



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

[REDACTED]
Dionne W.,¹
Complainant,

v.

Kiran Ahuja,
Director,
Office of Personnel Management,
Agency.

Appeal No. 2023000654

Hearing No. 530-2018-00257X

Agency No. 2018007

DISMISSAL OF APPEAL

By Notice of Appeal dated November 10, 2022, the Agency filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). The following day, the Agency uploaded its final order to the Commission's Federal Sector EEO Portal (FedSEP). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

Complainant filed a cross-appeal, seeking an enforcement of the AJ's decision and additional nonpecuniary compensatory damages. 29 C.F.R. § 1614.606. For the following reasons, we DISMISS the Agency's appeal. Complainant's cross appeal of the relief afforded by the Administrative Judge is DENIED and the AJ's Order is AFFIRMED.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Pharmacist, GS-12-9 at the Agency's Veterans Affairs Medical Center (VAMC) in Baltimore, Maryland. Complainant identified her disability as Phenylketonuria (PKU). ROI at 95 and 176. Complainant described her medical condition as a "hereditary metabolic disorder." ROI at 176. PKU "is characterized by the inability of the body to process the essential amino acid phenylalanine." ROI at 100.

On November 20, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of disability (physical), age (44 [born 1973]), and reprisal for prior protected EEO activity under the Age Discrimination in Employment Act of 1967 and Section 501 of the Rehabilitation Act of 1973 when, from 2015 and ongoing, the Federal Employees Health Benefits (FEHB) program and Blue Cross Blue Shield (BCBS) denied Complainant coverage for medically necessary prescribed treatment.

At the conclusion of the investigation, the Agency provided the Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). The complainant timely requested a hearing.

On May 31, 2019, the AJ assigned to the case issued a Notice of Intent to Issue a Decision Without a Hearing (NOI), setting forth the grounds for a proposed liability finding against the Agency on summary judgment. Consistent with the NOI and having found the record sufficient, the AJ found that summary judgment against the Agency was appropriate and, therefore, that a decision in favor of the Complainant was warranted.

The AJ noted that Complainant had not provided any evidence, other than her mere speculation, that the action at issue resulted from age discrimination or reprisal. The AJ explained, however, that the purpose of the NOI was to address solely the disability-based distinction and exclusion from coverage at issue and no other bases and advised the parties to focus their submission on the disability discrimination aspects of the matter only.

The AJ further explained that a decision without a hearing, or on summary judgment, was warranted on the grounds that the Agency failed to articulate a legitimate, nondiscriminatory reason for its disability-based exclusion.

The AJ asserted that the failure to provide benefits is a disability-based exclusion which is related to, and necessary to treat, Complainant's disability as part of an Agency-administered health insurance plan. The AJ stated that the Agency must demonstrate that it had a justifiable reason for doing so that was supported by legitimate actuarial data or actual or reasonably anticipated experience. The AJ determined that the Agency had not provided such evidence.

On September 14, 2020, Complainant submitted her Briefing for Compensatory Damages (Complainant's Briefing). The Agency filed its Response to Complainant's Briefing for Compensatory Damages on September 24, 2020 (Agency Response to Briefing). The AJ noted that Complainant did not provide any evidence of pecuniary damages other than her own statements. The AJ agreed with the Agency Response to Briefing that Complainant was not entitled to recovery of out-of-pocket expenses as a result. Agency Response to Briefing at 6.

The AJ further observed that Complainant's request for damages focused on various aspects of emotional distress and the physical manifestations of such distress. The AJ stated that Complainant provided very limited descriptions of how this harm affected her, yet she argued that she incurred substantial injury. The AJ explained that it is Complainant's burden to provide this evidence—the Agency need not request it. Nor was Complainant entitled to damages for "reckless indifference" or as a punitive measure and the emotional harm described by Complainant warranted only a modest award.

As a remedy for the discrimination, the AJ found that Complainant was entitled to \$5,000 in nonpecuniary damages based on Complainant's failure to provide a description of any actual harm she suffered as a result of the lack of coverage. I

The AJ issued a decision in favor of Complainant, and a decision on remedies on September 30, 2022. The AJ ordered that the Agency reimburse Complainant for nonpecuniary compensatory damages in the total amount of \$5,000.

The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged.

With regard to the relief awarded, the Agency expressed its belief that no relief should have been granted because Complainant failed to prove any of her claims. Agency Appeal Brief at p. 3.

