



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

[REDACTED]
Wiley G.,¹
Complainant,

v.

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

Appeal No. 2022000605

Hearing No. 410-2018-00309X

Agency No. 13-67004-00377

DECISION

Following its November 15, 2021 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) ordered relief following a 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.

BACKGROUND

During the period at issue, Complainant worked as a Motor Vehicle Operator, 0302, GS-4, at the Agency's Distribution Management Center in Albany, Georgia.

On February 26, 2013, Complainant filed a formal EEO complaint claiming that the Agency discriminated against him based on race (African American) and color (Black) when:

- a) on November 9, 2012, Complainant was not selected for the position of Heavy Mobile Equipment Mechanic Supervisor, WS-5803-10;

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.

- b) in March 2013, Complainant was not rated qualified and was not considered for two positions in the Fleet Support Division, Distribution Management Center which were Supervisory Distribution Facilities Specialist, Vacancy ID 855068 and Supervisory Distribution Specialist, Vacancy ID 859806; and
- c) on December 8, 2008, Complainant reported the use of the “N” word, but management did not do anything about the matter.

The Agency accepted claims a and b for investigation. However, Complainant later withdrew claim b. The Agency dismissed claim c for untimely EEO Counselor contact, pursuant to 29 C.F.R. § 1614.107(a)(2).

After the investigation of the accepted claim (claim a), Complainant timely requested a hearing before an EEOC Administrative Judge (AJ). Following the Agency’s motion for summary judgment, the AJ issued a decision without a hearing on December 31, 2014, in favor of the Agency. Specifically, the AJ determined that only the applicants with the top five scores were selected for interviews, and Complainant was not selected for an interview because his resume score was not in the top five. Therefore, the AJ determined that the Agency articulated legitimate, non-discriminatory reasons for Complainant’s non-selection for the Heavy Mobile Equipment Mechanic Supervisor position. Thereafter, the Agency issued a March 3, 2015, final order implementing the AJ’s finding of no discrimination. Complainant appealed.

In EEOC Appeal No. 0120151496 (April 26, 2017), the Commission affirmed the AJ’s finding of no discrimination regarding claim a. However, the Commission reversed and vacated the Agency’s dismissal of claim c after finding that Complainant had, in fact, alleged ongoing harassment and not just a single incident, and at least one alleged incident occurred within the 45-day time period preceding Complainant’s November 13, 2012 EEO Counselor contact. Therefore, the Commission remanded claim 3, now defined as a claim of ongoing hostile work environment harassment, to the Agency for further processing.

On remand, and following an investigation, Complainant requested a hearing before an AJ and subsequently amended his claim to include the basis of reprisal, which was accepted by the AJ. The AJ identified Complainant’s accepted claims as the following:

1. Whether Complainant was discriminated against based on race (African American) and color (Black) and subjected to a hostile work environment by members of the Fleet Support Division (FSD), Distribution Management Center (DMC) when he reported the use of the “N” word by nothing was done about it; and
2. Whether Complainant was discriminated against based on reprisal for prior protected EEO activity (reporting the use of the “N” word in December 2008) when he was reassigned pursuant to a “steak dinner bet” made by Complainant’s Supervisor.

Following a November 4, 2020 hearing, the AJ issued a bench decision on November 23, 2020. The AJ found that Complainant established a *prima facie* case of discriminatory harassment based on race and color when management failed to effectuate an adequate response to Complainant's report of use of the "N" word at the workplace. The AJ further concluded that Complainant's Supervisor retaliated against Complainant by reassigning him to another position following Complainant having reported that the "N" word had been used.

The AJ explained that the record indicated that Complainant's co-worker (CW1) played a voicemail message he received that stated, "I hate that we got that goddam n---er in the white house, Obama, and we going to have a bunch of goddam monkeys running around the White House." The AJ further explained that the record also indicated that a Team Lead had engaged in derogatory treatment toward Complainant,² and CW1 had informed Complainant that the Team Lead had also used the "N" word at work. Although the AJ acknowledged that these incidents were isolated, she indicated that the Commission has previously held that the "N" word is a racially charged term such that single incident can create a hostile work environment. Consequently, the AJ determined that Complainant had established that he had been subjected to a hostile work environment based on race and color.

The AJ further determined that the Agency was liable for the hostile work environment that Complainant endured. The AJ reasoned that management failed to take prompt and effective action after Complainant had reported CW1's voicemail as well as the Team Lead's actions. Specifically, the AJ noted that the Agency failed to separate Complainant from CW1, and the Agency failed to share with Complainant the findings of the investigation into the matter, which only resulted in CW1 receiving a Letter of Reprimand in February 2009. Nevertheless, the AJ indicated that CW1 received a temporary promotion effective September 27, 2009, which occurred within the same year that CW1 was reprimanded for use of a racial epithet in the workplace. The AJ stated that the record reflected that Complainant continued to notify management of the hostile work environment. However, management failed to act, and Complainant's concerns remained unaddressed.

