



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

[REDACTED]
Erick N.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2021004863

Hearing No. 450-2015-00139X

Agency No. ARHOOD14JUL02661

DECISION

On September 2, 2021, 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 July 30, 2021 final decision concerning compensatory damages and attorney's fees for his 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

At the time of events giving rise to this complaint, Complainant worked as a Library Technician, GS-6, at the Agency's Carl R. Darnall Medical Center in Fort Hood, Texas.

On August 22, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when he was subjected to ongoing harassment and, in relevant part, was told that his statement that his supervisor was biased and sexist was bordering on insubordination and that he had to be careful.

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.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing but subsequently withdrew his request. Consequently, on February 17, 2021, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision found that Complainant did not establish that he was subjected to sex discrimination with respect to his harassment claims. However, the decision went on to find that Complainant was subjected to one incident of unlawful retaliation when management told him that his statement that his supervisor was biased and sexist was bordering on insubordination and that he needed to be careful. The decision ordered the Agency to post a notice regarding the incident, conduct training, and found Complainant entitled to attorney's fees and compensatory damages.²

Complainant's representative filed an attorney's fee petition seeking a total attorney's fee award of \$45,385.00 representing 71.15 hours of work at an hourly rate of \$650.00 per hour, except for 0.1 hours billed at \$150 an hour and 6.75 hours billed at \$520 an hour. Complainant also sought a total of \$420,000.00 in compensatory pecuniary damages for front pay, retirement benefits, compensation for sick leave usage, and prescription drug expenses, as well as an unspecified amount in nonpecuniary compensatory damages for the emotional distress he suffered. In response, the Agency argued that the attorney's fee was excessive because the hourly rate was too high and that the fee should be reduced by 50% to reflect Complainant's lack of success on the bulk of his complaint. The Agency also objected to the pecuniary damages, contending that Complainant did not establish that any of the pecuniary damages he sought were due to the single incident of reprisal.

Thereafter, the Agency issued a final decision concerning Complainant's request for attorney's fees and compensatory damages. The decision found that Complainant's representative submitted sufficient evidence to substantiate that her requested hourly rate of \$650 was reasonable in light of her experience. The decision agreed that the requested attorney's fee should be reduced by 50% to reflect Complainant's limited success on the merits in prevailing on only one of his claims. The decision further excluded any time billed prior to the filing of the formal complaint and reduced an entry for travel time to the prehearing conference. The decision therefore awarded a total attorney's fee of \$15,900.00. With respect to Complainant's request for compensatory damages, the decision rejected Complainant's request for any pecuniary damages as Complainant did not establish that his resignation, his use of sick leave, or his medical and prescription drug expenses were due to the single incident of reprisal. Finally, the decision awarded Complainant \$1,000 in nonpecuniary, compensatory damages, finding this award consistent with past Commission decisions and took into account the limited amount of evidence of non-pecuniary damages submitted by Complainant.

The instant appeal from Complainant followed.

² Complainant appealed the Agency's decision on the merits of his claim and the Agency's decision was affirmed on August 3, 2022. See Erick N. v. Dep't of the Army, Appeal No. 2021002503 (Aug. 3, 2022).

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the Agency's award of compensatory damages should be increased to \$100,000 to reflect the extent of Complainant's emotional distress, resulting in his having to take hours of sick leave, and his ongoing depression and anxiety.³ Complainant also argues that the decision should not have reduced the award of attorney's fees because all of the hours expended were necessary as the reprisal claim was inextricably bound up with the other claim. Complainant also argues that the time spent traveling to the prehearing conference should not have been reduced because the attorney spent the full claimed time working while her paralegal drove.

In response, the Agency notes that it does not dispute the awarded hourly rate of \$650. The Agency contends that the decision correctly found that the attorney's fee should be reduced by 50% to reflect Complainant's limited success on the merits and that Complainant's representative is only entitled to fees for travel time at half the attorney's reasonable hourly rate, not the full hourly rate, so the entry for travel to the pre-hearing conference should be reduced to 2 hours of travel time at an hourly rate of \$325. The Agency further argues that the compensatory damages award of \$1,000 was sufficient to compensate Complainant.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 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").

