



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

[REDACTED]
Dexter K.,¹
Complainant,

v.

Sonny Perdue,
Secretary,
Department of Agriculture
(Forest Service),
Agency.

Appeal No. 0120181516

Agency No. FS-2016-00083

DECISION

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 March 13, 2018 final decision concerning his 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. In that decision, the Agency found that it had discriminated against Complainant on the basis of race, as discussed below. For the following reasons, the Commission MODIFIES the Agency's final decision.

BACKGROUND

Complainant worked as a Forester, GS-0460-11, at the Agency's Southern Research Station in Knoxville, Tennessee, where he had been employed for 12 years. On December 8, 2015, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him on the bases of race (Native American) and age (58) when on October 8, 2015, he was informed that he was not selected for the Forest Analyst position, Vacancy Announcement Number 15-RES-89688S-SB, GS-0460-12.

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.

Following the ensuing investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge. Complainant requested an Agency final decision and, in accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b) on May 18, 2017. Therein, the Agency concluded that Complainant had established that the selecting official's articulated reason for not selecting him was a pretext for race discrimination. In making its findings, the Agency noted that Complainant had more years of outstanding performance, authored more reports, and received more accolades than either selectee. The Agency ultimately concluded that Complainant's qualifications for the Forest Analyst position were demonstrably superior to those of the selectees, which it found to constitute evidence of unlawful bias on the part of the selecting official.

The Agency issued the following order for relief, as summarized herein:

1. Complainant may be awarded monetary damages upon submission of a substantiated claim for any and all damages arising out of the discriminatory non-selection that occurred on October 8, 2015. Complainant shall have 60 days from the receipt of the decision to submit evidence in support of his claim and the Agency shall have thirty days thereafter to submit rebuttal evidence.
2. Complainant shall submit evidence of past pecuniary losses, future pecuniary losses, and nonpecuniary losses.
3. Complainant shall, if necessary, assist management in the computation of a monetary award by providing any information reasonably requested, including evidence of interim earnings.
4. Within thirty days of its receipt of all necessary information, management will implement the order for relief and shall advise Complainant of other benefits due if applicable, and how it reached its determination regarding these matters.
5. The Agency will refer the case to the Office of Human Resources Management to determine whether disciplinary action is warranted.
6. The Agency shall conduct training for all management officials involved in the matter regarding their responsibilities and obligations under the anti-discrimination statutes.
7. The Agency shall post notice at the place where the discrimination occurred.
8. The Agency shall award attorneys fees upon submission of the required documentation.
9. The Agency shall furnish a report of the corrective actions taken to the Employment Adjudication Division of the Office of Adjudication.

On September 21, 2017, the Agency submitted to the Office of Adjudication what it termed as its final compliance report for the implementation of the final decision in Agency No. FS-2016-00083. With regard to section (5) of the order for relief, the Agency reported that the case was referred to the Office of Human Resources Management for a determination of the appropriate disciplinary action on May 25, 2017. As to section (6) of the order, the Agency reported that it had conducted the required training and had provided copies of the sign-in sheet and the power point presentation that was used in the training. According to the sign-in sheet, the training was conducted on July 7, 2017. Concerning item (7), the Agency reported that it had posted the appropriate notice at the facility where the discriminatory nonselection had occurred. Photographs of the notice indicate that it was posted between the dates of June 16, 2017 and July 16, 2017.

On March 6, 2018, the Agency issued its final decision on Complainant's requests for backpay, compensatory damages, attorneys' fees and other relief. It is from this decision that Complainant now appeals.

Regarding backpay, the Agency found that Complaint was entitled to an award for the period from October 8, 2015, to the date that he received a promotion to GS-12. It noted that Complainant would have to receive an award equal to what he would have earned in the employment lost through discrimination less interim earnings during the back pay period. The Agency further noted that the March 2018 final decision did not require that Complainant be placed in a GS-12 with promotion potential to GS-13 and GS-14. In addition, the Agency noted that it had denied Complainant's request for a \$10,000 punitive fee for each month that he was not placed in a GS-12 position. The Agency also noted that the March 2018 FAD did not require the Agency to place Complainant in any position.

