



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

██████████,  
Complainant,

v.

Eric H. Holder, Jr.,  
Attorney General,  
Department of Justice  
(Drug Enforcement Administration),  
Agency.

Appeal No. 0120123467

Hearing No. 461-2012-00010X

Agency No. DEA-2010-00883

DECISION

On September 5, 2012, Complainant filed an appeal from the Agency's August 2, 2012, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. and Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §2000e et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

BACKGROUND

In 2009, Complainant submitted an application for the position of Accounting Technician (Office Automation), GS-07, located in the Agency's New Orleans, Louisiana Division (New Orleans Division), Administrative Support Unit, Fiscal Operations Sub-Unit. Complainant applied for the position under the Schedule A hiring authority. In support of her application, Complainant attached a letter dated December 16, 2008, from Doctor A, Ph.D. Doctor A's letter discussed Complainant's diagnosis of "attention deficit hyperactivity disorder - combined type," and Complainant's symptomology of "attentional problems" and "confusion with predominately oral directions that are long and lengthy."

The interview panel for the Accounting Technician position consisted of the Administrative Officer (AO) for the New Orleans Division, the Division's Accountant, the Personnel Liaison Specialist (Personnel Specialist), and the Supervisory Fiscal Specialist. Complainant made the Best Qualified List (BQL) and was interviewed for the position. The Agency chose an original Selectee for the position who declined to accept the position.

Subsequently, while the Agency continued to find another person to fill the position, the AO inquired how Complainant was on the Merit Selection Certificate without having had prior federal employment. After the Personnel Specialist confirmed with Human Resources that Complainant was on the merit list due to her Schedule A application, she gave Doctor A's letter to the AO. The AO read Doctor A's letter and discussed Complainant's disability and the contents of the letter with the Special Agent in Charge (SAC) of the Agency's New Orleans Division. Thereafter, the Agency selected Complainant for the position of Accounting Technician, GS-7, and she began employment with the Agency effective March 14, 2010.

At the time Complainant was hired, her first line supervisor was the Supervisory Fiscal Specialist. Complainant's second line supervisor was the Administrative Officer.

In connection with her appointment paperwork, Complainant filled out an SF-256 "Self-Identification of Disability" form, listing herself as disability code "94 Learning disability (A disorder in one or more of the processes involved in understanding, perceiving, or using language or concepts [spoken or written]; e.g., dyslexia)."

Complainant worked as an Accounting Technician from March 2010 until November 2010. On November 21, 2010, the SAC placed Complainant in a detail to the Detailed Special Support Unit. The SAC then detailed Complainant again to the position of Assistant Special Agent in Charge II Secretary (ASAC Secretary), GS-07, effective December 5, 2010. Thereafter, Complainant was promoted to a GS-08 Diversion Program Assistant, effective September 2011.

On April 1, 2011, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to harassment on the bases of disability (Attention Deficit and Hyperactivity Disorder (ADHD)) and in reprisal for protected EEO activity.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on June 11 - 12, 2012, and issued a decision on June 25, 2012.

#### *AJ's Definition of Issues*

In her decision, the AJ defined the issues in Complainant's complaint as alleging discrimination based on disability (ADHD) and in reprisal for requesting reasonable accommodations when:

1. The Agency denied Complainant reasonable accommodations for her disability including failing to provide certain requested reasonable accommodations, providing ineffective purported reasonable accommodations, and/or providing purported accommodations which stigmatized Complainant.

2. The Agency disclosed confidential medical documents from Complainant's Schedule A job application to members of the interview panel prior to the Agency extending Complainant an offer of employment.
3. The Agency failed to safeguard and otherwise improperly disclosed confidential medical documents of Complainant to Agency employees without a need to know after Complainant started work.
4. The Agency subjected Complainant to a hostile work environment beginning in March 2010.
5. The Agency disparately denied Complainant a promotion and/or within grade increase.

### *AJ's Factual Findings*

The AJ found that Complainant was a qualified individual with a disability. The AJ made several factual findings in her decision. The AJ's findings are summarized below.

Since 2009, the Agency used the Unified Financial Management System (UFMS) to manage its accounting for financial transactions. UFMS required the segregation of duties to protect against fraud against the U.S. Government. The Fiscal Unit was responsible for dispensing cash out of the Imprest Fund for, in part, undercover operations. Operation of the Imprest Fund requires a Primary Imprest Cashier or a Backup Imprest Cashier to meet the Division's needs on a daily basis. Additionally, the Fiscal Subunit was responsible for processing documentation to obligate funds for the Division, which required that the documentation be approved by an Allowance Approver. The Fiscal Subunit had two Allowance Approvers to ensure that documentation could be processed to obligate funds on a daily basis, despite absences of one Allowance Approver. The UFMS segregation of duties prohibited the same employee from acting as Primary or Backup Imprest Cashier and as Primary or Backup Allowance Approver.

In the spring of 2010, the Agency reclassified positions in the Fiscal Department. As a result, the Agency established a career ladder for Accounting Technicians up to the GS-8 career level, providing that an employee could be promoted to that level if they met the time-in-grade requirement and were deemed to be performing at an acceptable level, and met other qualification requirements.

In May 2010, each of the employees in the Financial Subunit met with the Supervisory Fiscal Specialist, the AO, and the SAC regarding the reclassification of their positions. Every other GS-7 employee in Fiscal was promoted after the reclassification except for Complainant.

Complainant's workstation in the Fiscal Unit was situated in a high-traffic cubicle area where some of Complainant's coworkers played radios. When Complainant let the Agency know that

she could not concentrate with a radio being played in the workplace, management informed employees in the Fiscal Subunit to turn off the radios or wear headphones.

In May 2010, Complainant's supervisors advised her that she would begin training as Backup Imprest Fund Cashier. In May and June 2010, Complainant verbally requested from the AO and the Supervisory Fiscal Specialist a reasonable accommodation concerning the Backup Imprest Fund Cashier duties due to her disability. At least two meetings were held between May to June 2010, during which the Supervisory Fiscal Specialist and the AO provided explanations of the Imprest Fund Cashier duties to Complainant and attempted to convince Complainant regarding her concerns about counterfeit currency and robbery. The Supervisory Fiscal Specialist and the AO also explained to Complainant that she needed to perform this assigned duty in order to be rated as fully successful and that failure to perform the Backup Imprest Fund Cashier duties would prevent her from advancing in grade.

Complainant complained to the Personnel Specialist about performing the Backup Imprest Fund Cashier duties and stated she would have to resign if she were required to perform these duties. The Personnel Specialist spoke with the SAC, who subsequently met with Complainant. On June 4, 2010, the SAC informed Complainant she did not have to resign because of the additional duty. Complainant thought her request had been accommodated.

Thereafter, Complainant was trained to be and performed as a Backup Allowance Approver to backup Coworker 1 (the Primary Allowance Approver) and Coworker 2 retained her duties as Backup Imprest Fund Cashier.

