



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

[REDACTED]
Lydia W.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Pacific Area),
Agency.

Appeal No. 2021004453

Hearing No. 480-2020-00612X

Agency No. 4F-900-0034-19

DECISION

Simultaneously with the issuance of its February 11, 2019, 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 modification of the AJ's compensatory damage award. For the following reasons, the Commission REVERSES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a City Carrier Assistant (CCA) at the Los Angeles Dockweiler Station in Los Angeles, California. S1, Supervisor Customer Services, was Complainant's immediate supervisor. A1 was a Supervisor at the Dockweiler Station but was not in Complainant's immediate supervisory chain. Beginning in July 2018, S2 was the Station Manager for Dockweiler Station and Manager, Customer Services.

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.

Complainant filed a formal EEO complaint alleging discrimination based on sex (female) and retaliation (prior EEO activity) when, on November 7, 2018, she was put on Emergency Placement in an Off-Duty Status, and subsequently, on January 31, 2019, she received a Notice of Removal.

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. Complainant requested a hearing and the AJ held a hearing and issued a decision finding that the Agency discriminated against Complainant based on her sex and previous EEO activity. The Agency issued a final order rejecting the AJ's final order, and simultaneously filed an appeal with the Commission.

The AJ made the following factual determinations and findings after the hearing: Complainant was a credible witness based on her "tone of voice, demeanor, and ability to recall specific events." On November 7, 2018, Complainant was scheduled to report to work at 7:30 am. She did not arrive at work until 8:38 am. According to Complainant, she arrived late to work because she overslept due to being tired from a 12-hour shift the day before and being stuck in traffic on her way to work that morning. Complainant drank two glasses of wine at or before 11:30 pm, on November 6, 2018 (the night before). On November 7, S1 conducted a stand-up talk. After the talk, Complainant approached S1 around 8:40 am. S1 stated that he detected the smell of alcohol on Complainant's breath and noted that her speech was not typical. He did not perceive her physical or mental control to be markedly diminished.

S1 notified S2 about his observations. A1 was also present. S1 wanted to send Complainant for a fitness for duty test. A1 was directed to bring Complainant to S2's office. When Complainant arrived, S2, D1, the Union Steward, and S1 were present. S2 stated that he did not observe Complainant smelling of alcohol or slurring her speech. S1 informed Complainant that he had smelled alcohol on her breath and that she was going to be taken to a local occupational health service facility (the OHS facility) for an examination.

S1 stated that the reason Complainant was sent to the OHS facility was to ensure the safety of her coworkers, herself, and others while operating a vehicle at work, i.e., to determine if she was "fit for duty." S2 stated that Complainant was sent based solely on S1's observations. According to the AJ, "[w]hen asked whether Complainant's physical or mental control were markedly diminished on November 7, 2018, [S2] avoided answering the question directly, which [he] interpreted as damaging to his credibility. He added that the Agency only relied on [S1's] observations."

According to the record, earlier that morning, S1 was speaking to C1, a male coworker of Complainant, and asked, "have you been drinking?" C1 responded, "No, I drank last night." S1 stated, "You kinda smell like alcohol. You should take some breath mints at least." C1 was later assigned to drive and deliver mail, which he did. The AJ stated that he credit[ed] C1's testimony especially where it was provided against his personal interest.

According to the AJ, “[w]hile the Agency attacked his recall and whether his testimony was in all points squared with his declaration, [C1’s] demeanor demonstrated a conviction that the incident occurred in all salient points as he testified. [S1] did not send [C1] for a medical examination, nor a breath alcohol test (BAT).”

A1 drove Complainant to and from the OHS facility. The AJ found that A1’s demeanor during her testimony on whether Complainant was slurring her speech or was “zoned out” was uncomfortable and shifting. She stated that during the drive Complainant “was very quiet, spoke a bit, kind of zoned, didn’t talk much, and there was a little bit of slurring speech.” The AJ did not credit A1’s testimony that she perceived Complainant slurring her speech and found that she did not credibly testify whether Complainant was a safety risk following the medical exam when she stated she did not remember. Complainant, the AJ found, testified that she was not slurring, and was not zoned out, but was upset, worried, and irritated. The AJ credited Complainant’s testimony over A1’s.

The OHS facility performed a physical examination of Complainant and gave her a BAT. The doctor asked Complainant why she was there, and she told him that there was an allegation from a supervisor that he could smell alcohol on her breath. A medical note stated:

IMPRESSION: Pt with small amount of smell on br[e]ath. BAT 0.006. Patient does not appear to be intoxicated otherwise and may continue to work.

