

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PHILADELPHIA DISTRICT OFFICE
21 South 5th Street, Suite 400
Philadelphia, PA 19106-2515

Glovine Layode
Complainant

EEOC Hearing No.
170-2004-00329X

v.

R. James Nicholson, Secretary
Department of Veterans Affairs
Agency

Agency Case No. 200H-
0561-2003-102788

DECISION

This matter came before the U.S. Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e), as amended, which prohibits employment discrimination on the basis of race, color, national origin, religion and sex, as well as reprisal' for engaging in protected activity.

All procedural prerequisites having been met, a hearing was conducted on June 14 and 23 and July 15, 2005, pursuant to Section 1614.109 of the Commission's regulations, in East Orange, New Jersey. This matter concerns a discrimination complaint filed by Glovine Layode wherein she alleges that she was subjected to sexual harassment or sex-based harassment.

The Complainant was represented at the hearing by attorney Mitchell Kastner.

The Agency was represented by attorney VA Attorney.

Thirteen witnesses, including the Complainant, testified at the hearing. The Hearing Transcript (HT) and Report of Investigation (ROI) are part of the record.. Complainant Hearing

Exhibits C-2 through C-7 also C-2 and C-3 dated July 15, 2005 (Damages Exhibits) were admitted into evidence as were Agency Hearing Exhibits A-2 through A-4, A-6, A-8 and A-9.

Relevant Facts

The Complainant is an Administrative Officer of the Day (AOD) in Medical Administration Services (MAS) at the VA Medical Center in East Orange, New Jersey. She has held that position with the VA for more than 20 years and has been employed at the East Orange Medical Center for 9 years. (ROI, Ex. B-1; HT June 14 p. 28). An AOD is responsible for administrative oversight of the Medical Center during irregular tours. These tours include evenings, weekends and holidays.

During the period of time relevant to this complaint, there were three tours of duty for AODs: 8:00 a.m. to 4:00 p.m.; 4:00 p.m. to midnight and midnight to 8:00 a.m. Six AODs covered those shifts at the East Orange Campus. At times, there were two AODs on duty at the same time. At other times, AODs interacted at the beginning and end of tours. (HT June 23 pp. 330-331). The Complainant reported to First-Line Supervisor, Assistant Chief of MAS. The Complainant's second line supervisor was Second-Line Supervisor, Chief of MAS.

Alleged Harasser is also an AOD at the East Orange Medical Center. The Complainant had been acquainted with Mr. Alleged Harasser for many years when in June of 2001 she began an intimate relationship with him that lasted approximately one month. The intimate relationship between Mr. Alleged Harasser and the Complainant ended about the time that Mr. Alleged Harasser became physically violent with the Complainant during an off duty incident. (HT June 14 p. 32, HT June 23 pp. 331-334).

In October of 2001, during a tour in which the Complainant and Mr. Alleged Harasser

were both in the AOD office, Mr. Alleged Harasser verbally abused the Complainant by calling her a "bitch" and stating "I am going to fuck you up" in a very threatening manner. Thereafter, Mr. Alleged Harasser apologized to the Complainant in an email blaming illness as the reason for his actions (Hearing Ex. C-1). The Complainant did not report this incident to her supervisor at the time. (HT June 14 p. 41). Thereafter, Mr. Alleged Harasser often told the Complainant that she "got on his fucking nerves" and he regularly used foul language with her when he was angry while at work. (Layode Affidavit April 19, 2005 para. 4) . The Complainant chose not to report these various incidents when they occurred,

In May of 2002, the Complainant reported Mr. Alleged Harasser to the VA Police for smoking in a non-smoking area in the office where she worked after he refused to stop smoking. (HT June 14 pp. 41-45). Thereafter, Mr. Alleged Harasser became even more hostile toward the Complainant, frequently calling her "bitch" and stating that he couldn't believe she reported him to "the fucking police" or words to that effect. (Layode Affidavit April 19, 2005 para. 6). The Complainant did not report Mr. Alleged Harasser conduct to her supervisors at that time.