As to compensatory damages, the Agency found that, based on sworn affidavits from Complainant and his two brothers detailing the harm he experienced as a result of being discriminatorily nonselected in October 2018, Complainant was entitled to \$15,000 in nonpecuniary damages. The Agency noted the ostracism at work that Complainant had suffered after he had prevailed in his claim, his sleeplessness issues, his stress and depression, and the ending of his three-year relationship with his fiancé. Finally, the Agency noted that Complainant did not submit medical documentation supporting his claim for damages.

Regarding Complainant's claim for attorney's fees, the Agency determined that, based upon the submissions of Counsel that included an invoice and a statement from an attorney in a competing law firm attesting to the reasonableness of Counsel's rates, Counsel should be awarded \$14,790 in fees and \$117.50 in costs. The Agency noted that Counsel claimed hourly rates for herself, a senior partner, and an associate who worked on the case, but did not provide resumés or other evidence detailing their experience outside of their years of practice or a Laffey Matrix. The Agency determined that Counsel and the senior partner were each entitled to an hourly rate of \$300 while the associate (Associate 1) was entitled to an hourly rate of \$235. The Agency noted that Counsel's law firm claimed 65.10 hours of work performed on Complainant's behalf but deducted 15.1 hours because the invoice items corresponding to those hours were redacted to the point where the client for whom the work was performed could not be identified.

The 15.10 deducted hours included 9.3 hours from Counsel's time, 1.15 hours from the senior partner's time, and 4.2 hours from Associate 1's time. In a footnote, the Agency denied Counsel's request for seven additional hours of work that may be performed on future items for Complainant on the ground that such a fee award would be speculative.

According to an email from Counsel to the Agency's Point-of-Contact for Compliance (POCC) dated April 3, 2018, Complainant had been placed in a detail that he had accepted in January 2016. In an email dated May 18, 2018 to the Program Manager for Forest Inventory and Analysis (FIAPM), Complainant stated, "I am already a GS-12, per the FAD." In the April 2018 email, Counsel indicated that Complainant wished to remain in the detail he accepted in January until a GS-12 position in the Southern Research Station, but not within the Forest Information Analysis Unit, became available. Counsel also asked that his pay in the new position be changed to a GS-12 as of April 16, 2018, in order to award back pay from the period October 8, 2015 until April 15, 2018. Counsel stated that had Complainant been selected for the Forest Analyst Position, he would have been a GS-12 Step 3 on October 8, 2015, a GS-12 Step 4 on October 8, 2016, and a GS-12 Step 5 on October 8, 2017. Counsel further stated that Complainant would remain a GS-12 Step 5 until October 8, 2019, unless he received a promotion to a higher position, presumably GS-13.

In an appeal brief filed on May 2, 2018, Complainant emphasized that he was not appealing the March 2018 final agency decision with respect to the issues of back pay or promotion. Rather, he stated that he was seeking the Commission's assistance in getting the Agency to implement this element of relief. As to compensatory damages, Complainant asks for nonpecuniary damages in the amount of \$300,000, citing not only the discriminatory nonselection, but having to endure being ostracized in the workplace for over two years after prevailing on his claim. In support of his claim for damages, he submits sworn statements from himself and his two brothers and cites a number of Commission precedents in which we have awarded between \$30,000 and \$50,000 in nonpecuniary compensatory damages. Complainant also requests \$10,000 per month, retroactive to October 1, 2017 since he has yet to be placed into a GS-13 position. Finally, as to attorneys' fees and costs, Complainant not only reiterates his initial request in the amount of \$24,529 and \$117.50 in costs, but asks for an additional \$20,880 in fees and \$309.98 in costs incurred since the first invoice was submitted. Counsel now claims a total of \$42,706.50 in fees and \$427.48 in costs.