The BAT was conducted at 11:01 am. The technician noted that the test was negative. According to the record, for a positive test, the technician would have been required to perform a second BAT, which was not done here. Additionally, an employee, after receiving a positive test, must sign indicating the test was positive. As the AJ noted, this was not done and there were no other remarks indicating a positive test.

A1 learned the results of the test while they were at the OHS facility and contacted management. According to S1, when A1 was returning to the station, she called him and told him that “there was some type of alcohol in [Complainant’s] system.” She did not tell him that the test was positive; nor did she say the test was negative. According to S2, A1 stated that the test was positive. S1, the AJ found, did not credibly testify that management contacted Labor Relations for advice and that Labor advised placing Complainant on Emergency Placement. S2, he noted, provided conflicting testimony on whether they sought advice from Labor Relations. Specifically, the AJ found, they did not seek permission from Labor Relations, they just moved forward with the Emergency Placement. The AJ also noted that A1 testified that the decision to place Complainant was made sooner than advice could be given by labor relations.

When Complainant returned to Dockweiler Station after the exam, she was put on Emergency Placement off duty without pay. She was informed it was because the test results showed a trace of alcohol. According to S1, he was informed that Complainant’s result of the BAT was 0.006 before she was put on Emergency Placement.

However, S1 did not inform Labor Relations of the result. S1 was also aware of the narrative that Complainant did “not appear to be intoxicated otherwise and may continue to work.”

The AJ noted that despite the Emergency Placement indicating that Complainant was acting erratically, A1 testified that she was not acting erratically. The AJ noted that S1 did not walk Complainant out (although S2 testified that S1 did); nor did he call anyone to pick her up despite his stated safety concerns for Complainant and others. The AJ found that S1 *incredibly* testified that Complainant could have still been a safety risk when she returned to work after clearance by a medical officer and no other Agency employee observed a safety risk, and that his not calling a pickup for Complainant demonstrated his lack of concern for her posing a safety risk.

A1 conducted an investigative interview with Complainant and her representative on November 8, 2018. S1, the AJ noted, could not explain why Complainant was not brought back to work on November 8, 2018, when there clearly was no current safety risk. A1 testified that Complainant denied being under the influence, she did not interview anyone else, and she did not ask Complainant if others had observed her conduct. A1 stated that it was up to S1 whether to return Complainant to work. S2, the AJ noted, stated that, as of November 8, 2018, Complainant was not a safety risk, and it was up to S1 whether to bring Complainant back to work. A1 informed Complainant at the end of the interview that she remained on Emergency Placement and any further contact would be sent via mail. She was not contacted again until she received the Notice of Removal.

On January 2, 2019, S1 submitted a Request for Initiating Corrective/Administrative Action for Complainant, i.e. removal. Afterward, B1, a Labor Relations Specialist, emailed S1 raising concerns that the BAT was negative. He did not recommend removal. Nevertheless, S1 indicated that, “[w]e are not waiting for any further results and would like to go further with the NOR [Notice of Removal].” The AJ found that S1 did not credibly testify regarding B1’s concerns with proceeding with the removal given the negative test results. For example, S1 claimed he did not recall when asked whether B1 contacted him three times without response. S1 stated that he probably did but that he did not remember.

The AJ found that A1 falsely testified that she was not included in the communications regarding issuing discipline to Complainant because she was included as a recipient on the emails. He also noted that A1 paused for a long time in response to the question whether removal was the appropriate level of discipline for Complainant’s conduct. Consequently, the AJ did not credit her testimony following the pause that she would have done so, because he interpreted her pause as an effort to provide a response consistent with the Agency’s defense and not consistent with how she would have proceeded.

Despite B1’s concerns, Complainant was issued a NOR on January 30, 2019, by S1. S2 concurred in the action. The AJ noted that he asked questions of the witnesses regarding some of the terminology in the NOR, such as identifying Complainant’s conduct as egregious and pervasive, as well as lacking in honesty.

