



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

████████████████████
Cassandra L.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of Defense
(Department of Defense Education Activity),
Agency.

Appeal No. 0720180029

Hearing No. 570-2017-01253X

Agency Nos. EU-FY13-128; EU-FY14-018; and EU-FY17-005

DECISION

Following its August 23, 2018 final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of 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. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ.

Complainant filed a cross appeal. Complainant specifically challenges the AJ's award of non-pecuniary damages and requests reimbursement for out-of-pocket litigation expenses.

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.

BACKGROUND

During the period at issue in this complaint, Complainant worked as a Teacher at the Agency's Patch High School² in Stuttgart, Germany.

On October 8, 2013, December 23, 2013, and November 12, 2016, Complainant filed three formal EEO complaints. Complainant claimed that the Agency discriminated against and subjected her to a hostile work environment based on age (YOB: 1955), sex (female), and in reprisal for prior protected EEO activity.

The three formal complaints were accepted for investigation. After the investigations, the Agency provided Complainant with copies of the reports of investigation and notices of the right to request a hearing before an AJ. Complainant timely requested a hearing. The AJ held a hearing on November 6 – 9, 2017, and issued a decision on July 16, 2018.

Following the hearing, the AJ issued a decision concluding Complainant had been subjected to a retaliatorily-motivated hostile work environment which resulted in Complainant's involuntary retirement. The AJ ordered that the Agency to reinstate Complainant to an AP English Teacher position at Stuttgart High School (or to a substantially equivalent position), to expunge certain disciplinary actions from Complainant's personnel records, and award Complainant pecuniary and non-pecuniary damages and litigation costs.

The Agency issued a final order rejecting the AJ's findings of discrimination. Simultaneously, the Agency filed the instant appeal challenging the AJ's finding that Complainant's actions in April 2010 constituted prior protected activity under Title VII. The Agency further argues that even if Complainant's actions in April 2010 were considered protected activity, the record failed to support a causal connection between the activity, Complainant's reassignment, and the remaining claims. The Agency also challenges the AJ's finding of constructive discharge. Finally, the Agency argues that the compensatory damage award should be dramatically reduced if the Commission were to find that the Agency's conduct occurring after Complainant's August 21, 2013 reassignment was retaliatory.

In opposition to the Agency's appeal, Complainant, through her representative, filed a motion to dismiss. Complainant argues that the Agency failed to return her to her position and failed to provide prospective pay and benefits pending the outcome of the appeal as ordered by the AJ. Complainant explains that that Agency offered her an English teacher position at a school located in Italy run by a school principal who was identified as a participant in Complainant's instant harassment claim. Consequently, Complainant denied the Agency's offer. Complainant contends that an AP English teacher position was available at Patch High School at the time of the Agency's offer, but the Agency offered that position to a new employee.

² Patch High School is also referred as Stuttgart High School in the record.

Complainant concludes that the Agency's appeal should be dismissed, pursuant to 29 C.F.R. § 1614.505, because the Agency failed to notify the Commission and Complainant that the relief it provided was temporary or conditional, and the Agency failed to indicate that it would delay payment and pay interest on any amounts owed.

Complainant simultaneously filed a cross appeal with respect to damages. Specifically, Complainant requests that the Commission increase the compensatory damages award and increase the award of reasonable out-of-pocket litigation expenses Complainant incurred.

The Agency stated that as part of its offer of interim relief it declined to return Complainant to Stuttgart High School because her return would be "unduly disruptive to the work environment." Instead, the Agency stated that it would place Complainant in the position of TP-1701, Teacher (0301) (English) in Sigonella High School located in Italy because this position was the only vacant English Teacher position in Europe.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

Motion to Dismiss Agency's Appeal

As a preliminary matter, we deny Complainant's request to dismiss the Agency's appeal. Our review of the record indicates that the Agency complied with EEOC regulation 29 C.F.R. § 1614.505. Because the Agency declined to implement the AJ's decision, the Agency explained in the August 23, 2018 final order that it would provide "interim relief" that was "temporary or conditional." See 29 C.F.R. § 1614.505(a)(1), (2). The final order states that the Agency would place Complainant in a school in Italy "pending the outcome of the Agency appeal." The Agency further explained that it would "delay payment of any amounts owed, but [would] pay interest from the date of the original decision to the date payment is made, if required by the resolution of the appeal." See 29 C.F.R. § 1614.505(a)(4). The Agency also complied with EEO regulation 29 C.F.R. § 1614.505(a)(5) when it stated in the final order that it declined to return Complainant to Patch High School because Complainant's return would be "unduly disruptive to the work environment." We note that pursuant to 29 C.F.R. § 1614.505(a)(5), the determination not to return Complainant to her place of employment, as a form of interim relief, is not reviewable. Based on the forgoing, we find that the Agency properly filed an appeal.

