



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

████████████████████
Scott K.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Northeast Area),
Agency.

Appeal No. 0120182127

Agency No. 1B-007-0011-16

DECISION

On June 8, 2018, 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 May 11, 2018, 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 MODIFIES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the Agency's award of compensatory damages was appropriate.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Mail Handler at the Agency's San Juan Processing and Distribution Center in San Juan, Puerto Rico. Complainant's first-line supervisor was a Supervisor, Distribution Operations (S1), and his second-line supervisor was a Manager, Distribution Operations (S2). According to S1, Complainant's Mail

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.

Handler duties include operating a tow truck and lifting flat tubs of mail, which can weigh up to 70 pounds.

Complainant has intervertebral disc syndrome and degenerative disc disorder. Complainant stated that his Mail Handler duties aggravate his chronic back pain. On April 13, 2016, Complainant's physician determined that Complainant's restrictions were no bending, twisting, kneeling, squatting, pulling, pushing, lifting over 20 pounds, or operating motor vehicles. On April 21, 2016, Complainant submitted a request for light duty, along with his doctor's statement regarding his medical restrictions, to S1.

S2 stated that he decided to deny Complainant's request for light duty because Complainant could not perform the duties of his position based on his medical restrictions. On April 28, 2016, S1 issued Complainant a letter denying his request for light duty, stating that there was no work available within Complainant's restrictions. According to Complainant, he was sent home and told that there was no work available within his restrictions. Complainant averred that there were light duty assignments available within his restrictions. Complainant also alleged that S1 and S2 failed to follow the Agency's light duty policy.

On June 1, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability (lower back) when on April 28, 2016, his request for light duty was denied.

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 EEOC 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 concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

In EEOC Appeal No. 0120170557 (Jan. 25, 2018), the Commission determined that the Agency's action constituted unlawful discrimination in violation of the Rehabilitation Act. Specifically, the decision held that, because of his restrictions, Complainant was not qualified to perform his Mail Handler duties. Therefore, the decision found that the Agency, absent undue hardship, was obligated to consider reassigning him to a different position. The Commission concluded that the Agency did not show that reassigning Complainant to a different position would have resulted in an undue hardship on its operations. Accordingly, based on the record, we found that Complainant established that he was denied reasonable accommodation for his disability as alleged, beginning on April 28, 2016.

Among other things, the decision ordered the Agency to conduct a supplemental investigation on compensatory damages, including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. In compliance with the Commission's order, the Agency asked Complainant to provide support for his request for compensatory damages.

Complainant provided an affidavit in which he sought approximately \$210,000 in non-pecuniary compensatory damages and \$66,000 in lost wages. In support of his claim, Complainant indicated that he had been undergoing many medical problems including mental anguish, headaches, stomach aches, mood changes, crying episodes, aggressiveness, irritability, insomnia, tension, depression, emotional distress, and anxiety. He lost his health care benefits because the Agency placed him on Leave Without Pay status for over a year. He had to stop seeing his physician because he could no longer pay him. This negatively impacted his existing medical conditions, including his disability. In addition, following the Agency's discriminatory action April 2016, he was diagnosed with Major Depressive Disorder in May 2016. He experienced moderate to severe anxiety and insomnia. He also felt feelings of frustration, irritability, crying spells, anxiousness, guilty, headaches and stomach pains.

Complainant also provided an additional statement in which he noted a loss of enjoyment of life. After the Agency's failure to provide him with a reasonable accommodation, he was denied work. He stated that this caused pain to him and his way of life. He noted that his way of living changed completely. He was placed under a difficult financial situation which limited his ability to participate in activities and events that had brought him pleasure before. Complainant had to make changes in how he used to do things in and out of the home. He indicated that his pain was also felt by his wife. He became frustrated at home and his mood changed. He had to use his credit card to make purchases and could not pay off the bills at the end of the month. Complainant also alleged that the Agency's action caused damage to his reputation and good standing as an employee.

Complainant's wife provided a statement in support of her husband's claim of entitlement to non-pecuniary damages. She stated that he started crying when he called her on April 28, 2016, to tell her that the Agency sent him home from work without an assignment. She stated that he was very emotional and shocked. She also indicated that their lives had changed in every way possible. She recalled that it felt like her husband was no longer there and he was replaced by someone else. He had been so affected by the discriminatory action and it changed him. She detailed how their lives had changed. She noted that they could no longer go out to eat at restaurants, they limited the grocery purchases, and they had to pay with credit cards. All this took a toll on her husband and he would have mood changes, become sad and angry, and vacillated between wanting to eat everything in the house to having nothing at all. She said it was the most painful thing to watch how things changed for her husband, their relationship, and his relationship with their daughter. He had to limit the things their daughter was allowed to purchase. They stopped traveling and going to family reunions or gatherings. She saw a person so full of life have to suddenly stop to cry. She saw him lose his joy for life and everything in it. She indicated that he would become aggressive. She also recounted that they had to cancel all of their doctor appointments because they could no longer pay him. She said that the discriminatory action impacted their whole family: they cried together, they suffered together; and they shared in the emotional pain together.

Complainant's daughter provided her statement in support of her father's claim for compensatory damages. She recalled that he came home early from work crying on April 28, 2016.