On or about November 16, 2002, during a discussion over office radio volume, Mr. Alleged Harasser verbally abused the Complainant stating: "Fuck you, bitch, fuck you, even the judge in court said you were stupid for having the police give me a ticket for smoking in the office, you dumb bitch." (ROI Ex. Bla, pp. 24-25). A Police Officer Dwight was present during Mr. Alleged Harasser's statement and he issued a police report regarding the incident. (HT June 22 pp. 22-24). The following Monday Complainant notified her supervisors of the incident through an incident report. (ROI, Ex. C-8).

Within days, the Agency transferred Mr. Alleged Harasser to another facility and began an investigation

conducted by the Harassment Investigator , Health Information Administrator. Ms. Harassment Investigator learned from Mr. Alleged Harasser that he and the Complainant had engaged in a sexual relationship. The Complainant was reluctant to discuss this with Ms. Harassment Investigator but ultimately she did confirm the relationship during the investigation. The Agency disciplined Mr. Alleged Harasser with a reprimand, finding his conduct to be totally unacceptable and his language to be abusive and obscene. (ROI, Ex. C-9; Hearing Ex. A- 10). Ms. Harassment Investigator concluded, however, that the Complainant and Mr. Alleged Harasser both contributed to the hostile environment. (ROI, Ex. C-8 p. 7). The Agency concluded that Mr. Alleged Harasser had not engaged in sexual harassment of the Complainant. (HT June 23 p. 153). Ms. Second-Line Supervisor and Ms. First-Line Supervisor told the Complainant that she knew better than to have messed around with Mr. Alleged Harasser. (HT June 14 pp. 75-76).

In or about late February of 2003, the Agency returned Mr. Alleged Harasser to the East Orange Campus without notifying the Complainant. Ms. Second-Line Supervisor testified that the Complainant had heard of Alleged Harasser's return through the grapevine. (HT June 23 p. 185). Ms. Second-Line Supervisor testified that Ms. First-Line Supervisor met with the Complainant about Alleged Harasser's return and Ms. First-Line Supervisor testified that Ms. Second-Line Supervisor had the meeting. (HT June 23 p. 186). The Complainant requested a schedule change so that she would not have contact with Mr. Alleged Harasser either during or at the conclusion of her tour, but the Agency denied her request. (HT June 23 pp. 329-331).

On or about March 5, 2003, First-Line Supervisor presented the Complainant with a document entitled "Memo of Understanding" which stated in effect that the Complainant might be subjected to disciplinary action if "further evidence" regarding the Complainant's interactions with

co-workers should be presented. (ROI, Ex. C-10). The Complainant refused to sign the document. Mr. Alleged Harasser was presented with the same MOU which he signed on March 11, 2003. (ROI, Ex. C-10). Upon Mr. Alleged Harasser's return to the East Orange Campus, he began documenting the Complainant's whereabouts and work habits, and in April 2005 he forwarded a memorandum to his supervisor regarding the Complainant. (ROI, Ex. C-11). Ms. First-Line Supervisor concluded that Mr. Alleged Harasser's concerns about the Complainant's work were unfounded. (HT June 23 p. 276).

In May of 2003, the Complainant contacted an EEO Counselor alleging that she was subjected to a hostile environment based on sex. As a remedy the Complainant requested a schedule alteration that would keep her from working with Mr. Alleged Harasser. (ROI, Ex. A-3).

Hostilities remained between the Complainant and Mr. Alleged Harasser in the Spring of 2003 although Mr. Alleged Harasser verbal harassment of the Complainant ceased. (HT June 14, pp.159). In or about June of 2003, Mr. Alleged Harasser turned the lights off in the office where he had to work with the Complainant. The Complainant was afraid to work in the same room with Mr. Alleged Harasser with the lights off so she reported his conduct to her supervisor, Ms. First-Line Supervisor. Ms. First-Line Supervisor suggested that the Complainant work in another office outside of the AOD office. (HT June 14 pp. 67-68). The Complainant made the Agency aware that she did not feel that she could work with Mr. Alleged Harasser under any circumstances. (HT June 23 p.146).

