



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Charlotte District Office

129 West Trade Street, Suite 400
 Charlotte, NC 28202
 (704) 344-6682
 TTY (704) 344-6684
 FAX (704) 344-6734 & 6731

IN THE MATTER OF:)
)
William H. Ray, Jr.,)
Complainant,)
)
v.)
)
Mike Johanns,)
Secretary,)
Department of Agriculture,)
Agency.)

EEOC No.: 140-2005-00183X

Agency Nos.: 030465
 040069

DECISION

I. INTRODUCTION

On July 26, and August 23, 2005, the above-captioned complaint was heard before Kelly A. Davis, Administrative Judge, Charlotte District Office, Equal Employment Opportunity Commission, in Columbia, South Carolina, and via telephone conference call. William H. Ray, Jr. (hereinafter, Complainant) alleged that he was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* It is upon the totality of the evidence that the following decision is based.

II. APPEARANCES

The Complainant was represented by Nancy A. Chiles, Esq., and Anne Mjaatvedt, Esq.; the Agency was represented by Vanessa A. Schwamberger.

III. CLAIMS

Whether or not the Agency discriminated against Complainant based on:

(1) race (Black) and reprisal (prior EEO activity) when, on March 26, 2003, he was not selected for the position of County Executive Director, under Vacancy Announcement No. SC030003; and

(2) race and reprisal (prior EEO activity) when, on or about August 6, 2003, he was not selected for the position of County Executive Director, under Vacancy Announcement No. SC030007?

IV. FINDINGS OF FACT¹

1. At the time this complaint arose, Complainant was employed by the Farm Service Agency as a County Executive Director-at-Large, CO-11, at its Colleton County Office in Walterboro, South Carolina. IR at Exh. 6.
2. Complainant began working full-time for the Agency in March 1992. He received a Bachelor of Science degree in Agri-Business from South Carolina State University in 1990. Complainant first worked for the Agency as a Program Assistant, and soon entered the County Operations Training (COT) program. After working in several counties as part of the training program, he was promoted to County Executive Director (CED) of Cherokee County in 1994. CE 1.
3. When the Cherokee County FSA office was combined with the Spartanburg County FSA office in 1996, the Spartanburg CED with more seniority was put in charge of the combined offices. Complainant applied for and was appointed CED of the Jasper/Beaufort County FSA office; he moved his family to Mount Pleasant because of the good school system and to be close to his wife's family. HT at 192-96. Complainant received in-grade increases in both 1998 and 1999, as well as good performance reviews. His problems began in 2000, when he sought to increase the number of minority farmers participating in FSA programs and filed an EEO complaint for non-selection for a CED position in Calhoun County. CE 1, 2, 3, 8.
4. During a drought in 2000, in accordance with state statutes providing for disaster relief payments and USDA FSA policy, Complainant went out into the county to disseminate information about these programs and encourage African American farmers, who were previously underrepresented, to come into the office to apply. CE 8. Complainant applied for the Calhoun County CED position

¹Hereinafter, IR = Investigative Report; Exh. = Exhibit; HT = Hearing Transcript; AE = Agency Exhibit; CE = Complainant Exhibit.

in 2000; when he was not selected, he filed an EEO complaint in July of that year. Subsequently, Complainant began experiencing problems with his employment. His efforts to help minority farmers resulted in an August 15, 2000 suspension, poor performance reviews, and criticisms of his job performance. He then had to file a series of EEO complaints to rectify the situation, which were resolved in mediation. When the Agency failed to comply with the terms of the resolution, Complainant filed further EEO complaints for reprisal and continuing violations. CE 2; HT at 204-34.

5. In May 2002, as the result of an EEO mediation, the Agency agreed to place Complainant in the CED position in Dorchester County. When Complainant reported to the Dorchester office in July 2002, no one else showed up for work. Upon contacting the Regional Director, John Chott, Complainant was informed that the employees, including Theresa Sweatman, and farmers in Dorchester County did not want to work with him. Subsequently, Complainant was appointed as CED at-large, with his duty station as the Colleton County FSA office. HT at 226-232.

