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

[redacted]
Tommie R.,[1]
Complainant,

v.

Michael S. Regan,
Administrator,
Environmental Protection Agency,
Agency.

Appeal No. 2023001389

Agency No. 2020-0007-HQ

DECISION

On January 3, 2023, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 22, 2022, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

Whether the Agency correctly concluded that Complainant did not establish that he was subjected to disparate treatment and harassment but that he was denied a reasonable accommodation and whether the Agency's award of compensatory damages was sufficient to compensate Complainant for the harm he suffered as a result of the Agency's denial of his reasonable accommodation.

[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 Primary Information Security Officer at the Agency's Office of Mission Support, Information Technology Support System Security Staff at its Headquarters in Washington, D.C.

On December 19, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (physical and mental) and reprisal for protected EEO activity under Section 501 of the Rehabilitation Act of 1973 when,

1. Since July 23, 2019, his Supervisor, the Director, Information Technology Systems Security Staff, Office of Mission Support (Supervisor) has denied him a Reasonable Accommodation;
2. On August 2, 2019, his Supervisor required him to take two (2) hours of annual leave for the period 6:30 to 8:30 on August 1, 2019;
3. On August 12, 2019, his Supervisor denied him the opportunity to travel to Research Triangle Park, NC;
4. On October 18, 2019, his Supervisor denied him a specific Reasonable Accommodation, threatened him with Absent Without Leave (AWOL), and demanded he submit personal medical documentation;
5. On November 18, 2019 and December 2, 2019, his Supervisor sent emails belittling him to the entire staff;
6. On February 2, 2020, his Supervisor denied his request to change to a 4-10 schedule as part of his Reasonable Accommodation;
7. On February 12, 2020, his Supervisor threatened him with AWOL;
8. On March 5, 2020, his Supervisor issued him a Warning Letter; and
9. On June 9 and 10, 2020, his Supervisor excessively scrutinized his leave usage; and
10. On an unspecified date, his Supervisor added a Labor and Employee Relations employee onto emails dealing with his reasonable accommodation thus violating his privacy.[2]

[2] The record indicates that claim 1 refers to the same specific incident as in claim 4. The Agency dismissed claims 2 and 3 as discrete incidents of disparate treatment as they were untimely raised before the EEO counselor

Complainant suffers from numerous disabilities including post-traumatic stress disorder (PTSD), traumatic brain injury, obstructive sleep apnea, anxiety, and migraines, for which he requested and was granted a reasonable accommodation to telework when needed up to 3 days in a pay period. See Report of Investigation (ROI) at 101. On October 18, 2019, Complainant sent his Supervisor an email informing him of Complainant's intention to telework that day under his existing reasonable accommodation. See ROI at 120. The Supervisor responded by denying Complainant's request for telework citing "a predictable pattern of usage" of requesting telework the past five Fridays when Complainant was supposed to be in the office and informing Complainant that if he was not in the office by 10 a.m., he would be marked AWOL. See ROI at 274. Complainant stated that as a result of the Supervisor's threat of AWOL, his medical conditions were exacerbated so he took sick leave in order to get immediate medical attention. See ROI at 120. The Supervisor explained that he denied Complainant's request on the one occasion after he had noticed a pattern where Complainant requested to telework per his reasonable accommodation on every alternate Friday when Complainant was supposed to be in the office, which raised concerns that Complainant might be misusing his accommodation. See ROI at 260-64; 275.

Complainant asserted that since he requested his reasonable accommodation, his supervisor has subjected him to discrimination and demeaned him by denying his reasonable accommodation, subjecting him to excessive scrutiny about his schedule and not permitting him to work flexible hours based on shifting priorities, giving him a Warning Letter, and denying him travel. See ROI at 103-104. Complainant stated that as of August 2, 2019, he and the Supervisor had an informal agreement in place that Complainant could work staggered hours on occasions when he needed to work over his prescribed time and on August 2, which was one of his staggered schedule days, the Supervisor told him he needed to submit a leave request for the period from 6:30 a.m. to 8:30 a.m. because he had come in late. See ROI at 104. The Supervisor explained that Complainant's schedule was a set 6:30 a.m. to 4:00 p.m. schedule, but that he did once tell Complainant that "you are a GS 15 and I trust you will manage your time," but that Complainant misinterpreted what he had said to be an agreement that Complainant could come in and leave whenever he chose, switching his hours without supervisor approval. See ROI at 266-68.

