



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

[REDACTED]
Irvin C.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Federal Emergency Management Agency),
Agency.

Appeal No. 0720180024

Hearing No. 570-2015-00196X

Agency No. FEMA-00287-2014

DECISION

Following its June 8, 2018 final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of 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 Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Information Technology Specialist at the Federal Emergency Management Agency (FEMA), Office of the Chief Information Officer, in Winchester, Virginia.

On or about July 12, 2013, according to Complainant's Supervisor, an Agency employee ("the Employee") expressed concerns to him about Complainant's behavior. The Employee described Complainant as a "very angry person" and indicated she was concerned that his anger might

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.

escalate and that he had “a lot of guns.” The Supervisor contacted a Human Resources Specialist and relayed the information from the Employee. The Human Resources Specialist contacted the Agency’s Office of Security, and they recommended an investigation into potential misconduct by Complainant. Report of Investigation (ROI) at 57-60.

An initial investigation was commenced on August 8, 2013. That same day, Complainant was placed on administrative leave with pay, which was described by the Agency management witnesses as routine for anyone who was the subject of a formal investigation until the conclusion of the investigation and any actions are determined. ROI at 61-2, 91.

On December 12, 2013, a Special Agent interviewed Complainant regarding two allegations: (1) possession of a firearm at an Agency facility; and (2) creation of a hostile workplace based on coworkers’ accusations. Complainant was asked to provide a written statement, and he responded that he cooperated with the investigation by answering questions but would not provide a written statement. As a result of the investigation, the allegation that Complainant possessed a firearm in a federal facility was not substantiated, but it was found that Complainant had created a “hostile workplace” based on statements from a number of coworkers. ROI at 79-80. After the investigation was concluded, Complainant continued to be on involuntary administrative leave.

On April 1, 2014, the Director of the Personnel Security Division informed Complainant of the revocation of his national security clearance based on his refusal to cooperate during the investigation into allegations that he brought firearms to an Agency facility. ROI at 93-7. On April 30, 2014, the Complainant’s Supervisor issued Complainant a Notice of Proposed Removal due to the loss of his security clearance. ROI at 98-100.

EEO Complaint

On January 21, 2014, Complainant filed an EEO complaint, as later amended, alleging that the Agency discriminated against him based on his race (African American), and in reprisal for prior protected EEO activity, when:

1. On December 12, 2013, at management’s request, the Internal Security “interrogated” Complainant about accusations made against him that:
 - a. Complainant previously brought firearms into the workplace;
 - b. Complainant created a hostile work environment by encouraging others to file discrimination complaints against the Agency; and
 - c. Complainant “played the race card” to make false discrimination claims against the Agency to extort money from the Agency.
2. The December 12th interrogation and subsequent conclusions of the investigation made Complainant realize the discriminatory and/or retaliatory rationale behind his placement on involuntary administrative leave, starting on August 8, 2013.

3. On April 7, 2014, the Office of the Chief Security Officer issued Complainant a Notice of Determination, dated April 1, 2014, which served as notification that it was revoking his Top-Secret national security clearance with the Agency.
4. On May 1, 2014, the Supervisor issued Complainant a Notice of Proposed Removal, dated April 30, 2014, which proposed his removal from his position based on the revocation of his security clearance.²

Although the Agency accepted the complaint for investigation, it did not commence that investigation. Therefore, on November 6, 2014, Complainant requested a hearing before an EEOC Administrative Judge (AJ) and simultaneously requested sanctions against the Agency because it had failed to conduct an investigation into his EEO complaint.

While the case was pending before the AJ, the Agency conducted the investigation and forwarded the ROI to Complainant on March 24, 2015.³ ROI at 1.

On November 3, 2016, the AJ issued a Notice to Show Case and Scheduling Order. The AJ informed the Agency that a default finding for Complainant might be issued as a sanction for its untimely investigation and ordered it to supply a response. The Agency replied that sanctions in this case were wholly inappropriate, particularly the ultimate sanction of a default judgment. The Agency explained that the ROI was tardy due to reasons outside of the Agency's control. Specifically, the Agency claimed a cybersecurity intrusion occurred in the systems of the contractor that performed their EEO investigations, and a hold was placed while a security investigation was conducted. The Agency subsequently terminated its contract and completed the investigation for Complainant's complaint in March 2015.

