



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

██████████
Elsa S.,¹
Complainant,

v.

James F. Bridenstine,
Administrator,
National Aeronautics and Space Administration
(Marshall Flight Center),
Agency.

Appeal No. 0720180021

Hearing No. 420-2015-00076X

Agency No. NCN-14-MSFC-00044

DECISION

Following its March 12, 2018, 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. Complainant also filed an appeal following receipt of the Agency's final order. Complainant requests the Commission affirm the AJ's finding that the Agency denied her a reasonable accommodation. Complainant also requests the Commission reverse the finding that she was not subjected to a hostile work environment based on her disability. For the following reasons, the Commission REVERSES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Aerospace Technologist (AST), GS-14, at the Agency's Systems Engineering and Integration Division, Spacecraft and Vehicle Systems Department, Engineering Directorate, Marshall Space Flight Center (MSFC), facility in Huntsville, Alabama.

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.

Complainant had been in her current position for about four years and has worked for the Agency since 1983. Complainant was supervised by the Division Chief (hereafter "Supervisor"), SES, Spacecraft and Vehicle Systems Department, Engineering Directorate at all times relevant to the complaint. SES Manager, Spacecraft and Vehicle Systems Department, was Complainant's second line supervisor. Complainant and two other employees, Deputy Division Chief and Mission Support Assistant, work in a suite of offices for the Systems Engineering and Integration Division. Complainant, Deputy Division Chief, and Mission Support Assistant all report directly to Supervisor. In addition, over 100 additional employees report through four Branch Chiefs to Supervisor.

Complainant's impairments included irritable bowel syndrome (IBS), pancreatic lipoma, immunoglobulin A (IgA) deficiency, chronic migraine headaches, bowel incontinence, abdominal pain, susceptibility to infections, and sleep apnea. In late 2012 and early 2013, Complainant sought a diagnosis for her health issues after she experienced "unrelenting" diarrhea and stomach pain starting in July 2012. In September 2013, Complainant did not inform Supervisor that her need to use the restroom on another floor was due to bowel incontinence. However, Complainant did inform Supervisor of her health issues in 2012 and through 2013. In November 2013, an inoperable tumor was discovered on Complainant's pancreas. In early 2014, Complainant was diagnosed with her impairments.

Complainant alleged in September of 2013, she asked Supervisor for an accommodation to use the restroom on another floor and to communicate with Supervisor via text. Complainant alleged Supervisor denied those requests.

Due to health changes, Complainant had to set appointments for immediate consultation and treatment of her ailments. In late December Complainant used WebTADS to request leave during early 2014. Supervisor was on annual leave from December 23, 2013 through January 11, 2014.

On December 30, 2013, Complainant requested 40 hours of annual leave for January 2, 3, 7, 10, and 21, 2014. Complainant's WebTADS request stated "(annual leave) in lieu of (sick leave) for medical tests out of town on the listed days." Specifically, in response to a request for leave submitted on December 30, 2013, Supervisor responded on December 31, 2013 stating, "we really need to discuss at our earliest opportunity time and attendance." Supervisor did not set up a time to discuss time and attendance with Complainant as indicated. Complainant responded that day that she agreed because she had received test results from her Vanderbilt provider which required immediate attention in the form of the appointments requested. Later that same day, Complainant emailed Supervisor again stating that since her leave had not been officially approved, she rescheduled some appointments but requested to keep her January 3, 2014, appointment. Complainant informed Supervisor that her appointments would not conflict with her work.

When Supervisor failed to respond, Complainant emailed Supervisor again on January 3, 2014, informing Supervisor she rescheduled her appointments for liver and endocrine function.

Complainant stated testing showed problems with her liver and potentially uterine cancer which needed immediate attention. Complainant reiterated both conditions are ongoing and very serious which is why she needed to use leave to immediately seek treatment and avoid rescheduling appointments due to leave not being approved.

Supervisor did not approve or deny Complainant's request for leave at that time or during anytime while Supervisor was on annual leave. Rather, Supervisor emailed Complainant on January 3, 2014, in response to Complainant's email, stating "do what you need to do for your health."

On January 14, 2014, Supervisor met with Complainant to discuss her attendance. Supervisor requested Deputy Division Chief join the meeting after Complainant and Supervisor's conversation turned argumentative. Deputy Division Chief testified during this meeting both Complainant and Supervisor were argumentative and kept turning the conversation back to Complainant's health issues rather than time recording in WebTADS. During this meeting, Deputy Division Chief testified Complainant told Supervisor and him that she had a tumor which caused her to frequently use the restroom. Complainant stated she was still reachable by phone or email in the restroom. Complainant did not state she suffered from bowel incontinence.

