



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

[REDACTED]

James R.,<sup>1</sup>  
Complainant,

v.

Andrew Wheeler,  
Administrator,  
Environmental Protection Agency,  
Agency.

Appeal No. 2019003256

Hearing No. 440201100024X

Agency No. 20100047R05

**DECISION**

Complainant timely appealed to the Equal Employment Opportunity Commission (“EEOC” or “Commission”), pursuant to 29 C.F.R. § 1614.403, from an October 25, 2018 Final Agency Decision (“FAD”) on the matter of compensatory damages for an equal employment opportunity (“EEO”) complaint, where the Commission found the Agency to have discriminated against Complainant in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (“Rehabilitation Act”), as amended, 29 U.S.C. § 791 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Special Agent (“SA”) Criminal Investigator, GS-13, Criminal Investigation Division (“CID”), EPA Office of Criminal Enforcement, Forensics, and Training, in Chicago, Illinois.

On March 25, 2010, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (high blood pressure) and reprisal for engaging in prior protected EEO activity when:

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<sup>1</sup> 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.

1. On February 3, 2010, his fourth-level supervisor ("S4") denied his request for a reasonable accommodation, and,
2. He was subjected to harassment by his second-level supervisor ("S2") because of his disability.

At the conclusion of its investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a FAD or a hearing before an EEOC Administrative Judge ("AJ"). Complainant timely requested a hearing. The Agency submitted a Motion for Summary Judgment, which, over Complainant's objection, the AJ granted on May 7, 2012. The Agency issued a Final Order adopting the AJ's finding that Complainant failed to prove discrimination as alleged on June 15, 2012. Complainant appealed to the Commission, and the matter was docketed under EEOC Appeal No. 0120122981.

On April 4, 2018, the Commission reversed the Agency's Final Order, finding that the AJ erred when he determined that air travel was an essential function of Complainant's job, and that it would cause the Agency undue hardship if it were to allow Complainant to use alternative means of travel as a reasonable accommodation. The Commission further determined that "the undisputed evidence of record establishes that Complainant was subjected to discrimination based on his disability," and opted not to remand the matter for a hearing, as the record was sufficiently developed for a decision in favor of Complainant.

The record includes the following undisputed facts:

As a Special Investigator, Complainant regularly traveled out of state to conduct investigations, serve search warrants, and perform other duties. In 1999, Complainant developed a phobia of flying during an Agency work trip when he was on a flight with extreme turbulence. Despite his efforts to overcome the phobia, Complainant could no longer travel by plane without his already high blood pressure spiking to dangerous levels. For approximately the next 10 years, Complainant traveled by alternate means to his work-related travel assignments, making up the time by traveling outside work hours and, if necessary, paying for hotel stays out of pocket.

On July 27, 2009, S4, at the request of S2, issued a memorandum entitled "Special Agent Travel by Airplane in the Performance of Official Duties" which stated that air travel was an "essential function" of the SA position, that "[SAs] refusing to travel by the method determined by CID management to be most advantageous to the Government will be unable to serve as criminal investigators." On November 4, 2009, Complainant asked to be excused from the air travel requirement, and continue to travel by alternate means as a reasonable accommodation for his high blood pressure. The request, along with medical documentation submitted by Complainant, was reviewed by the Agency's National Reasonable Accommodation Coordinator ("Coordinator").

On January 19, 2010, the Coordinator issued a letter reflecting her determination that Complainant's high blood pressure constituted a disability. The letter explains that Complainant's blood pressure is regulated by medication, however, his "life [is] negatively impacted for days before an approaching flight," and that despite the medication, he experienced abnormal blood pressure in preparation for a flight. According to Complainant's doctor "if made to fly...[Complainant could be at an] increased risk for stroke or heart attack while preparing to fly, while flying, or while preparing to return home," as the anxiety related to flying causes Complainant's blood pressure to rise.

On February 3, 2010, S4 formally denied the request, stating that flying was an essential function of Complainant's position. Complainant contacted an EEO counselor. He also alleged that S2 harassed them by, among other things, making comments that caused Complainant to fear that he would be forced to fly, and by extension fear for his job.

