



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

[REDACTED]
Melodee M.,¹
Complainant,

v.

Kevin McAleenan,
Acting Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 0120180064

Agency No. HS-CBP-24169-2015

DECISION

On September 26, 2017, 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 August 22, 2017, 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.

ISSUES PRESENTED

Whether the Agency appropriately awarded Complainant \$10,000 for non-pecuniary compensatory damages and denied her request for attorney's fees.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Customs and Border Protection Officer at the Agency's Port of Entry in Los Angeles, California.

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 August 17, 2015, Complainant learned that her second line supervisor (S2) disclosed her EEO activity to two union officials, and two other coworkers, when S2 stated that all the officers were changing shifts in response to Complainant's EEO complaint.

On September 10, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of reprisal for prior protected EEO activity under Title VII when S2 disclosed Complainant's EEO activity. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an EEOC Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b) on April 25, 2017.

The decision found that Complainant proved that the Agency subjected her to per se reprisal discrimination when S2 disclosed Complainant's EEO activity to others. The evidence included statements from the president and vice-president of the union, who supported Complainant's claim. Additionally, S2 stated that she recalled disclosing Complainant's EEO activity. The Agency noted that S2's comments, on their face, discourage an employee from participating in the EEO process, which amounts to a per se violation of the law. Among other remedies, the Agency instructed Complainant to submit evidence in support of her entitlement to compensatory damages, attorney's fees, and costs.

On May 23, 2017, Complainant submitted her Request for Compensatory Damages and Attorney's Fees and Costs requesting \$110,000 for non-pecuniary compensatory damages and \$7,500 in attorney's fees. With her request, Complainant submitted her own affidavit and documentation from her medical providers. Regarding attorney's fees, Complainant's request noted that "a detailed breakdown is not necessary since the fees are minimal in nature and represent a quasi-hourly set amount."

On August 22, 2017, the Agency issued a Decision on Compensatory Damages and Attorney's Fees and Costs. As an initial matter, the Agency noted that Complainant did not request pecuniary compensatory damages. Regarding Complainant's request for non-pecuniary compensatory damages, the Agency stated that Complainant suffered from hyperthyroidism, major depressive disorder, and generalized anxiety disorder. The Agency determined that there was no evidence to suggest that the hyperthyroidism was related to Complainant's claim at issue.

The Agency found that Complainant's medical documentation showed that she began to suffer from "lasting impacts on her personal life" since she filed her complaint in November 2013. For example, Complainant suffered from a heightened emotional response to triggers, alienated personal relationships, marital problems, and exhibited hopelessness. The Agency determined that while Complainant established a nexus between the Agency's actions and her emotional distress, the remedies should be limited to the emotional distress arising from the S2's disclosure of Complainant's EEO activity and her statement regarding shift assignments due to the filing of EEO complaints.

The Agency found that Complainant suffered emotional harm in the workplace and in her personal life for two years following the disclosure. When considering the nature and severity of “the violation,” the Agency concluded that Complainant was entitled to \$10,000 in non-pecuniary compensatory damages. The Agency noted that the Commission similarly awarded \$10,000 in Complainant v. Dept’ of Treasury, EEOC Appeal No. 0120123017 (Apr. 24, 2015); Rowan v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120070384 (Jun. 19, 2009); and Shobert v. Dep’t of the Air Force, EEOC Appeal No. 01A40981 (Aug. 4, 2005).

The Agency denied Complainant’s petition for attorney’s fees. The Agency noted that the law firm “entered the matter after the findings,” and provided no supporting documentation, such as an affidavit from an attorney, billing invoices, or statement of fees in support of Complainant’s request. Further, the Agency found that there was no evidence that a licensed attorney even performed work on Complainant’s case and denied the petition in full.

Complainant filed the instant appeal and requested an extension of her deadline to file a brief in support of her appeal. The Commission granted an extension until November 10, 2017; however, Complainant did not submit a brief. The Agency did not respond to Complainant’s appeal.

ANALYSIS AND FINDINGS

Standard of Review

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”).

Non-Pecuniary Compensatory Damages

A complainant who establishes her claim of unlawful discrimination may receive compensatory damages for non-pecuniary losses (e.g. pain and suffering, mental anguish). 42 U.S.C. § 1981a (b)(3). For an employer with more than 500 employees, such as the Agency, the limit of liability for non-pecuniary damages is \$300,000. While there are no definitive rules governing the amount of non-pecuniary damages to be awarded, non-pecuniary damages must be limited to the sums necessary to compensate the injured party for actual harm, even where the harm is intangible, and should take into account the severity of the harm and the length of time that the injured party has suffered the harm. See Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984); Carpenter v. Department of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995). The amount of the award of non-pecuniary compensatory damages should not be “monstrously excessive” standing

alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989); EEOC v. AIC Security Investigations, Ltd., 823 F. Supp. 571, 574 (N.D. Ill. 1993).

Evidence from a health care provider or other expert is not a prerequisite for recovery of compensatory damages for emotional harm. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden. Objective evidence of compensatory damages can, for example, include statements from the complainant concerning his or her emotional pain or suffering, mental anguish, loss of enjoyment of life, injury to professional standing, injury to credit standing, loss of health, and any other nonpecuniary losses that are incurred as a result of the discriminatory conduct. Statements from others, including family members, friends, health care providers, 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. 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). However, the absence of supporting evidence, may affect the amount of damages appropriate in specific cases. See Banks v. U.S. Postal Service, EEOC Appeal No. 07A20037 (September 29, 2003) (citing, Lawrence, EEOC Appeal No. 01952288).