Prior Protected EEO Activity – April 2010 Incident

EEOC Regulation 29 C.F.R. § 1614.101(b) provides that no person shall be subject to retaliation for opposing any practice made unlawful by Title VII, the Agency Discrimination in Employment Act, the Equal Pay Act, or the Rehabilitation Act, or for participating in any stage of administrative or judicial proceedings under those statutes. In order to establish unlawful retaliation, an individual must initially be able to show that he or she engaged in prior EEO activity based on 29 C.F.R. § 1614.101(b).

EEOC's Enforcement Guidance on Retaliation and Related Issues explains that:

protected 'opposition' activity broadly includes the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination. The manner of opposition must be reasonable, and the opposition must be based on a reasonable good faith belief that the conduct opposed is, or could become, unlawful.

See EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, at Section A(2) (Aug. 25, 2016).

In her first formal complaint, Agency No. EU-FY13-128, Complainant claims that from September 2010 through 2013, she "witnessed and reported [to management] the results of sexual hostility toward female students at Patch High School." Complainant specifically mentions, in the formal complaint, an incident involving two male high school seniors vandalizing the cars of two female and one male high school students.

During the hearing, Complainant testified that the incident occurred in April 2010 and described the incident as follows:

I could see what was on the cars . . . in black paint . . . which had dripped down it, things like, " I like dick [or] doggie style is my favorite." There were huge penises drawn that were spewing semen. There were pictorials of girls performing sex acts on boys. And then underneath, there were the names of these girls who were . . . my current students or former students. There were really hurtful things written . . . there was a boy's car where they had on the windshield, " fag inside."

Complainant further testified that the incident occurred in a parking lot near the school where teachers and students parked. Complainant explained that other bystanders, approximately 50 or 60 people including teachers and students, saw the incident because it occurred along a route people typically used heading home from school. Complainant stated that she reported this incident because she had an obligation as a teacher to report "anything that is mistreating others," "sexual harassment," or "abuse of any kind." Complainant reiterated that reporting this incident was her "job . . . [and] by law, we have to report if we see things are wrong."

Complainant reported the April 2010 incident to the then-Patch High School Principal (“P1”). The record further indicates that Complainant also reported the incident to Stuttgart Garrison Commander (“SGC”) and the U.S. Military Academy (“West Point”) because one of the senior male students involved had been admitted to West Point for the following school year and Complainant’s husband had written a recommendation letter for him. Consequently, West Point conducted an independent investigation, revoked the student’s scholarship, and required that he complete a year of preparatory school before entering the academy.

We agree with the AJ’s determination that Complainant had a reasonable good faith belief that a potential EEO violation under Title VII existed because the student-on-student conduct she reported in April 2010 violated the Department of Defense Dependent Schools-Europe’s (“DoDDS-E”) Anti-Harassment Policy.

The Anti-Harassment Policy, issued by the DoDDS-E Director states, in pertinent part, that:

The purpose of this policy is to state the DoDDS-E’s commitment to maintaining an environment free from workplace harassment. This policy applies to all DoDDS-E employees, contractors, students, and visitors with DoDDS-E and throughout its five school districts. . . .

Workplace harassment can be based upon race, color, religion, sex (including sexual harassment), national origin, age (40 and over), or disability (mental and/or physical) . . . Department of Defenses that the school’s anti-discrimination policy.

As stated in the DoDEA Policy Memorandum 10-DME0-001, dated November 4, 2009, harassment is unacceptable conduct and **WILL NOT BE TOLERATED** at any level and in any location that can be reasonably regarded as an extension of the workplace. . . .

I am fully committed to vehemently enforcing this ant-harassment policy, and expect senior staff to work in advancing the policy throughout DoDDS-E.