NASA Procedural Requirement (NPR) 3713.1A Reasonable Accommodation Procedures allowed for employees to seek accommodation directly with their supervisors or to engage the Office of Diversity and Equal Opportunity (ODEO) to facilitate the interactive accommodation process. On January 19, 2014, Complainant met with Acting ODEO Manager and Disability Program Manager (Program Manager) of the MSFC ODEO and informed them of her medical conditions and symptoms. During this meeting, Acting ODEO Manager and Program Manager suggested Complainant would benefit from a maxi-flex and/or telework schedule. Complainant agreed with this suggested accommodation.

Thereafter, Complainant initiated contact with an EEO Counselor on January 29, 2014, alleging discrimination by Supervisor. Complainant's January 19 and 29, 2014, communications with Acting ODEO Manager, Program Manager, and the EEO Office concerning her requests for accommodation and her medical impairments were not communicated to Supervisor. On February 19, 2014, Complainant submitted a written request for reasonable accommodation to Program Manager. Complainant requested to switch to a maxi-flex schedule, to use annual leave in lieu of sick leave on an emergency basis, to work an alternate work schedule, to telework, to take late or off-schedule lunch breaks, to take frequent or extended bathroom breaks when required, to use the restroom on another floor, and to have guidance on how to exercise her accommodations.

Supervisor alleged Complainant had a history of attendance and time-tracking issues which resulted in Supervisor requiring Complainant to record her time in WebTADS on a daily basis. Complainant attested that "I immediately agreed to do that, realizing it was for my benefit as well as hers, at that point."

Complainant alleged when Supervisor failed to respond to her accommodation requests, she sought redress from second-line supervisor, SES Manager, without avail.

In a letter dated March 14, 2014, Complainant's doctor attested that Complainant was being treated for IBS, pancreatic lipoma, and IgA deficiency which can cause her to have frequent episodes of diarrhea, episodic bowel incontinence, abdominal pain and can be associated with chronic migraine headaches. Her doctor attested that as a result Complainant may need frequent or extended bathroom breaks and to eat frequent small meals on a regular schedule while working. This letter was provided to the ODEO as a part of the accommodation process.

On March 24, 2014, Complainant submitted NASA Form 1699, Confirmation of Request for Reasonable Accommodation. Complainant stated she submitted Form 1699, her request for accommodation because no action had been taken on her first request for accommodation or the interactive process she started in January 2014 with ODEO. Complainant's accommodation request entailed working a maxi-flex schedule, episodic telework, the ability to use annual leave in lieu of sick leave, and the ability to use the restroom on another floor.

On April 4, 2014, Supervisor approved Complainant's Form 1699. All accommodations requested by Complainant on her form were granted. On April 17, 2014, Complainant submitted a Form 4068, requesting a maxi-flex tour, which Supervisor approved that day.

On May 14, 2014, Complainant filed an EEO complaint alleging that the Agency subjected her to harassment and discrimination on the bases of sex (female), disability (gastrointestinal disease), and in reprisal for her current EEO activity.² The complaint delineated her allegations accordingly:

1. Based on Complainant's sex and disability, she was subjected to harassment by Supervisor from September 2013 to the present, including but not limited to the following incidents:
 - a. Supervisor verbally abused, belittled, embarrassed, and intimidated Complainant by referring to her as incompetent, paranoid, and crazy as well as criticizing her work in front of management and staff members;
 - b. In response to Complainant's December 31, 2013 and January 2, 2014, requests for annual leave to attend doctor's appointments on January 1, 2014, January 14, 2014, and February 28, 2014, Supervisor delayed approval (March 2014), resulting in Complainant having to reschedule those appointments;
 - c. Supervisor instructed Complainant to enter her time into WebTADS on a daily basis unlike other co-workers; and

² Complainant originally alleged discrimination on the bases of race and age. However, she subsequently withdrew her claims of discrimination based on race and age. Complainant does not raise these bases on appeal. Accordingly, we will not address these bases herein.

