



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

[REDACTED]
Eleni M.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2022003624

Agency No. ARREDSTON17JUL02264

DECISION

On June 10, 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 May 4, 2022, final decision concerning her equal employment opportunity (EEO) complaint 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 Human Resources Specialist, GS-0201-13 at the Agency's Civilian Resources Activity, Management Labor Sustainment Division, Redstone Arsenal in Huntsville, Alabama.

On September 12, 2017, Complainant filed an EEO complaint alleging that she was subjected to discrimination and a hostile work environment on the basis of disability when:

- (a) On July 3, 2017, she received email notification of denial of her Family and Medical Leave Act (FMLA) request from her supervisor (Supervisor-1);
- (b) On October 20, 2016, Supervisor-1 made insulting, intimidating, and ridiculing comments about her surgery; and

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.

(c) In October 2016 (Request 1), and in March 2017 (Request 2), Complainant requested a reasonable accommodation and did not receive a response from management.

The Agency accepted claim (a) for investigation, but dismissed claims (b) and (c) for untimely EEO Counselor contact pursuant to 29 C.F.R. § 1614.107(a)(2). At the conclusion of its investigation of claim (a), the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request an Agency decision or a hearing before an EEOC Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a decision pursuant to 29 C.F.R. § 1614.110(b).

The Agency decision determined that the Agency erred in its initial dismissal of claims (b) and (c). However, the Agency decision determined that claim (b) could still be dismissed without investigation on the alternate procedural grounds of failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). Finding the record sufficiently developed to do so, the Agency decided claims (a) and (c) on the merits without remanding them for investigation. The Agency found that Complainant failed to prove that the Agency subjected Complainant to discrimination as alleged.

On appeal, the Commission: (1) denied Complainant's request to remand the complaint for further investigation; (2) found that Supervisor-1 committed a *per se* violation of the Rehabilitation Act by communicating with Complainant's health provider about Complainant's confidential medical information without Complainant's knowledge or permission; (3) affirmed the Agency's finding that Complainant failed to establish discriminatory harassment; (4) found that the Agency failed in its responsibility to provide Complainant reasonable accommodation for her disability as required by the Rehabilitation Act; and (5) found that the Agency's excessive delay in responding to Complainant's request for reasonable accommodation was in bad faith, entitling Complainant to consideration of an award for compensatory damages. The Commission ordered, in part, that the Agency conduct an investigation on the claim for compensatory damages and issue a decision on the claim. Eleni M. v. Dep't of the Army, EEOC Appeal No. 2020001903 (Sep. 7, 2021), request for reconsideration denied, EEOC Request No. 2021005193 (Feb. 22, 2022).

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 her own signed statement and statements from Complainant's ex-husband, Complainant's sister, Complainant's hairdresser, and Complainant's mental health counselor.

In her statement to the Agency, Complainant requested back pay, restoration of leave, restoration of FMLA pay, reimbursement of debt monies for advanced leave, and \$300,000 in nonpecuniary, compensatory damages. Complainant did not request any pecuniary, compensatory damages.

Complainant described her symptoms as follows: “I regularly felt depression, fatigue and enervation, headaches, nervousness, sobbing jags, nausea and vomiting, tension, anxiety, insomnia, and frequent annoying illnesses such as colds.” Complainant reported feeling distress, anguish, and frustration. Complainant stated, “I certainly was constantly depressed during the near-year it took for the accommodation to arrive in my hands.” Complainant reported pain and flare-ups in her right upper extremity, the location of the relevant disability, because she did not have the accommodating software when she returned from surgery. Complainant described a loss of pride in her work and a loss of the sense of importance and meaning in her life. Complainant reported loss of quality time with her mother who was ill. Complainant reported seeking treatment with a therapist.

The statements from Complainant’s friends, family, and counselor described negative physical and emotional changes Complainant experienced. These statements, however, also included references to harms related to claims for which unlawful discrimination was not established or related solely to Complainant’s surgery and her physical recovery. Complainant’s ex-husband described Complainant experiencing worsened feelings of frustration and upset secondary to Supervisor-1’s treatment of her. Ex-husband described Complainant being under pressure to produce despite not having the reasonable accommodation, which was “torturous” to Complainant. Ex-husband stated that Complainant experienced “significant detrimental effects upon her hand, wrist, and forearm, as well as upon her psyche.” Complainant’s sister described Complainant as no longer having hope for the future but instead being filled with angst and a feeling of doom. Complainant’s hairdresser reported Complainant having uncontrollable tears and agitation. Complainant’s counselor stated, “without a doubt, [Complainant] was experiencing extreme emotional, mental, and behavior turmoil as a result of her wrist issues and lack of accommodations that ultimately resulted in her leaving her job.” The counselor noted that Complainant’s mental status was anxious, distracted, agitated, and sad.

