



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

[REDACTED]
Harold M.,¹
Complainant,

v.

Dr. Heather A. Wilson,
Secretary,
Department of the Air Force,
Agency.

Appeal No. 2019002082

Hearing No. 540-2007-00142X

Agency No. 4V1C07001

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 21, 2018, final decision addressing compensatory damages on 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

BACKGROUND

During the period at issue, Complainant worked as an Electronics Mechanic, GW-11, at the Agency's Aerospace Maintenance and Regeneration Group at Davis-Monthan Air Force Base in Tucson, Arizona.

On November 13, 2006, Complainant filed a formal EEO complaint alleging the Agency had failed to provide him reasonable accommodation for his disability. The Commission found that Complainant was a qualified individual with a disability within the meaning of the Rehabilitation Act and Complainant's long-term knee and ankle impairments limited his ability to stand and walk.

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 Commission concluded that the Agency denied Complainant a reasonable accommodation when it placed him into a security position, from September 5, 2006 through May 22, 2007, which violated his medical restrictions. Among other remedies, the Commission ordered the Agency to conduct a supplemental investigation to determine whether Complainant was entitled to compensatory damages as a result from the Agency's discriminatory action. EEOC Appeal No. 0120081812 (October 14, 2015), req. for recon. denied, EEOC Request No. 0520160085 (March 23, 2016).

On June 20, 2016, the Agency issued a final decision regarding compensatory damages based solely on Complainant's three-page request for compensatory damages submitted to it on May 5, 2016. The Agency determined that Complainant was entitled to \$1,000 in non-pecuniary compensatory damages for the mental anguish he suffered as a result of the discrimination, concluding Complainant failed to submit any objective evidence to support his emotional distress. The Agency further determined that Complainant failed to submit documentation to support his request for pecuniary compensatory damages. Complainant appealed.

On appeal, the Commission vacated the Agency's June 2016 final decision on compensatory damages and remanded the matter to the Agency for further processing. The Commission determined that the Agency failed to provide "Complainant with any guidance on the legal standards for compensatory damages or the types of evidence that he could submit." The Commission ordered that the Agency conduct a supplemental investigation into Complainant's entitlement to compensatory damages. EEOC Appeal No. 0120162540 (February 22, 2018), req. for recon. denied, EEOC Request No. 0520180335 (August 24, 2018).

On November 21, 2018, following its supplemental investigation, the Agency issued its second final decision on compensatory damages, which is the subject of the instant appeal. The Agency again awarded Complainant \$1,000 in non-pecuniary compensatory damages. In reaching this amount, the Agency reasoned that Complainant was "likely to have suffered some emotional harm during the 9-month period that he was denied a reasonable accommodation" even though Complainant had not "establish[ed] a causal relationship between the alleged harm and the discrimination."

The Agency denied Complainant's request for pecuniary damages of \$218,186.60 for past lost wages related to retirement contributions. The Agency determined that Complainant submitted documentation to provide \$1,313.48 in pecuniary losses and the Agency awarded Complainant this amount.

The instant appeal followed. On appeal, Complainant argues that the Agency did not grant his request for an extension to submit additional documentation in support of his damage award requests. Complainant explained that he required an extension because his wife had a stroke and was in an intensive care unit. Complainant further argues that the Agency failed to acknowledge during the supplemental investigation that he required additional surgery on his knee.

ANALYSIS AND FINDINGS

Past Pecuniary Damages

Pecuniary damages are quantifiable out-of-pocket expenses incurred as a result of the Agency's discriminatory actions. Damages for past pecuniary damages will not normally be granted without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals of actual loss and expenses.

We acknowledge Complainant's supplemental statement indicating that he "lost substantial income as well as Agency Contributions to [his] Thrift Savings Plan contributions for retirement" from 2008 through 2015 following his retirement from the Agency in 2007. Specifically, Complainant states that he has losses totaling \$218,186. However, lost wages are statutorily excluded from compensatory damage awards. See 42 U.S.C. U.S.C. § 1981a(b)(2), 1991. Thus, we find the Agency properly denied Complainant's request for lost wages.

We further acknowledge Complainant's request for coverage of litigation expenses he incurred while appealing his complaint. The record indicates that Complainant submitted receipts for depositions (\$889.60), postage (\$47.28), and transcription services (\$376.60) which were services necessary for processing his appeal. However, there is no documentation in the record to support expenses Complainant incurred for travel or printing as he asserts in his supplemental statement. Therefore, we find that the Agency's award of \$1,313.48 in past pecuniary damages was proper.

