



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

████████████████████  
Isabelle G.,<sup>1</sup>  
Complainant,

v.

Lloyd J. Austin III,  
Secretary,  
Department of Defense  
(Department of Defense Education Activity),  
Agency.

Appeal No. 2024002097

Hearing No. 410-2021-00227X

Agency No. DD-FY20-253

DECISION

Following its February 9, 2024, final order, the Agency filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) 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. The Agency also requests that the Commission affirm its rejection of a portion of the relief ordered by the AJ. For the following reasons, the Commission MODIFIES the Agency's final order.

ISSUES PRESENTED

The issues presented are: (1) whether the AJ correctly determined that Complainant was subjected to discrimination on the basis of disability; and

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<sup>1</sup> 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.

(2) whether the AJ's award of future pecuniary, compensatory damages was appropriate.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a teacher at the Agency's E.A. White Elementary School (White Elementary) in Fort Benning (now called Fort Moore), Georgia.

On October 20, 2020, Complainant filed an EEO complaint with the following claims:

- "Whether management officials in the Department of Defense Education Activity subjected Complainant to disparate treatment based on disability (physical) when on August 19, 2020, she received a Management Directed Reassignment to a 2nd grade classroom at EA White Elementary School"; and
- "Whether management officials in the Department of Defense Education Activity denied Complainant a reasonable accommodation (RA) based on disability (physical) when on September 7, 2020, her request to work at DoDEA Virtual School (DVS) was denied."

ROI at 60. Complainant has described her disability as "osteoarthritis and a connective tissue disease[,] which . . . are autoimmune disorders"; "fibromyalgia[,] which also causes pain, tenderness, insomnia, stiffness, fatigue, cognitive difficulties, headaches, depression, and anxiety"; "urinary incontinence[,] . . . orthopedic issues[,] . . . Meniere's disease[,] . . . [a]nd . . . cardiomyopathy." ROI at 25.

At the conclusion of the investigation into her claims, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an AJ. Complainant requested a hearing. During the hearing process, the AJ redefined the claims as follows:

1. Whether the Agency subjected Complainant to disparate treatment based on her disability when Complainant was removed from her reading support specialist position at E.A. White Elementary School;<sup>2</sup> and

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<sup>2</sup> We note that this claim appears to include both Complainant's transfer from the RSS position on August 19, 2020, as the claim was originally

2. Whether the Agency discriminated against Complainant based on her disability by failing to provide her effective reasonable accommodation after she was removed from her reading support specialist position at E.A. White Elementary School.

The AJ held a hearing on December 4-6, 2023, and issued a decision in favor of Complainant on her claim of disparate treatment.

After the hearing, the AJ made the following findings of fact. Complainant began working at the Agency as a classroom teacher in 2009, but she later held non-classroom positions as a teacher for gifted students (gifted teacher) and as a reading support specialist (RSS). Complainant suffered from medical conditions that limited her mobility and ability to breathe, which in turn limited Complainant's ability to work in-person with others during the COVID-19 pandemic. Complainant's conditions also included anxiety and depression, which made it difficult for her to handle stress and adapt to new situations.

In 2018, the Agency opened White Elementary, and Complainant worked as an RSS there. She remained in that position until August 17, 2020, when Complainant's first-line supervisor (S1), Principal of White Elementary, told Complainant that she was being transferred to a fifth-grade classroom teacher position at Stowers Elementary School due to staffing needs. The next day, on August 18, 2020, Complainant submitted a reasonable accommodation request to the principal of Stowers Elementary, requesting reassignment to an RSS position. The principal forwarded the request to the region's Disability Program Manager (DPM). On August 19, 2020, Complainant's reassignment to Stowers Elementary was rescinded, and Complainant was then reassigned to a second-grade classroom teacher position at White Elementary. Soon after, Complainant submitted another reasonable accommodation request to S1 seeking to be reassigned to the Agency's Virtual School (DVS) so as to limit in-person classroom work with others during the pandemic. At this point, however, all schools in the Fort Benning area were remote due to COVID-19 levels being high.

During the fall of 2020, the Agency was separately processing reasonable accommodation requests related to an employee's ability to work in-person during the pandemic.

