



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

[REDACTED]
Cynthia D.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Appeal No. 2020002980

Hearing No. 531-2015-00223X

Agency No. DON-14-00174-02674

DECISION

Following its April 6, 2020, final order, the Agency filed a timely 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. For the following reasons, the Commission REVERSES the Agency's final order.

ISSUES PRESENTED

1. Whether the AJ abused his discretion awarding Complainant attorney's fees in the amount of \$557.50 as a sanction against the Agency for its failure to submit the investigative report in a timely fashion.
2. Whether the AJ's finding that the Agency subjected Complainant to a hostile work environment because of her race (Black), national origin (Caribbean), and sex (female) is supported by substantial evidence of record.

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.

3. Whether the AJ erred in awarding \$11,000 in nonpecuniary compensatory damages and \$42,530.64 in attorney's fees to Complainant.

PROCEDURAL BACKGROUND

Complainant worked as a Scientist, ND-1230-04 at the Agency's Naval Surface Warfare Center in Indian Head, Maryland. On July 17, 2014, Complainant filed a formal EEO complaint in which she alleged that the Agency discriminated against her on the bases of race (African-American), national origin (Caribbean), and sex (female) by subjecting her to a hostile work environment that consisted of the following actions attributed to her immediate and second-line supervisors:

- a. On April 10, 2014, the Manager of the High Energetics Division, her first-line supervisor (S1) yelled and screamed at Complainant in his office without cause or justification but did not behave the same way toward Complainant's White male coworker (CW);
- b. On April 21, 2014, Complainant was advised that she did not receive a bonus for the 2013 period;
- c. On April 23, 2014, Complainant was issued a letter of caution without cause or justification; and
- d. On May 1, 2014, the Manager of the Research and Technology Division, her second-line supervisor (S2), excluded her from a project briefing schedule that he had created.

The Agency conducted its investigation between October 20 and December 11, 2014. In a memorandum dated February 3, 2015, the Agency's Deputy EEO Officer informed Complainant's Counsel that the investigative report (IR) had not yet been completed, and that the estimated new completion date for the report was February 13, 2015. The memorandum further provided that if Complainant decided not to wait for the investigation to be completed, she could request a hearing with the Commission. The IR was ultimately completed on March 30, 2015.

Complainant's counsel submitted a request for a hearing via a memorandum dated March 24, 2015. In addition to her hearing request, Complainant filed a motion for sanctions in the form of a default judgment against the Agency. She maintained that, as of the date of her hearing request, she still had not been provided with a copy of the IR. Complainant also pointed out that more than 180 days had elapsed since the filing of the complaint on July 17, 2014. As a sanction, Complainant asked the Commission to enter a default judgment against the Agency or to conduct a supplemental investigation and bear the costs for doing so, including attorney's fees in the amount of \$70,575. In a memorandum dated April 6, 2015, the Deputy EEO Officer notified Complainant's Counsel that the investigative file was being transmitted.

On April 10, 2015, the Agency filed a response opposing Complainant's motion for sanctions. The Agency asserted that it had timely notified Complainant of the delay in completing the

investigative file, that it had provided a complete investigative file to Complainant on April 2, 2015, and that it had never failed to comply with a show cause order to produce the investigative file. As to why the IR was late in being submitted, the Agency stated that on February 10, 2015, the investigator notified it that, although the investigation itself had been completed, it could not be transferred due to technical issues resulting from a change in the dispatching and transmitting systems utilized by the investigator. Agency Response to Complainant's Motion for Sanctions, Attachment 8. Finally, the Agency pointed out that Complainant was given her right to request a hearing with the Commission if she decided not to wait for the investigation to be completed.

On June 25, 2015, the AJ issued an acknowledgement and order for initial status conference. Section (6) of the order, entitled "Sanctions for Failure to Follow Orders," quoted verbatim 29 C.F.R. § 1614.103(f)(3), which specified sanctions that an AJ could impose where appropriate.

On July 30, 2015, the AJ issued a scheduling and discovery order. In Section II of the order, the AJ addressed Complainant's motion for sanctions filed on March 24, 2015. The AJ noted that, due to technical difficulties with the transmission, the report had not been sent to Complainant until March 30, 2015, even though the investigation itself was completed by February 9, 2015. The AJ determined that a sanction was warranted, stating:

Title VII's directives ring hollow when parties are deprived of the ability to prosecute their claims, even for a matter of months. Further delays such as these have collateral effects on the Administrative Judge's dockets, which in turn delays other cases pending before the Commission. *** I determine that while a sanction is appropriate for the Agency's failure to adhere to the 180-day timeframe, the lesser sanction of attorney's fees in preparing the motion for sanction is the appropriate penalty.

