UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 1

Docket No. SF-0752-08-0062-P-2

Linda D. Edwards,

Appellant,

v.

Department of Transportation,

Agency.

January 6, 2012

Ronald P. Ackerman, Esquire, Culver City, California, for the appellant.

Lierre M. Green, Esquire, Los Angeles, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the addendum initial decision finding that she was not entitled to pecuniary damages, but was entitled to $10,000 in nonpecuniary damages in compensation for the agency's discriminatory acts taken on the basis of the appellant's disability. For the reasons set forth below, we DENY the appellant's petition for review and AFFIRM the addendum initial decision.

BACKGROUND

¶2 On April 17, 2008, the appellant filed a petition for review of an initial decision that affirmed her removal from her position as an Air Traffic Control Specialist and rejected, inter alia, her claim of disability discrimination. *Edwards v. Department of Transportation*, MSPB Docket No. SF-0752-08-0062-I-1, Initial Decision (Feb. 13, 2008). The Board granted the petition for review and ordered the agency to cancel the appellant's removal because it was not taken for such cause as would promote the efficiency of the service. *Edwards v. Department of Transportation*, 109 M.S.P.R. 579, ¶¶ 1, 22-23 (2008). Because the appellant did not raise the issues on review, the Board did not address the appellant's discrimination claims.

¶3 The appellant sought review of the Board's decision concerning her claim of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., before the Equal Employment Opportunity Commission (EEOC). *See Edwards v. Department of Transportation*, EEOC Petition No. 0320080101, 2009 WL 1904988 (June 23, 2009). The EEOC concurred with the administrative judge's finding of no discrimination based on race but differed with the final decision of the administrative judge by finding that the agency committed disability discrimination. *Id.* at *6-7. It found that the agency failed to accommodate the appellant because it did not present credible evidence that allowing the appellant to return to work in January 2008, as indicated in her medical restrictions, would have imposed an undue hardship. *Id.* at *6. It further found that the agency denied this accommodation based on the appellant's "record of" disability. *Id.*

¶4 The EEOC thereafter referred the case back to the Board for further consideration under 5 U.S.C. § 7702(b)(5)(B) because it disagreed with the Board's final order in the appeal. The Board concurred in and adopted the

EEOC's finding that the agency discriminated against the appellant on the basis of her disability. *Edwards v. Department of Transportation*, 112 M.S.P.R. 82, ¶ 1 (2009). The Board ordered the agency to pay the appellant back pay pursuant to 42 U.S.C. § 2000e-5(g)(1), as Federal Aviation Administration employees may not be awarded back pay under the Back Pay Act. *Edwards*, 112 M.S.P.R. 82, ¶¶ 18, 22. The Board also forwarded the appeal to the regional office for adjudication of compensatory damages under the Civil Rights Act of 1991. *Id.*, ¶¶ 19-21.

¶5 On October 3, 2009, the appellant filed a motion for compensatory damages, seeking pecuniary damages for losses related to her loss of health benefits ($29,456), costs for pursuing training for other employment ($69,439), finance and interest charges ($420), mortgage-related losses ($20,516), and loss of future earning capacity ($100,000). *Edwards v. Department of Transportation*, MSPB Docket No. SF-0752-08-0062-P-1, Request for Damages File 1 (RDF1), Tab 5 at 7-9. The appellant also sought damages for nonpecuniary losses for past emotional suffering and mental distress ($100,000), future emotional suffering and mental distress ($120,000), and damage to career ($80,000). *Id.* at 11-12. In support of her motion, the appellant submitted a personal declaration, a declaration from her husband, Sammy Edwards, and twelve exhibits. *Id.* at 13-54. The agency responded in opposition to the appellant's motion. RDF1, Tab 9.