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defined in the ROI, as well as the Agency's later decision not to reassign Complainant to the RSS position for SY 2021-2022, which occurred after the investigation was complete.

When in-person teaching at White Elementary was scheduled to resume, Complainant's reasonable accommodation request was processed, and she was assigned to DVS as requested on October 6, 2020. She worked as a fourth-grade teacher at DVS through the end of the school year (SY) 2020-2021. As a result, Complainant's reasonable accommodation request submitted to the principal of Stowers Elementary was held in abeyance. In February 2021, Complainant was asked if she wanted to return to DVS the next year, SY 2021-2022, but Complainant indicated to DPM that she would only be interested in returning to DVS the next year if she could not return to her RSS position at White Elementary. DPM informed S1 of this. Therefore, the AJ found that as of February 2021, S1 was aware that Complainant's preference for SY 2021-2022 was to return to White Elementary in an RSS position.

In April 2021, the Agency notified Complainant that it could not offer her a DVS position for SY 2021-2022. On May 26, 2021, the Community Superintendent (CS) for the Agency's Georgia/Alabama Community sent a letter to Complainant reassigning her to a fifth-grade classroom teacher position at White Elementary. S1 testified that it was actually his decision to assign Complainant to this position. Though there had been an open RSS position at White Elementary, S1 assigned a different teacher (CW1) to the position. CW1 had been a fifth-grade classroom teacher at White Elementary the previous year, SY 2020-2021. The AJ noted that S1 testified at hearing that there was "no reason" why S1 assigned Complainant to the fifth-grade classroom teacher position as opposed to the RSS position. AJ Decision at 6.

However, in a prior affidavit, S1 listed numerous reasons for his decision not to assign Complainant to the RSS position. These included that CW1 was already trained and well-established in the new literacy program, and that the literacy program Complainant had used when she was previously an RSS had been replaced with a different literacy program. However, the AJ found this to be nonsensical, because CW1 did not begin as an RSS until the start of SY 2021-2022, and so also would have been unfamiliar with the new literacy program. S1 also indicated in the affidavit that Complainant's possible continuation at DVS for SY 2021-2022 was a reason why he did not assign her to the available RSS position at White Elementary. S1 also noted that, in addition to CW1, he assigned another teacher (CW2) to an RSS position for SY 2021-2022 because CW2 had been working at White Elementary the prior year, SY 2020-2021 (during which time Complainant was teaching at DVS).

The AJ also found that there was an open RSS position at McBride Elementary School, but in June 2021, the Agency hired a new employee to fill this position. CS testified that Complainant was not reassigned to the RSS opening at McBride because she was able to perform the fifth-grade teaching duties at White Elementary and because of the change in literacy program.

After Complainant's assignment to the fifth-grade classroom teacher position at White Elementary, the reasonable accommodation Complainant had submitted to DPM in August 2020, was taken out of abeyance. As a result, on July 9, 2021, Complainant was reassigned from the fifth-grade classroom teacher position to a gifted teacher position at White Elementary (which, like the RSS position, was not considered a classroom position). S1 and DPM also met with Complainant to discuss further accommodations for the gifted teacher position, including a flexible break schedule, a sit and stand stool, exemption from outside duties, and training on the revised gifted program.

Complainant returned to White Elementary for the start of SY 2021-2022 as the gifted teacher, but after several days she realized that she could not adapt to the change in duties from being an RSS to being a gifted teacher. Complainant therefore applied for disability retirement in August 2021, which was approved. Complainant was also later found to be eligible for Social Security disability benefits.

Regarding her reasonable accommodation claim, the AJ found Complainant could not prove the Agency failed to accommodate her. He found that the Agency had interpreted Complainant's original reasonable accommodation request as either a remote teaching position or a non-classroom teacher position. In SY 2020-2021, Complainant taught remotely (first at White Elementary and then at DVS). The AJ therefore found Complainant had been reasonably accommodated that year. The following year, SY 2021-2022, the AJ found that Complainant's need for an RSS position (as opposed to a gifted teacher position) was not obvious, and therefore management was entitled to request medical documentation from Complainant. The AJ found DPM credible when she testified that she asked Complainant for medical documentation to support her request to return to her RSS position for SY 2021-2022 as a reasonable accommodation. The AJ also noted that several emails from S1 and DPM showed that they asked Complainant for updated information from Complainant's doctors. Therefore, the AJ found that because Complainant did not provide such additional medical documentation, she could not prevail on her denial of reasonable accommodation claim (claim 2).