---

because Complainant did not contact an EEO counselor until October 8, 2019, well after the 45-day time limit. The Agency accepted the untimely claims as part of Complainant's hostile work environment claim.

The Supervisor stated that on August 2, 2019, he stopped by Complainant's office at two different times that morning to find that the office was dark, and Complainant could not be found and then when he sent Complainant an email inquiring as to Complainant's whereabouts, Complainant did not respond until hours later to say only that he had been "running around." See ROI at 265. He further noted that Complainant had a pattern of arriving late and he had an audit conducted that showed that Complainant did not login to his computer on August 1 until 8:35 a.m. and the audit further confirmed Complainant's frequent tardiness, indicating many occasions when Complainant did not login to his computer until around an hour after his scheduled start time of 6:30 a.m. See ROI at 265-69.

Complainant explained that he had previously traveled to Research Triangle Park in North Carolina, a trip which had required months of planning on his part, securing meeting rooms and scheduling meetings. See ROI at 110. He stated that his supervisor called him while he was on another work trip and told him he would need to guarantee that he would not need to use his reasonable accommodation during the trip, which Complainant took to mean the Supervisor canceling the trip because of Complainant's disability. See ROI at 110. The Supervisor denied cancelling Complainant's travel to Research Triangle Park, explaining that he only called Complainant to talk to him about the importance of Complainant's going on the trip in order to personally meet with customers as building personal relationships with customers was the purpose of the Agency's arranging for the official travel. See ROI at 269. He included a copy of the contemporaneous email exchange in which the Supervisor sent Complainant an email in which he reminded Complainant of the importance of the trip and being on site to engage with customers but stating that if it was not possible for Complainant to be physically on site considering Complainant's difficulties making it into the office, then "skype/conference line would be a good alternative." See ROI at 271. He further asserted that he only intended to remind Complainant that it was not fiscally responsible for the Agency to pay for the cost of Complainant's hotel and travel if Complainant would be conducting meetings from his hotel room rather than in person. See ROI at 272. The record includes Complainant's response to the Supervisor's email in which Complainant told the Supervisor that because he could not guarantee that his conditions would allow him to attend all the meetings in person while on the trip, that he would go ahead and "withdraw [his] trip to NC" and conduct the meetings virtually from his office. See ROI at 318-19.

Complainant stated that the Supervisor has made belittling comments on calls and sent him belittling emails in which the Supervisor refers to Complainant as a GS-15 and makes statements such as that GS-15s make a lot of money or that this is something GS-15s should be able to do. See ROI at 138-39. He asserts that it is not appropriate for the Supervisor to be constantly referring to Complainant's grade level on calls with junior employees and contractors. See ROI at 139. The Supervisor explained that he has been trying to coach Complainant and get him to take responsibility for completing his duties in a timely manner so he has been reminding Complainant of his responsibilities as the Information Technology Officer (ISO) so Complainant would no longer try to deflect responsibility and work to others, including contactors, rather than taking accountability for his own tasks. See ROI at 276-77. He denied intending to belittle Complainant but stated that he was only reminding Complainant of the assignments he was responsible for. See ROI at 277. He asserted that as a GS 15, Complainant should be more independent and able to work without much guidance but that instead Complainant has failed to take responsibility for all the projects that are within his purview and instead directed others to take on work for him. See ROI at 277-78.

Complainant stated that he requested a 4-10 schedule as a reasonable accommodation and was denied, insisting that there was no interactive process and accusing the Supervisor of manipulating his words to make Complainant look bad and misrepresenting what happened. See ROI at 144-48. He asserts that the Supervisor is not being truthful when he stated that his request for a 4-10 schedule was not denied, and they were only waiting for Complainant himself to agree to it because the form he was provided did not have a space for Complainant to sign. See ROI at 144. He also wanted to have the provisions allowing him to telework periodically added to his reasonable accommodation request, which he noted was not acknowledged. See ROI at 144. The Supervisor stated that, in fact, Complainant was approved to work a 4-10 schedule as well as working 2 days a week in the office, which was Complainant's issue as he only wanted to work 1 day a week in the office. See ROI at 278-79. He asserted that it was Complainant who refused to agree to the offer because he only wanted to work 1 day a week in the office, not 2, and wanted two AWL days and use the remaining two days as part of his reasonable accommodation. See ROI at 278-79. He further explained that when Complainant took his current position, it was with the understanding that he would work a 4-5/9 schedule in order to maximize the Agency availability to their customers and peers. See ROI at 279.

