



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

[REDACTED]

Will K.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 0120172368

Hearing No. 410-2013-00204X

Agency No. 200I-0508-2012102236

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 May 30, 2017 final order concerning an equal employment opportunity (EEO) complaint claiming 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.

BACKGROUND

During the period at issue, Complainant worked as a Medical Supply Technician at the Agency's Sterile Processing Department, Nursing and Patient Services in Decatur, Georgia.

On May 2, 2012, Complainant filed a formal complaint, claiming that the Agency discriminated against him based on race, sex (male), and disability.

The Agency framed the accepted issue as alleging a single hostile environment claim, which was that the Agency subjected Complainant to a hostile work environment on the bases of race

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.

(African-American), sex (male), and disability (service connected mental health condition, heart condition) when:

1. On March 30, 2010, Complainant requested a copy of his performance appraisal but he did not receive the appraisal until June 30, 2010.
2. In April 2010, Complainant's former supervisor told him that as part of a new plan, the work shifts would be rotated.
3. Starting on or about October 22, 2010, it took several months before Complainant was allowed to take possession of an empty locker.
4. On November 10, 2010, management did not respond to Complainant's report of contact (ROC) addressing a supervisor yelling at Complainant.
5. On April 28, 2011, his supervisor (RMO1) summoned the police and had Complainant escorted out of his department by VA police officers.
6. On May 11, 2011, after Complainant sent a letter to the Director, addressing the harassment to which he was being subjected, the director's response was not what he "would have liked."
7. On July 9, 2011, RMO1 did not respond to Complainant's request to have an audit conducted on his sick leave usage.
8. On July 30, 2011, RMO1 did not respond to Complainant's request to change his tour of duty.
9. On August 9, 2011, management denied Complainant's request for a shift change to permit him to go to his medical appointments.
10. On October 5, 2011, Complainant was accused of damaging government equipment.
11. On October 20, 2011, after Complainant became a member of the union, he received harassment from RMO1 when he requested an authorized absence to conduct union duties.
12. On at least two occasions, RMO1 accused Complainant of being absent from his work area (October 21 and December 9, 2011).
13. On February 14, and 29, 2012, Complainant was not cleared to return to work even though he submitted medical documentation from his physician that cleared him for duty.

14. On March 16, 2012, management sent Complainant home after his physician provided a statement informing the Agency that Complainant could not lift anything weighing more than 20 pounds.
15. Complainant was suspended for 14 calendar days effective May 6-19, 2012.

The Agency accepted the complaint for investigation. After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a two-day hearing beginning on May 29, 2014, and issued a decision on June 27, 2014.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Complainant filed an appeal from the Agency's final order.

On appeal, the Commission affirmed the AJ's finding regarding no discrimination related to ongoing discriminatory harassment. However, the Commission found that the Agency violated the Rehabilitation Act when it denied Complainant's requests for reasonable accommodation regarding returning him to the night shift and allowing him to work with a 20-pound lifting restriction.

The Commission ordered the Agency to conduct a supplemental investigation regarding Complainant's entitlement to compensatory damages as well as other remedies. Complainant v. Department of Veterans Affairs, EEOC Appeal No. 0120142904 (October 18, 2016).

On May 13, 2017, the Agency issued a final decision relating to the supplemental investigation on compensatory damages. The Agency awarded Complainant \$3,000 in nonpecuniary compensatory damages. In reaching this amount, the Agency reasoned, "Complainant indicates that he suffered stress from what he believes was a hostile work environment. We note however, that the EEOC decision did not find that Complainant was subjected to a discriminatory hostile work environment. As a result, with the exception of the [Agency's] failure to accommodate Complainant's disability, Complainant is not entitled to compensatory damages for stress associated with the alleged incidents of hostile work environment." Final Agency Decision on Comp. Damages at 10.

The Agency denied Complainant's request for \$9000.00 in past pecuniary damages. The Agency reasoned that "Complainant submitted a copy of an Accounts Receivable Status Report from [a named medical facility]. The status report reveals that Complainant was admitted to the hospital on March 18, 2015, he was discharged on March 24, 2015, and the total amount due is \$9000.00....The Complainant's \$9000.00 medical bill is attributable to hospitalization resulting from a therapist appointment in March 2015.

Complainant has not presented any evidence to establish a causal connection between his hospitalization in March 2015 and the [Agency's] failure to provide reasonable accommodation..." Final Decision on Comp. Damages at 6.

The Agency also denied any award for future pecuniary damages. The Agency reasoned that "[t]he record shows that Complainant had a pre-existing medical condition. Complainant has not provided any evidence to show that the [Agency's] failure to provide reasonable accommodation exacerbated his need for future medical treatment. In addition, Complainant did not submit medical documentation to support the need for future medical expenses and we find that Complainant's testimony regarding the matter is speculative." Final Decision on Comp. Damages at 7.

The instant appeal followed. On July 27, 2017, Complainant's attorney requested an extension to file a brief in support of Complainant's appeal. The Commission denied the extension request via letter dated August 3, 2017. Thus, we will not consider Complainant's statement to the Commission dated September 15, 2017.