He found that S1 did not credibly testify that Complainant's behavior was egregious because when asked to explain why it was egregious, S1's physical demeanor betrayed a discomfort answering the question and he was unable to effectively describe any egregious conduct. He admitted that no one else complained about her behavior or conduct. The AJ also noted that S2 would not specifically answer whether the conduct was egregious; therefore, he interpreted his testimony as "dodging and damaging" to his credibility. Complainant explained that nothing in her behavior was egregious. She cooperated and had nothing to hide. She was not defiant to management. She thought that the investigation would have resulted in her return to work. When asked whether Complainant's conduct was pervasive, despite including that term in the NOR, S1 stated that he did not know. S1 did acknowledge that this was a single incident without any prior similar observations. S2 also would not directly answer whether the conduct was pervasive, saying instead that it "was what it was," but he also admitted that the removal was based on a single incident. When asked whether Complainant was dishonest, as charged in the NOR, S1 replied, "in what way?" The AJ noted that when the question was reformulated, S1 testified, "no, I don't think so." According to the AJ, S2 paused to consider the question, stating "hmmm ...," followed by a nonresponsive answer, which he interpreted as dodging the question and damaging his credibility.

S1 testified that the NOR included Complainant's BAT result but the AJ noted that it did not include that information. S1 admitted that the opinion from the medical provider that Complainant was fit to return to work was not included in the NOR. S1 also testified that the NOR informed Complainant that she violated a zero-tolerance policy, but the AJ noted that the NOR did not include a reference to a zero-tolerance policy in the listed authorities. Complainant, the AJ noted, testified that there was no zero-tolerance policy.

The AJ took note of the Agency's Employee and Labor Relations Manual (ELM) regarding the standards of conduct which stated that, "[E]mployees must not drink beer, wine, or other intoxicating beverages while on duty; begin work or return to duty intoxicated; or drink intoxicating beverages in a public place while in uniform. Employees found to be violating this policy may be subject to disciplinary action." Additionally, under the Los Angeles District's rules, "[t]he consumption of alcoholic beverages, being under the influence, using or transporting of narcotics of any kind at any postal installation are grounds for removal." The AJ, noting language in the ELM, found that the rules recognized a difference between drinking alcohol and becoming intoxicated, i.e., "No employee may become intoxicated while at an [approved event]."

S1, the AJ noted, testified that his understanding was that there were no exceptions to having any amount of alcohol or drugs in an employee's system. S1 also maintained that a zero-tolerance policy was posted on bulletin boards at every station; however, he was unable to describe it and could not identify the policy with any specificity. He also did not recall when he received the policy. The AJ noted that the record did not include a policy as described by S1. Therefore, the AJ did not credit his testimony that there was a posted zero tolerance policy at the facility.

A1, according to the AJ, was also unable to identify a specific policy stating that there was zero tolerance for any alcohol in an employee's system. S2 maintained that the zero-tolerance policy was found in the ELM and the local LA Precepts and Procedures.

The record indicates that Complainant filed a grievance on both the November 7, 2018 Emergency Placement, and the January 30, 2019 Notice of Removal. As a result, she was returned to work on January 9, 2020. As of the time of the hearing, she was no longer supervised or managed by any of the individuals named as RMOs in her complaint.

The AJ found that Complainant established prima facie cases of discrimination based on sex and reprisal. According to the AJ, Complainant established a prima facie case of sex discrimination based on S1 sending Complainant for a medical examination and his successive steps of placing her on Emergency Placement and removing her, but with regard to C1, a male employee, who he suspected of having used alcohol sufficiently to smell it on his breath, S1, rather than referring C1 for a medical examination, told C1 to take a mint. The AJ also found that Complainant participated in EEO activity prior to November 7, 2018, and that S1, A1, and S2 were aware of her prior EEO activity. The AJ found that there was a sufficient nexus between the adverse treatment and Complainant's protected EEO activity. In this regard, the AJ noted that although S1, A1, and S2 disclaimed knowledge of Complainant's prior EEO activity, the record established sufficient links to their *likely* knowledge in that a settlement of one matter extended at least through October 2018, the month prior to the Agency's actions in November 2018. The AJ found an even stronger nexus regarding the NOR, which came after the EEO counselor communicated with S1 then S2.

The AJ also found that the Agency proffered legitimate, nondiscriminatory reasons for its adverse actions. Complainant was sent to the OHS facility for an alcohol test because her breath smelled of alcohol and she was in violation of the zero-tolerance policy and a safety risk. She was placed on Emergency Placement because she was observed acting in an erratic manner, and, after an assessment, was found to be under the influence of alcohol. With respect to the NOR, the Agency maintained that she was removed because she engaged in unacceptable conduct on November 7, 2018, by consuming alcoholic beverages before or while on duty, violating Agency policies and putting the public and coworkers in "harm's way by planning to operate a Postal Vehicle while under the influence of a controlled substance."

