



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

[REDACTED]  
Kerry B.,<sup>1</sup>  
Complainant,

v.

Robert Wilkie,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 0120180317

Hearing No. 430-2014-00201X

Agency No. 2004-0318-2013103845

**DECISION**

On October 26, 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 September 26, 2017, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

**ISSUE PRESENTED**

Whether substantial evidence in the record supports the Administrative Judge's award of \$16,000 in non-pecuniary compensatory damages for the Agency's failure to engage in the interactive process from April 23, through July 8, 2013.

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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.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Ratings Veterans Service Representative at the Agency's Regional Office in Winston-Salem, North Carolina. On or about April 23, 2013, Complainant submitted a request for a reasonable accommodation to work from home. With his request, Complainant submitted a physician's statement which noted that he is unable to sit "for a prolonged period of time" without experiencing severe pain. Complainant's physician recommended that Complainant work from home because he would be able to lay down and elevate his legs; get up to walk around; engage in intermittent exercise; and utilize his inversion table. Report of Investigation (ROI) at pgs. 366-369.

An EEO Program Manager (PM) ordered a Computer/Electronic Accommodation Program (CAP) assessment, which he received on June 11, 2013. ROI at pgs. 261, 370-372. On or about July 8, 2013, PM spoke with a nurse at Complainant's physician's office to discuss what "extended period of time" meant. The nurse responded that she could not answer because she had not performed a Functional Capacity Exam (FCE) on Complainant. PM stated that she contacted Complainant asking that he contact his medical provider to complete an FCE, per their recommendation. ROI at pg. 269.

On July 11, 2013, the Director issued Complainant a memo informing him that the medical information was insufficient and requested that he provide his doctor with a copy of his position description to have him identify what job duties require an accommodation. The Director also stated that in the interim, the Agency was granting Complainant a modified work schedule between the hours of 6:00 a.m. and 6:00 p.m. to allow Complainant to take frequent breaks to rest, stretch, and exercise. The Director also granted Complainant the ability to wear comfortable clothes and a neutral space to stretch and exercise. ROI at pg. 376, 462. On July 18, 2013, Complainant submitted a request for reconsideration to the Director. ROI at pgs. 396-399. On August 9, 2013, the Director approved Complainant's request to telework as a reasonable accommodation. ROI at pg. 296.

On August 27, 2013, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (Caucasian), sex (male), and disability (lumbar spine, severe arthritis, degenerative disc disease) when:

1. from April 21, 2013, through August 2013, management denied his reasonable accommodation request to telework;
2. On June 14, July 10, July 24, and August 5, 2013, the Agency forced him to use sick and annual leave;
3. In June 2013, the Agency forced him to undergo a CAP assessment;
4. On July 8, 2013, he was provided an interim accommodation allowing him 12 hours to work 8 hours, between 6:00 a.m. and 6:00 p.m.;

5. On July 15, 2013, PM informed him that he needed to undergo an FCE; and
6. On August 9, 2013, the Agency granted his request to telework, but did not implement the request.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on February 22, 23, and March 23, 2017. The AJ issued a decision on August 25, 2017.

The AJ found that Complainant was a qualified individual with a disability because he was substantially limited in the major life activity of sitting, and that he could perform the essential functions of his position. The AJ then found that the Agency did not promptly begin the interactive process because Complainant submitted his request on April 23, 2013, and it remained unacknowledged for approximately three weeks, and this delay was unjustified. The AJ stated that short staffing and PM's leave were not valid reasons for a three-week delay because the Assistant Director was available to process requests for reasonable accommodation, but he did not do so.

The AJ also found that once PM started to process Complainant's request, she spoke with a colleague at another location, sought guidance from the Job Accommodation Network handbook, and referred Complainant to CAP, without interacting with Complainant. The AJ then noted that once the Agency received the CAP assessment on June 11, 2013, it failed to act for another 27 days. On July 8, 2013, PM sought clarification from Complainant's physician because his medical restriction that Complainant was "unable to sit for extended periods of time" was vague. The AJ noted that it was within the Agency's discretion to seek clarification and request additional medical documentation, and it was at this point that the Agency began to make a good faith effort to accommodate Complainant. The AJ determined that the Agency did not make a good faith effort to accommodate Complainant from April 23, through July 8, 2013.