In EEOC Appeal No. 0120122981 (April 4, 2018), the Commission determined that Complainant is a "qualified individual with a disability," and that the AJ erred in determining that flying was an "essential function" of Complainant's position. Additionally, the Commission found that the Agency failed to establish that a reasonable accommodation allowing Complainant to take alternative transportation would create an undue hardship. While, the decision affirmed the AJ's finding that S2's actions did not rise to the level of a hostile work environment, the Commission considered them "ample evidence" of the Agency's failure to engage in good faith efforts to provide him with a reasonable accommodation, thereby triggering liability for compensatory damages under the Rehabilitation Act. See Teshima v. United States Postal Serv., EEOC Appeal No. 01961997 (May 5, 1998).

In addition to compensatory damages, the Commission found that Complainant was entitled to "a reasonable accommodation which allows him to travel by means other than air, including driving by car, in the performance of his job duties," and to have any leave that he used due to the Agency's failure to provide him with a reasonable accommodation restored. Among other things, the Commission further ordered the Agency to "provide a minimum of eight hours of in-person or interactive training to S2 and S4, with a particular emphasis on the Agency's obligations under Section 501 of the Rehabilitation Act."

At issue in the instant appeal are compensatory damages. The Commission ordered the Agency to conduct a supplemental investigation and make a determination on whether Complainant was entitled to compensatory damages within one hundred and twenty (120) days of the date of the Decision. The Agency was further instructed to issue a FAD to Complainant within thirty (30) days of reaching its determination on compensatory damages, explaining the amount of compensatory damages the Agency found him to be entitled to, and providing appeal rights to the Commission.

On May 22, 2018, the Agency sent Complainant's representative a supplemental affidavit with thorough questions regarding the impact the discrimination found by the Commission had on Complainant's health and finances, along with an opportunity to submit evidence in support of compensatory damages. Complainant responded fully on June 25, 2018. On unspecified dates, the Agency and Complainant engaged in unsuccessful settlement discussions.

On August 29, 2018, the Agency submitted a Letter of Partial Compliance to the EEOC Compliance Officer assigned to the case.<sup>2</sup> The Letter explained that Complainant was not provided with a reasonable accommodation because he retired from the Agency effective December 26, 2017. The Agency also provided documents establishing that it was prevented from considering disciplinary action or administering training to S2 and S4 because both retired prior to the Commission's April 4, 2018 Order. The Agency also submitted a settlement agreement where it agreed to pay Complainant \$73,000 for attorneys' fees "in exchange for Complainant releasing the Agency from all claims for attorneys' fees and costs" through the effective date of the agreement, August 7, 2018.

According to the August 29, 2018, Letter, the Agency was still "in the process of" reaching a determination on compensatory damages, leave restoration, and issuing a FAD on these matters with appeal rights. On October 9, 2015, Complainant submitted a Petition for Enforcement ("PFE") to the Compliance Officer when the Agency failed to timely issue the FAD on compensatory damages.

On October 25, 2018, the Agency issued a FAD on compensatory damages, awarding Complainant \$25,000 in nonpecuniary damages and \$59.19 in pecuniary damages. The Agency did not restore any leave, finding Complainant had not produced substantial evidence to support his claim for leave restoration. The instant appeal followed.

### ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to *de novo* review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, ("EEO MD-110") at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the *de novo* standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

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<sup>2</sup> EEOC Compliance No. 0620180454 (Jun. 6, 2019) (Complainant submitted Petition for Enforcement on Oct. 9, 2018, Agency's Final Compliance Report submitted on Nov. 6, 2018).

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., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. United States Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. § 2000e et seq., or Section 501 of the Rehabilitation Act of 1973 (“Rehabilitation Act”), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this “make whole” relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 119 S.Ct. 1906 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

#### *Scope of Compensatory Damages*

Complainant seeks compensatory damages for the Agency’s actions between 1999, when he was rendered unable to fly due to his disability, and his retirement in December 2017. The Agency determined that Complainant was entitled to compensatory damages beginning with his formal denial of accommodation on February 3, 2010, and ending on October 22, 2013, when the Deputy Director, CID, testifies that he spoke with Complainant and assured Complainant that he would not be required to fly, and that the Agency was “not interested” in firing him. We find the proper time frame to calculate compensatory damages from February 3, 2010, through October 15, 2015.

Based on our prior decision and the record, the February 3, 2010 denial of reasonable accommodations triggered Complainant’s anxiety and fear that he would be forced to fly or lose his job because it was when he became aware that he would be subject to the CID travel requirements under July 27, 2009 Memo. Moreover, the issue before us is compensatory damages arising from the Agency’s discriminatory act found in Claim 1, the February 3, 2010 formal denial of Complainant’s request for a reasonable accommodation.