6. On February 13, 2003, the Agency issued Vacancy Announcement Number SC030003 for the position of County Executive Director, CO-11, Dorchester County FSA Office, St. George, South Carolina. The announcement closed on February 28, 2003. The duties of the position included responsibility for directing and managing program and administrative operations of the County FSA Office as required to carry out authorized production flexibility, price support, farm loan, conservation, environmental quality, indemnity, disaster, emergency, defense, and related programs; performing office and field activities as needed to accomplish program objectives; taking appropriate actions to ensure that County Committee policies and objectives are properly communicated to and carried out by subordinate employees; and employing, training, and supervising subordinate County Office and Field employees. The vacancy announcement further indicated that eligible candidates would be screened on the following knowledge, skills, and abilities (KSAs): (1) ability to communicate both orally and in writing; (2) ability to identify and solve problems; (3) ability to plan, work, and make decisions independently; (4) ability to interpret and apply written regulations; (5)

evidence of the ability to supervise and direct the activities of subordinate employees; and (6) knowledge of FSA Farm Programs, farm practice, and customs. IR at Exh. 17.

7. In order to apply for the position, applicants were to submit an application and a supplemental statement addressing the KSA's. IR at Exh. 17.

8. Complainant applied for the Dorchester County CED position on February 27, 2003. His application reflects that he has ten years' experience as a CED, as well as a Bachelor of Science degree in Agri-Business. IR at Exh. 18.

9. Theresa Sweatman (Caucasian) also applied for the position. At the time of her application, she was still in training in the COT program; she possesses a GED. IR at Exh. 18.

10. Complainant and Sweatman were both interviewed for the position by the County Committee for Dorchester County, which is composed of farmers with farms in that county. Pinckney Murray (White) was the Dorchester County FSA Committee Chairperson. Murray and Ms. Sweatman's husband, Jeff Sweatman, are tenants together on a farm in Dorchester County. The other committee members were Wayne Welch (White) and Happy Bell (White); David Richer (Black) was an advisory member of the committee. HT at 419-24, 438-39. District Director John Rogers (White) was present for the candidates' interviews, but did not participate in asking questions of the candidates. HT at 553-57. Each of the committee members rated Sweatman higher than Complainant on the evaluation criteria that they examined and she was selected by the Committee for the position. AE 4.

11. Complainant contacted an EEO Counselor regarding his nonselection for this position on April 15, 2003. IR at Exh. 2. Complainant filed a formal complaint regarding the nonselection on May 22, 2003. IR at 1.

12. On July 10, 2003, the Agency issued Vacancy Announcement Number SC030007 for the position of County Executive Director, CO-12, Horry County FSA Office, Conway, South Carolina. The vacancy announcement closed on July 24, 2003. The duties of the position included responsibility for directing and managing program and administrative operations of the County FSA Office as required to carry out authorized production flexibility, price support, farm loan, conservation, environmental quality, indemnity, disaster, emergency, defense, and related programs; performing office and field activities as needed to accomplish program objectives; taking appropriate actions to ensure that County Committee policies and objectives are properly communicated to and carried out by subordinate employees; and employing, training, and supervising subordinate County Office and Field employees. The vacancy announcement further indicated that eligible candidates would be screened on the following KSAs: (1) ability to communicate both orally and in writing; (2) ability to identify and solve problems; (3) ability to plan work and make decisions independently; (4) ability to interpret and apply written regulations; (5) evidence of the ability to supervise and direct the activities of subordinate employees; and (6) knowledge of FSA Farm Programs, farm practices, and customs. IR at Exh. 19.

13. In order to apply for the position, applicants were to submit an application and a supplemental statement addressing the KSA's. IR at Exh. 19.

14. Complainant applied for the Horry County CED position on July 22, 2003. John Jenerette also applied for the position. Jenerette is a high school graduate; he began working for the Agency in September 1979 and was the Chief Program Assistant at the time of his application, having just completed the COT program. IR at Exh. 20.

15. Complainant, Jenerette, and a third candidate, Roselyn Quick (Black), were interviewed for the position by the County Committee of Horry County. Jerry Edge (White) was the Horry County FSA Committee Chairperson. AE 13. The other Committee members were Dwight Stevens (White) and Glen Winburn (White); James Wilson (Black) was the Committee's minority advisor. Franklin Sarvis (White), who was the District Director at the time, was present during the interviews and

asked specific program questions. HT at 640-41. Following the interviews, the Committee selected Jenerette for the position. IR at Exh. 20.