In the alternative, the Agency stated, if its appeal is overturned, the Agency did not view the damages award as excessive.

CONTENTIONS ON APPEAL

On appeal, among other things, the Agency challenges the AJ's decision, asserts that the AJ's decision should be reversed because the factual and legal errors demonstrate that the decision cannot be affirmed. The Agency also filed a request on November 10, 2022, asking that the Commission accept its Notice of Appeal which, the Agency asserts, was unavoidably filed one day late.

The Agency acknowledges that the deadline to file the Notice of Appeal was November 9, 2022, and asserts that it took reasonable steps to get the Notice of Appeal signed by the Agency Director so that it could be timely filed.

Notwithstanding those efforts, asserts the Agency, an email was sent to Counsel around 8:45 pm on November 9, 2022, advising that due to the number of matters needing her attention and/or signature, the Director had not reached the Notice of Appeal before ending her workday. Counsel asserts that she did not receive the message, however, until the morning of November 10th, that the Agency continued its efforts to get the Notice of Appeal signed and filed, and those efforts were completed that same day. The signed Notice of Appeal was uploaded to FedSEP before 2 pm on November 10, 2022, one day after the November 9, 2022, Appeal Notice filing deadline.

In response, Complainant raises various procedural arguments as to why the Agency should not be permitted to file any challenge to the Decision, including that the agency's appeal filed on November 10, 2022, was untimely and should not be accepted. Complainant opposes the Agency's extension request for submission of its Appeal, asserting that there was no mutual agreement between the parties for such an extension.

Complainant also summarily argues that the AJ's decision should be affirmed, except as to the level of relief ordered. On cross-appeal, she asserts generally that she has been oppressed financially, mentally, emotionally, and physically by the agency's actions and that the compensatory damages award is insufficient.

She also requests pecuniary damages for the first time on appeal related to her own work on the complaint, including reimbursement for her purchase of a laptop and storage fees for her documents.

APPLICABLE LAW AND STANDARD OF REVIEW

In rendering this appellate decision we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order, *de novo*. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (explaining that the *de novo* standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

When an AJ has issued a decision under § 1614.109(b), (g) or (i), the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the AJ's decision. 29 C.F.R. § 1614.110(a). The regulations also require the agency to simultaneously issue a final order and file an appeal with the Commission in accordance with 29 C.F.R. § 1614.403 if it issues a final order that does not fully implement the AJ's decision.

ANALYSIS

Timeliness of Agency's Appeal

Initially, we find that the Agency's final order does not comply with our regulations. When an AJ has issued a decision under § 1614.109(b), (g) or (i), the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the AJ's decision. 29 C.F.R. §

1614.110(a). The agency is also required to simultaneously issue a final order and file an appeal with the Commission in accordance with 29 C.F.R. § 1614.403 if it issues a final order that does not fully implement the AJ's decision.

The record reflects that the Agency filed its appeal on November 10, 2022. The Agency acknowledges on appeal that it filed its appeal one day late, but attributes its untimely appeal filing to the delayed signature of the Director due to the number of matters needing her attention and/or signature. See Agency's Request to Accept Notice of Appeal, Nov. 10, 2022.

The agency's responsive brief asserts that we accepted the appeal on November 16th, 2022. However, the document referenced by the Agency as an acceptance was merely the Commission's auto generated acknowledgement letter in which we informed the Agency that we had docketed an appeal filed on November 10, 2022, and has no legal significance as an appeal acceptance letter waiving the untimely nature of the appeal.²

Therefore, while we are certainly mindful of the Agency's explanation for its untimely filed appeal of the AJ's decision, we ultimately do not find that the press of other business in this matter resulting in the inability to sign a notice of appeal before this agency to be sufficient justification to invoke waiver or equitable tolling for filing the appeal.³ See Ardelia I. v. U.S. Postal Serv., EEOC Appeal No. 0120180521 (Jan. 26, 2018); Fishback v. Dep't of Justice, EEOC Appeal No. 05A60732 (June 16, 2006) (affirming the dismissal of an untimely appeal where the complainant alleged he was busy preparing for a hurricane); see also Collins v. Dep't of Veterans Affs., EEOC Appeal No. 0120130180 (March 8, 2013) (affirming an Agency's dismissal of an untimely complaint where the complainant stated that she was unable to timely file her complaint because she had to evacuate her home during a hurricane).