- d. Supervisor continuously refused to enter into the interactive process to discuss Complainant's disability limitations and multiple requests for reasonable accommodation with her.
2. Based on Complainant's sex and disability, she was discriminated against when:
 - a. In May 2013, Supervisor stated that Complainant was not eligible for a rating of "outstanding" on her May 1, 2012 to April 30, 2013 performance appraisal due to a previous contentious encounter Complainant had with a coworker; and³
 - b. Supervisor instructed Complainant to enter her time into WebTADS on a daily basis unlike other coworkers.
3. Based on Complainant's disability, Supervisor failed to accommodate Complainant by not permitting Complainant to work a maxi-flex schedule.
4. Based on reprisal for filing the instant EEO complaint, Supervisor indicated to Complainant on several occasions that she intended to force Complainant to transfer because the filing of an EEO complaint made Complainant untrustworthy.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing. Prior to a hearing, the Agency submitted a "Motion for Summary Judgment" and Complainant submitted a response in opposition. The Agency filed a reply to Complainant's response. On July 24, 2017, the AJ issued an "Order Granting, in Part, Agency's Motion for Summary Judgment" in which he granted summary judgment in favor of the Agency with regards to Claims 1(c) and 2⁴. The AJ denied summary judgment with regard to Claims 1(a), 1(b), 1(d), 3 and 4.

The AJ held a hearing on November 14-15, 2017. The issues for resolution by hearing were Claims 1(a), 1(b), 1(d), 3, 4, and the hostile work environment claim that compromised Claims 1 to 4. The AJ noted that a fair reading of the complaint shows that it included a disparate treatment claim (Claim 1(b)), a denial of reasonable accommodations (Claims 1(b), 1(d), and 3), and a hostile work environment claim (Claims 1 to 4). At the hearing, Complainant and three other witnesses testified on behalf of Complainant. The Agency had five witnesses testify on its behalf.

On November 16, 2017, the AJ issued a bench decision and requested Complainant file a petition for attorney's fees. After receiving Complainant's petition for attorney's fees and costs as well the Agency's response, the AJ issued a written decision on his finding of discrimination and entitlement to attorney's fees on January 24, 2018.

³ The Agency dismissed Claim 2(a) for untimely contact with an EEO Counselor. Complainant does not challenge the Agency's dismissal of claim 2(a) on appeal.

⁴ As claim 2(a) had already been dismissed for untimely EEO Counselor contact, the only remaining portion of claim 2 consisted of claim 2(b), which the AJ referred to as claim 2 in the summary judgment decision.

In his decision, the AJ found no discrimination with regard to Claims 1(a),1(b), and 4, and the hostile work environment claim. However, the AJ found Complainant established that she is a qualified individual with a disability, and that the Agency discriminated against her based on her disability with respect to Claims 1(d) and 3 when the Agency failed to engage in the interactive process with her and failed to provide her with a reasonable accommodation.

By way of relief, the AJ ordered the Agency to: (1) provide management officials with a minimum of two hours training on their rights and responsibilities under the Rehabilitation Act, with a focus on reasonable accommodation; (2) pay Complainant \$100,000.00 in nonpecuniary, compensatory damages; and (3) pay Complainant proven pecuniary compensatory damages of \$860.00. Additionally, the AJ granted Complainant's attorney's fee petition for \$112,622.69 and \$2,389.58 in costs and expenses.

On March 12, 2018, the Agency issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged. Concurrent with the final order, the Agency filed the instant appeal to this Commission.

On appeal, the Agency argues the Commission should reverse the AJ's findings. The Agency argues the AJ erred as a matter of law when the AJ shifted the burden of proof to the Agency to show Complainant was granted the requested accommodations. Specifically, the Agency argues although Complainant stated that she was not "allowed" to use her accommodations, she presented no evidence of even a single instance where her request for an accommodation was denied.

On April 11, 2018, Complainant also filed an appeal of the AJ's order. In her brief, Complainant requests this Commission affirm the AJ's finding of discrimination on her denial of accommodation claim and reverse the AJ's determination that she was not subjected to a hostile work environment under Claims 1(a), 1(b), 1(d), and 3. Complainant asserts she not only met her burden of proof for her reasonable accommodation claim, but she also met her burden of proof for a finding of disability harassment.

ANALYSIS AND FINDINGS

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. National Labor Relations Board, 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).