Following the February 3, 2010 formal denial of accommodations, Complainant received a 2010 EPA-CID Medical Review deeming him “not medically qualified to perform the essential functions of the job,” because complainant’s medical conditions prevented him from flying. Despite his high blood pressure and phobia, Complainant was deemed “medically qualified” in his EPA-CID Medical Reviews from 2001 to 2009 with the exception of a year when he had a knee injury, when he was provided “recommendations” rather than deemed “not medically qualified.” Complainant received a status of “not medically qualified to perform the essential functions of his

job” in his 2011, 2012, and 2013 EPA-CID Medical Reviews.<sup>3</sup> These reviews were essentially re-issuances of the February 3, 2010 formal denial of a reasonable accommodation, creating the same implications for Complainant’s job and prolonging anxiety related to the February 3, 2010 formal denial of reasonable accommodations.

The Agency appears to argue that Complainant had an informal accommodation starting October 22, 2013, so that Complainant’s anxiety related to denial of reasonable accommodation should have ceased on that date. It is well established in matters of reasonable accommodation that the alleged discrimination is considered ongoing. See Burris v. Navy, EEOC Appeal No. 01200645531 (Jan. 10, 2007). Even if the conversation between the Deputy Director, CID and Complainant took place on October 22, 2013, which Complainant categorically denies, any assurances he provided were undermined by the EPA-CID Medical Reviews. While the Agency points out that Complainant did not receive a “proposed removal” and was never “forced” to fly, we still find Complainant’s anxiety related to the February 10, 2010 formal denial of accommodation to be present until concrete evidence was provided supporting his job security. Based on the record, the first EPA-CID Medical Review in the record to notify Complainant that he was once again “medically qualified” was issued on October 15, 2015.

#### *Pecuniary Damages*

EEOC policy guidance provides that pecuniary damages may be awarded for losses that are directly or proximately caused by the agency’s discriminatory conduct. See EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, (“EEOC Notice No. 915.002”) at 8 (July 14, 1992). Pecuniary losses are out-of-pocket expense incurred as a result of the agency’s unlawful action, including job search expenses, medical expenses, and other quantifiable out-of-pocket expenses that are incurred as a result of the discriminatory conduct. *Id.* Future pecuniary losses are likely to occur after resolution of the complaint. *Id.*

It is well established that the Commission will not normally award pecuniary damages that are not supported by documentation. The amount to be awarded for past pecuniary losses can be determined by receipts, records, bills, cancelled checks, confirmation by other individuals, or other proof of actual losses and expenses. See EEOC Notice No. 915.002 at Sec. II (A)(1). The EEOC has stated that documentation, typically in the form of receipts, bills, or physician statements are required to support an award of past pecuniary damages. Almera v. Dep’t of Veterans Affairs, EEOC Appeal No. 01A13618 (Jan. 30, 2002). The Commission ruled that such documentation can take the form of a credible statement itemizing expenses. Van Hoose v. Dep’t of the Navy, EEOC Appeal Nos. 01982628 and 01990455 (Aug. 22, 2001).

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<sup>3</sup> There is no EPA-CID Medical Review for 2014 in the record, and the Agency points to a 2015 EPA-CID Medical Review to support its argument that Compensatory damages are not warranted through Complainant’s retirement in December 2017.

A complainant's general uncorroborated testimony is insufficient to support an award of past pecuniary damages. Valentine v. Dep't of Justice, EEOC Appeal No. 07A30098 (Dec. 10, 2003) reconsideration denied EEOC Request No. Request No. 05A40372 (Feb. 27, 2004).

#### Restoration of Leave / TCTO

The Commission's April 4, 2018 Order required the Agency to "restore leave used by the Complainant due to the Agency's failure to provide him with a reasonable accommodation." The Agency did not restore any leave to Complainant because there was insufficient evidence that Complainant used leave in order to travel for work purposes. Complainant confirms that he did not use his leave for work travel, instead traveling outside of work hours on evenings or weekends when he used alternate transportation to get to a work event. However, Complainant argues that in lieu of leave restoration, he is entitled to Travel Compensatory Time Off ("TCTO"), for the hours outside of work that he spent traveling for work purposes. He also argues that he is entitled to reimbursement for expenses that arose as part of his alternate travel, such as hotel stays, and additional *per diem* payments.