Regarding Complainant's claim of disparate treatment, the AJ found that Complainant could establish a prima facie case of disability discrimination as to the Agency's refusal to return her to the RSS position for SY 2021-2022. The AJ found that Complainant was disabled and that she was a qualified individual within the meaning of the Rehabilitation Act because "she was fully successful in performing her duties up until when she stopped working and applied for disability retirement." AJ Decision at 13. The AJ also found that Complainant was subjected to an adverse action when she was not returned to her RSS position for SY 2021-2022 and assigned to the gifted teacher position. The AJ found that the testimony of another gifted teacher indicated that the duties between an RSS and a gifted teacher were substantially different so as to constitute an adverse action. The AJ then found that the circumstances regarding the reassignment to the gifted teacher position could reasonably lead to an inference of discrimination, in that CW1 was similarly situated to Complainant but had not required a remote teaching position as an accommodation during SY 2020-2021 like Complainant had. Additionally, the AJ found that management's explanations for why Complainant could not return to the RSS position were not cogent reasons.

The AJ found that the Agency failed to articulate a legitimate, nondiscriminatory reason for its actions, given S1's testimony that he had "no reason" for not assigning Complainant to the available RSS position at White Elementary. Therefore, the AJ found that Complainant established her claim of disparate treatment. To the extent the Agency attempted to offer legitimate, nondiscriminatory reasons for its actions, the AJ found that these reasons were pretextual. The AJ reasoned that Complainant was originally assigned as a fifth-grade classroom teacher, and therefore any explanation indicating that the Agency needed Complainant to fill the gifted teacher position were pretextual. The AJ further found that CW1, like Complainant, did not have any training on the new literacy program and had just as much familiarity with it as Complainant did, and therefore S1's affidavit statement that CW1 was better prepared could not be true. The AJ also found S1's reasoning about wanting to establish a reading program with long-term goals made no sense given that Complainant had made it clear since February 2021, that she wanted to work as an RSS at White Elementary rather than continue at DVS. The AJ also found that S1's preference for CW1 and CW2 (who had been at White Elementary the prior school year) indicated that Complainant's prior reasonable accommodation in SY 2020-2021 motivated S1's decision not to reassign Complainant to the RSS position for SY 2021-2022. Therefore, the AJ found that Complainant was subjected to disability discrimination.

The AJ found, however, that Complainant could not establish a claim of disparate treatment when, on August 19, 2020, she was removed from her RSS position for SY 2020-2021 (i.e., the disparate treatment claim that was originally investigated as stated in the ROI). The AJ found that the Agency's legitimate, nondiscriminatory for this was that management was scrambling to fill classroom teacher positions, since its staffing and student enrollment was in flux due to the opening of DVS during the pandemic. The AJ found that Complainant failed to provide sufficient evidence indicating that this reason was pretext for disability discrimination.

With regard to remedies, the AJ found that Complainant credibly testified that the stress of learning on May 26, 2021, that she would not be returned to her RSS position for SY 2021-2022 caused her stress and "aggravated her preexisting conditions to the point that she was rendered totally disabled." AJ Decision at 19. The AJ reasoned that the approval of Complainant's application for disability retirement and her receipt of Social Security disability benefits established that Complainant had become totally disabled when she left White Elementary at the start of the new school year. Therefore, the AJ concluded that the Agency was liable for the harm emanating from Complainant's inability to continue working.

As a result, the AJ ordered the Agency to do the following: restore any leave Complainant used between her last day at White Elementary and the effective date of her retirement; take whatever action to address Complainant's leave balances that it would have taken if such leave balances existed on the effective date of Complainant's retirement; provide Complainant back pay with interest for any time that Complainant was on leave without pay between when she last reported at White Elementary through the effective date of her retirement, calculating the back pay pursuant to 5 C.F.R. § 550.805; provide eight hours of "EEOC training" to S1 and two hours to CS, focusing on the prevention of disability discrimination; and post within White Elementary copies of a notice indicating that management had been found to have failed to satisfy its obligations under the EEOC's regulations and the Rehabilitation Act.

