



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

████████████████████  
Selma D.,<sup>1</sup>  
Complainant,

v.

Arne Duncan,  
Secretary,  
Department of Education,  
Agency.

Appeal No. 0720150015

Hearing No. 570-2011-00117X

Agency No. ED-2009-05-00

DECISION

Following its December 12, 2014 final order, the Agency filed a timely appeal. On appeal, the Agency requests that the Commission affirm its rejection of an Equal Employment Opportunity Commission Administrative Judge's (AJ) finding of discrimination and separate determination of relief for a violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. On January 12, 2015, Complainant filed a timely cross appeal requesting that the Commission reverse the AJ's finding of no discrimination for a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Rehabilitation Act. The Commission accepts both appeals pursuant to 29 C.F.R. § 1614.405(a).

BACKGROUND

*Claim (1) – Non-Selection*

At the time of events giving rise to this complaint, Complainant worked as a Management and Program Analyst at the Agency's Office for Civil Rights, Resources Management Group, Human Resources Team in Washington, D.C. On May 14, 2008, the Agency issued Vacancy

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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.

Announcement OCR 2008-0023 for a Supervisory Management and Program Analyst position. The Selecting Official (SO) selected a three-person panel to review the applications, perform a first round of interviews, rank the candidates, and forward the list to him for review. The panel asked the candidates the same questions and independently ranked the candidates. The panel then met to combine their individual rankings and notes into a panel ranking. After the panel collectively ranked the candidates, Complainant was not among the top candidates and was not recommended for a second interview. SO subsequently interviewed the top four candidates and selected Selectee 1 who declined the position. The position was re-advertised eight months later and Selectee 2 was chosen.

*Claim (2) – Denial of Reasonable Accommodation*

Complainant has worked for the Agency and the Federal Government for over 30 years. In June 2004, Complainant was moved from an office to a cubicle environment at the Agency's facility at the Potomac Center. In 2007, Complainant was moved again to the Agency's Headquarters at Maryland Avenue. On December 17, 2007, Complainant's doctor wrote a letter stating that Complainant had the diagnosis of Adult Attention Deficit Hyperactivity Disorder (ADHD). Further, her doctor recommended that Complainant work in a private office or quiet cubicle and that Complainant work from home or utilize a flexible work schedule as reasonable accommodation. On December 19, 2007, Complainant wrote a memorandum requesting reasonable accommodation. Complainant's request enclosed her doctor's letter and the appropriate Agency form. Complainant wrote in the form that her impairment was: "Adult ADHD – cannot concentrate in loud open cubicle environment." Complainant requested to work from home, the necessary equipment to work from home, a private office, and a modified work schedule.

On January 8, 2008, Complainant met with her supervisor (S1) and other Agency officials to discuss her reasonable accommodation request. On February 7, 2008, Complainant's doctor wrote a more detailed letter stating that Complainant's "symptoms of distractibility, decreased attention span are currently exacerbated due to the changes in the work environment." Complainant's doctor added that the cubicle location allowed "for too many distractions for her disability." Her doctor stated that Complainant needed to work from home and on a modified or flexible work schedule, Complainant needed to work in the most distraction-free environment possible (e.g., a private office or quiet cubicle away from noise and/or distractions), and that she may need other necessary reasonable accommodations.

S1 requested more information and Complainant's doctor responded on March 7, 2008. Complainant's doctor described Complainant as having difficulty wrapping up the final details of a project, organizing things, evidencing signs of physical and mental restlessness, easily distracted by noise, talking too much and interrupting people, and trouble waiting her turn, which Complainant's doctor described as "classic signs of ADHD." Complainant's doctor added that medication "was not the full answer" and that "ADHD impact[ed] upon one's ability to care for self, to speak appropriately, to interact with others, to concentrate and to work effectively."

On March 11, 2008, Complainant wrote a 14-page memorandum to S1 in which she stated that her ADHD substantially and negatively affected her ability to "see, hear, think, listen, and concentrate (basically work) in a noisy workplace environment." Complainant noted that she was easily distracted to the point she could not concentrate with employees constantly walking and talking near her cubicle and for that reason she had to wait until other employees left at the end of the work day in order to complete her work. Complainant stated that she needed to be accommodated with a modified work schedule, distraction-free environment (e.g. private office, regularly schedule telework options), and other assistive aids as deemed appropriate.

