



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507**

[REDACTED]
Belia B.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Appeal No. 2022003701

Hearing Nos. 480-2020-00195X, 480-2020-00672X, 480-2020-00673X

Agency Nos. 18-32253-00947, 20-32253-00450, 20-32253-01057

DECISION

Following its June 23, 2022 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's) entry of default judgment and finding of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ.

BACKGROUND

At the time of events giving rise to these complaints, Complainant worked as a Supervisory Management Analyst, GS-13, at the Agency's Pearl Harbor Naval Shipyard in Joint Base Pearl Harbor, Hawaii.

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.

Complainant filed three EEO complaints alleging that the Agency discriminated against her on the bases of sex (female), disability (anxiety, depression, and post-traumatic stress disorder), and reprisal for prior protected EEO activity when, among other things:

- her first-line supervisor (Supervisor 1) did not select her for a Supervisory Management Analyst, GS-14, position;
- Supervisor 1 subjected her to harassment;
- she was denied a reasonable accommodation for her disabilities;
- Supervisor 1 listed her as Absent Without Leave (AWOL);
- Supervisor 1 had members outside of her chain of command issue her a suspension;
- her new first-line supervisor (Supervisor 2) failed to respond to her requests for Family and Medical Leave Act (FMLA) leave; and
- on November 18, 2019, she was issued a Final Decision of Removal.²

At the conclusion of the investigations, the Agency provided Complainant with copies of the reports of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing on all three of her EEO complaints, which were consolidated by the AJ.

The Agency filed a motion to dismiss Complainant's removal claim before the AJ for lack of jurisdiction because the removal claim was within the jurisdiction of the Merit Systems Protection Board (MSPB). The AJ denied the Agency's motion to dismiss, finding that the removal claim was firmly enmeshed in the EEO process and that it would create unnecessary procedural complications to remand it to the MSPB. Complainant filed a motion to disqualify two of Agency's counsel because they had been previously involved in Complainant's claims – specifically, her denial of reasonable accommodation claims – which the AJ granted.

At a status conference, the AJ ordered the Shipyard Commander to appear at the settlement conference and informed the parties that no requests for reconsideration of the order would be permitted. The Agency nonetheless

² The Agency accepted Complainant's removal claim as a mixed-case complaint and bifurcated it from Complainant's other claims alleging a failure to accommodate her disability, but investigated all claims together. Upon completion of the investigation, the Agency transmitted the record to Complainant with appeal rights to the Merits Systems Protection Board (MSPB) for the removal claim, not the EEOC.

filed a request for reconsideration of the Order and notified Complainant that one of Agency's counsel, identified as an Executive Director, would appear at the settlement conference rather than the Shipyard Commander. The AJ noted that the Executive Director whom the Agency proposed to attend the settlement conference was identified as a responsible management official for Complainant's denial of reasonable accommodation claim, and therefore was not appropriate to act as the settlement official. See Sanctions Order at 5 n.2. The AJ also expressed her belief that the Shipyard Commander was likely to be the only person who could approve the equitable and monetary relief to which Complainant would be entitled if she were successful and therefore was arguably necessary to attend the settlement conference.

The Agency objected to the AJ's specifically designating the Shipyard Commander as the official to attend the settlement conference, arguing first that the Shipyard Commander could not be available for the full eight-hours of a conference. Thereafter, when the AJ suggested a two-hour block of time would be sufficient, the Agency again objected, arguing that the Shipyard Commander would not be available for two hours, and finally asserting that the Shipyard Commander was not available at all.

The AJ ordered that if the Shipyard Commander was, in fact, unavailable to participate in any settlement conference, the Shipyard Commander was required to submit an affidavit affirming his unavailability. When the Agency did not submit the affidavit from the Shipyard Commander, the AJ offered an alternative means, permitting the Shipyard Commander to verify his unavailability by appearing at a teleconference. When the Shipyard Commander did not appear, the AJ again ordered the Agency to have the Shipyard Commander submit an affidavit of his unavailability. The Agency did not comply.

A settlement conference was held at which the Agency was represented by the Executive Director, who had been identified by the Agency as possessing the necessary settlement authority. However, during the settlement conference, the Executive Director repeatedly stated that he could not agree to any of Complainant's terms without the approval of the Shipyard Commander. The settlement conference ended with no resolution, due at least in part to the Executive Director's stating that the Shipyard Commander objected to Complainant's terms.

Because of the Agency's repeated failure to comply with the AJ's orders by failing to have the Shipyard Commander submit an affidavit confirming his

unavailability, the AJ issued an Order to Show Cause for the Agency to explain its refusal to follow the AJ's Orders.³ The Agency responded to the Order.

On August 3, 2021, the AJ issued an order imposing sanctions in the form of a default judgment against the Agency for the Agency's repeated failure to follow the AJ's orders by either having the Shipyard Commander appear at the settlement conference or to submit an affidavit from the Shipyard Commander attesting to his unavailability for settlement discussions. The AJ expressed concern that the Agency had not actually sent someone with the requisite settlement authority to the settlement conference, as the Executive Director had more than once indicated that any terms Complainant sought would need to be approved by the Shipyard Commander. In addition, the AJ specifically noted that the Agency had repeatedly insisted that it did not need to follow the AJ's orders because it disagreed with them, which would essentially eviscerate the Commission's ability to enforce EEO laws. The AJ found that a lesser sanction would not be sufficient to either deter future non-compliance or remedy Complainant for the months-long delay in the process. The AJ therefore issued a default judgment against the Agency.

