

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
Washington, DC 20013**

**Marta Fonda-Wall, Complainant,
v.
Eric H. Holder, Jr., Attorney General,
Department of Justice, Agency.**

Appeal No. 0720060035
Hearing No. 320-2003-08067X
Agency No. M010039

DECISION

Following its December 22, 2005 final order, the agency filed a timely appeal which the Commission accepts pursuant to 29 C.F.R. § 1614.405(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. The agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. [...]

BACKGROUND

Substantial evidence in the record supports the AJ's finding of the following facts:

At all times relevant to this complaint, complainant worked in the U.S. Marshal Service. This position required the incumbents to carry a gun and maintain a top secret security clearance.

From 1995 to 1998, complainant's supervisor (S1) had an intimate consensual sexual relationship with complainant's coworker. Sometime in 1998, the coworker wanted to discontinue her sexual relationship with S1. However, S1 ignored her request and forced her to have sexual intercourse and oral sex with him in his office. S1 also subjected the coworker to verbal abuse in front of her peers. Once the sexual abuse ceased, the verbal abuse escalated.

Complainant reported S1's abuse of her coworker to her first line manager (M1), who was a subordinate to S1. Other employees also told M1 about S1's abuse towards the coworker. The frequency of the reports of abuse to M1 varied from once a month to once every few months. As a result, M1 had several discussions with S1 about his abuse towards the coworker, however, the abuse did not cease. Despite agency policy, M1 did not report the

harassment to more senior agency officials.

In March 2001, the abuse escalated. Complainant observed S1 tear a \$10 bill in half, throw half of it toward the coworker and say, "I'll pay you the other half when I damn well feel like it." A few days later, complainant heard S1 subject the coworker to verbal abuse while standing so close to the coworker that she couldn't stand up. Alarmed at what she saw, complainant stepped between S1 and the coworker, placed her hand on S1's chest, and said to him, "You've got to stop this. You've got to stop this right now." Complainant reported what she saw to an EAP representative. Around April 24, 2001, the EAP representative, who was a friend of S1, told S1 that complainant had reported his mistreatment of the coworker.

On May 4, 2001, complainant informed S1 that she was having problems sleeping and that she was experiencing symptoms of anxiety in connection with an upcoming execution. S1 told complainant to go home. Subsequently, S1 purposely misrepresented to the EAP representative that complainant had reported experiencing "panic attacks" and an inability to sleep for 6 days. On May 8, 2001, relying solely on S1's misrepresentations, the EAP representative instructed S1 to take complainant's weapon as a result of lack of sleep and place her on light/limited duty.

On or about May 8, 2001, S1 provided a similarly distorted account of complainant's health to the Acting Chief. Relying solely on S1's misrepresentations, the Acting Chief directed agency management to confiscate complainant's government vehicle.

On or about May 11, 2001, S1 falsely accused complainant of revealing sensitive national security information to party X (herein referred to as "X"). Specifically, S1 untruthfully alleged that complainant breached security when she revealed the whereabouts of S1 to X. As a result, X was removed from complainant's caseload and was put under S1's responsibility. S1 used his power over X by means of his funds, travel, and other needs to influence X to corroborate S1's allegations against complainant.

On May 21, 2001, S1 issued complainant a memorandum alleging she had engaged in leave abuse and placed her on severe leave restrictions. The basis for the restrictions was S1's erroneous calculation that complainant had accrued a negative 25 1/2 hours of leave balance. The leave restrictions subjected complainant to burdensome requirements relative to the documentation required from medical providers in circumstances where normally employees were not required to provide documentation. The memorandum threatened discipline, including removal, for failure to comply with the leave restrictions.

On May 23, 2001, an agency contracted social worker cleared complainant to perform her full duties and to have her gun returned to her. When S1 became aware that complainant was to have her gun returned to her, he became extremely agitated and angry. S1 yelled at complainant and told her to come into M1's office to retrieve her weapon. When she hesitated, he yelled "If you want your f--king gun, get the f--k in here right now!" Once complainant entered the office, S1 became enraged. He slammed the door shut and began to display aggressive behavior towards complainant. He accused complainant of impugning his integrity, and then he suddenly and aggressively lurched toward her and came within 2 or 3 feet of her body. Complainant then ran out of the office, with S1 and M1 following her.

