



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

[REDACTED]  
Joanna G.,<sup>1</sup>  
Complainant,

v.

Lloyd J. Austin III,  
Secretary,  
Department of Defense,  
(Armed Forces Retirement Home),  
Agency.

Appeal No. 2022002444

Hearing No. 570-2020-00253X

Agency No. 2019-WHSAFRH-045

**DECISION**

On April 1, 2022, 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 April 25, 2022, final order 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 AFFIRMS the Agency's final order.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Financial Specialist at the Agency's Armed Forces Retirement Home in Washington, D.C. At the time of her employment, the Deputy Chief Operating Officer (Deputy Chief) was Complainant's first level supervisor. See Report of Investigation Officer (ROI) at 000189. Complainant's second level supervisor was the Chief Operating Officer (Chief). Id. The Director of Finance and Administration (Director) was a management official from the umbrella Agency which encompassed the Agency at issue herein and at the time of events served in a supervisory role in relation to Complainant. Id. at 000226.

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<sup>1</sup> 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 reported that she believed that the Chief, the Director, and the Chief Human Capital Officer (HC Officer) discriminated against her. Id. She explained that the discrimination was due to the fact that she was consistent in vocalizing and addressing the unjust treatment she received from the Director. Id. For example, Complainant reported that on February 26, 2019, she stated to the Deputy Chief Operating Officer (Deputy Chief) and the Chief that it would be advantageous to record conversations with the Director because of the derogatory statements she would make to Complainant. Id. at 000190. When Complainant explained what kind of statements the Director made which she considered derogatory, the Chief stated, “Well, that was a professional threat and I have never seen a subordinate go up against a supervisor and win.” The Chief told Complainant, “If you fight your boss, you’re not going to win.”

Complainant also learned that the Director initiated an inquiry with the Bureau of the Fiscal Service’s (BFS), Human Resources (HR) Department on June 19, 2019, regarding Complainant’s refusal to accept work assignments and her poor performance. Id. Complainant explained that the Director was not in the appropriate position to elevate the issue to HR and the request for the inquiry should have been made by someone in her chain of command who was familiar with her daily functions. Id. at 000191. Moreover, Complainant explained that in a normal working environment an employee would be instructed on how to handle or remedy a process if there was a problem with the product submitted. Id. Complainant noted that she was not told the outcome of the inquiry, nor was there ever any action taken against her. Id.

In response, the Chief stated that he did remember saying that, in his experience, if a subordinate cannot work with their supervisor, the subordinate never wins, and that no one wins if a subordinate cannot work with their supervisor. Id. at 000236. He explained that since the Director was assigned to the office, Complainant stated that she did not technically work for the Director because the Director was an employee of a larger branch of the Agency, not the Agency office wherein Complainant worked. Id. He further explained that this attitude from Complainant manifested itself daily, affected morale of employees, and was counterproductive. Id.

Regarding the inquiry to HR on June 19, 2019, the Director explained that the Agency initiated an inquiry based on significant employee conduct and performance concerns. Id. at 000228. She commented that her observation was that Complainant created a hostile work environment, including with a coworker, who the Director had to console. Id.

On May 7, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American) and in reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. On February 26, 2019, she was attempting to articulate false statements made by the Director, when the Chief interrupted her, threw up his hands and stated, “Well, that was a professional threat and I have never seen a subordinate go up against a supervisor and win;”

2. On June 19, 2019, she learned the Director initiated an inquiry with the BFS HR Department regarding three work products she had completed; and
3. On February 11-15, 2019, Complainant was suspended from her position.<sup>2</sup>

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, and the AJ held a hearing on January 19-20, 2022, and issued a decision on March 14, 2022.

In her decision, the AJ determined that the phrase “Well, that was a professional threat and I have never seen a subordinate go up against a supervisor and win,” was retaliatory and constituted a violation of Title VII's probation against retaliation for engaging in protected EEO activity. In so finding, the AJ determined that the statement was reasonably likely to deter other employees who may have witnessed statements about alleged discrimination by supervisors and managers from filing complaints or otherwise engaging in EEO activity.