Non-Pecuniary Damages

Non-pecuniary compensatory damages 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: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). Non-pecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency's discriminatory actions. See Carter v. Duncan-Higgans, Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance at 13. Additionally, 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 Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)).

The Agency awarded Complainant \$1,000 in nonpecuniary damages. In support of his claim for compensatory damages, Complainant states that he experienced "emotional distress" and "mental anguish." Complainant further states his mental anguish "has [led] to headaches, sleeplessness, and minor bouts of depression." Complainant explains that his marriage has also "suffered immeasurably."

Complainant further explains that when he did not receive a reasonable accommodation for the nine months between September 5, 2006 and May 22, 2007, he “was in severe emotional distress due to [his] realization that [he] had no choice but to apply for retirement.” Complainant states that “there was a long stream of excuses and denials leading up to [his] request for disability retirement” and he “had come to the conclusion that the Agency had no interest in accommodating [his] disability.” He applied for a medically retirement from the Agency in February 2017, which became effective in July 2007.

Beyond his personal statement, Complainant provided no other objective evidence of his emotional distress.² However, 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 Service, EEOC Appeal No. 01952288 (April 18, 1996) (citing Carle v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993)). The statement from Complainant identifies the type of harm he suffered and adequately ties that harm directly to the Agency’s actions. Based on Complainant’s representations of harm, we find that the weight of our prior decisions supports an award of \$10,000 in non-pecuniary compensatory damages. See Ralph B. v. Department of Homeland Security, EEOC Appeal No. 0120161451 (April 25, 2018) (\$10,000 for a discriminatory non-selection resulting in stress, anxiety, headaches sleeplessness, emotional withdrawal, fear of losing job); Caneva v. Department of Defense, EEOC Appeal No. 01A32890 (July 15, 2004) (\$10,000 in compensatory damages where complainant became depressed after his non-selection but presented no medical evidence); McManaway v. United States Postal Service, EEOC Appeal No. 01993233 (August 23, 2002) (\$10,000 where complainant experienced aggravation, frustration, humiliation, marital strain, and financial stress).

In reaching this amount, we conclude Complainant is not entitled to more than \$10,000 because he concedes that part of the emotional harm he experienced was caused by the Agency’s alleged refusal to provide him with a religious accommodation in addition to the disability accommodation.³

² We note that Complainant asserts he was unable to fully provide the evidence he intended to present to the Agency within the relevant time period because his wife had a stroke and was hospitalized.

³ The record indicates that Complainant filed a formal EEO complaint on September 6, 2007 for the Agency’s alleged failure to provide him a religious accommodation. The Agency determined that there was no denial of religious accommodation and no constructive discharge. On appeal, the Commission affirmed the Agency’s decision. See Complainant v. Dep’t. of the Air Force, EEOC Appeal No. 0120101589 (July 27, 2010) (finding that the “two-week period the Agency devoted to investigating Complainant’s request [did] not equate to a denial of a religious accommodation”). The Commission further found that “before the Agency conducted its research regarding Complainant’s [accommodation] request, Complainant requested immediate out-processing” on July 11, 2007 after he learned that his disability retirement had been approved.

We concur with the Agency that this award should *only* encompass the harm Complainant sustained by the discriminatory act at issue (denial of a reasonable accommodation).

We also address Complainant's argument that the Agency failed to acknowledge in the supplemental investigation that he had an additional knee surgery. We note that aside from Complainant's statement and an MRI report of a knee injury, Complainant has not provided any documentation in the record to support that he had an additional surgery, or that the additional surgery was a direct result of the discriminatory act (denial of reasonable accommodation) at issue.

CONCLUSION

The Agency's November 21, 2018 final decision concerning compensatory damages is hereby MODIFIED. The matter is REMANDED to the Agency for compliance with the following ORDER.

ORDER

To the extent it has not already done so, the Agency is ORDERED, within sixty (60) calendar days from the date this decision is issued, to pay Complainant \$10,000 in nonpecuniary compensatory damages and \$1,313.48 in pecuniary damages.

The Agency is further directed to submit a report of compliance, as provided, in the statement entitled "Implementation of the Commission's Decision."

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he 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 the date this decision was issued. 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 (K0618)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored.

Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

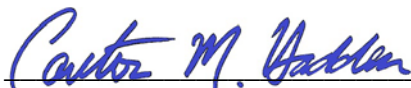
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

April 30, 2019
Date