



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

[REDACTED]
Shawnta A.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of Defense
(Defense Commissary Agency),
Agency.

Appeal No. 2019001394

Agency No. DeCA-00125-2013

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 7, 2018 final decision concerning an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

During the period at issue, Complainant worked as a Sales Store Checker at the Agency's McGuire Air Force Base Commissary in New Jersey.

The records reflect the following chronology of events. In October 2011, Complainant injured her right knee (Degenerative Joint Disease (DJD)). The injury affected Complainant's ability to pivot on that knee. Complainant requested that she not be assigned to the self-checkout lane, because performing this fast-paced assignment caused pain to her knee. Complainant's supervisor requested documentation and approved Complainant's request in October 2011. The accommodation remained in place until March 2013, when a new supervisor (S2) took over. S2 questioned Complainant's need for the accommodation and requested new medical documentation.

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.

On April 25, 2013, following the submission of new medical documentation, S2 denied Complainant's accommodation request after she consulted with the Disability Program Manager (DPM). Contrary to Complainant's physician, the DPM did not find that Complainant's injury was a disability and S2 agreed with him.

On June 18, 2013, Complainant filed a formal EEO complaint alleging that the Agency discriminated against her and subjected her to harassment based on disability and in reprisal for prior protected EEO activity, when on April 25, 2013, she was denied a reasonable accommodation.

After an 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 but the AJ remanded the complaint to the Agency to issue a final decision. The decision concluded that Complainant failed to prove the Agency subjected her to discrimination as alleged.

Complainant appealed. In EEOC Appeal No 0120160945 (June 21, 2018), the EEOC found that the Agency denied Complainant a reasonable accommodation. Specifically, the decision stated "[medical] documentation was provided on [numerous dates] all indicating that Complainant should not work the self-checkout lane because it was making her disability worse but management disregarded the medical documentation."

The decision ordered the Agency to take the following actions: provide Complainant with an effective reasonable accommodation, provide S2 and DPM eight hours of EEO training, conduct a supplemental investigation pertaining to compensatory damages, consider disciplinary actions against S2 and DPM, post a posting order, and pay reasonable attorney's fees. EEOC Appeal No. 012016945 (June 21, 2018).

On November 7, 2018 the Agency issued a final decision regarding compensatory damages. The Agency found that Complainant was entitled to \$25,000 in non-pecuniary damages. The Agency did not provide additional analysis in its final decision regarding its determination of non-pecuniary damages. The Agency found that Complainant was also entitled to the following remedies: restoration of 277.75 hours of sick leave; reimbursement of \$77.57 for mileage expenses traveling to medical appointments and reimbursement of \$260 for medical co-payments, and \$10,988.80 in reasonable attorney's fees.

The instant appeal followed. On appeal, Complainant contests the Agency's award of non-pecuniary damages and is seeking \$125,000. Complainant does not expressly contest on appeal the other remedies set forth in the Agency's final decision. Thus, we will only address herein, the Agency's award of non-pecuniary damages.

ANALYSIS AND FINDINGS

With respect to non-pecuniary compensatory damages, these are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for non-pecuniary damages claims includes statements from Complainant and others, including family members, co-workers, and medical professionals. See id.; see also Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Non-pecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency's discriminatory actions. See Carter v. Duncan-Higgans. Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance at 13. Additionally, the amount of the award should not be “monstrously excessive” standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

As part of the supplemental investigation, Complainant, in a sworn statement, provided testimony regarding the physical and emotional harm she experienced due to the Agency’s denial of a reasonable accommodation. She stated she was periodically assigned self-checkout duties over a period of several years. Complainant stated that she was frustrated that she had to continue to work self-checkout after requesting reasonable accommodation. Complainant stated that when she worked self-checkout, it caused swelling in her knee and tremendous pain. She asserts that the days she was assigned to self-checkout, she was unable to climb the stairs to her bedroom due to the pain and would therefore need to sleep on the sofa. She stated the denial of her reasonable accommodation prevented her from engaging in family activities due to the pain in her knee. She stated that this situation had an impact upon her relationship with her partner. Complainant stated, “I would be exhausted coming home from work, having fought to get through the pain in days when I had to go down to work self-checkout...”

The record also contains medical documentation indicating that the denial of a reasonable accommodation contributed to Complainant experiencing a worsening of her medical condition. A letter dated October 20, 2016 from Complainant’s physician stated, in pertinent part, “eliminate self-checkout indefinitely. This position will cause nerve inflammation, severe pain and extreme weakness...”

The record contains signed statements from Complainant’s co-workers during the relevant period regarding the physical and emotional harm she experienced. The co-workers stated that Complainant would experience pain after working self-checkout. One co-worker stated that Complainant told her after working self-checkout that her knee was swelling and she would observe Complainant limping after working self-checkout. Another co-worker stated that once the Agency made her work self-checkout, Complainant changed and she would not talk to people and would not go out.

Finally, the record contains signed statements from family members of Complainant. The record contains a declaration under penalty of perjury from Complainant's brother. He asserts that once Complainant was assigned self-checkout he noticed a difference in her. He asserts that Complainant would cancel family plans if she worked self-checkout because of the pain. He states, "I could see how my sister slipped into depression because she can't do the things that make her happy because either she was in pain because she had to work self-checkout, or she was worried that she was going to be made to work self-checkout." The record contains a signed statement from her partner. Therein, her partner states that, "[Complainant] has always taken pride in her job...however the physical and mental toll of self-checkout and what it did to her devastated her. She was afraid to go to work fearing she would be put on self-checkout and the resulting pain she would have to endure. Her stress level was through the roof." Her partner also stated that when Complainant worked self-checkout, she became withdrawn and extremely moody.

After analyzing the evidence which establishes the harm sustained by Complainant, with note of the serious nature and duration of her suffering, and upon consideration of damages awards reached in comparable cases, we find that Complainant is entitled to \$75,000 in non-pecuniary damages. We find that this case is analogous to Kristopher M. v. Dep't of the Treasury, EEOC Appeal No. 2019001911 (March 3, 2020) in which OFO awarded \$75,000 in non-pecuniary damages when the complainant was denied a reasonable accommodation for his disability for several years and experienced physical harm based on the agency's failure to accommodate and emotional harm consisting of frustration, anxiety, and emotional distress. We find this amount is not monstrously excessive and takes into account the nature and the duration of the harm experienced by Complainant.

Accordingly, we MODIFY the Agency's final decision and we REMAND this matter to the Agency for further processing in accordance with the ORDER below.

ORDER

The Agency is ORDERED to take the following actions:

1. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$75,000 in non-pecuniary compensatory damages.
2. The Agency shall pay Complainant for the attorney's fees incurred with this appeal in accordance with the paragraph below entitled "Attorney's Fees."

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), 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 the date this

decision was issued. 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

April 24, 2020
Date