



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

██████████
Kristopher M.,¹
Complainant,

v.

Steven T. Mnuchin,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal No. 2019001911

Hearing No. 480-2014-00827X

Agency No. IRS-14-0356-F

DECISION

Following its February 26, 2019 final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination, in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ.

BACKGROUND

During the period at issue, Complainant worked for the Agency as an Internal Revenue Agent, GS-12, in Camarillo, California.

On May 23, 2014, Complainant filed a formal EEO complaint alleging the Agency failed to provide him with an effective accommodation for his disability (paralysis in left arm) in the form of assistive computer technology.

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.

After an investigation of the claim, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

Following the hearing, the AJ issued a decision concluding Complainant established a violation of the Rehabilitation Act when the Agency failed to accommodate Complainant's disability for a period of two years starting in September 2012 (the period after Complainant received Dragon software training) through April 2014 when Complainant initiated EEO Counselor contact regarding the ongoing computer issues he encountered with the Dragon software. The AJ determined that after enduring two years of computer issues including screen-freezing, applications shutting down, loss of data, and the inability to run other software programs necessary for his job (Microsoft Office applications such as Word, Excel and an Agency created application called RGS) simultaneously with the Dragon software, Complainant ultimately requested that the Dragon software be removed from his computer. The AJ stated that these issues prevented Complainant from effectively performing his duties and ultimately caused Complainant to develop a new disability – carpal tunnel syndrome in his *right* hand and pain in his right arm and neck – which limited him to working 32 hours a week instead of 40 hours a week. Therefore, the AJ found that the Dragon software provided Complainant by the Agency was not an effective accommodation.

By way of relief, the AJ awarded Complainant \$75,000 in compensatory damages and attorney's fees and costs,² as well as ordering the Agency to provide Complainant with an effective reasonable accommodation without undue delay. Specifically, the AJ suggested that the Agency begin with reinstalling the Dragon software on Complainant's computer, provide the necessary, consistent, and on-going training and technology support resources to Complainant until Complainant can fully use his computer and until the Dragon software operates properly. The AJ further ordered that the Agency reconvene and determine an alternative effective accommodation if the Dragon software could not effectively accommodate Complainant's disability.

The Agency issued a final order rejecting the AJ's finding of discrimination. Simultaneously, the Agency filed the instant appeal challenging the AJ's finding of discrimination and order for relief. The Agency makes several arguments on appeal. First, the Agency argues that the AJ did not indicate in the decision that Complainant was a qualified individual with a disability. The Agency also argues that the AJ improperly concluded that the Agency was liable for failing to provide an effective accommodation without requiring Complainant to present evidence that an effective accommodation existed.

The Agency further disputes the AJ's damages award. Specifically, the Agency argues that the AJ awarded damages for a period more than forty-five days before Complainant initiated EEO Counselor contact which was contrary to the forty-five day time limit for EEO Counselor contact, pursuant to 29 C.F.R. §§ 1614.107(a)(2) and 1614.105(a)(1).

² The AJ issued this determination in a separate Order dated April 10, 2019.

The Agency explains that the AJ backdated its alleged failure to accommodate to September 2012, a period that was one year and eight months before Complainant had initiated EEO Counselor contact. The Agency also argues that the AJ improperly awarded damages for a period (2012 to the hearing in 2018) after Complainant had informed the Agency that he no longer wanted the Dragon software in 2016. Finally, the Agency argues that the AJ improperly awarded compensatory damages without citing to medical evidence indicating that Complainant's right hand, arm, and shoulder conditions were connected to the Agency's alleged failure to accommodate.

In response to the Agency's appeal, Complainant argues, through counsel, that the AJ's discrimination determination and damages should be upheld.

ANALYSIS AND FINDINGS

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.

Preliminary Matter – Period at Issue

As an initial matter, we address the Agency's contention that the AJ incorrectly determined that the alleged discrimination occurred from September 2012 through April 2014. Our review of the record supports that the AJ correctly identified the period at issue.