Regarding Complainant's complaint that an HR inquiry was initiated against her with discriminatory intent, the AJ noted that the Agency proffered that the inquiry was based on concerns that Complainant refused to accept work assignments and exhibited poor performance. Complainant was not disciplined as a result of the inquiry. The AJ determined that the inquiry was legitimate considering the conflict between Complainant and the Director over work assignments. The AJ found that Complainant presented no evidence that this explanation was pretext for discrimination.

Finally, regarding Complainant's claim of harassment, the AJ noted that the Agency claimed to have suspended Complainant because she violated Agency policy against unauthorized recordings and using cellphones during work hours for non-work activities. Since Complainant failed to show that the HR inquiry or suspension were motivated by her protected classes or EEO activity, the AJ found that Complainant's claim of harassment must fail.

As an award for the violation of Title VII, the AJ awarded Complainant \$5,000.00 in non-pecuniary compensatory damages. The AJ considered Complainant's testimony in support of her claim for damages, wherein Complainant stated that she felt additional stress from the retaliatory comments. Specifically, Complainant testified that she felt intimidated and threatened by the statement warning her against complaining about her supervisor. She also testified that she had taken leave for stress and began taking medication for increased blood pressure as of November 2018. She explained that she worried everyday about losing her job, which lasted for several months from February to October 2019. Her reported symptoms included blurred vision, headaches, and other symptoms that simulated heart attack and stroke like conditions.

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<sup>2</sup> The AJ incorporated Complainant's suspension claim in their Case Management Order; the AJ noted that Complainant did not timely raise the issue and therefore it was not separately actionable but would be considered as background evidence of discrimination and/or retaliation.

In consideration of Complainant's testimony, which the AJ determined to be forthright and credible, the AJ found that an award of \$5,000.00 was appropriate to compensate Complainant for her emotional distress experienced over an eight-month period as a result of the Agency's retaliation.

The Agency subsequently issued a final order implementing the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged in regard to her retaliation claim and the subsequent nonpecuniary compensatory damages.

### CONTENTIONS ON APPEAL

On appeal, Complainant argues that there was inconsistent testimony, for example, it was stated by senior management that a certain individual was the Chief Financial Officer, however, that individual was not an Agency employee. Complainant additionally argues that racism is evident in the unfounded HR inquiry. Regarding damages, Complainant argues that the Agency award of \$5,000.00 is not sufficient to compensate her for the severe emotional distress she suffered. She argues that her damages exceed the statutory limit of \$300,000.00.

In response, the Agency argues that Complainant fails to demonstrate that the AJ's award of \$5,000.00 should be overturned. The Agency contends that the award should be affirmed as there was substantial record evidence in support of the AJ's findings of fact, and there is no basis for overturning or disregarding the evidence presented at the hearing. The Agency contends that the AJ properly evaluated Complainant's damages evidence.

### 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. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

In the present case, upon review of the hearing transcript, the AJ decision, the motions throughout the record, and the record as a whole, we find that the AJ decision accurately recounted the relevant material facts and identified the legal standard for their decision. The AJ held a hearing, examined and considered witnesses, as well as Complainant's testimony.

While Complainant contends that there were inconsistencies in the testimony, we do not find that she has pointed to inconsistencies which would alter the AJ decision. It is readily apparent from the record that there was an underlying personality conflict between Complainant and the Director; on appeal Complainant continues to put forth arguments regarding issues which are not directly related to her complaint of discrimination, and rather serve as bare assertions reflecting workplace conflict with the Director. For example, simply stating that an event (HR inquiry) was racist does not make it so without additional evidence. Complainant has not pointed to any such evidence on appeal, nor does the record reflect any such evidence.

After careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged in regard to claims 2 and 3.

