



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

[REDACTED]
Alejandro T.,¹
Complainant,

v.

Andrew Wheeler,
Administrator,
Environmental Protection Agency,
Agency.

Appeal No. 2019004457

Agency No. 2018-0026-HQ

DECISION

On July 2, 2019, 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 May 24, 2019, final decision on damages concerning his equal employment opportunity (EEO) complaint alleging 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's February 21, 2019, final decision on liability and MODIFIES the Agency's May 24, 2019, final decision on relief.

ISSUES PRESENTED

The issues presented on appeal are: (1) whether the preponderance of the evidence in the record establishes that Complainant was subjected to disparate treatment and/or harassment based on disability and/or reprisal; and (2) whether the Agency has provided Complainant with make whole relief pursuant to its finding that Complainant was denied a reasonable accommodation for his disability.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a GS-2210-14 Primary Information Security Officer in the Project Management Office (PMO), Office of Water at the Agency's Headquarters in Washington, D.C. Complainant's first-line supervisor was the PMO Director (S1).

Complainant is a disabled veteran, and he stated that his disabilities include traumatic brain injury (TBI), post-traumatic stress disorder (PTSD), insomnia, obstructive sleep apnea, and severe migraines. According to Complainant, his disabilities limit him in the major life activities of prolonged walking or standing, getting up or down from a seated position, lifting heavy objects, being in extremely hot or stressful environments, working in or around noisy environments, bright lights, being around groups of people, and commuting to work. Complainant averred that management was aware of his disabilities because he was hired in 2015 under a special hiring authority as a 30% or more disabled veteran and because he has requested reasonable accommodations. Complainant stated that he engaged in protected EEO activity when he requested a reasonable accommodation in 2017.

Complainant alleged that, in February 2017, S1 verbally harassed him, calling him overweight, fat, and chunky in front of other employees multiple times. Complainant stated that, starting in November 2017, S1 would tell him that he was not an effective employee, called him a "work husband," and accused him of being a terrorist. S1 denied calling Complainant a work husband or a terrorist. According to S1, although she did not harass him, she did challenge Complainant about his work, questioning why he would pass work onto others without researching certain issues himself. S1 did not address Complainant's allegation that she made comments about his weight.

In 2017, Complainant worked a 4-10 compressed work schedule, with Mondays and Thursdays as telework days and Tuesdays and Wednesdays as his scheduled days in the office. According to Complainant, until the middle of 2017, when he needed an additional episodic telework day because of his disability, he would tell S1 that he would be teleworking, and she would approve his request without issue. Complainant averred that, towards the middle of 2017, S1's attitude towards him changed, and she began denying his requests for additional episodic telework days. Complainant alleged that S1 would not provide a reason for denying his requests for telework. Complainant stated that, although he offered to provide additional medical documentation to S1 to support his need for telework, S1 told him that it was not needed. S1 stated that, in October 2017, she suggested that Complainant submit a reasonable accommodation request. According to S1, in the five months before that point, Complainant was not consistently coming into the office on Tuesdays and Wednesdays and would telework those days without any approval.

On October 13, 2017, Complainant requested a reasonable accommodation, asking for the ability to take episodic telework days when he was experiencing symptoms of his chronic medical conditions. On October 18, 2017, S1 approved the reasonable accommodation request, with an effective date of October 24, 2017.

On October 30, 2017, the National Reasonable Accommodation Coordinator (RA1) added an addendum to the reasonable accommodation, specifying that Complainant “may employ episodic telework when needed but not to exceed 3 days in a pay period and must inform the supervisor by 9 am in writing that he is in need of an episodic telework event.” Report of Investigation (ROI) at 121.

On November 8, 2017, S1 issued Complainant his fiscal year (FY) 2017 Performance and Recognition System (PARS) performance evaluation, rating Complainant as “Fully Successful.” Complainant stated that he had been rated “Outstanding” in previous years, and he added that S1 did not tell him that his performance was not at the same level as in the past. Complainant alleged that he was working just as hard and accomplishing just as much as he had the previous year and that the only reason for the different rating was that he was requesting additional telework for his disability as a reasonable accommodation. S1 stated that Complainant had worked on two special tasks in FY 2016 that warranted an “Outstanding” rating. According to S1, Complainant did not produce any work in FY 2017 that went beyond the expectations for his position.

According to Complainant, although his reasonable accommodation approved in October 2017 stated that he needed to contact S1 by 9:00 a.m. when he intended to telework, S1 would tell him that she was not approving his telework request. Complainant alleged that, although S1 did not provide reasons for denying the telework, it seemed like the issue was that he was requesting disability-related telework too frequently. According to S1, Complainant was not limiting his episodic telework to three days per pay period, and he was not consistently notifying her that he would be teleworking by 9 a.m. S1 stated that she contacted RA1 on November 28, 2018, telling RA1 that the accommodation was not effective and that she needed medical documentation to understand Complainant’s need for accommodation.