Complainant asked M1 to protect her from S1 because she thought he was going to attack her. S1 ordered complainant to return to M1's office. When she refused, S1 said that he was going to write her up for insubordination. S1 left complainant's workstation, but shortly returned and said "Just get out of here. Get the f--k out of here and don't ever come back!"

On May 24, 2001, complainant told the EAP representative that she believes S1's behavior was in retaliation for her stepping in between S1 and the coworker when he was verbally abusing her. On May 25, 2001, S1 called a meeting in his office attended by various subordinates, including the coworker he had been harassing. S1 discussed the incident on May 23 and, under S1's influence, the subordinates came to a consensus about what had occurred on May 23. After the meeting, each participant submitted a narrative of the May 23 event, describing S1's behavior as normal and unremarkable and attributed the events to complainant's mental instability. Many of the witnesses later recanted their account or contradicted their narratives during the hearing. For example, the coworker who had been harassed later recanted her narrative and stated that she lied because S1 threatened to destroy her marriage and she was afraid of her abusive relationship with S1 being revealed.

On or about June 5, 2001, the agency's medical program staff recommended that the agency should again confiscate complainant's gun and government vehicle pending receipt of additional information regarding complainant's medical condition. On June 7, 2001, S1 and M1 confiscated complainant's gun at a preordained location. M1 contacted the local Police Chief and requested back up at the meeting place. Coincidentally, during that conversation the Police Chief stated that he knew complainant because in May 2001, complainant had displayed her official agency badge to the local police officers.

On or about June 13, 2001, complainant initiated an OIA complaint against S1, alleging his verbal abuse towards her coworker was conduct prohibited by agency policy. On June 18, 2001, the OIA advised complainant that the matters raised were beyond the jurisdiction of the OIA to investigate and they closed the matter. Also on June 18, 2001, S1 confiscated complainant's cell phone for exceeding the allowable minutes of use during the months of April and May 2001.

On June 27, 2001, S1 initiated an OIA complaint against complainant, alleging improper use of her official identification during the incident with the local Police Department in May 2001. Official identification misuse is prohibited by the agency's Code of Professional Responsibility.

On August 8, 2001, the agency ordered complainant to submit to a fitness for duty examination, to take place on August 21, 2001. On October 16, 2001, the agency found complainant fit for duty, including carrying a firearm, without any restrictions or accommodations.

On October 26, 2001, the agency proposed a two-day suspension for complainant for improper use of her official identification when she showed it to the local Police Officers.

On November 7, 2001, the agency's Security Programs Manager advised complainant that her security clearance was being suspended because she was accused of disclosing sensitive information to X. As a result, the agency suspended complainant from work for 24 days.

On November 12, 2001, the agency assigned complainant to a detail to a non-sensitive position.

On November 16, 2001, the agency announced a vacancy announcement for a criminal investigator position. Complainant felt that she was qualified for the position and applied. She was not selected for the position because her security clearance was suspended.

On January 22, 2002, the agency notified complainant that, based upon her security clearance suspension, she would be permanently reassigned to an office in a different state. The notice further advised complainant that based upon the mobility agreement that she signed when she first joined the agency, she would be terminated if she refused the reassignment.

On February 15, 2002, the agency deactivated complainant's top secret security clearance. The reason given was that, given her duties in her new assignment, there was no longer a need for her to hold a top secret clearance. The agency no longer pursued the merits of the original charge it had leveled against complainant, i.e., that she breached security.

On March 28, 2002, M1 rated complainant as unacceptable on her performance appraisal for the period of April 2001 to March 2002. In September 2002, the performance appraisal was revised to acceptable.