According to an email conversation that took place on May 8, 2018, the FIAPM called Complainant into his office and offered him a GS-0460-12 nine-factor Forest Information Analyst position in the Resource Analysis section. In an email to Complainant dated May 11, 2018, the FIAPM informed Complainant that he, the FIAPM, would have to prepare the SF-52 personnel action paperwork documenting the appointment by May 21, 2018. In an email to the POCC dated May 15, 2018, Counsel raised concerns that if Complainant accepted the position, he would be under the supervision of two of the individuals who played a role in the discriminatory nonselection. The Agency Representative responded to Counsel by email on May 18, 2018, pointing out that there was no legal basis for placing Complainant in a position that does not fall under the FIAPM's and the Research Station Director's chain of command when the Agency's March 2018 FAD ordered the Agency to do so.

The Agency Representative disputed Counsel's characterization of the offer as a "take it or leave it proposition," emphasizing that regardless of any position Complaint was offered within the Southern Research Station, he would still fall under the Director's chain of command. In an email to the FIAPM dated May 18, 2018, Complainant expressed concern that the offer was more like a unilateral reassignment than an interactive discussion of options but stated that if he received the SF-52, he would report to his new supervisor as soon as possible. In an email dated May 22, 2018, the Agency Representative informed Counsel that if Complainant declined the offer he would remain in his current position, on detail and that the backpay period would end on the date of his rejection of the offer. In an email dated May 31, 2018, the FIAPM informed Complainant that, based on Complainant's response in his May 18 email, he was confirming Complainant's acceptance of the position. The FIAPM requested that if Complainant chose to decline the assignment, the he notify him, the FIAPM, in writing, no later than June 6, 2018.

Complainant filed a supplemental appeal brief on June 6, 2018, in which he described the FIAPM's offer as a "take it or leave it" deal that he had to accept or reject that same day. He reiterated that the FIAPM was one of the individuals referenced in the May 18, 2017 final agency decision finding discrimination in his nonselection for a Forest Analyst position, and that this fact was ignored when the offer was made. Complainant further reiterated that the position offered was not a substantially equivalent because it required Complainant to report to the same chain of command that had passed over him for promotions in the past. He also stated that the individual who would become his supervisor in the new position was also named in the May 2017 final agency decision. In addition, he stated that the position he was offered had been open for five years because apparently no one else wanted to work in that position, although he indicated that he would stay in the position as a temporary detail until a more secure Forest Researcher became available that did not place him under the supervisory authority of individual found to have discriminated against him. Further, he asked that if he had to remain in a temporary detail, he continued to be paid at a GS-12 Step 5 level. He also pointed out that if he had been promoted to GS-12 back in October 2015, he would have been eligible to apply for promotion to GS-13.

The Agency filed a response brief on June 7, 2018. On the issue of backpay and promotion, the Agency pointed out that since Complainant was not appealing those matters, the Agency would not address them, noting that those matters were still being processed pending Complainant's decision whether to accept or reject the position that the FIAPM offered to him. On the issue of nonpecuniary compensatory damages, the Agency urges that Complainant's claim for \$300,000 be rejected and that its award to Complainant of \$15,000 be affirmed. On the issue of attorney's fees, the Agency continues to argue that Complainant did not provide any evidence justifying the fee request of \$21,826.50, reiterating that the fee request did not include resumés detailing Counsel's experience. As to the second fee request involving \$20,880.00 in fees, the Agency claims that it never received the fee request documentation.

That same day, Counsel wrote the Commission a letter in which she stated that the Agency had just notified her that it did not receive the attachments to the brief concerning her second fee request. She maintains that two copies of her appeal brief packet were sent to the Agency. One of those packets was sent by Federal Express and the other via regular mail.

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”).

Equitable Relief

The Agency is required to make Complainant “whole” by restoring him to a position in which he would have been were it not for its acts of unlawful discrimination. Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). In other words, when discrimination is found, an agency must provide a complainant with a remedy that constitutes full, make-whole relief to put Complainant, as nearly as possible, into the position he would have occupied absent the discrimination. Lazaro G. v. Dep’t of Commerce, EEOC Appeal No. 0120170802 (May 17, 2019); Brenton W. v. Dep’t of Transp., EEOC Appeal No. 1020130554 (June 29, 2017), req. for recon. den’d, EEOC Request No. 0520170496 (Jan. 17, 2018); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994).