Upon review, we see that none of the dates where Complainant alleges he is entitled to TCTO occurred between February 3, 2010 and October 15, 2015. Even if they did fall within the relevant time frame, Complainant has not shown that he is eligible to claim TCTO for any of the proffered dates. The Agency's TCTO Policy, located in Chapter 18 of the EPA Pay Administration Manual, provides that in order to obtain TCTO, an employee must submit a pre-travel estimate of TCTO to their supervisor for approval. The record is devoid of evidence indicating that Complainant timely requested approval for TCTO for the dates listed.

With respect to expenses arising from his use of alternate forms of travel, Complainant submitted a list of expenses, such as hotel stays, with corresponding dollar amounts, yet failed to provide receipts, or other sufficient proof of payment. Likewise, Complainant has not offered sufficient evidence to support his contention that for the work events where the Agency paid employees a *per diem*, he is entitled to the amount of the *per diem*, for each of the additional days he spent traveling to and from the event.

The record does not support an award of pecuniary damages for leave restoration, TCTO, additional *per diem* payments or reimbursement of work travel expenses.

#### Medical Expenses

Due to stress related to the denial of reasonable accommodations, Complainant developed continuous heartburn that caused chronic throat pain and sleep loss. He went to multiple doctor appointments, and was prescribed Pantoprazole. Complainant was prescribed additional medications following oral surgery, including Vicodin, Ibuprofen, Amoxicillin, Norco, Advil, Aspirin, and Ranitidine. He also offers a personal estimate for the cost of over the counter medication he took to relieve pain and heartburn associated with his stress over denial of reasonable accommodations. Complainant cites additional expenses when he paid to obtain his medical file and to meet with his doctor about a settlement.

Having thoroughly reviewed the evidence, we are unable to find documentation of payment for medical treatments or doctors' bills. The record includes a handwritten receipt and an insurance company document charging Complainant \$25, which he attributes to obtaining his medical file and the meeting with his doctor, yet neither document identifies what the transaction was for. As for medications, Complainant provides evidence that he received prescriptions, but no receipts. Other than Complainant's statement, there is no evidence that Complainant paid for any prescription or nonprescription medications to treat conditions related to the denial of reasonable accommodation, with the exception Pantoprazole.

Complainant states that he was prescribed Pantoprazole to treat his heartburn, which cost \$19.73 for 30 tablets (1 month supply). Complainant calculated that with refills, he paid a total of \$118.28. However, Complainant only submitted three receipts for Pantoprazole dated April 13, 2010, April 14, 2010 and June 29, 2010, for \$19.73 each.

Complainant also submitted a December 14, 2011 Walgreens receipt with two unidentified prescription purchases. There is no accompanying evidence to show that they were proscribed to Complainant for his conditions related to the denial of reasonable accommodation, so they cannot be included in Complainant's pecuniary damages. The receipt includes a blood pressure monitoring kit that also lacks sufficient evidence to be considered as pecuniary damages. While high blood pressure is Complainant's underlying condition, none of the medical information provided indicates that the blood pressure kit was intended to treat Complainant's conditions related to the denial of accommodation.

Complainant is entitled to \$59.19 in pecuniary damages for medical expenses.

#### Dental Expenses

Complainant states that the anxiety related to the Agency's denial of reasonable accommodations caused him to clench and grind his teeth "day and night" both during and outside of work hours. In addition to causing Complainant constant headaches, the clenching and grinding resulted in chipped, broken, and cracked teeth that caused painful cuts on his cheeks and tongue. Complainant's bite pattern changed, causing him to bite his cheeks and lower lip, resulting in more cuts and blood blisters. The clinching and grinding of his teeth became so intense that Complainant's jawbone deformed, expanding into the area under his tongue and outwards.

Complainant's dentist states that upon his initial visit on January 15, 2011, she found "extreme wear on all posterior teeth and the upper and lower right and left canines." She also recounts that some of Complainant's teeth were ground so far down that his nerves were nearly exposed, which would require multiple root canals to correct. Complainant visited his dentist 18 more times through March 2016 for repairs on 10 of his teeth that were broken or chipped from clenching and grinding, in order to prevent further breakage, and fix the damage done to his bite.