AJ's Scheduling and Discovery Order, pp. 2-3. The AJ based his decision to award sanctions on the fact that, even though the software glitch was a one-time occurrence, its effects upon the process were significant, but that the investigation was completed close to the deadline of January 13, 2015. The AJ ordered the Agency to pay Complainant attorney's fees for preparing and filing the motion, which Complainant stated at oral argument to be \$577.50. The AJ allowed the Agency to respond to Complainant's claimed amount of attorney's fees by August 31, 2015. Scheduling and Discovery Order, p. 3.

On August 28, 2015, the Agency filed a motion for reconsideration of the AJ's July 30, 2015 decision to impose monetary sanctions in the form of attorney's fees for failing to timely provide Complainant with the IR. The Agency argued that the doctrine of sovereign immunity bars an AJ from ordering attorney's fees as a monetary sanction, and that any payment of such sanctions would violate the Anti-Deficiency Act.

A pre-hearing conference was held before the AJ on May 9, 2016, to consider the Agency's March 7, 2016 motion for summary judgment. At the conclusion of oral arguments, the AJ issued a bench decision in which he granted the Agency's motion with respect to incidents identified above as

incidents (b) and (d) and ordered a hearing with respect to incidents (a) and (c). Pre-Hearing Conference Transcript, pp. 60-61. The hearing was held on July 21 and July 22, 2016.

FACTUAL BACKGROUND²

On March 31, 2014, S1 assigned Complainant and CW the task of modifying a Resource Conservation Recovery Act (RCRA) document. The project involved updating procedures for chemically treating aged and unused explosive materials in order that those materials could be safely disposed of in accordance with the laws of the State of Maryland. On April 9, 2014, just prior to leaving work for the day, Complainant submitted the RCRA document to S1. S1 perused the document and noticed that the formatting was incorrect. Upon closer inspection, he observed that Complainant had failed to track the changes that were made to the document and that Complainant had drafted instructions for disposal of explosives that, if followed, would have set the explosives off, thereby causing serious bodily harm. While looking for Complainant, S1 encountered CW and informed CW that the work product was unacceptable. There were no indications that S1 yelled at CW or even raised his voice to CW. Hearing Transcript Volume One (HT1) 131-33.

The following day, April 10, 2014, CW relayed S1's assessment of their work product to Complainant. The parties gave two competing versions of what happened next. Both parties agreed that there were two encounters between Complainant and S1. Complainant testified that before the safety meeting, she stopped by S1's office to ask about the RCRA document and S1 started yelling and screaming at her. Then he told her that they would continue their discussion after the safety meeting. HT1 28. According to S1, however, he encountered Complainant outside the conference room where the safety meeting was being held, and Complainant became argumentative and confrontational when he brought up the subject of the RCRA document. HT1 137-43.

As to the second encounter that took place after the safety meeting, both parties agreed that the incident occurred in S1's office. Complainant testified that she and S1 were standing in his office, and that S1 stood roughly five inches from her face, bellowing at the top of his voice for about five to ten minutes. HT1 28-29. On the other hand, S1 testified that he was seated in his chair facing his computer screen and using his mouse to point out the deficiencies in the RCRA document, which was on the screen. S1 further testified that Complainant was standing behind him, looking over his shoulder at the screen. As to his tone of voice, S1 testified that he was frustrated by the fact that Complainant had made such fundamental errors in a document for which he, S1, would ultimately be held accountable. HT1 144-49.

² As discussed in detail below, the AJ ultimately found in Complainant's favor with respect to incident (a) and in favor of the Agency with respect to incident (c) following the hearing. In response to the Agency's appeal, Complainant challenged neither the AJ's entry of summary judgment in favor of the Agency with respect to incidents (b) and (d) nor the AJ's post-hearing finding in favor of the Agency with respect to incident (c). Consequently, only the factual record pertaining to incident (a) will be considered herein.

Later, on April 10th, Complainant sought out the Deputy Head of the Department, her third-line supervisor (S3) to report her encounters with S1. S3 described Complainant's demeanor as "very agitated and upset." S3 testified that she referred Complainant to the Head of the Research and Technology Division, Complainant's second-level supervisor to discuss the interaction between her and S1. Hearing Transcript, Volume Two (HT2) 11, 14-16. According to the hearing testimony of S1 and S2, S2 encouraged, but did not require S1 to take a training course on dealing with employees that all supervisors were required to take. The training did not include any elements pertaining to EEO or hostile work environments. HT1 180-81; HT2 33-35, 45-48.