On June 11, 2010, the Personnel Specialist informed Complainant that her background investigation was complete and had Complainant sign the paperwork for her security credentials to be created. Complainant's forms for her security credentials were given to the AO and the forms were delayed from reaching the security office. Complainant signed the Agency form on June 11, 2010. On July 13, 2010, Complainant's photograph was taken for her security credentials. On July 13, 2010, the Security Officer for the New Orleans Division drafted the requisite security memorandum to be sent to the Agency's Office of Security Programs. On July 16, 2001, Complainant's security package was submitted to the Agency's Identification mailbox.

The AO and the Fiscal Supervisory Specialist rated Complainant "successful" in all performance elements for her performance evaluation for the period from March 2010 to June 2010.

On September 9, 2010, Complainant overheard the AO, who had walked over to the Fiscal Supervisory Specialist, reference the postponement of the scheduled Disability Awareness Training for Supervisors. The AO expressed that he would not want to go to that class and opined that the only reason others wanted to go was "so that they can be TDY."

On September 22, 2010, Complainant asked Coworker 2 to assist her with inputting some receipt documents during her free time because Coworker 1 had been out of the office on Monday and Tuesday and would be out on Friday and because Coworker 2 had time and was proficient in inputting these documents. In response to Complainant's inquiry, a verbal altercation occurred on September 22, 2010, between Complainant and Coworker 2 that the Fiscal Supervisory Specialist witnessed.

On September 23, 2010, the Fiscal Supervisory Specialist summoned Complainant and Coworker 2 to her office, during which Coworker 2 suggested that Complainant take over the Backup Imprest Cashier duties and that Coworker 2 become Backup Allowance Approver. In response to Coworker 2's comment at the September 23, 2010, meeting, Complainant told the Fiscal Supervisory Specialist that she had been subjected to a hostile work environment ever since the radios were silenced and since Complainant had been taken off Backup Imprest Cashier duties.

The date of September 24, 2010, was the last obligating day of the fiscal year, which meant that it was the last day that the Fiscal Unit could process obligations for fiscal year 2010. Processing of obligations in UFMS required the approval of one of the only two Allowance Approvers in the New Orleans Field Division, either the Primary Allowance Approver (Coworker 1) or the Backup Allowance Approver (Complainant).

On September 22, 2010, the Primary Allowance Approver submitted a sick leave request form for sick leave for September 23 and 24, 2010, because she needed to care of her daughter, who had given birth several days earlier.

On September 24, 2010, prior to 7:00 a.m., Complainant telephoned her office and left the Fiscal Supervisory Specialist a message informing her that she was sick and would not be able to report to work, and was therefore requesting sick leave. The Fiscal Supervisory Specialist denied Complainant's September 24, 2010 sick leave request and ordered Complainant via telephone call to report to the office.

Complainant informed the Fiscal Supervisory Specialist that she had taken medication and/or a sleep aid that made it unsafe for Complainant to drive and that it would be difficult for her to perform duties due to the medication. In response, the Fiscal Supervisory Specialist told Complainant that she was still on probation, she had no choice but to report for duty, and that she was sending an Agent to give her a ride to work.

The Fiscal Supervisory Specialist then sent a Lafourche Parish plainclothes Police Officer who also worked for the Agency as a DEA Task Force Agent to drive Complainant to work. The Fiscal Supervisory Specialist released Complainant to go home in the late afternoon, after the computer system failed, and arranged to have another Agent take Complainant home.

On October 7, 2010, the AO sent an electronic mail message to Person C of the Agency's Washington-based Human Resources Office in which he requested that Complainant be

terminated, citing in part an October 1, 2010 memorandum of the Fiscal Supervisory Specialist about the verbal altercation between Complainant and Coworker 2 on September 22, 2010, and the sick-leave incident of September 24, 2010.

In October 2010, management learned that Coworker 2 would have to take leave due to a serious family-related illness. As a result, on October 28, 2010, Complainant attended a meeting with the Fiscal Supervisory Specialist in the AO's office during which the AO told Complainant that she would now become the Backup Imprest Fund Cashier and would train the next Monday through Thursday and then start handing out money.

Complainant responded to the AO that she understood his comments, but that her condition had not changed any, and believing their assignment to be discriminatory, she refused to perform the duties. The AO told Complainant that her refusal to perform the Imprest Cashier duties would be an act of insubordination.

In a memorandum dated October 28, 2010, that had been prepared in support of a recommended termination of Complainant's employment by the AO, the Fiscal Supervisory Specialist expressly referred to Complainant's request not to perform Imprest Cashier duties in the context of her accommodation request, opining that, "In my opinion as her first-line supervisor, she was . . . using her disability as a crutch to eliminate any duties that she did not want to perform."

On October 29, 2010, Complainant went to the AO's office to ask if she could speak to him about reconsidering her reasonable accommodation request. The AO refused to discuss the accommodation issue further.

On October 29, 2010, the Fiscal Supervisory Specialist told Complainant that Employee Relations had purportedly instructed her not to do Complainant's performance evaluation at this time. The Fiscal Supervisory Specialist refused to explain further, and Employee Relations never returned Complainant's calls on the subject.

On November 2, 2010, Complainant filed a written request for reasonable accommodation of her disability by electronic mail, seeking restructuring of her job duties so that she would be relieved of performing Backup Imprest Cashier duties. The request was sent to the Personnel Specialist who forwarded it to the Fiscal Supervisory Specialist, the AO, and an Agency Attorney.

On November 4, 2010, Complainant met with the EEO Counselor, and the EEO Counselor later met with the SAC that day regarding the complaint. On the afternoon of November 4, 2010, Complainant was called in to meet with the Fiscal Supervisory Specialist and the AO. In that meeting, Complainant asked to have the Personnel Specialist present when she believed that continuing the meeting required a discussion of her disability. Once the Personnel Specialist was present, they began to discuss her disability and her November 2, 2010, written reasonable accommodation request.

Thereafter, the AO issued a memorandum for the record dated November 8, 2010, concerning the November 4, 2010 meeting. In the memorandum, the AO confirmed that: Complainant had raised issues concerning her disability and her reasonable accommodation request of currency counter/counterfeit detection machine in connection with the Imprest Cashier duties; he had advised her to quit discussing her disability; and he opined that Complainant was “acting out a role” or a “charade.”

Effective November 21, 2010, the SAC detailed Complainant. Complainant was then detailed again to the ASAC Secretary position effective December 5, 2010. In Complainant’s detail as ASAC Secretary, her first level supervisor was Person A and her second level supervisor was the SAC.

Beginning in January 2011, Complainant stopped receiving Notifications of Personnel Actions (SF-50s), as the Personnel Specialist no longer gave her any paperwork.

On February 17, 2011, the AO and the Supervisory Fiscal Specialist denied Complainant a within-grade increase.

By electronic mail on February 16, 2011, the SAC informed Person A that he would be offering Complainant a GS-07 Secretary position to place her in a better position should a GS-07/08 position become available and that he was still searching for a “7/8 position.”

Coworker 3, an ASAC Secretary, screamed at Complainant in front of another employee that Complainant was “as crazy as they come.” Complainant reported Coworker 3 immediately to Person A, who refused to take action against Coworker 3. Complainant also met with Person A and the SAC a few days later regarding this incident. Ultimately, the SAC verbally counseled Coworker 3 for referring to Complainant as “crazy.”

