



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

[REDACTED]
Elene K.,¹
Complainant,

v.

Nancy A. Berryhill,
Acting Commissioner,
Social Security Administration,
Agency.

Appeal No. 0120170703

Agency No. PHI-15-0125-SSA

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's October 13, 2016, decision concerning her entitlement to compensatory damages as a remedy of the Agency's violation of 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 MODIFIES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the Agency properly found that Complainant was entitled to \$40,000 in non-pecuniary compensatory damages, and \$5,332.14 in pecuniary compensatory damages.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Management Analyst, GS-6, at the Agency's Philadelphia Regional Office in Philadelphia, Pennsylvania.

On December 31, 2014, Complainant filed an EEO complaint in which she alleged that on September 24, 2014, Agency management denied her request for reasonable accommodation of her disabilities (Narcolepsy, Raynaud's Disease, and Spondylolisthesis).

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.

January 13, 2016 Final Agency Decision

The Agency determined that management was aware that Complainant needed a reasonable accommodation because her commute to work caused her to experience “additional, unnecessary pain which affected her concentration at work.” The Agency noted that Complainant’s lumbar spine condition caused pain to radiate into her legs, and her medical providers recommended that she have a commute time of less than 30 minutes and limit her time sitting. However, the Agency concluded that the Agency failed to provide her with reasonable accommodations such as full-time telework and alternative duty stations on five occasions from September 2014 to February 2015. Because Complainant was unable to procure a reasonable accommodation, she moved her family approximately 135 miles to Baltimore, Maryland after the Agency approved her for a hardship transfer to a position in that city in June 2015.

The final decision ordered the Agency to engage in the interactive process to determine if Complainant has an effective accommodation at her current official duty station and to provide her with a reasonable accommodation for her disability. The decision further provided that Complainant could request a transfer back to the Philadelphia Regional Office, and if so requested, the Agency must engage in the interactive process to determine a reasonable alternative duty station for the Philadelphia Regional Office. Additionally, the decision ordered the Agency to provide EEO training to responsible management officials; post a notice of discrimination at the Center for Material Resources; pay Complainant’s costs associated with this claim; and pay Complainant proven compensatory damages.

Compensatory Damages Claim

The Agency conducted an investigation regarding Complainant’s entitlement to compensatory damages. During the investigation, Complainant maintained that she was entitled to \$40,988 in future pecuniary compensatory damages, including \$16,500 for health insurance copayments associated with future back surgery; \$12,888 for sick leave to cover the surgery and recovery (or additional sick leave); \$5,600 for home assistance after the surgery; and \$6,000 for child support she will lose because her former husband moved to Maine after she had to move to Maryland, which resulted in the inability to garnish his wages.

Further, Complainant requested \$12,044 in past pecuniary compensatory damages, including \$890 for costs associated with doctors’ appointments, x-rays, copays, and gas/parking for the appointments; \$3,583 for the value of sick and annual leave used to move, appointments, and tests; \$1,206 for moving costs associated with moving from Pennsylvania to Maryland; \$85 for parking at the Philadelphia office because she could not physically endure the train commute; \$280 for a new driver’s license and vehicle licenses; and \$6,000 in lost child support. Additionally, Complainant requested \$200,000 in non-pecuniary damages for the emotional distress and pain and suffering she endured because of the Agency’s failure to accommodate her disability.

October 13, 2016 Agency Decision on Damages

In a decision dated October 13, 2016, the Agency awarded Complainant \$40,000 in non-pecuniary compensatory damages, although Complainant had requested \$200,000 in non-pecuniary compensatory damages. The Agency awarded Complainant \$5,332.14 in past pecuniary compensatory damages but denied Complainant's claim that she lost \$6,000 in support payments from her ex-husband because she had to move after the Agency failed to accommodate her. The Agency denied Complainant's request for future pecuniary damages on the basis that her claimed expenses for future surgery and missed child support payments were too speculative, too remote, and unsupported by documentation.

CONTENTIONS ON APPEAL

On appeal, Complainant maintains that her request for compensatory damages is supported by the Report of Investigation (ROI), including a statement from her physician that indicates that her 30-minute commute from Baltimore caused her to experience leg pain. Additionally, Complainant maintains that running was her "only feel-good activity," and not being able to run has been depressing for her. Further, Complainant states that her activity with her children has become severely limited because of the pain and sadness caused by the discrimination. Complainant also maintains that she has gained weight, lost self-esteem, and lost self-confidence because of the Agency's failure to accommodate her. The Agency requests that we affirm its decision on compensatory damages.