On March 20, 2008, the Employee Relations Specialist requested that the Federal Occupational Health Division of the U.S. Public Health Service review the medical documentation related to Complainant's accommodation request. Doctor 1 was assigned to review Complainant's reasonable accommodation request. Doctor 1 interviewed Complainant's doctor on March 31, 2008, regarding Complainant's diagnosis, treatment, and prognosis. Complainant's doctor shared with Doctor 1 that Complainant had other conditions including Bipolar Disorder and Obsessive Compulsive Personality Disorder and paranoid thinking. Complainant's doctor did not provide any additional information after Doctor 1 asked a follow-up question and ended the conversation.

On April 2, 2008, Doctor 1 issued a report regarding Complainant's reasonable accommodation request. Doctor 1 determined that the request for reasonable accommodation was not adequately supported and recommended that the Agency deny it. Additionally, Doctor 1 recommended that the Agency offer Complainant an Independent Medical Examination.

On April 21, 2008, Complainant submitted documentation from her second doctor stating that he concurred with Complainant's original doctor's diagnosis and recommendations, and that Complainant appeared to "exhibit difficulties focusing and concentrating on given issues for a sustained period." In addition, Complainant submitted a list of her medications to S1 noting that many of them caused drowsiness and that she was concerned about driving after taking them. In July 2008, Complainant underwent a psychological examination by a third doctor. The third doctor submitted her report to the Agency on September 17, 2008, confirming the ADHD diagnosis.

On June 5, 2008, S1 instituted an interim arrangement pending the outcome of the accommodation request. S1 granted Complainant delayed arrival and departure at work and continued flexible schedule. In addition, S1 granted Complainant additional quiet time over the lunch hour and several hours at the end of the day when no other employees were in the workspace. S1 continued to allow Complainant flexible telework so that Complainant could perform some work assignments from her residence, with the condition that Complainant request advance permission and show her work products at the conclusion of the telework days. S1, however, made no interim accommodation for a private office because those spaces were reserved for supervisory staff and special project managers. S1 subsequently retired in Summer 2008.

On August 29, 2008, the Agency's Reasonable Accommodation Coordinator (RAC) offered for the Complainant to undergo a psychological and psychiatric examination to assist the Agency in deciding upon her reasonable accommodation request. In September 2008, Complainant's second-level supervisor (S2) discontinued Complainant's delayed arrival to work.

On September 22, 2008, Doctor 1 reviewed Complainant's third doctor's evaluation and wrote a letter to the Federal Occupational Health Doctor. Doctor 1 reviewed all of the available medical evidence and decided that "the updated information [was] not helpful." Further, Doctor 1 noted that Complainant's third doctor's evaluation only focused on ADHD and did not address other mental health diagnoses "that could influence or even account for the problems reported." Additionally, Doctor 1 noted that Complainant's third doctor's ADHD evaluation was based only on Complainant's personal report of her symptoms. As a result, Doctor 1 concluded that the reasonable accommodation request was not sufficiently supported and recommended denial. On October 7, 2008, RAC informed Complainant that her reasonable accommodation request was not supported and denied her request. Complainant subsequently retired in December 2, 2011.

On November 12, 2008, Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of disability and in reprisal for prior protected EEO activity when<sup>2</sup>:

1. On July 16, 2008, she was not selected for the position of Supervisory Management and Program/Analyst under Vacancy Announcement OCR 2008-0023; and
2. On September 22, 2008, she was denied a reasonable accommodation (telecommuting).

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The AJ partially granted the Agency's motion and issued a summary judgment decision in December 2012, regarding claim (1). The AJ held a hearing on January 14, 2013, as to claim (2), and issued a decision on January 30, 2014.

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<sup>2</sup> This case arose before January 1, 2009, the effective date of the Americans with Disabilities Act Amendments Act of 2008, which made a number of significant changes to the definition of disability under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. Because this matter occurred in 2008, the Commission will use the analytical framework as it existed before the enactment of the ADA Amendments Act of 2008, to determine whether Complainant is an individual with a disability.