Given the extent of the damage to Complainant's teeth and the repairs required, we are not convinced by the Agency's argument that the Complainant's dental appointment, which was nearly a year after the denial of a reasonable accommodation damages was too far removed from the alleged discriminatory act to be included as pecuniary damages. Likewise, we are not convinced by the Agency's argument that Complainant's failure to specify the exact source of the stress causing him to grind and clench his teeth when speaking with his dentist is evidence that the damage was not a result of the stress and anxiety related to the denial of reasonable accommodations.

We also find sufficient evidence that Complainant's oral surgery was necessary to correct damage resulting from grinding and clenching his teeth. Complainant's dentist recounts that she referred Complainant to an oral surgeon after he complained of severe pain in his jaw during appointments on November 15 and 29, 2011, and saw that Complainant had excess bone growth sometimes associated with extreme teeth grinding and clenching. The Oral Surgeon diagnosed Complainant with temporal mandibular joint disorder ("TMD"). The record reflects multiple appointments in December 2011 and January 2012 with the Oral Surgeon, related to the December 27, 2011 surgery to remove excess bone growth. The Agency's implication that Complainant's oral surgery was not necessary, but based on Complainant's "paranoia" is inconsistent with the record. While the Oral Surgeon's notes indicate that prior to surgery Complainant felt "paranoid" that one of the bones growing in his jaw would break through the skin of his gums, they also indicate that Complainant's bone growth warranted the surgery. The Oral Surgeon's notes for the December 27, 2011 procedure confirm areas of excess bone had developed in two areas of Complainant's mouth, which were then removed.

Complainant provided an itemized November 15, 2011 dental bill for \$661, and a December 27, 2011 bill for oral surgery, including detailed notes about the procedure, for \$1,474. Complainant also provides a sworn statement from his dentist stating that "due to the extreme wear and the proximity to the nerves in many teeth, [Complainant] will most likely need root canal therapy on several teeth, crowns on at least 8 teeth to restore the correct occlusion of his teeth to chew properly and to protect the tooth structure and prevent possible tooth loss and to manage his TMD" which she estimated to cost \$11,400.

The Agency has not shown that the period of time it will take to treat Complainant's physical injury to be unreasonable, and substantial evidence in the record supports that Complainant requires the additional dental work to fully recover from the damage caused by teeth grinding related to the discrimination he experienced by the Agency. See Liang v. United States Postal Serv., EEOC Appeal No. 0720090030 (Apr. 23, 2010).

Complainant is entitled to a total of \$13,535 in pecuniary damages for dental work, to include the November 15, 2011 dental appointment at \$661 and the December 27, 2011 oral surgery at \$1,474 as past pecuniary damages, as well as additional repairs at \$11,400 as future pecuniary damages.<sup>4</sup>

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<sup>4</sup> To the extent Complainant's dental expenses were covered by insurance, we note that it is the Commission's position that payments by a health insurer on the complainant's behalf may not be

*Non-Pecuniary Damages*

After establishing entitlement to an award of compensatory damages, 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). It should likewise be consistent with amounts awarded in similar cases. See Hogeland v. Dep't of Agriculture, EEOC Appeal No. 01976440 (June 14, 1999). Moreover, the Commission points out that non-pecuniary compensatory damages are designed to remedy a harm and not to punish the Agency for its discriminatory actions. Furthermore, compensatory damages should not be motivated by passion or prejudice or “monstrously excessive” standing alone but should be consistent with the amounts awarded in similar cases. See Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (March 4, 1999).

The Commission has held that evidence from a health care provider is not a mandatory prerequisite for recovery of compensatory damages. See Carpenter, EEOC Appeal No. 01945652 (Jul. 17, 1995). Courts also have held that “expert testimony ordinarily is not required to ground money damages for mental anguish or emotional distress.” Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 724 (1st Cir. 1994), citing Wulf v. City of Wichita, 883 F.2d 842, 875 (10th Cir. 1989). A complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his/her burden in this regard. Nonetheless, the absence of supporting evidence may affect the amount of damages deemed appropriate in specific cases. See Lawrence v. United States Postal Serv., EEOC Appeal No. 01952288 (April 18, 1996).