Complainant first contacted an EEO counselor on May 25, 2001, to complain about the sex discrimination towards her coworker and her reprisal discrimination. On October 28, 2001, complainant filed an EEO complaint alleging that she was discriminated against in reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. She was physically intimidated and verbally abused;
2. She was charged Leave Without Pay;
3. The agency revoked her weapon, government vehicle, and cellular phone;
4. The agency proposed a two-day suspension;
5. Her top secret security clearance was suspended;
6. She was not selected for a position;
7. She was suspended for 24 days;
8. She was transferred to work in another locale;
9. She was permanently reassigned to work in another state; and
10. She received an unacceptable performance evaluation.

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). Complainant timely requested a hearing and the AJ held a hearing that lasted nine days and concluded February 5, 2004. The AJ subsequently issued a decision finding that complainant established by a preponderance of the evidence that she was subjected to retaliation for prior protected EEO activity when she was physically intimidated and abused; had severe restrictions placed on her leave; had her weapon and vehicle revoked; and received a bad performance evaluation.¹ Additionally, the AJ found the suspension of complainant's security clearance discriminatory because it was based upon S1's willful

retaliatory lies. The AJ further found that the discriminatory suspension of the security clearance was the proximate cause of the subsequent 24-day suspension, and the detail and ultimate relocation to another state were also discriminatory. The AJ awarded complainant pecuniary damages in the amount of \$187,263.72. Complainant was also awarded non-pecuniary damages in the amount of \$150,000.00. Further, complainant was awarded \$199,492.89 in attorney's fees, and \$11,557.02 in legal costs. The AJ also ordered the agency to either reactivate complainant's security clearance or reconsider its decision revoking complainant's security clearance and to do so absent retaliatory influences, to offer complainant reinstatement to her former position or an equivalent position in a location of complainant's choice, and to reimburse complainant for pay and/or benefits lost as a result of being suspended for 24 days and being placed on Leave Without Pay and Absent Without Leave status.

The agency issued a final order affirming the AJ's finding that complainant was subjected to harassment based upon retaliation, but rejecting the AJ's finding that the suspension of the security clearance, the 24-day suspension, the detail, and the reassignment were within the jurisdiction of the Commission. The agency also rejected the AJ's damages award.

CONTENTIONS ON APPEAL

On appeal, the agency concedes that complainant was subjected to retaliatory harassment by S1 and the agency is liable for that harassment. The agency argues that the AJ erred when he determined that the EEOC has the authority to review the actual suspension of complainant's security clearance. Further, the agency argues that any adverse actions that were a direct consequence of the suspension of complainant's security clearance are not actionable under Title VII and should not have been reviewed by the AJ. Finally, the agency articulates that the Administrative Judge's remedies must be reviewed and reduced.

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.

Here the AJ found that the suspension of complainant's security clearance was a direct result of S1's retaliation, and therefore the suspension and the resulting adverse employment actions were discriminatory. The seminal case of *Department of the Navy v. Egan* provides the legal framework for analyzing security clearance related claims. 484 U.S. 518, 520 (1988). There, the Supreme Court determined that the Merit Systems Protection Board did not have "the authority to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." Further, the Supreme Court noted that "the grant of security clearance to a particular employee, a sensitive and

inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* at 527. Additionally, the Court held that, since each agency must have broad discretion to determine who may have access to classified information, an outside non-expert body could not "review the substance of a judgment and . . . decide whether the agency should have been able to make the necessary affirmative prediction with confidence." *Id.* at 529. The Court further held that no outside body could determine what "constitutes an acceptable margin of error in assessing the potential risk," and considered it "extremely unlikely" that Congress intended to "involve the [MSPB] in second-guessing the agency's national security determinations." *Id.* at 531.

In 1989, the Commission issued policy guidance on the national security exception, explaining that it is an affirmative defense to a charge of discrimination. Policy Guidance on the Use of National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as amended (EEOC National Security Guidance), EEOC Notice No. N-915-041 (May 1, 1989). As such, employers must raise the affirmative defense and prove that the employment decision at issue was made because of national security requirements. *Id.* Further, the Commission restated that no one has a right to a security clearance and non-expert bodies cannot second guess the decisions of agency heads in determining who is qualified to receive a security clearance. *Id.* (citing *Egan*, at 528). Therefore, the Commission is "precluded from reviewing the substance of security clearance decisions [and] from reviewing the validity of the security requirement itself." EEOC National Security Guidance.