The AJ also concluded that because the Agency's discrimination rendered Complainant totally disabled, she was entitled to recover compensatory damages for the loss in her future earning capacity from the date she became totally disabled through the date she would become eligible for a voluntary retirement without any annuity reduction.

The AJ provided several guidelines to the Agency in how to calculate the loss in future earning capacity and noted that the total award of future pecuniary damages plus any nonpecuniary damages must not exceed \$300,000.00.

The AJ awarded Complainant \$62,200.00 in nonpecuniary, compensatory damages, calculating the amount of inflation from a \$50,000.00 award in a comparable case from 2017. The AJ found that Complainant being rendered totally disabled diminished her self-esteem and placed a strain on her family relationships. The AJ also found that Complainant experienced crying spells, that she felt worthless, and that she lacked purpose.

The AJ denied Complainant's request for past pecuniary, compensatory damages resulting from her medical treatment, as the AJ found that Complainant was receiving her medical treatment before the discrimination occurred and that Complainant failed to establish that she would not have continued to receive such treatment had the discrimination not occurred. The AJ also found that, because Complainant was not represented by an attorney, that she was not eligible for any attorney's fees or costs.

The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged. The Agency also rejected the AJ's conclusion that Complainant was totally disabled and the resulting future pecuniary damages for her loss in future earning capacity.

Complainant did not file an appeal of the AJ's decision.

#### CONTENTIONS ON APPEAL

The Agency argues that the AJ's award of future pecuniary damages was erroneous and should be set aside. It maintains that no expert testimony or other evidence (such as medical documentation) was submitted to prove that Complainant was totally disabled or was unable to continue working. In support of this contention, the Agency points out that Complainant indicated during the hearing that she would consider an offer of being reinstated to an RSS position with the Agency. The Agency also argues, with regard to the AJ's finding of discrimination, that Complainant cannot establish the third and fourth elements of a prima facie case (i.e., adverse employment action or an inference of discrimination) and that the AJ was erroneous in finding that S1 was motivated by disability discrimination.

The Agency also argues that the AJ made a finding that Complainant was “removed” from her RSS position for SY 2021-2022, but that this was not an allegation made in the complaint.

In her brief opposing the Agency’s appeal, Complainant argues that her medical retirement and social security payments are a clear indication of her being totally disabled and unable to work and that the Agency could have gotten her official retirement documents from the Office of Personnel Management (OPM). Regarding the prima facie case, she argues that the AJ relied on credible testimony in finding that the RSS and gifted teacher positions were sufficiently different as to constitute an adverse action and that S1’s testimony saying there was no reason for not assigning Complainant to an RSS position is sufficient to create an inference of discrimination. She further argues that she had been in the RSS position before teaching at DVS and that the position was taken away from her for SY 2021-2022 and given to CW1, who Complainant argues was less qualified than her.

#### STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ’s conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ’s credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

#### ANALYSIS

As an initial matter, we note that neither party appears to challenge the portion of the AJ’s decision finding no discrimination, nor any of the ordered remedies outside of future pecuniary damages.

Therefore, we affirm those portions of the AJ's decision and will reorder the uncontested remedies herein.

### *Finding of Discrimination*

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that Complainant was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14.

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Dep't of the Air Force, EEOC Appeal No. 2021004539 (Aug. 17, 2023).

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the factfinder by a preponderance of the evidence that the Agency's explanation was pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). Complainant can do this by showing that the proffered explanations were unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons were not credible permits, but does not compel, a finding of discrimination. Hicks, 509 U.S. at 511.

We find that substantial evidence supports the AJ's determination that Complainant established a prima facie case of disability discrimination. First, neither party disputes the AJ's conclusion that Complainant was an individual with a disability and that she was qualified within the meaning of the

Rehabilitation Act (the first and second elements of the prima facie case) during her employment with the Agency.