ANALYSIS AND FINDINGS

Past Pecuniary Damages

Pecuniary damages are quantifiable out-of-pocket expenses incurred as a result of the Agency's discriminatory actions. Damages for past pecuniary damages will not normally be granted without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals of actual loss and expenses.

We acknowledge the record contains an Accounts Receivable Status Report for Complainant from a medical facility. The report reflects an amount of \$9,000 for services provided in March 2015. We concur with the Agency that the record is devoid of evidence that the \$9,000 in treatment at the medical facility in March 2015 was due to the Agency's failure to provide a reasonable accommodation. Thus, we find the Agency properly denied Complainant's request for past pecuniary damages.

Non-Pecuniary Damages

Non-pecuniary compensatory damages 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 Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for non-pecuniary damages claims includes statements from Complainant and others, including family members, co-workers, and medical professionals. See *id.*; see also *Carle v. Dep't of the Navy*, EEOC Appeal No. 01922369 (Jan. 5, 1993).

Non-pecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency's discriminatory actions. See Carter v. Duncan-Higgans, Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance at 13. Additionally, the amount of the award should not be “monstrously excessive” standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

The Agency awarded \$3000.00 in nonpecuniary damages. We find, however, that an award of \$7,500.00 is more consistent with the amounts awarded in similar cases. We concur with the Agency that this award should only encompass the harm Complainant sustained by the Agency's denial of a reasonable accommodation and not the remainder of the hostile work environment claim in which there was a finding of no discrimination. Complainant, in an affidavit in the supplemental investigation dated January 27, 2017, stated that due to the Agency's denial of a reasonable accommodation, he is “depressed a lot” and stays at home. He stated that he does not see his children or grandchildren as much as he would like and that he has no social life.

The record reflects that the Agency failed to return Complainant to work for a few weeks following his lifting restriction. However, regarding the Agency placing him on the day shift and not returning him to the night shift, Complainant testified at the hearing that it has been two years and he is still on the day shift. Hearing Transcript at 20. We find an award of \$7,500 is neither monstrously excessive nor the product of passion or prejudice and is consistent with prior EEOC precedent. See Darla W. v. Dep't of Veteran Affairs, EEOC Appeal No. 0120160042 (Dec. 12, 2017) (OFO affirmed Agency's award of \$7,500 in nonpecuniary compensatory damages when Complainant testified that she experienced depression, mental anguish, insomnia, and loss of self-esteem when the Agency denied her a reasonable accommodation).

Future Pecuniary Damages

Future pecuniary damages are losses likely to occur after the resolution of the complaint. MD-110 at 11-23 (citing EEOC Damages Guidance). The record is devoid of evidence (such as medical documentation) that Complainant will require future treatment as a result of the Agency's failure to provide a reasonable accommodation. Thus, we concur with the Agency's denial of future pecuniary damages.

CONCLUSION

The Agency's May 13, 2017 final decision concerning compensatory damages is hereby MODIFIED. The matter is REMANDED to the Agency for compliance with the following Order.

ORDER

To the extent, it has not already done so, the Agency is ORDERED to take the following actions as set forth in EEOC Appeal No. 0120142904 as modified herein:

1. Within thirty (30) calendar days from the date this decision is issued, the Agency shall permit Complainant, at his request, to return to the night shift to permit him to schedule his medical appointments during the day. The Agency is also reminded of its ongoing responsibility to provide Complainant with needed and effective reasonable accommodations.
2. Within thirty (30) calendar days from the date this decision is issued, the Agency shall determine the appropriate amount of back pay (with interest, if applicable) lost by Complainant because of its denial of his request to return to work with the 20-pound lifting restriction. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount. Complainant must petition for enforcement or clarification of the amount in dispute. Complainant must file his or her petition for clarification or enforcement with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. Within thirty (30) calendar days from the date this decision is issued, the Agency shall determine and restore to Complainant the appropriate amount of leave he used, if any, as a result of its denial of his request to return to work with the 20 pound lifting restriction.
4. Within thirty (30) calendar days from the date this decision is issued, the Agency is directed to conduct training for RMO1, RMO2 and RMO3 (as set forth in EEOC Appeal No. 0120142904), on their responsibilities under the Rehabilitation Act to provide reasonable accommodation to individuals with disabilities.
5. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$7,500.00 in nonpecuniary damages.
6. The Agency shall pay reasonable attorney's fees for the processing of this complaint and with this appeal as set forth in the paragraph below entitled "Attorney's Fees."
7. The Agency shall post a notice as set forth 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."

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.

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he 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 the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

POSTING ORDER (G0617)

The Agency is ordered to post at its Sterile Processing Department, Nursing and Patient Service facility in Decatur, 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 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).

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 (R0610)

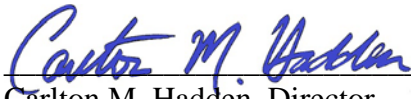
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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



Carlton M. Hadden, Director
Office of Federal Operations

December 20, 2018

Date