Complainant was promoted from GS-07 Accounting Technician to GS-08 Diversion Program Assistant, effective September 2011. Complainant received a rating of “Excellent” on her Performance Appraisal Record, for the period December 5, 2010, to September 30, 2011, which she signed on October 12, 2011.

Complainant currently works in the Agency's New Orleans Division office Special Support Unit (SSU) as a Diversion Program Assistant and she is successfully performing her duties of that position with effective reasonable accommodations. In Complainant's current position in the Agency's New Orleans Division SSU, Complainant's first level supervisor is Person B. In Complainant's current position in the Agency's New Orleans Division SSU, Complainant also reports to Person A.

*AJ's Findings on the Merits*

With regard to claim (1), the AJ determined that the Agency knew Complainant had a disability that substantially affected her ability to communicate, concentrate, train by oral instructions alone, and focus. The AJ noted Complainant placed the Agency on notice by oral communications of her various accommodation needs shortly after she began employment. The AJ noted Complainant made several accommodation requests between March and November 2010. Specifically, the AJ noted that Complainant's verbal accommodation requests included: (1) relocation of Complainant's work station to a low-traffic area; (2) heightened cubicle walls or an enclosed workstation; (3) training, work instructions, and assignments to be given in writing; (4) a money counter with counterfeit detection capacity and/or separate money counters and counterfeit detection equipment for the Backup Imprest Fund Cashier duties; (5) duty modification or work restructuring so that Complainant did not have to work as Backup Imprest Fund Cashier; (6) coworker radios to be turned off/down; and (7) additional time to read and study written instructions and policies before having to start new duties. The AJ noted Complainant made one formal written request for reasonable accommodation on November 2, 2010, in which she asked for consideration of restructuring her job duties "by redistributing the added duty of Backup Cashier to other personnel."

The AJ found that serving as Imprest Fund Cashier or working as Backup Imprest Fund Cashier was not an essential function of the GS-07, Accounting Technician position for which Complainant was originally hired. The AJ stated that when it came to the marginal job function of the cashier duties, Complainant's request for accommodation conflicted with what her superiors perceived as a requirement that the Accounting Technician they hired perform the Imprest Fund Cashier duties. The AJ determined that Complainant's superiors perceived her accommodation request with derision. The AJ found that the Agency acted upon the animus of Complainant's superiors by not accommodating Complainant in the position for which she was otherwise qualified and hired.

The AJ determined Complainant successfully performed the essential functions of her Accounting Technician duties prior to her details. The AJ noted that despite the assertions in the investigative record regarding alleged conduct issues, work-place unreliability, and hostility caused by Complainant in the workplace, the Agency did not establish such assertions at hearing. Rather, the AJ stated the evidence adduced at hearing showed that because the Supervisory Fiscal Specialist and the AO viewed Complainant's accommodation requests with derision and prejudice, they recommended her removal from the Fiscal Subunit by detail shortly after their recommendation for termination of her employment was presented to the Human Resource Office without a positive response. The AJ found the SAC's decision to detail Complainant rather than accommodate her in the performance of marginal duties in her Accounting Technician position was influenced by discrimination by Complainant's first and second level supervisors. Moreover, the AJ noted that although the Agency's details for Complainant relieved her of handling cash, they were not an effective, reasonable accommodation within Complainant's Accounting Technician position.



In addition, the AJ noted that Complainant established a prima facie case of reprisal because of the close timing between her EEO activity and the imposed detail. However, the AJ found the preponderance of the evidence did not show that her detail was caused or motivated by EEO Counselor activity or that any of the consequential effects of her detail were caused or motivated by that particular protected activity. Rather, the AJ noted the motivation for the Agency's discriminatory actions was management animus about her disability and her protected activity of requesting reasonable accommodations.

The AJ also addressed Complainant's claim about the Agency's failure to reasonably accommodate her other requests for an altered work station, written instructions or other written training, and additional time to read in order to perform the essential functions of her Accounting Technician job and her detailed positions. Specifically, the AJ found the preponderance of the evidence showed that while the Agency did not provide Complainant with every accommodation she requested to enable her to learn as efficiently as she and the Agency would have desired, she was reasonably accommodated by provision of all of the information that she needed to successfully perform her jobs through research, oral instruction and note taking, other training modes and online materials, allowance of tape recording, and various mentoring opportunities.

With regard to claim (2), the AJ found the Agency violated its legal obligation to maintain the confidentiality of Complainant's medical information, as embodied in the Schedule A letter of Doctor A. The AJ determined that the Personnel Specialist provided the Schedule A letter to the AO prior to the Agency's offer of employment to Complainant and that the AO read the letter and discussed its contents during a meeting with the SAC prior to making an offer of employment to Complainant.

With regard to claim (3), the AJ noted Complainant also claimed that she observed her federal self-identification of disability Form 256 on two open desks shortly after becoming employed with the Agency. However, the AJ found Complainant failed to prove by a preponderance of evidence that the Agency unlawfully disclosed her Form 256.

With regard to claim (4), the AJ determined Complainant failed to prove by a preponderance of evidence that the Agency subjected her to a hostile work environment because of her disability or in reprisal for making disability related reasonable accommodation requests or otherwise for engaging in protected EEO activity. The AJ determined that Complainant did not show by a preponderance of evidence that she suffered a work environment imbued with hostility sufficiently severe or pervasive to be reasonably deemed hostile or abusive in violation of the Rehabilitation Act or Title VII.

The AJ stated that although Complainant's work environment during the relevant time was "uncomfortable and tense," she was shunned or feared by some coworkers who did not understand her, she was the object of inappropriate, isolated verbal outbursts or comments by the AO, Coworker 3, and Coworker 2, she had a difficult transition both within the Fiscal Subunit and on her details relative to learning all of her duties, she nonetheless learned and

successfully performed the essential functions of her Accounting Technician job and her detailed positions. The AJ noted that none of the witnesses provided testimony that would support a reasonable finding she suffered an objectively hostile work environment on a prohibited basis. The AJ found Complainant was never physically threatened at work, generally had professional working relationships with her supervisors and enjoyed some coworker support and understanding. The AJ found that Complainant endured typical workplace frustrations and difficulties with her early transition because of the Personnel Specialist's absence, having to address workplace noise issues with new coworkers while trying to focus on training, experiencing her delayed security clearance, and simply trying to learn her Accounting Technician job while suffering from a disability.

With regard to her contention that the AO referred to her as a "bitch," the AJ found Complainant's hearing testimony was credible in both substance and demeanor on the actual "bitch" reference and her explanation for not mentioning such reference in her detailed accounts in her investigative record submissions. In contrast, the AJ found the AO's testimony denying the "bitch" reference not credible. The AJ noted that the AO denied making the epithet while he shifted, turned, and excessively blinked for one of the few times during his entire testimony. However, the AJ found the remainder of Complainant's testimony about the AO repeatedly and silently mouthing "bitch" to her when they made eye contact was not credible and had the ring of uncertainty or embellishment because this line of testimony was the only time that Complainant testified after a major pause and having looked at her lawyer for what appeared to be a cue.