16. Complainant filed a formal complaint concerning this nonselection on November 4, 2003, and was subsequently consolidated with the first complaint for investigation. IR at Exh. 1

17. On January 18, 2005, Complainant received notice that he was being suspended without pay pending removal from his CED position. A letter sustaining his removal was issued on April 7, 2005, and received by Complainant on April 8, 2005; the effective date of his separation was April 9, 2005. CE 4.

V. APPLICABLE LAW

The burden of proof in discrimination cases is 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. Once a prima facie case has been established, the burden of going forward shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action. If the employer articulates such a reason, the burden is then on the complainant to prove, by a preponderance of the evidence, that the legitimate reason offered by the employer was not its true reason, but a mere pretext for discrimination. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). A plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer discriminated. *Reeves v. Sanderson Plumbing Products*, 120 S. Ct. 2097 (2000).

VI. ANALYSIS & FINDINGS

Regarding his claims of non-selection based on race, Complainant can establish a prima facie case of discrimination by showing that: (1) he is a member of a protected group; (2) he applied and was

qualified for the position(s); (3) he was not selected for the position(s); and (4) he was accorded treatment different from that given to a person otherwise similarly situated who is not a member of his protected group. *Keyes v. Secretary of the Navy*, 853 F.2d 1016, 1023 (1st Cir. 1988); *Cuddy v. Carmen*, 762 F.2d 119, 122 (D.C. Cir.), cert. denied, 474 U.S. 1034 (1985). 94 (1994). I find that Complainant has established a prima facie case of race discrimination with regard to both positions as he has demonstrated that he is a member of the protected group; he applied and was qualified for both positions; he was not selected for either position; and he was accorded treatment different from that given to the selectees for the two positions, both of whom are White.

Regarding his claim based on retaliation with regard to the non-selections, Complainant may show that: (1) he engaged in protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. *Whitmire v. Department of the Air Force*, EEOC Appeal No. 01AO0340 (September 25, 2000). I find that Complainant has established a prima facie case of retaliation with regard to both non-selections as he was engaged in protected activity continuously from July 2000 through July 2002 and contacted an EEO Counselor with regard to the first non-selection at issue here in April 2003; the agency was aware of that activity, as evidenced by the testimony of Administrative Officer Perry Thompson; he was subjected to adverse treatment when he was not selected for the positions; and a nexus exists between the protected activity and the adverse treatment, as evidenced by both the temporal connection, in that the protected activity was virtually ongoing, and the fact that the District Director of a district other than the one in which Complainant was employed but one where he sought employment when he applied for the Horry County position, Franklin Sarvis, was aware of Complainant's prior EEO activity.

The question becomes then whether the Agency has articulated legitimate, nondiscriminatory reasons for Complainant's non-selections. While the Agency's burden of production is not onerous, it must nevertheless provide a specific, clear, and individualized explanation for the treatment accorded Complainant. Complainant is entitled to some rationale for his non-selection that provides him with an opportunity to satisfy his ultimate burden of proving that the Agency's explanation was a pretext

for prohibited discrimination. *Wilson v. Department of Veterans Affairs*, EEOC Appeal No. 01995055 (December 21, 2001). I find that the Agency has met its burden of articulating legitimate, nondiscriminatory reasons for Complainant's non-selections. Regarding the Dorchester County CED position, Committee Member Wayne Welch testified that Sweatman was selected because the Committee felt that she was the better candidate. Specifically, she was local and a part of the farming community and had a great record with the local farmers. Committee Chairman Pinckney Murray testified that Sweatman was selected because she had a better interview and the County Committee was more familiar with her work. Regarding the Horry County CED position, District Director Franklin Sarvis testified that the Committee felt Jenerette was best qualified for the position based on his program knowledge and supervisory experience. Committee Chairman Jerry Edge testified that Jenerette was selected because he knew their programs better and could best serve their county.

Complainant may still prevail, however, by demonstrating, by a preponderance of the evidence, that the Agency's articulated reasons were not the true reasons for the challenged employment decisions but were pretext for unlawful discrimination. He may make this showing "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. The critical factor is that the court must be persuaded that it was discrimination that motivated the employer to act as it did. It is not sufficient "to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination." *Hicks*, 509 U.S. at 519. However, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Reeves v. Sanderson Plumbing Products*, 120 S. Ct. 2097 (2000). In a non-selection case, pretext may be demonstrated in a number of ways, including a showing that the complainant's qualifications are observably superior to those of the selectee. *Bauer v. Bailar*, 647 F.2d 1037, 1048 (10th Cir. 1981).