¶6 After holding a hearing, the administrative judge granted the appellant's motion for compensatory damages, awarding her $10,000 in nonpecuniary damages but nothing in pecuniary damages. *Edwards v. Department of Transportation*, MSPB Docket No. SF-0752-08-0062-P-2, Request for Damages File 2 (RDF2), Tab 15, Addendum Initial Decision at 22, 30-31. The administrative judge denied the appellant's claims for pecuniary damages based on her loss of health benefits, costs associated with experimental treatment of her breast cancer, and mileage costs for traveling for treatment. The administrative judge found that some of the claimed health services occurred prior to the

appellant's removal, that the appellant had medical coverage through her husband's federal health care benefits, that she failed to show that she was required to travel 175 miles per day to receive treatment and that she failed to provide documentation of the claimed treatments. *Id.* at 17-18. The administrative judge similarly denied the appellant's requests for damages based on claimed costs for pursuing training for other employment because the appellant's degrees were obtained prior to her removal by the agency and because the principal amount of any student loans incurred are not properly paid as compensatory damages. *Id.* at 18-19. The administrative judge also denied the appellant's requests for claims related to various finance and interest charges because the appellant failed to provide information regarding the timeframe of the incurrence of such charges and failed to show that any of the expenses were directly or proximately caused by the agency's discriminatory conduct. *Id.* at 19-20. The administrative judge similarly rejected the appellant's claimed damages for mortgage losses, finding that the appellant was in a leave without pay status based on her absence from the workplace for breast cancer treatment when she fell behind on mortgage payments and sought a loan modification that increased the principal amount of the loan by $20,516, and thus she failed to show that her removal, as opposed to her leave without pay status, directly or proximately caused her inability to pay her mortgage. *Id.* at 20. The administrative judge also denied the appellant's claim of $100,000 for loss of future earning capacity, finding that, despite the appellant's contentions to the contrary, the appellant's official personnel folder indicates that she was separated based on her receipt of disability retirement benefits and that the appellant presented no evidence that she has been refused work based on her poor credit rating. *Id.* at 21-22.

¶7 After considering and analyzing the wide range of awards for nonpecuniary losses from the Board and the EEOC based on various factors, the administrative judge awarded the appellant $10,000 in nonpecuniary damages. *Id.* at 23-28. The administrative judge found that the agency's decision to remove the appellant, as

opposed to leaving her in a leave without pay status for an additional 3 months, did not result in any loss of income for the appellant as she was unable to work during that time. *Id.* at 27. The administrative judge also found that the appellant suffered from emotional distress independent of the discriminatory acts by the agency, such as her recurring breast cancer and the sudden death of her daughter, and that the appellant failed to submit a medical opinion establishing that her breast cancer worsened as a result of the agency's actions. *Id.* at 27-28. The administrative judge declined to award the appellant future pecuniary damages for future medical treatment for emotional suffering and mental distress, finding that the future course of the appellant's condition is too speculative without treatment records or means of estimating future emotional pain and suffering connected to the agency's discriminatory acts. *Id.* at 29. The administrative judge lastly declined to award the appellant damages for her claim of damage to her career, finding that the appellant was not medically released to return to work until February 13, 2009, that the appellant presently receives disability retirement benefits from the Office of Personnel Management because of her breast cancer dating back to at least September 2007, and that the appellant thus failed to establish a causation between the agency's discriminatory acts and her future lost wages. *Id.* at 30.

¶8 The appellant has filed a petition for review of the administrative judge's addendum initial decision. Petition for Review (PFR) File, Tab 1. The agency has filed a response in opposition. *Id.*, Tab 3.

ANALYSIS

¶9 Under the Civil Rights Act of 1991, an employee may recover compensatory damages from a federal agency that engaged in unlawful and intentional discrimination against her on the basis of her disability. 42 U.S.C. § 1981a(a)(2)-(3); *Hocker v. Department of Transportation*, 63 M.S.P.R. 497, 504 (1994), *aff'd*, 64 F.3d 676 (Fed. Cir. 1995) (Table). The Board may order the

payment of compensatory damages when there has been a finding that such discrimination occurred. *Heffernan v. Department of Health & Human Services*, 107 M.S.P.R. 97, ¶ 5 (2007); 5 C.F.R. § 1201.202(c). The Board has held that it will defer to and adopt the EEOC's criteria for proving both the entitlement to and the amount of compensatory damages. *See Sloan v. U.S. Postal Service*, 77 M.S.P.R. 58, 70 (1997).

¶10 Section 102(a) of the Civil Rights Act authorizes the award of compensatory damages for pecuniary losses and for nonpecuniary losses, such as, but not limited to, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health. Compensatory damages do not include back pay, interest on back pay, or any other type of equitable relief authorized by Title VII. To receive an award of compensatory damages, an appellant must demonstrate that she has been harmed as a result of the agency's discriminatory action and must establish the extent, nature, and severity of the harm, as well as the duration or expected duration of the harm. *Rivera v. Department of the Navy*, EEOC Appeal No. 01934157, 1994 WL 652171, at *3 (July 22, 1994), *recons. denied*, EEOC Request No. 05940927, 1995 WL 744159 (Dec. 8, 1995); EEOC's Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991, 1992 WL 1364354, at 11-12, 14 (July 14, 1992) ("Guidance"); *see Heffernan*, 107 M.S.P.R. 97, ¶ 6.