At the outset, we note that neither the Agency nor Complainant challenge the AJ's partial summary judgment on claims 1(c) and 2. Thus, we do not address these claims herein. Moreover, with regard to the Agency's argument that the AJ shifted the burden of proof on the Agency to establish Complainant was granted accommodations, we reject this argument. A review of the record establishes that the AJ merely noted that there was no evidence presented to dispute the testimony that Complainant was only granted the accommodation of telework on one occasion. The AJ noted that the Agency provided no records to refute Complainant's allegations and establish that on dates upon which Complainant requested accommodation, she was permitted to telework.

Reasonable Accommodation Claims 1(b), 1(d) and 3

Under the Commission's regulations, a federal agency may not discriminate against a qualified individual on the basis of disability and is required to provide reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2(o), (p). To establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a "qualified" individual with a disability pursuant to 29 C.F.R. §1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance on Reasonable Accommodation).

An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include such functions as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; and the operation of a major bodily function. 29 C.F.R. § 1630.2(i). An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to the ability of most people in the general population. 29 C.F.R. § 1630.2(j)(1)(ii).

An individual with a disability is "qualified" if he or she satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). "Essential functions" are the fundamental duties of a job, that is, the outcomes that must be achieved by someone in that position. Gwendolyn G. v. U.S. Postal Serv., EEOC Appeal No. 0120080613 (Dec. 23, 2013).

The record contains evidence showing that as a result of Complainant's physical impairments she experienced frequent episodes of diarrhea, episodic bowel incontinence, and abdominal pain. Commission regulations state major life activities include the operation of a major bodily function, including the bowel and bladder. 29 C.F.R. § 1630.2(i)(1)(ii); Katz v. Dep't. of State, EEOC Appeal No. 0720060024 (Mar. 26, 2009)(finding waste elimination is a major life activity). Moreover, we note the Agency does not dispute the AJ's finding that Complainant was a qualified individual with a disability. As such, we likewise find that Complainant is a qualified individual with a disability.

Upon review, we find that Complainant demonstrated that she needed the reasonable accommodation of situational telework showing that she had a medical condition that sometimes caused her to experience frequent episodes of diarrhea, episodic bowel incontinence, and abdominal pain. The AJ found both that the Agency exercised an unreasonable delay in granting her request for accommodation and denied her accommodation with respect to telework even after April 4, 2014.

Upon review, we find that the Agency unreasonably delayed in granting accommodations to Complainant starting on January 19, 2014, and that the Agency failed to establish a justification for the delay. The record establishes there was a delay of 75 days between Complainant's meeting on January 19, 2014, when she specifically requested accommodation, and April 4, 2014, when Supervisor approved her accommodation request. We find this delay was unreasonable. Despite having raised her impairments with Supervisor in January 2014 and Complainant's communications with Acting ODEO Manager, Program Manager, and the EEO Office on January 19 and 29, 2014, Complainant had to submit multiple requests for accommodation before ultimately getting approval. In one instance, Supervisor refused to grant the accommodations and required Complainant to resubmit the request due to her objection over Complainant's use of capitalized letters and font. We find this requirement that Complainant resubmit the request was solely due to Supervisor's objection to how Complainant portrayed Supervisor in the request as yelling by the use of capitalized letters.

The record shows Supervisor was not informed by Program Manager about Complainant's January 2014 accommodation requests until February 20, 2014. Substantial evidence supports the AJ's determination that the Program Manager did not adequately justify such a delay. Additionally, regarding the Agency's arguments that Complainant did not submit medical documentation until March 2014, we find this argument does not preclude a finding that the Agency failed to reasonably accommodate Complainant in the present case. Specifically, we note Supervisor did not request Complainant's medical documentation. Further, Supervisor, as the decision maker for the accommodation request, did not require medical documentation that Complainant needed telework to ultimately approve the accommodation request. Moreover, the record established that Program Manager did not inform Complainant when she initiated the request for reasonable accommodation that she would need to provide medical documentation.

While Complainant was able to use a restroom on another floor and use annual leave in lieu of sick leave while the accommodation request was pending, the record shows Complainant was not provided telework or maxi-flex during the delay. Moreover, the record supports the AJ's finding that even after the April 4, 2014, the Agency failed to provide Complainant telework as a form of reasonable accommodation.