On appeal, regarding the third element of the prima facie case, the Agency disputes that Complainant's reassignment to a gifted teacher position (as opposed to being returned to her requested RSS position) constituted an adverse employment action. For purposes of this element, an "adverse employment action" is an action by the employer "resulting in a material change in [a complainant's] work duties or working conditions," as well as "tangible personnel actions" (such as hiring, firing, demotion, promotion), or "significant change[s] in [a complainant's] responsibilities." Cucukow v. Dep't of Educ., EEOC Appeal No. 0120064678 (July 22, 2008). In its brief, the Agency argues that Complainant never assumed the duties of the gifted teacher position and therefore she never actually experienced a significant change of duties, especially since she would have remained a fulltime teacher with full pay and benefits. The Agency maintains that the testimony of another gifted teacher about the nature of the gifted teacher duties (as compared to the RSS position) was speculative and contradicted S1's testimony, which indicated that the two positions were similar.

We find that substantial evidence supports the AJ's conclusion that Complainant was subjected to an adverse action. Just because Complainant did not ultimately perform the full duties of the gifted teacher position does not preclude the AJ's determination that the change in duties constituted an adverse action. An employee should not be required to actually perform the duties of a new assignment in order for a factfinder to determine that such a change in duties is significant and thus constitutes an adverse action. Moreover, the AJ relied on the testimony of a gifted teacher who testified about the range of duties she performed, and the AJ found that these differed substantially from the RSS position. That S1 contradicted that determination in his testimony is not sufficiently compelling to overcome the substantial evidence standard.

Regarding the fourth element of the prima facie case, the Agency argues that the AJ erred in finding that the Agency's actions could reasonably lead to an inference of discrimination. The Agency argues that the evidence fails to show whether CW1 was similarly situated to Complainant or was in the same protected group as Complainant. The Agency contends that there was no testimony or evidence to show that CW1 did not have a disability or had never requested a reasonable accommodation. Without establishing that CW1 was outside of Complainant's protected bases, therefore, the Agency argues Complainant cannot establish the fourth element.

We find, however, that substantial evidence supports the AJ's determination that Complainant satisfied this element of the prima facie case. The AJ heard testimony from CW1 about her work history in the prior school years and determined her to be similarly situated to Complainant. And aside from CW1, the AJ also noted S1's mention of Complainant's work at DVS for SY 2020-2021 (as a reasonable accommodation) in his affidavit explaining his decision not to assign Complainant to the RSS position. We find this sufficient under the substantial evidence standard to establish a causal link between Complainant's disability and the adverse action, as required in element four of the prima facie case.

Because substantial evidence indicates that Complainant established a prima facie case of disability discrimination, we must next determine whether the Agency articulated legitimate, nondiscriminatory reasons for not assigning Complainant to the RSS position she requested for SY 2021-2022 at White Elementary. The AJ found, based on an exchange during S1's testimony at the hearing, that the Agency failed to articulate a legitimate reason. The AJ had asked S1 "what was the reason why [Complainant] was not reassigned to the reading support specialist [RSS] position for the 2021-2022 school year?" to which S1 had replied:

There really is no reason. So I had a classroom vacancy and she's certified as a classroom teacher. As a building level administrator, I'm approved to assign the staff based on where I feel they would fit within the needs of what I have. And [Complainant] is a fantastic classroom teacher. I knew she'd perform well. She had just been teaching fourth grade and other grades in the virtual school [DVS]. There really wasn't a reason one way or the other. She's returning from virtual school, she's certified, I have an opening and that's where I placed her.

Hr'g Tr. Day 2 at 534:3-19. Based on S1's answer, we find there is substantial evidence to support the AJ's conclusion that the Agency failed to articulate with sufficient particularity a legitimate, nondiscriminatory reason for not assigning Complainant as an RSS for SY 2021-2022 such that Complainant would have a full opportunity to demonstrate pretext.

On appeal, the Agency argues that S1 in fact provided several legitimate, nondiscriminatory reasons for his actions as enumerated in an affidavit, but we note that the AJ found these explanations to be pretextual, as they either contradicted record evidence or otherwise did not make sense.