On or about June 11, 2003, the Complainant was summoned to a meeting with Mr. Alleged Harasser, her supervisors, her union representative and Director of Human Resources at the

Facility. In that meeting Mr. Alleged Harasser admitted to some of his past behavior including telling the Complainant that he would "fuck her up". (HT June 14 p. 82). In the meeting, Mr. Director of Human Resources led a discussion regarding the Complainant's concerns about working with Mr. Alleged Harasser. Mr. Director of Human Resources then fashioned an agreement which purported to contain the parties' agreement regarding their future workplace interaction. The agreement included a clause that required the Complainant to resign her position with the Agency if she did not abide by the guidelines of the agreement. (ROI, Ex. C-13). Mr. Alleged Harasser signed the agreement. The Complainant refused to execute the agreement.

On January 26, 2004, Mr. Alleged Harasser made additional complaints about the Complainant's work that were not substantiated. (HT June 14 pp. 87-88).

Eventually, in 2004, the Agency relented and separated the Complainant and Mr. Alleged Harasser on the work schedule. (HT June 14 p. 90-92).

Applicable Law

The burdens of proof in discrimination cases are generally allocated according to the standard established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This case set forth a three-tier test for determining whether there has been discrimination in violation of Title VII. The Complainant has the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not such actions were based on discriminatory criteria. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If a *prima facie* case of discrimination has been established, the burden shifts to the Agency to articulate a legitimate, nondiscriminatory reason for the challenged action. *Burdine*, 450 U.S. at

253-4; *McDonnell Douglas*, 411 U.S. at 802. The Complainant may then show that the legitimate reason offered by the Agency was not the true reason, but merely a pretext for discrimination. *Burdine* at 256; *McDonnell Douglas* at 804. See also *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). The ultimate burden of persuading the trier of fact that the Agency discriminated against the Complainant always remains with the Complainant. As noted by the Court in *Burdine*, the factual circumstances necessarily vary in discrimination cases. Consequently, the courts have developed models for certain common situations to assist in determining whether a prima facie case has been established. See, *Burdine* at 256, n. 6; *McDonnell Douglas* at 802, n. 13.

To establish a *prima facie* case of discrimination with regard to the Complainant's allegations of sex-based harassment, she must establish that (1) she is a member of a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; and (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment. *Humphrey v. United States Postal Service*, EEOC Appeal No. 01965238 (October 16, 1998); *Fennell v. Small Business Administration*, EEOC Appeal No. 01A04742 (June 21, 2001); C.F.R. Section 1604.11. The Complainant must show that the conduct was "so objectively offensive as to alter the conditions of the victim's employment." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1997), 188 S.Ct. at 1003. Conditions of employment are altered only if the harassment culminated in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment. *EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful*

Harassment by Supervisors, p. 2, June 6, 1999; see also *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct.307 (1993), citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Juan J. Perez v. US Department of the Navy*, EEOC No. 01965831 (September 4, 1998), citing *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982) (unless conduct is very severe, a single incident or a group of isolated incidents will not be regarded as disparate treatment); *Roy H. Wright v. United States Postal Service*, EEOC Request No. 05940060 (May 31, 1994); *Carol J. Brink v. Department of the Army*, EEOC Appeal No. 01932011 (April 1, 1994). To meet his burden the Complainant must demonstrate that there were more than a few isolated incidents of harassment (e.g., the alleged harassment was "repeated," "continuous" or "prolonged") and that a reasonable person in the Complainant's position would find the conduct severely hostile or abusive. *Oncale*, *supra* at 81.

Once it is established that unlawful harassment occurred, the question of the Agency's liability arises. Where an employee is harassed by a coworker, the employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action. 29 C.F.R. Section 1604.11(d).