We note that the DoDDS-E’s Anti-Harassment Policy prohibited sex and sexual harassment; the policy was not just limited to employees but also applied to students; and the policy emphasized that senior staff employees had a responsibility to enforce it. The record indicates that Complainant had taught at Patch High School for over 30 years as a Master Teacher and it was reasonable to expect her, as a senior employee, to advance this policy. The record further indicates that the April 2010 incident occurred in a parking lot adjacent to school property long a common route the students took home and, therefore, could be construed as a reasonable extension of the workplace. For these reasons, we agree with the AJ’s finding that Complainant reasonably believed that the April 2010 incident constituted a violation of the Agency’s Anti-Harassment Policy, and in turn, created a potential Title VII violation.

We further agree with the AJ's determination that Complainant acted reasonably when she sent letters to the SGC and West Point. During the hearing, Complainant testified that she drafted a letter for P1 to present to the SGC, and P1 expressed concerns that Complainant could experience repercussions for having her name included in the letter. Nevertheless, Complainant requested that P1 issue the letter the SGC. However, Complainant stated that P1 did not send her letter to the SGC but read excerpts of her letter to the SGC over the phone. Complainant further stated that she learned from P1 that the civilian misconduct board was unaware of the April 2010 incident. As indicated in her personal journal entry, Complainant "had a feeling that nothing was ever going to be done" and the female students subjected to the April 2010 incident informed Complainant that people were blaming them for what happened and that the male students who participated in the April 2010 incident were now the "victims." Complainant further stated that she was worried that the female students "would consider suicide." As a result, Complainant testified that she sent the SGC a letter and she sent a copy of the letter to West Point. Complainant also explained that she had a close relationship with West Point; she corresponded with West Point about recommendations and issues over the past 25 years; and she felt that the school had "the right to full disclosure when it came to the men and women [it] accept[ed] and train[ed]."

For the reasons discussed above, we find that Complainant engaged in prior protected EEO activity when she reported the April 2010 incident because she reasonably believed that the incident violated the Agency's Anti-harassment policy, it could pose potential Title VII violation, and Complainant reasonably believed that she had a duty, as a Master Teacher, to report this incident to P1, the Commander, and West Point.

Hostile Work Environment

Complainant can establish a prima facie case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Specifically, in a reprisal claim, and in accordance with the burdens set forth in McDonnell Douglas, Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d (1st Cir. 1976), and Coffman v. Dep't of Veteran Affairs, EEOC Request No. 05960473 (Nov. 20n 1997), a complainant may establish a prima facie case of reprisal by showing that: (1) he or she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he or she was subjected to adverse treatment by the agency; and (4) a nexus exists between the prior protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

Here, Complainant has established a prima facie case of retaliation. As discussed above Complainant engaged in prior protected EEO activity when she reported the events that occurred during the April 2010 incident. We agree with the AJ's determination that Complainant suffered significant professional repercussions based on this protected activity and was therefore, was subjected to a retaliatorily-motivated hostile work environment.

As background, Patch High School had had three different Principals (“P1,” “P2,” and “P3”) from April 2010 until December 2010 before another Principal (“P4”) was hired in 2011. However, the Superintendent of DoDDS-E remained the same. Complainant testified that in August 2010, P2 removed Complainant’s AP English classes and assigned Complainant to teach 10th and 11th grade English even though Complainant had taught AP English for the past 20 years. On September 24, 2010, the Superintendent issued Complainant a Notice of Suspension from October 8, 2010 through October 17, 2010.³ Complainant also explained that P3 removed all of her 11th grade English classes after P2 left in November 2010.

Complainant further testified that during her first in-person meeting with P4 in August 2011, P4 stated, “You know [Complainant] that, people don’t like you here . . . People don’t like you in the community . . . When your names comes up, it’s bad.” Although P4 denied this statement and denied having any knowledge of Complainant reporting the April 2010 incident, the AJ found Complainant’s testimony to be credible but not that of P4. Specifically, the AJ found that P4’s testimony conflicted with a statement he made in his deposition that it was “common knowledge” that Complainant submitted a letter to West Point regarding the April 2010 incident. The AJ further acknowledged that a number of credible witnesses testified that P4 stated during his first faculty meeting that he had “beaten a lot of EEOs, so there was no reason to file those” even though P4 denied making this statement. We find no reason to disturb the AJ’s credibility determination. The AJ further found that that the August 2011 encounter between Complainant and P4 supported that P4 was aware of Complainant’s prior protected EEO activity as early as August 2011 and indicated Complainant’s standing within the school administration.