² When a complaint is filed on a proposed action and the agency subsequently proceeds with the action, the action is considered to have merged with the proposal. See Siegel v. Dep't of Veterans Affairs, EEOC Request No. 05960568 (Oct. 9, 1997); Charles v. Dep't of the Treasury, EEOC Request No. 05910190 (Feb. 25, 1991). In this case, the Agency ultimately removed Complainant, and the proposal to remove no longer exists because it has merged with the actual removal action. However, Complainant's actual removal is not at issue in this complaint because he filed a civil action (Civil Action No. 5:17cv00021) on the matter. Agency Appeal Brief Exhibits 4, 5. Complainant's civil action was dismissed by the court without prejudice for lack of jurisdiction in February 2018.

³ We note that the Agency did not fully investigate claims 3 or 4, despite its acceptance of these amended claims. ROI at 37-9. For example, the Agency failed to obtain an affidavit from the Director of the Personnel Security Division. An agency is required to conduct an impartial and appropriate investigation of the complaint, and we remind the Agency of its obligation to adequately investigate accepted claims. 29 C.F.R. § 1614.106(e)(2).

The Agency also argued that sanctions were not warranted for other reasons, such as Complainant's inability to prevail on the merits of his claims and the Commission's lack of jurisdiction to review the revocation of Complainant's security clearance. As such, the Agency also moved to dismiss the complaint.

On August 22, 2017, the AJ issued an Order granting Complainant's request for a default judgment and denying the Agency's Motion to Dismiss. The AJ held that the Commission has the authority to issue sanctions arising from its inherent power to protect its administrative processes from abuse by any party and ensure compliance with its regulations. Accordingly, the AJ issued a default judgment as a sanction against the Agency for its failure to conduct a timely investigation. The AJ also determined that Complainant had, at a minimum, established a prima facie case of discrimination and/or unlawful retaliation. The AJ then ordered Complainant to submit a request for relief. Complainant filed a Motion Requesting Damages and Attorneys' Fees and Costs requesting backpay and associated benefits, \$100,000.00 in non-pecuniary compensatory damages, and attorneys' fees.

On May 3, 2018, the AJ issued an Order on Damages Upon Default Judgment. The AJ found that Complainant was placed on administrative leave while the internal investigation began, and as such, backpay was not justified. However, the AJ awarded \$58,153.20 in attorney fees and \$1,635.49 in costs for one attorney and \$16,511.50 in fees and \$18.00 in costs for the other attorney.

The AJ noted that a default judgment constituted a finding of discrimination in Complainant's favor on the accepted issues, and that he established harms suffered. Specifically, Complainant described emotional stress, humiliation, and mental anguish, which included sleep dysfunction and loss of enjoyment of life and interest in activities he used to enjoy; loss of self-esteem; loss of trust; and constant worry. Complainant also experienced financial strain, stomach problems, palpitations and a racing heart, anxiety, depression, a decreased sex drive, weight fluctuation, and damage to his reputation. The AJ determined that \$60,000.00 in non-pecuniary compensatory damages was appropriate and consistent with other cases, citing to: Hibbert v. Department of Justice, EEOC Appeal No. 0720070036 (October 25, 2007) (\$60,000.00 awarded for six years of harassment which caused severe stress; anxiousness; frustration; humiliation; and embarrassment, which negatively impacted the complainant's home life); Alston v. Department of Housing and Urban Development, EEOC Appeal No. 07A50028 (March 28, 2009) (\$45,000.00 awarded for loss of self-esteem, harm to familial relationships, and health problems); Howard v. United States Postal Service, EEOC Appeal No. 0720060026 (May 3, 2008) (\$50,000.00 awarded for stress, depression, anxiety, insomnia, heart palpitations, high blood pressure, constant headaches, an increasing inability to function at a normal level, and increase in stress-related smoking).

The Agency issued the final order rejecting the AJ's decision and filed the instant appeal. The Agency argues that the Commission lacks jurisdiction over this case; that the Agency's actions were not taken due to Complainant's protected classes; and the AJ erred in granting a default judgment. Complainant opposed the Agency's appeal and cross appeals with a request for an increase in non-pecuniary compensatory damages.⁴

ANALYSIS AND FINDINGS

Standard of Review

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and the Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chap. 9, § VI.A. (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").