Analysis

Prima Facie Case

The Complainant is a member of a statutorily protected class in that she is female. She was subjected to unwelcome verbal conduct from a male co-worker with whom she had recently had an intimate relationship. The Complainant was called "bitch" and told by her former paramour that he was going to "fuck [her] up". The harasser used these sexual terms in a primarily aggressive manner towards the Complainant. The Complainant and the harasser had worked together without

incident before their intimate relationship in July of 2001. There is no evidence in the record to show that the harasser used such language against men or even against other women with whom he did not have intimate relationships.

The Agency asserts that the events which resulted in the Complainant's claim do not amount to sexual harassment. That does not mean, however, that the harassment is the fault of the Complainant, nor does it mean that this claim is not actionable as gender-based harassment. A complainant may state a claim of harassment and sex discrimination even where the harassment is not sexual in nature. See *Witt v. Department of Defense*, EEOC No. 01952811 (August 14, 1995). Harassment need not be overtly or explicitly sexual in nature, so long as it was based upon the victim's sex. See *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 345 (7th Cir.), cert. denied, 528 US. 874 (1999). See also, *Bowman v. Shawnee State University*, 220 F.3d 456, 463 (6th Cir. 2000) ("Non-sexual conduct may be illegally sex-based and properly considered in a hostile environment analysis where it can be shown that but for the employee's sex, he would not, have been the object of harassment."). Here, the sexual relationship that ended in violence and the harasser's focus on the Complainant as the object of his abuse is evidence of sex-based harassment. But for the sexual relationship the abusive conduct on the part of Mr. Alleged Harasser would not have occurred. This conclusion is supported by the record which shows that for many years before the sexual relationship, the Complainant and Mr. Alleged Harasser worked together without incident.

I find that the harassment in this case is clearly sex-based as it grew out of a sexual relationship between the harasser and the Complainant.

The harassment visited upon the Complainant by the harasser terrorized the Complainant. The Complainant had experienced the harasser's violent temper in the past and knew that it led to

violence. This knowledge, in conjunction with the explosive demeanor and hostile sex-based language used by the harasser, had the effect of placing the Complainant in a constant state of fear whenever she had to work with or interact with the harasser. For these reasons, I find that the Complainant was subjected to sex-based harassment from September of 2001 to November of 2002 and then from March 2003 to January 2004.

Agency Liability

Due primarily to the urging of the harasser, the Complainant chose not to notify the Agency about his conduct during much of the harassment. The Agency can not be held responsible for that of which it had no notice. The Agency did not learn that the Complainant was subjected to sex-based harassment until November of 2002. The Agency took immediate action when it transferred the harasser to another location so that he would be unable to interact with the Complainant. Unfortunately for the Complainant and the Agency, the Agency then chose to bring the harasser back to East Orange and require the Complainant to work in close proximity to him without resolving the issues between them. This was inappropriate. The Agency was specifically aware of the conduct of the harasser toward the Complainant, and it learned early in the investigation that the Complainant and the harasser had had an intimate relationship. The Agency apparently concluded that the earlier mutual sexual relationship created mutual fault for the harassment. The record, however, does not support such a finding. The Agency learned that the harasser - not the Complainant - had a tendency to completely lose control of himself when dealing with his former paramour. There is no credible evidence that the Complainant harassed the harasser, although the Agency attempted to portray her few attempts to stand up to the harasser as evidence that she had instigated the onslaught. The evidence does not support this assertion, but if the Complainant had goaded the harasser, would his explosive verbal threats be warranted? The

answer to that question is an unequivocal "no". The Agency's attempts to cement its position that the Complainant and the harasser were mutually at fault is evidenced by the series of agreements that the Agency urged the Complainant to sign. The Complainant chose not to sign these agreements that required her to accept blame for the harasser's failure to control himself and to place her employment at risk. The Agency's improper actions in this regard caused the Complainant additional suffering.

