



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

[REDACTED]
Jazmine F.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense,
Agency.

Appeal No. 2021001591

Hearing No. 570-2015-01003X

Agency No. 2012-FMD-030

DECISION

On December 28, 2020, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's March 25, 2016 final decision concerning an equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

BACKGROUND

During the period at issue, Complainant worked as a Program Analyst, GS-14, at the Agency's Washington Headquarters Services (WHS), Financial Management Directorate (FMD) in Washington, D.C.

Prior to the events at issue in the instant appeal, Complainant filed a May 20, 2010 EEO complaint (Agency No. 2010-FMD-038) alleging that her immediate supervisor at that time, the Deputy Assistant Director for the Programing Branch (male, Caucasian), and second-line supervisor, the FMD Assistant Director (male, Caucasian), had subjected her to a hostile work environment based on her race (African American), sex (female), and reprisal.

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 believed that she had been harassed through management decisions concerning demotion, assignments, awards, performance evaluations, duty hours, discipline, and monitoring of time and attendance. During the processing of that complaint, the Agency appointed, as settlement official, Complainant's third-line supervisor who was the FMD Director (female, Caucasian).

Beginning January 24, 2011, the Agency placed Complainant in a promotional detail to the Office of the Undersecretary of Defense (OUSD) Comptroller as a Senior Staff Accountant, Grade GS-15, for the Accounting and Financial Policy Directorate in Arlington, Virginia. Complainant's supervisor on the promotional detail was the Director of Accounting Policy (female, African American). According to a formalized memorandum, Complainant's promotional detail was not to exceed January 22, 2013, but the detail could have been extended upon mutual agreement between the FMD Director and the Director of Accounting Policy.

Effective January 17, 2013, the Agency removed Complainant from federal service for lack of candor while responding to questions about her personal legal issues on a SF-86 and in a deposition. Represented by current Counsel, Complainant unsuccessfully appealed her removal to the Merit Systems Protection Board (MSPB). See MSPB Docket No. DC-0752-14-0739-I-1 (Feb. 18, 2015).

Prior to her removal, on July 27, 2012, Complainant filed the instant EEO complaint (Agency No. 2012-FMD-030) alleging that the Agency unlawfully retaliated against her for her prior EEO-protected activity (the earlier complaint discussed above) when, on April 27, 2012, Complainant learned that her third-line supervisor, the FMD Director, interfered with a prospective employment opportunity by notifying her temporary detail supervisor, the Director of Accounting Policy, as well as human resources and the general counsel, about Complainant's prior EEO activity (including Agency No. 2010-FMD-038²).

On September 19, 2012, the Agency procedurally dismissed Complainant's formal complaint for failure to state a claim. This Commission reversed that decision and remanded the matter for an investigation. See EEOC Appeal No. 0120130136 (Mar. 27, 2014), Agency's *request for recons. denied*, EEOC Request No. 0520140325 (Feb. 13, 2015).

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing but subsequently withdrew her request. On July 13, 2016, the Agency issued a final decision, pursuant to 29 C.F.R. § 1614.110(b), that concluded that Complainant had failed to prove that the Agency subjected her to unlawful retaliation as alleged.

² In that case, the Commission affirmed the final Agency decision which adopted an EEOC AJ's finding that Complainant failed to prove that she was discriminatorily harassed. See Complainant v. Dep't of Def., EEOC 2019003363 (Jan. 22, 2020), *request for recons. denied*, EEOC Request No. 2020002692 (Sept. 10, 2020).

Complainant appealed. In EEOC Appeal No. 0120162132 (June 22, 2018), *request for recons. denied*, EEOC Request No. 0520180517 (Nov. 7, 2018), the Commission reversed the Agency's final decision. The FMD Director had maintained that she had discussed Complainant's prior EEO activity with the Director of Accounting Policy in order to settle Agency No. 2010-FMD-038 by arranging a permanent assignment with OUSD for Complainant. However, we concluded that the FMD Director's stated rationale was pretextual. It was noted that, after the Director of Accounting Policy advised that a permanent OUSD position was not available, the FMD Director gratuitously divulged Complainant's engagement in prior EEO-protected activity. We remanded the matter to the Agency for a supplemental investigation into damages, provision of eight hours of EEO training for the FMD Director, and consideration of discipline against the FMD Director.

In a letter dated December 27, 2018, the Agency instructed Complainant to submit evidence in support of her entitlement to damages. After Complainant responded, the Agency requested additional information which Complainant provided on March 26, 2019. On November 24, 2020, the Agency issued a final decision on damages awarding a total of \$4,226.10 for medical expenses as well as out-of-pocket costs from depositions and mailings. The Agency denied non-pecuniary compensatory damages because Complainant did not expressly quantify such relief. The Agency denied Complainant's request for attorney's fees because, until her request for attorney's fees, her correspondence indicated that she was acting *pro se*.