Non-pecuniary Compensatory Damages

Non-pecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See EEOC Notice No. 915.302, Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, at 10 (July 14, 1992).

³ We note that Complainant does not challenge the Agency's rejection of Complainant's request for pecuniary damages on appeal.

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

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from 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. Id.

Statements from others including family members, friends, health care providers, other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. Id.

An award of non-pecuniary, compensatory damages should reflect the extent to which the Agency's discriminatory action directly or proximately caused the harm, as well as the extent to which other factors also caused the harm. See Johnson v. Dep't of the Interior, EEOC Appeal No. 01961812 (June 18, 1998). It is the complainant's burden to provide objective evidence in support of her claim and proof linking the damages to the alleged discrimination. Papas v. U.S. Postal Serv., EEOC Appeal No. 01930547 (Mar. 17, 1994); Mims v. Dep't of the Navy, EEOC Appeal No. 01933956 (Nov. 23, 1993).

Complainant argues that he suffered from major depression and anxiety as a result of the Agency's retaliatory actions for which he required counseling, as well as experienced loss of self-esteem, sleep problems, withdrawal from relationships and isolation, and fear of losing control over his future. Complainant contends that the retaliatory incident was in fact a series of many retaliatory actions that caused him great distress over the entire time he was employed by the Agency. Complainant also submitted notes from his psychotherapy sessions from March to June 2015, which indicated that he had “thoughts of persecution by former coworkers and superiors at his job,” and that Complainant was “upset about past perceived unfair events that happened in the workplace,” although later sessions indicated that Complainant reported an improvement of his mood.

Upon our review of the record and the parties' arguments on appeal, we find that an award of \$5,000 is more appropriate to remedy the harm Complainant suffered as a result of the single incident of per se reprisal. We specifically note that Complainant's request of \$100,000 is monstrously excessive under the circumstances of this case. Contrary to Complainant's argument on appeal, the Agency did not find that Complainant suffered from a long series of retaliatory actions and Complainant did not specifically allege other instances of retaliation in his complaint. We find that the record does not support a finding that Complainant's physical symptoms or the majority of the conditions for which he required counseling were either caused by the single incident of reprisal or of long duration. We find that an award of \$5,000 is sufficient to remedy the harm Complainant suffered and is consistent with past Commission precedent in similar cases. See Gaye A. v. Dep't of Defense, EEOC Appeal No. 2019005924 (May 21, 2020) (awarding \$5,000 where the complainant suffered mental anguish and loss of enjoyment of life and depression, for which she had to seek treatment after a single retaliatory comment); Eleni M. v. Dep't of Transp., EEOC Appeal No. 0720160021 (July 25, 2018) (award of \$5,000 where there was a retaliatory issuance of letter of counseling, complainant suffered depressed mood, anxiety, sleeplessness, suicidal thoughts, crying episodes, withdrawal and isolation, increased irritability, loss of trust and had exhibited some of same symptoms before discrimination); Complainant v. Dep't of Veterans Affs., EEOC Appeal No. 0120120536 (Aug. 18, 2014) (\$5,000 in nonpecuniary compensatory damages awarded where complainant suffered mental symptoms such as depressed mood, anger, stress, difficulty sleeping, and loss of interest in activities).

While Complainant may feel he is entitled to more, this award considers the nature of the Agency's action, the degree of harm Complainant experienced, and the amount of supporting evidence Complainant offered. The Commission notes that nonpecuniary, compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. We therefore modify the Agency's final decision to award Complainant \$5,000 in compensatory, nonpecuniary damages.

Attorney's Fee Award

By federal regulation, the agency is required to award attorney's fees and costs for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. EEOC Regulation 29 C.F.R. § 1614.501(e)(1)(ii). To determine the proper amount of the fee, a lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

There is a strong presumption that the number of hours reasonably expended multiplied by a reasonable hourly rate, the lodestar, represents a reasonable fee, but this amount may be reduced or increased in consideration of the degree of success, quality of representation, and long delay caused by the agency. 29 C.F.R. § 1614.501(e)(2)(ii)(B).

The circumstances under which the lodestar may be adjusted are extremely limited, and are set forth in EEO MD-110, Ch. 11 § VI.F. The party seeking to adjust the lodestar, either up or down, has the burden of justifying the deviation. Id.