Applying *Egan* and EEOC National Security Guidance, the Commission has consistently affirmed the dismissal of complainants' claims alleging that they were subjected to discrimination due to their security clearance being revoked or denied, finding that such claims fail to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1), and are outside the purview of the Commission's jurisdiction. See, e.g., *Rezaee v. Department of the Air Force*, EEOC Appeal No. 01A60451 (April 25, 2006) (citing EEOC National Security Guidance); *Carr v. Department of the Army*, EEOC Appeal No. 01A44011 (November 4, 2004) (citing EEOC National Security Guidance). However, the Commission retains authority to review whether the grant, denial, or revocation of a security clearance was carried out in a discriminatory manner. *Id.*; *Schroeder v. Department of Defense (Defense Mapping Agency)*, EEOC Request No. 05930248 (April 14, 1994).

In *Dodson v. Department of Defense*, the Commission found discrimination where a manager sought to have an employee's clearance revoked in retaliation for filing EEO complaints. EEOC Appeal No. 01954101 (June 13, 1997). The Commission did not address whether the agency actually decided to revoke the clearance, nor did it analyze the substance of any information that was part of the decision to grant or revoke the clearance. The decision addressed the manager's motivation for seeking to have the employee's clearance removed. Further, in *Chatlin v. Navy*, the Commission found that an agency's decision to initiate a review of a security clearance was not the result of any substantive decision making process, and was thus reviewable by the Commission. EEOC Request No. 05900188 (June 1, 1990).

Here, the AJ determined the initiation of the investigation into complainant's security clearance was retaliatory. Specifically, the AJ found that complainant did not reveal sensitive

national security information to X, and S1 willfully lied and influenced X to lie in retaliation for complainant opposing S1's sexual harassment of her coworker. The AJ found that the suspension of the security clearance was discriminatory and ordered the agency to reinstate the security clearance or, in the alternative, to reconsider the suspension without considering any retaliatory information.

Upon review, we find that this case presents a situation within the Commission's authority. Here, it is undisputed that the motivation to investigate and suspend complainant's security clearance was based upon the discriminatory actions of S1. We note that we are not questioning the agency's judgment as to whether complainant should have access to sensitive information; the agency never made a determination on the merits of whether complainant's security clearance should be revoked for revealing sensitive information because the investigation was abandoned by the agency after complainant was relocated. While we find that the AJ was correct in finding that S1's motivation for initiating the suspension of complainant's security clearance was retaliatory, we agree with the agency that the Commission lacks jurisdiction to order an agency to reactivate an individual's security clearance. However, we find that the Commission does have jurisdiction to order the agency to reactivate the abandoned security clearance investigation. In its final agency decision, the agency acknowledged that it should reconsider complainant's suspension of her security clearance in light of S1's retaliation. Therefore, we affirm the AJ's finding that the investigation and security clearance suspension were based on retaliation, and affirm that the agency must reactivate the investigation into complainant's security clearance suspension.

Next, the AJ found that the suspension of complainant's top secret security clearance resulted in three agency actions taken against complainant: her 24-day suspension, her three-month involuntary assignment on detail, and her permanent involuntary reassignment. The AJ found that since the underlying suspension of her security clearance was retaliatory, the resulting adverse actions were discriminatory as well.

The agency asserts that the Commission does not have jurisdiction over these claims since they arose from the suspension of the security clearance. We note that Commission decisions have distinguished between claims in which complainants are alleging that their security clearances were revoked and claims in which complainants are alleging that they were removed or suffered some adverse action subsequent to their security clearances being revoked. See *Okuma v. Department of the Navy*, EEOC Appeal No. 01A31383 (October 14, 2003) (complainant's allegations that he was reassigned to a non-sensitive area after his security clearance was revoked states a claim); *Lyons v. Department of the Navy*, EEOC Request No. 05890839 (March 22, 1990) (the Commission has limited review where an individual has been denied a position or discharged from a position because he does not have a security clearance); *Zimmerman v. National Archives and Record Administration*, EEOC Request No. 05920102 (January 24, 1992) (the Commission found that it was not precluded from considering whether an employee with a disability could be reassigned to a non-sensitive position after his security clearance had been denied). Therefore, we are permitted to look at the subsequent adverse actions against complainant.