In sum, the Agency's actions were prompt but not appropriate. I find that the Agency is liable to the Complainant for all harm suffered after the Agency was informed of the November 22, 2002 incident.

Remedy

Compensatory Damages

Section 102(a) of the Civil Rights Act of 1991, codified as 42 U.S.C. §1981a, provides for an award of compensatory damages as part of the make-whole relief for intentional employment discrimination. Compensatory damages may be awarded for past pecuniary losses, future pecuniary losses, and non-pecuniary losses that are directly or proximately caused by the Agency's discriminatory conduct. *See EEOC Notice No. N 915.002 (July 14, 1992)*. Pecuniary losses are out-of-pocket expenses incurred because of the employment action found unlawful, "including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses." *See Young v. SSA, EEOC Decision No. 01955120 (January 30, 1998)*. Non-pecuniary losses may include "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" – losses not subject to "precise quantification." *Id.*

The Complainant has not presented evidence to demonstrate that she incurred any out-of-

pocket expenses which correlate to the instant case. I find, therefore, that the Complainant is not entitled to any award for past or future pecuniary damages.

In order to be entitled to an award for non-pecuniary damages, the Complainant must demonstrate that she has been harmed as a result of the Agency action found to be discriminatory; the extent, nature, severity, and duration of the harm must be shown. *Rivera v. Department of the Navy, EEOC Decision No. 09134157 (July 22, 1994)*. In *Johnson v. Department of the Interior, EEOC Decision No. 01961812 (June 18, 1998)*, the Commission described the type of "objective evidence" in support of a claim for such compensatory damages which must be considered:

Objective evidence may include statements from the Complainant concerning...her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other nonpecuniary losses that are incurred as a result of the discriminatory conduct. Statements from others, including family members, friends, and health care providers, could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown.

In support of her claim of entitlement to an award for non-pecuniary losses the Complainant testified regarding the negative effect that the Agency's actions had on her physical health and mental health. The Complainant also offered the testimony of a friend, the Friend, and a Psychologist, The Psychologist. I find the Complainant to be credible on the issue of her condition during the harassment and the noticeable manifestations that she suffered as a result of it. I also find Ms. The Friend and The Psychologist to be credible regarding their observations about the Complainant. The Complainant testified that she felt the Agency didn't believe her, that

they thought that she was lying to them. (HT June 14 p. 90). She testified that before this occurred, she was an outgoing person. Afterward, she became introverted and depressed. She stopped going out with her friends and her sister. She felt unimportant and began to gain a lot of weight. She cried a lot and didn't go out on dates while she was trying to get over the trauma of what happened. She felt that Mr. Alleged Harasser had the power to devalue and dehumanize her. (HT June 14 pp. 90-98). The Complainant testified that she had various stomach ailments and high blood pressure prior to the harassment that became exacerbated during the period of time at issue here. She had to use a lot of sick leave due to physical ailments and so that she could get away from Alleged Harasser when they were scheduled together. The Complainant testified that she felt much better once her schedule was changed and she is now getting back to normal. (*I d*) .

Ms. The Friend testified that her friend was fearful and traumatized by Mr. Alleged Harasser treatment of her. She saw her in tears over the situation and her anxiety level had increased tremendously. (HT June 14 pp. 12-13). Ms. The Friend recommended that her friend see a therapist. (*I d*) .

The Psychologist, who examined the Complainant for the purpose of this litigation, testified regarding his several meetings with the Complainant in 2004. He testified that the harasser's actions left the Complainant both embarrassed and threatened because the incidents occurred in her workplace, a comfortable and safe location for her, after working there for so many years before the incidents occurred. The Psychologist testified that the impact of such threats is greater when it occurs in a place where you would normally feel most comfortable. (HT July 15, 2005 p. 19).

During her interview with The Psychologist, the Complainant relayed that she suffered appetite problems, loss of interest in pleasurable activities, unreasonable guilt, slower motor skills,

sleep disturbance and unexplained fatigue. (HT July 15 p. 37).