Regarding the reprisal claim, the AJ found that Complainant engaged in protected oppositional activity when he reported the December 11, 2008 voicemail recording to his Supervisor. The AJ further found that Complainant's Supervisor retaliated against him in September 2012 by temporarily reassigning Complainant to the box gear section, which was less desirable given than this section required intensive work and was regarded as a form of punishment. The AJ noted that prior to complaining it had been several years since Complainant had been reassigned to another position. Complainant, however, was quickly reassigned following his oppositional activity, and the evidence established the reassignment was retaliatory.

² The AJ determined that the Work Leader used the "F" word in the presence of Complainant and another co-worker regarding paperwork that had been untimely filed. The AJ further determined that the record supports that the Team Lead described other co-workers as "the boy" and used the term "wetback" to describe a Mexican employee.

Following a separate April 20, 2021 hearing on damages, the AJ issued a September 30, 2021 decision awarding Complainant \$100,000 in non-pecuniary compensatory damages, \$8,513.91 in past pecuniary damages, annual leave restoration (or equivalent payment thereof) for 352 hours, and attorney's fees of \$34,332.00.

The Agency issued a final order accepting the AJ's finding that Complainant was subjected to discriminatory and retaliatory harassment by the events summarized above. However, the Agency rejected AJ's September 2021 damages decision and filed the instant appeal challenging the AJ's order of relief. On appeal, the Agency specifically requests that the Commission substantially reduce the damages awarded in the September 30, 2021 decision.

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.

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 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

As an initial matter, on appeal, the Agency question Complainant's credibility about the harm he suffered due to the discrimination by citing testimony from Complainant's deposition which the Agency contends is at odds with Complainant's hearing testimony. However, the Agency failed to admit this deposition into the record, and consequently, the AJ did not admit the deposition into evidence. Therefore, the Agency may not attempt to now introduce new evidence for the first time on appeal, and we find no basis to disturb the AJ's credibility determinations regarding Complainant.

In addition, on appeal, the Agency only disputes the AJ's remedial award of \$100,000 in non-pecuniary compensatory damages. Therefore, we need not disturb the AJ's other remedial awards including: (1) \$8,513.91 in past pecuniary damages, (2) annual leave restoration (or equivalent payment thereof) for 352 hours; and (3) attorney's fees in the amount of \$34,332.00. Therefore, these awards are AFFIRMED.

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. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102

of the Civil Rights Act of 1991 (EEOC Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). 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. See id.; see also 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 the Agency's discriminatory actions. See Carter v. Duncan-Higgans. Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance at 13. Additionally, the amount of the award should not be “monstrously excessive” standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)).

Complainant testified that he felt “really small” when management failed to respond to his multiple complaints, and management’s lack of response to his concerns made him miserable, which in turn, had a negative impact on his marital life. Complainant indicated that he distanced himself physically from his wife, he grew apart from his family, and he stopped engaging in social activities.

Complainant acknowledged that the Agency’s discriminatory and retaliatory actions exacerbated his anxiety which originated from trauma he sustained while on active military duty during the Gulf War. When a complainant has a pre-existing condition, the Agency is liable only for the additional harm or aggravation caused by the discrimination. Complainant is entitled to recover damages only for the injury, or additional injury, caused by the discrimination. See Terrell v. Dep't of Housing and Urban Dev., EEOC Appeal No. 01961030 (October 25, 1996); EEOC Notice No. N 915.002 at 12.

Here, Complainant clarified that the anxiety he experienced at work – the isolation and discrimination – was different from his military service-related anxiety, in that he did not understand what he was experiencing. However, he was clear that his service-connected anxiety and service-connected post-traumatic stress syndrome (PTSD) was significantly exacerbated by his working conditions. Complainant testified that he began counseling in 2009 or 2010 because his mental conditions worsened, and his marriage was suffering. Complainant also explained that he experienced a state of depression after he learned that CW1 had been promoted into a leadership position in 2009, despite Complainant’s reports to management about him.

In addition to the emotional harm he endured, Complainant also noted that he experienced physical effects from the stress and anxiety resulting from the discriminatory harassment. Specifically, Complainant stated he experience irritable bowel syndrome (IBS), headaches, elevated blood pressure, an ulcer, eczema, weight gain, panic attacks, and erectile dysfunction.

Complainant’s wife, a nurse of twenty years, also testified that Complainant’s mood changed because he was hearing racist words at work, and he attributed most of his frustration to the lack of preventative action by his Supervisor.

Complainant's wife explained that Complainant's Supervisor became the "talk of [their] relationship" and it felt "like some stranger came in [her] home and basically took over." Regarding personality changes, Complainant's wife stated that Complainant was no longer a friendly person, no longer intimate, stopped socializing with friends, and did nothing at home except having dread regarding going back to work. As a result, Complainant's wife indicated that their marriage suffered which prompted them to attend counseling together. However, she explained that the counseling was not as effective as it could have been because Complainant still had to go to work and work with the same people who were not getting disciplined for their actions. Consequently, she noted that Complainant gained a lot of weight and tried to "eat away" his stress.