The AJ found that Complainant established that the reasons stated by the Agency for its actions were pretext. First, regarding the Agency's argument regarding a zero-tolerance policy, the AJ found that there was no contemporaneous record documentation that Complainant was in contravention of a zero-tolerance policy. She was not provided with a copy of such a policy; nor was she informed that she had violated such a policy. The AJ noted that if there was such a policy, S1 did not follow it because if he had, he would have also sent C1 for a medical examination, but he did not.

Next, the AJ found that the OHS facility provided information to the Agency clearing Complainant to return for duty.

The Agency did not provide Complainant with a copy of the examiner's conclusion until it was required to do so during the EEO process.² The AJ noted that Complainant's BAT of 0.006 was far below the level of legal intoxication and far below a positive test for the Agency's own driving policy. The AJ noted that the BAT result was negative and there was no reason to restrict Complainant from continuing to work.

Complainant, the AJ found, also established that the Agency's reason for placing her off duty was a pretext. While the Emergency Placement was signed by A1, it was done at the direction of S1. The document charged Complainant was acting erratically, but S1 and A1 both testified that Complainant was not acting erratically. The document indicated that the evaluation concluded that she was "under the influence of alcohol," but she was not under the influence of alcohol. She had a smell of alcohol on her breath but produced a negative BAT. She did not appear intoxicated, and the assessment indicated that she could "continue to work." Accordingly, the AJ found that the reasons stated in the Emergency Placement were not worthy of credence.

With respect to the Agency's claim that Complainant was a safety risk for driving, the AJ noted that neither S1, A1, or S2 called for a ride for her, or otherwise ensured her safe dispatch to a hospital, clinic, her home, or any safe facility. Instead, Complainant was walked to the parking area where employees' personal vehicles were parked and drove away. The AJ found that the unavoidable conclusion was that none of Complainant's managers credibly believed she posed a safety risk to herself or others after receipt of a negative BAT.

Finally, the AJ found that Complainant demonstrated that the Agency's reason for removing her was pretext because the reasons stated in the notice were not worthy of credence as illustrated above.

The AJ ordered the Agency, to the extent it had not already done so because of the grievance, to provide Complainant with backpay from November 8, 2018 to January 8, 2020, and for any LWOP for that period to be indicated as regular time in the Agency records. Also, Complainant was to be credited for annual and sick leave for the period that she would have incurred such leave, and her RTR Employee Detail Report was to be changed to indicate zero lost hours rather than 1,200 lost hours. The Agency was further ordered to expunge its records of any information pertaining to the Emergency Placement and the removal. Complainant was awarded \$85,000 in nonpecuniary, compensatory damages, and \$38,510 in attorney fees. Finally, the AJ ordered the Agency to provide four hours of EEO training to S1, A1, and S2, and to consider taking disciplinary actions against them.

As noted above, the Agency rejected the AJ's finding of discrimination and filed an appeal with the Commission. On appeal, the Agency raised six specific contentions regarding the AJ's decision. They are:

² The Agency maintained on appeal that Complainant already had a copy of the report; therefore, it was unnecessary to provide her with a copy.

1. Whether the AJ erred in finding that there was substantial evidence to support a finding of sex discrimination in favor of Complainant including whether there was substantial evidence to support his finding of a prima facie case of discrimination and whether there was substantial evidence to support his finding of pretext;
2. Whether the AJ erred in finding that there was substantial evidence to support a finding of retaliation in favor of Complainant including whether there was substantial evidence to support his finding of a prima facie case of retaliation and whether there was substantial evidence to support his finding of pretext;
3. Whether the AJ erred in finding a prima facie case of retaliation could be established based on “likely,” as opposed to, “actual” knowledge of the alleged protected activity;
4. Whether the AJ abused his discretion and committed prejudicial error by excluding portions of the Declaration of Doctor M1, M.D.;
5. Whether the AJ’s compensatory damages award was excessive as it was inconsistent with the amounts awarded in similar cases; and
6. Whether the AJ’s compensatory damages award ought to be reduced given the fact that Complainant’s condition pre-existed the incidents herein.³

Complainant, in opposing the Agency’s appeal, argued that there was substantial evidence in the record supporting the AJ’s findings and conclusions.⁴

The Agency also submitted a response to Complainant’s opposition brief.

ANALYSIS AND FINDINGS

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. National Labor Relations Board, 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.