The Supervisor stated that because Complainant is a senior member of the team and in a customer-facing position, Complainant needed to be in the office on the days when the Supervisor had his compressed day off. See ROI at 279. The record includes the contemporaneous emails between the Supervisor and Complainant on the requested 4-10 schedule which confirm that Complainant was granted a 4-10 schedule as well as two days of telework per week. See ROI at 373-80.

Complainant asserted that on March 5, 2020, he received a Warning Letter which he asserted was based on false and irrelevant information. See ROI at 157. He disagreed with the reasons given in the Warning Letter, denying that the National Hosting Services (NHS) deployment project mentioned had ever been given a higher priority than any others and that it was intended to be a multi-year project and that the Supervisor had unrealistic expectations, did not understand the nature of the security involved, and simply wanted to move forward without defining project scope, cost, and resources. See ROI at 157-60. The Warning Letter stated that it was being issued for failure to follow supervisor instructions, noting that the Supervisor had instructed Complainant to implement an onboarding application process into their NHS on December 11, 2019, but that on numerous occasions in the following months, when the Supervisor had requested a status update, Complainant had not responded or indicated he was not ready to provide one and on two different occasions, sending inaccurate responses to other employees and evading responsibility for the project. See ROI at 204-205. The Supervisor stated that he issued the Warning Letter after consulting with Labor and Employee Relations regarding Complainant's continued defiance of supervisory instructions, noting that Complainant has been offensive and disrespectful in the emails he sends to the Supervisor along with his failure to complete his tasks on time. See ROI at 283-86.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision on the merits of Complainant's claims concluded that Complainant did not establish that he was subjected to disparate treatment or to harassment on any of his other claims but found that Complainant did establish that the Agency violated the Rehabilitation Act in the single incident on October 18, 2019 when Complainant's supervisor denied his request to telework that day in violation of his previously-approved reasonable accommodation request.

The Agency ordered a supplemental investigation on Complainant's entitlement to compensatory damages. Complainant sought pecuniary compensatory damages in the amount of $185,000 for prescription medications and other future medical expenses as well as non-pecuniary, compensatory damages in the amount of $185,000 for the emotional harm he suffered as a result of the Agency's denial of his reasonable accommodation, as well as requesting equitable relief in the form of the restoration of 40 hours of annual or sick leave he used between July 2019 and December 2020 due to the denial of his reasonable accommodation. In support of his request, Complainant submitted a statement attesting to the fact that his various conditions including PTSD, traumatic brain injury, anxiety, and depression were exacerbated due to the Agency's discrimination and that he suffered marital strains, the loss of his relationship with his children, loss of professional reputation, extreme humiliation, dread, the loss of his ability to study and work on his Master's degree, a feeling of isolation, and severe anxiety about his job security and his future. He also submitted unsigned statements from a long-time friend of his and his wife, which attested to the harm the Agency's actions caused to Complainant's emotional state and the resulting strain on his marriage.

On November 22, 2022, the Agency issued a supplemental decision on damages, finding that Complainant was not entitled to pecuniary, compensatory damages because he did not submit any documentation of his expenses. The Agency did, however, award Complainant equitable relief in the form of the restoration of the eight hours of sick leave Complainant took on October 18, 2019 after his request to telework was denied, and also awarded Complainant $8,000 in nonpecuniary, compensatory damages, noting that Complainant did not submit any objective evidence in support of the emotional suffering he endured and only unsigned statements from his coworker and wife and that the evidence did not indicate that the majority of the harms Complainant suffered were, in fact, due to the Agency's denial of his reasonable accommodation request on one day.

Complainant appealed.