To prevail in a disparate treatment claim such as this, complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in *McDonnell Douglas Corp. v.*

Green, 411 U.S. 792 (1973). She must generally establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the agency has articulated legitimate and nondiscriminatory reasons for its conduct.² See *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 713-17 (1983); *Holley v. Department of Veterans Affairs*, EEOC Request No. 05950842 (November 13, 1997). To ultimately prevail, complainant must prove, by a preponderance of the evidence, that the agency's explanation is pretext for discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Holley v. Department of Veterans Affairs*, EEOC Request No. 05950842 (November 13, 1997); *Pavelka v. Department of the Navy*, EEOC Request No. 05950351 (December 14, 1995).

Given our decision that the initiation of the suspension of the security clearance was discriminatory, the agency's subsequent reliance on the suspension of the security clearance to justify the subsequent actions taken against complainant is not legitimate. Specifically, the agency articulated that complainant was suspended for 24 days because she disclosed sensitive information. Further, the agency stated that complainant was detailed because her security clearance was suspended during the investigation, and her position required a clearance. Finally, complainant was reassigned to another state because her security clearance was suspended.

Complainant must now show, by a preponderance of the evidence, that the agency's articulated reasons for its actions were pretext for discrimination. We first note that complainant was suspended because of the allegations that she breached security, not because her security clearance was suspended. Besides the original accounts of S1 and X, the record does not contain any evidence that would support the agency's articulated reason for the 24-day suspension. A preponderance of the evidence of record supports complainant's assertion that she did not disclose sensitive information as alleged by S1. S1 willfully fabricated the allegations against complainant in an attempt to retaliate against her for opposing his sexual harassment of her coworker. Additionally, the record supports complainant's assertion that S1 influenced X to corroborate the allegations. Complainant has established, by a preponderance of the evidence, that retaliation was more likely than not a motivating factor in the 24-day suspension. Therefore, we find that the agency's legitimate, nondiscriminatory reason is a pretext for discrimination.

Next, complainant must show, by a preponderance of the evidence, that the agency's articulated reasons for detailing complainant and permanently reassigning her to another state are pretext for discrimination. The agency asserts that complainant was detailed and reassigned because her security clearance was suspended. Not only has complainant established that the articulated reasons are not legitimate, but she has also offered additional evidence that would establish that the agency's articulated reasons are pretext for discrimination. Specifically, the record shows that two other individuals, who had never engaged in prior protected EEO activity, had their security clearances suspended yet were permitted to either stay in their current positions or take paid administrative leave.

Specifically, S1 had his security clearance suspended due to domestic violence and a violation of a temporary restraining order. While his security clearance was suspended he was permitted to stay in his assigned location. The only responsibility taken away from him was the ability to authorize financial disbursements. Further, when another employee in complainant's job title had his security clearance suspended he was placed on paid administrative leave pending the outcome of his investigation and was not forced to go on detail to a non-sensitive position. Memoranda in the record suggest that S1 played a part in the decision to detail complainant and ultimately reassign her. Further, the agency failed to rebut complainant's evidence that there were non-sensitive positions in her location that were vacant and complainant was qualified for that she could have been placed in pending the outcome of the investigation. Complainant has established that retaliation was more likely than not a motivating factor in the decision to detail complainant and permanently reassign her. Therefore, we find that the agency's articulated reasons are pretext for discrimination.