The Agency’s First Contention

³ With respect to the AJ’s remedial award, the Agency indicated that it was only contesting the amount of compensatory damages provided to Complainant, and not separately appealing any of the other remedies ordered by the AJ. Thus, to the extent liability is found, those remedies are not being challenged here.

⁴ Complainant did not contest the amount of compensatory damages or attorney’s fees awarded, nor any other aspect of the AJ’s decision.

First, we find that the AJ did not err in finding that there was substantial evidence in the record to support his finding of a prima facie case of sex discrimination. The AJ found that C1, a male carrier, was a comparator who was treated more favorably. C1 was suspected of having drank alcohol prior to coming to work like Complainant. S1, rather than refer C1 to the same medical examination Complainant underwent, told him to have a mint because his breath smelled of alcohol. The AJ found that C1 credibly testified that despite admitting to S1 that he had been drinking was never taken to a medical facility for testing, examination, or evaluation, and he was never disciplined by being placed on emergency placement or issued a notice of removal. Moreover, C1 was never given an official discussion or investigative interview regarding his alcohol use.

To be considered “similarly situated,” a comparator employee must be similar in substantially all aspects, so that it would be expected that they would be treated in the same manner as a complainant. See Complainant v. Dep’t of Homeland Sec., EEOC Appeal No. 01A60528 (July 14, 2006) (citing Complainant v. Dep’t of Treasury, EEOC Appeal No. 01A22092 (Mar. 13, 2003)).

According to the Agency, C1 was not a valid comparator because, unlike Complainant, there was no evidence that S1 ever thought that C1 had slurred speech. According to the Agency, there is more than one reason why a person’s breath could smell of alcohol. Combined with the slurring of speech, the Agency maintained, the use of alcohol and/or intoxication was the logical conclusion. The Agency maintained that there was no evidence presented that only one factor should have warranted the same result. Also, the Agency noted, C1 admitted that based on his relationship with S1, S1 could very well have been joking when their interaction occurred. The Agency’s argument, however, ignores C1’s testimony, which was found to be credible by the AJ, that he told S1 that he had drank alcohol.

The Agency also argued that a prima facie case based on sex was defeated by S1’s treatment of C2, a male CCA, about two months before the incident with Complainant. The Agency argued that C2 was similarly situated to Complainant and thus a proper comparator who destroyed her claim for disparate treatment because he had the same position as Complainant, the same supervisor, had slurred speech, and alcohol on his breath, and he was taken to the clinic and subsequently removed. The AJ, however, found that C2 was not a valid comparator because “Complainant’s conduct was plainly different than [C2’s] conduct.” We find that the record supports the AJ. As the AJ noted, “[C2] engaged in far worse conduct than Complainant including two positive BATs [0.121 for his first test and 0.124 for his second test six minutes later] many multiples higher than Complainant, test[ed] positive for controlled substances, and [had] a prior 60-day suspension,” and he was not removed by the Agency but rather “resigned prior to removal.” Complainant had a negative BAT, with a blood alcohol level that was significantly lower than C2, and was not intoxicated.⁵ The Agency focused solely on the fact that

⁵ The Agency noted on appeal, however, that there was no evidence of C2 having had a 60-day Suspension, nor could there have been because his enter on duty date was August 1, 2018. He was put off work on September 14, 2018 and issued a removal on November 17, 2018; therefore,

both C2 and Complainant were sent for testing but ignored the fact that C2 presented with slurred speech, the smell of alcohol, and was clearly intoxicated as evidenced by his very high BAT. Unlike the situation involving Complainant and C1, where there was only a smell of alcohol, C2's conduct left S1 with no choice but to refer him for testing because, as the AJ found, his behavior was much worse. Even if C2 was a valid comparator, which he was not, Complainant had still established a prima facie case. Such evidence about C2 would only be relevant to defeat Complainant's argument regarding pretext.

We also find that the AJ did not err in finding there was evidence to support a finding of pretext. The Agency argued that Complainant was in violation of its zero-tolerance policy for drugs and alcohol. The AJ found, however, that the Notice of Removal "did not include a zero-tolerance policy in the listed authorities," nor were there any contemporaneous record documentation that Complainant was in violation of a zero-tolerance policy. Complainant was not provided a copy of such a policy and was not informed that she had violated it. At the hearing, not one RMO was able to point to where such a policy exists. S1 claimed that a zero-tolerance policy was posted on a bulletin at every station and that he believed he received training on it. Yet, as the AJ noted, he was unable to describe it and could not identify the policy with any specificity, and he did not know when he received the training or whether the zero-tolerance policy was in a particular manual or the local LA District rules. As Complainant notes on appeal, if there were such a policy, S1 did not follow it because he did not send C1 for a medical examination.