The administrative judge's credibility determinations are entitled to deference.

¶11 In her petition for review, the appellant disputes the administrative judge's credibility determinations, asserting that the administrative judge's credibility findings were not supported by evidence and that the administrative judge relied on "extraneous and immaterial evidence" in making her credibility findings. PFR File, Tab 1 at 6-7. The appellant's assertions on these issues are without merit as the administrative judge thoroughly explained her findings that the appellant's declaration was "mendacious" and due little weight, that Mr. Edwards's

declaration was not credible, and that the appellant was not a credible witness. *See* Addendum Initial Decision at 7-17. The appellant has pointed to nothing that constitutes a sufficiently sound reason to overturn the administrative judge's demeanor-based credibility determinations and nothing to suggest the need for the Board to reweigh the evidence and substitute its own judgment on the credibility issues. *See Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002); *Faucher v. Department of the Air Force*, 96 M.S.P.R. 203, ¶ 8 (2004). Rather, the addendum initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility. *See Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987); *see also Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 105-06 (1997) (the Board will give due deference to the credibility findings of the administrative judge and will not grant a petition for review based on a party's mere disagreement with those findings).

The appellant failed to establish entitlement to pecuniary damages.

¶12 Pecuniary damages are available for out-of-pocket expenses shown to be related to the discriminatory conduct. *See Minardi v. U.S. Postal Service*, EEOC Appeal No. 01981955, 2000 WL 33542026, at *2 (Oct. 3, 2000). Typically, these damages include reimbursement for medical expenses, job hunting expenses, moving expenses, and other quantitative out-of-pocket expenses. *Id.* The EEOC requires documentation in support of these expenses, typically in the form of receipts, bills, or physicians' statements. *Id.* Past pecuniary losses are those losses that are likely to occur before resolution of a complaint and future pecuniary losses are losses that are likely to occur after resolution of a complaint. *See* Guidance at 5-6.

¶13 The appellant is seeking damages for losses related to her loss of health benefits ($29,456), costs for pursuing training for other employment ($69,439), finance and interest charges ($420), mortgage-related losses ($20,516), and loss of future earning capacity ($100,000). *See* RDF1, Tab 5 at 7-9. In her petition

for review, the appellant asserts that the administrative judge incorrectly applied the law in finding that the appellant is not entitled to pecuniary damages. PFR File, Tab 1 at 10.

¶14 With respect to her health-related costs, the appellant asserts that the administrative judge should have applied the collateral source rule, which provides that, even if the appellant could recover from her insurance company for her experimental cancer treatment in Mexico, such recovery would not offset the agency's liability for the costs.[1] *Id.* at 11. The appellant asserts that the agency is liable for these expenses because they would have been covered by her insurance plan with the agency if she had not been removed. *Id.* at 11-12. The appellant further asserts that the fact that she was eligible for health insurance through her husband's employer should not serve to enrich the agency. *Id.* at 12. The appellant also asserts that the administrative judge reached an erroneous adverse inference that Mr. Edwards's leave statements would have shown that the appellant had health coverage during the relevant period of time if he had provided them as requested by the administrative judge. *Id.*

¶15 As noted above, pecuniary damages are available for out-of-pocket expenses, such as medical expenses, that are shown to be related to the agency's misconduct. *See Warren v. Department of the Army*, EEOC Appeal Nos. 01985656, 01A02134, 2001 WL 309379, at *5-6 (Mar. 20, 2001). The administrative judge found that the appellant failed to establish that the claimed medical expenses were directly or proximately caused by the agency's

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[1] The "collateral source" rule holds that "benefits received by the plaintiff from a source collateral to the defendant may not be used to reduce that defendant's liability for damages." *Finlay v. U.S. Postal Service*, EEOC Appeal No. 01942985, 1997 WL 221819, at *10 (Apr. 29, 1997) (citing 1 Dobbs, Law of Remedies § 3.8(1), at 372-73 (2d ed. 1993)). Double recovery is not an issue because complainant's health insurer may recover from him the monies it expended on his behalf. *See Ward-Jenkins v. Department of the Interior*, EEOC Appeal No. 01961483, 1999 WL 139427, at *5 (Mar. 4, 1999).