From July 8, 2013, through August 1, 2013, the AJ found that the Agency properly sought clarification from Complainant and granted his request on August 9, 2013. From August 9, through September 10, 2013, the Agency worked to secure the IT portal, license, and bandwidth to allow for telework, which the AJ found was not an unnecessary delay. Regarding the disparate treatment claims, the AJ found that the Agency provided legitimate, nondiscriminatory reasons for their actions, and that Complainant had not provided any evidence that the Agency discriminated against him based on his race or sex.

The AJ concluded that the Agency discriminated against Complainant based on disability when it failed to participate in the interactive process and accommodate him from April 23, through July 8, 2013. After reviewing the written submissions of both parties, the AJ awarded Complainant \$16,000 in non-pecuniary compensatory damages, \$30,373.44 in attorneys' fees, and \$693.04 in costs. Complainant had not requested pecuniary compensatory damages.

Regarding the non-pecuniary compensatory damages, the AJ noted that there were no similar cases to the instant complaint. The AJ found that the Commission awarded \$50,000 when a denial of an accommodation aggravated an employee's existing back injury and caused other extreme emotional harm. Sartini v. Veterans Affairs, EEOC Appeal No. 0120112305 (Sept. 19, 2012). However, the AJ found that Complainant's harm did not rise to the same level. The AJ noted that Lavern B. v. Dep't of Housing and Urban Development, EEOC Appeal No. 0720130029 (Feb. 12, 2015) was a closer case, in which the Commission awarded \$15,000.

The Agency subsequently issued a final order fully adopting the AJ's decision finding that Complainant proved that the Agency subjected him to discrimination as alleged; and awarding him \$16,000 in non-pecuniary compensatory damages, \$30,373.44 in attorneys' fees, and \$693.04 in costs.

Complainant filed the instant appeal and submitted a brief in support of his appeal on November 22, 2017. The Agency filed a response brief on December 21, 2017.

#### CONTENTIONS ON APPEAL

On appeal, Complainant, though his attorney, argues that the AJ erred in not awarding greater damages because the Agency's actions caused additional physical and emotional pain. He states that he became isolated, frustrated, and angry; and that this led to the end of a relationship during the months at issue. Complainant asserts that two coworkers, who provided affidavits, corroborated his suffering. Complainant cites to five Commission decisions in which the complainants were awarded amounts between \$25,000 and \$65,000 in non-pecuniary compensatory damages: Dayle H. Dep't of Veterans Affairs, EEOC Appeal No. 0120140883 (Jan. 17, 2017); Minna Z. v. Dep't of the Air Force, EEOC Appeal No. 0720160009 (Mar. 10, 2017); Halperin v. Dep't of Homeland Security, EEOC Appeal No. 0120051983 (May 31, 2007); McNabb v. U.S. Postal Service, EEOC Appeal No. 01A33116 (Apr. 19, 2004); and Complainant v. Dep't of Justice, EEOC Appeal No. 0120122924/0120132965 (Sept. 11, 2015).

Complainant also argues that the AJ erred in not awarding damages from July 8, 2013, forward. He states that there is "no factual basis for finding the two-month delay was reasonable." Complainant states that other than the two weeks to wait for resources to begin his telework, the delay was "entirely unnecessary." Complainant requests that the Commission reverse the Agency's final decision and sustain the AJ's decisions, with the exception of an increase in the damages award.

The Agency asserts that after conducting a hearing, the AJ concluded that the Agency was only liable for its failure to engage in the interactive process from April 23, through July 8, 2013. The Agency further argues that Complainant has not supplied a basis to determine that the AJ's compensatory damages award was clearly erroneous and not supported by substantial evidence. The Agency states that the AJ's \$16,000 award was appropriate given the nature, severity, and relatively short duration of Complainant's harm. The Agency requests that the Commission uphold its final order.

