



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

[REDACTED]  
Yvette H.,<sup>1</sup>  
Complainant,

v.

James N. Mattis,  
Secretary,  
Department of Defense  
(Defense Commissary Agency),  
Agency.

Appeal No. 0120172249

Agency No. DECA002062010

**DECISION**

On June 12, 2017, 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 May 10, 2017 final decision concerning her entitlement to compensatory damages following a finding of discrimination in 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Sales Store Checker at the Agency's Tinker Air Force Base Commissary in Oklahoma City, Oklahoma.

On October 13, 2010, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability when:

1. Her first-level supervisor (S1) did not provide her with a 10-minute sit down break for every hour she worked;
2. S1 did not provide her with more frequent restroom breaks;

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<sup>1</sup> 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.

3. On several occasions, S1 told her, "If you can't stand -- go home;"
4. On three occasions, S1 asked her, "Did you forget your Depends?" and
5. On August 13, 2010, S2 watched her for an entire hour while she worked at the self-checkout counters (SCO).

Following an investigation, Complainant failed to request a hearing before an EEOC Administrative Judge within the regulatory timeframe. As a result, the Agency issued a final decision finding that Complainant had not been subjected to discrimination. Complainant appealed and, in Complainant v. Dep't of Def., EEOC Appeal No. 0120113345 (July 16, 2013), the Commission remanded the matter for a supplemental investigation.

Following its supplemental investigation, the Agency issued a second final decision in which it found that Complainant had not been subjected to discrimination. Complainant appealed. In Yvette H. v. Dep't of Def., EEOC Appeal No. 0120140365 (Aug. 29, 2016), the Commission affirmed the Agency's finding of no discrimination as to four of Complainant's allegations. However, the Commission found that the Agency failed to provide Complainant with reasonable accommodation in the form of a 10-minute sit down break for every hour she worked. Id. As more fully detailed in our previous decision, Complainant notified the Agency of her restrictions and need for a ten-minute break every hour as early as November 12, 2008, but the Agency failed to accommodate her. Accordingly, the Commission found that the Agency had denied Complainant reasonable accommodation in violation of the Rehabilitation Act. The Commission ordered the Agency to conduct a supplemental investigation to determine Complainant's entitlement to compensatory damages, to provide Complainant with a reasonable accommodation, to provide training to S1, to consider disciplining S1, and to post a notice.

At the conclusion of the supplemental investigation, the Agency issued a final decision. Therein, the Agency concluded that Complainant was entitled to \$5,000.00 in non-pecuniary compensatory damages.

#### CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency's final decision did not point to any case law, facts, or lack of facts to support its decision to award \$5,000.00. Complainant further notes that she suffered from a lack of reasonable accommodation for over five years. Complainant cites a number of Commission decisions that support her request for an increase in the compensatory damages award. Accordingly, Complainant requests that the Commission award her \$50,000.00 in compensatory damages. The Agency did not submit a response.

## ANALYSIS AND FINDINGS

### *Non-Pecuniary Compensatory Damages*

Section 102(a) of the 1991 Civil Rights Act authorizes an award of compensatory damages for non-pecuniary losses, such as, but not limited to, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health. We note that damage awards for emotional harm are difficult to determine and that there are no definitive rules governing the amount to be awarded in given cases. A proper award must meet two goals: that it not be “monstrously excessive” standing alone, and that it be consistent with awards made in similar cases. See Cygnar v. City of Chicago, 865 F.2d 827, 848 (7<sup>th</sup> Cir. 1989).

Non-pecuniary losses 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 Notice No. 915.302 at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary 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).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Objective evidence of compensatory damages can include statements from Complainant concerning emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id. Statements from others including family members, friends, health care providers, and other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his burden in this regard. Id. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

Complainant has the burden of proving the existence, nature and severity of the alleged emotional harm. Man H. v. Dept. of Homeland Sec., EEOC Appeal No. 0120161218 (May 2, 2017). Complainant must also establish a causal relationship between the alleged harm and the discrimination. Id. Absent such proof of harm and causation, a Complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. Id.

See also e.g. Wilda M. v. U.S. Postal Serv., EEOC Appeal No. 0120141087 (Jan. 12, 2017) (Awards for emotional harm are warranted only if Complainant establishes a sufficient causal connection between the Agency's illegal actions and her injury).

In the instant case, Complainant provided a declaration in support of her claim for compensatory damages. She explained that she continued to work, despite the lack of accommodation, until she retired on July 26, 2014. Complainant averred she suffered great fatigue and pain as a result. Further, Complainant stated that “[d]oing household chores . . . became impossible due to having to rest from a day’s work.” Complainant indicated that she experienced elevated blood pressure and loss of enjoyment of life. Complainant noted that she had prescription pain medication but could not take it at work because her job required her to handle money.

Complainant’s husband also provided a declaration. He averred that he has known Complainant since 2005, and noticed her health deteriorating beginning in about 2008. He stated that Complainant was unable to do much of anything in the house after work and that she would sleep most of the time because she was extremely tired and in pain.

Based on the review of the evidence in light of Commission cases regarding non-pecuniary compensatory damages awarded for emotional harm, the Commission finds that the Agency's award of \$5,000.00 is insufficient to remedy the harm experienced by Complainant. In this case, Complainant demonstrated that she suffered from the Agency’s failure to accommodate her for more than five years. Complainant provided medical documentation to the Agency in 2008 and not until after she retired in 2014 – when the Commission issued its decision on August 29, 2016 – did the Agency agree to accommodate Complainant. The record is clear that Complainant did not receive accommodation for more than five years and experienced painful complications each day that she worked during that five-year period. Accordingly, we find that Complainant’s request for \$50,000 in compensatory damages is reasonable and in line with our precedent. See Danita P. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120172149 (July 18, 2018) (an award of \$50,000 in compensatory damages was appropriate where complainant suffered anxiety, sleeplessness, disengagement from family and high blood pressure); Harvey D. v. Dep’t of State, EEOC Appeal No. 0120171079 (Aug. 23, 2018) (\$50,000 in compensatory damages appropriate where the complainant became withdrawn and relationship with husband suffered); Complainant v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120112305 (Sept. 19, 2012) (\$50,000 awarded where complainant experienced exacerbation of injury, substantially increased pain, and emotional distress due to agency’s failure to accommodate).

While it does not appear that the Agency is responsible for complainant’s pre-existing conditions, it remains responsible for the actions it took which aggravated those conditions. By failing to accommodate Complainant and provide her with 10-minute breaks every hour for over five years, the Agency’s actions had an accrual effect. The amount awarded discounts damages incurred due to events other than those found to be discriminatory. In addition, we find this award is not motivated by passion or prejudice, not “monstrously excessive” standing alone, and is consistent with the amounts awarded in similar cases.

### CONCLUSION

Based on the above, we MODIFY the Agency's final order and award \$50,000 in nonpecuniary, compensatory damages. The Agency is directed to implement the following corrective action in accordance with the ORDER herein.

### ORDER

Within **sixty (60) calendar days** of the date on which this decision becomes final, the Agency shall tender to Complainant non-pecuniary damages in the amount of \$50,000, less any previous amounts of non-pecuniary damages previously paid to Complainant.

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 verifying that the corrective action has been implemented.

### 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)

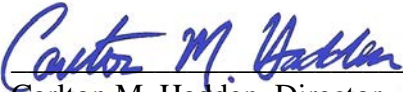
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from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

  
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Carlton M. Hadden, Director  
Office of Federal Operations

March 21, 2019

Date