



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

[REDACTED]

Anna B.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Finance & Accounting Service),
Agency.

Appeal No. 2021002342

Agency No. DFAS-00084-2019

DECISION

Complainant filed the instant appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's February 12, 2021 final decision concerning her award of compensatory damages regarding her equal employment opportunity (EEO) complaint alleging 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. The Agency's decision awarding compensatory damages is MODIFIED.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Computer Assistant, GS-7, at the Agency's Defense Military Pay Operations at Aberdeen Proving Ground, Maryland.

On April 15, 2019, Complainant filed her complaint alleging that she was discriminated against and subjected to ongoing harassment that resulted in a hostile work environment based on disability (glaucoma) and in reprisal (claim c) by her first level supervisor (S1) when from July 2018, to January 8, 2019, the following occurred:

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

- a. Since July 2018, and ongoing, S1 was overly critical towards her, made threatening remarks about discipline, and failed to recognize her disability;
- b. On December 20, 2018, S1 told her to use a magnifying glass; and
- c. On January 8, 2019, S1 called her into her office and said she was working slow.

After completion of the investigation of the complaint, Complainant did not request a hearing before an EEOC Administrative Judge (AJ). On October 30, 2020, the Agency issued its final decision finding that it denied Complainant a reasonable accommodation and subjected her to a hostile work environment, reprisal, and per se reprisal, in violation of the Rehabilitation Act. The Agency treated claim “a” as a hostile work environment claim, claim “b” as a denial of reasonable accommodation, and claim “c” as reprisal.

The record indicates that Complainant was hired at the Agency on July 9, 2018. The Agency stated that S1 was aware of Complainant’s glaucoma condition since she was hired. Complainant requested an anti-glare screen for her computer as a reasonable accommodation in September 2018. However, S1 failed to engage in the interactive process to accommodate her disability from September 2018 to January 2019, at which time the Agency placed Complainant’s reasonable accommodation request (i.e., adaptive equipment) for processing. The record indicates that in March 2019 (five months after her September 2018 request), Complainant was provided with her requested two large monitors, a larger print keyboard, and zoom text software. The zoom text software did not work properly until October 2019. The Agency stated that it took nearly one year to provide Complainant with an effective reasonable accommodation.

The Agency indicated that S1 learned of Complainant’s December 20, 2018 EEO counseling and S1 became angry at her and S1 gave her the January 8, 15, and 18, 2019 verbal counseling and emails. The Agency found that S1’s actions constituted per se reprisal. The Agency also found that S1’s harassment was motivated by Complainant’s disability.

The Agency stated that on January 10, 2019, Complainant complained about S1’s harassment to her managers. After the Agency’s investigation of the subject matter, S1 was relieved from her duties on January 28, 2019, and placed on full-time telework and prohibited from contacting her employees, including Complainant. On March 2, 2019, S1 voluntarily retired.

In its decision, the Agency, upon making a finding of discrimination, advised Complainant of her right to submit documentation to support a claim for compensatory damages.

The Agency indicated that on January 4, 2021, it received Complainant’s designation of legal representation. Complainant’s attorney submitted documents to support Complainant’s damages on January 8, 2021, and a petition for attorney’s fees on January 11, 2021.

The record indicates that Complainant submitted her statement indicating that due to the Agency's discriminatory actions, she felt depressed with lower self-esteem; she was stressed and lost the ability to trust that her organization and management had her back; she went to the Emergency Room (ER) on November 28, 2018, for severe headache, neck pain, and eye pain; she would frequently awake from her sleep and had a bad dream and took melatonin to help her sleep; she sometimes would not have the energy to prepare a meal or eat; she cried a lot; and she felt embarrassed and humiliated. Complainant stated however that she did not seek mental health services.

Complainant also submitted her mother's statement indicating that as a result of the Agency's discriminatory actions, Complainant complained of migraine headaches; she suffered a seizure and had to be rushed from work to the ER via ambulance; she saw a neurologist on two occasions; and she was depressed. Complainant did not submit medical documents from the neurologist.