Full relief must include an unconditional offer of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position, and 29 C.F.R. § 1614.501(a)(3). The record is unclear as to whether Complainant was ever promoted to GS-12. The order for relief in the Agency’s May 18, 2017 final decision on liability and ordering relief is silent whether Complainant should be placed into the Forest Analyst position or its substantial equivalent. In its final decision on compensatory damages and attorneys’ fees dated March 5, 2018, the Agency noted that Complainant should be promoted to one of the open and available GS-12 positions. This indicates that as of March 2018, Complainant had still not been placed into that position. The email conversation that took place in May 2018 indicates that Complainant had been in a temporary detail since January 2016 and that the FIAPM had offered him a permanent GS-12 Forest Information Analyst position on May 31, 2018. There is no information in the record that documents whether Complainant ultimately accepted the position or not. We therefore have no choice but to remand this matter in order to ascertain whether Complainant was placed into a Forest Analyst position or a substantially equivalent position.

Full relief must also include payment for any loss of earnings the person may have suffered as a result of the discrimination. 29 C.F.R. § 1614.501(a)(4). The Agency indicated in its March 2018 final decision that it would award him backpay but did not specify the amount.

In his sworn statement dated July 19, 2017, Complainant averred that if he had been selected for either Forest Analyst position in October 2015, he would have begun his tenure as a GS-12 on January 1, 2016, and that on January 1, 2017, he would have been qualified to be placed into a GS-13 position. He averred that his net back pay differential for 2016 would have been \$3,764.00, and that for the period between January 1 and October 1, 2017, his pay differential would have been \$11,279.17 for a total net back pay differential of \$15,043.17 for the period between January 1, 2016 and October 1, 2017, which he mischaracterizes as “pecuniary/monetary damages” in his sworn statement. There is no information in the record as to what Complainant’s back pay differential would have been since October 1, 2017. Counsel also asked that Complainant’s pay in the new position be changed to a GS-12 as of April 16, 2018, in order to award back pay from the period October 8, 2015 until April 15, 2018. Counsel stated that had Complainant been selected for the Forest Analyst Position, he would have been a GS-12 Step 3 on October 8, 2015, a GS-12 Step 4 on October 8, 2015, and a GS-12 Step 5 on October 8, 2017. Counsel further stated that Complainant would remain a GS-12 Step 5 until October 8, 2019, unless he received a promotion to a higher position, presumably GS-13. There are no copies of checks that had been issued to Complainant, calculations, or any other documentation that backpay had actually been awarded. We will therefore enter an order directing the Agency to produce any evidence it has demonstrating that it actually awarded Complainant back pay.

We will also enter an order directing the Agency to retroactively promote Complainant into the Forest Analyst position retroactive to the date that he would have been formally hired, and to award appropriate backpay and benefits if the Agency had not already done so.

Compensatory Damages

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). See also e.g. Myklebust v. Dep’t of Veterans Affairs, EEOC Appeal Nos. 07AA20124 & 01A22134 (Aug. 6, 2003), req. for recon. den., EEOC Request Nos. 05A31288 & 05A31298 (Oct. 9, 2003); Smithson v. Soc. Sec. Admin., EEOC Appeal No. 01A14263 (Feb. 12, 2003), req. for recon. den’d EEOC Request No. 05A30466 (March 20, 2003). 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, 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.

Complainant v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for recon. den. EEOC Request No. 05940927 (Dec. 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 Complainant v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Furthermore, the award should take into account the severity and duration of the harm. Carpenter v. Dept. of Agric., EEOC Appeal No. 01945652 (July 17, 1995).

Neither the Agency nor Complainant raised the issue of pecuniary damages in the two final decisions or on appeal, other than Complainant mischaracterizing his claim for back pay as pecuniary damages, as noted above. We will therefore limit our inquiry to the issue of nonpecuniary damages. Section 102(a) of the 1991 Civil Rights Act authorizes an award of compensatory damages 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. We note 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).

Non-pecuniary losses 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 Notice No. 915.302 at 10 (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).