Jurisdiction

As an initial matter, we address the Agency's contention that the Commission lacks jurisdiction over this complaint. The Agency asserts that the Commission has held that it will not review an agency's determination regarding the substance of a security clearance decision. See Policy Guidance on the Use of the National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as amended, EEOC Notice No. N-915-041 (May 1, 1989); Dep't of the Navy v. Egan, 484 U.S. 518 (1988).

⁴ We note that the Commission has the discretion to review only those issues specifically raised in an appeal. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 9, § IV.A.3 (Aug. 5, 2015). Complainant did not challenge the AJ's decision to not award backpay on appeal and, as such, we will not address it in the instant decision.

The Agency's arguments are misplaced in this case because adjudication of this complaint requires no review of the *substance* of a "security clearance determination". The legislative history of § 703(g) makes it clear that the Commission is not precluded from determining whether the grant, denial, or revocation of a security clearance was conducted in a discriminatory manner. See Al H. v. Dep't of State, EEOC Appeal No. 0120181043 (June 18, 2019). The Commission has found that the bar of jurisdiction created by Egan does not "insulate...from Title VII *all* decisions that might bear upon an employee's eligibility to access classified information. Rather, the Court in Egan emphasized that the decision to grant or deny security clearance requires a '[p]redictive judgment' that 'must be made by those with the necessary expertise in protecting classified information.'" See Glynda S. v. Dep't of Commerce, EEOC Appeal No. 2022000548 (Apr. 18, 2022), quoting Rattigan v. Holder, 689 F.3d 764, 767 (D.C. Cir. 2012) (emphasis in original); Zetta B. v. Dep't of the State, EEOC Appeal No. 0120171714(Nov. 20, 2018); Henry S. v. Dep't of Defense, EEOC Appeal No. 0720170020 (Mar. 28, 2018).

Here, Complainant has alleged that discriminatory and/or retaliatory motivations on the part of *his management* (not the security clearance officials) were involved in decisions to request an investigation and his placement on indefinite administrative leave long after it was determined there was no support for the accusation that he had brought a gun onto Agency property. He also asserts that it is undisputed that his security clearance was revoked solely because of the internal administrative investigation into the gun accusation that Complainant claimed was initiated and conducted based on discrimination and retaliation.⁵ Complainant confirms that he was not challenging the validity of the requirement of a security clearance or the substance of a security clearance decision. Complainant Opposition Brief at 30. As such, we find that the Commission has jurisdiction over the claims in this complaint.

Sanctions

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC Appeal No. 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party.

⁵ The Notice of Determination stated that Complainant's security clearance was revoked due to "refusal to cooperate with the instructions provided by [Agency] investigators during the investigation of allegations that you unlawfully brought one or more firearms into [an Agency] facility." ROI at 93. There is no evidence in the record regarding any security clearance investigation, and the Agency only supplied a copy of the internal investigation report into Complainant's alleged misconduct that determined there was no evidence to support a finding that Complainant carried weapons to work. Accordingly, we find there is no review of a "security clearance investigative report" needed in this case which would be out of the Commission's jurisdiction.

Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Several factors are considered in "tailoring" a sanction and determining if a particular sanction is warranted: 1) the extent and nature of the non-compliance, and the justification presented by the non-complying party; 2) the prejudicial effect of the non-compliance on the opposing party; 3) the consequences resulting from the delay in justice; and 4) the effect on the integrity of the EEO process. Gray v. Dep't of Defense, EEOC Appeal No. 07A50030 (Mar. 1, 2007).

We note that under 29 C.F.R. § 1614.109, AJs are granted broad discretion in the conduct of administrative hearings, including the authority to sanction a party for failure, without good cause shown, to fully comply with an order. See Malley v. Dep't of the Navy, EEOC Appeal No. 01951503 (May 22, 1997). Given the AJ's broad authority to regulate the conduct of a hearing, a party claiming that the AJ abused his or her discretion faces a very high bar. Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016), citing Kenyatta S. v. Dep't of Justice, EEOC Appeal No. 0720150016 n.3 (June 3, 2016) (responsibility for adjudicating complaints pursuant to 29 C.F.R. § 1614.109(e) gives AJs wide latitude in directing terms, conduct, and course of administrative hearings before EEOC).

