



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

[REDACTED]
Tomeka T.,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal No. 2022000651

Hearing No. 570-2017-00264X

Agency No. IRSCC-16-0038-F

DECISION

On November 14, 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 October 19, 2021, final decision concerning her 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. For the following reasons, the Commission MODIFIES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Tax Law Specialist, GS-13, at the Agency's Tax-Exempt Government Entities in the IRS Office of Chief Counsel in Washington, D.C.

On January 15, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when, inter alia, on June 8, 2016, Complainant was called into a meeting by an Agency official because of her status as an EEO

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, threatened and repeatedly asked to tell him that she would not file any further charges or allege retaliation and warned that her work conditions would suffer if she continued to pursue her EEO case.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision found that Complainant did not establish unlawful discrimination, dismissed one claim for untimely counselor contact, but found that Complainant established one incident of unlawful retaliation for the meeting in June 2016 when an Agency official repeatedly expressed his anger regarding Complainant's EEO complaint.

Complainant appealed and the Commission affirmed the Agency's finding of no discrimination with respect to Complainant's allegation of discriminatory harassment and affirmed the Agency's finding of one incident of unlawful retaliation. See Tomeka T. v. Dep't of the Treasury, EEOC Appeal No. 2020000390 (June 15, 2021). The Commission ordered the Agency to conduct a supplementary investigation on the issue of compensatory damages, as well as ordering the Agency to post a notice and consider discipline for the responsible management official.

Thereafter, the Agency issued a final decision concerning Complainant's entitlement to compensatory damages. The Agency found that Complainant was not entitled to pecuniary damages for leave usage because Complainant did not provide sufficient evidence to establish that her purported health issues were related to the incident of reprisal. The Agency went on to award Complainant \$4,500 in nonpecuniary compensatory damages, noting that although Complainant had not established that her health issues were due to the reprisal she suffered, it was reasonable that Complainant suffered some emotional distress as a result of the unlawful incident.

Complainant filed the instant appeal from the Agency's decision on compensatory damages.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the Agency should have restored 624 hours of sick leave she took from 2016 through 2021, as well as 936 hours of annual leave. She also argues that the Agency's award of nonpecuniary, compensatory damages should be increased to \$300,000 to compensate her for the years of emotional distress she suffered which, she alleges, led to her developing severe shingles and aggressive breast cancer, which has caused her extreme pain and suffering and loss of enjoyment of life.

In response, the Agency contends that the evidence does not support that the single incident of per se reprisal either directly or indirectly caused Complainant's serious health issues.

The Agency argues that the award of \$4,500 was sufficient to compensate Complainant for the distress she suffered for the single incident of per se reprisal.

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”).

Complainant argues that the Agency’s actions caused her severe emotional distress leading to mental anguish, repeated nightmares, and severe stress which weakened her immune system and thereby led to her developing severe shingles and aggressive breast cancer, which has wrecked her enjoyment of life and means she and her husband will never be able to have biological children. In support, she submitted statements from her husband attesting to the nightmares she had, as well as letters from two long-time friends, one of whom is a doctor, who both attested to the emotional distress Complainant suffered and their belief that the stress led to Complainant’s health issues. Complainant also submitted letters from two of her doctors attesting to the pain and suffering she has endured due to her breast cancer treatment and stating that Complainant had no family history of breast cancer or genetic predisposition to breast cancer.

Restoration of Leave

To be entitled to leave restoration, a complainant must demonstrate a causal nexus between the discrimination and the need to take leave. See Evans v. Dep’t of Justice, EEOC Appeal No. 0120080335 (June 22, 2012), request for recon. denied, EEOC Request No. 0520120522 (Dec. 11, 2012). The complainant has the burden of proof on this issue. See Velez v. U.S. Postal Serv., EEOC Appeal No. 01902746 (Nov. 16, 1990) (therapist’s testimony that retaliatory interview exacerbated complainant’s stress was sufficient to establish that discrimination caused complainant to take leave immediately after interview, but evidence did not establish that all of the subsequent absences were directly caused by discrimination). To meet that burden, the complainant must present evidence identifying the specific leave that he or she took because of the discrimination. See Henley v. Dep’t of Justice, EEOC Appeal No. 01A22186 (Nov. 7, 2002) (complainant not entitled to additional restoration of leave where evidence did not identify specific amount of leave complainant took as direct result of discrimination), request for recon. denied, EEOC Request No 05A30364 (Mar. 10, 2003).