Here, the Agency determined that Complainant was entitled to \$25,000 in non-pecuniary compensatory damages for the anxiety and stress he experienced between February 3, 2010 and October 22, 2013 that was related to its formal denial of his reasonable accommodation. Complainant requested \$160,000 in non-pecuniary compensatory damages to represent “\$20,000 for each of the eight years he endured his pain and suffering caused by [S4’s] refusal to accommodate him from February of 2010 until his retirement on December 31, 2017.”

In support of the \$160,000 amount, Complainant provided a statement describing the humiliation and diminished reputation he experienced when the July 27, 2009 Memo was referred to as the “[Complainant] Memo” by his colleagues who were aware he could not fly. Following the formal denial of his request for a reasonable accommodation Complainant recounts that S2 threatened him with a proposed removal because he could not fly, and he developed an ongoing fear that S2 or S4 would “force him to fly” and he would lose his job. His fears were bolstered by the 2010, 2011, 2012, and 2013 EPA-CID Medical Reviews deeming him “not medically qualified for the essential functions of his position.”

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used to reduce an award of compensatory damages (i.e. the “collateral source” rule). See Wallace v. United States Postal Serv., EEOC Appeal No. 01950510 (Nov. 13, 1995).

Complainant establishes that he experienced financial stress as a result of the Agency's actions, explaining that he believed he could be fired at any time and he had bills to pay and a child in college. According to Complainant's wife, Complainant developed additional anxiety over their future, fearing that he would not remain in his position as an SA for the full 20 years that would allow him to receive a full pension as a law enforcement officer.

Complainant also establishes that he experienced significant physical pain as a result of his anxiety. The December 27, 2011 oral surgery entailed a 6 week recovery where Complainant was unable to eat solid food for a month. Complainant showed he was impacted by pain on a daily basis, such as waking up coughing, gasping, and at times vomiting, due to his chronic heartburn. Additionally, Complainant's teeth grinding and TMJ, which both his dentist and oral surgeon attribute to stress during the relevant time frame, caused him to develop ongoing headaches to the extent that he began carrying pain medication at all times.

Complainant and his wife confirm that the pain and anxiety he experienced impacted his personal relationships. Complainant states that he "became short tempered, critical, and very suspicious of people's comments and actions" because the anxiety and pain he was disrupted his sleep so that he slept only 2 to 4 hours per night. Complainant's wife confirmed the change in Complainant and noted that the family dynamic also changed as a result.

The Agency argues that Complainant's work performance does not reflect the anxiety and distress he describes. During the relevant time frame, Complainant received performance ratings (signed off on by S2) of "Fully Successful" for fiscal years 2010, 2011, and 2012, and "Exceeds Expectations" for fiscal years 2013 and 2014. While the Agency could not locate Complainant's performance appraisal for 2015, it did establish that he received an individual cash award in July of 2015, and earned step increases in both 2012 and 2015. The record contains testimony by management officials describing Complainant as having a reputation as a hard worker, with a strong record for closing cases, and notable prosecutions.

The Agency also counters Complainant's stated constant anxiety over his possible termination "at any time" by noting that there is no evidence of proposed removal or disciplinary actions on record. It further notes that Complainant traveled 33 times after his accommodation request was "technically" denied, and was never required to fly for any of these work trips, indicating an informal accommodation pending the Commission's decision of Complainant's appeal.

Based on the documentation submitted by Complainant, the Commission finds that the Agency's award of \$25,000.00 in nonpecuniary compensatory damages is appropriate in this case, given the nature and duration of the harm. The Commission finds that this award is supported by the evidence, is neither "monstrously excessive" nor the product of passion or prejudice, and is consistent with prior Commission precedent. See Faustino v. U.S. Postal Serv., EEOC Appeal No. 0120161783 (Feb. 2, 2018) (Awarding \$25,000 in nonpecuniary compensatory damages for denial of reasonable accommodation, where the complainant's spouse and co-workers observed that Complainant experienced physical pain, mental stress, humiliation, depression and embarrassment, his spouse testified that he became socially withdrawn and their relationship