Regarding her workload, the AJ found that while Complainant showed that it increased over time and that she assumed some duties or tasks that others once performed, she did not prove that her workload was so burdensome as to alter the terms and conditions of her employment and/or that the workload unreasonably interfered with the performance of her duties.

Finally, the AJ found that although Complainant suffered heightened emotional responses to workplace frustrations and difficulties, likely endured a slower transition in gaining core competency with her Accounting Technician duties due to her disability, and had some verbal altercations or heated disagreements with coworkers and her first and second-line superiors, from the viewpoint of a reasonable person in her circumstances, all of these challenged events and actions were not sufficiently severe or pervasive to constitute an objectively hostile work environment under Title VII or the Rehabilitation Act.

With regard to claim (5), the AJ found Complainant did not establish a prima facie case of disparate treatment on her denial of promotion claim because she was not entitled to a GS-08 promotion in May/June 2010, as were her former GS-07 Accounting Technician colleagues, since she had just become employed and had not yet served her one-year, time-in-grade requirement to be eligible at that time for a GS-08 promotion.

However, the AJ determined that the within-grade increase denial was motivated by discriminatory animus toward Complainant because of her disability and reasonable

accommodation requests. The AJ noted the within-grade increase denial was further caused by the Agency's failure to reasonably accommodate Complainant's accommodation requests concerning the Backup Imprest Fund Cashier duties, which were a marginal function of the Accounting Technician position and was made in reprisal for her requests for reasonable accommodation associated with performing these marginal duties in November 2010. The AJ found the Agency denied Complainant an equal opportunity to fulfill her one-year, time-in grade requirement to be deemed eligible for a GS-08 promotion as an Accounting Technician on her anniversary in March 2011.

With regard to Complainant's reprisal claim, the AJ determined Complainant's first and second line supervisors developed animus against her because of her disability and accommodation requests, causing them to single her out as responsible for the Fiscal Unit's work environment after she made accommodation requests, to perceive her as "acting," performing a "charade," using her disability as a "crutch," and thus to consider her as someone upon whom they could not rely and did not want in their unit. The AJ also found her first and second line supervisors viewed Complainant's accommodation requests as blanket refusals to perform work or insubordination despite her willingness to train. The AJ found as a consequence, management reprised against Complainant by recommending her detail away from the Fiscal Subunit, interrupting her actual performance of Accounting Technician work that would have otherwise enabled her to be considered qualified for a promotion on her one-year anniversary date, and by initially denying her a within-grade increase despite her successful performance of the essential functions of her Accounting Technician duties.

#### *AJ's Remedial Relief*

As relief for the finding of discrimination with regard to claims (1), (2), and (5), the AJ ordered the Agency to provide training to all of its managers and supervisors and human resource or personnel liaison staff in its New Orleans Division regarding the Agency's obligations to maintain confidentiality of medical information in accordance with the Rehabilitation Act. The AJ also ordered the Agency to provide training on its compliance obligations with the reasonable accommodation requirements and prohibitions against reprisal to all of its managers and supervisors and human resource or personnel liaison staff in its New Orleans Division and to human resource or personnel liaison staff who provide advice and guidance to its New Orleans Division management but are located in headquarters or another Agency office. The AJ also ordered the Agency to calculate whether the initial denial of the within-grade increase and for which Complainant later received a collection letter ever resulted in the Agency's collection of sums attributable to the initial within-grade increase denial and stated the Agency must reimburse Complainant for any such collected sums. The Agency was also ordered to calculate the back pay owed to Complainant from her anniversary date in March 2011, until the effective date of her GS-08 promotion. The AJ noted that the back pay payment must provide the proper "gross up" for her tax liability associated with such a lump sum payment. Finally, the AJ ordered the Agency to: pay Complainant \$50,000.00 in nonpecuniary, compensatory damages; pay Complainant \$162,001.40 in attorney's fees and

\$7,145.08 in costs; and post a Notice at its New Orleans Division Office alerting employees that it has complied with the training obligations as part of a federal judgment.

The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged.

### *Complainant's Brief*

On appeal, Complainant notes the Agency has not appealed the AJ's decision. Complainant notes that the Agency's final order challenged the AJ's decision with regard to calculation of attorney's fees and costs. However, Complainant states that since the Agency did not timely appeal the AJ's decision with the Commission, the AJ's decision became the Agency's final decision. In addition, Complainant notes that as of the filing of her brief, the Agency has paid her the amount of attorney's fees and costs specified in the AJ's decision, and Complainant states she is not appealing the AJ's decision on attorney's fees and costs.

Additionally, Complainant states she is only appealing the AJ's finding of no discrimination on her hostile work environment claim (claim (4)), the AJ's nonpecuniary, compensatory damages award, the AJ's failure to award past and future pecuniary damages for her medical expenses, and the AJ's failure to recredit her leave. Complainant specifically states she is not appealing the AJ's finding of no discrimination regarding claim (3).

With regard to her hostile work environment claim, Complainant highlights several facts which were not specifically referenced in the AJ's decision or which were characterized differently by the AJ. Complainant's facts are summarized below.

Specifically, Complainant states that in response to her spring 2010 reasonable accommodation request concerning the distracting effect of multiple radios in the Fiscal Office, Complainant's coworkers were summarily ordered to use headphones for their radios. Complainant states the next day, Coworker 2 asked Complainant if she complained about the use of radios in office. Complainant claims the Agency's telling coworkers to shut off their radios and/or wear headphones stigmatized Complainant, "as it was done in a fashion which engendered hostility against Complainant among Complainant's coworkers."

On November 5, 2010, Complainant was improperly charged 1.5 hours of annual leave even though the Supervisory Fiscal Specialist previously claimed that no leave request was even needed for voting.

At 5:15 p.m. on November 5, 2010, the AO entered the Fiscal Unit and asked where Coworker 1 and Coworker 2 were. Complainant responded that Coworker 1 had left for the day and Coworker 2 had off that day. Complainant states that the AO then said to Complainant, "Well you need to go." Complainant states she said "ok," and then the AO walked over to her desk and put his face so close to hers that she could smell his breath and he said "Huh? Do you have any work to do?" Complainant states that she replied that she did

have work to do and the AO yelled "No! You need to go now." Complainant states that she grabbed her notepad and left the office.

From December 2010 to September 2011, Complainant was denied access to a scanner and was denied a printer for an extended period of time.

On December 20, 2010, Complainant sent an electronic mail to the Security Officer for keys to her new workstation. On a follow-up call the next day, the Security Officer told Complainant she "wouldn't be sitting there long."

On May 24, 2011, Coworker 3 demanded Complainant "let her know where [she] was going . . . and keep her informed of [her] moves throughout the day because [she] had a dotted line reporting structure to her." Later Complainant and Coworker 3 were told by management that the "dotted line" did not exist.

