedy not included in compensatory damages and that back pay would be addressed separately by the Agency.<sup>3</sup>

Regarding nonpecuniary compensatory damages, the Agency found that the Agency's delay in promoting Complainant from FS-04 to FS-03 caused anxiety and distress.

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<sup>3</sup> The Commission has docketed a petition for enforcement, Petition No. 2021004652, concerning the Agency's calculation of back pay.

However, the Agency stated that Therapist-1 indicated that the estrangement from her husband and the custody battle with her ex-husband, not the work situation, were the major causes of Complainant's stress and anxiety. The Agency awarded Complainant \$12,000 in nonpecuniary compensatory damages.

The instant appeal followed.

### CONTENTIONS ON APPEAL

On appeal, Complainant contends that she established that she experienced mental anguish that weighed heavily on her for years because of the discrimination. Complainant also argues that she suffered financial losses because she was earning less than her colleagues and was unable to save as much for retirement, which adds to her stress. Complainant requests an award of \$150,000 in compensatory damages.

The Agency did not submit a statement or brief in response to Complainant's appeal.

### ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

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 the Rehabilitation Act 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. § 1981a(b)(3). Compensatory damages do not include back pay, interest on back pay, or any other type of equitable relief. 42 U.S.C. § 1981a(b)(2). 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.

To receive an award of compensatory damages, a complainant must demonstrate that he or she has been harmed as a result of the agency's discriminatory action; 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 11-12, 14. Compensatory damages may be awarded for the past pecuniary losses, future pecuniary losses, and nonpecuniary losses which are directly or proximately caused by the agency's discriminatory conduct. EEOC Notice No. 915.002 at 8.

### *Pecuniary Compensatory Damages*

In a claim for pecuniary compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, the harm suffered because of the agency's discriminatory action. Objective evidence in support of a claim for pecuniary damages includes documentation showing actual out-of-pocket expenses with an explanation of the expenditure. The agency is only responsible for those damages that are clearly shown to be caused by the agency's discriminatory conduct. To recover damages, a complainant must prove that the employer's discriminatory actions were the cause of the pecuniary loss. EEO MD-110, at Chap. 11, VII.B.2 (citations omitted).

The Agency denied Complainant's request for \$150,000 for lost equity in her TSP account as speculative and unsupported. The Agency also noted that it would separately address back pay. Complainant contends that, if not for the Agency's discriminatory failure to promote her, she would have invested more in her TSP. We agree with the Agency that this is more properly addressed as an issue of back pay, which is the subject of a pending petition for enforcement. We affirm the Agency's decision to deny Complainant's request for pecuniary damages.

### *Nonpecuniary Compensatory Damages*

Nonpecuniary 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. 915.002 at 10. There is no precise formula for determining the amount of damages for nonpecuniary 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 Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that nonpecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be "monstrously excessive" standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of Interior, EEOC Appeal No. 01961483 (March 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. A complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain the burden for recovering compensatory damages for emotional harm. 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. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. See, e.g., Lawrence, EEOC Appeal No. 01952288.

The Commission applies the principle that “a tortfeasor takes its victims as it finds them.” Wallis v. U.S. Postal Serv., EEOC Appeal No. 01950510 (Nov. 13, 1995) (quoting Williamson v. Handy Button Machine Co., 817 F.2d 1290, 1295 (7th Cir. 1987)). Where a complainant has a preexisting condition, the Agency is only liable for the additional harm or aggravation caused by the discrimination. See Wallis, EEOC Appeal No. 01950510.

Although the record contains sufficient evidence to establish that Complainant is entitled to nonpecuniary compensatory damages, we find that Complainant's requested amount of \$150,000 is not supported by the record. However, we also find that the Agency's award of \$12,000 in nonpecuniary compensatory damages was insufficient.

Complainant stated that, as a result of the discrimination, her professional reputation was harmed, and the stress of her delayed promotion weighed on her for years. As a result of the discrimination, Complainant experienced constant, extreme stress, feelings of inadequacy, hives, skin irritation and poor sleep. Coworker-1 noted the importance of professional reputation in the Foreign Service and observed Complainant deal with anxiety, sleep difficulties, and relationship strain. Complainant's mother stated that Complainant, who had always been a high achiever, began to doubt herself, and the stress impacted all areas of her life. According to her mother, Complainant experienced anxiety, insomnia, hives, and hair loss.

Complainant sought therapy for work and family stress, and Therapist-1 diagnosed her with Adjustment Disorder, with Mixed Anxiety and Depressed Mood. We disagree with the Agency's characterization of Therapist-1's letter. The Agency contends that Therapist-1 attributed Complainant's symptoms entirely to being separated from her husband and her ongoing custody battle. While the record reflects that Complainant had other stressors, we find that the evidence shows that the discrimination contributed to Complainant's emotional distress.

As such, we conclude that an award of \$30,000 in nonpecuniary compensatory damages more appropriately compensates Complainant for the harm caused by the Agency.

Our award takes into account the duration and severity of the harm suffered and is neither “monstrously excessive” nor the produce of passion or prejudice.

We also find that this amount is more consistent with the amount awarded in similar cases. See Thaddeus G. v. Dep’t of the Navy, EEOC Appeal No. 2019004733 (Sep. 29, 2020) (\$30,000 for complainant who experienced emotional harm, damage to professional standing and reputation, increased anxiety, depression, sleep disturbances, and marital problems); Roxane C. v. Dep’t of Defense, EEOC Appeal No. 0120170899 (Dec. 29, 2017) (\$35,000 for complainant who experienced stress that affected her marriage and felt ostracized at work after sex and pregnancy discrimination); Kiara R. v. U.S. Postal Serv., EEOC Appeal No. 0120152620 (Aug. 10, 2017) (\$25,000 for complainant who suffered sleep problems, headaches, anxiety, stress, and stopped socializing with friends).

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency’s final decision on compensatory damages and REMAND the matter to the Agency for further action in accordance with this decision and the ORDER below.

### ORDER

Within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant \$30,000, less any amounts already paid to Complainant as nonpecuniary compensatory damages.

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). The report must include evidence that the corrective action has been implemented.

### ATTORNEY'S FEES (H1019)

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

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

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

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

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

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

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

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

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

A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

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

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

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

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

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

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

March 31, 2022

Date