



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

Celeste W. R. Gray,
Complainant,

v.

Ken L. Salazar,
Secretary,
Department of the Interior,
(National Park Service),
Agency.

Appeal No. 0120072136

Agency No. FNP03062

DECISION

On March 1, 2007, complainant filed an appeal from the agency's January 31, 2007 final decision in which the agency addressed complainant's claim for compensatory damages based on a previous finding of sexual harassment, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.* The appeal is deemed timely and is accepted pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission **MODIFIES** the agency's final decision on compensatory damages.

ISSUE PRESENTED

Whether the agency's award of \$19,843.03 in compensatory damages is appropriate, or should be increased pursuant to complainant's request.

BACKGROUND

On July 30, 2003, complainant filed a complaint of discrimination against the agency in which she alleged that she was subjected to discriminatory harassment on the bases of race (African-American), sex (female), disability, and, in reprisal for protected activity. At the conclusion of the investigation, complainant was provided with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). In accordance with complainant's request, the agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that complainant failed to prove that she was subjected to discrimination as alleged. Complainant appealed the FAD to the Commission.

In *Celeste W. R. Gray v. Department of the Interior*, EEOC Appeal No. 0120053424 (May 5, 2006), the Commission concluded that the agency correctly found no discrimination as to some of complainant's claims of harassment based on sex, race, disability and reprisal, but found that complainant did prove that she was subjected to sexual harassment when her supervisor did the following: rubbed her shoulders; called her into his office just to pick up trash off the floor in front of his desk; put a bottle of oil on her desk for her hair; told her that there was "nothing he did not know about a woman's body"; when complainant told her supervisor she was going out of town with a friend, the supervisor said, "I hope you don't give up nothing"; and the supervisor told complainant that her outfit was risqué. The Commission found that the testimony by two co-workers corroborated complainant's allegations, and that testimony further revealed that the supervisor asked another worker what kind of bra she had on, and that the supervisor looked at another employee's breasts and said, "Oh, I see the girls this morning" on more than one occasion.

As remedial action, the Commission ordered the agency to provide EEO training for the harassing supervisor; consider taking disciplinary action against the supervisor (now retired); conduct a supplemental investigation pertaining to complainant's entitlement to compensatory damages incurred as a result of the agency's discriminatory actions in this matter, and within forty-five (45) days of its receipt of complainant's evidence, issue a final decision determining complainant's entitlement to compensatory damages, together with appropriate appeal rights; and post a notice concerning the discrimination that was found at the agency's Higher Education and Park Initiative facility, located in Washington, D.C.¹

Complainant subsequently claimed, and provided evidence in support of her claim, that she was entitled to \$200,000.00 in non-pecuniary damages and \$49,459.75 in pecuniary damages. In terms of non-pecuniary damages, complainant claimed to have experienced all of the following directly due to the sexual harassment that she was subjected to: hypertension, headaches, sleep disorder, significant weight gain, psychological effects, depression, anxiety, nightmares, low self-esteem, increased alcohol usage, and social and personal effects (including detrimental effects on her relationship with her boyfriend).

¹ Complainant subsequently filed a Petition for Enforcement on December 19, 2006, in which complainant alleged that the agency had failed to make any determination with respect to her entitlement to compensatory damages. In *Gray v. Department of the Interior*, EEOC Petition No. 0420070008 (August 18, 2008), the Commission found that, in its response to petitioner's Petition for Enforcement, dated January 31, 2007, the agency had issued a final decision awarding petitioner \$19,843.00 in compensatory damages. Accordingly, the Commission denied the Petition for Enforcement as the record demonstrated that the agency was in compliance with the Order at hand.

The FAD found that due to the sexual harassment complainant experienced psychological episodes, depression (not major), hypertension, therapy, weight gain, *etc.* However, her new symptoms such as sleep apnea, continual use of alcohol, and her continued inability to relate to her boyfriend were not proximate causes of the discrimination since she left the RMO's supervision in July, 2003. The agency asserts that the record shows when complainant was reassigned to the Risk Management Division, she had no further contact with the RMO, no further incidents were reported, and complainant's doctor noted her significant improvement in September, 2003. Based on its review of the evidence submitted by complainant in support of her claim for compensatory damages, the agency found that complainant was entitled to \$10,000.00 in non-pecuniary damages.

As to pecuniary damages, the FAD accepted complainant's claim for \$8,137.50 for the psychiatrist's Forensic Examination since it singularly dealt with sexual harassment as evaluated by the expert witness. Next, the agency found that because complainant was only successful in one out of her four claims in her formal complaint, she was entitled to one quarter the total amount of \$2,055.00 claimed for psychotherapy bills (accrued between July 1, 2003 and May 5, 2004) and Hospital Emergency Room bills in the amount of \$1,779.75. As to future pecuniary damages, the agency also awarded complainant one quarter of the \$650.00 requested for Psychotherapy for five (5) months at \$130.00 per session. The agency noted that it was not responsible for complainant's remaining claims for pecuniary damages, especially the couple's therapy. The agency also noted that it was not responsible for rectifying complainant's individual health problems. The agency therefore, found that complainant was entitled to \$9,096.19 in pecuniary damages, bringing the total compensatory damages award to \$19,843.03.