The major turning point in Complainant’s relationship with management occurred in August 2013, when P4 and the Assistant Principal assigned Complainant to teach French classes (French 1 and French 2), rather than the AP English classes she had previously taught. They also moved Complainant out of her classroom of 20 years to another classroom located in the Annex. Complainant testified that she had taught English for the past 30 years and she had “never taught French.” Complainant explained that she had a minor in French, but she had not spoken the language since 1977 when she graduated from college and had no training in teaching a foreign language. The record further shows that a number of parents wrote to P4 asking him to reconsider Complainant’s reassignment from English to French, to no avail.

³ The Notice of Suspension explains that the Superintendent found that Complainant failed to follow verbal/written instruction and engaged in conduct unbecoming of a teacher when she sent a letter to West Point regarding a provisional cadet’s involvement in the April 2010 incident even though the Superintendent had instructed Complainant not to send the letter. The notice states that Complainant’s “misconduct was egregious” and Complainant’s “conduct was in direct opposition to [her] role to be an advocate for students.” The notice further states that “[Complainant’s] personal bias against [the student] undermines the credibility of DoDDS as an educational institution that wants all students to succeed, and is truly conduct unbecoming [of] a teacher.”

One parent described the administration's decision as "reducing [Complainant's] long and successful career to nothing but a humiliation."

P4 and the Assistant Principal offered what appeared to be valid reasons for reassigning Complainant to French classes on the Master Schedule. Specifically, P4 stated that Complainant's DoDEA Certificate indicated that she was certified to teach French and a full-time French teacher had recently retired. However, the AJ found, as do we, that the preponderance of the evidence supports that these reasons were pretext for discrimination. The record includes testimony from the Patch High School Department Chair of Guidance Counseling ("CGC"), who was responsible for assisting in the development of the Master Schedule. The CGC stated that neither P4 or the Assistant Principal collaborated with the Guidance Counseling Department or adhered to "any of the historical protocol" with developing the Master Schedule. As a result, the CGC explained that the Master Schedule was "illogical," developed "behind closed doors," and it was unclear to the CGC what data P4 and the Assistant Principal relied on to develop the schedule. The CGC stated that she believed P4 and the Assistant Principal "used the Master Schedule as a tool to reward and to punish," and she believed that Complainant's assignment to teach French classes was a "really mendacious act." Additionally, testimony from three other teachers at Patch High School stated that they also believed that the Master Schedule was used to retaliate against Complainant. Therefore, we find that the evidence supports that P4's and the Assistant Principal's proffered reasons for reassigning Complainant to teach French were pretext for retaliatory harassment.

After assigning Complainant to teach French, the AJ further determined that P4 and the Assistant Principal engaged in an ongoing campaign of "interrogating and investigating" Complainant about how she taught and what she said to students in her classroom, subjecting her work to intense scrutiny, nitpicking and making unreasonable demands following unannounced classroom visits, and lurking outside her classroom door. At the hearing, Complainant described their efforts as "relentless" and said she had never before received this level of scrutiny in her three decades of teaching. The evidence also indicated that the two administrators repeatedly questioned students about Complainant's actions in the classroom.

In addition, P4 admonished Complainant in a variety of both trivial and more significant ways. On April 22, 2015, P4 issued Complainant a Letter of Caution for purportedly making disparaging comments to her students about the high school administration. He also issued Complainant a May 13, 2016 Letter of Reprimand because she left an after-school departmental meeting, over P4's objection, to attend a medical appointment. According to testimony, the incident resulting in the Letter of Reprimand involved P4 yelling at Complainant, in front of her colleagues, to sit down and not leave the meeting even though she had a longstanding medical appointment with her psychiatrist. Earlier in the meeting, P4 had angrily dismissed Complainant's request to return to teaching English for the following year.

After careful consideration of the entire record, we conclude that substantial evidence supports the AJ's conclusion that the totality of events supports a finding that P4 and the Assistant Principal subjected Complainant to an ongoing retaliatory-based hostile work environment.

Constructive Discharge (Involuntary Retirement)

Ultimately, on November 28, 2016, Complainant gave notice that she planned to retire, and that the retirement was involuntary.

