



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

████████████████████
Nicole T.,¹
Complainant,

v.

Ashton B. Carter,
Secretary,
Department of Defense
(Defense Commissary Agency),
Agency.

Appeal No. 0120143019

Hearing No. 410-2012-00257X

Agency No. DECA001492011

DECISION

Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission **AFFIRMS** the Agency's final order finding discrimination.

BACKGROUND

On July 26, 2011, Complainant (a Cashier) filed an EEO complaint alleging that the Agency discriminated against her on the bases of disability (back) and in reprisal for prior protected EEO activity when she was harassed and subjected to a hostile work environment by her supervisors in May 2011.

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 requested a hearing and the

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

AJ held a hearing on the merits of the case on May 15, 2013, and July 17, 2013. Thereafter, the AJ held a hearing on damages on September 25, 2013. The AJ issued a decision on June 24, 2014. The AJ determined Complainant established that she was discriminated against when the Agency failed to accommodate her disability and sent her home from work based on her disability. The AJ found Complainant did not show that she was subjected to reprisal or a hostile work environment.

As relief for the finding of discrimination, the AJ ordered the Agency to post a notice of violation; consider taking disciplinary action against the responsible managers; conduct five hours of training for the responsible managers on the Americans with Disabilities Act (ADA); and pay Complainant nonpecuniary compensatory damages in the amount of \$8,000.00. Additionally, the AJ found Complainant was entitled to an award for “the short time period between when she was sent home and when she stated she could no longer work with an accommodation.” Specifically, the AJ found that Complainant presented documentation to the Agency, within three weeks of being sent home, that she was no longer able to work. The AJ noted that the Agency made several attempts to contact Complainant prior to the merits hearing and the damages hearing in an attempt to return her to work, and Complainant was not responsive as to whether there was any accommodation that would allow her to return to work. The AJ noted that Complainant testified that there was no accommodation that would allow her to return to work and she filed for disability retirement. The AJ also noted that as of the date of her decision, Complainant could not state whether there was any accommodation that would allow her to return to work.

The Agency issued a final order fully implementing the AJ’s finding that Complainant proved that the Agency subjected her to discrimination as alleged. The Agency stated it would implement the relief ordered by the AJ. Additionally, the Agency noted the AJ’s decision indicated Complainant was entitled to back pay for an approximate one month period to account for the brief timeframe from the date of May 12, 2011, when Complainant was sent home without pay through the date about one month later, when Complainant indicated she was completely unable to work, even with an accommodation. Thus, the Agency determined Complainant was due back pay for the dates of May 12, 2011, through the pay period ending June 18, 2011.

On appeal, Complainant claims the AJ erred by stating in her decision that Complainant requested an unspecified amount in compensatory damages as relief in her case for pain and suffering she received due to the Agency’s discriminatory treatment in this case. Rather, Complainant notes that at the damages hearing, she requested the maximum amount allowed by law for nonpecuniary losses, which she notes is \$300,000.00. On appeal, Complainant requests nonpecuniary damages of \$300,000.00.

Complainant also claims the AJ erred when she stated in her decision that Complainant was not responsive as to whether there was any accommodation that would allow her to return to work. Complainant cites to the damages hearing transcript when the AJ asked Complainant if she was interested in settling and Complainant stated she had no problem returning to work and just

wanted to make sure the Agency accommodated her. On appeal, Complainant requests front pay up to the age of 65.

In response to Complainant's appeal, the Agency notes the AJ based her decision to award limited back pay and no front pay on a finding that Complainant "presented documentation to the Agency, within three weeks of her being sent home, that she was no longer able to work." The Agency notes the AJ also recognized that the Agency made several attempts to return Complainant to work and she was not responsive to those efforts. The Agency points out that the AJ also found that Complainant "cannot today state whether there is any accommodation that would allow her to return to work."