I find evidence of pretext with regard to both non-selections. Regarding the Dorchester County position, I find Complainant's qualifications to be observably superior to those of Sweatman. He has more education, *i.e.*, a degree in an agriculturally-related field compared to a GED for Sweatman, and far more experience in the CED position, *i.e.*, he had been a CED since 1994, while Sweatman had just completed the COT program at the time of the selection. I also note Sweatman's complete lack of professionalism when Complainant was named acting CED of Dorchester County, *i.e.*, walking off the job. Further, there is the curious timing of the announcement of the Dorchester CED position, which points towards Sweatman's pre-selection. Specifically, despite the fact that the previous CED had resigned from the position approximately a year and a half prior to the interviews for the position, the position was announced within a week after Sweatman completed the COT program. In addition, I note the close relationship between Sweatman and the Chairperson of the County Committee, Pinckney Murray, who was a far from credible witness. Administrative Officer Perry Thompson testified that Sweatman and Murray are cousins. Although Murray denied any relationship with Sweatman, he did admit that his family socializes with the Sweatman family and that he and Sweatman's husband are tenants on a farm in Dorchester County; this admission came after he initially testified that he did not know Sweatman prior to the selection. I also note Murray's testimony that he wanted Sweatman to become the next CED of Dorchester County, and that the County Committee was supportive of her going into the COT program. Conversely, Murray and the County Committee were not supportive when Complainant was named the acting CED of Dorchester County. In fact, Murray testified that when he received notification of Complainant's assignment, he contacted Senator Thurmond's office and former Secretary of Agriculture Ann Venemann's office to complain about getting a CED without the County Committee voting and approving it.

Another committee member, Wayne Welch, was even less credible than Murray; he was defensive during his cross-examination, commenting at one point, "don't tell me what I considered." In addition, he was angry and loud on occasion during that same cross-examination; so angry and loud in fact, that these characteristics were apparent despite the fact that he testified telephonically. It was apparent that Welch was more than merely vexed that he was being asked to explain his role in the selection process. Finally, Welch told the EEO Counselor that Complainant did not have a good

reputation and that Ms. Sweatman had a better personality. IR at Exh. 2. At the hearing, however, he could not recall telling the EEO Counselor that Complainant did not have a good reputation and denied saying that the selectee had a better personality. I therefore cannot credit his testimony that he knew nothing about Complainant prior to the selection, particularly given that he was a member of the County Committee in 2002 when Complainant was run out of Dorchester County, or his testimony that the County Committee did not discuss race or EEO activity, given his comment to the EEO Counselor about Complainant's reputation.

Further, I note the racial composition of the County Committee who made the selection; all the voting members were White, while the minority advisory member had no vote. In addition, only two of the 37 CED's in the state of South Carolina at the time were Black; since the Complainant's subsequent removal from the Agency's employ, there is only one Black CED remaining. Finally, I note the testimony of various Agency employees about retaliation they experienced during the course of their employment; in particular, District Director John Rogers demonstrated hostility to persons filing complaints. Denna Rentz, who worked for the Agency as a Program Technician for almost 10 years and had a Bachelor of Science degree in Agriculture and Dairy Science with a minor in Chemistry, testified that she resigned from the Agency because she applied for the COT program and was turned down; she believed she was turned down because of a complaint that she had filed. Specifically, Rentz testified that after complaining about a co-worker, who was targeting another employee in the office, she and her co-workers in Colleton County were ostracized by District Director John Rogers. Rentz's former supervisor, Lynn Huggins, testified that after repeated contacts with Rogers, he would not return her phone calls or respond to e-mails. She testified that the problem employee was not transferred out of the office until she contacted somebody in the Agency's Headquarters in Washington, D.C. about violence in the workplace. Huggins also testified that once their complaints were filed, Rogers appeared in the office less and less; after Complainant was assigned there, Rogers never came to the Colleton County office. Rogers told Huggins that Complainant had filed an EEO complaint against the Agency. Moreover, Rogers was present for the interviews for the Dorchester County CED position and perhaps shared this knowledge of Complainant's EEO history with the County Committee as well. Given all of these factors, *i.e.*, the

lack of credibility of the County Committee members, Rogers' history of retaliation, Complainant's observably superior qualifications for the position, and Complainant's treatment in Dorchester County when he was previously assigned there, I find that Complainant has established that his non-selection for the Dorchester County CED position was based on both race and reprisal for prior EEO activity.