As the fact-finder, the AJ found Complainant credibly testified that she requested telework, even after April 4, 2014, but was only permitted to telework due to her impairment one time, on March 30, 2015. While the Agency argues in its brief the AJ overlooked the evidence that Complainant was allowed to telework during this timeframe, this argument is veiled in generalization. Complainant admitted she, like all facility employees, was under an episodic telework agreement which she was granted by Supervisor well in advance in order to complete specific projects. However, Complainant was only granted telework as an accommodation for her disability on one date despite testifying she requested from Supervisor it as often as twice a week due to her IBS. In the hearing, the AJ questioned Complainant on this matter and the AJ found the Complainant's testimony credible that every time Complainant requested telework due to her medical impairments, Supervisor denied the request and frequently stated Complainant should use leave instead.

The Agency appears to argue that it accommodated Complainant by permitting her to take leave when she experienced medical symptoms that made it difficult for her to work in the office. While an employer may choose between effective accommodations, forcing an employee to take leave when another accommodation would permit an employee to continue working is not an effective accommodation. See Denese v. Dep't of the Treasury, EEOC Appeal No. 0120141118 (Dec. 29, 2016). In this case, the Agency failed to provide Complainant with the effective accommodation that would have allowed her to continue working.

Further, we find that the Agency did not provide any evidence showing that it would be an undue hardship to provide Complainant with an effective accommodation. The record established all of Complainant's requested accommodations were in place within the Agency, available to employees, and allowed Complainant to perform the essential functions of her job. As such, we agree with the AJ's finding that the Agency failed to establish undue hardship.

Where a discriminatory practice involves the provision of a reasonable accommodation, damages may be awarded if the Agency fails to demonstrate that it made a good faith effort to provide the individual with a reasonable accommodation for his disability. 42 U.S.C. § 1981a(a)(3); see also Alonso T. v. Equal Emp't. Opportunity Comm'n., EEOC Appeal No. 0120162340 (Jan. 15, 2020). The Agency argues on appeal that the evidence shows it exercised good faith in its efforts to accommodate Complainant. However, we reject that conclusion based on the Agency's failure to engage in the interactive process which resulted in Complainant having to submit multiple reasonable accommodation requests and the fact that Supervisor required Complainant to resubmit her reasonable accommodation request due to her personal distaste of the use of capitalization in the request.

Upon review, we find substantial evidence supports the AJ's determination that the Agency failed to make a good faith effort to reasonably accommodate Complainant. Thus, we find the Agency failed to provide reasonable accommodation to Complainant in violation of the Rehabilitation Act and that Complainant is entitled to compensatory damages.

Disparate Treatment Claim 1(b)

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 he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction 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. The burden then shifts to the Agency to articulate a legitimate, non-discriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

Here, we find that assuming, arguendo, Complainant established a prima facie case of sex, disability, and reprisal discrimination, the Agency nonetheless articulated legitimate, nondiscriminatory reasons for its actions. Specifically, as to Claim 1(b), the record shows that Supervisor or any other Agency officials never actually denied her requests for leave as alleged. Supervisor told Complainant to do what was needed for her health. As the AJ found, while Supervisor did not deny the leave, she also did not approve it in the system since she was on leave herself, not because of Complainant's protected class. Rather than seeking approval from another Agency official, Complainant rescheduled her appointments. The record also established that Supervisor also required another employee, a male without disabilities and no prior EEO activity, to also enter his time in WebTADS daily like Complainant. Moreover, Complainant has failed to provide any evidence of similarly-situated individuals outside of her protected class who were treated more favorably than her to show pretext. In sum, we find that Complainant has not shown that the Agency's articulated reasons for its actions were pretextual or were motivated by discriminatory or retaliatory animus.

Hostile Work Environment Claims 1- 4

On appeal, Complainant argues the AJ erred in failing to find Complainant was subjected to a hostile work environment based on her disability. It is well-settled that harassment based on an individual's disability is actionable. See Meritor Savings Bank FSB v. Vinson, 477 U.S. 57 (1986). In order to establish a claim of harassment, the complainant must show that: (1) she is a qualified individual with a disability covered under the Rehabilitation Act; (2) she was subjected to unwelcome conduct; (3) the harassment complained of was based on her disability; (4) the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir.

1982). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Svs. Inc., EEOC Notice No. 915.002 (March 8, 1994).

In other words, to prove her harassment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a “reasonable person” in Complainant’s position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of her protected bases. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself. Here, we find that, after careful consideration of the evidence of record, Complainant has failed to show that the incidents occurred as alleged or were motivated by discriminatory animus toward her sex, disability, or protected EEO activity.