The instant appeal followed. On appeal and through Counsel, Complainant contends that the Commission should sanction the Agency for being recalcitrant toward the EEOC's orders by causing excessive delays and then only granting *de minimus* relief. Complainant asserted that the Agency should have awarded \$5,558.80 in attorney's fees for 9.4 hours of help that she had received from Counsel without charge. Complainant's Counsel cited EEOC cases with awards between \$50,000 and \$100,000 to justify increasing non-pecuniary compensatory. Complainant's appellate brief did not challenge the Agency's reimbursements for her medical and processing costs but calculated that an additional \$3,979.55 in pecuniary damages were warranted.

ANALYSIS AND FINDINGS

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

Sanctions / Default Judgment

We find unpersuasive the arguments of Complainant's Counsel for a default judgment or sanctions. This case had a lengthy history because it was time-consuming and procedurally complex and because of simultaneous separate claims of harassment and the mixed-case claim regarding removal.

Attorney's Fees

Attorney's fees and costs shall be awarded in accordance with 29 C.F.R. § 1614.501(e) and EEO MD-110, at Ch. 9, § VI. EEOC regulations do not allow attorney's fees for non-attorneys including *pro se* complainants. 29 C.F.R. 1614.401(e)(iii).

On appeal, Complainant has requested fees ostensibly incurred because she consulted with the same attorney who represented her while challenging her removal before the MSPB. However, we find that her claim for attorney's fees is not reasonable in this case.

On appeal, Complainant's Counsel, has maintained that the Agency incorrectly denied Complainant's request for attorney's fees. We concur with the Agency that Complainant in essence, represented herself in this matter. None of Complainant's correspondence indicated that she had legal representation until she requested attorney's fees. Upon a careful review of this entire record regarding Agency No. 2012-FMD-030, Complainant was a *pro se* litigant when she filed her EEO complaint on July 27, 2012, and thereafter, throughout the investigation, during the hearing process, as she contested every other unfavorable procedural and merits decision from the Agency, when she submitted evidence of damages, and at all critical stages up prior to the present appellate brief.

Counsel claims to have advised Complainant throughout her *pro se* advocacy. However, it appears that Complainant herself withdrew her request for a hearing, thereby effectively waiving an opportunity to have the matter heard by an AJ before whom Complainant could have conducted discovery, presented testimonial support and cross-examined the responsible Agency managers. Moreover, Complainant's lack of specificity with respect to non-pecuniary damages arising from her successful reprisal claim would not have occurred, had she consulted an attorney with applicable expertise. Even Counsel admitted that he did not contemporaneously bill or record his time assisting Complainant. Even after she prevailed on the one reprisal claim, he did not increase the level of legal service that she was provided. Complainant's claims for attorney's fees conflates paid legal services from other employment matters (such as her representation before the MSPB) with her individual *pro se* effort on this matter. Consequently, we concur with the Agency, in that Complainant's request for attorney's fees was not reasonable. The Agency properly denied attorney's fees given Complainant was entirely *pro se* in every effort except this latest appellate brief.

Non-Pecuniary Compensatory Damages

Non-pecuniary compensatory damages are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. EEOC Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Enforcement Guidance), EEOC Notice No. 915.002 (July 14, 1992). Although there is no precise formula by which to calculate nonpecuniary damages, the method for computing non-pecuniary damages should be based on the severity and the duration of harm Complainant suffered. Carpenter v. Dep't of Agric., EEOC Appeal No. 01945652 (July 17, 1995). Objective evidence in support of a claim for non-pecuniary damages claims includes statements from Complainant and others, including family members, co-workers, and medical professionals. EEOC Enforcement Guidance at 10; Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Non-pecuniary damages must be limited to compensation for the actual harm suffered as a result of discriminatory actions by the Agency. EEOC Enforcement Guidance at 13; Cortez J. v. Dep't of Def., EEOC Appeal No. 0120182712 (Nov. 29, 2019) *citing* Carter v. Duncan-Higgans. Ltd., 727 F.2d 1225 (D.C. Cir. 1994). A proper award of non-pecuniary compensatory damages should not be monstrously excessive; a proper non-pecuniary compensatory damages award cannot be a product of passion or prejudice; it should be consistent with non-pecuniary compensatory damages awarded in similar cases. Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

We note that it was completely unnecessary for the FMD Director to disclose Complainant's EEO activity to the Director of Accounting Policy in April 2012. Complainant's detail was not set to expire until January 22, 2013. Moreover, it was possible to extend Complainant's promotional detail after 2013. Indeed, Complainant had requested that her detail at OUSD be converted to a permanent position or that she be transferred elsewhere out of WHS's FMD. The FMD Director advised the Director of Accounting Policy that her intention was to locate another position for Complainant in order to settle Complainant's prior harassment complaint. We found this justification pretextual. The FMD Director's decision to discuss Complainant's EEO activity was motivated by unlawful retaliatory animus. We note a June 2012 email to WHS's Human Resources, wherein the FMD Director wrote the following about Complainant:

As a result of this EEO complaint, we have found that she has made a career of filing EEO complaints she has done so at several agencies. She admits to it at Commerce and an intel organization. But I know for a fact that she filed EEO complaints at Joint Staff and [Air Force] as well . . . is dismissal possible? If not, what is appropriate?