Complainant indicated in box 20 on his formal complaint that the discrimination was "on-going since May 2012." Complainant also stated in an attachment to his formal complaint that he had been discriminated against "since May 2012 and ongoing when the Agency failed to provide an effective reasonable accommodation for my injury." Complainant further noted in his affidavit that the Agency incorrectly identified the period at issue as beginning on April 16, 2014, and he did not understand how the Agency determined this date.

The AJ correctly determined that although Complainant requested the reasonable accommodation for the Dragon software in May 2012, it was not until after Complainant had received Dragon software training and after he started using this software on his computer when it became apparent in September 2012, that Complainant was having significant computer problems with the Dragon software that the Agency failed to resolve. Therefore, it was reasonable for the AJ to conclude that Complainant's allegation of discrimination began from September 2012 through his contact with the EEO Counselor in April 2014.

We also address the Agency's argument that the forty-five day time limit for EEO Counselor contact was not met if the alleged discrimination occurred in September 2014, because it occurred one year and eight months before Complainant initiated EEO Counselor contact. The Commission has specifically held that the denial of a reasonable accommodation constitutes a recurring violation that repeats each time the accommodation is needed. Harmon v. Office of Personnel Management, EEOC Request No. 05980365 (Nov. 4, 1999). Therefore, the employer has an ongoing obligation to provide a reasonable accommodation and failure to provide such an accommodation constitutes a violation each time the employee needs it. See "Threshold Issues," EEOC Compliance Manual, at 2-IV(C)(1)(a) (revised July 21, 2005). Since the matter is a recurring violation, Complainant's EEO Counselor contact was timely in challenging this ongoing alleged failure to provide him with an effective reasonable accommodation.

Therefore, we find that the AJ properly considered whether the Agency failed to accommodate Complainant's disability for a period of two years occurring from September 2012 through April 2014, when it did not resolve the significant problems Complainant experienced with the Dragon software previously installed on his computer that significantly impeded his performance of the essential functions of his position.

Reasonable Accommodation

Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p).

To establish that she was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a "qualified" individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide him with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002). A qualified person with a disability is an individual who can perform the essential functions of the position with or without an accommodation.

Here, Complainant has alleged that the Agency failed to provide him with an effective accommodation when his computer, over a two-year period, failed to work properly with the Dragon software previously installed as an accommodation for his disability.

The record supports a finding that Complainant is a qualified individual with a disability. During the hearing, Complainant testified that he is paralyzed in his left arm resulting from a 1989 injury. As such, he cannot, among other things, use a computer keyboard or mouse with his left hand. Based on this evidence, we find that the AJ correctly determined that it is undisputed that Complainant is an individual with a disability within the meaning of the Rehabilitation Act.

It is also undisputed that Complainant was qualified for his job and was performing in a satisfactory manner.

Due to his disability, for a seven-year period from 2005 (when he was first hired) through 2012, Complainant requested, and the Agency provided him with, a BAT keyboard as a reasonable accommodation.³ However, Complainant testified that in 2012, the BAT keyboard was no longer sufficient for him to complete his job duties because of an increased workload (specifically related to documentation and typing) which caused “serious sprain” and “fatigue, tingling pain” in his right hand, the only hand he was able to use. Consequently, Complainant requested the Dragon software in May 2012, which his first level supervisor (“S1”) approved.

The Agency policy reflects that once a reasonable accommodation request is approved by the deciding official, the Reasonable Accommodation Coordinators (“RAC”) “will secure all services and/or equipment needed to fulfill the request from various support organizations.” The policy indicates that the RAC is responsible for coordinating with the Information Resources Accessibility Program (“IRAP”) and the Modernization and Information Technology Services (“MITS” or “IT”). The policy further indicates that the RAC is also “responsible for following up with the IRAP until the employee receives the accommodation.”

On June 20, 2012, the RAC emailed Complainant regarding the delivery of Dragon software. In the email, the RAC informed Complainant that his reasonable accommodation request “will be met when you receive the items, and they are working correctly and to your satisfaction.” However, the RAC testified during the hearing that a reasonable accommodation request would have been met *once the item is received even if it did not function properly*. In Complainant’s case, the RAC stated that she considered the Dragon software an effective accommodation once the software was delivered and installed. The RAC further explained that she initially contacted IRAP and MITS to coordinate Complainant’s request for the Dragon software, but she conceded that she did not continue coordinating these efforts during the two-year period Complainant experienced difficulties with the software because she stated that it “not her role” to do so. She asserted, rather, that it was “IT and IRAP’s role.”