In her summary judgment decision for claim (1), the AJ assumed *arguendo* that Complainant established a *prima facie* case of discrimination and reprisal and found that the Agency articulated legitimate, nondiscriminatory reasons for not selecting Complainant for the position at issue. Specifically, interview panel members affirmed that Complainant was not referred for a second interview because she was not among the top four candidates. One panelist stated that the candidates were judged on how well they articulated their responses to the questions coupled with how conversant they were of human resources rules and practices, which extended beyond their actual knowledge of the requirements of the position. Further, a panelist confirmed that Complainant's interview demonstrated that she just did not rank among the top candidates based on the way she presented herself during the interview and her responses to the questions. The panelist noted that Complainant did not go into a lot of detail on some questions and she may have felt that the interviewers knew her and her work habits, which did not help her. As a result, the panel ranked Complainant lower than the top four candidates and she was not recommended for a second interview with SO.

The AJ concluded that Complainant failed to show that the Agency's reasons for its actions were pretextual. As a result, the AJ found that Complainant had not been subjected to discrimination or reprisal as to her non-selection for this position.

In her decision following a hearing, the AJ initially found that the record evidence showed that Complainant was a qualified individual with a disability and the Agency should have engaged with her in the interactive process to determine how to improve her ability to concentrate on her work. Complainant's requests for accommodation included regular telework, a private office or quiet cubicle, and a modified work schedule.

As to the modified schedule, Complainant testified that after filing her November 2008 EEO complaint, S2 allowed her to continue the modified work schedule that S1 had previously allowed (i.e., 10:30 a.m. arrival time), therefore, the AJ determined that that request was granted except for a period of a few weeks. However, Complainant testified that there were several empty offices. Complainant testified that her difficulties at work started when she was moved to a cubicle environment, so going back to an office should have ameliorated many of her concentration difficulties. The request to regularly work from home on some fixed days, with the necessary equipment for telework, also seemed to be a request that should have been explored. If there was concern that Complainant would not complete her assignments while working from home, the Agency could have monitored her output to ensure that this type of arrangement was effective. Additionally, the AJ found that there was insufficient evidence that these types of accommodations would have resulted in undue hardship. Thus, the AJ found that the Agency was liable for failing to accommodate Complainant beginning on October 7, 2008, the date she was informed of the denial.

The AJ concluded, however, that Complainant failed to show that the Agency retaliated against her for her protected EEO activity. The Agency relied on the opinion of a medical advisor who concluded that the documentation provided by Complainant was insufficient and recommended that the accommodations request be denied. Complainant's contention that these

medical conclusions were manipulated by the Agency was not supported by the preponderance of the evidence. Further, Complainant's testimony that her doctor heard from Doctor 1 that he had been instructed by Agency management to deny the accommodation was not persuasive nor was Complainant's argument that it was the Employee Relations Specialist who wanted the accommodation request denied. Accordingly, the AJ found that Complainant had not been subjected to reprisal.

The AJ held a damages hearing on July 10 and 11, 2014, and issued a decision on November 3, 2014. In her decision, the AJ found that the preponderance of the evidence showed that the October 2008 denial of accommodation caused Complainant great emotional distress. She reported to her then-therapist that she felt devastated by the "push back from work re accommodation." Complainant's subsequent therapist reported that workplace issues had a negative impact on her including the absence of accommodation, lost promotions, and the "hostile work environment." Complainant often stated her frustration and sadness with her doctor and sister over the accommodation and other work issues. Without the accommodation, Complainant testified that she encountered difficulties with focus at the workplace causing her to work late on a regular basis, until 9:00 p.m. or later. While Complainant's delayed start time was to accommodate the drowsiness caused by her non-ADHD medications, there was some evidence that Complainant would at times remain at work later than 9:00 p.m.

The AJ then noted that Complainant's pre-existing conditions included bipolar disorder, personality disorder, migraines, high blood pressure, being overweight, "stress due to social alienation/lack of validation; litigation," and sleeplessness. Complainant further testified to suffering from depression and high blood pressure prior to the October 2008 accommodation denial. The pre-existing conditions had not been resolved at the time of the accommodation denial, but there was evidence that Complainant's high blood pressure and migraines worsened. Complainant's doctor reported that she experienced emotional/physical paralysis, depression, mania, and periods of mood instability; however, the AJ noted that other non-compensable stressors likely contributed to Complainant's emotional pain and exacerbation of pre-existing conditions. For example, Complainant acknowledged that bankruptcy and mortgage difficulties caused her much stress; that she was distressed over non-promotions; and that she experienced other physical conditions including problems related to her leg, back, and urological concerns.