ADMINISTRATIVE JUDGE'S DECISIONS

The AJ issued a decision on the merits of the case on June 21, 2018. With respect to incident (a), the AJ found that on the morning of April 10, 2014, there were two encounters between Complainant and S1. The first encounter occurred in a corridor outside of a conference room and the second occurred in S1's office approximately one half-hour later. The AJ found in both instances that S1, while in close proximity to Complainant, raised his voice and gestured in such a manner as to put Complainant in fear for her personal safety; particularly in fear that he would hit her. In finding that S1's behavior was because of Complainant's protected bases, the AJ noted that S1 assigned Complainant the task in question with a male peer, CW, and that there was no evidence that S1 screamed at CW in a manner similar to Complainant. On this point, the AJ stated:

The Agency vehemently disputes that the male coworker should be compared to the Complainant in any regard; it contends that he is not a peer to Complainant because of the difference in their grades [CW was at Grade 03] and because S1 assigned Complainant to be the lead of the project. This argument has no merit with regard to S1's verbal harangue of Complainant, versus his more subdued interactions with the male peer. Notwithstanding their different grades, and even accepting S1's assertion that he assigned Complainant as the lead with regard to the project, the evidence presented in this case is that they were both responsible for the project, that they were both scientists, and that S1's criticisms of the work were of the sort that, according to his [S1's] own testimony, a person with a high school knowledge of chemistry would have recognized. *** Even if one assumed that S1 deemed Complainant as the senior scientist, and therefore more responsible for the project, that argument does not support his decision to scream at her in a way which placed her in fear of her safety. Further, it is not reasonably conceivable that any evidence of such sort could have been offered – S1's conduct was inappropriate. The Agency offers no persuasive evidence that there is some meaningful difference based on the two persons' grades that would justify one being screamed at for basic errors while the other would not. S1 directed his inappropriate conduct to the Black female scientist of a two-person team for no other obvious reason.

AJ Decision on the Merits (June 21, 2018) (AJ1), pp. 14-15. As to the severity of incident (a), the AJ ruled:

I find credible Complainant's offer of evidence that her interactions with S1 concerning the report gave her significant and reasonable fear for her physical safety. She states that he was physically close to her, that he towered over her in a way which was threatening, that he yelled at her during the interactions, and that he glared at her, and she thought he was going to hit her and that she was going to lose her job. This behavior continued again, in the same way, during their second encounter in S1's office. Indeed, they were likely closer to one another the second time, as both witnesses testified that one looked over the other's shoulder while they both looked at the document on S1's computer. I also take note of the fact that S1 is significantly taller than Complainant, which likely added to Complainant's apprehension during their two encounters. Finally, I note that both of these encounters occurred in an environment where they could have been overheard by others; S1 testified that the first encounter happened outside of a conference room as members of this team were assembling for a regular safety meeting; the second encounter happened in his office, with the door open. Viewed in the totality of the circumstances, these facts combine to create a threatening and humiliating work environment, the type which Title VII prohibits.

AJ1, pp. 16-17. Ultimately, the AJ found that Complainant had established, by a preponderance of the evidence, that incident (a) was severe enough to place Complainant in reasonable fear of her safety, thereby creating a hostile work environment on the bases of her race, sex, and national origin. The AJ also found that Complainant was entitled to an award of nonpecuniary compensatory damages in the amount of \$11,000:

Complainant describes the harassment as having caused her difficulty sleeping, prolonged difficulty interacting with her loved ones, and missed opportunities to spend time with her extended family. She also stated that she had significant difficulties with menstruation as a result of the stress in her workplace. On balance, I determine that an award of \$11,000 is appropriate relief for the pain and suffering that Complainant experienced due to the Agency's creation of a hostile work environment.

Finally, the AJ notified the parties that his decision was not final in that a determination had yet to be made on attorney's fees and costs. AJ1, p. 18.