The AJ thereafter held a hearing on the subject of the relief to which Complainant was entitled. The AJ found that Complainant had established a prima facie case of reprisal and discrimination based on sex with respect to her non-selection claim and the issuance of a letter of reprimand, as well as harassment based on sex and reprisal. The AJ further found that Complainant had established a prima facie case of disability discrimination and a denial of reasonable accommodation when she was denied a reasonable accommodation for her disabilities, placed on AWOL, denied sick leave and FMLA leave, and ultimately removed from her employment. The AJ found that Complainant was entitled to relief in the form of reinstatement, back pay, the removal of any negative information in Complainant's official personnel file, and restoration of leave, as well as awarding Complainant \$154,185.30 in compensatory damages, consisting of \$4,185.30 for pecuniary damages for out-of-pocket medical expenses and costs and \$150,000 in non-pecuniary damages. The AJ also awarded \$170,668.82 in attorney's fees.⁴ The Agency

³ Complainant also filed a Motion for Sanctions for Entry of Default Judgment. However, the AJ specifically noted that she was not ruling on Complainant's motion. See Sanctions Order at 6 n.3.

⁴ The AJ found the number of hours requested to be excessive and duplicative, reflecting excessive time spent by multiple attorneys reviewing, revising, and drafting the same motions. The AJ therefore reduced the hours billed.

subsequently issued a final order rejecting the AJ's orders on sanctions and on remedies.

The Agency appealed the AJ's Orders, and seeks to have the Commission affirm its rejection of the AJ's orders.

CONTENTIONS ON APPEAL

On appeal, the Agency contends first that the AJ erred in issuing default judgment against the Agency, arguing that a default judgment is too severe of a sanction and was not narrowly tailored for the offense. The Agency also assigns error to the AJ for denying its motion to dismiss Complainant's removal claim for lack of jurisdiction and for granting Complainant's motion to disqualify two of Agency's counsel. The Agency further argues that the AJ erred in finding Complainant entitled to relief and in awarding Complainant compensatory damages.

In response, Complainant argues that the AJ acted within their discretion in issuing default judgment against the Agency for the Agency's failure to follow the AJ's orders, and that the AJ correctly found Complainant entitled to relief. Complainant also argues that the AJ's award of compensatory damages was insufficient to fully compensate Complainant for the harm she suffered as a result of the Agency's discriminatory actions. Complainant further argues that the AJ erred in reducing the attorney's fee award for duplicative entries where complainant's attorneys conferred with each other or for co-counsel to attend the damages hearing.

ANALYSIS

Jurisdiction over Removal Claim

As an initial matter, we will first address the Agency's argument that the AJ erred in denying its motion to dismiss Complainant's removal claim as falling within the jurisdiction of the MSPB. A mixed-case complaint is a complaint of employment discrimination filed with a federal agency alleging discrimination on a protected basis from an action that can be appealed to the Merit Systems Protection Board (MSPB). 29 C.F.R. § 1614.302(a)(1). Following the investigation of an accepted mixed-case complaint, an agency is required to provide a complainant with appeal rights to the MSPB, not the EEOC.

In this case, we note that, following the investigation into Complainant's complaint alleging discrimination based on disability and reprisal when the

Agency withdrew her previously approved accommodations, assigned her work in violation of her medical restrictions, placed her on absence without leave status, and ultimately removed her from federal service, the Agency bifurcated Complainant's complaint, assigning two different Agency Complaint numbers, Agency Complaint No. 20-32253-0450 for the non-mixed EEO claims, and Agency Complaint No. 20-32253-01057 for the mixed complaint. When it had completed the investigation into the removal claim, the Agency informed Complainant of her appeal rights to the MSPB in the mixed complaint. Complainant, however, requested a hearing before the Commission on both her complaints, including her removal claim.

Under the unique facts of this case, we reject the Agency's argument and find that the AJ properly denied the Agency's motion to dismiss the removal claim for lack of jurisdiction. It is well-settled that in limited circumstances the Commission may properly assume jurisdiction of a mixed-case issue (i.e., an adverse action which is properly within the jurisdiction of the MSPB) when the claim is so firmly enmeshed in the EEO process that it would unduly delay justice and create unnecessary procedural complications to remand it to the MSPB. See Melissia M. v. Dep't of Homeland Sec'y, EEOC Appeal No. 2021005014 (Oct. 4, 2022); Verla G. v. U.S. Postal Serv., EEOC Appeal No. 2021003498 (Sept. 19, 2022); Willia M. v. Dep't of Vet. Aff., EEOC Appeal No. 0120171396 (Nov. 7, 2018); see also Williams v. Dep't of Justice, EEOC Appeal No. 07A40006 (Apr. 23, 2004). Here, we agree with the AJ that Complainant's removal claim is so firmly enmeshed in the EEO forum that it would better serve the interests of administrative economy to address it in the instant appeal. In reaching this conclusion, we note that Complainant's removal appears to be a direct consequence of her EEO claims regarding the Agency's failure to accommodate her disabilities and respond to her requests for leave, such that dealing with the removal action separately would result in piecemeal litigation of Complainant's claims. We therefore affirm the AJ's denial of the Agency's motion to dismiss the removal claim.

Disqualification of Agency Counsel

We next turn to the Agency's argument that the AJ erred in granting Complainant's motion to disqualify two of the Agency's counsel. Complainant argued in her motion that the two identified counsel had also been involved in the denial of her reasonable accommodation claim and, as such, would be material witnesses at the hearing. The AJ granted Complainant's motion.

EEO Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 1, § IV (revised August 2015) provides, in relevant part:

Heads of agencies must manage the dual obligations of carrying out fair and impartial investigations of complaints that result in final agency determinations as to whether discrimination has occurred and defending the agency against claims of employment discrimination. Only through the vigilant separation of the investigative and defensive functions can this inherent tension be managed.

Ensuring a clear separation between the agency's EEO complaint program and the agency's defensive function is thus the essential underpinning of a fair and impartial investigation, enhancing the credibility of the EEO office and the integrity of the EEO complaints process.

There must be a firewall between the EEO function and the agency's defensive function. The firewall will ensure that actions taken by the agency to protect itself from legal liability will not negatively influence or affect the agency's process for determining whether discrimination has occurred and, if such discrimination did occur, for remedying it at the earliest stage possible.

