



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

[REDACTED]
Freddie M.,¹
Complainant,

v.

Christopher C. Miller,
Acting Secretary,
Department of Defense
(Department of Defense Education Activity (DoDEA)),
Agency.

Appeal No. 2020002968

Agency No. PE-FY10-077

DECISION

On March 24, 2020, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from a final Agency decision (FAD) dated February 6, 2020, concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of, in relevant part, Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.²

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 received the FAD by mail on February 10, 2020. The Agency argues the appeal was filed beyond the 30-day time limit. However, the FAD initially issued by the Agency was undated. Thereafter, the Agency sent Complainant a reissued FAD that was dated, with no other changes. An Agency EEO Specialist then emailed Complainant on February 26, 2020, writing the United States Postal Service indicated the (dated) FAD was delivered (to his post office box) on February 24, 2020. The Specialist asked Complainant for confirmation of receipt, and advised that if he disagreed with the compensatory damages amount to follow the directions on appeal rights in the FAD, including timeframes. Because this advice could reasonably be read to mean that the 30-day time limit to file an appeal commenced running when the FAD that was purportedly delivered on February 24, 2020, was received by Complainant, we deem the appeal to be timely filed.

BACKGROUND

At the time of events giving rise to his EEO complaint, Complainant was employed by the Agency as a Supervisory Management Services Specialist, YA-0341-02 at the Ikego Elementary School in Ikego, Japan.

In Freddie M. v. DoDEA, EEOC Appeal No. 0120140976 (Jan 8, 2016), the Commission found that Complainant was discriminated against based on his disability (both knees due to degenerative joint disease and injuries) when the Agency did not provide him a designated parking space from November 2009 – June 4, 2010, with easier access to the school. It ordered the Agency to determine Complainant's entitlement to compensatory damages. The Commission found no discrimination on Complainant's remaining claims, including that he was discriminated against based on his race, sex, disability and reprisal when he was harassed from 2009 to June 4, 2010, and was terminated on June 4, 2020, during his probationary period.

After the Agency issued a FAD determining compensatory damages, Complainant appealed and the Commission vacated the FAD, ordered the Agency to conduct a supplemental investigation on Complainant's entitlement to compensatory damages, and issue another FAD addressing them.

Following the supplemental investigation, the Agency issued a FAD awarding Complainant \$5,000 in nonpecuniary damages. The instant appeal followed.

ANALYSIS AND FINDINGS

Compensatory damages may be awarded for past pecuniary losses, future pecuniary losses, and nonpecuniary losses that are directly or proximately caused by the agency's discriminatory conduct. Past pecuniary losses are prior out-of-pocket expenses, future pecuniary losses are out-of-pocket expenses that are likely to occur after this case is closed, and nonpecuniary losses are intangible injuries not subject to precise quantification like emotional harm, suffering, loss of health, and injury to reputation. Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (OLC Control No. EEOC-CVG-1992-3; July 14, 1992) (available at www.eeoc.gov).

In his investigatory statement on compensatory damages, Complainant wrote that his knee worsened because the Agency failed to reasonably accommodate him with a designated parking space, the school Principal required him to continuously use the steel school stairs and stand prolonged periods daily, and using public transit in Japan after he was terminated because he lost his sponsorship and with it his right to drive. Complainant indicated that his knees getting worse made walking even short distances painful, prohibited prolonged standing, prevented him from using stairs safely, and made it difficult for him to carry groceries.

Complainant stated that being terminated was the main reason for his divorce and separation from his child. He submitted an April 2013 divorce paper signed by his spouse, who was local to Japan, stating the grounds for the divorce were that her husband was “unable to keep a stable job while working with the U.S. government/schools in order to support his family.”

Complainant stated he had a loss of libido which contributed to his divorce, daily migraines, insomnia, and depression because of the EEO process and the Agency “ruining my life,” irritability and loss of pleasure in activities because of the EEO process, lost self-esteem due to harassment, and anxiety, feelings of helplessness, and financial problems because of his termination. He indicated that he gained weight, developed diabetes, high blood pressure, and a blood clotting condition that prevented him from sitting more than 30 minutes because the Agency disregarded his disability, his EEO case and his termination. Second supplemental report of investigation (ROI) on compensatory damages, Ex. 5, at 4, Bates No. 87).

Complainant requested 50 million dollars in non-pecuniary damages.