CONTENTIONS ON APPEAL

On appeal, Complainant reiterates his contentions on the merits regarding his Supervisor subjecting him to retaliation and the Agency's repeated failure to grant his reasonable accommodation request to work a 4-10 schedule as well

as the Supervisor's violation of his privacy.[3] He further contends that he should have been awarded $185,000 in pecuniary, compensatory damages and an additional $185,000 in nonpecuniary, compensatory damages for the extent of the emotional harm he suffered.[4]

In response, the Agency argues first that Complainant's appeal should be dismissed as untimely.[5] The Agency further contends, in the alternative, that its denial of pecuniary, compensatory damages was correct and that its award of $8,000 adequately compensated Complainant for the harm he suffered for the Agency's violation of his reasonable accommodation request on a single day.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (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").

[3] To the extent Complainant insists that his privacy rights were violated, we note that a violation of privacy is not within the Commission's jurisdiction. See Remona P. v. Dep't of State, EEOC Appeal No. 2021002652 (Aug. 2, 2022).

[4] Complainant did not challenge the Agency's award of equitable relief in the form of leave restoration.

[5] As an initial matter, we reject the Agency's argument that Complainant's appeal should be dismissed as untimely. When there is an issue of timeliness, the "Agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." Kelly v. U.S. Postal Serv., EEOC Request No. 05A00985 (Sep. 26, 2002) (quoting Guy v. Dep't of Energy, EEOC Request No. 05930703 (Jan. 4, 1994). In this case, the Agency offered no evidence as to when Complainant actually received the Agency's decision regarding damages and as such, we find that the Agency has not met its burden of establishing that the appeal was untimely.

ANALYSIS

Denial of Reasonable Accommodation

Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 (2012) (as amended) requires that an Agency make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the Agency can demonstrate that doing so would impose an undue hardship. 29 C.F.R. § 1630.9(a) (2017); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance) (revised Oct. 17, 2002). Once an employer becomes aware of the need for an accommodation of an employee's disability, the employer may engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. See 29 C.F.R. § 1630.2(o)(3) (2019). An Agency may choose among reasonable accommodations as long as the chosen accommodation is effective, and while the preference of the individual with a disability should be given primary consideration, an Agency has the ultimate discretion to choose between effective accommodations. See Enforcement Guidance, supra, at Q. 9.

To establish that he was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a "qualified" individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide him with a reasonable accommodation. See, e.g., Bill A. v. Dep't of the Army, EEOC Appeal No. 0120131989 (Oct. 26, 2016).

The Agency found and Complainant does not dispute that the Agency denied him a reasonable accommodation for a single instance on October 18, 2019, when the Supervisor denied Complainant's request to telework on that day under his existing reasonable accommodation. Complainant further insists, however, that the Agency also denied him a reasonable accommodation when it denied him a 4-10 schedule. We reject Complainant's contention. The evidence does not support Complainant's contention that he was denied the 4-10 schedule, only that he was not granted the other accommodation he requested of working only one day in the office but rather, requiring Complainant to be in the office two days a week along with two days of telework. Complainant contends that the Supervisor failed to properly engage in the interactive process and dragged the process out unnecessarily.

The Commission has stated that the failure to engage in the interactive process does not, in itself, constitute a violation of the Rehabilitation Act. See Pitts v. U.S. Postal Serv., EEOC Appeal No. 0120130039 (Mar. 13. 2013) (citing Doe v. Soc. Sec. Admin., Appeal No. 01A14791 (Feb. 21, 2003)). Liability depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation. Id.

In this case, Complainant's primary contention appears to be that he was not granted all the accommodations he requested, specifically that he be allowed to work in the office only one day a week and be permitted to telework the remaining three days a week. Complainant insists that the accommodation was not effective but provided no specific reason for why his disability makes him unable to come into the office two days a week, only asserting it was not necessary for him to be in the office as his duties can be performed remotely and his cell phone number is in every email and listed in the Agency directory. It is well-settled, however, that a complainant is not entitled to the accommodation of their choice, only an effective accommodation. See Lynette B. v. Dep't of Justice, EEOC Appeal No. 0720140010 (Dec. 3, 2015). Under the circumstances, we find that the Agency correctly concluded that the Agency violated the Rehabilitation Act by denying his request to telework for the single instance of October 19, 2019, but otherwise, the Agency fully complied with its obligations under the Rehabilitation Act. See Diane F. v. Social Sec'y Admin., EEOC Appeal No. 2019005952 (Feb. 9, 2021) (req. for recon denied, EEOC Appeal No. 2021002455 (June 7, 2021)).

