



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

[REDACTED]
Jade R.,¹
Complainant,

v.

Ryan K. Zinke,
Secretary,
Department of the Interior
(Office of Surface Mining Reclamation & Enforcement),
Agency.

Appeal No. 0720170032

Hearing No. 570-2015-00119X

Agency Nos. DOI-OSMRE-13-0449; DOI-OSM-14-0513;
DOI-OSM-15-0591

DECISION

Following its July 20, 2017, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. §1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission REVERSES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Surface Mining Reclamations Specialist, GS-12, at the Agency's facility in London, Kentucky. On January 14, 2015, Complainant filed one of several EEO complaints which were consolidated, alleging that the Agency discriminated against her on the bases of race (White), sex (female), disability (bipolar disorder), and in reprisal for prior protected EEO activity when:

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.

1. on August 2, 2013, management denied her the opportunity to be a member of the remote sensing development team;
2. on May 7, 2014, management demanded that Complainant continue working in violation of the family and medical leave act (FMLA);
3. on May 7, 2014, management placed her in AWOL status;
4. in September 2014, management denied her the opportunity to participate in the Agency leave share program; and
5. on March 4, 2015, Complainant became aware of a similarly situated employee who was allowed to stay in his position after his spouse was promoted to a supervisory position, when, in contrast, she was forced to move from her position after her husband was offered a supervisory position in her office.

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 requested a hearing and the AJ held a hearing on April 19-20, 2017, and issued a decision on June 13, 2017. In her decision, the AJ found no discrimination with respect to claims (1) - (4). The AJ also found that, with respect to claim (5), Complainant failed to establish a prima facie case of race, sex, or reprisal discrimination. The AJ also found, however, that Complainant established that she is a qualified individual with a disability, and that the Agency failed to provide her with a reasonable accommodation.

By way of relief, the AJ ordered the Agency to: (1) provide management officials with a minimum of four hours training on their rights and responsibilities under the Rehabilitation Act, with a focus on reasonable accommodation; (2) pay Complainant \$90,000.00 in nonpecuniary, compensatory damages; and (3) pay Complainant proven pecuniary compensatory damages. The Agency subsequently issued a final order affirming the AJ's finding of no discrimination with respect to claims (1) - (4), and rejecting the AJ's finding that Complainant proved that the Agency denied her a reasonable accommodation in violation of the Rehabilitation Act. On appeal, the Agency contends that the AJ erred in finding discrimination. Specifically, the Agency argues that Complainant was not a qualified individual with a disability, and that she did not request a reasonable accommodation. The Agency requests that we reverse the AJ's finding and affirm its final order.

ANALYSIS AND FINDINGS

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.

Initially, we note that Complainant has not challenged the findings of no discrimination or the remedies awarded by the AJ. We find no reason to alter the findings of no discrimination. We note that although the AJ allowed Complainant 14 days to submit evidence of pecuniary damages there is no indication that such a request or submission was made by Complainant. Furthermore, in her brief on appeal, Complainant makes no mention of pecuniary damages. Therefore, we shall not order an award of pecuniary damages.

As to claim (5), we concur with the AJ's finding that the Agency failed to provide Complainant with a reasonable accommodation. In so finding, we note that the Federal Government is directed to "be a model employer of individuals with disabilities." 29 C.F.R. § 1614.203. Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical limitations of an employee individual with a disability, unless the agency can show that the accommodation would cause an undue hardship. 29 C.F.R. § 1630.9. Reasonable accommodation includes modifications to the manner in which a position is customarily performed in order to enable a qualified individual with a disability to perform the essential functions of the position. To establish the Agency denied Complainant a reasonable accommodation, Complainant must show that: (1) she was an individual with a disability; (2) she was a qualified individual with a disability; and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002). Complainants with disabilities are not entitled to the accommodation of their choice, only to an effective one. See U.S. Airways, Inc. v. Barnett, 533 U.S. 391, 400 (2002).

Here, the record shows that Complainant was employed by the Agency beginning in November 1987, and at the time of the events at issue, she was assigned to the position of Surface Mining Reclamations Specialist working as a Title V inspector. The record further shows that in August, 2012, after Complainant's husband was promoted to a supervisory position, management reassigned Complainant from Title V inspector to Title IV inspector, for the stated reason that Complainant could not be supervised by her spouse. Following this reassignment (which, the AJ found, Complainant objected to), Complainant's performance began to decline until she ceased being able to function in the position. The record shows that Complainant made repeated requests to management for assistance with the new position, but that the Agency failed to engage in the interactive process to determine whether there was a reasonable accommodation available that would have allowed her to effectively perform the essential functions of the new position.