Damages

In a claim for compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, the harm suffered as a result of the agency's discriminatory action; the extent, nature, and severity of the harm suffered; and the duration or expected duration of the harm. *Rivera v. Department of the Navy*, EEOC Appeal No. 01934156 (July 22, 1994); Notice at 11-12, 14; *Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652 (July 17, 1995). Objective evidence in support of a claim for pecuniary damages includes documentation showing actual out-of-pocket expenses with an explanation of the expenditure and, for non-pecuniary claims, statements from the complainant and others, including family members, co-workers, and medical professionals. See *Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, EEOC Notice No. N915.002 (July 14, 1992) (Notice); *Carle v. Department of the Navy*, EEOC Appeal No. 01922369 (January 5, 1993). Awards are 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); Notice at 13. The agency is only responsible for those damages that are clearly shown to be caused by the agency's discriminatory conduct. *Carle v. Department of the Navy*, *supra*. To recover damages, the complainant must prove that the employer's discriminatory actions were the cause of the pecuniary or non-pecuniary loss. Notice at 8. An award of compensatory damages for non-pecuniary losses, including emotional harm, should reflect the extent to which the agency's discriminatory action directly or proximately caused the harm and the extent to which other factors also caused the harm. Notice at 11-12.

Pecuniary Damages

Here, complainant was awarded \$187,263.72 in pecuniary damages. After a review of the record, we find that almost all of the pecuniary damages awarded by the AJ are directly related to the agency's discriminatory actions. For example: wear and tear on complainant's vehicle in the amount of \$8,859.16; trailer rental and storage costs in the amount of \$3,484.19; moving expenses in the amount of \$1,136.00; lodging costs in the amount of \$244.08; lost profit on the sale of complainant's home in the amount of \$65,600.00; tutoring

costs for complainant's children due to readjustment after being involuntarily moved twice in the amount of \$32,000.00; attorney's fees incurred for child custody issues arising from complainant taking children out of state in the amount of \$3,000.00; cell phone costs in the amount of \$4,628.59; fees paid to a special advocate for complainant's children in the amount of \$5,000.00; plane fare for children to visit their father in her former work location in the amount of \$1,289.00; office supply costs in connection with this complaint in the amount of \$3,000.00; and past and future psychological care for complainant's children's separation anxiety from their father and stepfather in the amount of \$12,996.60.³ We also find that complainant submitted sufficient documentation to support her claims.

However, we do not agree with the AJ's award of \$46,026.00 for her children's lost scholarship tuition to Community College. Complainant asserts that had her children remained in the school at her former location, they would have been entitled to free tuition at Community College. We agree with the agency that complainant's children are young and still many years away from considering college, and various intervening factors could have affected whether her children would ever have been able to take advantage of the tuition entitlement. For example, complainant could have been transferred under the agency's mobility agreement, the children could have decided to go to school elsewhere, or they could have decided not go to school at all. Therefore, we reduce the award by \$46,026.00 and award complainant \$141,237.72 in pecuniary damages.

Non-Pecuniary Damages

Complainant initially requested \$612,000.00 in non-pecuniary damages. The AJ awarded complainant non-pecuniary damages in the amount of \$150,000.00.

After a careful review of the record we agree with the AJ that the harm complainant endured was a direct result of the agency's retaliatory actions. Complainant's doctor testified that she had never seen complainant in such a state, that her symptoms were not related to any prior or unrelated issues, and that her emotional harm was directly attributable to her work conditions. Additionally, complainant's doctor was so concerned about complainant's mental and physical health that she advised complainant not to return to the office unless S1 was not present.

Complainant established that she suffered a significant amount of emotional harm from the agency's actions, which manifested itself into physical harm. Specifically, complainant's doctor found that complainant was more anxious and upset than she had ever seen her, that her demeanor changed after the interactions with S1, and that she endured a great deal of psychological trauma. Complainant felt physically threatened and afraid that S1 was going to hurt her after he verbally assaulted her, had her corned against a wall, lunged toward her, and chased her down the hall to the extent that she had to call for M1's protection. Complainant did not feel safe at work, and often cried, shook, was depressed, became anti-social, and felt panicked. Complainant was in constant fear of S1's next retaliatory act, which left her always feeling apprehensive, nervous, and concerned for her safety.

