



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

[REDACTED]
Randolph A.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Department of Defense Education Activity),
Agency.

Appeal No. 2022002664

Hearing No. 480-2020-00175X

Agency No. PE-FY-19-033

DECISION

On April 14, 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 March 15, 2022, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a TP-1701-AA Substitute Teacher at the Agency's Daegu Elementary School in South Korea.

On February 25, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), color (Black), and in reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when, on or about November 9, 2018, the Superintendent blackballed Complainant from working as a Substitute Teacher, and Complainant was placed on Leave Without Pay (LWOP).

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. The AJ held a hearing on October 13, 2021, and subsequently notified the parties of the intent to issue a decision in favor of Complainant. The parties agreed that the issue of damages could be decided through pleadings.

In his damages pleadings, Complainant requested between \$125,000 and \$175,000 in nonpecuniary compensatory damages. Complainant did not request pecuniary damages. Complainant requested back pay. Complainant requested that all negative information about Complainant not being eligible to substitute teach or not allowed to substitute teach be removed from the Agency's records. Complainant also requested \$56,593.50 in attorney's fees and costs.

In support of his request for compensatory damages, Complainant submitted a sworn declaration. Complainant stated that he was told he was unable to return to his Substitute Teacher position just before the Veteran's Day holiday in November 2018 and was unable to return to the elementary school, causing embarrassment. Complainant also was told he was unable to coach the high school varsity basketball team, which he had been doing for two seasons. According to Complainant, he would frequently see students or other teachers around the base who would ask why he had not returned to school or when he would be coming back to school. Complainant stated that, because it was a small community, he would have an embarrassing run in with someone every weekend and three or four times during the work week. Complainant felt like he had a scarlet letter and that everyone thought he had done something wrong and was whispering about him. Complainant was worried that this would negatively reflect on his wife, who was also a teacher. Complainant was concerned that his base ID card would be suspended or terminated and that he would lose access to activities, including the ability to buy groceries at the commissary. Complainant was angry, angry at himself and angry at the people responsible for his situation.

Complainant stated that not being able to work caused substantial stress and led to a deep depression. Complainant had fleeting thoughts of suicide and considered ways to end his life. When he was employed, Complainant was very active and would go to the gym at least four times per week. Complainant stopped going to the gym and started gaining weight. Complainant noticed that he was drinking more, including having alcohol in the middle of the day. When Complainant's wife left for work in the morning, he would stay home watching television. Complainant started sleeping in a separate bedroom and would sleep in late. Complainant stated that his wife helped him get back into a daily routine in early 2019 after the holidays, but he stated that he remained depressed through the end of the school year and into the summer of 2019. Complainant averred that his depression affected his relationship with his wife, causing them to argue more and Complainant to be more abrupt with his wife. Complainant felt less masculine, which affected his intimacy with his wife. Complainant stated that his doctor prescribed him erectile dysfunction medication in December 2018, but he stated that the medication did not always help.

Complainant also stated that his relationship with his mother was affected. Complainant felt like he could not tell his mother what happened and got sick of hearing her ask him how he was doing over and over again.

Complainant stated that he was unemployed until August 2019. There were very few employment opportunities on base for civilians, and he was not eligible to work in South Korea. Relying on one paycheck caused stress for Complainant and his wife, and they considered leaving South Korea and whether the strain on their relationship would lead to a separation or divorce. Complainant felt like he had to ask his wife before spending any money, as though he was asking for an allowance. Complainant stated that his relationship with his wife improved when he started working in August 2019.

In response to Complainant's damages pleadings, the Agency argued that even \$7,500 in nonpecuniary compensatory damages would be excessive given the limited evidence provided by Complainant.

The AJ issued a decision and order entering judgment on February 7, 2022. Pursuant to the finding of discrimination based on race, color, and reprisal, the AJ ordered the Agency to: (1) provide the Superintendent with one hour of live EEO training each year for the next year; (2) expunge any documents concerning Complainant's pause of employment on November 9, 2018, from all official and unofficial records; (3) post a notice at all educational and administrative facilities in districts where the Superintendent served as superintendent;² (4) pay Complainant \$18,000 in nonpecuniary compensatory damages; (5) pay Complainant back pay from November 9, 2018, through August 19, 2019; and (6) pay Complainant \$50,191.50 in attorney's fees and costs.

