



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

[REDACTED]  
Harlan P.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 2021001693

Hearing No. 430-2016-00191X

Agency No. 2004-0652-2015103878

DECISION

On January 11, 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 January 8, 2021<sup>2</sup> final order concerning 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. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Maintenance Worker, WG-08, at the Richmond VA Medical Center in Richmond, Virginia.

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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.

<sup>2</sup> The Agency originally issued a final order on January 8, 2021. However, the decision erroneously stated Complainant had not filed a petition for attorney's fees. Therefore, the Agency rescinded this decision and issued a corrected decision on January 15, 2021. All references to the final decision in this decision refer to the revised decision issued on January 15, 2021.

On July 18, 2015, Complainant filed an EEO complaint alleged the Agency subjected him to discrimination. He later amended his complaint and the Agency ultimately accepted the following claims for investigation:

Whether Complainant was subjected to a hostile work environment based on his race (African-American) and reprisal (prior EEO activity), as evidenced by the following events:

1. On September 14, 2014, management was provided a copy of a CD in which General Foreman for Engineering Services ["General Foreman"] referred to African-Americans as "buckwheats".
2. On February 4, 2015, the local news station aired a video of General Foreman making racial comments and referring to African-Americans as "buckwheats" and Complainant believes one of the African-Americans the General Foreman was referring to was Complainant.
3. On June 8, 2015, Complainant was not selected for the position of Pipefitter, VVG-4204-10, vacancy announcement VHA-652-15-MVM- 130811-BU.
4. On June 11, 2015, Complainant was not selected for any of the four (4) Maintenance Mechanic, WG-4749-09, positions advertised under vacancy announcements VHA-652-15-MVM-1321753-BU (2 positions) and VHA-652-15-MVM-1322213-BU (2 positions).
5. On June 23, 2015, Maintenance Mechanic Supervisor looked at Complainant and said, "Look at [Complainant] sitting there, looking like a raccoon eating shit."
6. On November 10, 2015, Complainant was not selected for the position of Maintenance Mechanic, vacancy number ANS-15-DKO-15000447-BU.

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 EEOC Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on October 5, 2018. On November 26, 2018, the AJ issued a bench decision finding that the Agency had not discriminated against Complainant. The AJ found that the Medical Center Director took prompt and effective action upon learning of the General Foreman's derogatory comments by immediately relieving him of his supervisory responsibilities, transferring him to another department, and ultimately issuing him a 10-day suspension and requiring him to attend cultural diversity training following an internal investigation. The AJ also determined that the qualifications of the selectees for the various positions were plainly superior to Complainant's. Subsequently, the Agency issued a final order adopting the AJ's finding that Complainant failed to prove that he was subjected to discrimination as alleged. Complainant appealed the Agency's final order.

In EEOC Appeal No. 2019002209 (Sept. 22, 2020), we found that the AJ's decision finding of no discrimination was supported by substantial evidence and should be upheld. However, we also concluded that the evidence showed that the General Foreman also made references to Complainant's prior EEO activity and settlement activity, and the AJ did not address whether the act of disclosing Complainant's prior EEO activity amounted to unlawful retaliation. in violation of Title VII. We concluded the General Foreman's disclosure of Complainant's prior EEO activity amounted to unlawful retaliation in violation of Title VII and modified the Agency's final order as such. This issue was remanded to the Agency for an investigation of Complainant's entitlement to compensatory damages for the unlawful disclosures. Complainant, through counsel, was also directed to submit a request for attorney's fees.

The Agency conducted a supplemental investigation on compensatory damages. Complainant asserted he is entitled to \$175,000 in compensatory damages (pecuniary and non-pecuniary) as a result of the Agency's retaliatory conduct. In support, Complainant provided an affidavit, a separate statement, medical documentation, and two witness statements. On October 20, 2020, Complainant's attorney filed a fee petition, consisting of a statement of attorney's fees and two supportive affidavits, requesting attorney's fees in the amount of \$23,636.45.

When asked to detail the harm suffered as a result of the disclosure of his EEO activity, Complainant testified he incurred a financial loss as the "[p]otential increase of income by not getting promoted because of discrimination is \$100,000 to \$150,000 or more." He indicated these losses occurred between 2015 and 2018, and noted that he lost his home to foreclosure in 2014. He stated he was still unable to be promoted due to reprisal and unfair treatment. Complainant testified he suffered emotional harm including depression, anger, and high blood pressure, which occurred between 2011 and 2012, as well as from 2014 to present. According to Complainant, he also lost his wife, friendships, and the ability to have healthy relationship with others. He described future losses as including his high blood pressure, which requires medication. Because of the Agency's actions, argued Complainant, he is still judged unfairly by management. He states he is still experiencing unfair treatment related to promotions and overtime.