Thus, considering the emotional distress experienced by Complainant for the approximately three-year period between the accommodation denial and her retirement, but also adjusting for the numerous other significant factors which contributed to her emotional pain, the AJ awarded Complainant \$40,000 in non-pecuniary compensatory damages. In addition, the AJ awarded Complainant \$2,523 in medical expenses. The AJ determined that there was insufficient evidence to support Complainant's request for leave restoration. Likewise, the AJ found that there was insufficient evidence tying Complainant's use of ADHD Helpers at her home to the October 2008 accommodation denial because Complainant has used them since 2002. In addition, the AJ determined that the preponderance of the evidence did not support a finding

that the Agency's failure to accommodate Complainant's ADHD condition proximately caused her 2011 retirement.

Finally, as to attorney's fees and costs, the AJ approved the requested hourly fee of \$360.00. Based on the level of success, the AJ determined that Complainant was entitled to 60 percent of the 61.7 hours incurred until December 12, 2012, plus 100 percent of the subsequent 148.6 hours expended through August 22, 2014. As a result, the AJ awarded Complainant \$66,823 in attorney's fees and \$272.83 in costs. Additionally, the AJ ordered the Agency to post a notice.

The Agency subsequently issued a final order rejecting the AJ's finding that it denied Complainant reasonable accommodation and the relief ordered therein. The Agency filed the instant appeal with the Commission followed by a cross appeal by Complainant.

#### CONTENTIONS ON APPEAL

On appeal, the Agency argues that the AJ's finding that Complainant is a qualified individual with a disability was not substantially supported by the record or Commission case law. The Agency contends that substantial evidence did not show that Complainant's impairment, as opposed to some other factor, was responsible for her difficulties in concentration. Further, the Agency argues that even if Complainant is a qualified individual with a disability, it provided reasonable accommodation consistent with her requests. The Agency claims that the AJ ignored the measures it took to address Complainant's health concerns including granting her requests for a delayed arrival schedule and flexible four-day work week, regular telework, allowing her to move cubicles and to temporarily work in unoccupied offices, and prioritizing her assignments in writing. Finally, the Agency argues in the alternative that if the Commission finds that it failed to accommodate Complainant, the Commission should overturn the AJ's award of relief based on the Agency's good faith response to her reasonable accommodation request.

On cross appeal, Complainant first argues that the AJ erred in granting summary judgment in favor of the Agency as to claim (1). Complainant argues that she proved that the Agency's proffered reasons for not selecting her were false and pretext for discrimination. Complainant claims that she was better qualified for the position than the other four candidates and that the ranking process was subjective and littered with impropriety. Complainant contends that the overwhelming conclusion to be drawn after review of the totality of the circumstances proves that the Agency's reasons for not promoting her were false and pretextual. Accordingly, Complainant requests that the Commission reverse the AJ's summary judgment decision for claim (1) and the final order implementing it.

Next, Complainant argues that the AJ's damages decision was deficient in three areas. Complainant contends that the AJ erred in failing to award any restoration of leave Complainant took from October 7, 2008 through December 2, 2011. Next, Complainant argues that the AJ erred in failing to award any relief for expenses related to ADHD helpers.

Finally, Complainant claims that the AJ erred by failing to award the equitable relief she sought, including reinstatement and backpay and benefits. Accordingly, Complainant requests that the Commission reverse the AJ's damages decision denying the above-mentioned damages.