Disparate Treatment

Applying the McDonnell Douglas burden-shifting standard defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a complainant initially must establish a prima facie case of discrimination by presenting facts which, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993); Texas Dep't of Community Affs. v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas, 411 U.S. at 802. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Burdine, 450 U.S. at 253. Once the agency has met its burden, the complainant has the responsibility to demonstrate by a preponderance of the evidence that the agency's action was based on prohibited considerations of discrimination, that is, its articulated reason for its action was not its true reason but a sham or pretext for discrimination. See Hicks, 509 U.S. at 511; Burdine, 450 U.S. at 252-5 3; McDonnell Douglas, 411 U.S. at 804.

Complainant may establish a prima facie case of discrimination by providing evidence that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) either that similarly situated individuals outside his protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted).

We note that Complainant did not identify any similarly situated individuals not of his protected classes who were treated more favorably. The other employees who Complainant mentioned as having been treated more favorably were of lower grade levels than Complainant and held different positions and therefore, do not constitute valid comparators for Complainant. See Rivero v. U.S. Postal Serv., EEOC Appeal No. 0120082675 (March 23, 2011) (stating that to demonstrate a similarly situated comparator, a complainant must show that all relevant aspects of the comparator's work situation were nearly identical to his own, i.e., that the complainant and the comparators came under the same manager's supervision and performed the same job function).

We find, however, that even if Complainant could establish a prima facie case, the Agency articulated legitimate, nondiscriminatory reasons for issuing the Warning Letter to Complainant. The Warning Letter was issued for failure to follow supervisor instructions, specifying that the Supervisor had instructed Complainant to implement an onboarding application process, but that on numerous occasions in the following months, when the Supervisor had requested a status update, Complainant had not responded or indicated he was not ready to provide one and on two different occasions, Complainant had instead sent inaccurate responses to other employees in which he tried to evade responsibility for the project. See ROI at 204-205.

We further find that Complainant did not establish that the Agency's reasons for issuing the Warning Letter were a pretext for discrimination. While Complainant insists that the Warning Letter was based on false information and accused the Supervisor of manipulating his words and being disingenuous, we note that as Complainant chose not to request a hearing, the Commission does not have the benefit of an Administrative Judge's credibility determinations after a hearing. We can only evaluate the facts based on the weight of the evidence presented. See Liz M. v. Dep't of Defense, EEOC Appeal No. 0120150805 (April 5, 2017).

We further note that in a discrimination case involving an adverse action in response to alleged misconduct, the question is not whether the misconduct occurred, but whether the Agency's asserted belief that the misconduct occurred is a pretext for discrimination. See Ezequiel P. v. U.S. Postal Serv., EEOC Appeal No. 2021002377 (March 28, 2022). In this case, there is no evidence beyond Complainant's bare assertions that the Agency was motivated by discriminatory or retaliatory animus and the Commission has repeatedly stated that mere assertions or conjecture that an agency's explanation is a pretext for intentional discrimination is insufficient because subjective belief, however genuine, does not constitute evidence of pretext. See Juliet B. v. U.S. Postal Serv., EEOC Appeal No. 0120182519 (Oct. 8, 2019); Richardson v. Dep't of Agriculture, EEOC Petition No. 03A40016 (Dec. 11, 2003). We therefore affirm the Agency's conclusion that Complainant did not establish that he was subjected to disparate treatment.

Hostile Work Environment

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that he is a member of a statutorily protected class; (2) that he was subjected to unwelcome conduct related to his protected class; (3) that the harassment complained of was based on his protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 at § III.B.3.d (Apr. 29, 2024).