#### *Nonpecuniary Compensatory Damages*

To receive an award of compensatory damages, Complainant must demonstrate that she has been harmed as a result of the Agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for recon. den'd, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages available Under Section 102 of the Civil Rights Act of 1991 (Compensatory and Punitive Damages), EEOC Notice No. 915.002 at 11-12, 14 (July 14, 1992). Compensatory damages may be awarded for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) which are directly or proximately caused by the agency's discriminatory conduct. Compensatory and Punitive Damages at 8. The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part. Id. at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. Id. at 14, see Goetze v. Dep't of the Navy, EEOC Appeal No. 01991530 (Aug. 23, 2001).

The AJ awarded Complainant \$5,000.00 in nonpecuniary damages. Complainant argues that she is entitled to additional nonpecuniary damages due to emotional harm suffered throughout the discrimination period.

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, and other counselors 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. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. 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). 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).

In the instant case, the Commission finds that the AJ's decision to award \$5,000.00 in compensatory damages is supported by substantial evidence in the record and is in line with our case precedent. See, e.g. Gaye A. v. Dep't of Def., EEOC Appeal No. 2019005924 (May 21, 2020) (awarding \$5,000.00 in nonpecuniary, compensatory damages adequately compensates Complainant for the harm she suffered as a result of a supervisor's single retaliatory comment); Marcellus M. v. Dep't of Justice, EEOC Appeal No. 0120152864 (May 6, 2016) (awarding \$3,500.00 in nonpecuniary, compensatory damages based on evidence of depression, loss of enjoyment of life, stress, anxiety, humiliation, loss of self-esteem, excessive fatigue, and injury to professional standing, following finding that the employee was subjected to reprisal); Webster v. Dep't of Def., EEOC Appeal No. 0120102276 (Sept. 20, 2011) (awarding \$4,000.00 in nonpecuniary damages for Complainant's statement of embarrassment, frustration, social isolation, and injury to his professional reputation, following a finding of per se reprisal).

Although Complainant argues that the award of non-pecuniary damages should be increased, the record contains no statements from family members, friends, health professionals, or clergy members warranting an increase in the award. Moreover, the cases cited by the AJ consider emotional and mental suffering such as the symptoms presented by Complainant.

Complainant has not shown any additional symptoms which would indicate that she should be provided a higher award. We therefore find that the AJ's award of \$5,000.00 in nonpecuniary compensatory damages is appropriate.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision implementing the AJ's Order awarding \$5,000.00 in non-pecuniary damages and REMAND the matter for further processing in accordance with the slightly modified ORDER below.

### ORDER

To the extent it has not done so already, the Agency is ORDERED to take the following corrective actions within 60 days of the date this Decision becomes final:

1. The Agency shall pay Complainant compensatory non-pecuniary damages of \$5,000.00.
2. The Agency shall restore Complainant for leave taken during the period from February 2019 through October 2019.
3. The Agency will require the responsible management official, the Chief Operating Officer, to take eight (8) hours of EEO training in the provisions of Title VII of the Civil Rights Act of 1964 as amended, and with an emphasis on the prohibition against retaliation for engaging in protected EEO activity.
4. The Agency shall consider taking disciplinary action against the Chief Operating Officer. The Agency shall report its decision. If the agency decides to take disciplinary action, it shall identify the action taken. If the agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline.<sup>3</sup>
5. The Agency will post the attached notice in the Agency's Armed Forces Retirement Home, Washington, D.C., facility as indicated below.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting evidence that the corrective action has been implemented.

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<sup>3</sup> We note that the Order from the AJ has been slightly modified to include consideration of discipline for the responsible management official.

POSTING ORDER (G0617)

The Agency is ordered to post at its Armed Forces Retirement Home in Washington, D.C., copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

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:



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Carlton M. Hadden, Director  
Office of Federal Operations

December 7, 2022

Date