While we sincerely sympathize with Complainant's health condition, we find no evidentiary support for Complainant's argument that her health problems were attributed to the Agency's single retaliatory action. We specifically note that the Agency did not find, and the Commission affirmed, that Complainant did not establish that she suffered from ongoing harassment due to her sex or reprisal. The Commission affirmed the Agency's finding that there was only a single incident of reprisal when Complainant was called into a meeting with an Agency official who expressed his anger at Complainant's EEO activity. See Tomeka T. v. Dep't of the Treasury, EEOC Appeal No. 2020000390 (June 15, 2021). While we do not in any way condone the Agency official's conduct, we cannot find that the meeting in June 2016 was the cause of Complainant's severe shingles in 2018 or her diagnosis of aggressive breast cancer in 2020.

In this case, Complainant argues that she used 624 hours of sick leave and 936 hours of annual leave from 2016 through 2022 due to her deteriorating health conditions. Complainant does not explain the basis for those numbers nor has she provided persuasive evidence which would support a finding that any of the leave was used as a result of the Agency's retaliatory conduct in June 2016. We find that Complainant has not established that she is entitled to the restoration of any sick or annual leave because there is no evidence from which to determine if or whether Complainant took any leave as a direct result of the Agency's retaliation. See Lara G. v. U.S. Postal Serv., EEOC Appeal No. 0520130618 (June 9, 2017).

Nonpecuniary, Compensatory Damages

Compensatory damages may be awarded for losses and suffering due to the discriminatory acts or conduct of the agency and include past pecuniary losses, future pecuniary losses, and non-pecuniary losses that are directly or proximately caused by the agency's discriminatory conduct. See Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. N915.002 (July 14, 1992); Carle v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993). Non-pecuniary losses are losses that are not subject to precise quantification, including 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. Id.

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). 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 she should be entitled to \$300,000 in nonpecuniary, compensatory damages for the severity of the emotional distress she suffered as a result of the Agency's actions and the ongoing loss of enjoyment of life and her future family hopes due to her deteriorating health. As sympathetic as we are to Complainant's situation, we note that \$300,000 is excessive under the circumstances of this case. As noted earlier, we cannot find that either Complainant's shingles or her breast cancer are the result of the Agency's retaliatory conduct. While we acknowledge the letters submitted by Complainant's doctors, we note that they only definitively rule out family history and genetics as a cause of the breast cancer but do not provide any actual supporting evidence to conclude that breast cancer was caused by the Agency's actions four years prior to Complainant's diagnosis. We find that the record does not support a finding that Complainant's severe shingles or her breast cancer diagnosis were caused by the single incident of reprisal. We do, however, accept Complainant's statement and that of her husband and long-time friends as to the extent of the emotional distress she suffered, causing severe nightmares, anxiety, and migraines.

Upon our review of the record and the parties' arguments on appeal, we find that an award of \$10,000 is more appropriate to remedy the harm Complainant suffered in this case. We note that this amount meets the goals of not being motivated by passion or prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases. See Jazmine F. v. Dep't of Def., EEOC Appeal No. 2021001591 (Sept. 27, 2022) (awarding \$10,000 where the complainant suffered anxiety, depression, and insomnia as a result of a manager's retaliatory actions); Davida L. v. Dep't of Veterans Affs., EEOC Appeal No. 0120172609 (Feb. 15, 2019) (increasing an award of compensatory damages to \$10,000 where a supervisor's act of reprisal aggravated the complainant's panic attacks and insomnia and made the complainant become obsessed with problems at work); Complainant v. Dep't of the Treasury, EEOC Appeal No. 0120123017 (April 24, 2015) (awarding \$10,000 in nonpecuniary, compensatory damages where a manager's retaliatory comments caused headaches, nausea, nightmares, anxiety, and fear of termination).

While we understand that Complainant may feel she is entitled to more, we find that 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 \$10,000 in compensatory, nonpecuniary damages.

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 with respect to nonpecuniary, compensatory damages. The Agency is ordered to 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 pay Complainant \$10,000 in non-pecuniary, compensatory damages.

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.²

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.

² We note that the Agency has already submitted evidence indicating that it has complied with the Commission’s other orders in Appeal No. 2020000390.

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).

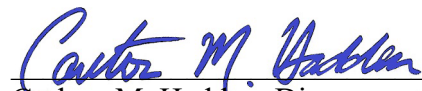
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

December 8, 2022

Date