The central question in a constructive discharge case is whether the employer, through its unlawful discriminatory behavior, made the employee's working conditions so difficult that any reasonable person in the employee's position would feel compelled to resign. Carmon-Coleman v. Dep't of Def., EEOC Appeal No. 07A00003 (Apr. 17, 2002).

As stated above, we agree with the AJ's determination that the Agency's actions were motivated by a retaliatory animus. The record supports that Agency officials retaliated against Complainant after she reported the April 2010 incident. Specifically, Agency officials removed Complainant's English classes that she had taught for the preceding 30 years and required that she teach French, a foreign language that she had not spoken since 1977. Agency officials subjected Complainant to interrogations, investigations, and unannounced classroom visits during the period she was assigned to teach French. Agency officials also relocated Complainant's office of 20 years and subjected Complainant to various disciplinary actions including a Letter of Caution and a Letter of Reprimand. In her resignation letter, Complainant states that P4 and the Assistant Principal "have carried out a reign of terror in which teachers of experience and expertise are moved out of their areas of content and forced to teach classes and subjects they have never taught." Complainant further states in her resignation letter that P4 "intentionally removed [her] from [her] area of passion and expertise, he knew that it would affect [her] confidence, [her] sense of self, [her] identity." We find it reasonable that an employee would feel compelled to resign working in these conditions.

We note that P4 testified that he announced his retirement in September 2016 and retired from Patch High School in November 2016 around the time that Complainant gave notice of her involuntary retirement on November 28, 2016 which was effective June 16, 2017. However, the record indicates that the Assistant Principal remained at Patch High School and this administrator was actively involved with reassigning Complainant to teach French classes. In fact, Complainant's psychologist testified that "once [P4] left, [Complainant] was more terrified of retaliation than when he was there . . . and [Complainant] was afraid of [the Assistant Principal]."

Past Pecuniary Damages

Pecuniary damages are quantifiable out-of-pocket expenses incurred as a result of the Agency's discriminatory actions. Damages for past pecuniary damages will not normally be granted without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals of actual loss and expenses. The AJ awarded \$16,125.00 in past pecuniary damages to cover Complainant's co-pays for medical treatments she incurred during the period at issue.

Because neither the Agency nor Complainant dispute the past pecuniary damages amount, we find no reason to disturb the AJ's finding on this award. Therefore, we find that Complainant is entitled to a past pecuniary award of \$16,125.00 plus damages.

Non-pecuniary Damages

Non-pecuniary compensatory damages are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for non-pecuniary damages claims includes statements from Complainant and others, including family members, co-workers, and medical professionals. See id.; see also Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Non-pecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency's discriminatory actions. See Carter v. Duncan-Higgans. Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance at 13. Additionally, the amount of the 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. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)).

When a Complainant has a pre-existing condition, the Agency is liable only for the additional harm or aggravation caused by the discrimination. If Complainant's pre-existing condition inevitably would have worsened, the Agency is entitled to a reduction in damages reflecting the extent to which the condition would have worsened even absent the discrimination; the burden of proof is on the Agency to establish the extent of these offsets. Wallis v. U.S. Postal Serv., EEOC Appeal No. 01950510 (Nov. 13, 1995) (citing Maurer v. United States, 668 F.2d 98 (2d Cir. 1981)); Finlay v. U.S. Postal Serv., EEOC Appeal No. 01942985 (Apr. 29, 1997). The Commission notes, therefore, that Complainant is entitled to recover damages only for injury, or additional injury, caused by the discrimination. See Terrell v. Dep't of Housing and Urban Dev., EEOC Appeal No. 01961030 (October 25, 1996); EEOC Notice No. N 915.002 at 12.

The AJ awarded \$200,000.00 in nonpecuniary damages. We conclude is appropriate and consistent with the amounts awarded in similar cases. In her cross-appeal, Complainant states that her psychologists diagnosed her with depression, anxiety, and post-traumatic stress disorder ("PTSD"). Specifically, Complainant states that she experienced "nightmares, a strong startle reflex, hypervigilance to threats of danger, anger, irritability, or concentration problems." Complainant further states that she "would wake up multiple times at night," and she became "depressed and anxious and out of control while she sought and obtained treatment for years" because of Agency management's retaliatory actions.