Additionally, complainant established that her reputation and professional life was damaged as a result of S1 and his subordinates lying about the events that occurred and attributing

them to fabricated mental health problems, which resulted in her being treated as an outcast and a trouble maker. Complainant was always uncomfortable around her coworkers, who isolated and alienated her because they were afraid of retaliation from S1, which caused complainant to be denied special assignments and other lucrative career opportunities. Further, complainant suffered humiliation and shame when the rumors about her mental health spread, and she suffered additional stress and anxiety when she was given a negative performance evaluation for the relevant time period.

The record supports complainant's assertion that the agency's actions wreaked substantial havoc on her life outside of the agency. Due to the two involuntary relocations to two different states, complainant was alienated from her children and husband, and the moves placed enormous stress upon her marriage that ultimately resulted in divorce. She also was forced to endure a custody battle when her ex-husband fought against complainant taking their children out of state. Complainant also suffered the stress and anxiety of having to quickly sell her home, the lost profits from that home, and being forced to place her belongings in storage during the interim. Further, complainant suffered additional emotional harm when she was forced to watch the impact the involuntary reassignments had on her children who were forced to move to another state, were forced to leave their home, family, and friends, had to struggle in a new school, were (and still are) separated from their father, and had to endure the divorce.

Upon review of the record, we note that the AJ failed to take into consideration the length of time complainant suffered the harm. Complainant's harm began when she first spoke out against S1's harassment towards her coworker in March 2001. Complainant is still assigned to Texas to this day, and she continues to deal with the effects of the divorce and child custody issues, and the emotional effects of watching her children's separation anxiety from their father. Further, complainant has continued to suffer the embarrassment and humiliation of having her security clearance revoked, being involuntarily transferred, and dealing with the consequences of a ruined reputation from the lies that S1 spread about her. In fact, the long term and continuing impact of the agency's actions were evident during the hearing, when complainant broke down into tears twice. The record establishes that complainant's harm has spanned over eight years.

Several Commission decisions have awarded significant compensatory damages in cases similar to this case. For example, in *Glockner v. Secretary of Veterans Affairs*, EEOC Appeal No. 07A30105 (September 23, 2004), the Commission affirmed an award of \$200,000.00 in non-pecuniary compensatory damages where complainant was subjected to harm for five years and she suffered humiliation, depression, significant fears, and her professional reputation was damaged. In *Looney v. Department of Homeland Security*, EEOC Appeal No. 07A40124 (May 19, 2005), the Commission affirmed an AJ's award of \$195,000.00 in non-pecuniary compensatory damages. In that case, complainant was retaliated against when she was detailed to a location for an extended period of time far from her home. Complainant's harm included crying, humiliation, depression, destruction of her spirit and confidence, tension, inability to sleep, difficulty coping with life, and a physical change in her appearance. Further, in *Mack v. Veterans Affairs*, EEOC Appeal No. 01983217 (June 23, 2000); req. for reconsideration denied, Request No. 05A01058 (October 26, 2000), the Commission awarded complainant \$185,000.00 in non-pecuniary compensatory

damages. In that case, complainant was depressed, hurt, embarrassed, felt demeaned, lost his house and automobiles, and lost custody of his daughter as a result of discrimination.

Additionally, there are District Court cases which are similar to the instant case with respect to the nature, severity, and duration of the harm that complainant endured. See *Peyton v. DiMario*, 287 F.3d 1121 (D.C. Cir. 2002) (upheld the reduction of a jury's non-pecuniary compensatory damage award from \$482,000.00 to \$300,000.00, where employee was retaliated against under Title VII, and as a result was distressed, fearful, and depressed); *Koster v. TWA*, 181 F.3d 24 (1st Cir. 1999) (employee was awarded \$250,000.00 for discrimination that resulted in emotional damages such as stress on his family life, trouble sleeping, and anxiety); *O'Sullivan v. City of Chicago*, 474 F.Supp.2d 971 (N.D. Ill. 2007) (employee was awarded \$250,000.00 in non-pecuniary damages when retaliation resulted in loss of reputation, humiliation, anxiety, headaches, nausea, and withdrawal from her family). Further, we note that the more egregious the agency's actions are, the more likely it is that a complainant will suffer significant emotional harm. Here, the agency's retaliatory conduct was severely egregious, and complainant has established that her harm was significant. Accordingly, the Commission finds that complainant is entitled to an award of \$200,000.00 in non-pecuniary damages.