Complainant provided medical records related to his treatment for depression and hypertension, but these documents did not include any information related to costs. The witness statements provided by Complainant both noted Complainant struggled with anger and depression and his relationships had been negatively affected since the statements by General Foreman. They also corroborated Complainant's assertions regarding the loss of house and dissolution of his marriage.

The Agency issued a final order on January 15, 2021, awarding Complainant \$8,500 in non-pecuniary compensatory damages and rejecting his request for attorney's fees. In assessing Complainant's request for compensatory damages, the Agency noted that he did not provide any information or evidence regarding the actual pecuniary losses, if any, the disclosure of his prior EEO activity had caused. Therefore, concluded the Agency, Complainant failed to demonstrate that he incurred any specific out-of-pocket expenses as a result of the Agency's retaliation.

The Agency did find, based on the witness statements provided by Complainant, that he suffered from emotional distress directly related to the Agency's retaliatory conduct. Complainant displayed behavioral manifestations of this emotional distress, which affected him from approximately September 14, 2014 to the present. Therefore, finding that he was entitled to non-pecuniary compensatory damages, the Agency considered recent EEOC awards in cases with harm of a similar nature and severity as experienced by Complainant. In the Agency's view, the awards in these cases ranged from \$3,000 to \$10,000. The circumstances in the instant case, determined the Agency, were the most like those cases where \$10,000 was awarded. Further, it reasoned that the content of the statement made by General Foreman and its dissemination to the general public necessitated an award on the higher end of the spectrum it found. However, because Complainant was not specifically named in the statements and there was no evidence concerning the duration of the resulting harm, the Agency awarded \$8,500 in non-pecuniary compensatory damages.

The Agency also reasoned that Complainant was not entitled to attorney's fees because he only prevailed on a claim raised by the Commission itself and not by Complainant or his attorney. Consequently, found the Agency, Complainant was not a "prevailing party".

On appeal, Complainant requests that we modify the Agency's decision by awarding him at least \$175,000 in damages and his requested attorney's fees. He contends the Agency erred in finding he was not the prevailing party and in making no effort to calculate a reduced attorney's fees award based on having prevailed only on the reprisal claim. Without providing citations to the record, Complainant further asserts that the reprisal claim was raised with the AJ. Regarding his damage award, Complainant argues he demonstrated severe anguish as a direct effect of the Agency's actions and the damages awarded should reflect the dollar value of being subjected to recurring physical and emotional distress. In his opinion, the Agency did not make a real effort to review his request and properly compensate him for his suffering.

In response, the Agency maintains that its award of compensatory damages was reasonable and consistent with Commission precedent. Further, it reiterates that Complainant is not entitled to attorney's fees because none of the requested fees relate to a successful claim. According to the Agency, Complainant has not presented any valid claims of error in the final decision nor evidence to support an increase in damages, and he cannot receive attorney's fees for work expended in pursuit of unsuccessful claims that were distinct from the Commission's retaliation finding.

## ANALYSIS AND FINDINGS

### Compensatory Damages

When discrimination is found, the agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore her as nearly as possible to the position she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S.

Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this “make whole” relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3)

To receive an award of compensatory damages, a complainant must demonstrate that they have been harmed because 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. denied, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

### *Pecuniary Damages*

Pecuniary losses are out-of-pocket expenses incurred because of the agency's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other such quantifiable expenses. Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination, or a voluntary settlement, whereas future pecuniary damages are those likely to occur after the resolution of the complaint. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 at Chapter 11, § VII.B (Aug. 5, 2015) (internal citations omitted).

In a claim for pecuniary compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, the harm suffered because of the agency's discriminatory action. Objective evidence in support of a claim for pecuniary damages includes documentation showing actual out-of-pocket expenses with an explanation of the expenditure. The agency is only responsible for those damages that are clearly shown to be caused by the agency's discriminatory conduct.

Here, we agree with the Agency that Complainant has not provided evidence of actual losses or expenses to support pecuniary damages resulting from General Foreman's disclosure of Complainant's prior EEO activity.

### *Non-Pecuniary 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. 915.002 at 10 (July 14, 1992). There are no precise formulae for determining the amount of damages for nonpecuniary losses. In Carle v. Department of the Navy, the Commission explained that “objective evidence” of non-pecuniary damages could include a statement by the complainant explaining how he or she was affected by the discrimination. EEOC Appeal No. 01922369 (January 5, 1993). Statements from others, including family members, friends, and health care providers could address the outward manifestations of the impact of the discrimination on the complainant. Id. The complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. Id. Non-pecuniary damages must be limited to the sums necessary to compensate the injured party for the actual harm and should take into account the severity of the harm and the length of the time the injured party has suffered from the harm. See Carpenter v. Dep’t of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995).