We acknowledge that this award should *only* encompass the harm Complainant sustained by the discriminatory act at issue to the extent that this discriminatory act exacerbated Complainant's preexisting psychiatric diagnosis. In this case, testimony from two of Complainant's psychologists ("Psych 1" and "Psych 2")⁴ indicate that Complainant was raped at the age of 10 and suffered emotional trauma including PTSD.⁵ The psychologists explained that Complainant was able to recover, complete her education, marry, and have children. However, her difficulties at work activated her PTSD symptoms which had remained dormant for years.

Psych 1 testified that she diagnosed Complainant with PTSD. Psych 1 further testified that Complainant stated that she had "found [her] calling" in the classroom as a teacher. Psych 1 explained that Agency officials

took away her skills that had formed a big part of her identity, had made her proud and confident, suddenly taking away what she knew how to do and making her do something that she was totally inept was the trigger for really having the floor pulled out from under her.

Psych 1 further stated that the [retaliatory harassment brought]

back memories of everything so the idea that she couldn't control how she was being treated and it was a hostile kind of treatment that she never knew what she was going to see from day to day . . . not just teaching French, but just everything that she asked for was denied. When other people seemed to be getting normal responses, she was getting hostile responses, and they were greatly magnified by her feeling of danger . . . or being retaliated . . . there were triggers . . . to re-awaken her symptoms of being in a hostile world and of being, afraid of being hurt, and she had a lot of those fears. I think they came and went, but they were primarily every day there was something. Sometimes, she said she would sit in her car and scream because she was so upset . . . she said she never knew what she was going to face from day to day.

Psych 1 explained that Complainant's symptoms included loss of appetite, weight loss, back pain, stress related diarrhea, flashback and nightmares, migraines, extreme irritability with suicidal thoughts, panic attacks, and insomnia which all occurred during the period that Psych 1 treated Complainant.

Psych 2 testified that she diagnosed Complainant with PTSD and acute stress disorder stemming from her current stress at work.

⁴ Psych 1 treated Complainant from September 2013 through December 2016 and Psych 2 treated Complainant from January 2017 through mid-May 2017.

⁵ Psych 1 testified that Complainant had experienced panic attacks, bulimia, and obsessive-compulsive eating disorder.

Psych 2 explained that the Complainant's short-term therapy goals were to overcome stress and anxiety to enable her to eat and sleep well and enjoy everyday life. Complainant's long-term therapy goals were to "overcome stress of the current situation and also to overcome her PTSD." Psych 2 clarified that acute stress disorder occurs "when somebody is directly experiencing the traumatic event or is living through and it is also extreme exposure to adverse work scenario." Psych 2 stated that Complainant's symptoms from this disorder included "difficulty falling asleep, frequent crying, anxiety, nervousness, stress, mood swings in the sense of sadness to normal, stress, fatigue, guilty of repercussions to her husband, scared, fear, [and] indigestion." Psych 2 also estimated that Complainant would require roughly an additional 100 or 125 therapy visits over the course of two and one-half years.

Three Patch High School teachers and the CGC testified to the emotional and physical harm Complainant endured while being subjected to a hostile work environment where they observed that Complainant was "professionally devastated," "shaken to her core," and would cry before beginning her work day. They further indicated that Complainant lost weight and did not sleep at night.

It is evident from the record that Complainant was previously diagnosed with PTSD and this pre-existing condition worsened, during the period that the Agency reassigned Complainant to teach French classes. We further note that Psych 2 indicated that Complainant had acute stress disorder, which was a new diagnosis stemming directly from the effects of the hostile work environment Complainant endured during the period at issue. We find an award of \$200,000 is neither monstrously excessive nor the product of passion or prejudice and is consistent with prior EEOC precedent. See Shameka M. v. Dep't of Veterans Affairs, EEOC Appeal Nos. 0120172281, 0120181116, 012018117 (Apr. 4, 2019) (awarding \$225,000 in non-pecuniary damages to a complainant with preexisting diagnosis of recurrent major depressive disorder and suffered severe emotional and physical distress resulting from more than two years of sexual harassment and retaliation. Complainant experienced, among other symptoms, substantial aggravation of her depression, suicidal thoughts, flashbacks to when she was molested and raped as a child, crying episodes, anxiety, confusion, embarrassment, sleep disturbance, and she required continuing medical and physiological treatment); Lauralee C. v. Dep't of Homeland Sec., EEOC Appeal No. 072015002 (Sept. 25, 2017) (awarding \$200,000 in non-pecuniary damages to a complainant with preexisting history of PTSD, two years of harassment, with lingering effects of severe emotional harm and Agency not the sole cause of emotional harm).