In this case, the record indicates that one of the Agency's named counsel served on the accommodation panel that determined whether Complainant was entitled to a reasonable accommodation. See Report of Investigation (Agency Complaint Nos. 20-32253-00450 and 20-32253-01057) (ROI 2) at 57. The Reasonable Accommodation Coordinator indicated in her statement that the counsel was the one who determined that Complainant was not entitled to an accommodation. See ROI 2 at 492. In addition, the record indicates that the other of Agency's named counsel may have been involved in the Executive Director's failure to respond to Complainant's request for Leave Without Pay (LWOP), purportedly telling the Executive Director that placing Complainant in LWOP status and a stay of her pending removal action was contingent upon dismissal of Complainant's pending EEO complaints. See ROI 2 at 482-86.

Here, we agree with the AJ that both the Agency's counsels' direct involvement in Complainant's claims in their roles as attorneys in the Agency's Office of General Counsel made it improper for those same counsel to also act as the Agency's representatives in the EEO complaint litigation. As such, we affirm the AJ's granting Complainant's motion to disqualify the Agency's counsel.

Allegations of Bias and/or Ex Parte Communications

We next turn to the Agency's contention that the AJ and the EEOC mediator exhibited bias, citing to entries in Complainant's attorney's fee petition showing notations of conversations between counsel and the mediator and one conversation between the AJ and Complainant's counsel.

An improper *ex parte* communication is an "oral or written communication between decision making personnel of the EEOC and an interested party to the proceeding which does not provide for the participation of the other interested parties." See Clement M. v. Dep't of the Navy, EEOC Appeal No. 0120140861 (Oct. 19, 2016). The AJ is typically prohibited from engaging in *ex parte* communication with either the agency or the complainant if the communication addresses the merits, or "substance," of the complaint. Id. In order for *ex parte* communication to be prohibited, it must relate to the substance of the case. Foster, et al v. Dep't of the Navy, EEOC Request No. 05920483 (Dec. 23, 1992) (*ex parte* communications between AJ and complainants related to a substantive issue were inappropriate); Bowers v. Dep't of Defense, EEOC Appeal No. 0720070012 (Mar. 22, 2010) (*ex parte* communications were procedural and no evidence agency prejudiced by them); Martin v. Small Business Admin., EEOC Appeal No. 0120070096 (Aug. 29, 2008) (no evidence that AJ relied on *ex parte* communication in reaching ultimate finding); Cartwright v. Dep't of the Navy, EEOC Appeal No. 01A51267 (Mar. 21, 2006) (*ex parte* communication about a procedural matter did not compromise AJ's objectivity). Finally, a party alleging bias on the part of an AJ must make a substantial showing of personal bias. See Catheryn P. v. U.S. Postal Serv., EEOC Appeal No. 2021002386 (Feb. 28, 2022).

We first note that the majority of the Agency's allegations of *ex parte* communications concern the EEOC mediator. However, the mediator was not a decision-maker and there is no evidence that the mediator somehow influenced the AJ. With respect to the single communication in the fee petition of a communication between the AJ and Complainant's counsel, we reject the Agency's argument because there is simply no evidence that the conversation was related to the merits of the claim or was in any way improper. Moreover, the Agency offers no additional evidence to support their assertions of bias on the part of the AJ aside from the Agency's disagreement with the AJ's decisions. We emphasize, moreover, that adverse rulings alone are not evidence of bias. See Michal G. v. Dep't of Agric., EEOC Appeal No. 2022004272 (Sept. 26, 2022). Here, contrary to the Agency's speculation,

there is no evidence of improper *ex parte* communication between the AJ and Complainant's counsel, or of any actual bias on the part of the AJ.

Default Judgment

The Commission's regulations confer upon its AJs very broad responsibility for adjudicating an EEO complaint once a complainant's hearing request has been granted. 29 C.F.R. §1614.109(a). This responsibility gives the AJ wide latitude in directing the terms, conduct, or course of EEO Administrative hearings. 29 C.F.R. §1614.109(e); EEO MD-110, Chap. 7, Sec. III(D) (Aug. 5, 2015). See also Douglas F. v. Equal Emp't Opportunity Comm'n, EEOC Appeal No. 0120122183 (Dec. 4, 2015); Andy B. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120131912 (Oct. 28, 2015); Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120122616 (June 23, 2015); Turner v. U.S. Postal Serv., EEOC Request No. 0520110239 (Apr. 12, 2011). Given the scope of the AJ's discretion, a party charging an AJ with abuse of that discretion invariably faces a very high bar. William G. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120162273 (Sept. 26, 2018); Romaine H. v. Dep't of Homeland Sec., EEOC Appeal No. 0120162083 (Dec. 15, 2017); Herb S. v. Dep't of Agric., EEOC Appeal No. 0120141055 (Feb. 28, 2017); Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016); Kenyatta S. v. Dep't of Justice, EEOC Appeal No. 0720150016 (June 3, 2016).

Among the powers of the AJ that are specifically enumerated in the Commission's regulations is the power to impose sanctions upon a party that fails to comply with her orders, including a full or partial judgment in favor of the complying party, i.e., a default judgment. 29 C.F.R. §1614.109(f)(3)(iv); EEO MD-110, *supra*, item 10(d); Candance C. v. Gen. Servs. Admin., EEOC Appeal No. 0720160013 (Aug. 8, 2016); Complainant v. Dep't of the Air Force, EEOC Appeal No. 0720090009 (June 5, 2015); Matheny v. Dep't of Justice, EEOC Request No. 05A30373 (April 21, 2005); Rountree v. Dep't. of the Treasury, EEOC Appeal No. 07A00015 (July 17, 2001).