On June 13, 2019, almost a year later, the AJ issued his decision on Complainant's claim for attorney's fees and costs. The AJ noted at the outset that, as of the date of his 2019 decision, the Agency had not provided the fees in the amount of \$557.50 in concert with his prior order dated July 30, 2015, awarded as a sanction against the Agency for its delay in producing the IR. AJ's Decision on Attorney's Fees and Costs (June 13, 2019) (AJ2), p. 3. As to Complainant's main claim for attorney's fees, the AJ found that Complainant was a prevailing party notwithstanding that she prevailed on only one of the four incidents comprising her original claim. Next, the AJ found that incidents (a), (b), and (c) were part of the same claim arising from S1's reaction to Complainant's subpar performance on a task that he had assigned to her and were therefore not

fractionable. The AJ also found that incident (d) was fractionable in that it arose out of Complainant's contention that her work had been marginalized by a different supervisor, S2. The AJ determined that a 10 percent across-the-board reduction in Complainant's total fees claimed was appropriate. AJ2, p. 12. After addressing various other contentions raised by the Agency, the AJ awarded Complainant \$42,530.64 in attorney's fees, noting that Complainant did not make a claim for costs. AJ2, pp. 7, 15.

CONTENTIONS ON APPEAL

On April 6, 2020, the Agency timely issued its final order rejecting the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged and declining to fully implement the AJ's order for relief.

With respect to the first encounter, the Agency contends the AJ's determination that S1 screamed at her for five to ten minutes, was inches from her face, and made her fear for her safety and job was not supported by the record. The Agency noted that this first encounter was so insignificant that it was not referenced by Complainant at any point prior to the investigation, was not part of the accepted claim, and was addressed in a single page in the hearing transcript. Further, the Agency added that there was no testimonial support for the AJ's finding that Complainant believed that S1 was going to hit her and terminate her employment nor any support for the AJ's findings regarding S1's demeanor during the first interaction.

With respect to the second encounter, the Agency contends that no witnesses corroborated Complainant's testimony that S1 bellowed at her in his office for approximately "five or ten minutes." The Agency further contends that there was no direct evidence from the administrative assistant, who allegedly heard "yelling." Rather, what the administrative assistant heard that day was relayed entirely through testimony from the Deputy Department Head. Further, the second encounter consisted primarily of S1 sitting in front of his computer. S1's testimony made it clear that the second encounter revolved around exploring the document and all of its improprieties with S1 asking pointed and critical questions about unsafe procedures and improper formatting. Indeed, they were likely closer to one another the second time, as both witnesses testified that one looked over the other's shoulder while they both looked at the document on S1's computer. The Agency further argues that there is no support for the AJ's finding of "severe" conduct as Complainant failed to elicit any evidence that demonstrated that an open-door office meeting was humiliating. The sole evidence was, at best, that a single administrative assistant may have heard loud voices or yelling emanating from the office, but as previously noted, the loud voices/yelling was not one-sided. Finally, the Agency notes that the evidence does not support a finding that S1 was towering over Complainant at any point in time during the second encounter as he testified that he was seated in front of his computer. Accordingly, the Agency requests that the Commission affirm its final order rejecting the Agency's decision on this claim and the relief ordered.

In addition, the Agency contends that the AJ erred in awarding monetary sanctions in this matter for its delay in producing the investigative file. Further, the Agency argues that the AJ erred in limiting an across-the-board reduction to only ten percent of attorney's fees. The Agency notes

that Complainant prevailed on only one of the four original allegations, which should have amounted to a more substantial reduction in awarded attorney's fees. Thus, the Agency requests that the attorney's fee award should be further reduced from ten percent to between 50 and 90 percent.

In response, Complainant argues that the AJ properly found that S1's behavior rose to the level of a discriminatory hostile work environment. Additionally, Complainant contends that she is entitled to an award of \$200,000 in compensatory damages for the emotional and physical harm she experienced following the incident. Further, Complainant challenges the AJ's across-the-board reduction in attorney's fees.

ANALYSIS AND FINDINGS

Attorney's Fees as a Sanction

The Commission's regulations confer upon its AJs very broad responsibility for adjudicating an EEO complaint once a complainant's hearing request has been granted, and that responsibility gives the AJs wide latitude in directing the terms, conduct, or course of EEO administrative hearings. Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018). The AJ's discretionary authority includes the power to impose sanctions upon a party that fails to comply with his orders. Id.

When [a party] *** fail[s] without good cause shown to respond fully and in timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances: (i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information; (ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party; (iii) Exclude other evidence offered by the party failing to produce the requested information or witness; (iv) Issue a decision fully or partially in favor of the opposing party; or (v) Take such other actions as appropriate.

29 C.F.R. § 1614.109(f)(3). Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Factors pertinent to "tailoring" a sanction, or determining whether a sanction is even warranted, include: (1) the extent and nature of the non-compliance, including the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the

opposing party; (3) the consequences resulting from the delay in justice, if any; (4) the number of times the party has engaged in such conduct; and (5) the effect on the integrity of the EEO process as a whole. Id.