Regarding the Horry County CED position, I again find that Complainant's qualifications are observably superior to those of the selectee, Jenerette. Again, Complainant has a college degree in an agriculture-related field, while Jenerette possesses a high school diploma. In addition, Complainant has many years experience as a CED, while Jenerette had just completed the COT program. Further, District Director Franklin Sarvis, who participated in the interviews of the candidates, admitted that he advised the County Committee that Complainant had filed several EEO complaints about the selection process and not to be surprised if it happened again, evidencing his hostility to persons filing EEO complaints. As with the Dorchester County position, one also has to note the timing of the announcement of the position. The position became vacant around January 1, 2003, but was not announced until July 2003. The selectee, Jenrette, and Quick both became eligible for the position during the six-month period that the position was vacant. Further, the voting members of the County Committee were all White; the Committee's lone minority member acted in an advisory role and had no vote. Finally, as noted above, there's the clear underrepresentation of African Americans in the CED position in South Carolina. Accordingly, I find that Complainant established that he was not selected for the Horry County CED position based on both his race and his prior EEO activity.

VII. COMPENSATORY DAMAGES

As relief for the discrimination that he suffered, Complainant requested compensatory damages. Section 102(a) of the Civil Rights Act of 1991 (1991 CRA), 105 Stat. 1071, Pub. L. No. 102-166, codified at 42 U.S.C. § 1981a, authorizes an award of compensatory damages as part of make-whole relief for intentional discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended. Section 1981a(b)(2) indicates that compensatory damages do not include back pay,

interest on back pay, or any other type of equitable relief authorized by Title VII. Section 1981a(b)(3) limits the total amount of compensatory damages that may be awarded each complaining party for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, according to the number of individuals employed by the respondent. The limit for a respondent who has more than 500 employees is \$300,000. 42 U.S.C. § 1981a(b)(3)(D).

In *Jackson v. U.S. Postal Service*, EEOC Appeal No. 01923399 (November 12, 1992), request for recon. denied, EEOC Request No. 05930306 (February 1, 1993), the Commission held that Congress afforded it the authority to award such damages in the administrative process. The United States Supreme Court reached a similar conclusion in *West v. Gibson*, 119 S. Ct. 1906 (1999), holding that the Commission has authority under Title VII to award compensatory damages against federal agencies in employment discrimination cases.

Accordingly, if a complainant has alleged that he is entitled to compensatory damages and the agency or the Commission enters a finding of discrimination, the complainant must be given an opportunity to submit evidence establishing his claim. To receive an award of compensatory damages, a complainant must demonstrate that he has been harmed as a result of the agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. *Rivera v. Department of the Navy*, EEOC Appeal No. 01934156 (July 22, 1994), request for recon. denied, EEOC Request No. 05940927 (December 11, 1995); *Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, EEOC Notice No. N915.002 at 11-12, 14 (July 14, 1992). “[C]ompensatory damage awards must be limited to the sums necessary to compensate [a complainant] for actual harm, even if the harm is intangible.” *Id.* at 13 (citing *Carter v. Duncan - Higgins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984)). Thus, a compensatory damages award should reimburse a complainant for proven pecuniary losses, future pecuniary losses, and non-pecuniary losses. Pecuniary losses are out-of-pocket expenses, including medical expenses and other quantifiable costs. *See Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, at 8. Non-pecuniary losses are those intangible losses, not subject

to precise quantification, e.g., emotional pain and 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. Id. at 10.

At the hearing, Complainant confined his proof to non-pecuniary losses and testified to the effect that the non-selections have had on him. First, he testified to the effect of the non-selections on his relationship with his wife. Specifically, he stated that it was extremely difficult for them to “see any hope” because every time he applied for a job and did not get it, he would get very depressed; he was frustrated and aggravated; and he vented and said some things that he should not have said, which caused them to have some issues in their relationship. Complainant further testified to the effect that the non-selections had on his relationship with his children. He testified that if he was not taking his frustrations out on his wife, he was taking them out on his children; in addition, he was exhausted when he got home in the evening. He described not telling his co-workers in Colleton County that his wife was pregnant with their third child because he thought it would make him vulnerable; that Thompson and State Director Ken Rentiers would move him all over the state, where he could not be close to his family. He also described the stability that obtaining one of these two positions would have brought to he and his family. Complainant further testified to the physical effects of the discrimination, including gaining weight, approximately 30 pounds, and difficulty with sleeping too much. HT at 268-276.