However, the AJ's discretion to impose sanctions is not without its limits. In general, sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. A sanction may be used to both deter the non-complying party from similar conduct in the future, as well as to equitably remedy the opposing party. If a lesser sanction would serve this purpose, an AJ may be abusing their discretion to impose a harsher sanction. A more severe sanction might be appropriate however if the AJ considers the conduct in question to constitute an attack on the integrity of the EEO process. The Commission's interest lies in deterring the underlying

conduct of the non-complying party and protecting its administrative process from abuse by either party to ensure that agencies, as well as complainants, abide by its regulations. See Royal v. Dep't of Vet. Aff., EEOC Request No. 0520080052 (Sept. 25, 2009). Factors pertinent to "tailoring" a sanction, or determining whether a sanction is, in fact, warranted, include: (1) the extent and nature of the non-compliance, including the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice, if any; (4) the number of times the party has engaged in such conduct; and (5) the effect on the integrity of the EEO process as a whole. See Chere S. v. General Srvcs. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018).

A default judgment against an agency is among the harshest sanctions that can be meted out. For that reason, a default judgment should only be imposed upon agencies that directly defy Commission orders and whose actions adversely impacted the conduct of the hearing. Such a situation occurred in Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018). In that case, the AJ ordered the agency to stop filing frivolous motions to dismiss the complaint on procedural grounds and made it very clear that the agency would be subject to sanctions if it continued to file such motions. Despite the AJ's warning, the agency in Chere S. went ahead and filed another motion to dismiss in direct defiance of the AJ's order for the agency to engage with the complainant in order to resolve the case. The Commission agreed with the AJ that the sanction of default judgment was warranted because the agency had repeatedly delayed the start of the hearing due to its repeated unsuccessful attempts to have the complaint dismissed on procedural grounds knowing that the likelihood of success on those motions was nil. The AJ also pointed out that the agency's conduct had the adverse effect of bottlenecking the administrative process, which in turn impacted on the ability to hear other pending cases. Chere S. thus stands for the proposition that default judgment may be imposed upon an agency that deliberately disobeys an order from the AJ and that disobedience adversely impacts the conduct of the hearing or undermines the integrity of the administrative EEO process. See also Mirta Z. v. Soc. Sec. Admin., EEOC Appeal No. 0720150035 (March 14, 2018) (where the agency defense counsel defied an AJ's order to turn over critical evidentiary documents that defense counsel claimed were privileged).

The Agency contends that the AJ abused her discretion in issuing a default judgment because the Agency's actions were not so severe or contumacious as to warrant the extreme sanction of a default judgment and the sanction was not narrowly tailored to the offense. Specifically, the Agency argues that it did not respond to the AJ's orders concerning the Shipyard Commander's

appearance at the settlement conference because it had a good faith, reasonable belief that the AJ did not have the authority to specify who would represent the Agency at a settlement conference.

As an initial matter, we note that while an agency cannot be forced to settle, the EEO MD-110 states that an AJ may require an agency to have an individual with settlement authority to appear at a settlement conference, although it does not provide for the AJ designating a specific person. In this case, however, the AJ expressed doubts concerning the appropriateness of Executive Director representing the Agency at the settlement conference because the Executive Director was a named responsible management official in the case, having been involved in denying Complainant's request for a reasonable accommodation, and because during the settlement conference, it became apparent that the Executive Director did not actually have settlement authority. The Executive Director more than once stated that an agreement could not be reached unless the Shipyard Commander approved of Complainant's terms. We note that the EEO MD-110 specifically prohibits an agency from sending an official to a settlement conference who was a responsible management official or otherwise directly involved in the case, as well as requiring the Agency to send an official to a settlement conference who actually had full settlement authority. Here, the record indicates that the Agency violated the EEO MD-110 in both respects at the settlement conference.

In this case, the AJ's decision to impose default judgment against the Agency was based on the Agency's actions in disregarding the AJ's orders at least three times, in filing a Request for Reconsideration of the Settlement Order in spite of the AJ's direct instruction that no requests for reconsideration would be permitted, and in repeatedly refusing to follow the AJ's orders to either produce an affidavit from the Shipyard Commander attesting to his unavailability or to have the Shipyard Commander appear at a brief teleconference to assert his unavailability for a settlement conference.

The Agency does not dispute that it repeatedly did not follow the AJ's orders. Rather, the Agency argues that its actions in failing to follow the AJ's orders were justified based on the Agency's reasonable belief that the AJ lacked the authority to issue the orders in question. We reject the Agency's argument. A party may not simply ignore an AJ's orders merely because the party disagrees with the AJ's actions. Furthermore, we emphasize that the Agency's stated reason, that the AJ lacked the authority to specifically designate the Shipyard Commander to attend the settlement conference, does not justify its continued and repeated refusal to comply with the AJ's orders to have the

Shipyard Commander submit an affidavit affirming his unavailability or to appear at a brief videoconference solely to affirm his unavailability.

The Agency does not appear to dispute that an AJ has the authority to compel a party to provide an affidavit or to have an agency employee appear at a conference. The Agency, in fact, provided no reason to justify its refusal to comply with the AJ's orders with respect to the Shipyard Commander's affidavit. We also emphasize that in this case, the AJ was not imposing an overly onerous task on the Agency in requiring the Agency to produce an affidavit from the Shipyard Commander attesting to his unavailability. As the AJ specifically noted, a "two-line affidavit, signed by [the Shipyard Commander]" would have satisfied the Agency's obligations under the AJ's orders. See Sanctions Order at 8. The Agency has not presented any argument to indicate that producing such an affidavit would have imposed an onerous burden on either the Agency or the Shipyard Commander. EEO MD-110, Chapter 7, Section III, Part D (10), under the heading of "Administrative Judge's Authority", specifically states, "the Administrative Judge may impose sanctions where a party fails to appear or be prepared for a conference (for example, for status or *settlement discussions*) or hearing pursuant to an order of the Administrative Judge [emphasis added]." In sum, we conclude that the nature and extent of the Agency's non-compliance in refusing to follow orders that were straightforward and not burdensome, i.e., produce an affidavit, as well as the justification for the non-compliance, i.e., a disagreement with the Agency's orders, militate in favor of issuing a severe sanction against the Agency.

