



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

[REDACTED]
Chara S.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2019001100

Hearing No. 410-2016-00363X

Agency No. 200I-0316-2015104421

DECISION

On November 9, 2018, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's October 5, 2018 final order concerning an EEOC Administrative Judge's (AJ) September 24, 2018 Decision on Damages and Attorneys' Fees related to the AJ's finding that the Agency violated Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. when it delayed approval of Complainant's part-time telework request by approximately four months.²

BACKGROUND

During the relevant timeframe, Complainant worked as a GS-11 Loan Technician at the Agency's Atlanta Regional Office in Decatur, Georgia. Complainant was injured in an accident while on active duty in 1998 and experiences complications from permanent medical conditions including spinal radiculopathy and spondylosis (degeneration) in the lumbosacral and cervical regions with

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.

² The AJ's decision on the merits concluded that the Agency should have approved the telework request on or about March 13, 2015 but did not do so until July 20, 2015.

symptoms including chronic spinal pain, muscle spasm, and nerve damage that impacts her upper right extremities.

On October 21, 2015, Complainant filed a formal EEO complaint alleging that the Agency discriminated against her on the basis of disability when:

1. On July 7, 2015, during a meeting with Human Resources Director, she asked Complainant personal questions regarding her disability, medications and medical treatment; and
2. On July 20, 2015, the Human Resources Director notified Complainant that she had been approved to telework for 90 days, although Complainant requested telework as a permanent reasonable accommodation.³

Following an investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ). The AJ assigned to the matter held a hearing and, on August 6, 2018, issued a bench decision finding that the Agency improperly delayed the implementation of Complainant's reasonable accommodation (RA) request which should have been granted "on or shortly after March 13, 2015." Thereafter, on August 14, 2018, the parties submitted written closing arguments for the damages phase of the hearing.

In Complainant's August 14, 2018 Closing Argument on Damages, Complainant requested the following: (a) \$16,125.00 to compensate her for the loss of income and use of leave resulting from her absence from work after April 7, 2018; (b) \$4,017.66 in past out-of-pocket medical expenses; (c) \$8,000.00 for future medical expenses; and (d) \$150,000 in non-pecuniary compensatory damages for, inter alia, physical pain, emotional pain and suffering, mental anguish and loss of enjoyment of life. The basis for the first three items of Complainant's damages claim was that Complainant suffered an exacerbation of her pre-existing conditions on April 7, 2015 because the Agency unduly delayed its response to her February 20, 2015 request for reasonable accommodation. Complainant explained that she severely exacerbated her existing medical conditions through the simple act of reaching for a binder that was located on a shelf above her desk. Complainant claimed that her request included lost wages for 34 full days (272 hours) that Complainant missed work during the period April 7 to May 25, 2015 and an additional 57 half-days (228 hours) during the period May 26 to August 14, 2015.

³ The EEOC Administrative Judge (AJ) assigned to the matter determined that claim (2) actually entailed two separate claims: whether the recurring 90-day telework accommodation approved by the Agency, as opposed to Complainant's requested permanent telework accommodation, effectively accommodated Complainant's condition and whether the Agency unreasonably delayed its decision to approve Complainant's telework request. The AJ subsequently granted summary judgment in favor of the Agency regarding all claims except the Agency's delay in implementing Complainant's reasonable accommodation request.

In his decision addressing damages, the AJ concluded that Complainant failed to establish a causal connection between the exacerbation of her medical condition caused by the event on April 7, 2015 and the Agency's unlawful delay in the approval of her RA request. The AJ noted that had the Agency approved the RA request on or about March 13, 2015, Complainant may or may not have been in the office on April 7, 2015 since her RA request was for three days per week, not specific days of the week. Accordingly, the AJ concluded that it was not possible to determine whether April 7, 2015, would have been one of Complainant's three telework days, or whether she would have been in the office that day regardless of the status of her RA request. The AJ also concluded that the record failed to establish that the three-week delay in part-time telework was the proximate cause of the gradual "degenerative changes" that Complainant's physician (P1) found to be the cause of her post-April 7, 2015 pain or medical problems/costs.⁴ Accordingly, the AJ concluded that Complainant was not entitled to either past or future pecuniary compensatory damages or non-pecuniary damages associated with the April 7, 2015 injury.

With regard to non-pecuniary compensatory damages, the AJ found that Complainant presented evidence that she endured some degree of additional pain and discomfort from having to work in the office full-time. However, the AJ also found the record devoid of evidence establishing to what extent Complainant's specific symptoms/side effects were caused or otherwise exacerbated by the Agency's delay in approving her RA request. Given the limited evidence in the record, the AJ awarded Complainant \$6,000 in non-pecuniary damages.

As a result, the AJ ordered the Agency to: (1) pay Complainant compensatory damages in the amount of \$6,000; (2) restore Complainant 77.25 hours of annual leave; (3) provide the responsible management officials eight hours of EEO training with respect to the Agency's obligations under the Rehabilitation Act, with an emphasis on reasonable accommodation; (4) consider taking appropriate disciplinary action against the discriminating management officials; and (5) post a notice that the Agency violated the Rehabilitation Act at its facility. The Agency subsequently issued a final order fully implementing the AJ's decision. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that she is entitled to a larger compensatory damages award. Complainant argues that the Agency's delay in granting her reasonable accommodation contributed to an exacerbation of her chronic pain and depression. Complainant claims that the April 7, 2015 trip to the emergency room was the result of the gradual deterioration of her preexisting medical condition and that work at the office contributed to the degeneration of her medical condition.