The Psychologist also testified that the Complainant felt as if she were being punished by the Agency when it attempted to elicit her voluntary termination, and that this will impact her into the future. (HT July 15 pp. 19-20 and 37-38). The Psychologist diagnosed the Complainant as having a moderate adjustment disorder which was a direct result of her work-based interactions with Mr. Alleged Harasser . (HT July 15 pp. 33-35). He further testified that the Complainant has moved on and tried to overcome her injury. She has regained her former lifestyle and lost weight, however anxiety still exists. (HT July 15 pp. 35-36)

Based on the credible testimony presented, I find that the Complainant did incur emotional harm which was causally related to the Agency's discriminatory conduct. I further find that this emotional harm endured at full strength from October 2001 to November 2002 and then from March 2003 through January 2004, and to a lesser extent to the present time. The Complainant is entitled, therefore, to an award for non-pecuniary losses which she incurred during the period of time that the Agency had the opportunity to take decisive and appropriate action but did not (March 2003 to January 2004 at full strength and to a lesser extent to the present).

Although difficult to quantify and no hard-and-fast rules exist for the amount to be awarded in a particular case, a damage award for emotional harm must satisfy two prerequisites: (1) it must not be "monstrously excessive," standing alone, and (2) it must be consistent with awards made in similar cases. *See Cygnar v. City of Chicago*, 865 F. 2d 827, 848 (7' Cir. 1989). The Commission has awarded compensatory damages in varying amounts based on the extent of damage shown.

In *Smith v. Department of Defense*, EEOC Appeal No. 01943844 (May 9, 1996), the Commission ordered an award of \$25,000 where the Complainant established that she suffered

emotional distress as the result of hostile environment sexual harassment. The Complainant in that case was diagnosed with major depression and generalized anxiety disorder. Her symptoms included uncontrolled crying, insomnia, anxiety, tremors, panic attacks, suicidal tendencies, and paranoia. She was hospitalized on four occasions and received extensive therapy. The award was limited because half of the 33 months of harassment predated the 1991 Civil Rights Act and because a portion of the Complainant's emotional harm was caused by circumstances other than the sexual harassment.

In *Wallis v. United States Postal Service*, EEOC Appeal No. 01950510 (November 13, 1995), the Commission awarded the Appellant \$50,000. Considered were the Appellant's suffering from the effects of discrimination for two years, and expected future suffering. The Commission took into account the Appellant's injuries two years before the date of the incident at issue, caused by other factors, including his wrongful termination and bankruptcy.

In *Quinn v. SSA*, EEOC Appeal No. 01976921 (May 18, 2000), Complainant suffered from depression, anxiety and loss of sleep during three years of harassment by her supervisor. She was diagnosed with clinical depression and work related emotional distress and was prescribed an antidepressant. The Commission awarded the Complainant \$50,000 in compensatory damages.

In *Meyer v. Secretary of Agriculture*, EEOC Appeal No. 01984033 (1999), the Commission upheld an Agency award of \$50,000 for emotional distress suffered over a two year period. The Complainant's condition improved after she was removed from the supervision of the harasser.

I find that the nature and severity of the Complainant's harm is comparable to that in *Smith, Quinn and Meyers*. Since the Complainant is not entitled to an award for damages incurred from October 2001 to February 2003, I have adjusted the award accordingly. I have considered the fact

that the Complainant's injury remains at a moderate level and that the Agency's actions in the Spring of 2003 caused the Complainant additional pain and suffering. Accordingly, I hereby award the Complainant \$25,000 in non-pecuniary compensatory damages. The fact that the Complainant's medical conditions existed prior to the conduct in this case was also considered. The instant award is compensation in part for the exacerbation of the prior existing conditions. *See Finlay v. Postmaster General, EEOC Appeal No. 01942985 (1997).*

This part of the award, however, is limited by the lack of medical documentation for some of the Complainant's physical ailments.