deteriorated, and the complainant provided documentation supporting that he had to undergo physical therapy); see also Minna Z. v. Dep't of the Air Force, EEOC Appeal No. 0720160009 (Mar. 10, 2017) (Awarding \$25,000 in nonpecuniary compensatory damages for denial of reasonable accommodation where the complainant established that she suffered insomnia, depression, migraines, anxiety, humiliation, damage to professional reputation, diminished quality of life, damage to relationships with friends and family, and the aggravation of preexisting mental & physical conditions as a result), see also, Dallas D. v. United States Postal Serv., EEOC Appeal No. 0120150319 (Mar. 24, 2017) (Awarding \$30,000 in nonpecuniary compensatory damages for denial of reasonable accommodation, where the complainant was also found to have been subjected to a hostile work environment, and due to the discrimination Complainant experienced extreme stress, marital problems, documented exacerbation of his pre-existing medical conditions, abdominal pain, isolation from his family and attempted suicide), Marquerite W. v. Dep't of Labor, EEOC Appeal No. 0120142727 (Dec. 22, 2016) (Awarding \$30,000 in nonpecuniary compensatory damages for denial of reasonable accommodation, where the lack of accommodation placed Complainant in an "inherently degrading and humiliating" situation, caused her considerable physical pain on a daily basis for several months, and resulted in mental anguish, documented exacerbation of her health conditions); see also Mike G. v. Dep't of Agriculture, EEOC Appeal No. 0120152027 (Sept. 8, 2016) (Awarding \$12,000 in nonpecuniary compensatory damages for denial of reasonable accommodation, where complainant experienced exacerbation of his depression, anxiety, and post-traumatic stress disorder, weight gain, diminished quality of life, a strain on his relationships, financial difficulties, and sleeplessness).

#### *Petition for Enforcement ("PFE")*

On October 9, 2018, Complainant submitted a Petition for Enforcement ("PFE") to the EEOC Compliance Officer assigned to his case because the Agency had yet to issue a FAD on the matter of compensatory damages. Based on the Commission's April 4, 2018 Order, the deadline for the Agency to have completed its investigation and made a determination on the amount of compensatory damages (if any) it owed to Complainant fell on August 2, 2018. The last possible day for the Agency to timely issue the FAD fell on September 3, 2018. The FAD was ultimately issued on October 25, 2018.

The PFE requested the Agency's full compliance with the Commission's April 4, 2018 Order and that the Agency be ordered to pay Complainant's attorney's fees associated with preparing and filing the PFE. The matter was not docketed as a separate EEOC action. However, the Agency submitted an opposition to the PFE and Complainant submitted a response. In the instant appeal, Complainant both disputes the Agency's compensatory damages decision in its FAD, and asks the Commission to pursue the October 9, 2018 PFE.

Complainant vehemently argues that but for his PFE, the Agency would not have issued the FAD on October 25, 2018, but further delayed the EEO process. Other than Complainant's bald statement, nothing in the record supports this assertion. Rather, the Agency proactively notified the EEOC Compliance Officer of its completion status with respect to the FAD.

It also demonstrated that it was taking steps to comply with the Order by timely submitting the necessary documentation to satisfy the compliance requirements for the rest of the Order, including the August 7, 2018 settlement agreement resolving attorney's fees. We also note the Agency's promptness in initiating the investigation on compensatory damages, and in providing Complainant and his attorney with materials and detailed instructions for contributing evidence for consideration in the FAD.

We acknowledge the inconvenience and angst that the Agency's nearly two month delay in fully complying with the April 4, 2018 Order caused Complainant. However, under the circumstances, we do not find the delay warrants docketing Complainant's PFE. Accordingly, Complainant's PFE and request for attorney's fees associated with the PFE are both denied.

### CONCLUSION

We REVERSE the Agency's decision regarding the award of compensatory damages and REMAND the matter in accordance with the ORDER below.

### ORDER (C0618)

To the extent it has not done so already, the Agency is ordered to take the following remedial action within **ninety (90) calendar days** from the date this decision was issued, unless otherwise indicated:

- I. The Agency shall pay Complainant **\$25,000.00** in non-pecuniary compensatory damages if it has not done so already.
- II. The Agency shall pay Complainant pecuniary damages in the amounts of **\$13,535.00** for dental expenses, and, if it has not done so already, **\$59.19** for medical expenses.
- III. To the extent Complainant is seeking additional attorney's fees, because he is a prevailing party in this appeal, the attorney may submit his claim for such fees to the Agency, as provided in the statement entitled "Attorney's Fees" below.
- IV. The Agency is further directed to **submit a report of compliance** in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The report must include supporting evidence that the corrective action has been implemented.

### 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)

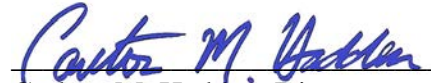
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

September 17, 2020  
Date