Soon after the "dotted line incident," Complainant walked over to place a document from Person A to the SAC in Coworker 3's inbox. Immediately after Complainant placed the document in the inbox, Coworker 3 picked it up and threw the paperwork in the garbage. When Complainant challenged Coworker 3 on this action, Coworker 3 told her not to worry about whether or not Person A had any notes on the document, saying she would "handle" Person A.

On October 6, 2011, Complainant was instructed by Person A to make sure that Complainant communicated her movements with Coworker 3 throughout the day. Complainant, in an effort to comply with Person A's request, sent an electronic mail message to Coworker 3 to request clarification on what it was exactly she needed Complainant to do. Shortly afterwards, Person A came over, noticeably upset, and told Complainant not to send Coworker 3 any more electronic mail messages.

From November 29, 2011 through December 1, 2011, Complainant was scheduled to attend time and attendance training, originally to occur in person in Washington, D.C., but someone other than Person A cancelled Complainant's on-site attendance and modified the training to video teleconference. The Personnel Specialist then sent out an electronic mail message inviting others to attend the November 2011 time and attendance training; the AO, the Personnel Specialist, Coworker 3, and others then all attended. On the second day, the AO came in to interrupt the training and commandeered the video teleconference connection for a call; after the call, the video teleconference connection ceased to function for roughly about 24 hours, disrupting the training entirely.

On various dates, Coworker 3 interfered with Complainant's ability to attend EAP counseling sessions by publicly paging Complainant over the intercom when she was at an appointment with EAP or by transferring the phones to Complainant shortly before Complainant's appointment with EAP, causing her to have to remain at her desk due to a standing policy requiring coverage of Coworker 3's phone line.

Complainant argues that the Commission should find that the harassment to which Complainant was subjected was objectively severe and pervasive. Complainant argues the key to this analysis is the AJ's own findings that Complainant's supervisor, the AO, called Complainant a "bitch" in response to Complainant making a request for reasonable accommodation, and the finding that Coworker 3 publicly screamed that Complainant was "as crazy as they come." Complainant's claims the AJ inappropriately ignored these probative comments, characterizing them as "inappropriate, isolated verbal outbursts or comments," while noting "that Complainant's work environment during the relevant period was uncomfortable and tense." Rather, Complainant claims it is error to separate out these elements, as the Commission instructs that "when considering whether a harassment complaint states a hostile or abusive work environment claim- the decision maker must consider all of the alleged harassing incidents and remarks." Complainant claims that the Commission should find the harassment suffered by Complainant meets the objectivity prong of the severity and pervasiveness standard, and that Complainant has proven her claim that the Agency subjected her to a hostile work environment on the bases of disability and in reprisal for protected EEO activity.

Complainant also argues that the AJ erred by not awarding past and future pecuniary damages since Complainant had requested such damages. Complainant notes she submitted her medical invoices and bills which were admitted into the record as part of Joint Exhibit 27. Complainant claims that her past pecuniary damages for medical expenses, therapy, and medication total \$3,888.96. Complainant also notes that she submitted documentation of future pecuniary damages as well. Complainant cites to a March 28, 2011 letter from Doctor B who proposed a future treatment plan for Complainant which called for 21 sessions on a specified schedule over a 17-month timeframe, at \$200.00 per session, for a total of \$4,200.00. Thus, Complainant states she should be awarded \$8,088.96 to compensate her for past and future pecuniary damages which she claims were omitted by the AJ in her decision.

Complainant also claims the AJ erred in not awarding leave restoration as a result of the Agency's discriminatory and retaliatory conduct. Complainant notes she identified leave recredit as an item of non-monetary relief she was seeking in her pre-hearing report. Specifically, Complainant proffers that all of her leave usage during her tenure with the Agency, with the exception of 16 hours of annual leave and 8 hours of sick leave, was expended in order to seek medical treatment and/or to seek emotional and psychological relief from the stress and emotional anguish caused by the Agency's discrimination and retaliation. Complainant cites an October 2012 declaration she attached to her appellate brief. Complainant states that according to the Agency's electronic leave records, her leave usage as caused by the Agency's discrimination in this matter totals to 228 hours of sick leave, 208.25 hours of annual leave, and 5.5 hours of compensatory time. In addition to the leave appearing on the attached leave records, Complainant states she also incurred 16 hours of approved Leave Without Pay (LWOP) time in the April-May 2011 timeframe in connection with her (later rescinded) resignation from the Agency.

Finally, Complainant claims the AJ erred by reducing her nonpecuniary, compensatory damages award by 50%. Complainant argues the AJ did not meet the requirement for finding alternate causation for the other 50% of Complainant's harm. Complainant states the single alternative causal factor associated with compensatory damages in the AJ's decision is the existence of a pre-existing condition. Complainant states the AJ did not expressly cite the pre-existing condition as the basis for her finding that not all of Complainant's injuries were proximately caused by the Agency's discrimination and reprisal. However, Complainant argues that assuming arguendo that the preexisting condition was the alternative causal factor relied upon by the AJ, then the AJ committed legal error by assigning to Complainant the burden of proving sole proximate causation for damages. Complainant argues that the Commission precedent assigns the burden of proving alternate damages causation to the Agency once the Complainant has met her burden of proving some proximate causation for damages from the Agency's conduct. Complainant claims the AJ made no finding that the Agency had met its burden of proving reduction of compensatory damages due to preexisting conditions. Further, Complainant states her unrebutted testimony of record clearly shows her preexisting suicidal ideations were in remission at the time of her hiring, and that she had not been particularly depressed immediately prior to starting work with the Agency.

In addition, Complainant states it was error for the AJ to impose a percentile reduction to the award of pecuniary or nonpecuniary damages without a more particularized consideration of which specific harm the Agency caused and which it did not cause.

#### *Agency's Brief*

In response to Complainant's appeal, the Agency argues the AJ's finding of no hostile work environment should be sustained for three reasons. First, the Agency states the acts about which Complainant complained were neither severe nor pervasive. The Agency claims the incidents that Complainant perceived to be hostile and abusive consisted of a multitude of picayune issues, including: having her supervisor "stigmatize" her when she instructed Complainant's coworkers to wear headphones in response to her complaint that the playing of radios in the office was distracting; not receiving her security credentials as quickly as she might like; receiving an increased workload; not receiving office supplies as quickly as she might like; being required to come to the office to perform her duties; conflicts with other coworkers; and some apparent confusion as to whom would be signing her leave slips in or about December 2010. The Agency states that those actions about which Complainant complains individually or taken together do not come close to constituting severe or pervasive action. Moreover, the Agency claims the AJ correctly concluded that the isolated incident in which Complainant's supervisor lost his temper and called her a bad word is insufficient to constitute a hostile work environment.

Second, the Agency states that Complainant failed to show any connection between many of the workplace issues raised by her and her disability or request for accommodation. For example, the Agency states Complainant has shown no nexus between the delay in receiving her security credentials and her disability. The Agency also notes the delay in receiving office

supplies was unconnected to her protected status. The Agency states Complainant must prove more than that the incidents occurred and were severe and pervasive. Rather, the Agency notes Complainant must tie the actions to improper motive and it states she has failed to do so.