Here, the Agency carefully considered recent decisions involving a supervisor’s disparaging remarks about a complainant’s prior EEO activity and found cases ranging in awards from \$3,000 to \$10,000. In making its award, the Agency considered the specifics of Complainant’s case, including the nature and duration of the actual harm and the content and extent of the dissemination of the supervisor’s statements. We conclude the Agency considered the correct factors and the award of \$8,500 for non-pecuniary, compensatory damages is appropriate. This amount takes into consideration the severity of the harm suffered and is consistent with prior Commission precedent. See Cortez J. v. Dep’t. of Defense, EEOC Appeal No. 0120182712 (Nov. 29, 2019) (awarding \$8,500 in non-pecuniary compensatory damages where Agency reprisal caused Complainant severe anxiety, headaches, stomachaches, stress-related neck pain, loss of appetite, loss of weight, marital strife and loss of reputation); Eleanore M. v. Dep’t. of Homeland Security, EEOC Appeal No. 2020001608 (Aug. 3, 2021) (awarding \$8,000 in non-pecuniary compensatory damages where Complainant asserted feeling depressed and humiliated following public removal of her assignments along with weight loss, frequent crying, shame, embarrassment, and difficulty sleeping); Nicole T. v. Dep’t of Def., EEOC Appeal No. 0120143019 (Jan. 11, 2017) (awarding \$8,000 in non-pecuniary compensatory damages when Complainant was discriminatorily sent home without pay and experienced chest pains, headaches, hair loss, lost sleep, loss of concentration, strained marriage, and bouts of crying); Complainant v. U.S. Postal Serv., EEOC Appeal No. 0720140025 (Sept. 28, 2015) (awarding \$7,500 in non-pecuniary compensatory damages for depression, anxiety, chest pains, lack of concentration, crying spells, headaches, fatigue, sleeplessness, loss of appetite, loss of enjoyment of life, loss of trust in people, loss of interest in personal care, impaired relationships, heightened fear/paranoia, humiliation and embarrassment).



### Attorney's Fees

Title VII and the Commission's regulations authorize the award of reasonable attorney's fees and costs to a prevailing complainant. 29 C.F.R. § 1614.501(e); see also EEO Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 11-1 (Aug. 5, 2015). To establish entitlement to attorney's fees, the complainant must first show that he or she is a prevailing party. See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources, 532 U.S. 598 (2001). A prevailing party for this purpose is one who succeeds on any significant issue and achieves some of the benefit sought in bringing the action. Davis v. Dep't of Transp., EEOC Request No. 05970101 (Feb. 4, 1999) (citing Hensley v. Eckerhart, 461 U.S. 427, 433 (1983)).

Contrary to the Agency's assertion, we find that Complainant is a prevailing party in the instant matter for the purposes of awarding attorney's fees. Regardless of how the finding came about, the Commission determined, in its previous appellate decision, that the General Foreman's disclosure of Complainant's prior EEO activity amounted to unlawful reprisal and ordered a supplemental investigation regarding entitlement to and the amount of compensatory damages. While Complainant did not prevail in all of his arguments on appeal, he was successful on this issue, and in receiving the right to make a showing of compensatory damages suffered, he achieved some of the benefit sought in bringing the action. Therefore, Complainant is entitled to reasonable attorney's fees for legal work performed on that successful claim. However, the instant record does not allow for a proper determination of the hours expended on that particular claim, including obtaining compensatory damages and processing this appeal. Therefore, the case is remanded the Agency to allow Complainant's attorney to submit to the Agency a verified statement of the fees related to the finding of unlawful retaliation and any success achieved in the instant appeal.

### 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 award of compensatory damages, but REVERSE the Agency's decision on entitlement to attorney's fees and REMAND the case to the Agency for further processing in accordance with the Order below.

### ORDER

1. Within thirty (30) calendar days of the date this decision is issued, Complainant's attorney shall submit a petition to the Agency – **not** this Commission – for legal fees and costs related to the finding of unlawful retaliation and any success achieved in the instant appeal, and pursuant to the guidance in 29 C.F.R. § 1614.501(e).
2. Within sixty (60) calendar days of the date the fee petition is received by the Agency, the Agency is ordered to review Complainant's fee petition and issue a final decision on the amount of fees and costs to be awarded, with appropriate appeal rights to this Commission.

### 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:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director  
Office of Federal Operations

August 22, 2022

Date