



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

[REDACTED]
Alline B.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 0120181662
Hearing No. 461-2017-0071X
Agency No. 200305022016102186

DECISION

On April 18, 2018, 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 22, 2018, 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 AFFIRMS the Agency's final decision (FAD) regarding compensatory damages.

ISSUE PRESENTED

The issue presented on appeal is whether the Agency's FAD awarded the appropriate amount of compensatory damages after previously finding that Complainant had been subjected to discrimination based on reprisal with respect to her supervisor making a disparaging remark and inquiring about her participation in prior EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Clinical Instructor, Nurse Level III at the Agency's Medical Center in Pineville, Louisiana. On May 6, 2016, and by amendments dated September 2, November 15, and December 22, 2016 and January 20, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her and

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.

subjected her to a hostile work environment on the bases of race (African-American), disability, and reprisal for prior protected EEO activity under Title VII when:

1. From January 13 through December 12, 2016, she was subjected to disparate treatment with respect to: assignment of duties; details; tour of duty; denial of training and other incidents;
2. On August 26, 2016, her request for a reasonable accommodation was denied;
3. From December 2014 through January 2017, she was subjected to a hostile work environment with regard to 75 events; and
4. On October 6 and November 6, 2016, she was discriminated against based on reprisal, when she was subjected to reprisal with respect to her supervisors making disparaging remarks and inquiring about her participation in protected EEO activity.

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. Complainant timely requested a hearing but subsequently withdrew her request. Consequently, the Agency issued a final decision, dated January 17, 2018, pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove the Agency subjected her to discrimination as alleged with respect to claims 1 through 3, but that she established discrimination with respect to claim 4. Among other things, the Agency ordered that a supplemental investigation be conducted into Complainant's entitlement to compensatory damages and indicated that she was entitled to an award of attorney fees as a prevailing party.

On March 22, 2018, the Agency issued the FAD on compensatory damages awarding Complainant \$2500.00 in compensatory damages for her non-pecuniary losses that were proximately caused by its discrimination. Complainant filed the instant appeal. Complainant requests that the Commission reverse the Agency's FAD and award her all the relief she claims she is entitled to under the law. Complainant contends that she presented enough documentary support to justify a higher damages award. In response to Complainant's appeal, the Agency asks that the Commission affirm its FAD.

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, 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").

ANALYSIS AND FINDINGS

Compensatory Damages

When discrimination is found, the agency must provide a complainant with a remedy that constitutes full, make-whole relief to restore her as nearly as possible to the position she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). To receive an award of compensatory damages, a complainant must demonstrate that she has been harmed by the agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsideration denied, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

Compensatory damages may be awarded for the past pecuniary losses, future pecuniary losses, and non-pecuniary losses which are directly or proximately caused by the agency's discriminatory conduct. Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (Enforcement Guidance), EEOC Notice No. 915.002, at 8 (July 14, 1992). Objective evidence of compensatory damages can include statements from the complainant concerning his or 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. Statements from others, including family members, friends, health care providers, or 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. Lawrence v. U.S. Postal Service, EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 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 in this regard. The more inherently degrading or humiliating the agency's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. See Banks v. U.S. Service, EEOC Appeal No. 07A20037 (Sept. 29, 2003) (citing Lawrence v. U.S. Postal Service, EEOC Appeal No. 01952288 (Apr. 18, 1996)).

Pecuniary Compensatory Damages

Pecuniary losses are out-of-pocket expenses that are incurred because of the employer's unlawful action, including moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. Guidance at 14. For claims seeking pecuniary damages, objective evidence should include documentation of out-of-pocket expenses for all actual costs and an explanation of the expense, e.g., medical billings, other costs associated with the injury caused by the agency's actions, and an explanation for the expenditure. *Id.* at 9.