Upon review, we find the record is void of evidence sufficient to show the alleged behavior by Agency officials was based on Complainant’s protected status. We agree with the AJ’s finding that Supervisor’s actions as alleged were unprofessional, rude, disrespectful, and oblivious to Complainant’s health issues, embarrassment, and fear, but the testimony showed that Supervisor’s actions were motivated by anger and frustration with Complainant and her unexplained absences/accountability, not her statutorily protected basis. In sum, we find that the evidence does not establish that the events at issue either occurred as alleged or were the result of discriminatory animus toward her sex, disability, age, or protected EEO activity. As such, we find that Complainant has not established that she was subjected to discriminatory harassment.

Compensatory Damages

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to the discriminatory act or conduct. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 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 nonpecuniary loss (emotional harm). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 at Chapter 11, § VII.B; and Goetze v. Dep’t. of the Navy, EEOC Appeal No. 01991530 (Aug. 23, 2001).

Pecuniary losses are out-of-pocket expenses incurred because of the agency’s unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other such quantifiable expenses.

Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination, or a voluntary settlement, whereas future pecuniary damages are those likely to occur after the resolution of the complaint. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 at Chapter 11, § VII.B (Aug. 5, 2015) (internal citations omitted).

In a claim for pecuniary compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, the harm suffered because of the agency's discriminatory action. 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 agency's discriminatory actions were the cause of the pecuniary loss. Id. (internal citations omitted).

Non-pecuniary losses are losses that are not subject to precise quantification, including emotional pain and injury to character, professional standing, and reputation. Id. There is no precise formula for determining the amount of damages for 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).

With respect to non-pecuniary damages, the AJ found the Agency's failure to accommodate Complainant exacerbated her symptoms. The AJ found credibility in Complainant's emotional testimony about the stress and embarrassment she faced at work having to sit in her own feces or clean her underwear in the restroom toilet at work because she was not granted accommodations. Complainant and her husband stated Complainant experienced depression, loss of confidence, feelings of social isolation at work, strain on their marriage, and psychological stress until her retirement and, thereafter, whenever she was contacted by the Agency. We find the record supports the AJ's finding of nonpecuniary, compensatory damages in the amount of \$100,000.00. See Jade R. v. Dep't of the Interior, EEOC Appeal No. 0720170032 (Mar. 23, 2018)(Commission awarded \$90,000.00 in nonpecuniary, compensatory damages for Agency's failure to accommodate which resulted in an aggravation of Complainant's preexisting condition); see also Complainant v. Nuclear Regulatory Commission, EEOC Appeal No. 0120093196 (Sept. 13, 2012)(Commission found Complainant entitled to \$100,000.00 in nonpecuniary, compensatory damages for the Agency's failure to accommodate Complainant which caused short-term aggravation to Complainant's medical condition), request for reconsideration denied, EEOC Request No. 0520130050 (Mar. 15, 2013).

On appeal, neither party challenged the AJ's finding of \$860.00 for pecuniary damages. Pecuniary losses are out-of-pocket expenses incurred due to an employer's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. The record supports the AJ's decision to not award pecuniary damages for the total \$1,136.00 in out-of-pocket expenses alleged by Complainant.

We agree with the AJ that Complainant could only establish a causal connection between the \$860.00 in the form of co-pays for her counseling after January 2014 and the Agency's discriminatory actions. We find the AJ's award of pecuniary damages totaling \$860.00 for documented co-pays for counseling relating to her EEO complaint was the appropriate award for pecuniary damages.

Attorney's Fees

The Rehabilitation Act and the Commission's regulations authorize the award of reasonable attorney's fees and costs to a prevailing complainant. 29 C.F.R. § 1614.501(e); see also EEO Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 11-1 (Aug. 5, 2015). Fee awards are typically calculated by multiplying the number of hours reasonably expended times a reasonable hourly rate, an amount also known as a lodestar. See 29 C.F.R. § 1614.501(e)(ii)(B); Blum v. Stenson, 465 U.S. 886, 899 (1984); Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

All hours reasonably spent in processing the complaint are compensable, but the number of hours should not include excessive, redundant or otherwise unnecessary hours. Id. 11-15. A reasonable hourly rate is based on prevailing market rates in the relevant community for attorneys of similar experience in similar cases. Id. 11-6. An application for attorney's fees must include a verified statement of attorney's fees accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. Id. 11-9.