The Agency concedes that Complainant is entitled to an award of back pay. The Agency states there is no dispute that Complainant was sent home on May 12, 2011. The Agency claims this is the start date for the period of back pay. The Agency argues the AJ correctly determined that the closing date for back pay should be when Complainant's doctor submitted documentation indicating that Complainant could no longer work.

The Agency notes that on June 1, 2011, Complainant's doctor wrote a letter, which was provided to the Agency, in which he indicated that Complainant's disability was permanent and not likely to improve with the passage of time. The Agency notes that subsequent reports from the Doctor submitted in 2012 and 2013, also indicate that Complainant is disabled and cannot work at all. The Agency also notes that Complainant filed a form CA-7, a workers' compensation claim, in which she indicated that she was totally disabled and that her disability began on May 13, 2011, the day after she was sent home. The Agency argues that the medical documents submitted by Complainant's doctor and Complainant's own workers' compensation claims indicate Complainant was unable to return to work.

The Agency claims the earliest of the dates upon which Complainant was no longer able to return to work was May 13, 2011. The Agency states the latest date was June 1, 2011. The Agency argues the closing date for back pay is the date on which it became impossible for the Agency to provide an accommodation and for Complainant to return to work.

Additionally, the Agency cites Complainant's deposition and hearing testimony as evidence she could not do any of the standing, twisting, grabbing, bending, and lifting required of her position. The Agency notes Complainant also testified she could not meet the scan time requirements of the position.

With regard to the AJ's statement that Complainant could not "today state whether there is any accommodation that would allow her to return to work," the Agency notes Complainant relies entirely upon a conversation between the AJ, counsel for the Agency, Complainant, and her representative that took place after closing arguments had finished at the damages hearing, in which the AJ was trying one last time to determine if settlement was possible. The Agency notes that Complainant's statement that she was willing to return to work was made after the AJ told her that the damages award was going to be small. The Agency claims this statement

is contrary to Complainant's previous testimony at the merits hearing, the deposition, and the medical documentation submitted by Complainant and her doctors. The Agency states Complainant has not submitted evidence that she would have been capable of returning to work prior to her removal in June 2013. Rather, the Agency notes that all of the medical evidence and Complainant's own testimony establish that she could not perform the essential functions of her job and there was no accommodation the Agency could have provided that would enable her to perform the essential functions of her job.

With regard to Complainant's claim for front pay, the Agency notes Complainant was removed from her position on June 25, 2013, due to excessive unexcused absences. The Agency notes that prior to her removal, Complainant never submitted any medical documentation indicating she could return to work. The Agency explains, as a result she was removed from her position. The Agency states that the removal forecloses the possibility of front pay unless it is deemed improper. The Agency states the propriety of the removal was not the subject of the instant case. The Agency notes Complainant filed an appeal with the Merit Systems Protection Board (MSPB) in August 2013, addressing her removal, which she later voluntarily dismissed. The Agency argues the record supports the non-award of front pay.

With regard to Complainant's contention that the AJ erred when characterizing Complainant's nonpecuniary damages for pain and suffering as "unspecified," the Agency notes Complainant cites to evidence that she was seeking "nonpecuniary losses at the maximum allowed by law." The Agency states whether the amount requested was specified or not, the maximum award for nonpecuniary damages would have been \$300,000.00. The Agency claims that if the AJ's characterization was an error, it was harmless.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

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. (Aug. 5, 2015).

At the outset, we note that Complainant does not challenge the definition of the issues addressed by the AJ. Complainant does not challenge the AJ's finding of disability discrimination with regard to the Agency's failure to accommodate Complainant's disability and sending Complainant home from work based on her disability and those findings are

AFFIRMED herein. In addition, Complainant does not challenge the finding of no discrimination with regard to her reprisal and hostile work environment claims. The Commission has the discretion to review only those issues specifically raised in an appeal. Accordingly, we will not address the finding of discrimination with regard to the failure to accommodate Complainant's disability and sending her home based on her disability or the finding of no discrimination with regard to the reprisal and hostile work environment claims in this decision. This decision will address Complainant's challenge to the remedies awarded by the AJ and Agency.

