



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Candi R.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2022003913

Agency No. 200P-0593-2020101727

DECISION

On June 29, 2022, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 25, 2022 final decision concerning her entitlement to compensatory damages.

BACKGROUND

Complainant, a Registered Nurse working in the Pain Management and Rehabilitation Service at the Agency's Medical Center in Las Vegas, Nevada, filed a formal complaint alleging discrimination based on race (African American), color (Black), disability and reprisal (current complaint) when:

- 1) On November 18, 2019, she was charged 8 hours of Absent Without Leave.
- 2) On December 15, 2019, her supervisor sent a derogatory text about her to fellow supervisors.
- 3) On December 23, 2019, she received her final proficiency report with an overall rating of "Satisfactory".
- 4) On February 6, 2020, she was not promptly provided a reasonable accommodation.

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.

- 5) She was subjected to ongoing hostile work environment harassment.

Following an investigation of the claims by the Agency, Complainant requested a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). However, this request was subsequently dismissed on May 7, 2021, and the case was remanded to the Agency for issuance of a final agency decision. Following a supplemental investigation, the Agency issued a final decision.

The Agency found that Complainant failed to establish a claim of discrimination on the bases race, color, reprisal, or disability for Claims 1 and 3 – 5. However, the Agency found that Complainant had established she was subjected to “per se” retaliation with respect to claim 2. Therefore, the Agency ordered remedial relief, to include Complainant’s opportunity to present evidence establishing her entitlement to compensatory damages.

In its final decision on damages, the Agency represented that it did not receive any submissions from Complainant in support of a claim for compensatory damages. Accordingly, the Agency awarded Complainant no compensatory damages.

Complainant filed the instant appeal.

ANALYSIS AND FINDINGS

When discrimination is found, the agency must provide a complainant with a remedy that constitutes full, make-whole relief to restore her as nearly as possible to the position she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994).

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this “make whole” relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

To receive an award of compensatory damages, a complainant must demonstrate that he or she has been harmed by the agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for recon. den'd, EEOC Request No. 05940927 (Dec.

11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

Here, the Agency asserted that due to Complainant's failure to submit any evidence regarding damages in accordance with its Order, Complainant's request was denied. In its response to Complainant's appeal, the Agency specifically noted:

Complainant did not submit any evidence during the CDI [Compensatory Damages Investigation], nor did she submit any request for damages. Complainant's affidavits were initially due on October 13, 2021. Complainant's attorney requested and received a 13-day extension, until October 20, 2021. Complainant's attorney requested another extension on October 26, 2021, citing personal illness as the reason she had not yet submitted evidence. The Department's ORMDI's [Office of Resolution Management, Diversity and Inclusion] investigator followed up on the status of the affidavits on November 8, 2021, and November 17, 2021, and provided another 10-day extension, until November 27, 2021. The investigator e-mailed on November 30, 2021, and the attorney was given another extension until December 3, 2021. The investigator sent a final e-mail to ensure that Complainant submitted an affidavit, but no evidence was received. Therefore, ORMDI found that Complainant had failed to establish any causal nexus between the Agency's actions and any potential damages, therefore they denied Complainant's request for damages due to the complete lack of any supporting evidence.

On appeal, Complainant has not submitted any statement disputing the Agency's representation that it did not receive any information regarding any potential damages.²

CONCLUSION

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity Commission to affirm the Agency's final decision because the record is devoid of evidence to support Complainant's entitlement to compensatory damages.

² On August 5, 2022, Complainant sent via e-mail a request for an extension of time to file a statement or brief in support of her appeal. Per EEOC Regulation 29 C.F.R. § 1614.403(d), which states that any statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations (OFO) within 30 days of filing the notice of appeal, Complainant's request was denied. OFO specifically indicated that Complainant's "August 5, 2022 request for an extension is therefore denied because it postdated the date the original brief or statement was due."

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 (S0610)

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. 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

September 14, 2023

Date