



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

[REDACTED]

Sid E.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of the Army,
Agency.

Appeal No. 0120172812

Agency No. ARBRAGG12NOV04624

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 July 18, 2017 final decision concerning an award of compensatory damages for an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

BACKGROUND

During the relevant time, Complainant worked as an Audiovisual Production Specialist for the U.S. Army Special Forces Command, Airborne, at Fort Bragg, North Carolina.

Believing that he was subjected to disability discrimination and reprisal for prior protected EEO activity, Complainant filed a formal complaint on February 15, 2013. 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, but subsequently withdrew his request.

On April 7, 2017, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency found no discrimination was established with respect to a number of ongoing harassment

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.

and disparate treatment claims. However, the Agency concluded that the evidence established that management failed to engage in the interactive process in order to provide Complainant with reasonable accommodations for his Multiple Sclerosis (MS) from July 23, 2012 through April 25, 2013 (claim B(1)).

Consistent with the Agency's decision finding discrimination, Complainant submitted a claim for compensatory damages and attorney's fees. Reasoning that he had to withdraw funds from retirement accounts to obtain more intensive treatment for his hypertension, depression, stress, and anxiety, Complainant requested \$15,000.00 for past pecuniary compensatory damages. He sought \$95,000.00 in non-pecuniary damages, stating that the discrimination exacerbated his Multiple Sclerosis. According to Complainant, the discrimination caused him headaches, loss of self-confidence, depression, and loss of enjoyment of life with his family. Finally, Complainant requested \$31,777.98 for 113.9 hours in attorney's fees.

On July 18, 2017, the Agency issued a decision denying Complainant past pecuniary damages, granting \$5,000.00 in non-pecuniary damages, and \$12,324.50 in attorney's fees.

Complainant filed the instant appeal, challenging the Agency's decision on remedies.

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, the agency must provide the complainant with full, make-whole relief to restore him/her as nearly as possible to the position s/he would have occupied absent the discrimination. See, Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. Postal Service, EEOC Appeal No. 01933395 (July 21, 1994). Compensatory damages may be awarded for the past pecuniary losses, future pecuniary losses, and non-pecuniary losses which are directly or proximately caused by the agency's discriminatory conduct. Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (Enforcement Guidance), EEOC Notice No. 915.002, at 8 (July 14, 1992). When seeking

compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, the harm suffered as a result of the Agency's discriminatory action; the extent, nature, and severity of the harm suffered; and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934156 (July 22, 1994); Notice at 11-12, 14; Carpenter v. Dep't of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995).

Pecuniary Damages

Pecuniary damages are quantifiable out-of-pocket expenses incurred as a result of the Agency's discriminatory actions. The Agency rejected Complainant's request for past pecuniary damages, reasoning that he failed to provide documentation to support her claim. The list which Complainant provided of mental health visits, beginning in December 2012, reflected some visits since 2013, and only one visit since July 2015. The document provided no explanation regarding how such treatments related to the finding of discrimination, that is, the narrow question of the organization's failure to engage in the interactive process of accommodation. Complainant does not raise the denial of past pecuniary damages on appeal. Therefore, the Commission shall not consider the matter in our decision.

Non-pecuniary Damages

As noted above, Complainant requested \$95,000.000 in non-pecuniary damages. Objective evidence in support of a claim for non-pecuniary damages claims includes statements from the Complainant and others, including family members, co-workers, and medical professionals. See Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. N915.002 (July 14, 1992) (hereafter referred to as "Notice"); Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (January 5, 1993). However, evidence from a health care provider or other expert is not a prerequisite for recovery of compensatory damages for emotional harm. Lawrence v. United States Postal Service, EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Here, in support of his claim, Complainant provided his own statement as well as a letter from his wife and from his sister-in-law.

Complainant's wife describes witnessing her husband, "suffer through emotional pain, mental anguish, self-worthlessness, belittleness [sic], and defamation of his character." She contends that Manager W's failure to provide a reasonable accommodation and harassment caused her husband stress and anxiety, resulting in the prescription of Zoloft, and exacerbated his MS. Complainant's sister-in-law, also self-described "best friend," explained that Complainant would call her upset and describe how he was prevented from completing some of his job duties because Manager W would not give him time to get from one building to another. According to Complainant's sister-in-law, Manager W yelled at Complainant when he tried to explain his need for an accommodation. As a result, Complainant began to feel useless and depressed.