We further find that the other factors relevant to determining whether a sanction is justified, i.e. the prejudicial effect of the non-compliance and the effect on the integrity of the EEO process, also support the AJ's decision. The Agency's repeated failure to comply with the AJ's orders necessitated a delay in scheduling the settlement conference and therefore delayed any possible resolution of the case by approximately six months. We note that any such delay cannot be deemed to be insignificant or unprejudicial to Complainant where Complainant had already been removed from her employment and was therefore without an income during the time that her case was proceeding. Moreover, as the AJ emphasized in her Sanctions Order, we are highly concerned by the Agency's apparent conviction that if they believed an AJ may have issued an Order which exceeded her authority, the Agency was either absolved from complying with any of the AJ's subsequent orders or that a good-faith disagreement with an AJ's orders justified its non-compliance. A party does not have the authority to unilaterally decide that an AJ has exceeded their authority, and even such a good-faith belief does not relieve a

party of its ongoing obligation to obey an AJ's orders. To hold otherwise would be, as the AJ stated, to eviscerate an AJ's authority and severely compromise the Commission's ability to enforce the EEO laws.

Under the circumstances of this case, we find that the AJ did not abuse her discretion in sanctioning the Agency by entering default judgment in Complainant's favor. See 29 C.F.R. § 1614.108(f)(3)(v); Rhinesmith v. Dep't of the Treas., EEOC Appeal No. 07A10103 (Jan. 28, 2003). We agree with the AJ that the Agency's repeated non-compliance with the AJ's orders was an attack on the integrity of the EEO process and as such, warranted a severe sanction. We find that the sanction of a default judgment was appropriately tailored to impress upon the Agency the need to comply with the AJ's Orders and deter any future non-compliance.⁵ See Candace C. v. General Srvc. Admin., EEOC Appeal No. 0720160013 (Aug. 8, 2016).

Complainant's Entitlement to Relief

After deciding to issue a default judgment for a complainant, the Commission must determine if there is evidence that establishes the complainant's right to relief. One way to show a right to relief is to establish the elements of a prima facie case. See Royal v. Dep't of Veterans Affs., EEOC Request No. 0520080052 (Sept. 25, 2009); see also Matheny v. Dep't of Justice, EEOC Request No. 05A30373 (Apr. 21, 2005).

In this case, the AJ found that Complainant had established a prima facie case with respect to her claims of discrimination based on sex and reprisal when Supervisor 1 did not select Complainant for a Supervisory Management Analyst position and when Supervisor 1 issued Complainant letters of reprimand on August 16, 2018 and September 28, 2018. Complainant stated that her prior EEO activity consists of a hostile work environment claim with the Inspector General's office and contacting the EEO counselor for her first EEO complaint on August 16, 2018. See Report of Investigation (Agency

⁵ In doing so, we note that, even prior to issuing the Order to Show Cause, the AJ had more than once warned the Agency that its failure to comply with her orders could result in sanctions. However, the AJ's warnings to the Agency had no effect in deterring the Agency from its actions. We are therefore satisfied that the specific circumstances of this case do not indicate that alternative lesser sanctions such as an adverse inference or exclusion of evidence would have been possible or appropriate in order to adequately punish the Agency for its conduct and deter any future non-compliance with an AJ's orders.

Complaint No: 18-32253-00947; EEOC Hearing No. 480-2020-00195X) (ROI 1) at 1020-21. The AJ found that Complainant had established a prima facie case of disparate treatment based on sex and reprisal because the evidence indicated that Complainant was the only person who was named on the "Certificate of Eligibles" and Supervisor 1, as the selecting official, did not make a selection. See ROI 1 at 1022, 1080-83. Supervisor 1 stated that she was not aware that Complainant was on the Certificate of Eligibles and that she wanted a greater number of candidates. See ROI 1 at 1083. The AJ noted, however, that rather than re-posting the vacancy to widen the pool of candidates, Supervisor 1 later tried to fill the position by direct hire of a male contractor with less experience than Complainant and then later designated a temporary promotion of Supervisor 2 to the position which then became permanent. See Order Entering Judgment and Relief at 7; ROI 1 at 1019. 1021-22; 1083.

In addition, the AJ found that Complainant had established a prima facie case of disparate treatment based on sex and reprisal for two letters of reprimand Supervisor 1 had issued, the first on August 16, 2018 for "Inappropriate Conduct" for "talking unsupportively and negatively" about Supervisor 1 and making "derogatory comments" that were "damaging to [Supervisor 1's] efforts as the new Director." See ROI 1 at 33. Complainant stated that she was only fulfilling her duties to "stand watch" over the Learning Organization program by expressing her concerns about Supervisor 1's plans to reorganize the Command Performance Improvement Office and that Supervisor 1 refused to listen, so Complainant spoke to a few of her mentors. See ROI 1 at 1024-27. Supervisor 1 rescinded the August 16, 2018 letter of reprimand but then issued another letter of reprimand on September 28, 2018 for "making inaccurate and misleading statements about [Supervisor 1]" which undermined Supervisor 1's authority. See ROI 1 at 36-38. Complainant stated that a male co-worker of hers who had also expressed concerns about Supervisor 1's plans and management style was not reprimanded. See ROI 1 at 51; 1027-29. The co-worker agreed that Supervisor 1 was more friendly to him and sought his input on elements of his program. See ROI 1 at 1212.

The AJ also found that Complainant had established a prima facie case of being subjected to a hostile work environment based on sex and reprisal due to a number of incidents, including Supervisor 1 excluding her from meetings, making comments about Complainant's dress and perceived manner towards male employees, removing Complainant as chairperson of the Learning Organization Steering Group, cancelling a vacancy announcement Complainant was trying to fill, initiating an investigation into Complainant for behavior reported in 2015, and scolding Complainant for not being able to

attend a meeting with Supervisor 1 even though Complainant's absence was due to having a meeting with the EEO office scheduled for the same time. See ROI 1 at 1028-49. We find that the evidence in the record supports the AJ's finding that Complainant had established a prima facie case with respect to her claims in her first complaint alleging disparate treatment and a hostile work environment based on sex and reprisal.

