



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

[REDACTED],
Complainant,

v.

Eric K. Shinseki,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 0120123334

Hearing No. 480-2010-00630X

Agency No. 200P-V121-2010100682

DECISION

Complainant timely filed an appeal from an Agency's final order dated August 9, 2012, concerning an award of attorney's fees and compensatory damages which was awarded after a finding of employment discrimination. For the following reasons, we AFFIRM the Agency's final order.

BACKGROUND

The record indicates that on February 12, 2012, Complainant, a Homeless Program Coordinator, GS-12, at the Agency's Central California Healthcare System, Fresno, California, filed the instant complaint alleging discrimination based on his sex (male) when he was subjected to sexual harassment. Specifically, Complainant alleged that on November 12, 2009, while he was assisting other employees in escorting the intoxicated EEO Program Manager to her hotel room, she made sexually offensive comments to and about him, grabbed his buttock, and upon arriving in her room, lunged at him and stated that she wanted to "dry hump" him;¹ and on November 13, 2009, his supervisor called him over to his table at the off-site conference they were attending, asked him to turn around, jokingly commented that Complainant's ass or butt was alright, and then laughed. At the conclusion of the investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ).

¹ The record indicates that a few months after the incident, the EEO Program Manager received a Woman of the Year award by the Agency's Women's EEO Committee. The record also indicates that she has not engaged in any inappropriate conduct toward Complainant since this incident.

Prior to a hearing, the Agency made an offer of resolution on May 24, 2011, to pay Complainant a lump sum total of \$48,000 and to give those employees, identified in the instant complaint, additional alcohol and sexual harassment training pursuant to 29 C.F.R. §1614.109. Therein, the Agency stated that \$48,000 would cover all reasonable attorney's fees and costs accrued. Complainant was informed that he must accept the offer in writing within 30-days of his receipt thereof. Otherwise, if the subsequent relief awarded in the AJ's decision, the Agency's decision, or the Commission's decision on appeal was not more favorable than the offer, Complainant would not receive attorney's fees or costs incurred after the expiration of the 30-day acceptance period pursuant to 29 C.F.R. § 1614.109(c)(3). At the time of the offer, Complainant's attorney informed the Agency that attorney's fees incurred as of May 24, 2011, was around \$15,000. On June 23, 2011, Complainant rejected the offer and asked for \$75,000 in damages, \$16,000 attorney's fees/costs, and that the identified employees receive alcohol and sexual harassment training. The Agency refused Complainant's request for more money.

Subsequently, on September 21, 2011, the AJ held a hearing. On May 9, 2012, the AJ issued a decision finding that Complainant was subjected to sexual harassment for which the Agency was liable. Therein, the AJ awarded injunctive relief and ordered the Agency to post a Notice for 60 days informing its employees of a finding of discrimination had been made against the Agency. The AJ, however, denied Complainant's request for payment for the difference in his salary and other benefits he lost as a consequence to his transfer to another position in May, 2010. Specifically, the AJ noted that Complainant did not raise a claim of constructive demotion and although he was uncomfortable around his supervisor, a reasonable person in his position would not have found his working conditions so intolerable that he felt compelled to transfer to a lower-paying position in order to remove himself from the supervisor's supervision. The AJ also denied re-credit of Complainant's "some sick leave" he took as a consequence of the harassment since he failed to provide any specific information on this matter. Furthermore, the AJ determined that no injunctive relief was required concerning Complainant's working environment since he normally did not work with the EEO Program Manager, who was not his supervisor, and since he voluntarily moved from his position under the supervisor's supervision, described above. After considering all of the relevant factors of the case, the AJ determined that Complainant was entitled to non-pecuniary compensatory damages in the amount of \$6,500. The AJ also determined that Complainant was entitled to attorney's fees and costs and asked his attorney to submit a petition for attorney fees and costs. Accordingly, on May 23, 2012, Complainant's attorney filed the petition for attorney fees/costs, including his three attorneys' detailed billing records, seeking \$24,339.50 for the service rendered since April 23, 2010.