After the supplemental investigation, the Agency issued a final decision concerning compensatory damages on May 4, 2022. The Agency’s decision did not address back pay, reimbursement of advanced leave, or leave restoration and stated that those topics would be addressed in a future memorandum. The decision denied Complainant’s request for retirement adjustment because it was not at issue in the case.² The Agency awarded \$15,000.00 for compensatory damages. The Agency found that Complainant had approximately eight months between the time she submitted a written request for reasonable accommodation and the time the Agency received the accommodating software. The Agency found, however, that much of the alleged emotional distress was based on Complainant’s perception of harassment by Supervisor-1 and Complainant’s alleged involuntary retirement, neither of which were determined to be discriminatory. Accordingly, the Agency awarded Complainant \$15,000.00 in nonpecuniary, compensatory damages. The Agency also agreed to pay the requested amount of \$15,329.70 for attorney’s fees. The Agency’s decision did not award any other damages or costs.

² The Agency noted that Complainant had failed to appeal from a Merit Systems Protection Board (MSPB) decision related to the alleged involuntary retirement.

Complainant appeals the Agency's award of nonpecuniary, compensatory damages. Complainant argues that the Agency's award is not sufficient to compensate Complainant for the severe emotional distress she suffered related to the unlawful discrimination. Complainant renewed her argument that case law supported an award of \$300,000.00 in nonpecuniary, compensatory damages.³

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, 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").

The only issue on appeal here is the amount of nonpecuniary, compensatory damages to be awarded. Complainant has not requested pecuniary damages.

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.

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).

³ The Agency submitted a brief in opposition to the appeal. Complainant submitted a motion to strike the Agency opposition brief. We note that even if we were to consider the Agency's opposition brief, it would not affect the analysis contained herein.

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 \$15,000.00 for nonpecuniary, compensatory damages was insufficient. Complainant's mental health counselor described Complainant's mental status as anxious, distracted, agitated, and sad. Complainant's counselor stated, “without a doubt, [Complainant] was experiencing extreme emotional, mental, and behavior turmoil as a result of her wrist issues and lack of accommodations that ultimately resulted in her leaving her job.”

Complainant reported symptoms including depression, fatigue, crying spells, and anxiety. Complainant further stated that she experienced pain and flare-ups related to the underlying disability, loss of pride in her work, loss of sense of meaning in her life, and loss of quality time with her mother. Complainant's sister also reported observing Complainant's new pessimistic viewpoint and Complainant's hairdresser confirmed that Complainant experienced crying spells.

On appeal, Complainant argues that the Agency's award is not sufficient to compensate Complainant for the severe emotional distress she suffered related to the unlawful discrimination. We agree with Complainant's argument, but not to the degree Complainant requested. While acknowledging the nonpecuniary losses were greater than reflected in the Agency's award, we note that Complainant's evidence submitted in support of her request for nonpecuniary, compensatory damage regularly references portions of the complaint which were not found to be discriminatory. In particular, significant portions of the evidence reference the right upper extremity injury by itself, Complainant's alleged involuntary retirement, and harassing behavior from Supervisor-1.

The Agency awarded Complainant \$15,000.00 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 \$25,000.00 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 Orlando O. v. United States Postal Service, EEOC Appeal No. 2022002384 (July 5, 2023) (Commission awarded \$20,000.00 in nonpecuniary, compensatory damages where complainant and complainant's wife described loss of self-esteem, loss of self-worth, and an increase in anxiety, helplessness, and depression secondary to the agency unnecessarily delayed responding to Complainant's request for reasonable accommodation for four months); Cecille W. v. United States Postal Service, EEOC Appeal No. 2021001542 (Sept. 28, 2022) (Commission awarded \$30,000.00 in nonpecuniary, compensatory damages where the agency failed to reasonably accommodate complainant; complainant reported experiencing stress, depression, fear, and loss of income, realized she was going to lose her house and had to move into parents' basement, and complainant's friend and children described Complainant having negatively altered spirit).

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 \$25,000.00 in nonpecuniary, compensatory damages.

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

November 9, 2023

Date