Nonpecuniary damages

In her decision, the AJ stated that "Complainant requested an unspecified amount in compensatory damages as relief in this case for pain and suffering." However, we find the record reveals that at the damages hearing Complainant requested "nonpecuniary losses at the maximum allowed by law." In the present case that amount would be \$300,000.00. We find the AJ's characterization of Complainant's nonpecuniary damages request constituted, at most, harmless error.

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); Complainant 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 Complainant 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 Complainant 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 testified that she suffered chest pains and headaches as a result of the failure to accommodate, hair loss, lost sleep, loss of concentration, strained marriage, and bouts of crying. The AJ noted Complainant's son described deterioration in Complainant's mental and physical health.

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 Complainant 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 \$8,000.00 for her emotional distress in nonpecuniary, compensatory damages is supported by substantial evidence. 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. Complainant v. U.S. Postal Serv., EEOC Appeal No. 0720140025 (September 28, 2015) (finding of disability discrimination regarding Complainant's removal and awarding \$7,500.00 nonpecuniary, compensatory damages for depression, anxiety, chest pains, lack of concentration, crying spells, headaches, fatigue, sleeplessness, loss of appetite, loss of enjoyment of life, loss of trust in people, loss of interest in personal care, impaired relationships, heightened fear/paranoia, humiliation and embarrassment); Complainant v., General Services Administration, EEOC Appeal No. 0120120310 (May 15, 2014) (awarding Complainant \$8,000.00 in nonpecuniary, compensatory damages for anxiety, depression, and marital strain). Therefore, we find that the record supported the AJ's decision regarding nonpecuniary damages.

Back Pay

We note there is no dispute that the award of back pay commences on May 12, 2011, the date Complainant was sent home. Upon review, we find substantial evidence supports the AJ's determination that back pay ends when Complainant produced evidence, within three weeks of being sent home, that she could no longer work with an accommodation. Thus, we find the Agency properly determined that Complainant was due back pay for the period of May 12, 2011, through the pay period ending June 18, 2011.

Front Pay

The Commission has stated that front pay may be awarded in lieu of reinstatement when: (1) no position is available; (2) a subsequent working relationship between the parties would be

antagonistic; or (3) the employer has a record of long-term resistance to anti-discrimination efforts. See Complainant v. U.S. Postal Serv., EEOC Appeal Nos. 01950027, 10955806, 01960303 (July 17, 1998) (citations omitted), request for reconsid. denied, EEOC Request Nos. 05981041, 05981061, 05981062 (Aug. 5, 1999). The fact that front pay is awarded in lieu of reinstatement implies that complainant is able to work but cannot do so because of circumstances outside of her control. Id. (citation omitted). In the present case, substantial evidence shows that Complainant was not available to return to work for the Agency, thus we find that she is not entitled to an award of front pay.

CONCLUSION

The Agency's finding that Complainant was unlawfully subjected to disability discrimination when the Agency failed to accommodate her disability and sent Complainant home without pay is **AFFIRMED**. The Agency's finding of no discrimination with regard to her reprisal and hostile work environment claims is **AFFIRMED**. The decision on pecuniary damages is **AFFIRMED**. 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 is issued, the Agency shall pay Complainant \$8,000.00 in nonpecuniary, compensatory damages.
2. Within 180 days of the date this decision is issued, the Agency shall provide five hours of Americans with Disabilities Act training to the responsible management officials.
3. Within 60 days of the date this decision is issued, the Agency shall calculate the back pay owed to Complainant from May 12, 2011, until the pay period ending June 18, 2011.
4. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against the responsible management officials. 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.

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 (G1016)

The Agency is ordered to post at its Fort Benning, Georgia 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 was issued, 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.

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 (M0416)

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 Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. The requests may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. 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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may

request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

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

January 11, 2017

Date