Similarly, S1 testified that in the beginning the RAC was “involved quite a bit,” but when Complainant began to experience computer problems, “[S1 and Complainant] directly worked with IT and IRAP.” S1 also testified that the RAC emailed him on August 14, 2012, informing him that she was closing Complainant’s reasonable accommodation request as “granted” as of August 10, 2012, even though Complainant had not started Dragon training and S1 acknowledged that, at the time, it was “too soon to tell” whether Dragon software was working properly.

The record reflects that Complainant received Dragon software training from August 14 - 16, 2012 and from August 28 - 31, 2012.

³ The BAT keyboard allows the individual to conduct one handed data entry.

Complainant, however, encountered significant difficulties operating the software on his Agency computer. Complainant testified that he had “immediate” problems with the software and the computer would freeze and run slower than normal. In a September 6, 2012 email, the Dragon software trainer informed Complainant and the RAC that while Complainant’s computer met the “minimum requirements to install and use Dragon, performance is likely to be lower than optimal.” The Dragon software trainer noted that Complainant’s computer would require 3 to 3.5 GB RAM on an XP system at 2.4 GHz or faster processor opposed to the 2 GB RAM and 1 to 1.5 GHz processor Complainant had, because Revenue Agents such as Complainant tend to operate 5-10 software applications at a time.

In response to these deficiencies, the RAC emailed S1 on September 7, 2012, requesting approval for Complainant to “get a faster laptop that would work better with the Dragon software.” However, the record indicates that Complainant did not receive the requested higher-powered laptop until nearly two *years* later in 2014, and even then, Complainant contests S1’s testimony that the laptop he eventually received was new. The RAC testified during the hearing that she could not recall whether this request was filled or whether she followed up with Complainant.

On January 29, 2013, Complainant emailed several individuals including the RAC, the IRAP, the MITS employee, the Dragon trainer, and S1 that he had received the latest version of Dragon software installed on his computer, but his “computer is not up to the task of running Dragon.” Complainant further explained that “due to the load I am placing on my computer, it is functioning at substandard levels, which, in some situations, results in the undoing of any gained efficiencies that came with loading these programs.” Complainant also offered “to pay out of [his] pocket to help bring my computer up to par.” (Emphasis in original).

The record indicates that from January 2013 through November 2013, Complainant submitted approximately 61 ticket requests with MITS to resolve various problems he experienced with the Dragon software.

By May 9, 2014, S1 emailed the IRAP directly about the series of issues Complainant had experienced over a two-year period. S1 stated that:

In May of 2012, [Complainant] requested Dragon (voice-recognition) software installed on his computer as part of his reasonable accommodation. Since the software was installed on his computer two years ago, it has caused major continuous computer problems. The main issues being that it does not work well with RGS, the program we use as Revenue Agents. We have tried to resolve these issues for two years in every way possible working with multiple divisions including MITS and RGS coordinators without any success (emphasis in original). [Complainant’s] computer was migrated last month to Windows 7 and he received a new and what seems to be faster computer. However, he is still having lots of computer issues due to Dragon.

[Complainant] has dedicated hours upon hours for months on the phone with help desk and in-person MITS in an effort to make Dragon software work. This has had a major negative impact on productivity levels and frustration beyond belief. He is simply asking for a computer that works properly so he can do his job. We are now in the process of uninstalling Dragon off his computer which is not an easy process in itself.

Are there any other voice recognition software available that he can use? What are our options?

Four days after sending this email, S1 and Complainant's second level supervisor ("S2") had a meeting with Complainant on May 13, 2014. S2's meeting notes reflect that Complainant could use two computers as a possible solution and the notes also reflect that Complainant was experiencing "tingling" in his hand. Although Complainant testified during the hearing that he received two computers, he explained that one computer had the Dragon software, the other computer had the Windows 7 software, but the Windows 7 software was not working. Thus, Complainant's computer issues remained unresolved.