While an attorney is not required to record in detail the way each minute of his or her time was expended, the attorney does have the burden of identifying the subject matters on which he or she spent his or her time by submitting sufficiently detailed and contemporaneous time records to ensure that the time spent was accurately recorded. See Spencer v. Dep't of the Treasury, EEOC Appeal No. 07A10035 (May 6, 2003). The attorney requesting the fee award has the burden of proving, by specific evidence, entitlement to the requested fees and costs. Koren v. U.S. Postal Serv., EEOC Request No. 05A20843 (Feb. 18, 2003).

First, we find that Complainant prevailed in proving the Agency subjected her to disability discrimination when she was not provided reasonable accommodations and, therefore, she is entitled to attorney's fees. Complainant was represented by three attorneys concerning the instant complaint. The Request for Attorney's Fees and Costs submitted by Complainant stated the hourly rate for Attorney 1 was \$563, Attorney 2 was \$602, and Attorney 3 was \$483. While the Agency challenged the hourly rate before the hearings unit, neither party contested these rates on appeal. A review of the record shows Complainant's efforts to retain local counsel were unsuccessful and the Agency failed to show why retaining counsel from Washington D.C. was unreasonable. The AJ used the *Laffey* Matrix for hourly rate when out-of-state counsel is retained to determine the prevailing market rate for hourly rate. Additionally, we agree with the Agency's argument that Complainant's attorneys are not entitled to receive full rate for travel time. The AJ agreed with the Agency in this regard as well and awarded travel time at one half of the attorney's normal hourly rate. Therefore, we find the hourly rate was reasonable for Attorney 1, Attorney 2, and Attorney 3.

We note that before the hearings unit, the Agency admitted Attorney 1 represented Complainant in the beginning on March 24, 2015, communicating effectively with Agency counsel and engaged in efforts to resolve the case with Attorney 2. However, on appeal, the majority of the Agency's opposition to the attorney's fees awarded by the AJ, concern an affidavit supplied on behalf by Attorney 2 which the Agency argues does not detail her involvement in the case. We are not persuaded by the Agency's argument. The rest of the Agency's arguments concerning attorney's fees consist of a general statement that the attorney's fees awarded cannot be sustained due to incomplete statement of attorney's fees, the vague nature of counsel's billing and the clear evidence in the record demonstrating that the telework and maxi-flex claims were distinct from Complainant's other unsuccessful claims.

We note Complainant's fee petitions requested a total of 237.52 for the work of three attorneys. We agree with the AJ's finding that an across the board reduction of total hours by 10% is appropriate to account for a small amount of insufficiently detailed billing entries and one of the six claims as a fractionable unsuccessful claim. We also find the record supports an award of travel time to attend the hearing at half the hourly rate in the amount of 14.15 hours for Attorney 1 and 12.5 hours for Attorney 3. Considering the complexity of the case and the experience of Complainant's counsel, this Commission finds a total award of attorney's fees in the amount of \$112,622.69 is reasonable and supported by the fee petitions.

Furthermore, we agree with the AJ's finding that the record supports costs and expenses largely related to travel in the amount of \$2,389.58. Accordingly, Complainant's counsel is awarded this amount in costs and expenses.

CONCLUSION

Accordingly, the Commission REVERSES the Agency's final order finding no discrimination. We REMAND this matter to the Agency to provide remedial relief consistent with this decision and the Order herein.

ORDER

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

1. Within 60 days from the date this decision is issued, the Agency shall pay Complainant \$100,000.00 in nonpecuniary, compensatory damages and \$860.00 in past pecuniary damages.
2. Within 90 days from the date this decision is issued, the Agency shall provide eight hours of in-person or interactive training to Supervisor, Acting ODEO Manager, and Program Manager on the Rehabilitation Act. The training shall emphasize the Rehabilitation Act's requirements with respect to an Agency's duties to provide reasonable accommodations to individuals with disabilities.

3. Within 60 days from the date this decision is issued, the Agency shall consider taking disciplinary action against Supervisor, Acting ODEO Manager, and Program Manager. 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 responsible management officials have left the Agency's employment, then the Agency shall furnish documentation of their departure date(s).
4. Within 60 days from the date this decision is issued, the Agency shall pay \$112,622.69 in attorney's fees and \$2,389.58 in costs and expenses to Complainant's attorneys.

The Agency shall submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation showing that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Huntsville, Alabama facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. §1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (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 14, 2020
Date