Finally, the Agency argues that objective evidence supports the AJ's findings that no hostile work environment existed. The Agency notes that when Complainant complained about her perception that she had been subjected to a hostile work environment, the Agency took appropriate action by conducting an investigation of the allegations during an internal Agency management review.

With regard to nonpecuniary damages, the Agency states the Commission should not disturb the AJ's award in the amount of \$50,000.00. The Agency argues that Complainant incorrectly suggests that it was the Agency's burden to prove that its actions were not the proximate cause of her injuries. The Agency states it is Complainant's burden, not the Agency's burden, to prove her damages. Moreover, the Agency notes that the AJ provided an extensive rationale for the award, which is reasonable and consistent with Commission precedent in similar cases.

The Agency also argues that Complainant's requests for pecuniary, compensatory damages and equitable relief also should be denied because Complainant failed to meet her burden to prove that the Agency's discriminatory conduct, as found by the AJ, was the cause of the harm for which she provided evidence. The Agency states that Complainant herself attributed much of her injuries to the actions of co-workers, which the AJ did not find to constitute a hostile work environment.

With regard to Complainant's claim of leave recredit, the Agency states there was no evidence submitted at the hearing regarding this item. The Agency notes while Complainant submits her own declaration on appeal, for the first time, regarding leave recredit, she was not subject to cross examination on these facts and still has not provided evidence of causal nexus between these items and the failure to accommodate and reprisal found by the AJ.

### ANALYSIS AND FINDINGS

As a preliminary matter, we first address Complainant's submission of new evidence on appeal. As a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to or during the investigation. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 9, § VI.A.3. Here, Complainant failed to make such a showing. Accordingly, we decline to consider this new evidence on appeal.

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual



finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (November 9, 1999).

At the outset, we note that Complainant does not challenge the definition of the issues addressed by the AJ.<sup>1</sup> Complainant does not challenge the AJ's finding of disability and reprisal discrimination regarding a portion of claim (1) (the Agency failed to provide an effective reasonable accommodation for the marginal cashier duties of Complainant's Accounting Technician position), claim (2), and a portion of claim (5) (within grade increase) and those findings are AFFIRMED herein. In addition, Complainant does not challenge the finding of no discrimination with regard to a portion of claim (1) (the Agency reasonably accommodated Complainant's other requests for accommodation), claim (3), and a portion of claim 5 (non-promotion). The Commission has the discretion to review only those issues specifically raised in an appeal. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, 9-10 (November 9, 1999). Accordingly, we will not address the finding of discrimination with regard to part of claim (1), claim (2), and part of claim (5), or the finding of no discrimination with regard to part of claim (1), claim (3), a part of claim (5) in this decision.

### *Hostile Work Environment*

To establish a claim of harassment based on disability or reprisal, Complainant must show that: (1) she is a member of the 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 her statutorily protected class; (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; and (5) there is a basis for imputing liability to the employer. Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); 29 C.F.R. § 1604.11. Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris, 510 U.S. at 21. The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994) (Enforcement Guidance on Harris).

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<sup>1</sup> The parties do not dispute the fact that Complainant is an individual with a disability. The AJ found and the Agency does not dispute that it failed to reasonably accommodate Complainant for her disability.

We find that substantial evidence of record supports the AJ's determination that Complainant failed to prove that the Agency subjected her to a hostile work environment because of her disability or in reprisal for her protected activity.

Despite Complainant's contention that management's telling coworkers to shut off their radios and/or wear headphones stigmatized Complainant, and was done in a way "which engendered hostility against Complainant among Complainant's coworkers," we find the record does not support this assertion. Complainant states that after management asked employees to shut off their radios and/or wear headphones, Coworker 2 asked Complainant if she was the one that complained about the radios. During the hearing, Coworker 1 testified that Coworker 2 also asked Coworker 1 whether Coworker 1 was the one who complained about the radios. The Supervisory Fiscal Specialist stated that when she asked coworkers to shut their radios off and/or wear headphones she did not mention that Complainant was the one complaining about the use of radios in the office. Additionally, we find there is no indication the Supervisory Fiscal Specialist discussed Complainant's disability or reasonable accommodation request with the employees in connection with this incident. During the hearing, Coworker 1 testified that she observed some hostility from Coworker 2 after the radio incident and that Coworker 1 felt that Complainant was the one who complained. However, Coworker 1 testified that Coworker 2 did not go around telling anybody else or making it difficult in the work environment for Complainant. Moreover, we find no evidence that Coworker 1 or any other employee discussed Complainant's disability or reasonable accommodation request in relation to this incident.

With regard to the incident on September 24, 2010, when the Fiscal Supervisory Specialist denied Complainant's sick leave request and ordered Complainant to report to the office, we find Complainant failed to show that discriminatory animus motivated the actions of the Fiscal Supervisory Specialist. The record reveals that September 24, 2010, was the last obligating day of the fiscal year, which meant that it was the last day that the Fiscal Unit could process obligations for fiscal year 2010. Processing of obligations in UFMS required the approval of one of only two Allowance Approvers in the New Orleans Field Division, either the Primary Allowance Approver (Coworker 1), or the Backup Allowance Approver (Complainant). As the Primary Allowance Approver had previously submitted a sick leave request form for September 23 and 24, 2010, to care for her daughter, who had given birth several days earlier, Complainant was the only Allowance Approver scheduled to work on September 24, 2010. The record contains an October 1, 2010 memorandum from the Supervisory Fiscal Specialist noting that there was approximately \$300,000.00 in available funding that would have been lost had it not been approved on September 24, 2010. At the hearing, the Fiscal Supervisory Specialist testified she was concerned with having the remaining funding approved, specifically \$60,000.00 in funding for the Mobile Enforcement Team which had been provided by Congress to get the enforcement team up and running. The Supervisory Fiscal Specialist stated that if the funding was not approved on September 24, 2010, they would have lost the money and headquarters would have pulled the money back.

With regard to Complainant's contention that the AO referred to her as a "bitch," the AJ found Complainant's hearing testimony was credible in both substance and demeanor on the actual "bitch" reference. However, we note the AJ found the remainder of Complainant's testimony about the AO repeatedly and silently mouthing "bitch" to her when they made eye contact was not credible and had the ring of uncertainty or embellishment because the AJ stated this line of testimony was the only time that Complainant testified after a major pause and having looked at her lawyer for what appeared to be a cue. On appeal we see no reason to disturb the AJ's credibility determinations based on the demeanor of the witnesses. We note that Complainant has only shown that the AO referred to her as a "bitch" on one occasion.

The record shows that Coworker 3 screamed at Complainant in front of another employee that Complainant was "as crazy as they come." Complainant reported Coworker 3 immediately to Person A, who refused to take action. Complainant also met with Person A and the SAC a few days later regarding this incident. Ultimately, the SAC verbally counseled Coworker 3 for referring to Complainant as "crazy." We find Complainant failed to show that the "crazy" comment or the Agency's actions in responding to the comment were linked to her disability or made in retaliation for requesting a reasonable accommodation.

