



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Claude A.,¹
Complainant,

v.

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

Appeal No. 2022000963

Agency Nos. 200H-0526-2018102807, 200H-0500-2018103296

DECISION

On December 4, 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 November 17, 2021, final decision on the issues of compensatory damages and attorney's fees concerning his consolidated equal employment opportunity (EEO) complaints alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Captain/Supervisory Police Officer, GS-0083-09 at the Agency's James J. Peters VA Medical Center in Bronx, New York.

Complainant filed two EEO complaints alleging that the Agency discriminated against him on the bases of disability (Post-Traumatic Stress Disorder (PTSD) and sleep apnea) and in reprisal for prior protected EEO activity.

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.

Complaint A (Agency No. 200H-0526-2018102807)

1. In February 2018, his private medical records were accessed by Agency officials without authorization;
2. On March 2, 2018, his supervisor, the Chief of Police (Chief), instructed him to turn in his badge, credentials, and weapon and informed him that he no longer had authority as an instructor and supervisor;
3. On March 5, 2018, the Chief issued him a Suspension of Arrest Authority and Firearms Authority Letter, that restricted him to administrative duties and instructed him to wear civilian clothing instead of his uniform while at work;
4. On March 15, 2018, the Chief and the Human Resources (HR) official denied his request to investigate his contention that he did not undergo a psychological examination at the Albany VAMC; and
5. On April 3, 2018, the Deputy Chief of Police (Deputy Chief) did not allow him to attend recertification training until the Suspension of Authority was resolved.

Complaint B (Agency No. 200H-0500-2018103296)

6. On February 14, 2018, an HR Specialist informed Complainant that his tentative job offer for the Deputy Chief of Police position at the Albany VAMC (Vacancy ID No. 528D-18-TPS-059) was withdrawn because of Complainant's incomplete annual physical that was performed at the Bronx VAMC;
7. On or about February 27, 2018, a Nurse Practitioner failed Complainant on the pre-employment physical examination because of his disability rating and annual physical exam results which disqualified Complainant for employment;
8. On March 1, 2018, HR officials at the Albany VAMC sent Complainant a Withdrawal of Tentative Employment Offer letter regarding the Deputy Chief of Police position;
9. On or about March 1, 2018, a member of the Albany Stratton VAMC reported to Complainant's supervisor at the Bronx VAMC that Complainant failed the psychological examination in connection with his application for the Deputy Chief of Police position; and
10. On March 15, 2018, HR officials failed to investigate Complainant's allegation that he did not undergo a psychological examination at the Albany VAMC, which later resulted in the suspension of his police authority.

At the conclusion of the investigation and supplemental investigation of the consolidated complaints, 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). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The decision concluded that Complainant proved that the Agency subjected him to discrimination based on disability regarding the claims related to the rescission of the Deputy Chief of Police job offer and to the suspension of his police officer duties and credentials. The Agency found that Complainant was not subjected to reprisal as to these claims. Finally, the Agency found that the sharing of medical information did not violate the Rehabilitation Act.

The Agency ordered the following relief: (1) immediate reinstatement with a tentative job offer for the position of Deputy Police Chief at the Albany VAMC in Albany, New York, or a substantially equivalent position agreeable to Complainant; (2) back pay covering the period beginning February 14, 2018, to the date Complainant was placed in the position, the date Complainant declined the position, or the date of expiration of the offer; (3) the restoration of all leave taken as a result of the discrimination; (4) expungement from all official Agency records any reference to Complainant's discriminatory preemployment examination, the withdrawal of Complainant's tentative job offer for the Deputy Police Chief position, and the suspension of Complainant's firearms and arrest authority; (5) a supplemental investigation into Complainant's entitlement to compensatory damages; and (6) EEO training and the consideration of discipline for the identified responsible management official and to post a notice.

Complainant appealed the Agency's decision. On appeal, the Commission affirmed the Agency's final decision and remanded the matter for corrective action. The Commission ordered the following remedial actions: (1) reinstatement of the offer of employment to the Deputy Chief position at the Albany VAMC, or a substantially equivalent position agreeable to Complainant; (2) back pay, with interest, and other benefits due the Complainant pursuant to 29 C.F.R. § 1614.501; (3) a supplemental investigation to determine whether Complainant was entitled to compensatory damages incurred as a result of the Agency's discriminatory actions; (4) expungement from all official Agency records any reference to Complainant's discriminatory preemployment examination, the withdrawal of Complainant's tentative job offer for the Deputy Police Chief position, and the suspension of Complainant's firearms and arrest authority from March 5, 2018 through April 30, 2018; (5) the restoration of any leave used as a result of the discrimination; (6) training to the identified responsible management officials; and (7) consideration of disciplinary action against the identified responsible management officials. Claude A. v. Dep't of Veterans Affairs, EEOC Appeal No. 2020003160 (May 25, 2021).