The Agency offered no evidence to rebut this testimony. This evidence clearly establishes that Complainant suffered emotional harm directly attributable to his non-selections for these positions. Accordingly, I find that Complainant is entitled to an award of compensatory damages. Having determined that Complainant proved that he suffered emotional distress causally connected to Agency action, I must next determine the amount of compensatory damages to be awarded for that harm. In determining the amount of a compensatory damages award, I am guided by the principle that such an award is limited to the sums necessary to compensate Complainant for the actual harm caused by the Agency’s discriminatory action and must attempt to affix a reasonable dollar value to

compensate him for that portion of his emotional distress that was caused by the Agency's discrimination. EEOC Notice No. N 915.002 at 13.

It is a Commission goal to make damage awards for emotional harm consistent with awards in similar cases. *Chow v. Department of the Army*, EEOC Appeal No. 01981308 (August 5, 1999). In *Terrell v. Department of Housing and Urban Development*, EEOC Appeal No. 01961030 (October 25, 1996), request for recon. denied, EEOC Request No. 05970336 (November 20, 1997), the Commission awarded \$25,000.00 in non-pecuniary damages resulting from the complainant's non-selection based on "quite serious" emotional harm lasting upwards of two years, frequent crying, introversion, disruptions in relationships with family and friends, suicidal thoughts, depression, sleep problems, and exacerbation of marital and financial difficulties, although the majority of the complainant's problems were not caused by the discrimination. In *Garrett v. U.S. Postal Service*, EEOC Appeal No. 07A30024 (February 25, 2004), the Commission awarded \$35,000.00 in non-pecuniary damages where the Agency's discriminatory conduct caused Complainant to suffer emotional distress, depression, anger, embarrassment, and humiliation.

Having carefully considered the facts of this case, I find that Complainant is entitled to non-pecuniary damages in the amount of \$60,000.00. In reaching this amount, I have considered a number of factors. First, I considered the nature and severity of Complainant's emotional distress and related symptoms, including his emotional distress and upset, humiliation, and the interference in his relationships with his family members. I also considered the physical manifestations of the emotional distress, including substantial weight gain, sleeping too much, and physical exhaustion; these manifestations are all indicators of depression. I have also considered the fact that Complainant's proof was confined to his own unrebutted testimony. Finally, I considered the amounts awarded in similar cases. Based on these considerations, I find that \$60,000.00 is a proper award for the non-pecuniary damages which Complainant has suffered.

VIII. ATTORNEY'S FEES

Complainant's Counsel submitted a fee petition dated September 1, 2005. This fee petition claimed \$40,971.70 in attorney fees and costs, based on a rate of \$250.00 per hour for 98.80 hours of work by Attorney Nancy A. Chiles and a rate of \$150.00 per hour for 94.10 hours of work by Attorney Anne E. Mjaatvedt and costs in the amount of \$2,806.70. The Agency responded on September 27, 2005, arguing that the claimed hours are excessive, duplicative, unsupported, and not warranted as requested. It contends that a total of 192.9 hours is grossly disproportionate to the degree of difficulty of this matter and the amount of time which should have been spent in preparing this case. Further, the Agency notes that the fee agreement signed by Complainant and Counsel shows that Complainant agreed to a rate of \$190.00 an hour for work performed by Attorney Chiles and \$100.00 an hour for work performed by Attorney Mjaatvedt. Finally, the Agency objects to the costs claimed by Complainant as detailed documentation, including receipts, was not supplied. Complainant replied to the Agency's response on September 27, 2005, supplying receipts for the claimed costs, as well as responding to various contentions made by the Agency.

By federal regulation, the administrative judge may award the employee reasonable attorney's fees and other costs incurred in the successful processing of an EEO complaint. 29 C.F.R. § 1614.501(e). To determine the proper amount of the fee, a lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

In *Blum*, 465 U.S. at 895, the U.S. Supreme Court held that reasonable hourly rates are to be measured by the "prevailing market rates in the relevant community." In her affidavit, Attorney Chiles states that she has been licensed to practice law in the State of South Carolina since November 1980 and has practiced law in Charleston, South Carolina for the past 25 years. Ms. Chiles has been a sole practitioner with a general law practice since March 1993, and has successfully litigated numerous employment cases as part of that practice. Her part-time Associate Attorney, Ms. Mjaatvedt, has been licensed to practice law in the State of South Carolina since November 2003. Ms. Mjaatvedt has participated in two contested trials with Ms. Chiles and Ms.