ANALYSIS AND FINDINGS*Standard of Review*

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

Compensatory Damages

When discrimination is found, an agency must provide the 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. For an employer with more than 500 employees, such as this agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3)

To receive an award of compensatory damages, a complainant must demonstrate that she has been harmed because of the agency’s discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep’t of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsideration denied, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

Non-Pecuniary Compensatory Damages

Complainant maintains she is entitled to \$200,000 in non-pecuniary compensatory damages. She maintains that she endures severe pain daily because of the Agency’s actions, which may continue for the rest of her life. Complainant further maintains that because of the Agency’s failure to accommodate her, she can no longer run, although she previously ran half-marathons. Complainant also contends that she cannot drive to the store or take her children to practice without experiencing pain and cannot pick up her children or assist them with practicing gymnastics or cheerleading moves. Complainant maintains that she experienced stress commuting to work with increasing pain each day, knowing her condition was worsening.

Further, Complainant maintains that because of the Agency’s actions, she experiences significant neck, upper back, knee, and hip pain, which limits her ability to sleep well and turn her neck. Complainant also contends she and her family had to move away from family in Pennsylvania to Maryland, where they have no other family or assistance.

Complainant also submitted a copy of a letter from a friend and colleague (C1) dated May 4, 2016. In this letter, C1 stated that he witnessed Complainant in pain most days; being unable to sit or stand long periods; being uncomfortable in long car rides; and being limited in physical activities. C1 further stated that Complainant was unable to enjoy physical activity with her two daughters to the degree that most parents might do so, and most evenings, she needs to lie down and constantly adjust her position to find relief. C1 also stated that he witnessed the “devastation” in Complainant’s eyes when she talked about having to stop running and the distinct possibility she would never again enjoy something she loved.

Upon review, we concur with the final decision's determination that Complainant established her entitlement to non-pecuniary damages through her own statement and a witness statement. However, we find that the Agency's non-pecuniary compensatory damages award of \$40,000 is insufficient to compensate Complainant.

Instead, the Commission finds it appropriate to award Complainant \$65,000 because Complainant's statement, along with a supporting witness's statement, establish that for an extended period, the Agency's failure to accommodate Complainant caused her to experience physical discomfort/pain, deterioration of her medical condition, emotional distress, loss of enjoyment, and negative impacts on familial relationships. See Selma D. v. Dep't of Educ., EEOC Appeal No. 0720150015 (Apr. 22, 2016) (complainant awarded \$65,000 where agency's failure to provide telework, a modified work schedule, and cubicle as reasonable accommodations resulted in aggravation of her preexisting medical conditions); Complainant v. Dep't of Transp., EEOC Appeal No. 0720140022 (Sept. 16, 2015) (complainant awarded \$60,000.00 where agency's failure to accommodate resulted in depression, anxiety, sleeplessness, and exacerbation of existing symptoms); Complainant v. Soc. Sec. Admin., EEOC Appeal No. 0720130013 (Aug. 14, 2014) (complainant awarded \$60,000.00 where agency's failure to accommodate resulted in exacerbation of post-traumatic stress disorder, depression, stress, and elevated blood pressure); Henery v. Dep't of the Navy, EEOC Appeal No. 07A50034 (Sept. 22, 2005) (\$65,000.00 awarded where complainant suffered from frustration, negativity, and loss of sleep for a four-year period, as well as physical pain associated with the resulting excessive walking. The discrimination caused significant increase in complainant's need for medical treatment, as well as an increase in physical and emotional harm).

The Commission finds that this amount considers the severity of the harm suffered and is consistent with prior Commission precedent. Finally, the Commission finds this award is not "monstrously excessive" standing alone, is not the product of passion or prejudice, and is consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (Apr. 15, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

Pecuniary Compensatory Damages

Past Damages

The Agency awarded Complainant \$5,332.14 in past pecuniary damages but denied Complainant's claim that she lost \$6,000 in support payments from her ex-husband because she had to move after the Agency failed to accommodate her. Complainant maintains that after she moved from Pennsylvania to Maryland, her daughters' father moved to Maine, and she has not received child support since the move. Complainant further maintains that she received approximately \$600 per month from her ex-husband through wage garnishment, but she believes he works "under the table" in Maine so that the state of Maryland cannot garnish his wages.

Upon review, we note that a temporal correlation of events does not necessarily establish causation. In this case, there is no evidence beyond Complainant's mere conjecture that the Agency's actions caused her ex-husband to cease paying child support. As such, we find that her claim for child support as compensatory damages is too speculative for recovery. The Agency awarded Complainant the remainder of her requested past pecuniary compensatory damages. Therefore, we find that the Agency properly found that Complainant is entitled to \$5,332.14 in past pecuniary compensatory damages.

Future Damages

During the investigation, Complainant claimed money damages for her need to have a future back operation to fuse her L5 and S1 vertebrae. She stated that she did not need this surgery before she was denied the reasonable accommodation at issue in this case.

The record contains a copy of a letter from Complainant's physician (Dr1) dated March 21, 2016. In this letter, Dr1 reported that Complainant received lumbar injections with "little relief," and that she had Lumbar Spondylolisthesis. Dr1 further reported that the surgical option would be a Lumbar fusion of the L5 and S1 bone, and would likely be via the anterior or posterior approach and involve four screws and two rods, or four screws and a prosthetic cage with bone graft. Dr1 also stated that recovery is usually six weeks to three months, with physical therapy two to three times per week for about six to eight weeks.