The Agency conducted a supplemental investigation on the issue of Complainant's entitlement to compensatory damages. The supplemental investigation contains Complainant's submission for compensatory damages which included Complainant's signed statement and the signed statement of Complainant's wife (Wife).

In his statement to the Agency, Complainant requested compensatory damages ranging from \$539,823 to \$700,000. The nonpecuniary, compensatory damages request included \$150,000 for emotional distress and \$150,000 for reputational harm. Complainant stated that he began to experience emotional distress during the employment screening process when it became apparent to him that he was being discriminated against. Complainant reported that the emotional distress continued while he was employed at the Bronx VAMC.

Complainant stated that he still sometimes experiences emotional distress. Complainant reported regularly experiencing symptoms of emotional distress including “trouble sleeping, increased anxiety, headaches.” Complainant described not being able to return to law enforcement because “word of me ‘failing a psychological test’ has circulated even to the VA’s Law Enforcement Training Center.” Complainant stated, “because of the dissemination of this false information by VA employees, my reputation has been totally and irretrievably damaged.”

Complainant requested pecuniary damages which he stated included the increased cost of the home he purchased in Westchester County, New York, when compared against the potential cost of the house he was considering in Albany, New York, the tax difference between the two houses, and mileage fees for trips to Albany (totaling \$213.84). Complainant did not provide documentation of these expenses. Complainant’s statement also requested back pay for the denied promotion, attorney’s fees, and an undefined amount for “reduced pension benefit.”

Wife stated that Complainant was depressed and anxious for a few weeks when Complainant tried to fix what he assumed was a very unfortunate misunderstanding. Wife stated that Complainant was “absolutely distraught and very emotional” when Complainant’s badge and credentials were taken. Wife described weeks of Complainant feeling shame and having poor sleep. Wife stated that Complainant described an interaction with one of his former subordinates where the subordinate came into the office and upon seeing Complainant in plain clothes stated, “I can’t come in here, this is the land of broken toys!” Wife stated that this was one of many stories of underhanded or hurtful comments made to him by other officers. Wife stated, “although this was over 3 years ago, still now, when he talks about this discrimination case with me and those close to us, he consistently shows signs of depression and emotional upset.” Wife stated that Complainant has ruminated countless times over what occurred. Wife stated that Complainant “continues to have trouble sleeping, has stress headaches, and awful stomach aches whenever he thinks about or has to talk about the matter.”

After the supplemental investigation, the Agency issued a final decision concerning damages and attorney’s fees on November 17, 2021. The Agency found that Complainant suffered from feelings of emotional distress, anger, loss of reputation, and loss of self-confidence for several weeks to months in 2020 because of the Agency’s proven discriminatory conduct. The Agency also found that the testimony of Complainant and Complainant’s wife was limited to a few weeks to a few months. Based on the foregoing, the Agency awarded Complainant \$35,000 in nonpecuniary, compensatory damages. Based on an attorney’s fee petition claiming 52 hours worked at an hourly rate of \$275, the Agency awarded \$14,300 in attorney’s fees. The Agency did not award any other damages or costs.

Complainant appeals the Agency’s award of damages. Complainant argues that the award of \$35,000 in compensatory damages is insufficient based on the evidence and the Agency’s failure to consider all the claimed damages.

Complainant also argues that he is entitled to equitable relief concerning future retirement benefits such as increased retirement benefits and retirement law enforcement credentials related to the Deputy Chief position.² Complainant is not contesting the attorney's fee award except to request attorney's fees for work performed in the instant appeal.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

When discrimination is found, an 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 Title VII and the Rehabilitation Act 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 make-whole relief. 42 U.S.C. § 1981a(b)(3). Compensatory damages do not include back pay, interest on back pay, or any other type of equitable relief. 42 U.S.C. § 1981a(b)(2). 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.

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 quantifiable out-of-pocket expenses.

² Complainant failed to appeal the Commission's May 25, 2021 decision regarding the merits of his consolidated complaint and the associated remedial actions. Complainant failed to appeal within 30 days of receipt of the decision despite the decision explicitly informing Complainant of the time limits on his right to appeal. See 29 C.F.R. § 1614.405. On appeal, Complainant does not submit any justification to invoke waiver or equitable tolling for filing an appeal of the May 25, 2021 decision. We therefore treat Complainant's appeal as relating only to the Agency's November 17, 2021 final decision on compensatory damages and attorney's fees. To the extent Complainant on appeal disputes any other remedy apart from compensatory damages or attorney's fees, we find that such arguments are untimely and will not be addressed herein.

Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination, or a voluntary settlement. EEO MD-110, at Chap. 11, VII.B.2 (internal citations omitted). Future pecuniary damages are losses likely to occur after the resolution of the complaint.

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. To recover damages, a complainant must prove that the employer's discriminatory actions were the cause of the pecuniary loss. Id. (citations omitted).

In Complainant's case, Complainant renews his request for the cost differential and tax differential between a house in Albany he was considering purchasing and the house he purchased in Westchester County as well as mileage for a trip to and from Albany for preemployment medical screening. Complainant has not provided any documentation of such expenses to support an award of pecuniary compensatory damages. Because we find that Complainant has not shown that the Agency's discrimination caused any pecuniary loss, we shall not award any pecuniary damages.

Nonpecuniary, compensatory damages 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. 915.002 at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for nonpecuniary 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). Nonpecuniary, 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 healthcare provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from Complainant concerning her or 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 nonpecuniary losses that are incurred as a result of the discriminatory conduct. Id.

Statements from others including family members, friends, healthcare providers, and 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 her burden in this regard. Id. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

Complainant has the burden of proving the existence, nature, and severity of the alleged emotional harm. Man H. v. Dep't of Homeland Sec., EEOC Appeal No. 0120161218 (May 2, 2017). Complainant must also establish a causal relationship between the alleged harm and the discrimination. Id. Absent such proof of harm and causation, a complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. Id.; Wilda M. v. U.S. Postal Serv., EEOC Appeal No. 0120141087 (Jan. 12, 2017) (awards for emotional harm are warranted only if complainant establishes a sufficient causal connection between the agency's illegal actions and her injury).

After a review of the evidence, we find that the Agency's award of \$35,000 for nonpecuniary, compensatory damages was insufficient. There is no evidence that Complainant sought any medical attention for his symptoms; however, Complainant and Wife provided statements describing his symptoms. Complainant described symptoms of emotional distress and general reputational harm. Wife described Complainant's symptoms of emotional distress and provided an example of reputational harm Complainant suffered via comments made by other officers. Wife witnessed changes in Complainant's mood and behavior, which she connected with Complainant's loss of credentials and the rescission of the job offer. On appeal, Complainant argues, in part, that the Agency minimized Complainant's symptoms by characterizing them as lasting only a few weeks to a few months. We agree with this portion of Complainant's argument. Complainant and Wife describe Complainant having trouble sleeping and headaches, symptoms which are still occurring. Complainant reported regularly experiencing increased anxiety in addition to the two prior symptoms. Wife stated that Complainant also experiences awful stomach aches whenever he thinks or must talk about the discrimination.

The Agency awarded Complainant \$35,000 in nonpecuniary, compensatory damages. After a thorough review of the record, and given the severity, nature, and duration of the distress experienced by Complainant as a direct result of the discrimination, we find that an award of \$50,000 in nonpecuniary, compensatory damages to be more appropriate. We find that this amount is not motivated by passion or prejudice, is not "monstrously excessive" standing alone, and is consistent with prior Commission precedent. See Complainant v. Dep't of Homeland Security, EEOC Appeal No. 2020005333 (June 8, 2022) (Commission affirmed the Agency awarding complainant \$50,000 in nonpecuniary, compensatory damages after complainant and complainant's wife described Complainant suffering from stress, anxiety, trouble sleeping,

gastrointestinal issues, migraines, headaches, paranoia, and strain on family relationships following a discriminatory nonselection).

Because we find that Complainant prevailed in this appeal with our finding that the compensatory damage award should be increased, we find that Complainant is entitled to additional attorney's fees for the work performed on this appeal as set forth in the Attorney's Fees Order herein.

CONCLUSION

Accordingly, we MODIFY the Agency's final decision on compensatory damages and REMAND the matter to the Agency for further action in accordance with the Order herein.

ORDER

To the extent it has not already done so, the Agency shall, within 60 days of the date this decision is issued, pay Complainant \$50,000.00 in nonpecuniary, compensatory damages and \$14,300 in attorney's fees.

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 (R0610)

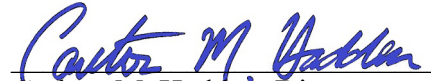
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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:



Carlton M. Hadden, Director
Office of Federal Operations

October 16, 2023
Date