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 Complainant concerning 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. Statements from others including family members, friends, health care 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. See also e.g. 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).

In his sworn statement, Complainant stated:

My claim for emotional damages is \$300,000, \$50,000 for the initial knife to the heart I felt upon seeing the Forest Analyst position announcements in October of 2015 and \$10,000 per month until this October [2017], when again I am requesting that my new GS-13 step 1 position be put into effect. If this position cannot be put into effect by this October, the \$10,000 per month emotional damages amount should continue until this change can be effected.

Complainant's Sworn Statement for Damages dated July 19, 2017. We assume that the phrase "initial knife to the heart" refers to the nonselection action that took place on October 8, 2015, and that Complainant is asking for \$50,000 in nonpecuniary damages for that act of discrimination. As to the remaining \$250,000, Complainant appears to be asking that this amount be awarded to him in monthly increments of \$10,000 until he receives his promotion to GS-13. Complainant does not provide a clear explanation as to why he is entitled to this \$250,000 recovery.

To the extent that Complainant is seeking promotion to GS-13, that issue is one of equitable relief and was addressed above. To the extent that Complainant is seeking to recover damages for emotional distress caused by the Agency's processing of his EEO complaint, such damages are unavailable. Corcoran v. U.S. Postal Serv., EEOC Appeal No. 01954814 (July 31, 1997), req. for recon. den'd. EEOC Request No. 05971029 (July 30, 1998), citing Rountree v. Dep't of Agric., EEOC Request No. 05950919 (Feb. 15, 1996). Punitive damages are likewise unavailable in the federal sector. Candice B. v. U.S. Postal Serv., EEOC Appeal No. 0120171229 (Dec. 11, 2018) citing Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981(A)(b)(1). To the extent that Complainant is requesting frontpay, this is a substitute for reinstatement that can only be invoked if Complainant is no longer working for the Agency, which is clearly not the case. See Carmina E. v. Dep't of Justice, EEOC Appeal No. 0720150011 (Jan. 9, 2018) (front pay may be awarded in lieu of reinstatement where: (1) where no position is available; (2) where a subsequent working relationship between the parties would be antagonistic; or (3) where the employer has a record of long-term resistance to anti-discrimination efforts).

Yet another possibility is future pecuniary damages for loss of earning capacity. To invoke this remedy, Complainant would have to show that the injuries he suffered as a result of being discriminated against are reasonably certain to have narrowed the range of economic opportunities available to him. *Id.* The fact that Complainant is seeking to be placed into the position clearly shows that his earning capacity has not been in any way impaired.

Finally, to the extent that Complainant is actually claiming an additional \$250,000 in nonpecuniary damages, we must ascertain whether the evidentiary record is sufficient to support such a claim. In his sworn statement, Complainant averred that he felt demoralized and emotionally devastated over not being selected for two positions because of his race and being told that if he wanted to move up he would have to move out. He averred that he was ostracized and treated as an outcast in his department, that no one in his department spoke to him, and that he ate lunch alone. He also stated that he felt as if he were being “slapped in the face” when he saw a dozen or so of his colleagues receive promotions since January 1, 2016. He further stated that his stress and depression over losing his bid for promotion had caused the breakup of his relationship with his fiancé. One of his brothers averred that with every promotion Complainant was denied, he observed the “slow and measurable deterioration” of Complainant’s mind, body and spirit during family get-togethers. He testified how Complainant’s joy gave way to depression, which was exacerbated when Complainant was passed over for promotion in October 2015, and how Complainant’s health was failing, and how Complainant was becoming a recluse. Complainant’s other brother also averred that Complainant was becoming a recluse and that Complainant had called off his planned marriage and ultimately ended his romantic relationship.

As we noted previously, although Complainant asked for \$300,000 in nonpecuniary damages, the precedents he cites address recoveries that range from \$30,000 to \$50,000.