### ANALYSIS AND FINDINGS

#### *The AJ's Partial Summary Judgment Decision (Claim (1) - Non-Selection)*

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

#### Disparate Treatment

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

In the instant case, the Commission finds that the AJ properly issued summary judgment as the material facts are undisputed. The Commission agrees with the AJ that assuming arguendo that she established a prima facie case of discrimination and reprisal, Complainant failed to present evidence to rebut the Agency's legitimate, nondiscriminatory reasons for not selecting Complainant for the position at issue. Specifically, the record reveals that the three-person panel interviewed the candidates and rated the candidates based on their interview responses. ROI, at 134. Each panel member independently analyzed the candidates and the panel then made a group recommendation of the top four applicants to SO for further consideration. Id. at 140. Complainant was found qualified, but was not referred for SO's consideration as one of the top four candidates. Id. at 134. One panel member stated that Complainant simply did not present herself as well as the top candidates and failed to provide sufficient detailed responses during her interview. Id. at 140-41. The candidates were judged by how well they demonstrated their skills, abilities, and talents based on the requirements of the position and how knowledgeable they were of human resources rules and practices. Id. at 142. The panel



did not find that Complainant was one of the top candidates based on her interview. As a result, Complainant was not recommended for a second interview with SO.

Construing the evidence in the light most favorable to Complainant, the Commission finds no evidence that Complainant's disability or prior protected activity was a factor in any of the Agency's actions. At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted on the basis of discriminatory or retaliatory animus. Complainant failed to carry this burden. As a result, the Commission finds no basis to disturb the AJ's summary judgment decision finding that Complainant was not subjected to discrimination or reprisal when she was not selected for the Supervisory Management and Program Analyst position as alleged.

*The AJ's Decision After a Hearing (Claim (2) - Denial of Reasonable Accommodation)*

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. Nat'l Labor Relations Bd., 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.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-16 (Nov. 9, 1999).

Denial of Reasonable Accommodation

The Rehabilitation Act of 1973 prohibits discrimination against qualified disabled individuals. See 29 C.F.R. § 1630. In order to establish that the Agency denied Complainant a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a qualified individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (Oct. 17, 2002) (“Enforcement Guidance”). Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. See 29 C.F.R. §§ 1630.2(o) and (p).

The Commission finds that substantial record evidence supports the AJ's determination that Complainant was substantially limited in her ability to concentrate as a result of her ADHD condition. In addition, Complainant's other conditions (bipolar disorder and obsessive compulsive disorder) were known by the Agency and affected her ability to concentrate. Further, substantial record evidence shows that Complainant suffered from the side effects of multiple medications which negatively affected her ability to concentrate. Accordingly, the Commission finds that substantial record evidence supports the AJ's finding that Complainant is a qualified individual with a disability as defined by the Rehabilitation Act.

In December 2007, Complainant requested to work from home, a private office, and a modified work schedule as reasonable accommodation. The Agency provided temporary accommodations including attempting to move Complainant to another cubicle, delayed arrival time (which S2 discontinued in September 2008), and occasional "as needed flexiplace." Subsequently, in October 2008, the Agency denied Complainant's reasonable accommodation request of regular telework, a private office or cubicle, and a modified work schedule after determining that it was unsupported. The AJ noted that Complainant testified that she was allowed to continue her modified work schedule in November 2008. The Agency, however, failed to present sufficient evidence that granting Complainant's request to regularly work from home and/or allowing Complainant to work from one of the empty offices Complainant testified were available would have been an undue hardship. Accordingly, the Commission finds that substantial record evidence supports the AJ's finding that the Agency failed to accommodate Complainant in violation of the Rehabilitation Act.

In addition, the Commission finds that the AJ's finding that Complainant failed to show that she was subjected to reprisal is supported by substantial evidence. The record supports the Agency's legitimate, non-retaliatory reason for denying Complainant's accommodation request in that they relied upon the opinion of its medical advisor who deemed Complainant's documentation insufficient. Complainant failed to show that this reason was mere pretext for unlawful retaliation. Accordingly, the Commission finds that substantial record evidence supports the AJ's finding that Complainant was not subjected to reprisal as alleged.<sup>3</sup> The Commission will now turn to the AJ's order of relief.

## REMEDIES

### *Non-pecuniary Compensatory Damages*

When discrimination is found, the Agency must provide 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

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<sup>3</sup> Additionally, the AJ noted in her damages decision that there was insufficient evidence that the Agency's actions resulted in Complainant's retirement in December 2011.

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 the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

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 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 punish the Agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or “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).