In this case, we find that the AJ erred when she issued a default judgment as a sanction because she did not fully consider the relevant factors in determining an appropriate sanction, which must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned, and she did not consider a lesser sanction than a default judgment. See Dalton E. v. Dep't of Housing and Urban Dev., EEOC Request No. 2019001739 (Sept. 29, 2022) (abuse of discretion when the AJ issued a default judgment and did not consider whether a lesser sanction would have adequately addressed the agency's failure to provide a report of investigation when ordered by the AJ and ameliorated any prejudice to the complainant); Voysest v. Social Security Admin., EEOC Appeal No. 01A35340 (Jan. 18, 2005) (the AJ abused his discretion by issuing a sanction that was not "tailored").

We note that the AJ ignored that the Agency complied with the Show Cause Order and claimed the untimely investigation was a result of a cyberattack that was outside of its control. In doing so, the AJ wholly disregarded the justification presented by the non-complying party. See Embrey v. Dep't of Housing and Urban Dev., EEOC Appeal No. 07A50009 (Jul. 26, 2005) (an AJ abused her discretion when she issued a default judgment against an agency, which did not fail to respond to an AJ's Order nor fail to respond in a timely fashion, and there was no evidence of any bad faith in the agency's responses to the AJ's orders), request for recon. denied, EEOC Request No. 05A51207 (Sept. 19, 2005).

On the other hand, our regulations require agency action in a timely manner at many points in the EEO process. Tammy S. v. Dep't of Def., EEOC Appeal No. 0120084008 (June 6, 2014).

Compliance with these timeframes is not optional and “the Commission has the inherent power to protect its administrative process from abuse by either party and must ensure that agencies, as well as complainants, abide by its regulations.” Because of the length of time it can take to process a federal sector EEO complaint, any delays in complying with the time frames in the regulations can impact the outcome of the complainant’s claims. Royal v. Dep’t of Veterans Affairs, *supra*.

Complainant filed his EEO complaint on January 21, 2014, and he amended his complaint twice, with the latest amendment filed on May 2, 2014. ROI at 37. The Commission’s regulation provides that when a complaint is amended, the deadline for the investigation is either 180 days after the last amendment or 360 days after the filing of the original complaint, whichever date is earlier. 29 C.F.R. § 1614.106(e)(2). Here, the deadline for the completion of the investigation was October 29, 2014, and the Agency completed the investigation on March 24, 2015, which was approximately four months and 24 days late. Further, we note that the EEO Investigator does not appear to have commenced the investigation until initial contact was made with Complainant until February 4, 2015, significantly after the Agency’s deadline to complete the investigation and after Complainant already filed his hearing request. ROI at 44.

Despite the asserted security breach involving its contractor, we find that the Agency had an obligation to resolve the matter far sooner than it did and secure an alternative method for conducting an investigation in Complainant’s case. Instead, it waited until after Complainant had been forced to request a hearing without an investigation. Therefore, while the Commission finds that the Agency did not act in a manner to warrant the sanction of a default judgment, we find that some sanctions are appropriate for the Agency’s delay. See Jordon S. v. Dep’t of Justice, EEOC Appeal No. 0120171870 (Mar. 20, 2019); Evelina M. v. Dep’t of Justice, EEOC Appeal No. 0120171018 (Dec. 11, 2018); Crysta T. v. Dep’t of Agriculture, EEOC Appeal No. 0120171275 (Nov. 29, 2018).