Despite Complainant's own actions which ultimately precipitated her removal, we nevertheless find that the FMD Director undermined Complainant's potential employment opportunities in reprisal for prior EEO-protected activities.

Consequently, we find that non-pecuniary compensatory damages are warranted since *per se* reprisal occurred. Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998); Woolf v. Dep't of Energy, EEOC Appeal No. 0120083727 (June 4, 2009); Vincent v. U. S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), request for recons. denied EEOC Request No. 0520090654 (Dec. 16, 2010).

A fair reading of Complainant's statements in support of entitlement for damages reveals that she suffered serious emotional, physical and professional harm that was attributable to the retaliation found to have occurred. Complainant stated that after her detail supervisor, the Director of Accounting Policy, informed her that the FMD Director had discussed her EEO activity, she felt her professional reputation within the Agency had been besmirched. Complainant stated that she felt helpless and "in limbo" because the FMD Director advertised her permanent position in WHS as a vacancy although Complainant could have otherwise returned to that position at the end of her detail. Complainant's request for non-pecuniary compensatory damages revealed that, during summer 2012, after she had learned about the FMD Director's retaliatory motives, she began to require psychiatric care including medications for new diagnoses of adjustment disorder, anxiety, depression and insomnia. Around this same time, Complainant was diagnosed with Bell's Palsy that caused paralysis of part of her face. Her treating physician opined that a stressful event, such as those she experienced at work, could have triggered the onset of Bell's Palsy. In light of the FMD Director's statement, in conjunction with evidence of resultant harm to health and employment, we find that \$10,000 is an appropriate award of non-pecuniary compensatory damages.

This award is based on cases with similar circumstances involving comparable injuries. For example, in David L. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120172609 (Feb. 15, 2019), a hospital director disclosed to the hospital's chief of staff that a nurse had filed an EEO complaint and implied that the nurse's career was in jeopardy as a result of doing so. We found that reprisal had aggravated the nurse's panic attacks and insomnia; family members and colleagues observed that the nurse become obsessed with problems at work. As a result, it was we increased the nurse's non-pecuniary compensatory damages award to \$10,000. Similarly, in James T. v. Dep't of Justice, EEOC Appeal No. 2020002928 (Aug. 4, 2021), we found that a warden of a penitentiary had committed *per se* reprisal against a disciplinary hearing officer by advising that if he filed an EEO complaint about his demotion, then it would be "throwing money away." The disciplinary hearing officer's depression and anxiety drastically increased as his perception of self-worth plummeted. An award of \$10,000 in non-pecuniary damages was merited based on the severe harm suffered. In addition to being consistent with the aforementioned prior Commission precedent, \$10,000 is not monstrously excessive nor is this amount produced by prejudice or undue passion.

CONCLUSION

Based on a thorough review of the entire record and all contentions on appeal, we AFFIRM the final Agency decision regarding denial of attorney's fees, award of medical expenses as pecuniary damages, award of mailing costs and award of deposition costs. However, we MODIFY the Agency's decision by adding an award of non-pecuniary compensatory damages in accordance with the preceding discussion above. This matter is hereby REMANDED to the Agency for compliance with the ORDER herein.

ORDER

To the extent it has not already done so, the Agency shall take the following actions:

1. **Within ninety (90) calendar days** from the date this decision is issued, the Agency shall pay Complainant \$10,000 in non-pecuniary compensatory damages.
2. **Within ninety (90) calendar days** from the date this decision is issued, the Agency shall pay Complainant \$3,202 in pecuniary damages for her medical costs and copayments.
3. **Within ninety (90) calendar days** from the date this decision is issued, the Agency shall pay Complainant \$130.60 as reimbursement for her out-of-pocket costs from mailing correspondence.
4. **Within ninety (90) calendar days** from the date this decision is issued, the Agency shall pay Complainant \$893.50 as reimbursement for the out-of-pocket costs associated with deposing the FMD Director and FMD Assistant Director.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g).

Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled “Right to File a Civil Action.” 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

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

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0920)

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

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

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

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

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

An agency’s request for reconsideration must be submitted in digital format via the EEOC’s Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

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

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

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

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

September 27, 2022

Date