



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

[REDACTED]
Ronnie R.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services
(Indian Health Service),
Agency.

Appeal No. 2019001754

Agency No. HHS-IHS-0272-2015

DECISION

On November 9, 2018, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from an Agency decision, dated October 11, 2018, concerning an award of compensatory damages regarding an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

BACKGROUND

During the relevant time, Complainant worked as an Accountant Lead at the Agency's Indian Health Service, Portland Area Office, Division of Financial Management in Portland, Oregon.

Complainant suffers from a knee impairment that also causes back pain. Following an incident of severe pain, where he was unable to move for eight hours and missed several days of work, Complainant requested an ergonomic chair which would provide some pain relief. Specifically, on December 1, 2014, Complainant requested a reasonable accommodation and provided the relevant documentation and forms on December 12, 2014. The Agency approved the request soon after, on December 17, 2014.

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.

The documentation was forwarded to the Agency's acquisitions department, but no action was taken until a meeting could be held with the Agency's EEO manager. The meeting did not occur until months later, in March 2015. The chair was finally provided to Complainant on March 25, 2015.

Believing that he was denied a reasonable accommodation when the Agency took approximately four months to provide him with an ergonomic chair, Complainant filed a formal complaint based on disability. Following an investigation, the Agency issued a decision finding no discrimination on January 5, 2016. Complainant appealed the decision to the Commission.

On appeal, the Commission found that the Agency's undue delay in providing an ergonomic chair constituted a denial of reasonable accommodation. Specifically, the Commission found that the delay was due "solely to the actions of Agency employees," that the chair request was placed on hold in order to "discern the Agency's own reasonable accommodation procedures, which the Agency should already have in place and employees should be informed about." The Commission found the more than three-month delay was excessive. The matter was remanded to the Agency for a supplemental investigation and final decision on the issue of compensatory damages. See Complainant v. Dep't of Health and Human Svc. (Indian Health Svc.), EEOC Appeal No. 0120161406 (May 31, 2018).

In compliance with the Commission's order, on October 11, 2018, the Agency issued the instant decision. In light of the Agency's determination of a "minimum nature of the harm" and "lack of documentation to support that harm," the Agency awarded Complainant \$500 in non-pecuniary compensatory damages.

Complainant filed the instant appeal.

ANALYSIS AND FINDINGS

When discrimination is found, the respondent Agency must provide the employee with a remedy that constitutes full, make-whole relief to restore the employee as nearly as possible to the position he or she would have occupied absent 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). The Commission is authorized to award compensatory damages as part of the "make whole" relief for intentional discrimination. Pursuant to section 102(a) of 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).²

² Here, Complainant did not request *pecuniary* damages.

Compensatory damages, however, are limited to the amount necessary to compensate an injured party for actual harm caused by the Agency's discriminatory action, even if the harm is intangible. Damiano v. U.S. Postal Serv., EEOC Request No. 05980311 (Feb. 26, 1999). Compensatory damages should consider the extent, nature and severity of the harm and the length of time the injured party endured the harm. *Id.*; Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991 (EEOC Damages Guidance), EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14. The Commission notes that a proper award of non-pecuniary compensatory damages, the amount of the award should not be “monstrously excessive” standing alone, the product of passion or prejudice, and consistent with the amount awarded in similar cases. See Ward-Jenkins v. Dept. of Interior, EEOC Appeal No. 01961433 (Mar. 4, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Or. 1939).

Following the issuance of our prior decision, in a letter dated June 13, 2018, the Agency informed Complainant of his possible entitlement to compensatory damages. The letter described the various types of damages, as well as the explanations and evidence needed to support a successful claim. Thereafter, on July 12, 2018, Complainant submitted a response stating that he “felt very alone, stressed out, lots of anxiety” and “lost sleep”. Further, Complainant continued to suffer from “the pain of my joints” and “the fear of my back going out again.” The delay in providing the accommodation, caused him to “struggl[e] each day with an inadequate chair” and “on-going pain.”