In its decision, the Agency reasoned that the statements relate to the alleged "abuse" and "harassment" by Manager W, rather than the finding of discrimination (i.e. the Agency's failure

to engage in the interactive process). Further, the Agency found the statements to contain simply conclusory statements that lacked objective evidence. While acknowledging that “at least some of the pain and suffering Complainant described was a result of management’s failure to engage Complainant in the interactive [process]”, the Agency granted Complainant \$5,000.00 in non-pecuniary damages.

After a careful review of the record, we find an award of \$15,000.00 for non-pecuniary damages is more appropriate. In this case, the Agency attempts to frame its finding of discrimination as simply a “per se” violation, as the management official failed to realize his duty to engage in the interactive process. A closer reading of the Agency’s own April 7, 2017 decision, however reveals a more blatant disregard and rejection of Complainant’s multiple requests for accommodation.

In the April 7, 2017 decision, the Agency observed that Complainant requested a reasonable accommodation in July 2012. Complainant “requested that his building be made wheelchair accessible because he needed to use a wheelchair to travel longer distances. The [Agency’s] only response was that they had no money to make the building accessible or essentially, that to do so would be an undue hardship.” The decision proceeds to note that such argument is “not persuasive given the overall financial resources of the U.S. Army.” Not only did the Agency’s decision determine that the Agency failed to engage in the interactive process but more specifically that Complainant’s request “was *denied* without appropriate reason or interaction” (emphasis added). The decision continues, noting that Complainant again requested an accommodation when he described his difficulty in getting from one building to another quickly due to his disabling condition (claim (A)(7)). According to the Agency’s April 7, 2017 decision, “there are no magic words when it comes to requesting reasonable accommodation” and “that [Manager W] knew, upon watching Complainant walk that he had a disability that caused him to have mobility issues” and therefore, the Agency “had an obligation to engage in an interactive dialogue.” While Manager W was found to have responded to Complainant’s third request for a reasonable accommodation (by telling him not to go outside, lift heavy objects, walk on uneven terrain, and plan his schedule so he had time to get to locations on time), the Agency concluded Manager W “imposed restrictions that stripped Complainant of some of his duties . . . [which] resulted in confusion, resentment, and ultimately led to the April 2013 reprimand.”

While the Agency argues that Complainant’s statement, and those of his family, reference harm caused by Manager W’s unfounded harassment, the Commission notes that Manager W was the same management official who failed to engage in the interactive process. Therefore, a clear distinction in the harm resulting from the express finding of discrimination (claim (B)(1)) and Manager W’s other alleged, but unproven, acts of discrimination cannot be made as asserted by the Agency.

We find that \$15,000.00 takes into consideration the nature of the Agency’s discriminatory actions (i.e. failing to engage in the interactive process over a nine-month period) and the harm suffered by Complainant (anxiety, headaches, loss of confidence, feeling useless, and exacerbation of MS and hypertension). This amount is not “monstrously excessive” and is

consistent with the amount awarded in similar cases. See Massingill v. Dep't of Veterans Affairs, (Commission affirmed an award of \$10,000 where the complainant's pre-existing depression and back pain were exacerbated by the agency's discriminatory reassignment and failure to engage in the interactive process); Batieste v. Dep't of the Air Force, EEOC Appeal No. 01974616 (May 26, 2000) (Commission awarded \$12,000 in non-pecuniary damages where following discriminatory removal Complainant developed feelings of worthlessness, a negative attitude, anxiety, irritability, feelings of isolation, nausea, insomnia, and loss of credit standing); Taber v. U.S. Postal Serv., EEOC Appeal No. 01983780 (July 18, 2001) (Commission awarded \$15,000 where connection established between the disability discrimination and the worsening of his condition, even when partially attributable to other factors).