Complainant submitted a medical document of her November 28, 2018 ER event. The ER document indicates that Complainant was admitted and discharged on the same day, November 28, 2018 (Wednesday), and was cleared to return to work on Monday, December 3, 2018. The ER doctor noted that Complainant came in for headache, which had been resolved with some mild left neck discomfort; she had no numbness or weakness; she had blurry vision which was resolved; she had a history of seizure disorder but there was no syncope and no reported seizure on November 28, 2018; she had no recent neck injury; she had history of left-sided headaches dating back to February 2018 (i.e., prior to her July 9, 2018 hiring at the Agency); she felt a lump in her left neck for several years and had history of left-sided neck pain; she took medications for her glaucoma condition; she was alert; she had no acute distress; and she had normal psychological condition.

The Agency indicated that Complainant did not submit a claim for pecuniary damages. The Agency awarded Complainant \$10,700.00 in nonpecuniary damages for the discrimination. Complainant requested \$2,021.60 for her attorney's fees and the Agency awarded the full amount of \$2,021.60.

On appeal, Complainant requests \$50,000.00 for nonpecuniary, compensatory damages. Complainant does not appeal the award for attorney's fees.

ANALYSIS AND FINDINGS

Pursuant to Section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of make-whole relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process.

For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000.00. 42 U.S.C. § 1981a(b)(3).

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. 915.302, Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or “monstrously excessive” standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from a complainant concerning his emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

Statements from others including family members, friends, health care providers, and other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. Id. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

Complainant has the burden of proving the existence, nature and severity of the alleged emotional harm. Man H. v. Dept. of Homeland Security, EEOC Appeal No. 0120161218 (May 2, 2017). Complainant must also establish a causal relationship between the alleged harm and the discrimination. Id.

Absent such proof of harm and causation, a complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. Id.; Wilda M. v. U.S. Postal Serv., EEOC Appeal No. 0120141087 (Jan. 12, 2017) (awards for emotional harm are warranted only if complainant establishes a sufficient causal connection between the agency's illegal actions and her injury).

Here, Complainant provided her own statement, her mother's statement, and her ER medical document. As a result of the Agency's discriminatory actions, i.e., its delay in providing her an accommodation for her eye conditions and subjecting her to harassment, Complainant stated she experienced emotional distress, humiliation, embarrassment, loss of sleep and appetite, feeling under-valued, and crying spells. On one occasion, Complainant stated she experienced a severe headache, neck pain, and eye pain, she went to the ER via ambulance from her work and was discharged on the same day and was allowed to return to work the following Monday. The ER document showed that Complainant had history of headaches, neck pain, and seizure disorder prior to the Agency's discriminatory actions.

Although Complainant requested \$50,000.00 for nonpecuniary damages for the Agency's discriminatory actions, we find that amount is not supported by the evidence provided. We also find the Agency's awarding of \$10,700.00 inappropriate given the duration of its delay in providing Complainant with an effective accommodation, i.e., almost a year, in addition to harassment.

After a thorough review of the record and given the severity, nature, and duration of the Agency's discriminatory actions, we find that an award of \$15,000.00 in nonpecuniary, compensatory damages is supported by the evidence submitted, neither "monstrously excessive" nor the product of passion or prejudice, and consistent with prior Commission precedent. See Bernard S. v. Dep't of Health & Human Servs., EEOC Appeal No. 0120181509 (Sept. 17, 2019) (\$15,000.00 award in nonpecuniary damages for retaliatory harassment resulting in humiliation, anxiety attacks, sleep problems, and withdrawal from family); Andy B. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019000791 (Mar. 15, 2019) (\$15,000.00 award in nonpecuniary damages for delayed reasonable accommodation that exacerbated pre-existing mental health conditions and produced stomach ailments, fatigue, hopelessness, marital problems, and social withdrawal). We find \$15,000.00 is adequate to compensate Complainant for the harm suffered as a result of the Agency's actions.

CONCLUSION

Accordingly, the Agency's final decision concerning Complainant's nonpecuniary compensatory damages is MODIFIED and we REMAND the matter to the Agency to comply with the ORDER herein.

ORDER

To the extent it has not already done so, the Agency, within 60 calendar days of the date this decision is issued, shall pay Complainant \$15,000.00 in nonpecuniary, compensatory damages.

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).

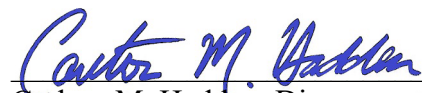
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

June 14, 2022

Date