Based on the foregoing, we dismiss the Agency's appeal. See Pamala L. v. Office of Personnel Management, EEOC Appeal Nos. 2022004288 and 2022004845 (Nov. 20, 2023)(Agency appeal dismissed for a one day delay in filing based on employee negligence); Ela O. v. Nat'l Sec. Agency, EEOC Appeal No. 0720130021 (Oct. 30, 2015) (AJ's finding of discrimination became

² Relatedly, the Commission's grant of the agency's request for an extension of the briefing period did not address nor excuse the untimely filing of its appeal.

³ We also note that Agency counsel did not attempt to get the Director's signature until two days before the filing deadline.

agency's final decision by operation of law where agency failed to take action during the 40-day period); see also Devrieze v. Dep't of the Interior, EEOC Appeal No. 01A33741 (Sept. 28, 2004) at fn. 2 (finding AJ's decision to be binding on the agency by operation of law due to agency's failure to simultaneously file its final order and appeal).

Complainant's Appeal

When discrimination is found, an agency must provide a remedy that constitutes full, make-whole relief to restore complainant as nearly as possible to the position he or she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994).

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to the discriminatory act or conduct. See EEO MD-110 at Chap. 11, § VII (citing Carey v. Phipus 435 U.S. 247, 254 (1978) (purpose of damages is to "compensate persons for injuries caused by the deprivation of constitutional rights")). Types of compensatory damages include damages for past pecuniary loss (out-of-pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm). See EEO MD-110 at Chap. 11, § VII.B; Goetze v. Dep't. of the Navy, EEOC Appeal No. 01991530 (Aug. 23, 2001).

Nonpecuniary compensatory damages are losses that are not subject to precise quantification, including emotional pain and injury to character, professional standing, and reputation. Id. There is no precise formula for determining the amount of damages for nonpecuniary 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 Treas., EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that nonpecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be "monstrously excessive" standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Complainants have the burden of proving the existence, nature and severity of the alleged emotional harm and must also establish a causal relationship between the alleged harm and the discrimination.

Absent such proof of harm and causation, a complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. The Commission has held that evidence of emotional distress should include detailed information on physical or behavioral manifestations of the distress, if any, and any other information on the intensity of the distress, information on the duration of the distress, and examples of how the distress affected the complainant both on and off the job. Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). In addition to a detailed statement by the individual claiming emotional distress damages, other evidence of such damages may include statements by health care professionals, such as physicians, psychologists, psychiatrists, therapists or counselors, as well as friends, family or coworkers who could attest to the existence, nature and severity of the complainant's distress, its duration and causation.

Here, Complainant raised a number of arguments regarding relief. She asked for the maximum amount of nonpecuniary damages available as well as requesting, for the first time on appeal, pecuniary damages she allegedly incurred related to her work on processing her complaint. However, reviewing the AJ's findings and legal conclusions de novo, we have decided to implement the relief as stated by the AJ in the Decision on Remedies. The AJ indicated, and we agree, that the evidence the AJ cited that Complainant submitted was insufficient in demonstrating harm sufficiently to justify a higher award. She did not present corroborative evidence from her friends or relatives and her statement was insufficiently detailed concerning the specific nature of the effect the discrimination had upon her. See AJ's Decision on Remedies at 2. We also find no basis for Complainant's request on appeal for additional compensatory damages as she did not provide sufficient justification for the request before the AJ.

Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that Complainant was discriminated against by the Agency as alleged and the relief awarded was appropriate.

Accordingly, we AFFIRM the AJ's decision and VACATE the Agency's final order rejecting that decision.

We REMAND the matter to the Agency for further processing in accordance with the order below.

ORDER

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

Within thirty (30) days from the date the decision is issued, the Agency shall pay Complainant the sum of \$5,000.00 as compensatory damages.

POSTING ORDER (G0617)

The Agency is ordered to post at its Office of Personnel Management (OPM) facility in Washington, D.C. copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

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 (R0124)

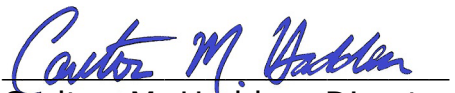
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court

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:



Carlton M. Hadden, Director
Office of Federal Operations

December 31, 2024
Date