Attorney's Fees and Costs

A complainant will be awarded reasonable attorney's fees and other costs incurred in the successful adjudication of a complaint alleging discrimination in violation of the Rehabilitation Act. 29 C.F.R. § 1614.501(e). Attorney's fees are computed by determining the "lodestar," the number of hours reasonably expended multiplied by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983); 29 C.F.R. § 1614.501(e)(2)(ii)(B). The number of hours should not include excessive, redundant, or otherwise unnecessary hours. Hensley, 461 U.S. at 434; Bernard v. Department of Veteran Affairs, EEOC Appeal No. 01966861 (July 17, 1998). A reasonable hourly rate is a rate based on "prevailing market rates in the relevant community" for attorneys of similar experience in similar cases. Cooley v. Department of Veterans Affairs, EEOC Request No. 05960748 (July 30, 1998) (quoting Blum v. Stenson, 465 U.S. 886 (1984)).

The attorney requesting the fee award has the burden of proving, by specific evidence, entitlement to the requested fees and costs. Hyde v. Department of Justice, EEOC Appeal No. 0120073964 (November 24, 2009); Koren v. United States Postal Service, EEOC Request No. 05A20843 (February 18, 2003). EEOC regulations require the complainant's attorney to submit a verified statement of attorney's fees and other costs to the agency or AJ within thirty days of receipt of the decision and submit a copy of the statement to the agency. 29 C.F.R. § 1614.501(e)(2)(i). A verified statement of fees and costs includes: (1) an itemized list of services rendered; (2) documentary evidence of reasonableness of hours; (3) documentary evidence of reasonableness of rate; and (4) documentation of costs. EEOC Management Directive 110, Chapter 11, § VII.A. (November 9, 1999). The MD-110 provides that the statement shall include "documentary evidence of reasonableness of rate" which may consist of "an affidavit stating that the requested rate is the attorney's normal billing rate" MD-110, Ch. 11, § VII.A.3.

Complainant requested that the Agency provide \$31,777.98 in attorney's fees. The Agency noted that the fee records which were submitted only accounted for \$24,649.98. In its July 18, 2017 decision, the Agency reduced this amount by fifty percent (to \$12,324.50), reasoning that Complainant was "only a partially prevailing party". The Agency determined that because Complainant failed on his claims of harassment and disparate treatment, and the billing records fail to detail the specific issues or claims, such a reduction is appropriate.

On appeal, Complainant admits that “upon review . . . prior counsel inadvertently filed the incorrect detailed fee accounting with the Agency.” He submits the correct fee accounting on appeal, corresponding with the previously submitted affidavits, and asks that the Commission award the full (\$31,777.98) amount.

Courts have held that fee applicants should exclude time expended on “truly fractionable” claims or issues on which they did not prevail. See National Association of Concerned Veterans (NACV) v. Secretary of Defense, 675 F.2d 1319, 1337 n. 13 (D.C. Cir. 1982). Claims are fractionable or unrelated when they involve “distinctly different claims for relief that are based on different facts and legal theories.” Hensley, 461 U.S. at 434-35. In the instant case, both successful and unsuccessful claims, arose from a common set of facts. The alleged harassment by Manager W was not utterly separate and distinct from Manager W’s failure to engage in the interactive process. Similarly, the allegedly discriminatory discipline and comments by Manager W related to Complainant’s difficulties in the absence of a reasonable accommodation. Due to this significant overlap, we do not find an across-the-board reduction is justified.

As for the lack of documentation to support the \$31,777.98 in fees, we agree that Complainant should not be providing the appropriate evidence for the first time on appeal. Therefore, Complainant is granted \$24,169.98 in attorney’s fees.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we **MODIFY** the Agency’s decision on compensatory damages and attorney’s fees. The matter is **REMANDED** to the Agency in accordance with the **ORDER** below.

ORDER

Within sixty (60) calendar days of the date this decision was issued, to the extent it has not already done so, the Agency shall:

- (1) Pay Complainant \$15,000.00 in compensatory damages; and
- (2) Pay directly to Complainant’s attorney, \$24,169.98 in attorney’s fees.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must submit a report of compliance.

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).

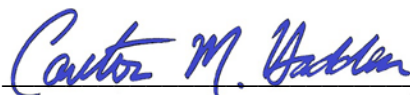
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

February 27, 2019

Date