Although we have determined that the Agency violated the Rehabilitation Act by disclosing Complainant's confidential medical documents prior to an offer of employment, failing to provide her with an effective accommodation for the marginal cashier duties of her Accounting Technician position, and by denying her a within-grade-increase, we find that Complainant has not proven sufficiently severe or pervasive events to show that she was subjected to a hostile work environment. Although Complainant's work environment was tense and she experienced workplace frustrations and difficulties, we do not find that it was hostile or abusive based on Complainant's protected bases. Therefore, we find substantial evidence supports the AJ's determination that Complainant failed to establish that she was subjected to a hostile work environment based on her disability or in reprisal for making disability related reasonable accommodation requests.

### *Nonpecuniary Damages*

When discrimination is found, the agency must provide a complainant with a remedy that constitutes full, make-whole relief to restore her as nearly as possible to the position she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §2000e et seq., or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this "make whole" relief. 42 U.S.C. § 1981a(b)(3). In

West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process.

Nonpecuniary losses are losses that are not subject to precise quantification, i.e., 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. See EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002, at II.A.2 (July 14, 1992) (Compensatory Damages Guidance). There is no precise formula for determining the amount of damages for nonpecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that nonpecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the agency for the discriminatory action. Further, compensatory damages should not be “monstrously excessive” standing alone, should not be the product of passion or prejudice, and should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999) (citing Cyngar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)). Where a complainant's emotional harm is due in part to personal difficulties, which were not caused or exacerbated by the discriminatory conduct, the agency is liable only for the harm resulting from the discriminatory conduct. See Compensatory Damages Guidance, at II, A.2.

In this case, the AJ found that Complainant credibly and emotionally testified with the support of one friend/coworker (Coworker 4) that she suffered from extreme stress, shock, and humiliation, much of which she attributed to perceived harassment partly perpetrated by her coworkers' misbehavior or mistreatment of her. The AJ noted Complainant testified the stress manifested itself in frequent absences from work, headaches, rashes, weight fluctuation, high blood pressure, diagnosed depression and anxiety, insomnia, nightmares, excessively heightened emotions shown by crying spells and panic attacks, and suicidal ideations (showing a re-emergence of a pre-existing psychiatric problem). The AJ noted Complainant also testified that she felt as if her discriminatory superiors (the AO and the Supervisory Fiscal Specialist) “followed her” to her details and that she lost her confidence or esteem and withdrew from her family and friends.

The AJ noted that Complainant stated she did not obtain some relief for her sleep problems until after her recent hospitalization. The AJ noted that Complainant sought but had to stop her EAP counseling sessions, which she also testified provided her some relief. Additionally, the AJ noted that Complainant's testimony showed that in her new job (at time of hearing) she had been successfully accommodated, had job satisfaction, and was performing satisfactorily. The AJ determined that although Complainant clearly suffered severe and numerous mental and physical effects during the relevant time period, as was corroborated by extensive medical and counseling records, she did not prove that all of these effects were attributable to the Agency's illegal discrimination and its reprisal against her commencing in late October/November of 2010.

Additionally, the AJ found that the medical disclosure violation that Complainant showed does not support any compensatory damage award because the Agency hired Complainant despite that disclosure. The AJ determined Complainant failed to prove that the disclosure contributed to or otherwise caused the Rehabilitation Act violations that were supported by a preponderance of the evidence.

Thus, the AJ determined that after careful consideration of Complainant's and her co-worker's credible testimony, particularly Complainant's tearful hearing testimony showing a serious re-emergence of her suicidal ideations, as well as her supporting medical and counseling records, Complainant was not entitled to all damages sought on her behalf because she did not prove that all of her claimed damages were proximately caused by the illegal discrimination and reprisal. Moreover, the AJ noted that Complainant did not prove by a preponderance of the evidence that she would continue to suffer in the future, mental and physical effects proximately caused by such discrimination and reprisal.

The AJ concluded Complainant proved by a preponderance of the evidence that she suffered approximately 12 months of the described compensatory damages, i.e., for the period of November 20, 2010, until approximately 3 months after her promotion was effective in September 2011, with some intermittent psychological relief from her details commencing in late November 2010. The AJ found Complainant proved by a preponderance of the evidence that approximately 50% of those damages were directly or proximately caused by the illegal discrimination and reprisal. Thus, the AJ found Complainant proved an award of \$50,000.00 in compensatory damages for the mental and physical suffering proximately caused by the Agency's discrimination.

In order to establish an entitlement to compensatory damages, the burden is on a complainant to submit evidence to show that the agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. See Damiano v. U.S. Postal Serv., EEOC Request No. 05980311 (February 26, 1999). After a thorough review of the record, and given the severity, nature, and duration of distress experienced by Complainant as a direct result of the discrimination, we find that the AJ's award of \$50,000.00 for her emotional distress in nonpecuniary, compensatory damages is supported by substantial evidence. This amount discounts damages incurred on account of events other than those found to be discriminatory, including harm caused by the harassment claim and the other failure to accommodate claims on which Complainant did not prevail. Also, we find this award is not motivated by passion or prejudice, not "monstrously excessive" standing alone, and consistent with the amounts awarded in similar cases. Sartini v. Dep't of Veterans Affairs, EEOC Appeal No. 0120112305 (September 19, 2012) (Commission awarded \$50,000.00 in nonpecuniary, compensatory damages where Agency the failed to provide Complainant with a reasonable accommodation which resulted in the aggravation of a pre-existing back injury and severe aggravation and exacerbation of Complainant's relatively "stable" mental condition in the form of extreme emotional distress, depression, substantial weight gain, anxiety, paranoia, marital trouble, humiliation, and embarrassment); Williams v. U.S. Postal Serv., EEOC Appeal No.

01990520 (February 14, 2002) (Commission awarded \$50,000.00 in nonpecuniary, compensatory damages to a complainant who was denied a reasonable accommodation for his disability and who experienced an exacerbation of a pre-existing condition, depression, and had homicidal and suicidal thoughts); Ortiz v. U.S. Postal Serv., EEOC Appeal No. 01A15376 (September 25, 2002), req. for recons. den., EEOC Request No. 0520030082 (January 7, 2003) (Commission awarded \$50,000.00 in nonpecuniary, compensatory damages to a complainant, who was denied an accommodation for his disability over a four-year period and who experienced emotional distress, sleeplessness, insomnia, depression, and ulcers).

### *Pecuniary Damages*

Complainant argues that the AJ erred by not awarding past and future pecuniary damages since she had requested such damages. Complainant notes she submitted her medical invoices and bills which were admitted into the record as part of Joint Exhibit 27. Complainant claims that her past pecuniary damages for medical expenses, therapy, and medication total \$3,888.96.

Contrary to Complainant's contention that the AJ failed to address her request for pecuniary damages, we find the AJ did address Complainant's request and determined pecuniary damages were not warranted. Specifically, the AJ found Complainant was not entitled to all the damages sought on her behalf because she did not prove that all of her claimed damages were proximately caused by the illegal discrimination and reprisal. Additionally, the AJ concluded Complainant "did not prove by a preponderance of evidence that she would continue to suffer in the future mental and physical effects" that were proximately caused by the Agency's discrimination.