The AJ also considered the Agency's various policies for how to handle employees when they have consumed alcohol while on duty or if they are intoxicated while on duty. However, the AJ found "[t]here is no credible evidence for any of the Agency officials to have believed Complainant consumed alcohol on duty—especially when her conversation with [S1] occurred within minutes of her arrival[,] [a]nd they all disclaimed concern of Complainant being intoxicated." On appeal, Complainant notes that S1 testified that he did not "notice any exceptional diminishment of the Complainant's physical or mental control on November 7th." Thus, we find that the record supports the AJ's determination that, Complainant demonstrated that the Agency's reasons concerning a zero-tolerance policy and her fitness for duty were unworthy of credence.

The AJ further noted that while the Emergency Placement stated that Complainant was acting erratically, both S1 and A1 each testified that Complainant was not acting erratically. Moreover, although the Emergency Placement stated that Complainant was under the influence of alcohol, the AJ found that her negative BAT test results were 0.006, which was far below the level of legal intoxication and, we note, was not considered a positive test by the OHS facility.

The Agency's Fourth Contention

he had yet to even work at the Agency for 60 days when the events that led to his removal arose. Accordingly, we find that the AJ erred in finding that C2 was suspended for 60 days before his removal.

The Agency submitted a Declaration from Doctor M1, the Associate Medical Director for the Agency. M1 stated, in pertinent part, that:

The Postal Service's drug and alcohol policy is zero-tolerance, meaning that no employee should have any amount of drugs or alcohol in their system while at work at the Postal Service. This is in part because of the unique circumstances that factor into how alcohol will affect a person and the fact that a large portion of the Postal Service's workforce interacts with customers and operates vehicles or other machinery

M1 also stated that:

[Complainant] was in violation of the Postal Service policy regarding drugs and alcohol on November 7, 2018. Not only did she have a detectable amount of alcohol in her system when she was tested, she appeared impaired while at work. And regardless of what [Complainant's] breath alcohol content was at the time it was taken, I can say, with a reasonable degree of scientific and medical certainty, that that number would have been higher at 7:30 a.m., the time she was scheduled to report to work, as well as at 8:30 a.m. the time she actually clocked in.

The AJ limited his consideration of M1's Declaration to her statement that, "I can say, with a reasonable degree of scientific and medical certainty, that that number [Complainant's BAT] would have been higher ... at 8:38 a.m." Specifically, the AJ stated that:

I have limited the quoted portion to the expertise for which [M1] is relevant. However, I also note that Complainant does not dispute that her BAT would have likely been higher when she clocked in than when she was tested. She is not an appropriate witness regarding Agency policy where she cites to none and does not explain any. Rather, such declaration testimony is concerning because she claims 'no employee should have any amount of drugs or alcohol in their system while at work at the Postal Service,' when there are clearly exceptions delineated in Agency policy, including Officer Approved Events, working meals, employee recognition event[s], employee appreciation event[s], industry conference, sales meeting[s], supplier meeting[s], etc. ROI at 247 (ELM 665.26). She is not competent to testify to any perceived level of impairment when Complainant was at work because she was not a firsthand witness.

The Agency argued that the AJ's decision to exclude aspects of M1's Declaration was an abuse of discretion and constituted prejudice in this matter. We disagree. Administrative Judges have broad discretion in the conduct of hearings, including discovery, and the determination of whether to admit evidence, or permit or compel the testimony of witnesses. See 29 C.F.R. §1614.109. Upon review of the record, the Commission finds no evidence that the AJ abused his discretion in these matters.

Here, the AJ admitted only the relevant portion of M1's declaration in which he found her credible, based on her expertise, i.e., that Complainant's BAT would have likely been higher when she clocked in than when she was tested. The AJ excluded the other portions of her declaration regarding the existence of a zero-tolerance policy and what she perceived to have been Complainant's level of impairment while at work, which was not based on her personal observation.⁶