Attorney's Fees and Costs

Complainant was awarded \$199,492.89 in attorney's fees, and \$11,557.02 in legal costs. Here, the AJ originally approved an award of \$163,422.50 in attorney's fees. Subsequently the AJ increased the award by 15% after finding that it was reasonable to increase the fee award to reflect complainant's high degree of success in her compensatory damages award and the highly competent and complex representation by her attorneys. We agree that complainant's attorneys spent a reasonable amount of time on very complex issues. We also agree that the attorney's fees were reasonable. Therefore, we affirm the AJ's award of \$199,492.89, and legal costs in the amount of \$11,557.02.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the agency's finding of no discrimination and order the agency to comply with the order below.

ORDER

The agency, to the extent it has not already done so, is ordered to take the following remedial actions:

1. Within thirty (30) calendar days of the date this decision becomes final, pay pecuniary damages to the complainant in the total amount of \$141,237.72;

2. Within thirty (30) calendar days of the date this decision becomes final, pay non-pecuniary damages to the complainant in the total amount of \$200,000.00;

3. Within thirty (30) calendar days of the date this decision becomes final, pay attorney's fees to the complainant in the total amount of \$199,492.89 and legal costs in the amount of \$11,557.02.

4. Within thirty (30) calendar days of the date this decision becomes final, the agency shall reactivate the investigation into the suspension of complainant's security clearance, taking into account our finding of discrimination, and if it is determined that she is eligible for a security clearance, that she be reinstated to her former position or offered a substantially equivalent position.

5. Within sixty (60) calendar days of the date this decision becomes final, the agency shall remit to complainant all pay and/or benefits lost as a result of the agency's retaliatory actions taken herein including losses incurred as a result of her 24-day suspension, being placed on leave without pay (LWOP) and absent without leave (AWOL) status, and being denied administrative leave. Complainant shall cooperate in the agency's efforts to compute the amount of benefits due, and shall provide all relevant information requested by the agency. If there is a dispute regarding the exact amount of benefits, the agency shall restore the undisputed amount of benefits to complainant within sixty (60) calendar days of the date the agency determines the amount it believes to be due.

6. Within one hundred and eighty (180) days of the date this decision becomes final, the agency shall provide a minimum of 40 hours of EEO training to managers at the involved facility focusing on their obligations under Title VII with special emphasis on harassment and retaliation.

7. The agency shall consider taking appropriate disciplinary action against the responsible management officials. The Commission does not consider training to be disciplinary action. The agency shall report its decision to the compliance officer. If the agency decides to take disciplinary action, it shall identify the action taken. If the agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the agency's employ, the agency shall furnish documentation of their departure date(s).

8. The agency shall post the notice discussed below.

The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G0900)

The agency is ordered to post at the involved facility copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and

shall remain posted for sixty (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 at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

FOR THE COMMISSION:

Stephen Llewellyn
Executive Officer
Executive Secretariat

July 29, 2009
Date

- 1 The AJ also found that complainant failed to establish that the revocation of her cell phone and the non-selection were retaliatory.
- 2 The agency concedes that complainant established a prima facie case of retaliation.
- 3 The agency states that the Commission is prohibited from compensating complainant for her children's harm caused by the agency's discriminatory actions. The agency points to *Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652 (July 17, 1995) and *Pohlel v. United States Postal Service*, EEOC Appeal No. 01A54696 (December 15, 2005). These decisions are distinguishable first, as they state that the Commission cannot award non-pecuniary damages for harm to wife and children due to agency's discriminatory actions; and second, as the award in the present matter is for out-of-pocket expenses incurred by complainant as a direct result of the agency's discriminatory actions.

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

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 (K1208)

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, DC 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.

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 (Z0408)

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 that the Court appoint an attorney to represent you and that the Court 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 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").