CONTENTIONS ON APPEAL

On appeal, complainant, through counsel, contends that the FAD misinterpreted the record as indicating that she only suffered emotional distress when she was directly supervised by the sexual harasser and that her emotional suffering stopped in late 2003 after she was transferred. Complainant states that in fact, her treating psychologists and a psychiatrist projected that as a result of the severity of complainant's emotional distress, she will not complete her recovery until eight years after the sexual harassment began. Complainant states that additionally, the agency ignores six affidavits signed in 2006 by complainant, her family members, co-workers and friends describing her severe ongoing emotional suffering. Based on these facts, complainant avers that a compensatory damages award of \$185,000.00² in non-pecuniary damages and \$43,359.75 in pecuniary damages would be appropriate and consistent with similar awards by the Equal Employment Opportunity Commission. Complainant additionally requests an opportunity to submit evidence in support of an enhancement of the award as necessary to pay the required taxes. In reply, the agency avers that its calculation of compensatory damages was reasonable and asks the Commission to affirm its FAD.

² This amount is reduced from complainant's prior request for \$200,000.00.

ANALYSIS AND FINDINGS

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. Section 102(a) of the CRA, codified as 42 U.S.C. § 1981a, authorizes an award of compensatory damages as part of the "make whole" relief for intentional discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended. Section 1981a(b)(3) limits the total amount of compensatory damages that may be awarded to each complaining party for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, according to the number of persons employed by the respondent employer. The limit for an employer with more than 500 employees, such as the agency herein, is \$300,000.00. 42 U.S.C. § 1981a(b)(3)(D).

The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002, (July 14, 1992) (Guidance).

Non-pecuniary Damages

In *Carle v. Department of the Navy*, the Commission explained that evidence of non-pecuniary damages could include a statement by the complainant explaining how he or she was affected by the discrimination. EEOC Appeal No. 01922369 (January 5, 1993). Statements from others, including family members, friends, and health care providers could address the outward manifestations of the impact of the discrimination on the complainant. *Id.* The complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. *Id.* Non-pecuniary damages must be limited to the sums necessary to compensate the injured party for the actual harm and should take into account the severity of the harm and the length of the time the injured party has suffered from the harm. *Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652 (July 17, 1995).

In support of her claim for non-pecuniary damages, complainant has submitted numerous detailed statements from herself and witnesses, as well as letters/reports from medical professionals who have treated her, who attest to the harm which she suffered due to the sexual harassment found in this case. As previously noted, complainant requested \$185,000.00 in non-pecuniary compensatory damages, and the agency found that only \$10,000.00 in non-pecuniary damages are warranted. The Commission initially notes that we do not find based on the evidence, that as soon as complainant changed supervisors, her emotional distress ceased. The medical and testimonial evidence in the record suggest that complainant's emotional distress and physical problems resulting from the sexual harassment may have improved somewhat after she left the harasser's supervision, but there remained numerous

significant residual effects. For instance, in a report dated July 21, 2006 (several years after the harassment had ceased), complainant's psychiatrist stated the following:

She experienced a Major Depressive Episode during [the time of the harassment] which had a duration of more than a year with residual symptoms still present. She also developed a new diagnosis of Alcohol Abuse, as she was using alcohol as a maladaptive means of coping with her distress and anxiety. She reports dysfunction in her ability to perform her work effectively and efficiently and dysfunction in her interpersonal relationships with her boyfriend, with her daughter and with her friends. She felt less like "going to places and seeing my family, I couldn't be bothered with them."

Forensic Examination Report, at 1. Additionally, the report states "Unfortunately, by the time she was moved to a new position, [Complainant] feels that she was 'not the same person. I was nasty, ornery, angry. I had no patience.'" *Id.*, at 9. The report goes on to state "[Complainant] reports that even after being moved, problems continued in her relationship with her boyfriend. She indicates that at one point, he wanted to leave because he was so frustrated and upset over her constant reports about her boss' harassment." *Id.*, at 10.

The report continues as follows:

After she was placed in a new position at work, [Complainant's] symptoms gradually improved over the next year, however she reports feeling that she is still not her normal self. Sleep improved as did her energy and her attention and concentration. She now feels somewhat more confident, however she still experiences depressed mood at times and has not been able to lose the weight she gained. She still experiences decreased libido and a feeling that it is difficult to be emotionally and physically intimate with her boyfriend. She is emotionally over-reactive, not being able to appreciate when he is joking with her.

Id., at 11.