Based upon the evidence provided by Complainant, the AJ found that \$40,000.00 was the appropriate award for Complainant’s non-pecuniary compensatory damages. The Agency has argued that it operated in good faith; therefore, the AJ’s compensatory damages award should be set aside. The Commission is unpersuaded by the Agency’s appellate arguments and finds the AJ’s award to be insufficient. The Commission notes that record evidence confirmed that Complainant experienced an exacerbation of certain pre-existing conditions (e.g. depression and high blood pressure) for which she sought treatment caused by the stress created by the Agency's discriminatory actions. The Commission finds that an award of \$60,000.00 is reasonable under the circumstances. See 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 takes into account 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)).

Additionally, the Agency generally challenges the AJ's award of pecuniary damages (\$2,523). The Commission finds no reason to alter the pecuniary award.

#### *Attorney's Fees*

The Commission's regulations authorize the award of reasonable attorney's fees and costs to a prevailing complainant. 29 C.F.R. § 1614.501(e); see also EEOC's Management Directive 110 (MD-110) (Nov. 9, 1999) Chapter 11. Fee awards are typically calculated by multiplying the number of hours reasonably expended times a reasonable hourly rate, an amount also known as a lodestar. See 29 C.F.R. § 1614.501(e)(2)(ii)(B); Hensley v. Eckerhart, 461 U.S. 424 (1983).

The degree of success is an important factor in calculating an award of attorney's fees. Farrar v. Hobby, 506 U.S. 103 (1992). In determining the degree of success, the Commission will consider all relief obtained in light of a complainant's goals, and, if a complainant achieved only limited success, he should recover fees that are reasonable in relation to the results obtained. Hensley, 461 U.S. at 43.

The AJ awarded Complainant 60 percent of the 61.7 hours incurred until December 12, 2012, and 100 percent of the 148.6 hours expended through August 22, 2014, for a total of \$66,823 in attorney's fees and \$272.83 in costs. The Agency generally challenges the amount awarded arguing that the Commission should not award attorney's fees or costs if it overturns the compensatory damages award. Complainant requests that the Commission uphold the AJ's award of attorney's fees and costs. The Commission finds no basis to disturb the AJ's award of attorney's fees and costs.

#### *Equitable and Other Relief*

In her cross appeal, Complainant contends that the AJ erred in denying her request for additional relief including leave restoration, reimbursement for ADHD helpers, reinstatement, and back pay. Complainant claimed that she proved a causal nexus between the Agency's denial of her accommodation request and the leave used and leave without pay she was charged from October 7, 2008 through December 2, 2011. The AJ noted that record evidence showed that Complainant suffered from numerous other medical issues and conditions during this time period which likely caused many of the absences. Further, Complainant attributed her need for leave to the Agency's alleged retaliation since 1999. As such, the Commission finds that

substantial record evidence supports the AJ's finding that Complainant presented insufficient evidence to support awarding her restoration of leave. Likewise, substantial record evidence supports the AJ's finding that Complainant was not entitled to relief related to her use of ADHD helpers as testimony revealed that she had previously utilized these assistants and others prior to 2008. Finally, the Commission notes that the AJ found that there was insufficient evidence that the Agency's actions resulted in Complainant's retirement. The Commission finds that Complainant is not entitled to any additional relief.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, the Commission REVERSES the final order and directs the Agency to comply with the Order below.

### ORDER

Within 120 days of the date this decision becomes final, the Agency shall take the following actions:

1. The Agency shall pay Complainant \$60,000.00 in non-pecuniary compensatory damages.
2. The Agency shall pay Complainant \$2,523.00 in pecuniary compensatory damages
3. The Agency shall pay Complainant \$66,823.00 in attorney's fees and \$272.83 in costs.
4. The Agency shall provide eight hours of training to the responsible management officials regarding their obligations in provided reasonable accommodation under the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. 791 et seq.
5. The Agency shall consider taking appropriate disciplinary action against the responsible management officials. 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 responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
6. The Agency shall immediately post a notice in accordance with the paragraph below.

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.

POSTING ORDER (G0914)

The Agency is ordered to post at the Office for Civil Rights in Washington, D.C. 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 becomes final, 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 at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H0610)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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 (M0815)

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 or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. 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, P.O. Box 77960, Washington, DC 20013. 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 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).

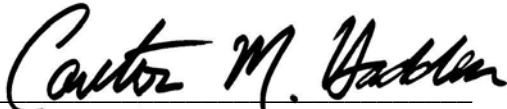
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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:

A handwritten signature in black 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

April 22, 2016  
Date