Equitable Relief

The Complainant is also awarded the restoration of 10 days of sick leave that she used between March 2003 and January 2004 in an attempt to stay away from Mr. Alleged Harasser and due to her physical and mental suffering during that time.

Attorney's Fees Award

A prevailing party in a Title VII claim may seek an award for attorney's fees and costs. 29 C.F.R. §1614.501(e)(1). The United States Supreme Court has held that the amount of an award for attorney's fees is normally determined by multiplying the number of hours reasonably expended by a reasonable hourly rate, also known as a lodestar. *Hensley v. Eckerhart*, 461 U.S.424 (1983); *Blum v. Stenson*, 465 U.S. 886 (1984). An adjustment to the lodestar may be appropriate, if the lodestar would not be reasonable in light of the results obtained. *Hensley, supra*. The party seeking such an adjustment has the burden to show that it is warranted. *Copeland v. Marshall*, 641 F. 2d 880, 892 (D.C. Cir. 1980).

By Order dated August 10, 2005, the Complainant was directed to submit a "Verified Statement of Attorney's Fees and Costs". The Order required that the Verified Statement include

an itemized list of services, as well as other documentary evidence. The Order provided that failure to provide the information as directed could result in the reduction or denial of an award for attorney's fees and costs. The Complainant timely submitted Verified Statements dated August 12, 2005. On August 16, 2005, the Complainant submitted an additional declaration. The Agency did not submit a reply.

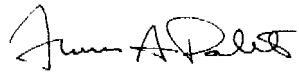
The Complainant has the burden to prove entitlement to an award for attorney's fees and costs. *See Copeland v. Marshall, 641 F. 2d 880, 892 (D.C. Cir. 1980)*. Attached to the Complainant's Verified Statement is the statement for services rendered to the Complainant. Each of the entries includes dates of service, hours expended, and a brief description of the work performed. Also attached to the Verified Statement is the affidavit of the Complainant's attorney and other attorneys regarding the prevailing rate for employment lawyers. The Complainant has not submitted a fee agreement.

The reasonable hourly rate for statutory fee cases is to be determined by the "prevailing market rates in the relevant community." *Blum v. Stenson, 465 US 886, 895 (1984)*. The burden is on the fee applicant to produce evidence that the requested rates are consistent with those in the community for similar services by attorneys with comparable skill, experience and reputation. An attorney's customary billing rate for fee-paying clients is evidence of a reasonable attorney fee for that attorney. *Cunningham v. City of McKeesport, 753 F. 2d 262, 267 (3rd Cir), vacated and remanded on other grounds, 478 US. 1015 (1985)*.

The Agency has not objected to the requested hourly rate of \$200.00 per hour. The affidavits submitted by Mr. Kastner support a \$200.00 hourly fee. I find that the rate of \$200.00 per hour is reasonable under the circumstances of this case.

I also find all entries in the Complainant's verified statement of fees to be reasonable under

the circumstances of this case. Therefore, I find that Complainant is entitled to Attorney's fees in the amount of \$13,511.53 and costs in the amount of \$2971.00.



Francis A. Polito

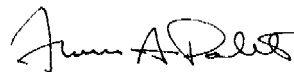
Administrative Judge

Corrective Action

To remedy the effects of discrimination which was found to have occurred the Agency is

ORDERED to take the following remedial action:

- 1 Pay Complainant compensatory damages in the amount of (\$25,000.00);
2. Post, for sixty (60) days and in conspicuous places where employee notices are customarily posted, copies of the attached Notice of Violation at the VAMC in East orange, New Jersey;
3. Take reasonable steps to ensure that copies of the Notice of Violation as posted are not altered, defaced, or covered by any other material;
4. Restore 10 days or 80 hours of sick leave to the Complainant;
5. Pay Attorney's fees in the amount of \$ 13,511.53 and costs in the amount of \$2971.00;



September 7, 2005

Date

Francis A. Polito
Administrative Judge