Terry Rickson, an attorney with whom Ms. Chiles shares office space. Complainant's Counsel also provided affidavits from attorneys in their community, indicating that \$250.00 per hour is a reasonable rate for Ms. Chiles' work and that \$150.00 per hour is a reasonable rate for Ms. Mjaatvedt's work. The fee agreement entered into by Complainant and his Counsel, however, sets forth a lower fee. Their July 21, 2005 agreement sets forth an hourly rate of \$190.00 per hour for Ms. Chiles's work and \$100.00 per hour for Ms. Mjaatvedt's work. The Agency argues that the contractual rates should prevail.

I find that the contractual rates must prevail. Although the Commission has held that private for-profit attorneys who charge certain clients a reduced rate are entitled to the prevailing market rate, it requires that the attorney present evidence establishing the prevailing market rate and that the complainant was, in fact, charged a discounted rate. *See* MD-110, 11-6 (November 9, 1999); *Lal v. Securities and Exchange Commission*, EEOC Appeal No. 01974652 (February 2, 2000) (attorney entitled to fee at prevailing market rate where retainer agreement with the complainant stated that rates he would be charged were reduced); *Gatewood v. Department of Veterans Affairs*, EEOC Appeal No. 01976511 (August 6, 1999) (agency's decision to reduce requested rate from \$250.00 per hour to \$122.50 per hour justified insofar as retainer agreement specified latter rate and contained no language indicating that it was a reduced rate). As in *Gatewood*, there is nothing in the retainer agreement at issue indicating that the rates are discounted or special lower rates charged as a public service to federal workers with employment discrimination claims.

In determining the number of hours reasonably expended, I recognize that the attorney "is not required to record in great detail the manner in which each minute of his time was expended." *Hensley*, 461 U.S. at 437, n.12. The attorney does have the burden, however, of identifying the subject matters in which she spent her time, which can be documented by submitting sufficiently detailed contemporaneous time records to ensure that the time spent was accurately recorded. *See National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982). Counsel for the prevailing party should make a "good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary." *Hensley*, 461 U.S. at 434.

Regarding the services provided by Ms. Mjaatvedt, the Agency's primary arguments are that she was never listed as Complainant's representative or co-counsel at any point and that many of the hours she claims are redundant, repetitive and/or excessive. First, I note that there is no requirement that an Attorney name his or her Associates as co-counsel before those Associates can be awarded attorney's fees. Although I do not find that the hours claimed by Ms. Mjaatvedt are redundant and/or repetitive of hours claimed by Ms. Chiles, there are a few entries that I find are excessive. Specifically, Mjaatvedt claims 6.80 hours for the preparation of a motion to amend on August 17, 2005; the motion to amend in question concerns a request to allow Complainant to include a claim of reprisal on the first complaint at issue here. Given that the Commission has held, for many years, that a Complainant may amend a complaint at any time to add a new basis, this particular motion to amend should not have required 6.80 hours. I find that 4.00 hours should have been sufficient for that task. In addition, I find that Mjaatvedt's claim of a total of 24.90 hours for hearing preparation for the second day of hearing is excessive, particularly given that Chiles spent 9.00 hours on that task, and find that 16.00 hours should have been sufficient time to prepare for the second day. The final item that I find excessive in Mjaatvedt's claim is her request for 16.60 hours to draft the closing argument; I find that 12.00 hours should have been sufficient for that task. Accordingly, I will reduce the total hours claimed by Mjaatvedt by 16.30 hours and find that it is appropriate to award Complainant attorney fees for 77.80 of the hours claimed in Mjaatvedt's fee petition at a rate of \$100.00 per hour for a total of \$7,780.00.

As for the services claimed by Ms. Chiles, I find that the hours claimed in her billing statement are not excessive, redundant, or otherwise unnecessary. As for the Agency's objection to the 10.00 hours charged on August 22, 2005 for a telephone call with Jackie Frazier and the drafting of an affidavit, I find that that exhibit was not untimely submitted, was relevant to the claims before me, and that the Agency was indeed provided the opportunity to rebut the affidavit but failed to do so. CE 8; HT at 714. In addition, I do not find Chiles' claims for 9.00 hours to condense the transcript of the first day's testimony or for 3.50 hours on August 19, 2005, to prepare for the second day of the hearing to be unreasonable. Accordingly, I find it reasonable to award fees for the work of Attorney Chiles at the rate of \$190.00 per hour for 98.80 hours of work for a total of \$18,772.00.