discriminatory conduct. Addendum Initial Decision at 17-18. Indeed, the appellant notes in her petition for review that she "does not claim that her medical expenses were a result of the Agency's discriminatory conduct, only that her loss of health benefits were a result of the unlawful termination." PFR File, Tab 1 at 12. Thus, the appellant's attempt to apply the collateral source rule to the instant circumstances is misplaced. As the agency noted in its response to the appellant's petition for review, the application of the collateral source rule to medical expenses is premised upon first finding that the medical expenses at issue were related to the agency's discriminatory conduct. *See* PFR File, Tab 3 at 11; *see also Miller v. Department of the Treasury*, EEOC Appeal No. 01A60181, 2006 WL 1057755, at *3 (Apr. 11, 2006); *Reneau v. U.S. Postal Service*, EEOC Appeal No. 01A30568, 2004 WL 933346, at *6 (Apr. 20, 2004). The appellant does not dispute the administrative judge's finding that the medical expenses claimed by the appellant were not related to the agency's discriminatory conduct, and the appellant has provided no reason for broadening the application of the collateral source rule in this way. *See* Addendum Initial Decision at 17-18.

¶16 Further, we have found no legal basis, and the appellant has pointed to none, under EEOC or Board law establishing a right to pecuniary damages for medical expenses unrelated to the agency's discriminatory conduct that otherwise may have been covered under the appellant's health insurance plan but for her removal. Further, regardless of whether the administrative judge's adverse inference that the appellant was covered under her husband's medical insurance was appropriate, the appellant has failed to establish that she was substantively prejudiced by such a finding, given that the medical expenses were not related to the agency's discriminatory conduct. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984); Addendum Initial Decision at 9. Moreover, the administrative judge noted that the appellant testified that her husband, a Department of Defense employee, had health benefit coverage as of October 2007. Addendum Initial Decision at 8-9. Additionally, the appellant has failed to

show how the agency was "enrich[ed]" by the fact that she was eligible for her husband's medical insurance given, again, that the appellant failed to establish that her medical expenses were related to the agency's discriminatory conduct. Accordingly, the appellant's assertion that she is entitled to pecuniary damages for all medical expenses following her loss of health benefits, the loss of which stemmed from her removal, is without merit.

¶17 With respect to her claimed educational expenses, the appellant asserts in her petition for review that, even though much of her education took place before she was removed, "some of the costs were incurred as Appellant was not being paid [due to] the Agency's failure to provide her reasonable accommodation, leading up to her removal." PFR File, Tab 1 at 13. The appellant once again fails to point to evidence that shows she incurred educational expenses as a result of the agency's discriminatory conduct, particularly as the evidence shows that the appellant finished her degrees in 2006.[2] *See* RDF1, Tab 5 at 28-29; Addendum Initial Decision at 19.

¶18 With respect to her mortgage-related costs, the appellant concedes that she was falling behind on her mortgage before she was removed due to the fact that she was in a leave without pay status for purposes of undergoing treatment for breast cancer. PFR File, Tab 1 at 13. However, she asserts that she was "[u]ltimately . . . forced to seek a loan modification after she was terminated because of her continued loss of income" and that her loan modification was therefore a direct and proximate result of her removal. *Id.* However, this assertion is without merit because the EEOC has recognized that expenses such as rent, tax payments, mortgage payments and living expenses would have been incurred whether an appellant was discriminated against or not. *See Mature v.*

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[2] While the appellant submitted two statements from Chapman University from 2009, the statements do not show when the appellant incurred the educational expenses as both statements showed that the appellant's account was past due and in collections "in house." *See* RDF1, Tab 5 at 28-29.

U.S. Postal Service, EEOC Appeal No. 07A20065, 2003 WL 1440662, at *4 (Mar. 17, 2003); *Wan v. U.S. Postal Service*, EEOC Appeal No. 01995204, 2001 WL 884829, at *3-4 (July 11, 2001). In other words, it cannot be said that these expenses would not have occurred "but for" the agency's discrimination. *See Mature*, EEOC Appeal No. 07A20065, 2003 WL 1440662, at *4.

