



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

████████████████████
Lowell H.,¹
Complainant,

v.

Michael R. Pompeo,
Secretary,
Department of State,
Agency.

Appeal No. 2019003637

Agency No. DOS-0398-17

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 10, 2019, final decision addressing compensatory damages on an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

BACKGROUND

During the period at issue, Complainant worked as a Motor Vehicle Operator, GS-8, at the Agency's Operations Division in Washington, D.C.

On January 3, 2018, Complainant filed a formal EEO complaint claiming that the Agency discriminated against him based on disability (torn left medical collateral ligament (MCL) in left knee, torn left rotator cuff and left toe)² when:

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 Complainant was diagnosed with these conditions following a December 17, 2016 work-related injury. The injuries restricted Complainant to driving no more than four hours a day, limited Complainant's use of his left arm to handle luggage, and limited walking to no more than twenty-five feet (including no climbing of steep hills).

1. Complainant was denied a reasonable accommodation;
2. on August 17, 2017, Complainant received a memo regarding disciplinary action;
3. on September 20, 2017, Complainant received a Letter of Warning; and
4. Complainant was subjected to a hostile work environment, characterized by, but not limited to heightened scrutiny regarding his requests for leave, inappropriate language, and yelling.

On November 7, 2018, following an investigation, the Agency issued a final decision concluding that Complainant had established a failure to accommodate his disability in connection with parking privileges, the approval of leave requests, and the issuance of a letter of warning. For relief, the Agency ordered, among other remedies, a supplemental investigation into his claim for compensatory damages.

On April 10, 2019, the Agency issued a final decision on compensatory damages. The Agency rejected Complainant's request for \$300,000 in nonpecuniary compensatory damages. Instead, the Agency awarded Complainant \$2,000 in nonpecuniary compensatory damages. In reaching this amount, the Agency reasoned that Complainant did not provide sufficient evidence to support that he suffered any long or short term physical or mental harm due to being denied his preferred parking arrangement, denied consideration of his leave requests, or being issued attendance-related discipline. With respect to his parking assignment, the Agency noted that Complainant indicated that his parking assignment at Navy Hill "aggravated" his pre-existing knee injury, without explaining the extent or type of aggravation he experienced. The Agency also disputed Complainant's claim that he missed "a few sessions of therapy," and indicated that the Agency's November 7, 2018 decision only determined that Complainant was denied leave for one medical appointment. Finally, the Agency indicated that Complainant's request for \$300,000 is more akin to a request for punitive damages, even though punitive damages are not permitted on a federal-sector complaint.

Regarding Complainant's request for pecuniary damages, the Agency determined that Complainant did not indicate that he incurred any medical or other out-of-pocket expenses, and the Agency therefore did not award him any pecuniary damages.

However, the Agency indicated that it would make a separate determination, subject to mitigation, regarding Complainant's request for back pay for time off associated with his workers' compensation claim during pay period 19 in the fall of 2017. The Agency explained that the evidence Complainant submitted in his supplemental affidavit concerning his request for backpay was incomplete and did not include leave information or documentation concerning the Federal Compensation Act benefits paid during the period at issue.

The instant appeal followed.

On appeal, Complainant argues that he suffered emotional and physical harm from the Agency's discriminatory actions for more than a two-year period. Complainant provides testimony from his wife and co-workers concerning his mental and emotional state. He requests \$75,000 in non-pecuniary compensatory damages. Complainant further argues that his medical bills, from December 17, 2016 to present, have been "greater than \$10,000" and he requests \$10,000 in past pecuniary damages.

ANALYSIS AND FINDINGS

Past Pecuniary Damages

Pecuniary damages are quantifiable out-of-pocket expenses incurred as a result of the Agency's discriminatory actions. Damages for past pecuniary damages will not normally be granted without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals of actual loss and expenses.

Here, the Agency denied Complainant's request for pecuniary damages of \$10,000 for costs associated with his medical expenses. We note that Complainant provides documentation of his work-related injury and documentation of his work restrictions. However, Complainant has not provided any documentation (medical bills or receipts) to support his purported personal costs associated with the discrimination. Thus, we find the Agency properly denied Complainant's request for past pecuniary damages.

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 Agency awarded \$2,000 in nonpecuniary damages. We find, however, that that an award of \$50,000 is more consistent with the amounts awarded in similar cases.

In a supplemental affidavit, Complainant testified that he suffered stress, anxiety, sleeplessness, depression, marital strain, humiliation, loss of self-esteem and health, excessive fatigue, loss of enjoyment of life, loss of, and injury to, professional standing, reputation, and credit. Complainant indicated that he is “not the same husband, father, or friend that he was before he was discriminated against and subjected to a hostile work environment, and as a result, he has been depressed, tired, and stressed while around his family. Complainant further noted that his assignment to the Navy Hill parking lot required that he “walk up a steep incline” and walk “200 to 300 feet” to and from the main building which further aggravated his knee injury.