In other words, to prove his hostile work environment claim, Complainant must establish that he was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis; in this case, his disability or his protected activity in requesting a reasonable accommodation. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

We find that Complainant did not establish that he was subjected to unlawful harassment. Complainant alleges that the Supervisor harassed him by making inappropriate belittling comments which referred to Complainant being a GS 15, that the Supervisor excessively scrutinized his leave requests, and was generally unsympathetic and uncooperative with respect to Complainant's disabilities and his need for a reasonable accommodation. While it is clear that Complainant took issue with the Supervisor's managerial and communication styles, such personality clashes and other common workplace grievances "while sometimes unpleasant, do not constitute harassment, even if done in a confrontational manner." Felton M. v. Dep't of Agriculture, EEOC Appeal No. 0120171203 (June 23, 2017); see also Carver v. U.S. Postal Serv., EEOC Appeal No. 01980522 (Feb. 18, 2000) (A supervisor questioning an employee with respect to their duties, even if done in a confrontational manner, is a "common workplace occurrence" and generally does not constitute harassment). We conclude that the alleged incidents of harassment were not severe or pervasive enough to establish a hostile work environment as it is well-established that the EEO laws are not a civility code and forbids "only behavior so objectively offensive as to alter the conditions of the victim's employment." Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998).

Pecuniary Compensatory Damages

When discrimination is found, an agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore him as nearly as possible to the position 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). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under Title VII and the Rehabilitation Act may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and nonpecuniary losses (e.g., pain and suffering, mental anguish) as part of make-whole relief. 42 U.S.C. § 1981a(b)(3). Compensatory damages do not include back pay, interest on back pay, or any other type of equitable relief. 42 U.S.C. § 1981a(b)(2). 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.

Pecuniary losses are out-of-pocket expenses incurred because of the agency's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination, or a voluntary settlement. EEO MD-110, at Chap. 11, VII.B.2 (internal citations omitted).

In a claim for pecuniary, compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, the harm suffered because of the agency's discriminatory action. See Sheila O. v. Dep't of Health and Human Srvcs., EEOC Appeal No. 2021001250 (June 7, 2022). Objective evidence in support of a claim for pecuniary damages includes documentation showing actual out-of-pocket expenses with an explanation of the expenditure. The agency is only responsible for those damages that are clearly shown to be caused by the Agency's discriminatory conduct. To recover damages, a complainant must prove that the employer's discriminatory actions were the cause of the pecuniary loss. Id. (citations omitted).

Complainant first argues that the Agency should have awarded him his full requested amount of $185,000 in pecuniary, compensatory damages to compensate him for his past medical expenses and the continuing cost of treatment for his various conditions. We reject Complainant's argument. Contrary to Complainant's argument on appeal, Complainant's submission in the Agency's supplemental investigation on damages did not include any documentary evidence, such as medical bills or receipts, to support his claimed medical expenses. See Israel F. v. Dep't of the Navy, EEOC Appeal No. 2024001719 (Aug. 6, 2024) (finding the complainant not entitled to reimbursement where complainant did not present documentary evidence to support claimed medical expenses). Moreover, we note that the evidence does not establish that these medical expenses, whether past or future, can be attributed mainly to the Agency's discriminatory conduct as it is clear that the conditions pre-existed the Agency's conduct and were the subject of the reasonable accommodation requests Complainant made. We reiterate that it is Complainant's burden to submit evidence to establish that the Agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. See Complainant v. Dep't of Justice, EEOC Appeal No. 0120123467 (April 3, 2015). Under the circumstances, we find that the Agency correctly found that Complainant was not entitled to pecuniary, compensatory damages.

Non-pecuniary Compensatory Damages

Nonpecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See EEOC Notice No. 915.302, Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, at 10 (July 14, 1992). 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). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or "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).

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 a complainant concerning his 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 his 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'y, 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.; 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).

The Agency awarded Complainant non-pecuniary compensatory damages in the amount of $8,000. Complainant argues that he should be awarded $185,000 in non-pecuniary, compensatory damages to compensate him for the severity of the harm he suffered. Complainant contends that the Agency has continuously denied him a reasonable accommodation for his disabilities in the five years he has worked at the Agency, referring to a previous claim he filed against the Agency, and reiterating that his Supervisor has continuously subjected him to harassment in the form of belittling emails, threatening him with AWOL, and excessive scrutiny of his leave requests. He submitted a statement asserting that due to the Agency's denial of his accommodation requests and harassment over a period of five years he has suffered severe emotional distress including marital strain, the loss of his relationship with his children, loss of professional reputation, extreme humiliation and embarrassment, insomnia, isolation, anxiety, and loss of pride in his work. He also stated that his conditions have been exacerbated so he will require treatment for the rest of his life. He submitted brief unsigned statements from a long-time friend and his wife, stating that Complainant felt frustrated and trapped and lost his enjoyment of his job while his wife attested to the strain on their marriage.