In concluding that Complainant was only entitled to \$500 in non-pecuniary damages, the Agency noted that “Complainant acknowledged that the 98-delay . . . did not *aggravate* the back or knee pain” (emphasis added). Rather, the delay merely “resulted in a lack of pain relief that the ergonomic chair would have provided.” The Agency noted that there was no evidence regarding “what pain relief Complainant realized once he obtained his chair.” According to the Agency, Complainant simply described the lack of an ergonomic chair as “an annoyance because it distracted from his work.” As for his claim of emotional distress, the Agency found Complainant was not “particularly specific” regarding the “nature and severity” of such harm.³

As an initial matter, we find that the Agency’s decision mischaracterizes many of Complainant’s statements. While the absence of an ergonomic chair may not have increased Complainant’s pain or worsened his existing conditions, he was harmed by the pain endured in his standard chair.

³ We note that while the Agency’s October 11, 2018 final decision on compensatory damages states that “[a] supplemental investigation into the damages was conducted between August 16, 2018 and August 31, 2018” and attributes statements made by Complainant to “Supplemental Report of Investigation – SROI”, specifically “Ex. F-1”, we find that no indication in the record provided to us by the Agency that such *additional* report was created. Instead, “Ex. F-1” appears to refer to the affidavit provided by Complainant in the original investigation on the merits of his complaint.

In his affidavit, Complainant plainly explained that during the prolonged delay, he continued to use his standard chair and applied ice packs he kept in the office freezer to help with the back pain. Further, he attested that “. . . since receiving the new chair I have not had to put ice on my back at work or take any powerful pain pills” Moreover, far from simply an “annoyance”, Complainant describes feelings of isolation, stress, anxiety, and sleeplessness as a result of the denied reasonable accommodation.

Additionally, we note that the focus of Complainant’s appeal statements is on his desire to hold management officials “accountable.” He seeks to “let this office know they cannot treat staff in such a way” and contends that “the only way this office will learn from it’s mistakes” is to have them pay a substantial award. In assessing potential awards for non-pecuniary damages the proper focus is upon the harm suffered, not the facts underlying the liability finding. See e.g. Charles E. v. Dep’t of Justice, EEOC Appeal No. 0720180006 July 19, 2018) citing Memphis Cmty. School Dist. v. Stachura, 477 U.S. 2999, 311-12 (1986). In other words, non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the Agency for the discriminatory action. See Ward-Jenkins v. Dep’t of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999). Therefore, although such contentions are understandable, they are misplaced.

In sum, based on a review of the instant record, we find that Complainant is entitled to an award of \$5,000 in non-pecuniary damages. Such amount reflects the lengthy delay and harm endured by Complainant as a result of the Agency’s actions and is consistent with the amount awarded in similar cases. See Pleasant v. Dep’t of Housing and Urban Development, EEOC Appeal No. 01A52841 (May 2, 2006) (\$5,000 award in non-pecuniary compensatory damages for denial of an ergonomic chair); Purl v. United States Postal Service, EEOC Appeal No. 01A23399 (August 15, 2003) (\$5,000 award in non-pecuniary compensatory damages for a two-month delay in providing a reasonable accommodation); Damiano v. United States Postal Service, EEOC Request No. 05980311 (February 28, 1999) (\$5,000 in non-pecuniary damages based on statements from complainant that the agency's failure to provide reasonable accommodation caused him to feel hurt, angry and depressed).

CONCLUSION

The Agency’s October 11, 2018 decision, regarding compensatory damages, is hereby **MODIFIED**. The matter is **REMANDED** to the Agency for further processing in accordance with this decision and the **ORDER** below.

ORDER

Within thirty (30) days from the date this decision is issued, the Agency shall pay Complainant \$5,000 in non-pecuniary compensatory damages, minus any amounts already paid.

The Agency shall submit a report of compliance, including supporting documentation verifying that the corrective action has been taken, as provided in the statement below.

ATTORNEY'S FEES (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/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 (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)

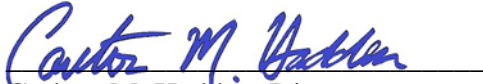
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

May 7, 2019

Date