Complainant also submitted a letter from a Physician's Assistant (PA) dated May 4, 2016. In this letter, PA reported that Complainant was diagnosed with Lumbar Spondylolisthesis at L5 and S1, and the usual management for this condition is pain medication, physical therapy, transforaminal and pars injections, and surgery. PA further reported that surgery would consist of a lumbar decompression and fusion of the L5 and S1 vertebrae, and patients would have restrictions three months after surgery and begin physical therapy three months after restrictions have been lifted. PA concluded that Complainant's medical providers would like her to have an updated MRI of the lumbar spine as well as pain management for an injection to determine how much relief she obtains of her back and leg pain.

Additionally, in a letter dated September 22, 2016, another physician (Dr2) reported that during Complainant's visit to him on August 16, 2016, he advised her to begin four to six weeks of physical therapy, and then to try additional injections to help with her back and leg pain. Dr2 also reported that he believed that Complainant would benefit from injections, but if she did not receive relief of her symptoms after physical therapy and injections, he would discuss "potential surgical options" with her. Dr2 further stated that prior to 2014, Complainant did not have leg or back pain that required treatment.

Upon review, we find that Complainant has not shown that she will indeed incur future costs because of the Agency's failure to accommodate her. Regarding surgery, while all three medical officials indicate that surgery may be an option for Complainant in the future, none of them state that she will certainly need such a procedure.

In fact, Dr2 only refers to “potential surgical options” as the last resort if other options are not successful. Further, Dr2 stated that he believed that Complainant would benefit from injections, which indicates that there was a possibility that surgery would not be necessary. Further, while PA reported on the mechanics and expectations of surgery and recovery, she did not state that surgery was required for Complainant. Therefore, we find that Complainant’s claim for costs associated with future surgery is too speculative and unsupported by evidence for her obtain recovery on this matter.

Finally, regarding Complainant’s claim for \$6,000 in future lost child support payments, as explained above, we likewise find that this request is too speculative and unsupported by evidence for Complainant to obtain recovery. Consequently, we find that the Agency properly found that Complainant did not prove she was entitled to future pecuniary compensatory damages.

CONCLUSION

Accordingly, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency’s determination regarding pecuniary compensatory damages. The Commission MODIFIES the Agency’s determination regarding non-pecuniary compensatory damages and REMANDS this matter to the Agency to take further actions consistent with this decision and the ORDER set forth below.

ORDER

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

1. Within thirty (30) calendar days of the date this decision is issued, the Agency shall engage in the interactive process to determine if Complainant has an effective reasonable accommodation for her current official duty station and provide a reasonable accommodation her disability.

During the interactive process, Complainant may request a transfer back to the Philadelphia Regional Office. If so requested, the Agency will further engage in the interactive process to determine a reasonable alternative duty station for the Philadelphia Regional Office. Should Complainant request a transfer to the Philadelphia Regional Office, the Agency will, within sixty (60) calendar days of the date this decision is issued, make Complainant a written offer to work at a duty station within 30 minutes (driving time in rush hour) from her home, or in the alternative, telework from her home.

Complainant will have a minimum of thirty (30) days from the date of receipt of the offer to accept or decline the offer. If Complainant fails to accept the offer within the period set by the Agency, Complainant’s inaction will be considered rejection of the offer, unless she can show that she was prevented from responding within the time limit due to circumstances beyond her control.

2. Within thirty (calendar) days after this decision, the Agency shall pay Complainant \$65,000 in non-pecuniary compensatory damages and \$5,332.14 in pecuniary compensatory damages.
3. The Agency shall provide eight (8) hours of training for all named management officials (in final agency decision) who remain employed by the Agency and all management officials within the Center for Material Resources, Philadelphia Regional Office, Front Office within ninety (90) calendar days of the date this decision is issued. The Agency shall also train the current management team at the above-named immediate office regardless of whether they were involved in the above-cited complaint. The training must address the Rehabilitation Act, management's obligations to reasonably accommodate employees with disabilities, and sensitivity towards individuals with disabilities. These individuals will include, but are not limited to, the Team Leader and Director for the Center for Material Resources.
4. Complainant is entitled to costs associated with the prosecution of this claim. The costs may include mailing, photocopying, and any other reasonable out-of-pocket expenses. This claim must itemize the costs and be accompanied by documentary evidence (such as bill and receipts) to support the claim. Failure to provide such documentation will result in denial of the claim.
5. The Agency shall post the notice referenced in the paragraph below entitled, "Posting Order."

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

POSTING ORDER (G0617)

The Agency is ordered to post at its Philadelphia Regional Office 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 as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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 (M0617)

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. 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.

Complainant's request 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 agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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)

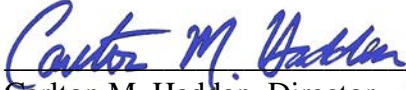
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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 (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 blue 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

March 27, 2019

Date