Both Complainant and his wife asserted that the hostile work environment exacerbated his pre-existing PTSD and anxiety and the associated physical manifestations of these mental conditions. Complainant acknowledged that he had a motor vehicle accident in April 2013, lost a total of ten family members and friends during the relevant period, and survived tornadoes that hit his neighborhood in January 2017. However, Complainant and his wife both clarified that the discriminatory and retaliatory harassment Complainant was subjected to was a primary cause that aggravated his underlying conditions. Regarding the deaths of family members, Complainant's wife stated that, while sad, death is a part of life and there is an expectation that loved ones will eventually die. In contrast, Complainant's wife indicated that Complainant was initially excited about his job at the FSD and the work environment he was subjected to came as a shock with long-lasting effects, especially after Complainant had reported the incidents and CW1 received a promotion. Notably, Complainant testified that it was the hostile work environment that influenced his decision to retire from the Agency and seek disability retirement in November 2020. Complainant and his wife both noted that this decision occurred before Complainant was diagnosed and hospitalized with COVID in December 2020.

On appeal, the Agency argues that the AJ's award of non-pecuniary damages was excessive and should be reduced. The Agency reasons that Complainant's medical conditions and associated physical conditions (IBS and gestational issues) were pre-existing conditions and originated from Complainant's military service. The Agency further reasons the other life events unrelated to the discriminatory harassment contributed to Complainant's emotional harm. Finally, the Agency asserts that Complainant and his wife provide testimony regarding Complainant's non-selections claims which were previously adjudicated in favor of the Agency or withdrawn by Complainant, and consequently, are not relevant and not related to the discrimination and the non-pecuniary damages award should be reduced.

We concur with the Agency that this award should *only* encompass the harm Complainant sustained by the discriminatory act at issue to the extent that this discriminatory act exacerbated Complainant's anxiety, PTSD and the associated physical manifestations of these mental conditions. In this case, it is evident from the record that Complainant was diagnosed with PTSD before he began working at the FSD and this condition was related to his military service. Additionally, Complainant's wife acknowledged that Complainant had PTSD and some of the other physical conditions.

However, she clarified that many of these conditions were stable and controlled before Complainant began working at the FSD and did not exacerbate until after Complainant began working at the FSD. Consequently, Complainant and his wife clearly indicated that the majority of Complainant's conditions were exacerbated by the discriminatory act. Complainant's wife identified the hostile work environment as the main cause of their marital issues which resulted in Complainant seeking counseling following the December 2008 voicemail and CW1's 2009 promotion. The record further indicates that after Complainant's retaliatory 2012 reassignment, he had approximately 44 mental health physician visits from 2013 through 2019. Although Complainant experienced other life events during this period (car accident, death of family members, and adoption of his grandson in 2012), Complainant and his wife both attribute the emotional harm Complainant sustained during this period as work-related.

We find an award of \$100,000 is neither monstrously excessive nor the product of passion or prejudice and is consistent with prior EEOC precedent. See Brown-Fleming v. Dep't of Justice, EEOC Appeal No. 0120082667 (2010)(awarded \$150,000 in nonpecuniary damages where despite complainant's pre-existing conditions, the cause of her emotional harm and physical problems was attributed to the discriminatory termination); Brenton W. Dep't of Veteran Affairs, EEOC Appeal No. 2020002329 (2021)(awarded \$70,000 in nonpecuniary damages where complainant was subjected to co-worker harassment over a month which triggered complainant's pre-existing PTSD which had previously been under control); Coffee v. Dep't of Defense, EEOC Appeal No. 0720090012 (2009)(awarded \$70,000 in nonpecuniary damages where management failed to address complainant being harassed by a co-worker for three month period and complainant experienced weight loss, depression, mood swings, and had difficulty with family relationships).

CONCLUSION

Accordingly, we REVERSE the Agency's final order rejecting the AJ's order of remedial awards. We AFFIRM the AJ's order as stated in our Order below. We REMAND this matter to the Agency in accordance with the ORDER below.

ORDER

To the extent that it has not already done so, the Agency is ORDERED to take the following actions within sixty (60) calendar days from the date this decision is issued:

1. The Agency shall pay Complainant \$8,513.91 in past pecuniary damages.
2. The Agency shall pay Complainant \$100,000 in non-pecuniary compensatory damages.
3. The Agency shall restore 352 hours (or equivalent payment thereof) annual leave.
4. The Agency shall pay Complainant \$34,332.00 in attorney's fees and costs.

ATTORNEY'S FEES

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she is entitled to an award of reasonable attorney's fees incurred in the processing of this appeal. 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 this decision becoming final. 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

October 31, 2022

Date