We do find that the record in this case is sufficient to support an award of \$50,000, and that such award is consistent with our precedent. In Yvette H. v. Dep’t of Defense, EEOC Appeal No. 0120172249 (Mar. 21, 2019), we awarded \$50,000 in nonpecuniary compensatory damages to the claimant after finding that the Agency failed to provide her with a reasonable accommodation. In her declaration, the claimant stated that she suffered pain, fatigue, and loss of enjoyment of life, and that household chores became impossible. The claimant’s husband also provide a declaration in which he stated that Complainant was unable to do much of anything around the house and would sleep most of the time. In Harvey D. v. Dep’t of State, EEOC Appeal No. 0120171079 (Aug. 23, 2018), we awarded \$50,000 in nonpecuniary damages to a claimant who was discriminatorily denied a medical clearance. The claimant provided his own sworn statement as well as declarations from his husband, his sister, and four friends, but did not provide medical or documentary evidence. Complainant showed that he had experienced sleeplessness, crying spells, weight loss, humiliation, anger and feelings of helplessness. Other family members and friends indicated in their statements that the claimant had become anxious, depressed, despondent and withdrawn, and that his relationship with his husband had suffered as a result. See also Alena C. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0720180003 (April 12, 2018) (awarding \$50,000 following discriminatory nonselection where complainant began to experience pain, muscle spasms, and headaches, and became socially withdrawn);

Cavanaugh v. U.S. Postal Serv., EEOC Appeal No. 07A20102 (Nov. 12, 2003) (\$50,000 for discriminatory nonselection which led to exacerbation of depression and caused irritability, sleeplessness, and tension headaches); Complainant v. Dep't of Transp., EEOC Appeal No. 0120080520 (Jan. 21, 2011) (Complainant awarded \$50,000 in compensatory damages based on testimony from complainant and complainant's family members indicating that complainant experienced emotional mood swings, marital strain, a general loss of self-esteem and stopped enjoying life).

The Agency awarded Complainant \$15,000 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 \$50,000 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 the amounts awarded in cases in which the claimant submitted statements from family, friends, and coworkers but little or no medical documentation in support of the claim.

Attorneys' Fees & Costs

Complainant's Counsel worked on his case from December 2015 through April 2018, with assistance from three associates and occasional consultations with a senior partner in her law firm. She submitted two requests for attorney's fees. In the first request, dated June 22, 2017, Counsel claimed \$21,826.50 in fees for 65.1 hours of work on Complainant's case between December 2015 and June 2017 and \$117.50 in costs. In the second request dated April 27, 2018, counsel claimed \$20,800.00 in fees for 66.2 hours of work done between June 2017 and April 2018 and \$309.98 in costs. Between the two requests, Counsel claims \$42,706.50 in fees and \$427.48 in costs. In awarding Counsel's firm \$14,790.00 in fees and \$117.50 in costs, the Agency addressed only the first request since Counsel did not submit the second request until nearly two months later.

By federal regulation, the agency is required to award attorneys' fees for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 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. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). There is a strong presumption that the lodestar represents a reasonable fee, but this amount may be reduced or increased in consideration of the degree of success, quality of representation, and long delay caused by the agency. 29 C.F.R. § 1614.501(e)(2)(ii)(B). The circumstances under which the lodestar may be adjusted are extremely limited and are set forth EEO MD-110, Chapt. 11, § VI(F)(2). (Aug. 5, 2015). A fee award may be reduced: in cases of limited success; where the quality of representation was poor; the Attorney's conduct resulted in undue delay or obstruction of the process; or where settlement likely could have been reached much earlier, but for the Attorney's conduct. Id. The party seeking to adjust the lodestar, either up or down, has the burden of justifying the deviation. Id. at p. 11-8. See also e.g. Liza B. v. Dep't of Agric., EEOC Appeal No. 0120181084 (May 14, 2019); Victor S. v. U.S. Postal Serv., EEOC Appeal No. 0120180973 (April 16, 2019); Shad R. v. U.S. Postal Serv., EEOC Appeal No. 0120180357 (Mar.19, 2019).