We find substantial evidence supports the AJ in this regard. For instance, the literacy program for the RSS position had changed while Complainant was at DVS, but it would have been new for *any* RSS in SY 2021-2022. While CW1 previously served in the RSS position and was qualified/certified for the position, the same could be said of Complainant. That Complainant had performed the gifted teacher position in the past is not specific enough to explain why management refused to assign her to an open RSS position when her preference for that position was known to management as early as February 2021. We therefore find that substantial evidence supports the AJ's conclusion that, to the extent the Agency put forward any legitimate, nondiscriminatory reasons, these were pretext for disability discrimination.

The Agency also argues on appeal that the AJ incorrectly found S1 to be motivated by discrimination because of Complainant's prior reasonable accommodation request. The Agency argues that there is no evidence that S1 was motivated for that reason. However, the AJ noted that in S1's affidavit, S1 mentioned Complainant's time at DVS during SY 2020-2021 as part of his rationale. The AJ found that S1 treated CW1 and CW2 (who had been at White Elementary during that prior school year) more favorably than Complainant who was at DVS per her reasonable accommodation request. We find that substantial evidence supports the AJ's reasoning. In addition, given that S1's stated reasons were found to be pretextual, under the burden shifting framework we find that S1 was motivated by Complainant's disability when he decided not to reassign her to the RSS position.

Lastly, the Agency argues that the AJ made a finding on a claim that Complainant never alleged. The Agency notes that the AJ's decision stated that Complainant was "removed" from her position as an RSS for SY 2021-2022, but in fact Complainant was not removed during that school year. Rather, the only time Complainant was actually removed from the RSS position was during SY 2019-2020. The Agency maintains that Complainant merely wished to be returned to the RSS position for SY 2021-2022, and therefore the AJ made a finding of discrimination for a removal that did not occur. We find this argument overly literal and insufficient to reverse the AJ. While we agree that the AJ perhaps inaccurately referred to a removal at certain points in his decision, it is clear when reading the AJ's decision as a whole that the AJ's finding of discrimination was related to the Agency declining to reassign Complainant to the RSS position for SY 2021-2022.<sup>3</sup>

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<sup>3</sup> In support of its position, the Agency quotes the following from the AJ's decision: "Complainant established by a preponderance of evidence that [S1] **removed** her from her reading support specialist position for the 2021-

### *Future Pecuniary, Compensatory Damages*

The Commission has upheld awards of future pecuniary damages for the loss of future earning capacity where a complainant has shown that her or his future earning power has been diminished as a result of the agency's discrimination. See Moore v. U.S. Postal Serv., EEOC Appeal No. 0720050084 (Mar. 6, 2007); Hernandez v. U.S. Postal Serv., EEOC Appeal No. 07A30005 (July 16, 2004); Brinkley v. U.S. Postal Serv., EEOC Request No. 05980429 (Aug. 12, 1999). Proof of entitlement to damages for loss of future earning capacity involves evidence suggesting that an individual's injuries have narrowed the range of economic opportunities available to her. Generally, the party seeking compensation for loss of earning capacity needs to provide evidence to demonstrate with reasonable certainty or reasonable probability that the earning capacity has been impaired and there must be evidence which will permit the factfinder to arrive at a pecuniary value for the loss. See Welker v. Dep't of Agric., EEOC Appeal No. 0120120330 (July 27, 2012).

The AJ ordered the Agency to calculate Complainant's future lost wages from the time Complainant became totally disabled until she otherwise would have voluntarily retired without any annuity reduction. This was based on the AJ's conclusion that the Agency's discrimination rendered Complainant totally disabled. However, we find that substantial evidence does not support the AJ's award of future, pecuniary damages.