The AJ further found that Complainant had established a prima facie case that the Agency denied her a reasonable accommodation. Complainant stated that she was diagnosed with anxiety and PTSD in 2006 but that her anxiety was well-controlled with medication, and she was able to perform the essential functions of her position until Supervisor 1 began subjecting her to a hostile work environment, which served as a "trigger" for her condition. See ROI 1 at 1051-52. The evidence indicates that she informed management of her conditions as early as October 2018 by providing medical documentation to support her sick leave requests. See ROI 2 at 1051. The record reflects that Complainant requested reasonable accommodations which included telework, breaks to employ relaxation techniques, an intermediary for communications with Supervisor 1, and/or reassignment to a different supervisor or a different department. See ROI 2 at 208-209.

The Agency denied the request to telework, stating that Complainant's position as a supervisor required face-to-face interactions with her subordinates, but offered her temporary alternative accommodations including an intermediary between Complainant and Supervisor 1 for two months, and an alternate worksite in a different building in the Shipyard. See ROI 1 at 627-28; ROI 1 Supplemental at 229-31. The evidence shows that Complainant returned to work under these alternate accommodations but then Complainant's offered accommodation of an alternate worksite was abruptly revoked when Complainant received an email instructing her to empty out her alternate worksite office. See ROI 1 Supplemental at 420. The record further shows that Complainant reached out to her new first-line supervisor (Supervisor 2) more than once to inform her about the revocation of her alternate accommodation and that the accommodations were not effective. See ROI 1 Supplemental at 394-423. The record reveals that when the Agency did not provide an effective accommodation, Complainant requested leave and ultimately to be reassigned to a different position in a different department as an accommodation, which the Agency denied without discussion. See ROI 2 at 392, 434.

Complainant further asserts that she made repeated requests for FMLA leave to Supervisor 2 which were not responded to. See ROI 2 at 393-96. The

record includes the numerous emails Complainant sent to Supervisor 2 requesting FMLA leave and donated annual leave from September 26, 2019, into October, but the evidence indicates that Supervisor 2 ignored Complainant's emails requesting leave, resulting in Complainant's being marked AWOL.⁶ See ROI 2 at 433-455. Ultimately, on September 17, 2019, Complainant received a Notice of Proposed Removal for Excessive Absences, having been absent from work without approved leave from September 9, 2019 onwards. See ROI 2 at 393-96; 102-109. Complainant's removal became effective on November 22, 2019. See ROI 2 at 157-63.

We find that the evidence in the record supports the AJ's conclusion that Complainant had established a prima facie case with respect to her denial of reasonable accommodation claim and that her removal was discrimination based on disability and reprisal because the evidence supports that the Agency revoked Complainant's offered alternate accommodations and made no further attempt to either engage in the interactive process or provide any accommodation at all, including flatly refusing to consider reassignment to a different position. While we acknowledge, as the Agency asserts, that an employee is not entitled to be reassigned to a different supervisor as a form of reasonable accommodation, see Joan S. v. Dep't of Justice, EEOC Appeal No. 0120151172 (Aug. 3, 2017), that does not absolve the Agency from its obligation to provide Complainant with some form of reasonable accommodation. See Matilde M. v. Social Sec'y Admin. EEOC Appeal No. 0120140147 (Jan. 17, 2017) (noting that agencies are required to undertake an individualized assessment as part of the reasonable accommodation process).

Finally, we emphasize that Complainant's removal for excessive absences was directly caused by Supervisor 2's failure to respond to any of Complainant's repeated requests for FMLA leave and/or donated annual leave from September 2019 onwards. We therefore find that the AJ correctly determined that Complainant was entitled to relief following the entry of default judgment against the Agency. See Chere S. v. Gen. Srvcs. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018); see also Montes-Rodriguez v. Dep't of Agric., EEOC Appeal No. 0120080282 (Jan. 12, 2012), req. for recon. den'd, EEOC Request No. 0520120295 (Dec. 20, 2012) (noting that the effect of default

⁶ We note that Supervisor 2's statement that Complainant failed to report to work and did not request leave from September 9, 2019 onwards is directly contradicted by the numerous emails from Complainant to Supervisor 2 contained in the record. See ROI 2 at 433-55; 460.

judgment against the Agency is a finding of discrimination in favor of the complainant).

Compensatory Damages

We next turn to the Agency's contention that the AJ's award of \$150,000 in compensatory damages is excessive and not in line with similar cases. In response, Complainant contends that the AJ's award was inadequate and does not fully compensate Complainant for the emotional harm she suffered due to the Agency's discriminatory actions, arguing that an award of \$225,000 would be more appropriate.

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). 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).

To receive an award of compensatory damages, Complainant must demonstrate that she has been harmed as a result of the Agency's discriminatory action; the extent, nature and severity of the harm; and the duration or expected duration of the harm. Complainant v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for recon. den'd, EEOC Request No. 05940927 (Dec. 8, 1995); EEOC's Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 at 11-12, 14 (July 14, 1992) ("Guidance"). Complainant is required to provide objective evidence that will allow an Agency to assess the merits of her request for damages. See Complainant v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Furthermore, the award should take into account the severity and duration of the harm. Carpenter v. Dep't. of Agric., EEOC Appeal No. 01945652 (July 17, 1995).

Section 102(a) of the 1991 Civil Rights Act authorizes an award of compensatory damages for non-pecuniary losses, such as, but not limited to, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health. We note that damage awards for emotional harm are difficult to determine and that there are no definitive rules governing the amount to be awarded in given cases. A proper award must meet two goals: that it not be “monstrously excessive” standing alone, and that it be consistent with awards made in similar cases. See Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989).