The record further reflects that Complainant then sought a 64-bit computer as a possible solution. On July 11, 2014, S2 emailed Complainant that he believed that the RAC had placed a ticket for him to receive a 64-bit computer. However, the record indicates that the IT Supervisor did not inquire whether there was an approved 64-bit operating system available until November 2014. Specifically, on November 7, 2014 the IT Supervisor emailed S2, Complainant, and other individuals that Complainant was using the "most current model" available. The IT Supervisor further stated that:

since we don't know if/when we will be able to provide a computer with more resources, I think you will have to limit how many programs you have open at the same time. For example, only Word open or Outlook open but not both. And maybe if you have office open you can't have RGS nor IDRS open at the same time.

However, Complainant informed the MITS employee, the IRAP employee, the IT Supervisor, S2, and others in a December 18, 2014 email that it was not possible for him to run just one program at a time. Complainant explained that that the Agency programs (RGS and IDRS) involved use of other programs for them to work.⁴ Complainant further stated that his position duties consisting of closing, opening, and changing case statuses required that he use multiple systems to conduct these duties. Complainant reiterated that limited computer resources attributed to his inability to use the Dragon software simultaneously with the other required programs necessary to fulfill the duties of his position.

⁴ Complainant stated that "RGS involves MS Word, and PDF; IDRS is opened in conjunction with MS Word and/or PDF; I tend to use MS Word in conjunction with MS Excel."

Complainant explained that he could not operate both the Dragon software and the other necessary programs without encountering significant computer problems.

On January 7, 2015, after two frustrating years, Complainant informed management officials, via email, that he no longer wanted to use the Dragon software. Complainant stated:

Sometime after I was migrated to Windows 7 in spring of 2014, I discovered a dictation program that came (out of the box) with Windows 7. This program looks like it will do the job; I am willing to try anything if it means I can abandon this long trial-and-error process I've experienced with Dragon.

This resident program seems much more simplistic and appears to require less resources; therefore it appears to help with – more stable computer performance. While someone sorts out the Dragon hardware requirements and software conflicts, I've experienced, I am compelled to abandon Dragon and use this stripped down voice-recognition program.

Complainant testified during the hearing that he initially thought that the Windows 7 voice recognition program would be useful. However, Complainant later learned that it was not, and he returned to using the BAT keyboard fulltime.

As a result of repetitive use of his right hand from using the BAT keyboard, Complainant was diagnosed with Carpal Tunnel Syndrome in right his hand and shoulder sprain in right arm. A copy of Complainant's accepted claim for the Office of Workers' Compensation Programs (OWCP) reflects these diagnoses and indicates that Complainant was restricted to working 8 hours per day up to 32 hours a week.

Our review of the record supports the AJ's finding that the Agency subjected Complainant to discrimination when it failed to satisfy its *ongoing* obligation to provide Complainant with an effective accommodation. Because an employer has an ongoing obligation to provide a reasonable accommodation, failure to provide such an accommodation constitutes a violation each time the employee needs it. See "Threshold Issues," EEOC Compliance Manual, at 2-IV(C)(1)(a) (revised July 21, 2005).

As a general rule, an Agency can either accept an employee's reasonable accommodation request or demonstrate that the request would cause an undue hardship. Here, the Agency accepted Complainant's request for the Dragon software and incurred an ongoing obligation to provide Complainant with the necessary computer resources to ensure that the Dragon software was effective. Therefore, the RAC incorrectly determined that she provided Complainant an effective reasonable accommodation as of August 10, 2012, when she closed Complainant's reasonable accommodation request as granted. Indeed, the RAC could not have known at the time whether the Dragon software would help Complainant to perform his essential functions because Complainant had not been trained on the Dragon software and he had not used the software on his computer.

Moreover, once Complainant made the RAC aware of his computer issues, the RAC still had an ongoing obligation to help coordinate and facilitate efforts with the IRAP, MIRS and Complainant as to how to resolve these issues for as however long Complainant continued to have computer issues.