On July 2, 2012, the AJ issued her determination on Complainant's request for attorney's fees and costs. Therein, the AJ stated that since Complainant rejected the Agency's offer of resolution pursuant to 29 C.F.R. § 1614.109, he was not entitled to attorney's fees and costs incurred after June 23, 2011, the date on which the offer was rejected. After considering the underlying purpose of the Agency's offer, as well as the attempts of herself and another AJ to

settle the case on a number of occasions prior to the hearing, the AJ determined that the full payment of attorney's fees was not warranted under the "interest of justice" exception under 29 C.F.R. §1614.109(c)(3). After reviewing the time records of Complainant's attorneys, the AJ found that the time expended and work performed by the attorneys from April 27, 2010, through June 23, 2011, was reasonable and necessary. Accordingly, the AJ determined that Complainant was entitled to attorney's fees of \$16,050 and costs of \$174.50 for a total award of \$16,224.50.

In its August 9, 2012 final order, the Agency fully implemented the AJ's determination findings of discrimination and the relief ordered in its entirety. The Agency also stated that it would take whatever corrective, curative, and preventive actions and would adopt whatever measures were necessary to ensure that violations of federal EEO law similar to those found in this case would not recur. Management would also consider taking action with respect to the officials responsible for the discrimination in this case, which action might, in appropriate circumstances, include counseling, reassignment of the offending individual, EEO training, and/or disciplinary action. The Agency indicated that an appropriate management official would sign and conspicuously post at the facility the attached notice of violation for a period of not less than 60 days.

Complainant appeals the Agency's final order. Specifically, Complainant, via his new attorney, contends that he is entitled to compensatory damages in the amount of \$30,000 and attorney's fees to the full amount charged to him in the amount of \$24,339.50. Complainant does not provide any documentation to support his damages.

ANALYSIS AND FINDINGS

Initially, we note that the Agency does not contest the AJ's finding of discrimination. On appeal, Complainant does not contest the Agency's decision denying back pay and benefits. Thus, we do not discuss these matters herein. The only issue on appeal is whether the Agency, fully implementing the AJ's determination, properly decided the amount of compensatory damages and attorney's fees/costs. Specifically, we will discuss herein whether the Agency's decision to award Complainant \$6,500 for compensatory damages and \$16,224.50 for his attorney's fees/costs was proper.

Compensatory Damages

The Commission notes that damage awards for emotional harm are difficult to determine and that there are no definitive rules governing the amount to be awarded in given cases. A proper award must meet two goals: that it not be "monstrously excessive" standing alone, and that it be consistent with awards made in similar cases. See Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989). Section 102(a) of the 1991 Civil Rights Act authorizes an award of compensatory damages for all post-act pecuniary losses, and for non-pecuniary losses, such as, but not limited to, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health. To receive an award of

compensatory damages, Complainant must demonstrate that he has been harmed as a result of the Agency's discriminatory action; the extent, nature and severity of the harm; and the duration or expected duration of the harm. Rivera v. Department of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), request for reconsideration denied, EEOC Request No. 05940927 (December 8, 1995); EEOC's Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 at 11-12, 14 (July 14, 1992) ("Guidance"). Complainant is required to provide objective evidence that will allow an agency to assess the merits of her request for damages. See Carle v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993).

The award should take into account the severity and duration of the harm. Carpenter v. Department of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995). In this case, the AJ awarded no pecuniary damages to Complainant related to the Agency's unlawful discrimination. Since Complainant presents no specific argument with supporting evidence establishing pecuniary damages, we agree with the AJ's finding of no pecuniary damages.

In determining non-pecuniary, compensatory damages, the Commission strives to make damage awards for emotional harm consistent with awards in similar cases. In this case, the AJ considered the facts asserted by Complainant that: the harassing conduct by the EEO Program Manager was a short-lived, one time episode; after six months of the November 13, 2009 incident with Complainant's supervisor, he was no longer under that supervisor's supervision as a result of his voluntary move to another job; he took some sick leave as a consequence of the harassment; his ability to interact with the person he was in a relationship with deteriorated for several weeks, although their relationship survived long-term; he was upset and embarrassed about the incident; the people at work who knew about the incident distanced themselves from him, saying that they did not want to get involved; he lost sleep, saw a psychologist, and took medication for depression; he filed a workers' compensation claim for psychological injury; and he lost the supervisor's trust. However, the AJ stated that Complainant provided no specific details about his treatment or medication or any corroborating medical testimony or documentary evidence. On appeal, Complainant does not dispute this. The AJ also noted that Complainant's coworker did not notice any change in his demeanor to indicate that he was under stress after the incidents.