We are not persuaded by Complainant's arguments.[6] To begin with, we emphasize that Complainant is only entitled to damages that were directly caused by the Agency's discriminatory conduct and the Agency only found and we affirm the Agency's determination that Complainant was denied a reasonable accommodation when his request to telework was denied on a single day. While Complainant insists that he has been subjected to continuous harassment, he was not successful on those claims and is therefore not entitled to damages for those unsuccessful claims.

[6] To the extent Complainant argues that he is entitled to punitive damages, we note that punitive damages are not available to federal employees. See Ervin P. v. Dep't of Defense, EEOC Appeal No. 2023005253 (June 12, 2024).

In addition, while Complainant cites to a previous case he filed against the Agency which also found that the Agency had denied him a reasonable accommodation, that previous case is not at issue here nor did the Agency's decision on the merits find that Complainant had been continuously denied a reasonable accommodation over the course of five years, as Complainant insists. Complainant did not offer sufficient evidence beyond his own unsupported statements to indicate that his pre-existing conditions were, in fact, exacerbated due to the Agency's single discriminatory action. We also note the fact that the statements from his long-time friend and his wife are very brief, unsigned, and do not contain any details or corroborating information to support Complainant's own statements. Finally, we emphasize that compensatory damages are only intended to remedy the harm caused by the discriminatory event, not to punish the Agency for its conduct. See Doyle T. v. Dep't of the Air Force, EEOC Appeal No. 2022004281 (Sept. 30, 2022).

Under the circumstances, we find that the Agency's award of $8,000 appropriately took into consideration both the nature of the Agency's discriminatory action and the duration of the emotional harm Complainant likely suffered due to the denial of his reasonable accommodation on one day and the threat of being marked AWOL on that day. We find that an award of $8,000 is also not "monstrously excessive" standing alone, is not the product of passion or prejudice, and is consistent with the amounts awarded in similar cases. See Alycia R. v. Dep't of Homeland Security, EEOC Appeal No. 2022003632 (March 27, 2024) (increased an award of compensatory damages to $10,000.00 where the complainant's husband testified that she had exhibited fear, agitation anxiety, and insomnia as a result of the agency's failure to accommodate her); Ayesha M. v. Dep't of Veterans Affs., EEOC Appeal No. 2022003988 (May 22, 2023) (affirming an Agency's award of $8,000 where the complainant suffered stress, depression, and hopelessness and a loss of professional reputation from the Agency's discrimination); Lisa C. v. U.S. Postal Serv., EEOC Appeal No. 2021002674 (July 28, 2022) (awarding complainant $7,500 where the Agency's denial of a reasonable accommodation for 5 months resulted in the complainant suffering depression and anxiety for which she required medication, feelings of judgment at work, and sleep disturbances); Coralee H. v. U.S. Postal Serv., EEOC Appeal No. 2019004219 (Aug. 6, 2020) (Commission awarded complainant $10,000 for non-pecuniary damages where the agency's continued denial of her request for an ASL interpreter caused complainant anxiety, depression, problems sleeping, fatigue, difficulty concentrating, muscle tension, headaches, stomach problems, and social withdrawal).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decisions on the merits of Complainant's claims and on his claim for compensatory damages.

ORDER (D0617)

The Agency is ordered to take the following remedial actions:

I. To the extent it has not already done so, within 60 days of the date this decision is issued, the Agency will pay Complainant $8,000.00 in nonpecuniary, compensatory damages.

II. To the extent it has not already done so, within 60 days of the date this decision is issued, the Agency will restore 8 hours of sick leave to Complainant.

III. To the extent it has not already done so, within ninety (90) calendar days of the date this decision is issued, the Agency shall provide eight hours of interactive EEO training to the Supervisor on his responsibilities and obligations under the laws enforced by the Commission, with special emphasis on the Rehabilitation Act and the duty to provide reasonable accommodations to qualified Agency employees with disabilities. 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.

IV. Within 30 days of the date this decision is issued, the Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

The Agency is 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 Office of Mission Support in its Headquarters 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).

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:

Carlton M. Hadden, Director
Office of Federal Operations

January 8, 2025
Date