She was sent out of the room, but she could tell that her father was emotionally sad and that it was related to a problem at work. Since that day, she has seen a change in her father's daily routine. She stated that he doesn't go to work, stays at home, and mostly keeps to his room. When she asked him what was going on at work, he started to cry while he was telling her about the discriminatory action of the Agency. She knew he was not okay and saw her father change completely. She recounted how he used to help her with her school work and was the "best teacher" helping her to understand and learn. However, after the discriminatory action, she would have a problem or not understand, he would "just go crazy on" her and go to his own room. She also said that he stopped playing with her with respect to the things they did before. The daughter described how his "whole personality changed, he became aggressive," starting arguments with her and her mother. When they would go out anywhere, he did not want to leave the car. They had planned a trip to Orlando but had to cancel the trip. She also recounted that Complainant always complains of headaches and stomach pains. She said he would cry, telling her that he failed the family and that they deserved better. She noted that he had to stop going for treatment and refused to take his medications. She said in summary, after the discrimination, she felt she lost her father and she really wanted him back. She wished that everything would go back to the way it was before when he worked.

The Agency did not obtain any other evidence which would contradict the statements provided by Complainant and Complainant's witnesses.

The Agency issued a final decision finding that Complainant was not entitled to \$210,000 in non-pecuniary damages. The Agency found that this amount was monstrously excessive and that \$10,000 was a more appropriate award. The Agency indicated that Complainant had several pre-existing medical conditions. As such, the Agency found it is only liable for any exacerbation of Complainant's conditions due to the discrimination. The Agency noted that the continuation of his status after May 2017 was included in Complainant's other EEO complaints, which have not been resolved. As such, the Agency argued that any effects that could be due to the issues in the other complaints should not be attributed to the Agency's action in April 2016. Therefore, the Agency found that Complainant was not entitled to compensation for all the harm for which he provided supporting evidence.

CONTENTIONS ON APPEAL

Complainant appealed asserting that he lost over \$66,000 in wages due to the Agency's discriminatory action. Further, he claimed that the Agency's award of \$10,000 does not compensate him for the harm he experienced.

The Agency responded to the appeal, noting that Complainant was not awarded back pay in the Commission's decision in EEOC Appeal No. 0120170557. As such, it argued that he is not entitled to such an award. Further, the Agency argued that Complainant failed to establish any exacerbation or new conditions following its decision to send him home. Accordingly, the Agency asked that the Commission affirm its decision awarding \$10,000 in non-pecuniary damages.

ANALYSIS AND FINDINGS

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").

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

We note that Complainant alleged that he incurred lost wages due to the Agency's discriminatory action. The decision in EEOC Appeal No. 0120170557 did not order the Agency to pay back pay to Complainant. Complainant failed to request reconsideration on the Commission's previous decision if he wanted to challenge the Commission's failure to provide him with back pay. Further, we note that back pay is not considered compensatory damages. As such, we find that Complainant is not entitled to \$66,000 in lost wages.

A fair reading of Complainant's statement in support of his entitlement to compensatory damages is that he limited his request to non-pecuniary damages. Non-pecuniary losses are losses that are not subject to precise quantification, including emotional pain and injury to character, professional standing, and reputation. See EEO MD-110 at Chapter 11, § VII.B. 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 to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be "monstrously excessive" standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

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 or her 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. 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.

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

We find that the Agency's award of \$10,000 was not appropriate. We note that Complainant stated that since May 2016, just after he was subjected to discrimination by the Agency, he was diagnosed with Major Depressive Disorder. Complainant indicated that this was caused by the Agency's discriminatory action. The Agency did not provide any evidence to refute this. Further, Complainant and his witnesses provided very detailed statements explaining the extent Complainant changed following the Agency's action on April 28, 2016. Both Complainant's wife and daughter described how he had completely changed following that day, when he came home from work early crying. Complainant also averred that he experienced many medical problems including mental anguish, headaches, stomach aches, mood changes, crying episodes, aggressiveness, irritability, insomnia, tension, depression, emotional distress, and anxiety. Based on the totality of the evidence provided by Complainant, we determine that \$10,000 is not sufficient to compensate Complainant for pain and suffering he experienced following the Agency's discriminatory action on April 28, 2016.

Instead, we find that Complainant is entitled to \$85,000 in non-pecuniary, compensatory damages, finding that the discrimination caused the suffering described by Complainant. The award of \$85,000 is supported by the evidence of record and is consistent with the amount awarded in similar cases. See Billy B. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120132680 (Nov. 19, 2015) (Commission awarded \$85,000 in non-pecuniary, compensatory damages where the agency denied reasonable accommodation to and discharged complainant, which exacerbated his preexisting condition and caused emotional distress), request for reconsideration den'd, EEOC Request No. 0520160135 (May 12, 2016); Mohar v. U.S. Postal Serv., EEOC Appeal No. 0720100019 (Aug. 29, 2011) (Commission awarded \$100,000 in non-pecuniary, compensatory damages where agency retaliated against complainant, which contributed to severe emotional distress, a complete transformation from an outgoing happy person, anxiety, depression, and self-loathing); Millard v. U.S. Postal Serv., EEOC Appeal No. 01991535 (May 31, 2001) (Commission awarded \$75,000 in non-pecuniary, compensatory damages where agency harassed and then removed complainant, which contributed to stress, anxiety, disturbed sleep, social withdrawal, impaired concentration and memory, and fatigue). As such, we modify the Agency's final decision and determine that Complainant is entitled to \$85,000 in nonpecuniary damages.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final decision and REMAND the matter to the Agency in accordance with the ORDER below.

ORDER

To the extent it has not already done so, the Agency shall provide the following remedial relief within sixty (60) calendar days of the date this decision is issued:

1. Pay Complainant \$85,000 in non-pecuniary compensatory damages.

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).

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 (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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(c).

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 his or her 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

February 20, 2020

Date