



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

[REDACTED]
Sherill S.,¹
Complainant,

v.

Lisa S. Disbrow,
Acting Secretary,
Department of the Air Force,
Agency.

Appeal No. 0120160115

Agency No. 5KOM06013

DECISION

On September 21, 2015, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 27, 2015, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the amount of compensatory damages awarded by the Agency to Complainant, following a finding of discrimination by the Commission, should be increased.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Human Resources (HR) Assistant, GS-7, with the Agency's Civilian Personnel Office, 951st Reserve Support Squadron, at the March Air Reserve Base (ARB), located in California. Complainant was hired as a probationary employee, beginning her employment on March 20, 2006.

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.

On July 3, 2006, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination and harassment on the bases of race (Caucasian), sex (female, pregnancy), and in reprisal for prior protected EEO activity when:

1. S1 subjected her to a hostile work environment during the period of March through June 2006;
2. She was terminated from her HR Assistant position on June 14, 2006;
3. On August 29, 2006, her termination was rescinded and she was reinstated to the HR Assistant position under S1;
4. The Agency did not clear her personnel record of the prior termination as they agreed to do in August 2006;
5. A Civilian Performance Appraisal dated October 1, 2006, was issued with ratings of "5" (fully successful) without her knowledge or approval;
6. She was not permitted to telework;
7. She was placed in AWOL status from January 22, 2007, to February 2, 2007; and
8. She was forced to resign, resulting in a constructive discharge.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing, which the AJ held on July 8 and 9, 2009. The AJ thereafter issued a decision in the Agency's favor on December 18, 2012, finding no discrimination. The Agency's Final Order fully implemented the AJ's decision. From that Order, Complainant appealed to the Commission.

Initially, the Commission dismissed Complainant's appeal as untimely. EEOC Appeal No. 0120131447 (October 24, 2013). Complainant filed a request for reconsideration. On the basis of new evidence concerning the date of mailing of the notice of appeal, the Commission granted Complainant's request on the issue of timeliness and, proceeded to address the merits of the appeal. The Commission determined that the AJ's findings with regard to discrimination were not supported by the evidence. It found that Complainant had been discriminated against because of her pregnancy when she was subjected to harassment, wrongfully terminated from her position, and, after she was reinstated, constructively discharged. EEOC Request No. 0520140092 (February 13, 2015).

The Commission's reconsideration decision provided for relief, including an order directing the Agency to conduct a supplemental investigation into Complainant's entitlement to compensatory damages. The Agency conducted that investigation and determined, in its final order, that Complainant was entitled to an award of \$10,000.00 in non-pecuniary compensatory damages. From that order, Complainant brings 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, 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, the Agency must provide 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 Transport. Co., 424 U.S. 747, 764 (1976); Albermarle 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 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.

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 Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002, at II.A.2 (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 punish the Agency for the discriminatory action. Further, compensatory damages should not be “monstrously excessive” standing alone, should not be the product of passion or prejudice, and 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) (citing Cyngar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)).

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 a complainant concerning her 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.

In this matter, as is set forth in detail in the Commission's decision granting reconsideration, Complainant was subjected to a pattern of discrimination because she was pregnant, including a wrongful termination, constructive discharge, and continuous harassment from March 2006 to February 2007. Complainant asserts that, as a result of being subjected to this pattern of harassment by her supervisor motivated by his animus against her for being pregnant, she suffered extreme stress and anxiety. Complainant described those circumstances in an affidavit supporting her claim for damages as follows:

From the outset of my employment, [my supervisor] yelled at me, questioned me, demeaned me, and made me feel inadequate, based upon the fact that I informed him that I was pregnant around the time that I began working under his supervision. As a result of [my supervisor's] actions, I suffered significant emotional distress, which manifested itself in having ongoing [digestive problems], the onset of headaches, overall stress and concern for my job and significant difficulties with respect to my pregnancy.²

In its decision granting reconsideration, the Commission found as a fact that the hostile work environment in Complainant's workplace was so severe as to be "intolerable," i.e., so intense as to support a claim for constructive discharge. EEOC Request 0520140092 at 13. Complainant was subjected to this high level of stress and anxiety for a period in excess of 11 months both in the workplace and while on maternity leave. We conclude that an award in the amount of \$75,000.00 would fairly compensate Complainant, considering the nature, severity, and duration of her suffering.

This award is consistent with other non-pecuniary compensatory damages awards given in similar cases. See Adah T. v. Department of the Interior, EEOC Appeal No. 0120131110 (September 18, 2015) (\$75,000 where complainant suffered emotional harm over 16-17 months); Crear v. Department of Veterans Affairs, EEOC Appeal No. 07A50079 (January 26, 2006) (\$70,000 awarded where complainant experienced anger, worry, embarrassment, feelings of disrespect and degradation, sleep problems, hair loss, and problems with her husband and children); McTier v. Department of the Navy, EEOC Appeal No. 07A30016 (March 2, 2004) (\$85,000 awarded where complainant experienced constant sadness, depression, anxiety, distrust of her supervisors, irritability, guilt, frequent crying, feelings of betrayal, and a lack of energy); Miles v. U.S. Postal Service, EEOC Appeal No. 07A30019

² In addition to damages resulting from emotional suffering, Complainant seeks compensation for other categories of damages, including lost future earnings and foregone professional opportunities. We conclude that Complainant's proof of these damages is too speculative to support an award.

(February 27, 2004) (\$75,000 awarded where complainant worked in constant fear for more than three months and became angry, depressed, and distant from her husband); Wiggins v. Social Security Administration, EEOC Appeal No. 07A30048 (January 22, 2004) (\$70,000 awarded where complainant cried frequently for three months and experienced stress, depression, insomnia, headaches, embarrassment, loss of self-esteem, increased back pain, and loss of enjoyment of life).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, the Agency's decision is hereby MODIFIED. The Agency shall comply with the Order as set forth below.

ORDER

To the extent it has not yet done so, the Agency is ordered to take the following remedial action:

1. Within one hundred and twenty (120) days of the date this decision is issued, the Agency shall pay complainant \$75,000.00 in non-pecuniary compensatory damages.
2. 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 of the Agency's calculation of benefits due Complainant, including evidence that the corrective action has been implemented.

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she 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 the date this decision is issued. 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 (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 (M0416)

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 Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. The requests may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. 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 (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

April 5, 2017
Date