The Agency's Fifth and Sixth Contentions

The Agency argued that notwithstanding his ruling on liability, the AJ's findings with respect to Complainant's nonpecuniary damages constituted an abuse of discretion, and that the award should therefore be drastically reduced to be in line with past precedent and the actual hearing testimony. Complainant sought damages in the amount of \$85,000, and as noted above, the AJ awarded that amount. The AJ noted that Complainant testified to the nature, extent, and duration of the distress caused by the discrimination. She explained that she was diagnosed with depression in 1994, and that it was generally manageable, but following the Emergency Placement and NOR, it became severely worse. She could not function for months because of anxiety attacks. She had difficulty eating because her anxiety constricted her throat. She could not go to the market and was worried she would pass out. Prior to her complaint, she took 10mg of Wellbutrin;⁷ thereafter, she was prescribed 20 mg of Trintellix and 0.5 mg of Xanax as needed for sleep and anxiety. Her doctor visits also became more regular. Prior to November 2018, she saw a doctor every three to four months, but this increased to every four weeks, before decreasing to every two months.

The AJ noted Complainant's admission that she also saw medical professionals during this period regarding her relationship with her boyfriend. Her provider noted for a June 2, 2019, appointment that Complainant was feeling better, her medication had been helpful, she needed her medication, her appetite was good, her sleep pattern was improved, her anxiety was down, her depression was down, her lassitude was down, and her prognosis was favorable and stable. Complainant also raised concerns about not having her job at the Agency and indicated that she was planning to move in with her mother. In April 2019, Complainant had indicated she was not feeling better, her sleep pattern was not improved, her anxiety, depression, and lassitude were up, and she was experiencing thought racing. The notes for November 17, 2018, noted her suspension, depressed mood, poor sleep, anxiety, panic attacks, poor appetite, low energy, difficulty concentrating, loss of interest in activities, and loss of sexual desire.

⁶ The Commission takes no position on whether the Agency has a zero-tolerance policy regarding alcohol. We do find, however, ample support for the AJ's conclusion that the Agency, in this case, did not provide credible evidence that Complainant's removal was based on the violation of such a policy. In this regard, we note the AJ's determination that the NOR did not list the zero-tolerance policy in the listed authorities supporting the removal; moreover, there were no contemporaneous documentation that Complainant was in violation of the zero-tolerance policy.

⁷ A medication used to treat depression.

Complainant, the AJ noted, testified to being unable to socialize, having some good days and bad days. The AJ also noted that because of the Emergency Placement, and the NOR she was cut off from contacting anyone from work, and therefore was unable to go through her normal routines. Complainant noted that, after the matters at issue, she was crying constantly, and that this continued until her return to work in January 2020. She was constantly worried and is still sometimes worried. She noted that some of her stress and worry was because of the EEO process and not knowing the outcome, which the AJ noted was not recoverable.

Finally, the AJ found that: Complainant was worried these matters would follow her even though she was at a different station; would wake up from nightmares; was taking a sleeping aid four times a week until January 2020; had stomachaches and headaches; had diminished family relationships; and she had to rely on her boyfriend to pay for housing. Although her condition improved after her return in January 2020, her financial position was still difficult because she had not received her back pay.

The AJ found that the nature and duration of the harm experienced by Complainant was most acute from November 2018 to January 2020, a period of 14 months, though the effects continued thereafter even until the date of the hearing in March 2021. The AJ focused on three of the Commission's prior decisions, i.e., Complainant v. Department of Treasury, EEOC Appeal No. 0720070015 (May 22, 2008)(the Commission affirmed an administrative judge's award of \$85,000 where complainant requested damages for loss of reputation, injury to professional standing, injury to character and reputation, emotional pain and suffering, mental anguish, loss of enjoyment of life, loss of health, emotional distress, loss of sleep, anxiety, stress, depression, loss of self-esteem and excessive fatigue, following termination of a temporary promotion and being subjected to a hostile work environment), request for reconsideration denied, EEOC Request No. 0520080667 (Sept. 10, 2008); Leung v. U.S. Postal Serv., EEOC Appeal No. 0120080685 (Oct. 8, 2009)(the Commission increased an agency award from \$17,000 to \$85,000 where complainant was terminated and stated that he experienced extreme and long-lasting emotional distress, and embarrassment that resulted in on-going loss of self-esteem; depression; grief; anguish; anger; stress; weight loss; headaches; nausea; sleeplessness; suicidal idealization; withdrawal from friends, coworkers and family; and a general loss of enjoyment of life during the two years since his wrongful termination); and Complainant v. Dep't of the Army, EEOC Appeal No. 01993594 (Sept. 13, 2000)(the Commission awarded \$85,000 where complainant was not selected for a position and received a lower report than deserved and submitted credible evidence indicating that the agency's discriminatory actions caused him to, in part, become very irritable; distant; wake up at night and make sudden jerking movements; not want to go to work; just lay in bed when he was not working; and neglect his home duties. Complainant was later diagnosed with major depression, single episode mild to moderate with anxiety).