Counsel's lodestar is set forth as follows, based on varying rates charged between 2015 and 2018:

<u>Attorney</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Fees Claimed</u>
		2015-2016	
Counsel	48.4	\$350.00	\$16,313.81 ²
Sr. Partner	4.9	\$435.00	\$2,131.50
Associate 1	4.2	\$235.00	\$987.00
		2017	
Counsel	20.6	\$355.00	\$7,313.00
Sr. Partner	0.2	\$450.00	\$90.00
Associate 2	1.2	\$225.00	\$270.00
		2018	
Counsel	29.6	\$365.00	\$10,804.00
Sr. Partner	0.5	\$450.00	\$225.00
Associate 3	20.4	\$225.00	\$4,590.00
Totals:	130.0		\$42,724.31

The reasonable hourly rate is generally determined by the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skill, experience and reputation. Blum v. Stenson, 465 U.S. 886, 895 (1984). For the purpose of determining the prevailing market rate, the relevant legal community is the area where the Agency's facility and the complainant are located. McTier v. Dep't of the Navy, EEOC Appeal No. 07A30016 (Mar. 2, 2004); Cook v. U.S. Postal Serv., EEOC Appeal No. 01A03897 (Mar. 13, 2001); Black v. Dep't of the Army, EEOC Appeal No. 01921158 (Jan. 14, 1993). In this case, both parties agreed that the relevant legal community is Chattanooga, Tennessee.

The first issue we will address is the sufficiency of the documented evidence in Counsel's claim for attorney's fees and costs. Counsel submitted two affidavits, two verified statements documenting in detail the various services performed and rates charged, and two affidavits from an outside attorney attesting to the reasonableness of the rates charged by Counsel's firm. In its March 2018 final decision and again in its June 7, 2018 response to Complainant's appeal, the Agency found this evidence insufficient, arguing that a resumé from the attorney of record was required in order for Complainant to recover attorney's fees. It is not.

² The lodestar amount would normally be 48.4 hours multiplied by Counsel's hourly rate of \$350 for what would have been fees in the amount of \$16,940. However, on 17 items in June 2016, Counsel charged less than the full lodestar amount, and on four of those items, she charged nothing at all, resulting in fees of \$16,313.81.

The regulations governing awards of attorney's fees and costs require that the attorney of record provide a verified statement of fees and costs accompanied by an executed affidavit. 29 C.F.R. § 1614.501(e)(2). The verified statement of fees and costs shall include documentary evidence of the reasonableness of the rate, **such as** (emphasis added) an affidavit stating that the requested rate is the attorney's normal billing rate, a detailed affidavit of another attorney in the community familiar with prevailing community rates for attorneys of comparable experience and expertise, a resumé, a list of cases handled, or a list of comparable cases where a similar rate was accepted. EEO MD-110, Chapt. 11, § VI(G)(1)(c). The phrase "such as" means that a resumé is one type of evidence that can be included, but it is not the only type and is certainly not mandatory. We therefore find that the documented evidence submitted by Counsel in support of her fee request satisfies the requirements of the regulations and Management Directive 110.

We can now address the reasonableness of the hourly rates charged by Counsel and the other members of her law firm who worked on the case. Counsel provided affidavits dated June 19, 2017 and April 30, 2018, from a principal of a competing law firm attesting to the reasonableness of the hourly rates charged by Counsel, the senior partner and the three associates. Both affidavits were sworn and notarized. Under oath, the attorney averred that she had been practicing in the field of labor and employment law in the Chattanooga, Tennessee area for over 30 years, and was the chair of the Labor and Employment Department of her law firm. In making these affidavits, the attorney affirmed that Counsel's verified statements regarding the fees and costs rendered appeared reasonable. Yet the Agency rejected this evidence and capped the hourly rates of Counsel and her senior partner at \$300. It did so based upon its reading of an unpublished district court opinion issued on April 3, 2014, over a year before the discriminatory nonselection and four years before the Agency issued its final decision on attorney's fees. The Agency relies on a passage that cites to prior findings of what constitutes a reasonable fee in the Eastern District of Tennessee, which includes Chattanooga. Eight cases are listed in the passage involving hourly rates ranging from \$225 to \$300.