The record indicates that the efforts made to resolve Complainant's computer problems were either unduly delayed or only partially implemented. Although S1 approved Complainant for a faster laptop as early as September 2012, the record reflects that Complainant did not receive the laptop until 2014. The record supports a finding that in May 2014, Complainant discussed with S1 and S2 the possibility of using two computers. However, Complainant testified that while he received two computers, only one computer had the Dragon software and the Window 7 voice recognition program on the other computer did not work. In July 2014, Complainant inquired about getting a 64-bit computer because he believed that it would allow him to run the Dragon software simultaneously with the other computer software he used daily. However, the record supports a finding that IT Supervisor did not inquire about the status of this request until November 2014. The IT Supervisor determined that there were no 64-bit computers available for an undetermined period, and the IT Supervisor suggested that Complainant limit running several computer software programs simultaneously even though this not possible. While the Agency provided Complainant and all Revenue Agents with a 64-bit computer two years later in 2016, Complainant had already requested that the Dragon software be removed from his computer, and he had already returned to using the BAT keyboard fulltime.

Despite these efforts, the record reflect that the Dragon software was not an effective accommodation. For a period of two years, the Dragon software did not enable Complainant to perform the essential functions of his position because his computer was not capable of running the multiple computer systems needed to complete these duties simultaneously with the Dragon software. Because the Dragon software was not an effective accommodation, Complainant sustained a work-related injury after resuming use of the BAT keyboard fulltime.

The Agency has failed to explain why it did not immediately procure Complainant a better laptop capable of supporting his software needs while running Dragon and instead made him wait for years to receive one. Simply providing him with Dragon software without the supporting hardware did not amount to an effective accommodation. The Agency has made no showing whatsoever that procuring the necessary hardware would have constituted an undue hardship.

The Agency also made inadequate efforts, despite repeated requests from Complainant, to explore alternative accommodations when the one provided was ineffective. We take administrative notice that there are abundant resources available within the Federal government to help agencies determine effective reasonable accommodations for their employees. The Department of Defense's Computer/Electronic Accommodations Program ("CAP") (<https://www.cap.mil/>) is one example. Among other things, the CAP program conducts "needs assessments" to identify potential solutions to assist federal employees in performing the essential functions of his/her job.

Therefore, for the reasons discussed above, we find that the AJ correctly determined that Complainant was discriminated against when the Agency failed to provide Complainant with an effective accommodation over a two-year period after the Dragon software installed on Complainant's computer prevented him from completing the essential functions of his position.

Non-pecuniary Damages

Non-pecuniary compensatory damages 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)).

The AJ awarded \$25,000 in compensatory damages for emotional distress and \$50,000 for physical pain and suffering for a total of \$75,000.00 in nonpecuniary damages. We conclude the award is appropriate and consistent with the amounts awarded in similar cases.

To the extent that the Agency argues that Complainant failed to provide medical documentation to support the AJ's compensatory damage award, we note that 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 Complainant concerning 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.

Here, Complainant testified at the hearing that he suffered emotional harm consisting of frustration, depression, anxiety, and emotional distress from September 2012 through April 2014 when he tried to find solutions to his computer issues related to the Dragon software. Complainant stated that,

Here I am how many years into this job and it was just extremely disappointing. And it would cause... depression outside of work and anxiety, because I knew the

next day – I mean, it wasn't like I was going to work to be – feel productive. I mean, when you go – when you get done with the job and you feel like your total day was wasted and you didn't make any progress in what you're assigned to do.

With respect to physical harm, Complainant provided testimony and medical documentation of the physical harm he experienced as a result of the Agency's failure to provide him an effective accommodation. Complainant testified that he began to feel "sensations" in his right arm as early as 2012. Because the symptoms got worse, Complainant explained that he filed a workers' compensation claim with OWCP in 2014 and it was determined that he had developed carpal tunnel and sprain in his right shoulder and arm. Complainant further explained that his approved OWCP claim restricts him to working 32 hours a week. A copy of Complainant's June 25, 2014 accepted OWCP claim confirms that Complainant was diagnosed with work-related carpal tunnel syndrome and right shoulder impingement based on physician reports from May 2014. Other OWCP documents shows these conditions are permanent and limit Complainant to eight hours of repetitive movements with his wrist and elbow and no more than 32 hours of work a week. Based on this evidence, we conclude that Complainant has established a sufficient nexus, at least in part, between his development of repetitive motion injuries in his right hand and arm and the Agency's failure to provide him with an effective accommodation for his disability (paralysis of the left arm).