Concerning nonpecuniary compensatory damages, the AJ noted that Complainant's sworn declaration was not supported by additional evidence. The AJ described Complainant's embarrassment following removal from his position in a small, insular community; his stress regarding lack of income; and his deep depression, including brief, passing thoughts of suicide. AJ noted that Complainant felt humiliated, was angry with himself and others, was abrupt and more argumentative with his spouse, felt less masculine, slept in a separate bedroom, and was prescribed medication for erectile dysfunction. Complainant stopped working out, ate more, drank more alcohol, slept more, and gained weight. The AJ found that Complainant's emotional distress was more serious than in cases with awards with a present-day value below \$18,000 in Karlene G. v. Dep't of the Interior, EEOC Appeal No. 0120141261 (Jan. 24, 2017) (awarding \$11,000 in nonpecuniary damages) and in Hamilton v. U.S. Postal Serv., EEOC Appeal No. 01A30899 (Mar. 4, 2004) (finding complainant entitled to \$10,000 in nonpecuniary damages), while the AJ determined that Complainant's emotional distress was less serious than in cases with awards with a present-day value above \$18,000 in Randle-Harris v. United States Postal Service, EEOC Appeal No. 01A04769 (March 6, 2001) (awarding \$15,000 in nonpecuniary

² According to the record, the Superintendent served as the superintendent of the Agency's Pacific West District for the 2018-2019 school year.

damages) and in Erich A. v. National Aero and Space Administration, EEOC Appeal No. 0120161456 (September 21, 2018) (awarding \$25,000 in nonpecuniary damages).

Regarding back pay, the AJ ordered the Agency to assume Complainant would have worked a full day for every school day from November 9, 2018, through August 19, 2019. The AJ found that Complainant's entitlement to back pay ended on August 19, 2019, when the Agency discovered that Complainant had not completed the required background check. The AJ characterized this discovery as after-acquired evidence. The AJ also found that Complainant had not substantiated his entitlement to back pay after August 19, 2019, because he obtained new employment in August 2019.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant proved that the Agency subjected him to discrimination as alleged and fully implementing the ordered relief. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that he is entitled to an award of \$80,000 in nonpecuniary compensatory damages. Complainant characterizes his testimony concerning damages as reasonable, internally consistent, and uncontradicted and notes that medical evidence is not required for an award of compensatory damages. According to Complainant, the AJ did not properly assess the severity of the harm and failed to recognize that the harm continued for almost a year. In support of his request for additional compensatory damages, Complainant cites to similar awards ranging from \$50,000 to \$90,000.

In response to Complainant's appeal, the Agency contends that the AJ's compensatory damages award of \$18,000 was supported by the record and should be affirmed.

ANALYSIS AND FINDINGS

When discrimination is found, the Agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore him as nearly as possible to the position he 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 nonpecuniary 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, 119 S.Ct. 1906 (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 nonpecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

Nonpecuniary 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 Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.302 at 10 (July 14, 1992). 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 nonpecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than 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 his 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. 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. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

Upon review, we do not find that Complainant is entitled to \$80,000 in nonpecuniary compensatory damages. In one of the cases Complainant cited on appeal, Gamez v. Social Security Administration, EEOC Appeal No. 07A20129 (October 27, 2003), the Commission affirmed an award of \$90,000 in nonpecuniary compensatory damages. However, in Gamez, in addition to complainant's testimony that she had physical symptoms, she developed depression and was prescribed antidepressants, her relationship with her spouse deteriorated, and she became withdrawn, complainant's testimony was supported by the testimony of her spouse, her coworker, two friends, and several doctors who treated complainant. Here, Complainant did not provide any statements from relatives or friends or any medical evidence to support his claim for damages.

Upon review, we conclude that a modest increase to \$22,500 in nonpecuniary compensatory damages will appropriately compensate Complainant for the harm caused by the Agency. Our award takes into account the duration and severity of the harm suffered and is neither “monstrously excessive” nor the product of passion or prejudice.