Non-pecuniary losses 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, supra, at 10. 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).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep’t of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from Complainant concerning emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id. Statements from others including family members, friends, health care providers, and other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. Id. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

Complainant has the burden of proving the existence, nature and severity of the alleged emotional harm. Man H. v. Dep't of Homeland Sec., EEOC Appeal No. 0120161218 (May 2, 2017). Complainant must also establish a causal relationship between the alleged harm and the discrimination. Id. Absent such proof of harm and causation, a Complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. Id. See also Wilda M. v. U.S. Postal Serv., EEOC Appeal No. 0120141087 (Jan. 12, 2017) (awards for emotional harm are warranted only if Complainant establishes a sufficient causal connection between the Agency's illegal actions and her injury).

In this case, both Complainant and her husband testified at a hearing on damages and Complainant also submitted some of her medical records. The AJ found that Complainant credibly testified that her anxiety and PTSD were under control prior to Supervisor 1 becoming her supervisor and the beginning of the Agency's discriminatory actions against Complainant. See Damages Hr'g Tr. at 30-31. Complainant stated that Supervisor 1's treatment of her was the "trigger" for her delayed onset PTSD after a trauma that occurred in her youth and that she started experiencing increased anxiety and near daily panic attacks. See Hr'g Tr. at 32-34; 45-50. She further stated that she suffered from insomnia, night terrors, loss of appetite, depression, and chest pain, as well as stress-related gastrointestinal issues and anemia from not being able to keep nutrients in her system. See Hr'g Tr. at 83-85; 130-31. Beginning in November 2018, she started seeing a clinical psychologist whom she continued to see twice per week for months. Complainant expressed frustration over the time and emotional distress she suffered due to the Agency's refusal to provide an effective accommodation. See Hr'g Tr. at 72-74. Complainant stated that she felt like the Agency "threw [her] away like trash" when she received the notice of removal. She stated that she distanced herself from her work friends, her husband, and her special-needs son, until ultimately she needed to send her son to stay with her mother because she was unable to care for him. See Hr'g Tr. at 94; 97-103; 145.

Complainant's husband further testified as to the damage which Complainant's emotional state caused their relationship and their social life, explaining that he also had to take time off from work and stopped socializing with friends in order to take care of Complainant. See Hr'g Tr. at 179-80; 183-84; 197-99. He also described a "dissociative episode" that lasted for two days where Complainant did not recognize him and talked to him like she was someone else and he was an abuser from her youth. See Hr'g Tr. at 173-75. He further testified that she had suicidal ideations. See Hr'g Tr. at 175. Complainant and her husband also testified that they suffered financial hardships due to

the loss of Complainant's income, needing to refinance their house and resorting to the local food bank to obtain food, which added to her feelings of distress and humiliation. The AJ noted, however, that there was also evidence of factors other than the Agency's discrimination which contributed to Complainant's overall health and well-being, including her husband's own health issues, undergoing at least two surgeries and requiring Complainant to take care of him, as well as Complainant being involved in a car accident in October 2020 that totaled her car.

The AJ found that the evidence indicated that Complainant's harm lasted for at least two years but was most acute from June 2018 to November 2019 and further, that the evidence indicates that Complainant's condition has improved and she should be able to return to work, assuming effective accommodations are in place. The AJ cited to Cassandra L. v. Dep't of Defense, EEOC Appeal No. 0720180029 (Aug. 20, 2019), wherein the Commission affirmed an award of \$200,000 in a case where the complainant's pre-existing PTSD was reactivated and she suffered significant mental and physical harm as a result of being constructively discharged and forced to retire, as the most similar case. The AJ noted that an award of \$200,000 in 2019 would have a present-day value of \$219,169.15 in 2022. The AJ found, however, that because the record contained substantial evidence of non-work-related factors that likely contributed to Complainant's harm, that Complainant would only be entitled to compensatory non-pecuniary damages of \$150,000. See Order Entering Judgment at 20-27.

We find that the AJ's award of \$150,000 was appropriate, taking into account the duration and severity of the harm suffered and the extent to which Complainant's harm was caused by the Agency's conduct and not other factors. We also find that this amount is neither "monstrously excessive" nor the product of passion or prejudice and is consistent with the amount awarded in similar cases. See, e.g., Jeffrey R. v. U.S. Postal Serv., EEOC Appeal No. 2020002824 (Sept. 13, 2021) (awarding \$140,000 where the Agency's failure to accommodate complainant caused him insomnia, confusion, anxiety, hopelessness, depression, isolation, severe financial strain and suicidal thoughts); Elsa S. v. Nat'l Aeronautics and Space Admin., EEOC Appeal No. 0720180021 (Feb. 14, 2020) (awarding \$100,000 for an agency's delay in reasonably accommodating the complainant despite her multiple requests, where complainant's underlying disabling conditions were exacerbated and also caused stress, embarrassment, depression, and loss of confidence); Alene S. v. U.S. Postal Serv., EEOC Appeal No. 0720150038 (April 6, 2016) (reducing an AJ's award to \$200,000 where the Agency's discriminatory conduct exacerbated the complainant's PTSD and caused physical harm so she

would be unable to work again); Jackson v. Dep't. of the Air Force, EEOC Appeal No. 0720110036 (Mar. 13, 2012) (affirming an AJ's award of \$125,000 where the complainant was subjected to sex-based harassment and suffered loss of self-esteem, injury to character and professional standing, marital strain, loss of health, sleep problems, anxiety, stress, depression, and humiliation).

Attorney's Fees

Lastly, we will address the AJ's award of attorney's fees and costs. Complainant contends that the AJ erred in reducing the hours billed for duplicative entries, arguing that complainants are entitled to have more than one counsel and that the work was reasonable and necessary for Complainant's claims.⁷

By federal regulation, the agency is required to award attorney's fees for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 29 C.F.R. § 1614.501(e)(1)(ii). To determine the proper amount of the fee, a lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

All hours reasonably spent in processing the complaint are compensable, but the number of hours should not include excessive, redundant or otherwise unnecessary hours. EEO MD-110, at 11-15. An application for attorney's fees must include a verified statement of attorney's fees accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. Id. at 11-9.