In order to establish an entitlement to compensatory damages, the burden is on Complainant to submit evidence to show that the Agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. See Damiano v. U.S. Postal Serv., EEOC Request No. 05980311 (Feb. 26, 1999). Here, substantial evidence in the record does not establish that the discriminatory conduct directly or proximately caused Complainant

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2022 school year because she requested reassignment to the DVS for the 2020-2021 school year as a reasonable accommodation. . ." AJ Decision at 17 (emphasis added by Agency). However, other parts of the decision accurately described the situation without using the term "removed," such as: "this explanation reveals that Complainant's reasonable accommodation of assignment to the DVS during the 2020-2021 school year motivated [S1]'s decision not to **reassign** Complainant to a reading support specialist [RSS] position for the 2021-2022 school year." AJ Decision at 16 (emphasis added).

to lose her future earning capacity or rendered Complainant completely unable to work. While Complainant applied for disability retirement soon after she was expected to perform the gifted teacher position, she did not submit any medical evidence or letters from a doctor indicating that it was the Agency's actions that made her totally disabled under OPM's standard. That is, aside from her own assertions, there is no evidence in the record to show that the Agency's reassignment of Complainant to the gifted teacher position caused a complete loss in Complainant's future earning capacity. In this regard, we note that the AJ did not make any finding—nor did Complainant allege—that Complainant was constructively discharged. The lack of such a claim implies that it was not the Agency's actions which forced Complainant to retire. Moreover, we note that Complainant does not dispute in her brief the Agency's argument that she never in fact performed the duties of the gifted teacher before applying for retirement. Therefore, the fact that Complainant's disability retirement application was approved does not necessarily indicate that it was her reassignment to the gifted teacher position that caused her loss in future earning capacity.

We also find that OPM's determination that Complainant was totally disabled is alone insufficient to conclude that Complainant can never work again. See McKelvey v. U.S. Postal Serv., EEOC Appeal No. 0120054980 (May 7, 2007) (“[J]ust because a complainant is deemed ‘totally disabled’ under a different statutory authority (i.e., the Social Security Act governing disability retirement), it does not necessarily follow that she is not . . . able to perform h[er] job with a reasonable accommodation”). We therefore find that substantial evidence fails to support the AJ's conclusion that the Agency's actions proximately or directly rendered Complainant totally disabled and that Complainant is in fact completely unable to work. Given that the burden of proof rests with Complainant, we find the record lacking in sufficient medical evidence or other proof that is required for an award of future pecuniary, compensatory damages based on a loss of future earning capacity.

#### *Other Relief*

Neither party disputes the remaining remedies ordered by the AJ. However, we note that the AJ did not order the Agency to consider discipline for the officials he found responsible for the discrimination. We find that such relief is appropriate in this case and order it herein.

### CONCLUSION

Accordingly, we MODIFY the Agency's final order. The Agency shall comply with the Order as set forth herein.

### ORDER

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

1. Within 60 days of the date this decision is issued, the Agency shall restore any leave that Complainant used between when she last reported for work at E.A. White Elementary School through the effective date of her retirement from the Agency's employment. Following this restoration of leave, the Agency shall take whatever action to address Complainant's leave balances that it would have taken if such leave balances existed on the effective date of Complainant's retirement from the Agency's employment.
2. Within 60 days of the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501, for any time that Complainant was on leave without pay between when she last reported for work at E.A. White Elementary School through the effective date of her retirement from the Agency's employment. The Agency shall provide Complainant the back pay and benefits within 60 days of the date of that determination. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount. Complainant may petition the Commission for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer referenced in the statement entitled "Implementation of the Commission's Decision."
3. After the Agency has calculated and paid Complainant's back pay award, Complainant shall have 60 days following the end of the tax

year in which the final payment is received to calculate the adverse tax consequences of any lump sum back pay awards, if any, and notify the Agency. Following receipt of Complainant's calculations, the Agency shall have 60 days to issue Complainant a check compensating her for any adverse tax consequences established, with a written explanation for any amount claimed but not paid.

4. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$62,200.00 in nonpecuniary, compensatory damages.
5. Within one year of the date this decision is issued, the Agency shall provide eight hours of equal employment opportunity training to S1 and two hours to CS. Such training should focus on the prevention of discrimination based on disability. The training shall supplement, not replace, any training S1 or CS would be required to receive if this decision was not issued. Training is not considered discipline.
6. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against S1 and CS. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the designated employees have left the Agency's employment, then the Agency shall furnish documentation of their departure date.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its E.A. White Elementary School facility in Fort Moore, Georgia 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 (H0124)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), they are 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 (T0124)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, **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:



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Carlton M. Hadden, Director  
Office of Federal Operations

November 25, 2024  
Date