Applying the first tailoring factor, the noncompliance at issue was the Agency's untimely submission of the investigative report to Complainant. EEOC Regulation 29 C.F.R. §1614.108(e) provides in pertinent part that the agency must complete its investigation of an individual complaint within 180 days of the date that the complaint was filed, unless the parties both agree in writing to extend the investigatory time frame. Because Complainant filed her complaint on July 17, 2014, the investigation needed to be completed no later than Tuesday, January 13, 2015. The Agency did not provide Complainant with a copy of the IR until April 2, 2015. The Agency attributed its tardiness in submitting the IR to a software glitch resulting from a change in transmission systems, pointing out that it did not receive the IR from the contract investigator until March 5, 2015.

Applying the second and third factors, we find that any prejudicial effects of and consequences resulting from the Agency's untimely submission of the IR were minimal. Commission Regulation 29 C.F.R. § 1614.108(h) provides in pertinent part that at any time after 180 days have elapsed from the filing of the complaint, the complainant may request a hearing. Thus, Complainant was free to expedite the process by requesting a hearing at any time after January 13, 2015, although she was not required to do so. Applying the fourth factor, the untimely submission of the IR was the only incident of non-compliance with the Commission's regulations.

Applying the fifth factor, we have found in previous decisions that a failure to comply with the regulatory time limits for submitting reports of investigation does not warrant a severe sanction unless the noncompliance is deliberate or egregious or had resulted from lack of due diligence. Rather, we have either imposed evidentiary sanctions such as excluding affidavits and exhibits from the investigative report or have directed agencies to address the technical issues that caused their noncompliance. For example, in Salvatore B. v. Dep't of Agric., EEOC Appeal No. 2019005314 (Mar. 5, 2021), we found that the agency submitted a final decision almost 400 days after completing the investigation. Rather than impose the requested sanction of default judgment, we notified Federal Sector Programs about the agency's noncompliance. Similarly, in Cher C. v. Dep't of Homeland Sec., EEOC Appeal No. 2020003445 (Aug. 9, 2021), we found that a default judgment for a deficient and untimely investigative report was too harsh a sanction and instead ordered the agency to analyze its deficiencies, prepare a plan to correct those deficiencies and report on its progress in its next MD-715 report. As to the imposition of evidentiary sanctions, in Melissa H. v. Dep't of Homeland Sec., EEOC Appeal No. 2021000696 (Nov. 10, 2021), we reversed the AJ's grant of default judgment in lieu of a hearing due to the investigative report being submitted 37 days late and ordered a hearing at which the agency would not be allowed to rely on affidavits or exhibits from the investigative report in presenting its case.

Here, we find that the impact of the Agency's untimely submission of the IR upon the integrity of the EEO process was at best slight. There was no showing that the Agency attempted to obstruct the process, failed to exercise due diligence, or otherwise engaged in any conduct that would merit

a sanction. It was clearly prevented from timely submitting the IR due to circumstances beyond its control, namely the technical glitches caused by the change in the investigator's dispatching and transmitting systems. Given the specific circumstances present in this case, we find that a monetary sanction such as attorneys' fees, while certainly not as severe as a default judgement, is insufficiently tailored to remedy the problem at hand. This is especially true in light of the minimal impact of the late submission of the investigative report upon the integrity of the EEO administrative process. As a result, we will notify Federal Sector Programs (FSP) which monitors the federal agencies' EEO programs of the Agency's failure to comply with the regulations regarding the timely processing of investigative reports.

Standard of Review – Post-Hearing

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. Nat'l Labor Relations Bd., 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.

Hostile Work Environment

To establish a claim of harassment Complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected classes; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

The Commission's antidiscrimination statutes are not civility codes. Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998). Since we are addressing a single incident or at most two interrelated incidents, Complainant would have to show in order to ultimately prevail on her harassment claim that S1's conduct toward her during their two encounters was so severe that a "reasonable person" in her position would have found the conduct to be hostile or abusive. Assuming that S1 did yell and scream at Complainant in such a manner, she would also have to prove that he did so out of illegal considerations of her race, sex, or national origin. Only if Complainant establishes both of those elements, severity and motive, will the question of Agency liability present itself.