While an attorney is not required to record in detail the way each minute of their time was expended, the attorney does have the burden of identifying the subject matters on which they spent their time by submitting sufficiently detailed and contemporaneous time records to ensure that the time spent was accurately recorded. See Spencer v. Dep't of the Treasury, EEOC Appeal No. 07A10035 (May 6, 2003). The attorney requesting the fee award has the burden of proving, by specific evidence, entitlement to the requested fees and

⁷ To the extent Complainant appears to argue that the attorney's fee award should be increased to account for Hawaii's Gross Excise Tax, we note that the AJ took the Gross Excise Tax into consideration in the hourly rate. See Order Entering Judgment at 30.

costs. Koren v. U.S. Postal Serv., EEOC Request No. 05A20843 (Feb. 18, 2003).

The AJ reduced or disallowed a number of billed entries for work that she found to be duplicative or unreasonable, including where multiple attorneys attended the same conferences and also entries related to matters unrelated to the EEO appeals, such as for the Office of Workers' Compensation or MSPB. See Order Entering Judgment at 31-32. She further disallowed the hours claimed by one of Complainant's attorneys at the damages hearing because the attorney played no active role and did not question either of the two witnesses, and the AJ found that the damages hearing was not complex enough to require his attendance. See Order Entering Judgment at 32. The AJ further reduced some of the hours billed where multiple attorneys performed the same work, reviewing and revising the same motions and responses. See id.

Complainant argues that the AJ erred in reducing the hours billed because all the hours were reasonable and necessary for Complainant's claim and Complainant was entitled to have multiple attorneys. We reject Complainant's argument and find that the AJ reasonably reduced the hours billed to reflect excessive and duplicative entries. In addition, while a complainant is permitted to have multiple counsel, the Commission has recognized that the presence of multiple counsel at a hearing or deposition may be considered duplicative in certain situations, such as where one or more counsel had little or no participation. See Hodge v. Dep't of Transp., EEOC Appeal No. 01911370 (April 23, 1992). While it is understandable that Complainant disagrees with the AJ's decision to reduce the hours billed, we see no basis to disturb the AJ's reduction of the hours billed for duplicative or excessive entries.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final order rejecting the AJ's Order on Sanctions and the Order Entering Judgment and Relief. We REMAND this matter to the Agency for further processing in accordance with this Decision and the following Order.

ORDER (D0617)

The Agency is ORDERED to take the following remedial actions:

- 1) Complainant is entitled to back pay beginning on July 12, 2018 until the date on which she accepted reinstatement.⁸ The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision was issued. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
- 2) The issue of Complainant's increased tax burden from the Agency's lump sum payment of back wages is remanded to the Agency. On remand, the Agency shall conduct a supplemental investigation, including providing Complainant an opportunity to submit evidence of her increased tax burden. For guidance on what evidence is necessary to prove pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992) (available at www.eeoc.gov). The Agency shall complete the investigation and issue a FAD appealable to the EEOC determining the appropriate amount of damages.

⁸ We note that the AJ awarded interim relief, requiring the Agency to make an offer of immediate placement to a Supervisory Management Analyst, GS-14, position or its equivalent and that the Agency stated it has complied with the AJ's order. We remind the Agency of its ongoing obligation to provide Complainant with an effective reasonable accommodation that will enable her to perform the essential duties of her position.

- 3) Within 60 days of the date this decision is issued and to the extent it has not already done so, the Agency shall expunge any negative information in Complainant's official personnel file regarding the September 28, 2016 Letter of Reprimand; the December 10, 2018 charge of Absence Without Leave; and the March 19, 2019 Five-Day Suspension. These adverse materials shall also be removed from Agency supervisory files. Along with the removal of the Five-Day Suspension, Complainant shall be compensated for the loss of pay for those five days.
- 4) The Agency shall restore Complainant all annual, sick leave, and compensatory time used by Complainant from July 12, 2018 to November 18, 2019. To the extent that there are any charges of "Absence Without Leave" or "Leave Without Pay" during the relevant time period, the Agency shall reimburse Complainant for all pay and benefits lost during this time period.
- 5) Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$154,185.30 in compensatory damages.
- 6) Within 120 days of the date this decision is issued, the Agency shall consider taking disciplinary action(s) against the management officials identified as being responsible for the unlawful discrimination perpetrated in this case, in particular Supervisor 1 and Supervisor 2. The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Commission. 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.
- 7) Within 90 days of the date this decision is issued, the Agency shall provide at least 2 hours of interactive training with a focus on the Rehabilitation Act to Supervisor 1, Supervisor 2, the Executive Director, and the Shipyard Commander. In light of the apparent disregard for the requirements of the Rehabilitation Act displayed by the responsible management officials in this case, we strongly recommend that the Agency provide additional hours of live training in addition to the minimum required 2 hours. If any of these individuals are no longer employed at the Agency but remain in federal service, the Agency shall contact the individual's current employing agency and coordinate providing the individual the required training and consideration of disciplinary action. The

Agency may contact our Training and Outreach Division for Assistance in obtaining the necessary training via <https://www.eeoc.gov/federal-sector/federal-training-outreach>.

- 8) The Agency is also ordered to pay an attorney's fee of \$170,668.82 for work performed before the AJ. We note that this fee award is separate from the attorney's fee for work performed on these appeals, which may be pursued in accordance with the paragraph below entitled "Attorney's Fees."
- 9) Within 30 days of the date this decision is issued, the Agency is ordered to post a notice in accordance with the paragraph below entitled "Posting Order."

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

POSTING ORDER (G0617)

The Agency is ordered to post at its Pearl Harbor Naval Shipyard in Joint Base Pearl Harbor, Hawaii 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 Agency shall also send a copy of the notice via email to all employees reporting to the Pearl Harbor Naval Shipyard and Intermediate Maintenance Facility. 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).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/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 receipt of this decision. 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 (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

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 their 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:

/s/Raymond Windmiller

Raymond Windmiller
Executive Officer
Executive Secretariat

December 12, 2024

Date