Complainant provided medical statements for items that pre-dated the finding of discrimination set forth in claim 4. She failed to provide any evidence after October 6, 2016, when claim 4 took place, that proves the discrimination was the proximate cause for her medical treatment, and/or that she incurred any costs as a result.

Non-pecuniary Compensatory Damages

An award of non-pecuniary compensatory damages should reflect the extent to which the agency's discriminatory action directly or proximately caused the harm as well as the extent to which other factors also caused the harm. *Johnson v. Dep't of the Interior*, EEOC Appeal No. 01961812 (June 18, 1998). It is the Complainant's burden to provide objective evidence in support of her claim and proof linking the damages to the alleged discrimination. *Papas v. U.S. Postal Service*, EEOC Appeal No. 01930547 (Mar. 17, 1994); *Mims v. Dep't of the Navy*, EEOC Appeal No. 01933956 (Nov. 24, 1993). The Commission recognizes that not all harms are amenable to a precise quantification; the burden of limiting the remedy, however, rests with the employer. *Chow v. Dep't of the Army*, EEOC Appeal No. 01981308 (Feb. 12, 2001). Moreover, the amount of an award 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. *Cygnar v. Chicago*, 865 F.2d 827, 848 (7th Cir. 1989); *EEOC v. AIC Security Investigations, Ltd.*, 823 F. Supp. 571, 574 (N.D. Ill. 1993).

Complainant contends that the Agency's compensatory damages award of \$2500.00 in non-pecuniary damages was an insufficient amount. She maintained that she submitted evidence that supported an award in the range of \$250,000.00 to \$300,000.00. Complainant cited to Commission cases where higher awards were made when complainants were able to establish serious psychological and emotional injuries that required treatment for an indefinite period of time, and where complainants lived in constant fear of a supervisor's retaliatory actions. In sum, Complainant maintained that she provided sufficient evidence to show that she suffered extreme stress, shock and humiliation, lack of social interactions, weight fluctuations, depression, anxiety, insomnia, nightmares, loss of her voice, and others conditions resulting from the Agency's harassing conduct and retaliatory actions that will persist for an indefinite period of time, which warrant an increase in the compensatory damage award.

We find that Complainant has not established that she is entitled to an increase in the amount awarded by the Agency. The Commission notes that the Agency did not find discrimination with respect to Complainant's allegations of disparate treatment, denial of a reasonable accommodation, and harassment. Therefore, we find that Complainant is not entitled to compensatory damages with respect to these issues. See Alvera L. v. Dep't of Homeland Security (ICE), Appeal No. 0120150446 (Aug. 9, 2017) (the Commission held that Complainant was not entitled to non-pecuniary damages regarding the issues where the Agency found no discrimination and Complainant did not appeal.)

The sole issue up for consideration with respect to Complainant's compensatory damages claim was the Agency's finding of discrimination regarding claim 4. The finding of discrimination was based on statements made by Complainant's first-line supervisor on October 6, 2016 and November 4, 2016. He stated, respectively, "How is your EEO complaint coming along... you got me tied up in that mess;" and "How did I get in your complaint?" Based on these comments, the Agency awarded Complainant \$2500.00. The Commission finds that the evidence submitted by Complainant does not support an award of non-pecuniary damages greater than \$2500.00. We find that this amount is adequate to compensate Complainant for the harm shown to be causally related to the discriminatory conduct.