With regard to her request for past pecuniary damages, we note the record shows Complainant sought and received extensive medical treatment during the relevant time. Complainant's documentation consisted of numerous progress notes, discharge summaries, medical charts, lab results, and medical bills. The medical documentation indicates Complainant was seen during the relevant time for treatment of her ADHD, headaches, sleeping problems, panic attacks, work related stress, depression, worries about her job duties, what she perceived to be a hostile work environment, and concerns about not being reasonably accommodated. We note that the AJ held that although "Complainant clearly suffered severe and numerous mental and physical effects during the alleged period, as was corroborated by extensive medical and counseling records, she did not prove that all of these effects were attributable to the Agency's illegal discrimination and its reprisal against her commencing in late October/November 2010."

The record reveals that Doctor B with the Bridge to Wellness a Family Psychiatric Center performed an evaluation of Complainant on March 1, 2011. The Evaluation noted Complainant reported that she was hired under Schedule A for her ADHD disability and asked for an accommodation for her position. The Evaluation noted that Complainant reported that her job changed and she asked for a money counter after she found out she had to handle a lot

of money. Doctor B diagnosed Complainant with depression and ADHD and recommended medication and further therapy as part of a treatment plan.

In addition, the record contains a November 28, 2011 Psychiatric Evaluation by Doctor C noting that Complainant was complaining of not sleeping and panic attacks when thinking about going to work or getting out of her car to go to work. The Evaluation stated that Complainant alleged her supervisor has not been sensitive to providing her an accommodation and explained that Complainant reported it was “very stressful when she was asked to perform a job as an impres[t] cashier when this was not part of her job description.” The Evaluation noted Complainant did not feel she “had the capacity to count large amounts of money” and complained to Human Resources about her supervisor wanting her to work in the cashier capacity. The Evaluation also noted that Complainant felt she has “had unpleasant repercussion[s] because of her filing a complaint.” Doctor C recommended Complainant take medications for her depression, anxiety, and insomnia and be treated in the Generations Partial Hospitalization Program.

In the present case, the evidence provided supports a finding that the Agency’s denial of reasonable accommodation aggravated Complainant’s emotional condition resulting in her obtaining medical treatment. However, the Commission finds that the Agency is liable only for the harm directly attributable to the discriminatory denial of an effective reasonable accommodation for the marginal cashier duties of Complainant’s Accounting Technician position and the denial of a within grade increase. We note that some of the incidents that led Complainant to seek medical treatment are not part of our findings of discrimination and thus, we find Complainant is not entitled to reimbursement for those charges. Additionally, we recognize the Agency does not challenge the specific amount of any of the medical charges submitted by Complainant. Thus, we find that Complainant has proven by a preponderance of the evidence that approximately 50% of the claimed past pecuniary damages were proximately caused by the illegal discrimination and reprisal and we reduce Complainant’s request for past pecuniary damages from \$3,888.96 and find an award of \$1,944.48 is appropriate.

We note Complainant also sought future pecuniary damages for future therapy sessions. In support of her claim, Complainant supplied a March 28, 2011 letter from Doctor B proposing a treatment plan and an estimated cost for the plan to cover 21 sessions over a 17-month time frame. However, we note Complainant failed to establish a nexus between the proposed treatment plan and the unlawful discrimination found by the Commission. Thus, we find Complainant is not entitled to future pecuniary damages.

#### *Restoration of Leave*

Finally, we address Complainant’s claim that her leave should be restored as a remedy for the Agency’s discrimination and retaliation. While Complainant did identify restoration of leave as a desired remedy during the processing of her complaint and in her pre-hearing report, we find the record does not support such a claim. While we find there are instances in the record showing Complainant took leave during the relevant period, we find Complainant failed to

establish that she used the identified leave in order to seek medical treatment and/or to seek emotional and psychological relief from the stress and emotional anguish caused by the Agency's discrimination and retaliation. Thus, we deny Complainant's claim for leave restoration.

### CONCLUSION

The Agency's finding that Complainant was unlawfully subjected to disability discrimination and retaliated against regarding claims (1) (failure to accommodate the marginal cashier duties), (2), and (5) (within grade increase) is AFFIRMED. The Agency's finding of no discrimination with regard to claims (1) (other failure to accommodate claims), (3), (4), and (5) (promotion) is AFFIRMED. The decision on pecuniary damages is MODIFIED. The matter is REMANDED for compliance with the Order herein.

### ORDER

To the extent it has not already done so, the Agency shall take the following actions:

1. Within 60 days of the date this decision becomes final, the Agency shall pay Complainant \$50,000.00 in nonpecuniary, compensatory damages.
2. Within 60 days of the date this decision becomes final, the Agency shall pay Complainant \$1,944.48 for past pecuniary, compensatory damages.
3. Within 180 days of the date this decision becomes final, the Agency shall provide training to all its managers and supervisors and human resource or personnel liaison staff in its New Orleans Division regarding the Agency's obligations to maintain confidentiality of medical information in accordance with the Rehabilitation Act.
4. Within 180 days of the date this decision becomes final, the Agency shall provide training on its compliance obligations with the reasonable accommodation requirements and prohibitions against reprisal of the Rehabilitation Act and regulations of the Commission to all of its managers and supervisors and human resource or personnel liaison staff in its New Orleans Division and human resource or personnel liaison staff who provide advice and guidance to its New Orleans Division management but are located in headquarters or another Agency office.
5. Within 60 days of the date this decision becomes final, the Agency shall calculate whether the initial denial of the within-grade increase and for which Complainant later received a collection letter ever resulted in the Agency's collection of sums attributable to the initial within-grade increase denial and reimburse Complainant for any such collected sums.



6. Within 60 days of the date this decision becomes final, the Agency shall calculate the back pay owed to Complainant from her anniversary date in March 2011, until the effective date of her GS-08 promotion. The back pay payment must also include an award to account for any increased tax liability associated with such a lump sum payment.
7. Within 60 days of the date this decision becomes final, the Agency shall consider taking disciplinary action against the AO, the Supervisory Fiscal Specialist, the SAC, and the Personnel Specialist for discriminating against Complainant and any other Agency employees responsible for the discrimination perpetrated against Complainant. The Agency shall report its decision to the Commission and specify what, if any, action was taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline.<sup>2</sup>

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

#### POSTING ORDER (G0914)

The Agency is ordered to post at its New Orleans, Louisiana Division facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision becomes final, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period.

#### ATTORNEY'S FEES (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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<sup>2</sup> Since Complainant acknowledges that the Agency has already paid the full amount of attorney's fees awarded in the AJ's decision, we will not include this provision in our Order.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

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

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0610)

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

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

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

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

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)


This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

#### RIGHT TO REQUEST COUNSEL (Z0610)

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

the civil action must be filed within the time limits as stated in the paragraph above (“Right to File a Civil Action”).

FOR THE COMMISSION:

A handwritten signature in black ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director  
Office of Federal Operations

April 3, 2015  
Date