⁴The record shows that on April 16, 2015, P1 diagnosed Complainant's pain as due to "Degeneration of Cervical Intervertebral Disc" and "Cervical Radiculopathy." Also, in July 2015, after Complainant had obtained an MRI, P1 concluded that Complainant's "MRI scan shows [only] postoperative findings of her [prior] [2012] C5/C6 ACDEF. Her pre-existing cervical spine degenerative changes likely became aggravated following the event at work."

Thus, Complainant contends that she has proven that the exacerbation of her preexisting disabilities that manifested on and following April 7, 2015 was due in material part to the Agency's unjustified, near three-week delay in granting Complainant's reasonable accommodation of telework. Accordingly, Complainant requests that the Commission increase the compensatory damages award.

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 Bd., 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review whether, or not, a hearing was held.

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

ANALYSIS AND FINDINGS

Initially, we note that Complainant is solely challenging the award of compensatory damages, not the award of attorney's fees. Accordingly, our review will be confined to the compensatory damages award.

When discrimination is found, the agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore him as nearly as possible to the position he would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). To receive an award of compensatory damages, a complainant must demonstrate that he has been harmed as a result of the agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsideration denied, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14. Compensatory damages may be awarded for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) which are directly or proximately caused by the agency's discriminatory conduct. EEOC Notice No. 915.002 at 8. The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part. Id. at 11-12.

The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. Id. at 14.

Non-Pecuniary Compensatory Damages

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).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr 18, 1996) (citing Carle v. Dep't of the Navy, EEOC. Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from a complainant concerning his or her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

Statements from others including family members, friends, health care providers, other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his burden in this regard. Id. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

An award of non-pecuniary, compensatory damages should reflect the extent to which the Agency's discriminatory action directly or proximately caused the harm, as well as the extent to which other factors also caused the harm. See Johnson v. Dep't of the Interior, EEOC Appeal No. 01961812 (June 18, 1998). It is the complainant's burden to provide objective evidence in support of his claim and proof linking the damages to the alleged discrimination. Papas v. U.S. Postal Serv., EEOC Appeal No. 01930547 (Mar. 17, 1994); Mims v. Dep't of the Navy, EEOC Appeal No. 01933956 (Nov. 23, 1993).

While the evidence shows that Complainant's April 7, 2015 injury was likely due to cervical degenerative changes, substantial record evidence supports the AJ's finding that Complainant failed to establish that the three-week delay in granting part-time telework was the proximate cause of the degenerative changes or that such injury would not have occurred had the Agency granted Complainant's RA request three weeks earlier. Further, the record is clear that Complainant experienced severe emotional distress, anxiety, and panic attacks; however, those conditions were attributed by her doctors to either pre-existing conditions or other factors not related to discrimination such as divorce and family issues. Thus, the Commission finds that \$6,000.00 is an appropriate amount of non-pecuniary damages as Complainant presented evidence to establish that the Agency's actions caused at least some exacerbation of her conditions. See Phillis W. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120180863 (June 5, 2019) (complainant awarded \$5,000 for exacerbation of pre-existing physical conditions as a result of delay in providing reasonable accommodation); Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120132114 (May 29, 2015) (\$5,000 in nonpecuniary damages where complainant suffered from insomnia, headaches, mood swings, marital issues, and exacerbation of physical symptoms); Harriet M. v. Dep't of Agric., EEOC Appeal No. 0120150114 (Dec. 27, 2017) (\$5,000 awarded where agency's failure to accommodate exacerbated complainant's preexisting conditions of depression, sleeplessness, and suicidal thoughts)

Thus, the Commission finds that substantial evidence supports the AJ's award of \$6,000. This award is not motivated by passion or prejudice, not "monstrously excessive" standing alone, and is consistent with the amounts awarded in similar cases.

CONCLUSION

Accordingly, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order that adopts the AJ's award of damages.⁵

ORDER

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

1. Within 60 days of the date this decision is issued, the Agency shall pay Complainant non-pecuniary compensatory damages in the amount of \$6,000.00.
2. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$33,698.74 in attorney's fees and \$6.76 in costs.
3. Within 90 days of the date this decision is issued, the Agency shall restore to Complainant 77.25 hours of annual leave.

⁵ We note that the Agency's untimely response to Complainant's appeal was not considered.

4. Within 90 days of the date this decision is issued, the Agency shall provide eight (8) hours of training to the officials involved in this case, including the officials identified as the two Local Reasonable Accommodation Coordinators and the Loan Guaranty Officer. The training shall emphasize the Agency's obligation to provide reasonable accommodations for disabilities.
5. Within 60 calendar days after this decision is issued, the Agency shall consider taking disciplinary action against the management officials identified above. The Agency shall report its decision on discipline to the Compliance Officer. 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 or reasons for its decision not to impose discipline.
6. The Agency shall post a notice in accordance with the paragraph below.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Veterans Benefit Administration Atlanta Regional Office in Decatur, Georgia, copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

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 CFR § 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 (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

July 16, 2020

Date