EEOC Regulation 29 C.F.R. § 1614.109(f)(3) specifically sets forth the types of sanctions an AJ may take when required by the appropriate circumstances. An AJ may: (1) draw an adverse inference that the requested information would have reflected unfavorably on the non-complying party; (2) consider the requested information to be established in favor of the opposing party; (3) exclude other evidence offered by the non-complying party; (4) issue a decision fully or partially in favor of the opposing party; or (5) take other action deemed appropriate. Based on the specific circumstances of this case, we find the most appropriate sanction to address the Agency’s conduct is to draw an adverse inference that the information in the untimely ROI would have reflected unfavorably upon the Agency. As such, we MODIFY the AJ’s sanction from a default judgment to a drawing of an adverse inference.⁶

⁶ The Agency’s failure to abide by the regulations reflects negatively on the Agency’s support for the integrity of the EEO process. See Beatrice B. v. Dep’t of Veterans Affairs, EEOC Appeal No. 2019001641 (Sept. 17, 2020). As a result, we will also notify EEOC’s Federal Sector Programs (FSP), which monitors the federal agencies’ EEO programs, of the Agency’s failure to comply with the regulations regarding the timely issuance of the report of investigation.

Retaliatory Harassment

To establish a claim of harassment Complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his statutorily protected classes; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [Complainant’s] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

“The threshold for establishing retaliatory harassment is different than for discriminatory hostile work environment. Retaliatory harassing conduct can be challenged under the Burlington Northern standard even if it is not severe or pervasive enough to alter the terms and conditions of employment.⁷ If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation.” EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, Sect. II.B, ex. 17. (Aug 25, 2016). Only if both elements are present, retaliatory motivation and a chilling effect on protected EEO activity, will the question of Agency liability for reprisal-based harassment present itself. See Janeen S. v. Dep’t of Commerce, EEOC Appeal No. 0120160024 (Dec. 20, 2017).

For claim 1, Complainant alleged that, at management’s request, he was “interrogated” on December 12, 2013, regarding an accusation that he brought a firearm to an Agency facility and created a hostile workplace. The record shows that Complainant responded to the specific questions and denied carrying a weapon onto federal property or threatening anyone. Internal Investigation Report at 2, 7.

We find that, prior to the investigation, Complainant had engaged in well-known protected activity based on undisputed evidence of his repeated public opposition to discrimination, and there was a nexus with the “interrogation” based on specific statements from Agency witnesses made during the investigation about his verbal protests of discrimination and desire to file EEO complaints. The Employee stated that Complainant raised racism in their conversations and complained about others at work, and he informed her that people were mistreating him. Id. at 20-2. The Supervisor corroborated that Complainant repeatedly brought race into his criticisms of almost every initiative. For example, Complainant complained that the individuals chosen for a particular effort did not “look like me,” and were all white men and one white woman. Id. at 30.

⁷ Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006).

A witness attested that Complainant “played the race card a lot,” made race a factor in almost every issue, and mentioned filing lawsuits against managers and encouraged other employees to file EEO complaints. *Id.* at 66, 70.

In this case, we find that the Agency’s internal investigation and “interrogation” of Complainant was sufficient to dissuade a reasonable employee from making or supporting a charge of discrimination. *See Minh W. v. Dep’t of Veterans Affairs*, EEOC Appeal No. 2021004892 (Jan. 31, 2023) (complainant was the subject of a fact-finding investigation, which could dissuade a reasonable person from engaging in protected activity). When drawing an adverse inference against the Agency as a sanction, we find that the evidence would have established retaliatory motivation for the Agency’s actions in requesting and conducting the misconduct investigation, as well as its subsequent decision to find that Complainant failed to cooperate with the investigation. Claims 2 and 3 were direct consequences of the events in claim 1, and they would not have occurred absent these initial actions. We find that the Agency’s actions of placing Complainant on an extended administrative leave long after he was cleared of the gun allegations and revoking his security clearance solely for his alleged failure to cooperate in a retaliatory investigation were materially adverse and were actions that would also dissuade reasonable employees from engaging in protected EEO activity. *See Dominica H. v. Dep’t of Health and Human Serv.*, EEOC Appeal No. 0120150971 (Nov. 22, 2017) (the agency’s actions, including placement of the complainant on administrative leave would likely have a chilling effect and deter employees from full exercise of their EEO rights). The Agency’s actions resulted in the ongoing harassment of Complainant when he continuously remained on administrative leave and was precluded from returning to work. Regarding claim 3, we draw an adverse inference that the record would have shown that management officials harbored a retaliatory animus towards Complainant’s protected activity that directly resulted in the internal misconduct investigation which was the sole reason for the pulling of Complainant’s security clearance. In sum, based on the events spanning claims 1 -3, we conclude that the Agency subjected Complainant to an ongoing pattern of retaliatory harassment.