¶19 With respect to her claim of loss of future earning capacity, the appellant asserts in her petition for review that she accepted disability retirement only because the agency did not offer her a position that accommodated her medical restrictions and that she otherwise would have returned to work. PFR File, Tab 1 at 14-15. Where an employee has shown that her future earning power has been diminished as a result of the agency's discrimination, the EEOC has awarded future pecuniary damages for the loss of future earning capacity. *Reed v. Department of Transportation*, EEOC Appeal No. 0120080520, 2011 WL 397051, at *6 (Jan. 21, 2011). Proof of entitlement to loss of future earning capacity involves evidence suggesting that the individual's injuries have narrowed the range of economic opportunities available to her. *Id.* Generally, the party seeking compensation for loss of earning capacity needs to provide evidence which demonstrates with reasonable certainty or reasonable probability that the loss has been sustained. *Id.* Additionally, there must be evidence to allow the fact finder to arrive at a pecuniary value for the loss. *See Conrad v. Department of Justice*, EEOC Appeal No. 0120090690, 2010 WL 1514298, at *7 (Apr. 9, 2010).

¶20 The appellant's assertions on review provide no reason to disturb the administrative judge's findings with respect to the appellant's claim of loss of future earning capacity. The appellant based her claim of loss of future earning capacity on her assertion that her personnel records indicate that she was removed for failing to attend work and on the fact that her credit rating is poor because she could not pay her bills. *See* RDF1, Tab 5 at 9. As the administrative judge found, the appellant's official personnel file indicates that she separated from the

agency in October 2008 as a result of disability retirement. Addendum Initial Decision at 21; RDF1, Tab 9, Exhibit D. The administrative judge further found that the appellant failed to submit evidence showing that her credit rating had negatively affected her employment prospects, especially in light of the appellant's testimony that she had only applied for two positions, one for which she was overqualified and the other from which she never received a response. Addendum Initial Decision at 21-22.

The appellant has provided no reason to disturb the administrative judge's award of $10,000 in nonpecuniary damages.

¶21 Nonpecuniary damages constitute the sums necessary to compensate an injured party for actual harm, even where the harm is intangible. *Carter v. Duncan-Higgans, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984). Nonpecuniary losses are losses that are not subject to precise quantification including 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. Guidance at 7; *see Sloan*, 77 M.S.P.R. at 70. An award of compensatory damages for nonpecuniary losses should reflect the extent to which the agency directly or proximately caused the harm and the extent to which other factors also caused the harm. *See* Guidance at 7-8. The award should take into account the severity and duration of the harm, although nonpecuniary damages are limited to a maximum amount of $300,000. 42 U.S.C. § 1981a(b)(3)(D); *Hensley v. Tennessee Valley Authority*, EEOC Appeal No. 0120072458, 2008 WL 5479223, at *5 (Nov. 10, 2008). The EEOC has stated that the amount of a nonpecuniary damage award should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. *See Ward-Jenkins*, EEOC Appeal No. 01961483, 1999 WL 139427, at *6 (citing *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989)).

¶22 Objective evidence of nonpecuniary damages may include a statement by the complainant explaining how she was affected by the discrimination. *Carle v. Department of the Navy*, EEOC Appeal No. 01922369, 1993 WL 1504728, at *4 (Jan. 5, 1993). Statements from others, including family members, friends, and health care providers may address the outward manifestations of the impact of the discrimination on the complainant. *Id.* The complainant may also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. *Id.* However, evidence from a health care provider is not a mandatory prerequisite to establishing entitlement to nonpecuniary damages. *Sinnott v. Department of Defense*, EEOC Appeal No. 01952872, 1996 WL 546877, at *6 (Sept. 19, 1996).

¶23 The EEOC has recognized that an appellant is entitled to recover damages only for injury, or additional injury, caused by the discrimination. *Terrell v. Department of Housing and Urban Development*, EEOC Appeal No. 01961030, 1996 WL 637242, at *12 (Oct. 25, 1996), *recons. denied*, EEOC Request No. 05970336 (Nov. 20, 1997). Where a complaining party's emotional harm is due in part to personal difficulties which were not caused or exacerbated by the discriminatory conduct, the employer is liable only for the harm resulting from that conduct. Guidance at 8 (citing *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503 (11th Cir. 1989)).