We find at the outset that Complainant established the first two elements of her claim in that she is a member of protected race, sex, and national origin groups, and receiving an extreme critical response (whether the underlying criticism was warranted or not) is certainly unwelcome in the subjective sense. As to the third element, indicators of an unlawful motive include discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint. Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015). The AJ premised his finding of unlawful motive upon the fact that S1 did not yell at CW when he encountered CW on the afternoon of April 9, 2014, when he was looking for Complainant. If S1 was so angry about the poor quality of the RCRA document, one would expect that he would yell at the first one he saw who was responsible for that submission. But there was no indication that S1 ever yelled at, shouted at, or otherwise raised his voice to CW at any time during their encounter on April 9th, let alone cause CW to fear for his personal safety. While Complainant may have been the lead, that is no justification for yelling at her in such an unprofessional fashion while not reprimanding CW at all, even though both individuals were responsible for the RCRA document. We therefore concur with the AJ that the particular circumstances presented in this case are sufficient to establish that Complainant's race and sex were factors in S1's harsh treatment of her in his office on April 10, 2014.

As to the fourth element, it is settled Commission precedent that if the conduct complained of is sufficiently pervasive or severe, a single incident or group of isolated incidents could be regarded as discriminatory harassment. Backo v. U.S. Postal Serv., EEOC Request No. 05960227 (June 10, 1996); Frye v. Dep't of Labor, EEOC Request No. 05950152 (Feb. 8, 1996); Walker v. Ford Motor Co., 684 F.2d 1355, 1358 (11th Cir. 1982). The more severe the harassment, the less need to show a repetitive series of incidents. Kelly v. Dep't of the Interior, EEOC Appeal No. 0120091631 (Aug. 8, 2011). As noted above, Complainant and S1 presented different versions of the events in question. Neither party presented documentary or testimonial evidence corroborating their version of what had transpired in S1's office. Thus, we are left with a "he said/she said" scenario. However, the AJ clearly found Complainant's testimony about what happened in S1's office 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 (EEO MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015). The Agency has presented no documents or testimony tending to corroborate S1's version of the incident. In the absence of such evidence, we can find no reason to question the AJ's assessment of Complainant's credibility as a witness. See e.g. Jackson v. Dep't of the Air Force, EEOC Appeal No. 0720110036 (March 13, 2012).³

³ Although the Agency argued that the AJ erred in crediting the testimony of Complainant and her witnesses over the Agency's witnesses, we decline to reweigh the parties' credibility on appeal. We note that the witnesses provided conflicting testimony about S1's behavior towards women. The Agency, however, has not pointed to any objective documentary evidence contradicting the testimony of Complainant and her witnesses, nor has it shown that their testimony so lacks in credibility that a reasonable fact finder would not credit it.

As to the fifth element, where the harassment does not result in a tangible employment action, the agency can raise an affirmative defense by demonstrating: that it exercised reasonable care to prevent and correct promptly any harassing behavior; and that Complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. Elaine P. v. Dep't of Defense, EEOC Appeal No. 2021001102 (April 25, 2022) citing Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 765 (1998) & Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). Immediately after the incident that occurred in S1's office, Complainant reported that incident to S3, who in turn, referred her to S2. Although S2 discussed the matter with S1, he neither disciplined S1 nor required him to take mandatory EEO training on harassment prevention. Instead, he merely suggested that S1 take a general supervisory course on employee relations that S1 had to take anyway. We therefore agree with the AJ that under the particular circumstances of this case, the Agency failed to take immediate and appropriate corrective action and is therefore liable for the actions of S1 that occurred in his office after the safety meeting on April 10, 2014.

REMEDIES

When discrimination is found, an agency must provide a complainant with a remedy that constitutes full, make-whole relief to restore the complainant 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); Lazaro G. v. Dep't of Commerce, EEOC Appeal No. 0120170802 (May 17, 2019), req. for recon. den. EEOC Request No. 2019004115 (Sept. 17, 2019); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994).

Compensatory Damages

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under Title VII may receive compensatory damages for non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of "make whole" relief. 42 U.S.C. § 1981a(b)(3). In a claim for compensatory damages, a complainant must prove that she suffered harm as a result of the Agency's discriminatory action; the extent, nature, and severity of the harm suffered; and the duration or expected duration of the harm. 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. The size of a compensatory damages award will be governed by the severity and duration of the harm suffered and the documentation of both the harm and the causal connection to the Agency's acts of discrimination. In general, the more severe the harm, the longer its duration, the stronger its connection to the Agency's discriminatory acts, and the more thorough its documentation, the higher the award will be. Miquel G. v. Dep't of Transportation, EEOC Appeal No. 2019002129 (Sept. 23, 2021).

Jackson, supra. [Citations omitted].

Objective evidence of compensatory damages can include statements from Complainant concerning her 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. 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). Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. Id.

