



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

[REDACTED]
Chanell A.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023003102

Agency No. 2003-756-2022-143312

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 25, 2023, final decision concerning her equal employment opportunity (EEO) complaint of 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 and REMANDS the matter for further action.

ISSUE PRESENTED

The issue presented is whether the Agency properly determined the compensatory damages awards following its finding of disability discrimination.

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 Medical Support Assistant at the Agency's Health Care System in El Paso, Texas.

On January 21, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on her disability (physical) when:

1. on November 9, 2021, Complainant was rated Fully Successful on her annual performance appraisal; and
2. the Agency failed to provide Complainant with her requested accommodation of a caption telephone.

The Agency issued a final decision on November 17, 2022, finding a violation of the Rehabilitation Act when there was an unreasonable delay in accommodating Complainant. However, the Agency did not find discrimination for Complainant's performance rating. As part of the remedies, the Agency conducted a supplemental investigation into Complainant's claims for compensatory damages.

On April 25, 2023, the Agency issued a Final Decision on Compensatory Damages. Complainant requested \$5,207.00 as pecuniary losses for prescribed medication and hearing aids. She testified that, as a result of the Agency's delay in accommodating her, she experienced depression and anxiety, and she paid \$210.88 for prescription medication. The Agency found sufficient evidence to show a proximate cause for this medication and awarded reimbursement of \$210.88. However, the Agency determined that the record showed that Complainant is hearing impaired, and she wore hearing aids prior to and after the Agency's conduct. As such, Complainant did not establish that the cost of her hearing aids was caused by the Agency's failure to timely provide a caption telephone.

Regarding non-pecuniary compensatory damages, Complainant requested \$2,500,000.00 for depression and anxiety. She provided supporting evidence, including a statement from her primary care provider that Complainant was treated for depression and anxiety. The Agency found that Complainant provided evidence of emotional harm. The duration of harm was approximately three years, from when Complainant requested a caption telephone in August 2019 until the installation was finalized in July 2022.

The Agency considered similar cases with awards between \$9,000.00 and \$20,000.00, and adjusting for present day value, it determined that \$25,000.00 for non-pecuniary compensatory damages was appropriate.

The instant appeal followed.

CONTENTIONS ON APPEAL

In her appeal brief, Complainant renews her reimbursement request for her hearing aids. Complainant also requests over 67 hours of sick leave and an increase in the non-pecuniary compensatory award to \$75,000.00.²

The Agency opposes Complainant's appeal. It asserts that the final decision thoroughly and accurately detailed the relevant facts and applied the appropriate legal standards, and Complainant presented no evidence to the contrary. The Agency requests that the Commission affirm the final decision on compensatory damages.

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 (EEO MD-110), 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").

² Complainant filed her appeal on May 2, 2023, and submitted her appeal brief on June 14, 2023. However, the Commission's regulations provide that "[a]ny statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations within 30 days of filing the notice of appeal." 29 C.F.R. §1614.403(d). Even crediting Complainant's arguments, we find that they do not change the disposition of this case. In addition, Complainant requests sick leave for the first time on appeal and the matter is remanded to the Agency for appropriate action.

ANALYSIS

Pecuniary Compensatory Damages

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. 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. EEO MD-110, at Chap. 11, VII.B.2.

Complainant disclosed that she was diagnosed with a hearing impairment disability in 2016. Complainant's Audiologist explained that the nature of Complainant's hearing loss is severe. Compensatory Damages Report of Investigation (CDROI) at 33, 55. We find that the Agency correctly determined that the need to buy hearing aids was not caused by the Agency's failure to timely accommodate Complainant. Rather, it was due to the severity of her disability. As such, Complainant is not entitled to reimbursement from the Agency for her hearing aid purchase.

The Agency provided the requested costs for Complainant's medications prescribed to treat her depression and anxiety caused by the Agency's action. We find no reason to disturb the Agency's decision and AFFIRM the award of \$210.88 for pecuniary compensatory damages.

Non-Pecuniary Compensatory Damages

Non-pecuniary 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).

Non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish an 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).

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 complainants concerning their 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, 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. Complainants’ own testimonies, along with the circumstances of a particular case, can suffice to sustain their 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.

An award of non-pecuniary compensatory damages should reflect the extent to which the agency’s discriminatory action directly or proximately caused the harm as well as the extent to which other factors also caused the harm. Johnson v. Dep’t of the Interior, EEOC Appeal No. 01961812 (June 18, 1998). It is the complainants’ burden to provide objective evidence in support of their claims and proof linking the damages to the alleged discrimination. Papas v. U.S. Postal Serv., EEOC Appeal No. 01930547 (Mar. 17, 1994); Mims v. Dep’t of the Navy, EEOC Appeal No. 01933956 (Nov. 23, 1993).

Here, Complainant testified that she suffered from depression and anxiety, and she did not feel happy coming to work, because of the delay in her accommodation. She added that her friends and family were aware of her depression and anxiety when she started disengaging. Complainant's physician confirmed treating Complainant for depression and anxiety. CDROI at 34-6, 56. Complainant submitted statements from two friends, who attested that Complainant had a regression in her overall health and happiness, and she looked unhappy. CDROI at 58, 60.

We find that the Agency's award of \$25,000.00 for non-pecuniary compensatory damages was not monstrously excessive and consistent with similar Commission decisions based on the nature, severity, and duration of Complainant's harms. For example, in Lydia F. v. Department of Veterans Affairs, EEOC Appeal Number 2020001007 (September 16, 2021), the Commission awarded \$20,000.00 for an exacerbation of a complainant's anxiety and depression, for which she received pharmaceutical treatment from a psychiatrist, and for her withdrawal from friends and family, due to a failure to accommodate and subsequent constructive discharge.³ The Commission also awarded a complainant \$20,000.00 for his harms, including his claimed anxiety and panic for three years, in Don T. v. United States Postal Service, EEOC Appeal Number 2020003494 (July 27, 2021).

As noted by the Agency, the Commission has found that an award of non-pecuniary damages may consider the present-day value of comparable awards. Lara G. v. U.S. Postal Serv., EEOC Request No. 0520130618 (June 9, 2017). According to the U.S. Bureau of Labor Statistics' Consumer Price Index Inflation calculator,⁴ an award of \$20,000.00 in 2021 is worth approximately \$23,000.00.

Complainant offered no support for an increase to \$75,000.00. Accordingly, we AFFIRM the Agency's final decision to award \$25,000.00 in non-pecuniary compensatory damages.

³ The duration of the complainant's harms was not specified, but the appellate decision noted that the complainant's symptoms were exacerbated in February and March 2016, and she testified that she continued to feel the impact of the agency's actions during the 2019 hearing.

⁴ https://www.bls.gov/data/inflation_calculator.htm

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 decision on compensatory damages and REMAND the matter to the Agency for further action, in accordance with the Order below.

ORDER

To the extent that it has not already done so, the Agency is ordered to:

1. pay Complainant, within **sixty (60) calendar days** of the date this decision is issued:
 - a) \$210.88 in pecuniary compensatory damages; and
 - b) \$25,000.00 in non-pecuniary compensatory damages;
2. within **ninety (90) calendar days** from the date this decision is issued, the Agency shall determine how many hours of leave (annual, sick, leave without pay, etc.) Complainant used from August 2019 through July 2022 as a result of the delay in providing an accommodation and restore that amount to Complainant. The Agency shall provide the Compliance Officer with a printout or statement by an appropriate agency official, identifying the amount and type of leave restored.

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). The report must include supporting documentation of evidence that the corrective action has been implemented.

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

November 27, 2024

Date