According to the AJ, like the complainant in EEOC Appeal No. 0720070015, Complainant experienced each of the reputational effects and emotional and physical distress. Moreover, Complainant experienced the more significant and more degrading adverse action of removal compared to a termination of a temporary promotion and hostile work environment.

The AJ also found that Complainant also experienced emotional and physical distress like the complainant in EEOC Appeal No. 0120080685. Finally, the AJ found that similar to EEOC Appeal No. 01993594, Complainant received medical attention at a greater degree following the incidents in her complaint, including increased medication. According to the AJ, he carefully considered the relevant facts, including the nature and duration of the distress experienced by Complainant, and the amounts awarded in other comparable cases, including in what years those amounts were granted. The AJ also stated that he discounted Complainant's frustration with the EEO process, her pre-existing conditions, and her familial and social difficulties that were not attributable to the discrimination.

The Agency argued that the AJ's compensatory damages award was grossly excessive and inconsistent with awards in similar cases. Arguing that the AJ abused his discretion, the Agency requests that the Commission drastically reduce the AJ's award. Specifically, the Agency argues that none of the cases cited by the AJ are:

[f]actually similar to the instant case because all of them considered damages that were demonstrably more significant than what Complainant herself testified to, especially given the fact that she herself admitted that while she was off work from the Postal Service she applied for 20 jobs per month, was able to work successfully, took vacation, and was offered her original position back, which she rejected. For example, Complainant testified at hearing that while off work from the Postal Service after November 7, 2018, Complainant applied for and, in some cases, obtained and successfully performed multiple other forms of work. According to her, despite her other testimony, she 'wasn't at home sitting waiting to get [her] job back from the post office.'

The Agency, citing several cases, one awarding as little as \$1,500, argues for an amount that was less than \$25,000.

We find that there is substantial evidence in the record to support the AJ's award of \$85,000 in this case. As noted above, the AJ found the testimony of Complainant to be credible. An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive for 29 C.F.R. Part 1614 (MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015). Other than the Agency's disagreement with the AJ's determinations, we find that it has not shown that the AJ erred or that the record does not support the AJ's findings. We also find that the AJ took into consideration the matters raised by the Agency, i.e., her preexisting medical condition, when arriving at an appropriate amount. Finally, we find that the cases cited by the AJ are consistent with Complainant's damages as found by the AJ, including duration and severity of her harm.

We shall order the Agency to comply with the remedies provided by the AJ as slightly modified herein.

CONCLUSION

We REVERSE the Agency's final order finding no sex discrimination. The Agency will comply with our ORDER herein.⁸

ORDER

The Agency shall provide the following remedies:

1. The Agency, if it has not already done so, shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant from November 8, 2018, through January 8, 2020, pursuant to 29 C.F.R. § 1614.501, no later than 60 days after the date this decision is issued. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within 60 days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision." Moreover, the Agency shall ensure that its pay and leave records reflect that any Leave Without Pay during the subject period is indicated as regular time in Agency records. Additionally, the Agency shall ensure that Complainant's RTR Employee Detail Report indicates zero lost hours for the relevant period.
2. Within 60 days of the date this decision is issued, the Agency shall expunge the Notice of Removal and any reference to the Emergency Placement as well as any corresponding adverse materials from its records.
3. Within 60 days of the date this decision is issued, the Agency shall provide four hours of in-person (or interactive trainer-to-trainee videoconference) EEO training to S1, A1, and S2 particularly regarding sex discrimination
4. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against S1, A1, and S2.

⁸ Because of our determinations above, we do not find that it is necessary to address the AJ's findings that Complainant established a prima facie case of reprisal, and established that she was subjected to discriminatory retaliation, or the Agency's rejection of those determinations as set forth in its second and third contentions. A determination of these matters would not alter the remedy to which Complainant is already entitled because of our finding of discrimination based on sex.

The Commission does not consider training to be disciplinary action. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the responsible management officials have left the Agency's employment, the Agency shall furnish documentation of their departure dates.

5. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$85,000 in nonpecuniary, compensatory damages.

6. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$38,510 in attorney's fees.

POSTING ORDER (G0617)

The Agency is ordered to post at its Los Angeles Dockweiler Station located in Los Angeles, California 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 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

May 18, 2022
Date