This award is consistent with the amounts awarded under similar circumstances. See Lydia F. v. Dep't of Veterans Affs., EEOC Appeal No. 2020001007 (Sept. 16, 2021) (\$20,000 in nonpecuniary compensatory damages for exacerbation of depression and anxiety, humiliation, increased debt due to unemployment, a strain on her marriage, and a lack of confidence that followed complainant to her next job); Maxine C. v. U.S. Postal Serv., EEOC Appeal Nos. 2019001571 & 2019003019 (July 7, 2020) (\$20,000 in nonpecuniary compensatory damages where complainant became aggressive, depressed, and insecure, withdrew from friends and family, and increased alcohol consumption); Orlando O. v. Environmental Protection Agency, EEOC Appeal No. 0120182452 (Dec. 10, 2019) (\$20,000 in nonpecuniary compensatory damages for severe damage to professional reputation and professional relationships, sleeping issues, family problems, and stress); Gerald L. v. Tennessee Valley Auth., EEOC Appeal No. 0120171266 (Oct. 23, 2018) (awarding \$25,000 in nonpecuniary damages where complainant indicated that discrimination caused stress, depression, anxiety, paranoia, sleeplessness, and weight gain).

Complainant does not challenge any of the other remedies ordered by AJ. In the order, we shall restate the unchallenged remedies awarded by the AJ. We note that Complainant may be entitled to additional attorney's fees and costs related to filing this appeal and should submit any petition for attorney's fees and costs to the Agency.

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 order as it relates to liability. We MODIFY the Agency's final order concerning remedies and REMAND the matter to the Agency for further action in accordance with this decision and the ORDER below.

ORDER

To the extent it has not already done so, the Agency shall:

1. Within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant \$22,500 in nonpecuniary compensatory damages, less any amount previously paid to Complainant as nonpecuniary compensatory damages.
2. Within 60 calendar days of the date this decision is issued, the Agency shall expunge from all official and unofficial records any documents concerning Complainant's pause of employment on November 9, 2018.
3. Within 60 calendar days of the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant pursuant to 29 C.F.R. § 1614.501. The back pay period shall be November 9, 2018, through August 19, 2019, and the Agency shall assume Complainant would have worked a full day on every school day. The Agency's back pay calculation shall include all forms of compensation and reflect fluctuations in working time, overtime rates, Sunday

premium and night work, changing rate of pay, transfers, promotions, and privileges of employment. Any outside wages or salary Complainant earned during the back pay period should be subtracted from the amount of back pay due. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency within 30 calendar days of receiving any Agency request for information. Within 60 calendar days of the date the Agency determines the amount of back pay due Complainant, the Agency shall pay Complainant that amount. The Agency shall provide Complainant with a clear and concise plain language statement explaining the formulas and methods it used to calculate back pay. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount. Complainant may file a petition for enforcement or clarification regarding the amount in dispute. The petition for enforcement or clarification must be filed with the Compliance Officer at the address referenced in the statement entitled "Implementation of the Commission's Decision."

4. Within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant \$50,191.50 in attorney's fees and costs. Complainant shall submit any petition for additional attorney's fees and costs to the Agency in accordance with the statement entitled "Attorney's Fees."
5. Within 90 calendar days of the date this decision is issued, the Agency shall provide a minimum of six hours of in-person or interactive EEO training to the Superintendent. To the extent the Agency has provided the two hours of EEO training ordered by the Administrative Judge, the Agency shall provide a minimum of four hours of in-person or interactive EEO training to the Superintendent. The required training shall address unlawful discrimination under federal EEO laws, with a special emphasis on discrimination based on race, color, and reprisal, appropriate responses to complaints of prejudice or discrimination, and implicit bias. The Commission does not consider training to constitute disciplinary action. For assistance in obtaining the necessary training, the Agency may contact the Commission's Training and Outreach Division via email at FederalTrainingandOutreach@eeoc.gov.
6. Within 120 calendar days of the date this decision is issued, the Agency shall report whether it proposed discipline against the Superintendent and any other responsible management official(s) for the discrimination. 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. If the Superintendent or other responsible management official(s) have left the Agency's employment, then the Agency shall furnish documentation of their departure date(s).
7. Within 30 calendar days of the date this decision is issued, the Agency shall post a notice in accordance with the statement entitled "Posting Order."

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 documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Pacific West District educational and administrative facilities 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).

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.

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 (T0610)

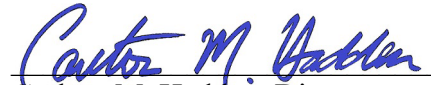
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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

February 23, 2023
Date