Complainant’s wife explained that her husband was no longer the “happy-go-lucky guy” after he returned to work following his work-related injury. She indicated that Complainant would come home upset and “downtrodden” because his supervisor would embarrass, demean, and demoralize him in front of staff due to his inability to drive the vehicles. Complainant’s wife also stated that the extreme stress caused Complainant to be “disengaged” from her and the children and the stress also caused him sleepless nights and insomnia.

Complainant’s co-workers (“CW1” and “CW2”) further testified to Complainant’s emotional state. CW1 noted that Complainant used to be a “family man” and a “courteous co-worker.” However, Complainant’s behavior changed after his job injury. Specifically, CW1 noted that Complainant was not “upbeat and jovial” and “the hostile work environment was taking a toll on him, due to mistreatment including being written up and unfair treatment.” CW2 also testified that Complainant was a “different person” when he returned to work after his work-related injury and indicated that “management was not treating him fairly.”

We concur with the Agency that the award should only encompass the harm Complainant sustained by the discriminatory acts at issue. In this case, Complainant asserted on appeal, that his assignment to the Navy Hill parking lot further “aggravated” his pre-existing knee injury. He provides no without further elaboration on the extent of the aggravation of his injury. However, in this instance, the Agency was aware of Complainant’s knee injury and associated physical restrictions (in pertinent part, walking no more than twenty-five feet and no climbing of steep hills). Because of this work-related injury, Complainant requested a reasonable accommodation to have access to the parking lot closer to the main building. However, management assigned Complainant to the Navy Hill parking lot, which required that he walk up a steep hill and walk 200 to 300 feet to and from the main building. Because the Navy Hill assignment directly violated his work restrictions, it is reasonable and logical to presume that walking up a steep hill with a knee injury (a torn MCL) would cause further damage. Given these circumstances, the record reflects that it was more probable than not, that Complainant’s knee injury was aggravated when he was required to climb a hill and walk additional distance to access the Navy Hill parking lot.

With respect to Complainant’s leave requests, we acknowledge the Agency’s argument that that the November 7, 2018 decision only indicated that Complainant was denied leave on one occasion (September 1, 2017) to attend a medical appointment.

We further acknowledge the Agency's argument that supplemental documentation indicating that one leave request was denied because it was submitted too far in advance, and two leave requests were denied because too many employees had already requested leave that day, did not support a finding that Complainant was prevented from attending medical appointments on those days or that Complainant's requests were subsequently approved due to changed circumstances. However, the leave request denials Complainant submitted in his supplemental affidavit support the Agency's own November 7, 2018 determination, that Complainant's supervisor "did not appreciate that, to the extent that Complainant was requesting leave as a reasonable accommodation in order to attend physical therapy and doctor's appointments, his leave requests should have been given priority over other types of leave requests."

Regarding the Agency's argument that Complainant provided insufficient evidence to support his emotional distress, 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 Service, EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Department of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from a 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.

As previously discussed, Complainant's testimony identifies the type of harm he suffered and adequately ties that harm directly to the Agency's actions. Based on Complainant's representations of harm, we find that the weight of our prior decisions supports an award of \$50,000 in non-pecuniary compensatory damages. See Danita P. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120172149 (July 18, 2018) (\$50,000 in non-pecuniary damages where the agency's failure to provide telework for over a year caused complainant to experience problems sleeping, headaches, disengagement from family, and higher blood pressure; Augustine S. v. Dep't of Agriculture, EEOC Appeal No. 0120152598 (Dec. 8, 2017) (\$50,000 in non-pecuniary damages where the agency's denial of accommodation resulted in complainant not wanting to socialize with family and worrying that he could be fired); and Kevin B. v. Dep't of Health and Human Services, EEOC Appeal No. 0720170014 (Apr. 24, 2017) (\$60,000 in non-pecuniary compensatory damages when the agency's denial of accommodation resulted in a worsening in complainant's medical condition and sleeping problems as well as anxiety, pain and suffering).

Finally, we note that the Agency appropriately determined that compensatory damages do not include back pay, interest on back pay, or any other type of equitable relief authorized by Title VII. However, we direct the Agency to issue a decision on this pending matter in accordance with our Order below.

CONCLUSION

We AFFIRM the Agency's April 10, 2019 determination on past pecuniary damages and MODIFY the determination on non-pecuniary compensatory damages. These matters are REMANDED to the Agency for further processing in accordance with the ORDER below.

ORDER

To the extent that it has not already done so, the Agency is ORDERED to take the following actions:

1. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$50,000 in nonpecuniary damages.
2. Within thirty (30) calendar days from the date this decision is issued, the Agency shall notify Complainant of the opportunity to submit documentation regarding his request for back pay and Complainant shall submit his response to the notice within thirty (30) calendar days from receipt of the Agency's notice.
3. Within thirty (30) calendar days after the Agency receives Complainant's response, the Agency shall issue a final decision on Complainant's request for back pay.

The Agency is further directed to submit a report of compliance, as provided, in the statement entitled "Implementation of the Commission's Decision."

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 (T0610)


This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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

June 16, 2020
Date