Costs

By federal regulation, the Agency is required to award attorney's fees⁶ 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). Reasonable costs can include court reporter fees, transcripts, printing, witnesses, photocopying, mileage, postage, telephone calls, or any other reasonable out-of-pocket expense incurred by the attorney that are normally charged to a fee-paying client in the normal course of providing representation. 29 C.F.R. § 1614.501(e)(2)(ii)(C); MD-110 at 11-12 and 11-13.

To determine the precise amount of fees and costs due, the complainant's attorney must submit to the agency a verified statement of attorney's fees (including witness fees, if applicable) and other costs, as appropriate. See 29 C.F.R. § 1614.501(e)(2)(i). This statement must be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. Id. The agency must then issue a decision determining the amount of attorney's fees or costs it deems to be due, and include in this decision the specific methods applied in determining the amount of this award. See 29 C.F.R. § 1614.501(e)(2)(ii)(A). If the complainant is dissatisfied with this decision, he or she may appeal it to EEOC. Id.

In her cross-appeal, Complainant, through her representative, submitted an original request for costs totaling \$32,383.08. Complainant included an itemized list for printing, copying, and mailing; hotel costs for depositions and hearings, traveling expenses (airfare and mileage), witness fees, and fees incurred from processing Complainant's initial and amended complaints. Our review of the record indicates that Complainant submitted receipts for all itemized costs except for \$1150.55, which consisted of a November 2015 deposition meeting in Germany (\$200.00), November 2015 binder folders purchased in Portugal (\$25), and mileage expenses occurring November 3 – 11, 2017 (\$925.55). Therefore, we determine that Complainant is entitled to a reduced amount of cost totaling \$31,232.53 plus interest.

Removal of Disciplinary Actions

The Agency shall expunge from all personnel and associate Agency records the April 22, 2015 Letter of Caution and the May 13, 2016 Letter of Reprimand.

Reinstatements and Related Benefits

The Agency is ordered to offer Complainant reinstatement to an Advanced Placement ("AP") English Teacher position at Patch High School, or a substantially equivalent position located in Stuttgart, Germany or another school located within close proximity. The offer of reinstatement shall include any benefits customarily afforded to DoDDS Teachers, such as a transportation agreement and living quarters allowance.

⁶ Complainant's representative was not a currently licensed attorney. Therefore, she has not requested attorney's fees.

The Agency shall also be required to pay for Complainant's moving expenses back to Germany, including but not limited to, the cost of movers, temporary storage, and transportation back to Germany.

Accordingly, we REVERSE the Agency's final order rejecting the AJ's findings of discrimination and retaliation and we REMAND this matter to the Agency in accordance with the ORDER below.

ORDER

The Agency is ORDERED to take the following actions:

1. Within sixty (60) calendar days from the date this decision is issued, the Agency shall offer Complainant retroactive reinstatement to an AP English Teacher position at Patch High School or a substantially equivalent position located in Stuttgart, Germany or another school within close proximity.
2. Within one-hundred and twenty (120) calendar days from the date this decision is issued, the Agency shall provide Complainant with a back pay award, with interest, that includes her salary retroactive to the date of her retirement, as well as other employment benefits. If Complainant declines reinstatement, the back pay period will end on the date she declines. The back pay award shall be offset by any retirement benefits received by Complainant.
3. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$200,000 in non-pecuniary compensatory damages and \$16,125 in past pecuniary compensatory damages, for a total of \$216,125.
4. Within sixty (60) calendar days from the date this decision is issued, Agency will expunge the April 22, 2015 Letter of Caution and the May 13, 2016 Letter of Reprimand from all personnel and associated Agency records.
5. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$31,232.53 for litigation costs.
6. Within ninety (90) calendar days from the date this decision is issued, the Agency will require the responsible management officials currently employed by the Agency to take at least eight (8) hours of in-person EEO training focusing on the prohibition against retaliation for engaging in prior protected activity.
7. Within sixty (60) calendar days from the date this decision is issued, the Agency shall consider taking disciplinary action against the responsible management officials currently employed by the Agency. Training shall not be considered as disciplinary action.

POSTING ORDER (G0617)

The Agency is ordered to post at its Patch High School facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission.

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. **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

August 20, 2019
Date