Although the only recoverable costs cited in the regulations are for reporting fees, expert witnesses and copying, the Commission has held that recoverable costs may include reasonable out-of-pocket expenses incurred during the normal course of representation. *Hatfield v. Department of the Navy*, EEOC Appeal No. 01892902 (December 12, 1989). Recoverable expenditures include costs associated with clerical work, postage, and telephone calls, as well as travel expenses. Payment of costs may be contingent upon the provision of documentation to support a claim for costs, such as bills for copying, telephone bills, or receipts for mailings. *Davis v. Department of the Treasury*, EEOC Request No. 05901213 (March 1, 1991). As Complainant's Counsel provided the documentation in support of their costs in the September 27, 2005 filing, I find it reasonable to award costs in the full amount requested, \$2,806.70.

Conclusion

I find that Complainant proved, by a preponderance of the evidence, that he was discriminated against as alleged.

Remedy

I find the following relief is appropriate:

- (1) The Agency shall appoint Complainant to the position of County Executive Director, CO-11, Dorchester County FSA Office, retroactive to May 21, 2003. It shall appoint him to the position of County Executive Director, CO-12, Horry County FSA Office, effective August 10, 2003.
- (2) The Agency shall determine the appropriate amount of back pay with interest and all other benefits due Complainant for the period from May 21, 2003, to April 9, 2005, the effective date of his termination,² pursuant to 29 C.F.R. § 1614.501, and tender that amount to

²Complainant's entitlement to reinstatement and/or front pay will have to be addressed in the context of his removal claim.

Complainant. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency.

- (3) The Agency shall tender to Complainant non-pecuniary compensatory damages in the amount of \$60,000.00.
- (4) The Agency shall post a notice that discrimination has been found to have occurred at its Dorchester County FSA Office in St. George, South Carolina, and its Horry County FSA Office in Conway, South Carolina.
- (5) The Agency shall tender to Complainant attorney's fees and costs in the amount of \$29,358.70.

NOTICE

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to C.F.R. §1614.109(b), 109(g) or 109(i). **With the exception detailed below, the complainant may not appeal to the Commission directly from this decision.** EEOC regulations require the Agency to take final action on the complaint by issuing a final order notifying the complainant whether or not the Agency will fully implement this decision within forty (40) calendar days of receipt of the hearing file and this decision. The complainant may appeal to the Commission within thirty (30) calendar days of receipt of the Agency's final order. The complainant may file an appeal whether the Agency decides to fully implement this decision or not.

The Agency's final order shall also contain notice of the complainant's right to appeal to the Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for such appeal or lawsuit. If the final order does not fully implement this decision, the Agency must also simultaneously file an appeal to the Commission in accordance with 29 C.F.R. §1614.403, and append a copy of the appeal to the final order. A copy of EEOC Form 573 must be attached. A copy of the final order shall also be provided by the Agency to the Administrative Judge.

If the Agency has not issued its final order within forty (40) calendar days of its receipt of the hearing file and this decision, the complainant may file an appeal to the Commission directly from this

decision. In this event, a copy of the Administrative Judge's decision should be attached to the appeal. The complainant should furnish a copy of the appeal to the Agency at the same time it is filed with the Commission, and should certify to the Commission the date and method by which such service was made on the Agency.

All appeals to the Commission must be filed by mail, personal delivery or facsimile to the following address:

Director
Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848, Washington, D.C. 20036
Fax No. (202)663-7022

Facsimile transmissions over 10 pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

An Agency's final action that has not been the subject of an appeal to the Commission or civil action is binding on the Agency. See 29 C.F.R. §1614.504. If the complainant believes that the Agency has failed to comply with the terms of its final action, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within thirty (30) calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. The complainant may file such an appeal within thirty (30) calendar days of receipt of the Agency's determination or, in the event that the Agency fails to respond, at least thirty-five (35) calendar days after complainant has served the Agency with the allegations of noncompliance. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within thirty (30) calendar days of receiving the notice of appeal.

Kelly A. Davis
Kelly A. Davis
Administrative Judge

Sept. 30, 2005
Date