Based on the foregoing, the AJ determined that while Complainant suffered some emotional distress, the harm was not severe and that the extent of the harm was limited. After considering the awards in similar cases and all of the relevant factors discussed above, the AJ found and we agree that \$6,500 was a reasonable award of non-pecuniary, compensatory damages to Complainant for the proven emotional and psychological distress he suffered as a direct result of the Agency's discriminatory conduct. See Stapp v. Department of the Navy, EEOC Appeal No. 01A05634 (September 9, 2002) (\$5,000 in non-pecuniary compensatory damages for harm of limited duration resulted from sexual harassment which caused depression, humiliation, loss of self-esteem, and impaired relationship with her husband). On appeal, Complainant, other than merely seeking \$30,000 for his compensatory damages, provides no evidence to support the damages.

Attorney's Fees/Costs

In order to determine attorney's fees in EEOC administrative proceedings, we find that the AJ properly applied the "lodestar" method, i.e., by multiplying a reasonable hourly fee and a reasonable number of hours expended, and considering the degree of success. 29 C.F.R. §1614.501(e)(2)(ii)(B); Hensley v. Eckerhart, 461 U.S. 424 (1983). Furthermore, we note that EEO Regulation 29 C.F.R. § 1614.109(c)(2) provides, in part, that any time after the parties have received notice that an administrative judge has been appointed to conduct a hearing, but not later than 30 days prior to the hearing, the agency may make an offer of resolution to the complainant. Here, we find that the Agency properly made an offer of resolution set forth in the regulation on May 24, 2011, which was more than 30 days prior to the September 21, 2011 hearing.

EEOC Regulations 29 C.F.R. § 1614.109(c)(3) further provides, in part, that if the complainant fails to accept an offer of resolution and the relief awarded in the administrative judge's decision, the agency's final decision, or the Commission decision on appeal is not more favorable than the offer, then, except where the interest of justice would not be served, the complainant shall not receive payment from the agency of attorney's fees or costs incurred after the expiration of the 30-day acceptance period. Here, the record clearly indicates that Complainant rejected the Agency's offer of resolution on June 23, 2011. We find that the Agency's offer of resolution was sufficient pursuant to 29 C.F.R. § 1614.109(c)(3). Also, the relief awarded by the AJ was less favorable than the relief contained in the Agency's offer, i.e., \$48,000. Upon review, we find that the AJ properly determined that the full payment of attorney's fees was not warranted under the "interest of justice" exception set forth in the regulation. On appeal, Complainant makes no argument that additional attorney's fees should be paid due to an interest of justice. Based on the foregoing, we find that the AJ properly determined that the time expended and work performed by Complainant's attorneys from April 27, 2010, through June 23, 2011, was reasonable and necessary, plus the cost of the deposition in the amount of \$174.50. Therefore, we find \$16,224.50 for Complainant's attorney's fees/costs proper.

CONCLUSION

Accordingly, the Agency's final order is **AFFIRMED**. The Agency is directed to implement the following corrective action in accordance with the **ORDER** herein.

ORDER

The Agency, within 60 days of the date this decision becomes final, to the extent that it has not already done so, shall pay Complainant \$6,500 for non-pecuniary, compensatory damages and \$16,224.50 for attorney's fees/costs.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days

of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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).

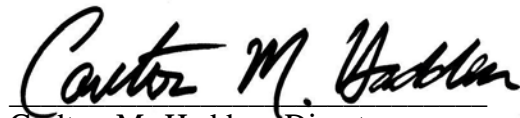
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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 (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

August 15, 2013

Date