Based on the finding that Complainant was subjected to retaliatory harassment,⁸ he has established an entitlement to relief. Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either 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).

⁸ As Complainant would not be entitled to any additional remedies, we do not find it necessary to address whether the Agency’s actions were also motivated by his race.

Non-Pecuniary Compensatory Damages

Non-pecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See EEOC Notice No. 915.302, Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be “monstrously excessive” standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

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

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

An award of non-pecuniary compensatory damages should reflect the extent to which the agency's discriminatory action directly or proximately caused the harm as well as the extent to which other factors also caused the harm. Johnson v. Dep't of the Interior, EEOC Appeal No. 01961812 (June 18, 1998). It is the complainant's burden to provide objective evidence in support of his 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).

Here, Complainant supplied a declaration and attested to the harm he suffered as a result of the retaliatory harassment he experienced. Complainant averred he experienced constant worry; anxiety; bouts of hopelessness and wonder about his future. Complainant explained that his self-esteem was at an all-time low, and he felt both depressed and angry. Complainant also reported resulting physical symptoms, such as sleep dysfunction; stomach problems; palpitations and a racing heart; and weight fluctuation. Finally, Complainant asserted his relationships with his family were impacted, and his son frequently asked if he was depressed because he no longer laughed or played with his children.

In this case, we note that the Agency did not specifically challenge the amount of the AJ's award of \$60,000 in non-pecuniary compensatory damages. Complainant asserts that he is entitled to an increased award in his opposition to the Agency's appeal, and he cites to cases that awarded \$175,000.00 up to \$200,000. However, Complainant did not explain how these cases were similar to his situation. Further, Complainant avers that the AJ's award was "grounded in the facts of this case and commensurate with other decisions issued by the Commission." Complainant Opposition Brief at 24. We find that Complainant has not shown that an increase in his non-pecuniary compensatory damages is warranted.

In addition, the AJ's award of \$60,000 is not monstrously excessive and consistent with similar harms. See Thersa E. v. U.S. Postal Service, EEOC Appeal No. 2021005121 (June 29, 2022) (complainant awarded \$60,000.00 in non-pecuniary compensatory damages for five years of additional stress, depression, uncertainty of job future, worry, fear, restlessness, tension, and difficulty sleeping and concentrating); Pasquale D. v. Dep't of Homeland Security, EEOC Appeal No. 0120160892 (Apr. 12, 2018) (complainant awarded \$60,000 for emotional and physical distress of anxiety attacks, mood swings, nightmares, insomnia, difficulty concentrating, loss of self-esteem, alcohol dependency, weight gain, paranoia, diminishment of self-worth, and exacerbation of hypertension and severe back pain).

As such, we REVERSE the Agency's final order rejecting the AJ's award of \$60,000 in non-pecuniary compensatory damages.

Attorney's Fees and Costs

We note that neither party specifically challenges the AJ's decision on Complainant's attorneys' fees and costs, and we find no reason to disturb the AJ's award of \$58,153.20 in fees and \$1,635.49 in costs for one attorney and \$16,511.50 in fees and \$18.00 in costs for the other attorney. Accordingly, we REVERSE the Agency's final order on attorneys' fees and costs.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the AJ's sanction and REVERSE the Agency's final order rejecting the AJ's decisions regarding the awards for non-pecuniary compensatory damages and attorneys' fees and costs.

ORDER

To the extent that the Agency has not already done so, it is ORDERED to take the following actions:

1. Pay Complainant \$60,000 in non-pecuniary compensatory damages within sixty (60) calendar days of the date of this decision.
2. Pay \$58,153.20 in attorney fees and \$1,635.49 in costs for one attorney and \$16,511.50 in fees and \$18.00 in costs for the other attorney within sixty (60) calendar days of the date of this decision.
3. The Agency shall immediately post a notice in accordance with the paragraph 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 documentation of evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Office of Equal Rights 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).

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).

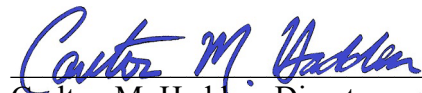
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

July 25, 2023

Date