As discussed above, the AJ found that an award to Complainant of \$11,000 was appropriate for the pain and suffering she experienced due to S1's excessively harsh reprimand. AJ Decision, p. 18. In reaching his decision, the AJ relied on Complainant's hearing testimony. Complainant testified that after her confrontation with S1 in his office on April 10, 2014, she had been getting between five and six hours of sleep per night, as opposed to eight hours of sleep that she had been getting before the incident. She added that her insomnia lasted for about six months before she started taking herbal remedies to minimize her anxiety. Complainant also testified that she had experienced weight gain as a result of her encounter with S1 and that as of June 21, 2016, the date of the hearing, she was still eight pounds overweight. In addition, Complainant testified that she had experienced hair loss and a fear of going to work and that none of these symptoms had occurred before April 10, 2014. Further, Complainant testified that she had lost interest in getting together with members of her extended family. HT1 38-43, 67-71.

After a thorough review of the record, and given the severity, nature, and duration of distress experienced by Complainant as a direct result of the discriminatory confrontation with S1 on April 10, 2014, we find that an award of \$12,000 for her emotional distress in nonpecuniary, compensatory damages is supported by the record. We find this award is not motivated by passion or prejudice, not "monstrously excessive" standing alone, and is consistent with the amounts awarded in similar cases. See e.g. Starr R. v. Gen. Serv. Admin., EEOC Appeal No. 0120143031 (Jan. 12, 2017) (awarding \$12,000 in nonpecuniary damages where testimony from the complainant's spouse established that the complainant gain weight, had difficulty sleeping, had frequent migraines, suffered from depression and anxiety, and lost interest in a lot of things she once loved doing); Mike G. v. Dep't of Agric., EEOC Appeal No. 0120152027 (Sept. 8, 2016) (awarding \$12,000 in nonpecuniary damages where evidence established that the complainant experienced exacerbation of his depression, anxiety, and post-traumatic stress disorder, weight gain, diminished quality of life, a strain on his relationships, financial difficulties, and sleeplessness); Complainant v. Soc. Sec. Admin., EEOC Appeal No. 0720080002 (Aug. 12, 2011) (awarding \$12,000 in nonpecuniary damages based on testimony of the complainant and her sisters showing that the complainant felt depressed and helpless, withdrew from normal activities, spent less time with family due to obsessing over Agency's actions, temporarily gave guardianship of her son to her sister-in-law, felt stressed, had high blood pressure, suffered dizziness and headaches and noting pre-existing conditions). We will therefore enter an order directing the Agency to award Complainant \$12,000 in nonpecuniary compensatory damages.

Attorney's Fees

By federal regulation, the Agency is required to award attorney's fees for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 29 C.F.R. § 1614.501(e)(1)(ii). The fact that complainant did not prevail on all of her claims does not, in itself, justify a reduction in the hours expended where the claims are intertwined, and it would be impossible to segregate the hours involved in each claim. It is true that attorney's fees may not be recovered for work on unsuccessful claims. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Courts have held that fee applicants should exclude time expended on "truly fractionable" claims or issues on which they did not prevail. See National Association of Concerned Veterans (NACV) v. Secretary of Defense, 675 F.2d 1319, 1337 n. 13 (D.C. Cir. 1982). Claims are fractionable or unrelated when they involve "distinctly different claims for relief that are based on different facts and legal theories." Hensley, 461 U.S. at 434-35.

As noted above, the AJ determined that Complainant was entitled to \$42,530.64 in attorney's fees after reducing the award across-the-board by ten percent. The AJ based his determination on his findings that allegations (a), (b), and (c) were intertwined. The AJ also stated, "a straight arithmetic reduction based upon the percentage of the claims identified as truly fractionable may be ill considered," but did not elaborate. AJ2, pp. 3-4, 12. On appeal, the Agency conceded that allegations (a) and (c) were intertwined because Complainant's defective work product was the underlying basis for those allegations. Agency Appeal Brief (AAB), p. 35. However, the Agency contends that the reduction should have been much higher, on the order of at least 50 percent because allegations (b) and (d) were fractionable relative to allegations (a) and (c). AAB, pp. 35-36. Complainant, through counsel, responded that even the 10 percent reduction was unreasonable because of the length of time and amount of resources expended in representing Complainant. Complainant's Response Brief, pp. 25-26.