¶24 The appellant is seeking damages for nonpecuniary losses for past emotional suffering and mental distress ($100,000), future emotional suffering and mental distress ($120,000), and damage to career ($80,000). RDF1, Tab 5 at 11-12. In her petition for review, the appellant asserts that the administrative judge misapplied EEOC law in finding that the appellant's failure to seek medical treatment for her depression and anxiety for 2 years after her removal diminished the appellant's claim that she suffered from debilitating depression because the EEOC has repeatedly held that medical documentation is not necessary to support a claim for nonpecuniary damages. PFR File, Tab 1 at 7-8; Addendum Initial

Decision at 13. Citing various EEOC decisions awarding upwards of $75,000 in nonpecuniary damages, the appellant further asserts that she "suffered tremendously" as a result of her removal by the agency and that she submitted evidence that she sought counseling. PFR File, Tab 1 at 8-10.

¶25 First, the administrative judge did not specifically rely on the appellant's failure for 2 years to seek medical treatment for her alleged depression and anxiety following her removal to find that the appellant was entitled to only $10,000 in nonpecuniary damages as opposed to the appellant's requested $300,000. *See* Addendum Initial Decision at 13. Rather, in making her credibility determinations upfront, the administrative judge noted that the appellant's failure for 2 years to seek treatment for her alleged depression and anxiety resulting from the agency's discriminatory conduct "diminishe[d] her claims that she suffered from debilitating depression, anxiety, etc." *See id.* Further, EEOC precedent does not prohibit the Board from considering whether an appellant has provided supporting medical evidence of her claim for nonpecuniary damages; rather, it simply provides that such evidence is not mandatory in awarding compensatory damages for nonpecuniary losses. *See Sinnott*, EEOC Appeal No. 01952872, 1996 WL 546877, at *6. Whether with supporting medical evidence or other evidence, the appellant must still prove her injury and that the agency's discriminatory conduct caused the injury. *See Terrell*, EEOC Appeal No. 01961030, 1996 WL 637242, at *12. Additionally, the EEOC has explicitly recognized that "the absence of supporting evidence [to support a claim of emotional distress] may affect the amount of damages deemed appropriate in specific cases." *Lawrence v. U.S. Postal Service*, EEOC Appeal No. 01952288, 1996 WL 197403, at *5 (Apr. 18, 1996).

¶26 The administrative judge here conducted a thorough and lengthy analysis of several lines of EEOC cases granting a wide range of awards for nonpecuniary damages, and she specifically noted cases in which the appellant had or had not presented supporting medical evidence. *See* Addendum Initial Decision at 23-27.

In arriving at an award of $10,000 in nonpecuniary damages, the administrative judge found that the appellant suffered from emotional distress, such as her breast cancer and the death of her daughter, independent of the agency's discriminatory conduct that had to be considered and that an award of $10,000 was in line with other EEOC decisions, which involved similar general claims and lacked supporting objective medical evidence. *Id.* at 27-28. The appellant fails in her petition for review to identify any error by the administrative judge in relying upon the cases cited in the addendum initial decision or in considering that the appellant did not seek treatment for her depression and anxiety stemming from the agency's discriminatory acts until 2 years after she was removed. *See id.* at 28-29. Furthermore, each of the EEOC decisions cited by the appellant in her petition for review in support of her claim for nonpecuniary damages is distinguishable from the instant case because the employees in those cases provided supporting evidence in the form of, inter alia, credible testimony by the appellant, credible statements from family and friends, and/or unrebutted medical evidence that is absent from the instant case. *See, e.g.*, *Maeso v. Department of Homeland Security*, EEOC Appeal No. 0720080003, 2009 WL 591061, at *3 (Feb. 26, 2009); *Kelly v. Department of Veterans Affairs*, EEOC Appeal No. 01951729, 1998 WL 454814, at *8-*9 (July 29, 1998); *see also* PFR File, Tab 1 at 9.

ORDER

¶27 Accordingly, we concur with the administrative judge's decision to grant the appellant's motion for compensatory damages, awarding the appellant $10,000 in nonpecuniary damages and nothing in pecuniary damages. The agency is ordered to issue a check to the appellant for $10,000 for nonpecuniary damages. The agency must complete this action no later than 20 days after the date on which this order is issued.

¶28 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶29 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶30 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

This is the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of

prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.