In determining the degree of success, the Commission will consider all relief obtained in light of a complainant's goals, and, if a complainant achieved only limited success, the complainant should recover fees that are reasonable in relation to the results obtained. Hensley, 461 U.S. at 434. While a reasonable fee should not be determined simply by mathematical formula, hours spent on unsuccessful claims should be excluded from the amount of a reasonable fee. Id. Attorney's fees may not be recovered for work on unsuccessful claims. Id. at 434-35. Courts have held that fee applicants should exclude time expended on "truly fractionable" claims or issues on which they did not prevail. See Nat'l Ass'n of Concerned Veterans v. Sec'y of Defense, 675 F.2d 1319, 1327 n.13 (D.C. Cir. 1932). 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. In cases where a claim for relief involves "a common core of facts or will be based on related legal theories," however, a fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Id. at 435.

In this case, we find that the Agency's decision properly accounted for Complainant's degree of success on the merits by reducing the fee by 50%. Here, Complainant succeeded only on his single reprisal claim of the single incident when management told him that his statement that his supervisor was biased and sexist was insubordination and he should be careful. We specifically note that Complainant was unsuccessful on his claim of sex discrimination based on his complaint of alleged workplace violence, management's response to his complaint of alleged violence, and of discrimination based on his sex or reprisal with respect to his evaluation. Complainant can reasonably be said to have succeeded on no more than half of his claims and, as such, the Agency properly reduced the attorney's fee by 50%.

Pursuant to 29 C.F.R. 1613.501(e)(1)(iv), attorney's fees may not be awarded for services performed prior to the filing of the formal complaint, "except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant." See Ponce v. Dep't of the Air Force, EEOC Appeal No. 01903196 (Sept. 14, 1990). On appeal, Complainant argues that disallowing all the hours billed prior to filing the complaint is unfair in light of the fact that an attorney is ethically required to do a necessary inquiry into the complaint before proceeding. In this case, the Agency disallowed all but two of the hours billed prior to the filing of the formal complaint. In doing so, the Agency did not award fees for an additional 1.25 hours of services performed on July 15, 24, and 25, 2014, involving additional discussion of his case with Complainant. We find that an award of an additional 1.25 hours of services for discussions with Complainant is appropriate pursuant to 29 C.F.R. 1613.501(e)(1)(iv). See generally McKeel v. Dep't of Energy, EEOC Appeal No. 01893703 (December 13, 1989).

Finally, Complainant challenges the Agency's reduction of the 8.25 hours billed on December 3, 2014, for the prehearing conference, arguing that the attorney worked the entire time while her paralegal drove. The Commission has held that the rate for an attorney's travel time should be reduced by 50 percent from the regular rate charge. See Hoy v. Dep't of the Air Force, EEOC Appeal No. 01951243 (Jan. 26, 1996). In its decision, the Agency awarded 6.25 hours at the full rate of \$650 an hour and the remaining 2 hours for travel at a reduced rate of half the normal hourly rate. Contrary to Complainant's argument on appeal, we do not find that the Agency acted improperly in reducing the hourly rate for 2 hours of travel time. The fee petition itself did not specify the amount of time spent on travel and we cannot find that the work likely to have been conducted while the attorney was being driven reasonably merits the full hourly rate for attorney work. We affirm the Agency's award of 6.25 hours at the full hourly rate of \$650 and 2 hours at an hourly rate of \$325 for the work billed on December 3, 2014.

We therefore modify the Agency's award of attorney's fees to award a total attorney's fee of \$16,712.50.⁴

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final decision on compensatory damages and attorney's fees. The Agency shall comply with the ORDER below.

ORDER

Within sixty (60) calendar days from the date this decision is issued, to the extent it has not already done so, the Agency shall provide the following remedial relief:

1. The Agency shall pay Complainant \$5,000 in non-pecuniary, compensatory damages.
2. The Agency shall pay Complainant \$16,712.50 in attorney's fees.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

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.

⁴ (1.25 x 650) + \$15,900.00 = \$16,712.50.

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.

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.

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

November 2, 2022

Date