In complainant's statement of May 2006, she indicates the following about the persisting symptoms:

Today, I still endure headaches and am unable to trust my supervisors. I have frequent nightmares and drink beer excessively. I want to be alone and I do not associate with my daughter and grandchildren as much as before this happened. My

sex life changed drastically because I'm just not in the mood. I have severe mood changes. I gained so much weight that I have low self-esteem now. Now, whenever I go down to the 5th floor where I worked for [the harasser], just being there elevates my blood pressure to an uncontrollable level and I feel faint... The humiliation and mental anguish I endured left me feeling nervous and distrustful. It was like an adverse rollercoaster working under [the harasser's] supervision. Not a day would pass when I did not feel depressed... The depression I suffer feels as if it is long-term because even though [RMO] retired, I still feel depressed from the thoughts of his control and dominance. Just the mention of his name brings tears to my eyes. I lost numerous girlfriends because they asked me to bring them something back from lunch, and I yelled at them for no apparent reason other than the memory of having to pick up [the harasser's] breakfast and lunch... Prior to the sexual harassment I did not feel depressed. Today, the least little negative thing that someone says makes me feel depressed and unappreciated.

In their affidavits, complainant's witnesses all echo the fact that the sexual harassment essentially changed complainant into an emotionally different person (sad, depressed, irritable, angry, self-conscious) with physical problems (high blood pressure, weight gain, headaches, increased alcohol consumption as a "comfort"), whose relationships with those close to her deteriorated as a result.

After a thorough review of the record, we find that \$10,000.00 is inadequate, and \$185,000.00 is too high an amount to compensate complainant. We find that \$100,000.00 is appropriate to compensate complainant for her more than three years of severe physical and emotional pain and suffering that resulted from the sexual harassment. We point out that non-pecuniary compensatory damages are designed to remedy a harm and not to punish the agency for its discriminatory actions. *See Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 311-12 (1986) (stating that compensatory damages determination must be based on the actual harm sustained and not the facts of the underlying case). The Commission notes that this award is not "monstrously excessive" standing alone, is not the product of passion or prejudice, and is consistent with the amount awarded in similar cases. *See Santiago v. Department of the Army*, Appeal No. 01955684 (October 14, 1998) (awarding \$125,000.00 in non-pecuniary damages where complainant suffered depression and other emotional and mental disorders, and severe chest and stomach pains, digestive problems, and incidents of shortness of breath due to three years of verbal abuse and sex and age-based discrimination by her supervisor); *Kelly v. Department of Veterans Affairs*, EEOC Appeal No. 01951729 (July 29, 1998) (awarding \$100,000.00 in non-pecuniary damages where hostile work environment caused complainant to develop severe psychological injury, from which she was still suffering at the hearing); *Chow*

v. Department of the Army, EEOC Appeal No. 01981308 (August 5, 1999) (\$100,000.00 for physical and mental suffering due to supervisor's harassment over two-year period).

Pecuniary Damages

Pecuniary losses are out-of-pocket expenses that are incurred as a result of the employer's unlawful action, including moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. Enforcement Guidance: 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.

After a review of the record, the Commission finds that complainant is entitled to the entire pecuniary damages award requested. We do not find, as the agency contends, that compensation for the harm suffered should be reduced to one quarter since complainant only prevailed on one of the four claims she initially raised in her complaint. The evidence shows that complainant's claimed pecuniary losses resulted directly from the sexual harassment to which complainant was subjected. Complainant is entitled to all pecuniary damages requested (including future pecuniary damages since there is evidence that complainant will continue to suffer the consequences of discrimination for up to eight years after the harassment ended).

We address briefly the agency's contention that the request for compensation for couple's therapy is unreasonable. We find it reasonable and appropriate to award complainant the requested out-of-pocket costs to pay for couple's therapy (weekly sessions for one year) as the record clearly indicates that complainant's relationship was severely detrimentally affected by the harassment at issue. Additionally, as to the agency's assertion that it cannot be held responsible for "rectifying an individual's health problems in general", we agree, but find that here, complainant's weight gain (increased from 145 lbs. - 220 lbs.) was not simply part and parcel of her individual health problems, but was proximately caused by the harassment, and occurred precisely during the time when she was being harassed.³

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the FAD and find that the agency is required to pay \$100,000.00 in non-pecuniary damages, as well as \$49,459.75 in pecuniary damages, for a total of \$149,459.75. The agency shall comply with the Order below.

³ Complainant's psychiatrist indicates in her Forensic Examination Report "[Complainant] feels that she does not want to risk being attractive to men for fear of how they might treat her. Regarding her weight gain, she notes, 'I figured if I got fat he would leave me alone!'"

ORDER (D0403)

Within sixty days of the issuance of the decision, or the date the decision becomes final, the agency is hereby ORDERED to pay complainant \$149,459.75 in compensatory damages.⁴

ATTORNEY'S FEES (H0900)

If complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/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 this decision becoming final. 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 (K0408)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, D.C. 20013. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. If the agency does not comply with the Commission's order, the complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

⁴ The Commission has included the tax consequences of the compensatory damages in the award that we make herein. Accordingly, complainant shall not request or be provided any additional amount to cover any tax consequences of this compensatory damages award.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M1208)

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. *See* 29 C.F.R. § 1614.604(c).

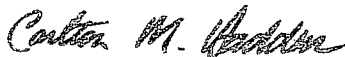
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0408)

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 (Z1008)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above (“Right to File A Civil Action”).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

JUL 24 2009

Date