## ANALYSIS AND FINDINGS

### *Standard of Review*

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

As an initial matter, we note that Complainant has only challenged the AJ’s award of non-pecuniary compensatory damages on appeal. Accordingly, our decision will only address this issue.

### *Non-Pecuniary Compensatory Damages*

Non-pecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, 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). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be “monstrously excessive” standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep’t of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

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 his 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, 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.

In this case, we find substantial evidence in the record to support the AJ's award of \$16,000 for non-pecuniary compensatory damages. Complainant provided two coworker statements, in addition to his own statement, to show that he suffered pain and suffering. For example, Complainant had trouble sleeping, isolated himself and did not socialize, which affected his relationship with his partner. Complainant's co-workers also described seeing him frustrated, irritated, and anxious. We find that the \$16,000 award for Complainant's pain and suffering for two and a half (2½) months is in line with similar cases. See Queen L. v. Dep't of Agriculture, EEOC Appeal No. 0120160554 (Mar. 22, 2018) (complainant was awarded \$15,000 for depression, anxiety, chronic diarrhea, nausea, sleeplessness, and night sweats for five months when the agency failed to engage in the interactive process regarding her request for a reasonable accommodation); and Dalton C. v. Dep't of Health and Human Services, EEOC Appeal No. 0120170077 (Mar. 27, 2018) (complainant was awarded \$15,000 when the agency's denial of a reasonable accommodation for four months led to depression, anxiety, loss of self-esteem and confidence, and a decline in general mood).

Complainant argues that there is "no factual basis for finding the two-month delay was reasonable," referring to the timeframe between July 8, and September 10, 2013. However, we find that there is substantial evidence to support the AJ's determination that the "delay" was reasonable because the Agency engaged in the interactive process when it attempted to obtain additional information regarding Complainant's condition, and after it granted Complainant's request to telework, it was reasonable to allow time to set up the logistics of implementing the telework. Hearing Transcript at pgs. 183-184, 187-188, 190. Accordingly, we find that there is substantial evidence in the record to support the AJ's award of \$16,000 in non-pecuniary compensatory damages for the Agency's failure to engage in the interactive process from April 23, through July 8, 2013.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find sufficient evidence in the record supports the award of \$16,000 in non-pecuniary compensatory damages, and AFFIRM the Agency's final order fully adopting the AJ's decision.

ORDER

To the extent that it has not already done so, the Agency is ordered to take the following actions:

1. Within sixty (60) days of the date this decision is issued, restore all leave (annual, sick) taken between April 23, and July 8, 2013, as a result of the Agency's failure to provide Complainant with a reasonable accommodation.
2. Within sixty (60) days of the date this decision is issued, pay Complainant \$16,000 in non-pecuniary compensatory damages.
3. Within sixty (60) days of the date this decision is issued, pay Complainant \$30,373.44 in attorneys' fees and \$693.04 in costs.
4. Within ninety (90) days of the date this decision is issued, provide no less than four (4) hours appropriate in-person or interactive EEO training on the Agency's duty to provide reasonable accommodations to PM, the Director, and the Assistant Director of the Winston-Salem Regional Office. The training shall emphasize the Rehabilitation Act's requirements with respect to an Agency's duty to engage in the interactive process in a timely manner to ensure that similar violations do not occur.
5. Within sixty (60) days of the date this decision is issued, consider taking appropriate disciplinary action against responsible management officials identified as PM, the Director, and the Assistant Director of the Winston-Salem Regional Office. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the named employees have left the Agency's employ, the Agency shall furnish documentation of his or her departure date.
6. Immediately post a notice in accordance with the paragraph below.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's payment of compensatory damages, attorneys' fees and costs, and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Winston-Salem 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 (R0610)

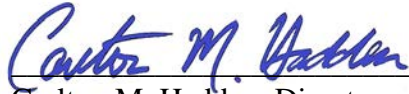
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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



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Carlton M. Hadden, Director  
Office of Federal Operations

May 31, 2019

Date