In this case, Complainant provided supporting documentation from two medical providers. One medical provider (MP1) gave a diagnosis of Dysthymic Disorder and Generalized Anxiety Disorder on May 15, 2017. Another medical provider (MP2) presented a comprehensive statement in which she determined that Complainant suffered from Major Depressive Disorder, Recurrent and Severe without Psychotic Features, and Generalized Anxiety Disorder. Based on clinical observations, assessments, and psychological test results, MP2 concluded that Complainant was experiencing severe psychological dysfunction, and that the Agency's discrimination had significantly diminished her quality of life.

The supporting documentation shows that Complainant felt excessive anxiety, worry, sadness, irritability, hopelessness, helplessness, and intense social discomfort resembling agoraphobia. Complainant experienced physical symptoms, including trouble sleeping, a decreased appetite, heart palpitations, muscle tension, nausea, and severe headaches. Complainant also stated that she cried on a daily basis.

Complainant's personal life suffered; for example, she no longer enjoyed her hobbies of shopping, exercising, and spending time with friends. Additionally, her relationship with her husband deteriorated. Complainant stated that she did not have energy to go out on dates with him, and that they fight more often because he is "sick and tired" of hearing about her problems at work. Complainant used to go grocery shopping and clean the house, but her husband has taken over those responsibilities, which has created more conflict in their marriage.

Complainant also experienced an "extreme" amount of stress at work. Complainant stated that she cannot trust her supervisors or co-workers, and she has considered retiring early. Complainant

expressed worry about making minor mistakes at work and felt that she was under “exaggerated scrutiny.” Complainant also stated that she felt that S2 turned her coworkers against her, and she described an incident when she felt humiliated when a coworker repeatedly called her a “backstabber.”

While we agree with the Agency that Complainant should not be paid for harm starting in 2013, we find that her harm was exacerbated in 2015, soon after she learned of the discriminatory conduct. We note that the union president stated that Complainant was “shocked and upset” when she learned about S2’s remarks. ROI at pg. 113. Additionally, Complainant informed MP2 that she experienced an increase in the intensity and frequency of her symptoms since September 2015, with a “marked increase in symptoms” in April and May 2017.

We find that the Agency erred in determining an award of \$10,000 based on the nature and severity of “the violation,” and should have considered the nature, severity, and duration of Complainant’s harm. Based on the statements by Complainant and MP2, the Commission determines that the Agency’s award of \$10,000 is too low and we modify the award to \$40,000 in non-pecuniary compensatory damages, which is consistent with the amounts awarded in similar cases. See, e.g., Wiggins v. Department of the Air Force, EEOC Appeal No. 07A10072 (July 23, 2002) (\$40,000 in non-pecuniary damages where complainant was diagnosed with stress-related hair loss, and experienced depression, an upset stomach, and impaired relationship with her spouse for a period of 2 years); Garrett v. United States Postal Service, EEOC Appeal No. 07A30024 (February 25, 2004) (\$35,000 in non-pecuniary damages where complainant experienced emotional distress, depression, anger, embarrassment, and humiliation, as well as headaches, and sleep difficulties, which were corroborated by a friend); Turner v. Department of Interior, EEOC Appeal No. 01956390 (April 27, 1998) (\$40,000 in non-pecuniary damages awarded where the agency subjected complainant to sexual harassment and retaliation, which resulted in depression, anger, anxiety, frustration, sleeplessness, crying spells, loss of self-esteem and strained relationships).

Further, this amount takes into account that, unlike cases where greater damages were awarded, Complainant’s injury did not render her totally incapacitated either for work or in her personal life. The award also meets the goals of not being motivated by passion or prejudice, not being “monstrously excessive” standing alone, and being consistent with the amounts awarded in similar cases. Accordingly, we MODIFY the Agency’s award for non-pecuniary compensatory damages from \$10,000 to \$40,000.

Attorney’s Fees

By federal regulation, an agency is required to award attorney’s fees and costs for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. EEOC Regulation 29 C.F.R. § 1614.501(e)(1)(ii). To determine the proper amount of the fee, a lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983). An application for attorney’s fees must include a verified petition accompanied by an affidavit executed by the attorney of record itemizing each

expense comprising the attorney's charges for legal services, together with bills, receipts, or other appropriate documentation. 29 C.F.R. § 1614.501(e)(2)(ii)(B); EEO MD-110, Chap. 11, §VI(G)(1).

In this case, we find that Complainant has not submitted appropriate documentation in support of her request for attorney's fees. There is no verified petition detailing the charges, nor any information regarding the number of hours spent on Complainant's case. Complainant's attorney's assertion that "a detailed breakdown is not necessary since the fees are minimal in nature and represent a quasi-hourly set amount" is incorrect. Accordingly, we AFFIRM the Agency's denial of Complainant's request for \$7,500 in attorney's fees.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's award of non-pecuniary compensatory damages from \$10,000 to \$40,000, and AFFIRM the Agency's denial of attorney's fees.

ORDER

Within sixty (60) calendar days of the date this decision is issued, the Agency shall take the following remedial action:

1. Pay Complainant non-pecuniary compensatory damages in the amount of forty thousand dollars (\$40,000).

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The report must include supporting documentation of the Agency's payment of the non-pecuniary compensatory damages, including evidence that the corrective action has been implemented.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

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.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request 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 agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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).

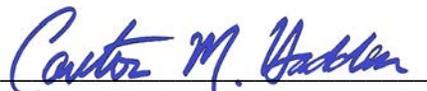
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

June 14, 2019

Date