Regarding past pecuniary damages, Complainant stated that because he was terminated he flew round trip in March/April 2011 from Tokyo to New York with a ticketing cost of \$757 to renew his American driver’s license to use in Japan and flew roundtrip from Norfolk, Virginia to Tokyo in January/April 2013 with a ticketing cost of \$2,211.80 to sign the divorce papers his spouse filed. For the most recent flight, he requested \$150 for damage to his luggage. He stated that because of his divorce, in 2013 he relinquished his \$420,000 home in Japan to his ex-spouse, paid \$5,520 to ship his things from Japan to Virginia, and was forced to sell his low mileage 2003 BMW in Japan at a loss of about \$45,000. Complainant stated that in 2013 he purchased a car in Virginia Beach, Virginia for \$42,965. He stated that because of all the “wrong doing” by the Agency he incurred expenses of \$721.15 in property taxes in 2013 and \$614.42 in 2014 (presumably on his car).

Complainant indicated he has past and future pecuniary damages of \$30 weekly in gasoline, \$400 monthly in automobile insurance, \$600 which rose to \$650 a month in rent, \$123 yearly renter’s insurance, and \$200 - \$300 monthly for food.

Regarding future pecuniary losses, Complainant contended that because of his worsened health he is now permanently and totally disabled, is unemployable, needs \$5,000 to \$50,000 to build a recording studio in his home to provide a source of income.

Complainant requested 1.5 million dollars for 20 years of lost income.

The Agency denied Complainant past and future pecuniary damages because he failed to show a causal connection between the claimed expenses and the Agency failing to reasonably accommodate him with a designated parking space for seven months. Because we agree with the Agency’s assessment on pecuniary damages, they are denied.

The Agency awarded Complainant \$5,000 in “nominal” non-pecuniary damages because he mainly attributed his intangible injuries to his participation in the EEO process³ and his termination and devoted very little narrative to how the parking issue caused his intangible injuries or provided corroborating testimony or evidence to support the parking claim caused his intangible injuries. We agree with the Agency’s assessment of the evidence, except to add that Complainant also to a lesser extent attributed intangible injuries to harassment. However, Complainant did not win on his harassment or his termination claim.

In his investigatory EEO statement on his underlying claims, Complainant stated that by the time he was first diagnosed he had difficulty standing long periods, walking upstairs, was unable to sit and stand in one spot too long due to possible blood clotting, and could not experience daily activity with family and friends. This was before he requested the reasonable accommodation of a designated parking space. Underlying ROI, Ex. F-5, at 273, Bates No. 738. In reference to the above, we find Complainant’s development of the blood clotting problem is unrelated to the parking matter.

As noted above, Complainant stated that his bilateral knee condition worsened because of the work he performed at the school, not being provided a designated parking space for seven months, and having to use public transit in Japan after he was terminated. As such, he did not solely attribute his worsening knees to his parking claim. Moreover, Complainant stated he had bilateral knee degenerative joint disease, which by definition means his knees would continue to worsen. Given all this, in the absence of medical evidence, we find that Complainant did not show his worsening knee condition was directly or proximately caused by not being reasonably accommodated with designated parking space for seven months. We find the same regarding Complainant’s weight gain and his development of diabetes.

We agree with the Agency that Complainant sustained some nonpecuniary damages because he was not reasonably accommodated by being provided a designated parking space for seven months. It is more likely than not that this contributed in small part to Complainant’s emotional pain, depression, and irritability, and he experienced some physical discomfort by having to walk further.

Given the severity and duration of Complainant’s emotional pain, and more significantly the small role played by the parking matter in causing this, we find that he has not shown he is entitled to more nonpecuniary damages than what the Agency awarded - \$5,000. This is similar to what the Commission has awarded in other cases. Phillis W. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120180863 (June 5, 2019) (complainant awarded \$5,000 in nonpecuniary damages where a delay of 14 months in providing the reasonable accommodation of an ergonomic chair was only one of multiple factors that caused emotional harm).

The FAD is AFFIRMED.

³ A complainant may not recover damages caused by participation in the EEO process. Wallace v. USPS, EEOC Appeal No. 01950510 (Nov. 13, 1995).

ORDER

To the extent it has not already done so, the Agency shall pay Complainant \$5,000 in nonpecuniary damages. If Complainant was previously issued a check for \$5,000, but has not cashed or deposited it, the Agency shall give him another opportunity to obtain payment to the extent necessary for him to do so. The Agency shall complete the above within 65 calendar days of the date of this decision.

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 (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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).

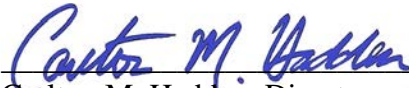
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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

December 30, 2020

Date