We find that an award of \$75,000 is neither monstrously excessive nor the product of passion or prejudice and is consistent with prior EEOC precedent. See Henery v. Dept. of the Navy, EEOC Appeal No. 07A50034 (Sept. 22, 2005) (complainant awarded \$65,000 in compensatory damages due to agency's failure to accommodate complainant's disability for a four year period where complainant suffered from frustration, negativity, and loss of sleep and physical pain associated with resulting excessive walking, and caused significant increase in complainant's need for medical treatment, as well as increase in physical and emotional harm); Court v. U.S. Postal Serv., EEOC Appeal No. 07A10114 (May 15, 2003) (complainant awarded \$60,000 in compensatory damages due to agency's failure to accommodate complainant's disability which resulted depression and physical suffering for more than two years).

Therefore, we find no basis to disturb the AJ's award of \$75,000 in compensatory damages.

Attorney's Fees and Costs

By federal regulation, the Agency is required to award attorney's fees and costs for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. EEOC Regulation 29 C.F.R. § 1614.501(e)(1)(ii). Reasonable costs can include court reporter fees, transcripts, printing, witnesses, photocopying, mileage, postage, telephone calls, or any other reasonable out-of-pocket expense incurred by the attorney that are normally charged to a fee-paying client in the normal course of providing representation. 29 C.F.R. § 1614.501(e)(2)(ii)(C); MD-110 at 11-12 and 11-13.

The AJ determined in an April 10, 2019 Order that Complainant should be awarded attorney's fees and costs amounting to \$68,761.69. Because neither Complainant nor the Agency dispute amount this we find no reason to disturb the AJ's finding on this award. Therefore, we find that Complainant is entitled to 68,761.69 in attorney's fees and costs.

CONCLUSION

Accordingly, we REVERSE the Agency's final order rejecting the AJ's findings of discrimination. We MODIFY the AJ's order as stated in our Order below. We REMAND this matter to the Agency in accordance with the ORDER below.

ORDER

The Agency is ORDERED to take the following actions:

1. Within thirty (30) calendar days from the date of this decision is issued, the RAC, representatives from IRAP and MITS, Complainant's management, and Complainant shall participate in an *interactive process* of no more than sixty days (60) to determine what effective accommodation(s) (including but not limited to the Dragon software and supporting hardware) the Agency can provide that will allow Complainant to effectively perform the essential functions of his job. During this process, the Agency should seek advice from experts in the assistive technology field, and testing of various options may occur. Once an effective accommodation is agreed upon, the Agency shall provide such an accommodation in a prompt manner, as well as providing consistent and ongoing support and training.
2. The Agency shall offer Complainant the *option* to have his performance standards suspended while he and Agency officials engage in the interactive process (described in paragraph 1 of this Order) to determine an effective accommodation for his disability.
3. Within sixty (60) calendar days from the date of this decision is issued, the Agency shall pay Complainant \$75,000 in compensatory damages.
4. Within sixty (60) calendar days from the date of this decision is issued, the Agency shall pay Complainant the \$68,761.69 in attorney's fees and costs ordered by the AJ.
5. Within ninety (90) calendar days from the date of this decision, the Agency will require the RAC, S1 and S2 to take at least eight (8) hours of in-person EEO training focusing on processing reasonable accommodation requests involving assistive technology and the Agency's ongoing obligations to engage in the interactive accommodation process as required by the Rehabilitation Act.

POSTING ORDER (G0617)

The Agency is ordered to post at its Camarillo, California office 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 (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she 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 this decision becoming final. 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

March 3, 2020

Date