Complainant, in her brief on cross-appeal, argued that the AJ failed to consider that despite Complainant not prevailing on every allegation, the allegations were intertwined and not fractionable. More specifically, Complainant contends that although there was no evidence that S2, the Agency official involved in allegation (d), was present during S1's hostilities, it was wholly reasonable to ascertain that S2 was aware of interactions between S1 and Complainant. Thus, S2 would be aware of Complainant's tarnished reputation, and thus, was a reason that she would have had briefing duties removed from her job duties. Therefore, allegation (d) was intertwined with allegations (a) through (c) as they all involve S1's creation of a hostile work environment. Complainant argues that allegations (a) through (d) had a direct correlation to the creation of the hostile work environment by S1. As such, allegations (a) through (d) were sufficiently intertwined and therefore the Agency's request to have a reduction in attorneys' fees between 50%-90% is wholly inappropriate and not in accordance with Commission precedent.

The Agency argues that that a reduction far greater than 10 percent was warranted in light of Complainant's failure to prevail on three of the four separate allegations, the AJ's correct determination that allegation (d) was distinct and because the AJ also should have determined that allegation (b) was distinct. The Agency claims that not only is the full fee petition amount not

warranted but the AJ erred in not reducing the fee petition amount by a much greater percentage in light of Complainant's failure to prevail on three of the four allegations and the AJ also should have determined that allegation (b) was distinct. The Agency argues that Complainant's contention that claim (d) is intertwined with claims (a) and (c) is nothing more than an inappropriate bootstrapping of event and pure speculation without any actual evidentiary correlation between the actions of the separate supervisors with respect to two distinct actions.

We find after reviewing the various appeal briefs and responses that allegations (a) and (c) are separate and distinct from allegations (b) and (d), and consequently, that a 50 percent fee reduction is in order. As previously noted, the Agency conceded that allegation (c), pertaining to the letter of caution, arose from the same defective work product and involve the same supervisor as the harsh dressing-down that was at issue in allegation(a). In contrast, neither the bonus at issue in allegation (b) nor the managerial briefings at issue in allegation (d) had anything to do with the reprimand at issue in allegation (a), for which liability was found. We therefore disagree with the AJ that a proportional fee reduction under these specific circumstances would be "ill-considered." On the contrary, a 50% across-the-board fee reduction has been found to be appropriate in a similar situation.

In Schlieter v. U.S. Postal Serv., EEOC Appeal No. 0720030007 (Sept. 29, 2003), a case comparable to the case now before us, the complainant alleged discrimination on the bases of sex and reprisal when she was issued a letter of warning for entering the men's locker room and harassed following the locker-room incident. The AJ in Schleiter ultimately found discrimination on the letter of warning incident but not on the harassment claim. On appeal, the Commission found no basis to disturb the AJ's discrimination finding on the letter of warning incident or the AJ's finding of no discrimination on the harassment claim. We found that the AJ properly determined that the complainant's successful and unsuccessful claims of discrimination were sufficiently distinct to justify reducing the requested amount of attorneys' fees by 50%. As in Schleiter, Complainant's claims in connection with allegations (a) and (c) and the claims in connection with allegations (b) and (d) are factually distinct and rely on separate legal theories, each capable of standing alone. Accordingly, we will award Complainant attorneys' fees in the amount of \$23,451.88.⁴

⁴ The fee award is calculated by dividing the gross award of \$46,903.76 (the amount prior to the 10 percent reduction originally ordered by the AJ) in half. See also e.g. Stacy v. Dep't of the Navy, EEOC Appeal No. 0720020056 (Mar. 18, 2004) (successful claim on discriminatory reduction-in-force sufficiently distinct from unsuccessful discrimination claims to justify reducing the requested attorneys' fees by 50%).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final order and direct the Agency to take corrective action in accordance with this decision and our order below.

ORDER (C0618)

To the extent that it has not already done so, the Agency is ordered to take the following remedial actions:

1. Within 60 days of the date the decision is issued, the Agency shall pay Complainant \$12,000 in nonpecuniary compensatory damages.
2. Within 60 days of the date the decision is issued, the Agency shall pay Complainant \$23,451.88 in attorney's fees.
3. Within 90 days of the date the decision is issued, the Agency shall provide eight hours of training to the individual identified in this decision as S1. This training must focus on management's responsibilities with respect to eliminating discrimination in the federal workplace and must also place special emphasis on preventing discriminatory harassment. If the officials have left the Agency, it shall furnish evidence of their departure dates.
4. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against S1. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the compliance officer. 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 management official has left the Agency's employ, the Agency shall furnish documentation of his departure date.

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). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Naval Surface Warfare Center in Indian Head, Maryland copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the

Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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

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

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

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

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

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

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

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

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

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


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

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

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

July 21, 2022

Date