The AJ noted that the Agency stipulated that Complainant had a disability covered under the Rehabilitation Act. The AJ also found that the Agency was aware of Complainant's bipolar disorder and that Complainant had performed well in her position for over 25 years before she was transferred. We concur with the AJ's finding that Complainant was a qualified individual with a disability. In so finding, we note that the discussion of "qualified" does not end at Complainant's position of record. The term "qualified individual with a disability," with respect to employment, is defined as an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the position held or desired. 29 C.F.R.

§1630.2(m). The term “position” is not limited to the position held by the employee, but also includes positions that the employee could have held as a result of reassignment. Therefore, in determining whether an employee is “qualified,” an agency must look beyond the position which the employee presently encumbers. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (Enforcement Guidance - Reasonable Accommodation), No. 915.002 (revised October 17, 2002); see Interpretive Guidance on Title I of the Americans With Disabilities Act, Appendix, to 29 C.F.R. Part 1630.2(o).

In the instant case, it is clear that Complainant is a qualified individual with a disability as she had been performing effectively in her prior position for more than twenty-five years. Additionally, we concur with the AJ’s finding that the Agency was aware of Complainant’s disability, and that by transferring her into a new position, the Agency created the circumstances under which Complainant’s performance began to deteriorate. Further, when it became evident that she was no longer able to perform the essential functions of the new position without a reasonable accommodation, despite Complainant’s requests for assistance, the Agency failed to engage in the interactive process. Accordingly, we conclude that the AJ’s finding that the Agency violated the Rehabilitation Act by failing to provide Complainant with a reasonable accommodation is supported by substantial evidence.

Finally, we address the AJ’s award of compensatory damages. Nonpecuniary damages are available to compensate the injured party for actual harm, even where the harm is intangible. Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984). Emotional harm will not be presumed simply because a complainant is a victim of discrimination. The existence, nature, and severity of emotional harm must be proved. The method for computing nonpecuniary damages should typically be based on a consideration of the severity and duration of harm. Complainant v. Department of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995). We note that for a proper award of nonpecuniary damages, the amount of the award should not be ‘monstrously excessive’ standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Complainant v. Department of the Interior, EEOC Appeal No. 01961483 (March 4, 1999) (citation omitted).

Here, the AJ awarded Complainant \$90,000.00 in nonpecuniary, compensatory damages, finding that the discrimination suffered by Complainant resulted in an aggravation of her preexisting mental disability to such a degree that she needed to increase her medication, and that her condition deteriorated to the point where she was unable to function at work and had to leave her position. We find that given the hearing testimony and other evidence, the AJ’s award of \$90,000.00 is supported by the evidence of record and is consistent with the amount awarded in similar cases. See Nia G. v. Department of Homeland Security, EEOC Appeal No. 0120160716 (February 6, 2018) (Commission awarded \$110,000 in nonpecuniary, compensatory damages where the Agency’s termination resulted in loss of identity, self-esteem, and great emotional pain); Billy B. v. Department of Veterans Affairs, EEOC Appeal No. 0120132680 (November 19, 2015) (Commission awarded \$85,000 in nonpecuniary, compensatory damages where Agency denied reasonable accommodation to and discharged Complainant, which exacerbated

his preexisting condition and caused emotional distress), request for reconsideration denied, EEOC Request No. 0520160135 (May 12, 2016).

We shall order the Agency to comply with the AJ's order as slightly modified herein.

CONCLUSION

The Agency's final order finding no discrimination regarding claim (5) is REVERSED. The complaint is REMANDED to the Agency for compliance with the Order herein.

ORDER

To the extent it has not already done so, the Agency shall take the following remedial actions:

- (1) Within 60 days from the date this decision is issued, the Agency shall pay Complainant \$90,000.00 in nonpecuniary, compensatory damages.
- (2) Within 90 days from the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive training to all responsible management officials found to have discriminated against Complainant regarding their responsibilities under the Rehabilitation Act, with a special emphasis on reasonable accommodation.
- (3) Within 60 days from the date this decision is issued, the Agency shall consider taking disciplinary action against all responsible management officials found to have discriminated against Complainant. The Agency shall report its decision to the Commission. If the Agency decides to take disciplinary action, then it shall identify the action taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline.

The Agency shall 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).

POSTING ORDER (G0617)

The Agency is ordered to post at its London, Kentucky facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled “Implementation of the Commission’s Decision,” within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION’S DECISION (K0617)

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 in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (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.**