We find that the amount of the award meets the goals of not being "monstrously excessive" standing alone, not being the product of passion or prejudice, and being consistent with the amount awarded in similar cases. See Onie R. v. Dept. of Def., EEOC Appeal No. 0120141870 (June 16, 2016) (\$3,000 award appropriate where employee provided evidence that the agency's reprisal resulted in anxiety, feelings of intimidation and disrespect, despondence, sleep loss, fatigue, difficulty in concentrating, hypersensitivity, and feelings of guilt); Marcellus M. v. Dep't of Justice (FBI), EEOC Appeal No. 0120152864 (May 6, 2016) (Commission adjusted Agency award to \$3500 in non-pecuniary compensatory damages for harm suffered as a result of the reprisal discrimination); Malekpour v. Dep't of Transp., EEOC Appeal No. 0720100016 (Dec. 16, 2011), req. for recon. den'd EEOC Request No. 0520120340 (June 21, 2012) (\$3,000 award appropriate where employee had reported mental anguish and anxiety after being threatened about not attending mediation and witness observed that Complainant appeared medically distressed after retaliatory incident that occurred in the presence of other employees); Robledo v. Dep't of Homeland Sec., EEOC Appeal No. 0120113438 (Oct. 21, 2011), req. for recon. den'd EEOC Request No. 0520120132 (May 24, 2012) (\$3,000 award appropriate where employee and his friend testified that he suffered anguish, and emotional pain for several weeks after discriminatory denial of leave); Webster v. Dep't of Defense, EEOC Appeal No. 0120102276 (Sept. 20, 2011) (\$4,000 award for injury to employee's professional reputation and increased level of distress following agency's act of per-se reprisal).

We find that, based on the facts of this case, were the majority of Complainant's discrimination claims were not upheld, the Agency's award takes into account the nature of the Agency's actions, the degree of harm Complainant experienced, and the amount of supporting evidence Complainant offered.

Attorney's Fees

Title VII and the Commission's regulations authorize the award of reasonable attorney's fees and costs to a prevailing Complainant. 29 C.F.R. § 1614.501(e); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 11-1 (Aug. 5, 2015). Fee awards are typically calculated by multiplying the number of hours reasonably expended times a reasonable hourly rate, an amount also known as a lodestar. See 29 C.F.R. § 1614.501(e)(ii)(B); Blum v. Stenson, 465 U.S. 886, 899 (1984); Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

All hours reasonably spent in processing the complaint are compensable, but the number of hours should not include excessive, redundant or otherwise unnecessary hours. Id., 11-15. A reasonable hourly rate is based on prevailing market rates in the relevant community for attorneys of similar experience in similar cases. Id., 11-6. An application for attorney's fees must include a verified statement of attorney's fees accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. Id., 11-9.

While an attorney is not required to record in detail the way each minute of his or her time was expended, the attorney does have the burden of identifying the subject matters on which he or she spent his or her time by submitting sufficiently detailed and contemporaneous time records to ensure that the time spent was accurately recorded. See Spencer v. Dep't of the Treasury, EEOC Appeal No. 07A10035 (May 6, 2003). The attorney requesting the fee award has the burden of proving, by specific evidence, entitlement to the requested fees and costs. Koren v. U.S. Postal Serv., EEOC Request No. 05A20843 (Feb. 18, 2003).

The record reflects that the Agency's final decision, dated January 17, 2018, advised Complainant that a verified statement of costs and attorney's fees accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services should have been submitted within 30 days of receipt of the decision. According to the Agency, Complainant submitted a non-itemized receipt for \$5,840.00 in attorney's fees in connection with her complaint. The Agency denied her claim for attorney's fees because she did not file a timely petition for attorney's fees as required by 29 CFR § 1614.501(e). On appeal, Complainant does not address the delay, and only reiterates the fact an invoice for attorney's fees was filed. Like the Agency, we find that this submission alone is insufficient to support an award of attorney's fees and decline to award fees in the instant matter.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's FAD concerning the amount of compensatory damages to which Complainant is entitled.

ORDER

The Agency, to the extent that it has not already done so, is ORDERED to take the following remedial action, within one hundred and twenty (120) calendar days of the date this decision is issued:

The Agency shall pay Complainant non-pecuniary compensatory damages in the amount of \$2500.00.

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 (S0610)

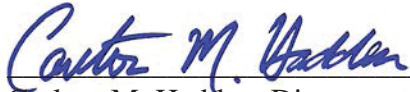
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole

discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

June 28, 2019

Date