However, we find the Agency's reliance on this unpublished opinion to be seriously flawed in several respects. First, the matters at issue in those cases included contracts, constitutional law, the Fair Labor Standards Act, the Employee Retirement Income Security Act, and other topics. Only one of those prior decisions involved an employment law claim, but it is unclear whether employment discrimination was involved. It appears that none of the cases in that compilation raised an issue employment discrimination. Second, all of those precedents were issued between 2009 and February 2014, at least 18 months before the nonselection and four years before the issuance of the March 2018 final decision. Third, there was no information regarding years in practice or experience with respect to any of the attorneys involved in those cases. We also note that the Agency stated in its March 2018 final decision that Counsel failed to provide a Laffey matrix. The Laffey matrix is a chart compiled yearly by the United States Attorney's Office in the District of Columbia that provides a schedule of hourly rates prevailing in the Washington, D.C., area in each year, going back to 1981, for attorneys at various levels of experience. As such, it cannot be utilized to determine the reasonableness of rates charged outside the greater Washington D.C. metropolitan area. Chere S. v. Gen. Servs. Admin., EEOC Appeal No. 0720180012 n. 4 (Nov. 30, 2018).

Ultimately, we find that Counsel's verified statements of fees and costs, her affidavits, and the affidavits from the attorney attesting to the reasonableness of the hourly rates charged by Counsel, her senior partner, and the three associates was sufficient to justify those rates.

We now turn to the second part of the lodestar analysis, which concerns the number of hours expended. In its response to Complainant's appeal, the Agency reiterated that it had to deduct 15.1 hours from the lodestar because of heavy redactions that prevented it from assessing whether those items were excessive, duplicative, or redundant. Having reviewed the unredacted versions of Counsel's fee request, we find that none of the hours deducted were for items that were excessive, duplicative, or redundant. As for the Agency's rejection of Counsel's claim for seven additional hours of work that "might have to be performed," we need not address this in light of Counsel's second fee request. The Agency rejected that request in its entirety on the grounds that Counsel failed to provide a copy of the request and its supporting documentation as part of her appeal brief. However, we find credible Counsel's assertions that she had sent the Agency copies of the documentation of her second fee request via both Federal Express and the United States Postal Service. In accordance with Counsel's lodestar information referenced above, we will enter an order awarding Complainant \$42,724.31 in fees for 130.0 hours of legal work.

Finally, with respect to costs, the Agency awarded \$117.50 for documented costs. Complainant has requested an additional \$309.98 in costs. The Agency argues that Complainant has not provided any evidence in support. We disagree. The record shows that Counsel submitted documentation attached to its April 2018 fee petition indicating that \$309.98 in costs were additionally incurred from June 2017 to April 2018. Thus, we will also award Complainant \$427.48 in costs.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we MODIFY the Agency's final decision and REMAND the matter for further processing of Complainant's claim for relief in accordance with our order below.

ORDER (D0617)

To the extent that it has not already done so, the Agency is ordered to take the following remedial action within sixty (60) calendar days of the date this decision is issued:

1. The Agency shall determine whether Complainant had been placed in the position of Forest Analyst, GS-0460-12, at its Southern Research Station, or a substantially equivalent position, and if so, on what date. If not, the Agency shall offer Complainant such a position, retroactive to the date he would have been formally hired for that position. Complainant shall be given a minimum of **fifteen (15) calendar days** from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the time period set by the Agency will be considered a rejection of the offer, unless Complainant can show that circumstances beyond his control prevented a response within the time limit.
2. If the Agency has already awarded Complainant backpay with interest and other benefits, due, it shall provide evidence of that award in the report of compliance referenced below. If not, then the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, retroactive to the date he would have been formally hired into the Forest Information Analyst position, pursuant to 29 C.F.R. § 1614.501. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. The Agency shall award Complainant \$50,000, less any amount already paid to Complainant as nonpecuniary compensatory damages.
4. The Agency shall award Complainant \$42,724.31 in fees and \$427.48 in costs.

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). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

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 CFR § 1614.503(f) for enforcement by that agency.

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).

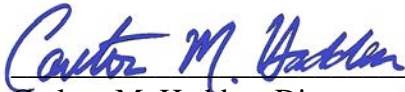
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

September 11, 2019

Date