On November 30, 2017, RA1 emailed Complainant, stating that S1 had discussed the need for medical documentation from Complainant because “perhaps the accommodation is not effective or regular set days of telework may be warranted instead of episodic telework.” ROI at 147-48. On December 18, 2017, Complainant responded to RA1’s email, asking for a set telework schedule with the ability to take episodic telework days as needed for his medical conditions without being forced to take leave. Complainant also submitted medical documentation to RA1 in support of his request, including a December 15, 2017, doctor’s note that stated that, because of Complainant’s chronic PTSD, chronic low back pain, migraine headaches, and flat feet, he “is unable to be around people, cannot climb and cannot walk/stand for long periods. He is however capable of performing telework, desk work etc.” ROI at 125. On December 21, 2017, RA1 provided S1 with a memorandum, stating that the Agency determined that, based on the provided medical documentations, Complainant was an individual with a disability and recommended that Complainant and S1 meet to discuss what accommodations could be effective. S1 stated that the medical documentation provided by Complainant did not have any specific details about his restrictions other than that he was unable to be around people. S1 approved the request on January 8, 2018, with an effective date of January 22, 2018.

S1's approval stated that the accommodation would consist of a private work space in the office and episodic telework as needed for disability symptoms, not to exceed one day per pay period. According to S1, Complainant did not accept the offered accommodation, so his October 2017 reasonable accommodation remained in effect.

Complainant alleged that on January 24, 2018, S1 substantially increased his workload, adding duties that required him to be in the office for meetings and to conduct drills. According to Complainant, S1 assigned him the extra work after she was contacted by the EEO counselor. S1 denied increasing Complainant's workload. According to S1, she was just providing Complainant with an explanation of the tasks he was responsible for as a means of communicating her expectations as his supervisor.

Complainant stated that S1 denied his requests to telework on June 14 and 15, 2017, November 15, 2017, December 5, 2017, January 16, 2018, February 6, 2018, February 13 and 13, 2018, February 26, 2018, and March 6, 2018. Complainant averred that S1 would not tell him the reason she was denying his requests. The record also contains a 4:31 a.m. May 22, 2018, email from Complainant asking to telework as part of his reasonable accommodation and an 8:16 a.m. email from S1 on the same date denying his request. S1 averred that, on November 15, 2017, Complainant did not ask for permission for an episodic telework day, instead informing her that he would be teleworking. S1 stated that she denied Complainant's request to telework on December 5, 2017, because she "felt that [Complainant] was not trying to honor the telework agreement" and was trying to telework full time. ROI at 192. According to S1, she denied the February 6, 2018, request because Complainant could not identify what he would work on while teleworking. Regarding March 6 and May 22, 2018, S1 stated that Complainant had taken more than 20 episodic telework days and "as the supervisor I felt that his request for episodic telework was excessive" and she did not want her staff to think that she was allowing Complainant to telework full time. Id.

Complainant contacted an EEO counselor on December 7, 2017. On February 12, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (physical and mental) and reprisal for prior protected EEO activity (requesting reasonable accommodation) when:

1. On various dates, S1 subjected him to verbal abuse and intimidation;
2. Since October 2017, S1 has not allowed him to utilize his reasonable accommodations in an effective way;
3. On November 8, 2017, his FY 2017 PARS performance rating was lowered to Fully Successful;
4. On multiple occasions, including December 5, 2017, he was forced to take leave when his request for episodic telework was denied; and
5. On January 24, 2018, S1 substantially increased his workload.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b) on February 21, 2019. The decision concluded that Complainant proved that the Agency subjected him to discrimination when he was denied a reasonable accommodation. The Agency found that Complainant did not establish that he was subjected to disparate treatment or a hostile work environment as alleged in his remaining claims.

Complainant requested \$85,000 in nonpecuniary compensatory damages for “pain and suffering” and “emotional and psychological distress.” Complainant stated that the discrimination exacerbated his preexisting conditions, including migraine headaches, depression, PTSD, TBI, gastroesophageal reflux disease (GERD), and chronic pain. Complainant added that he had to increase the amount of medication he took, including the amount Zofran, Fericept, Trazadone, and Prilosec. According to Complainant, as a result of being denied a reasonable accommodation, he experienced nightmares, insomnia, stomach pain, panic attacks, weight gain, mental anguish, and emotional turmoil that affected his relationship with friends and family. Complainant stated that he had to visit the emergency room multiple times for chest pain and heart attack-like symptoms that were ultimately found to be caused by stress. According to Complainant, the requested \$85,000 included his out of pocket expenses for medical treatment. Complainant also asked for the restoration of 150 hours of leave for June 14-15 and December 5, 2017, January 16, February 6, February 13-14, February 27, March 6, and May 22, 2018, and other days he was forced to take off because of his disabilities. Complainant provided some medical documentation, including visit summaries from an April 17, 2018, visit to the emergency room for chest pain and a September 14, 2018, visit to his primary care provider for chest pain. Complainant provided the names of witnesses who had knowledge of the impact of the discrimination, but he did not provide statements from these witnesses as requested by the Agency.

On May 24, 2019, the Agency issued a final decision on relief. The Agency awarded Complainant \$8,000 in nonpecuniary compensatory damages. The Agency did not award Complainant pecuniary damages because he did not provide any documentation of his out of pocket expenses for medical care. The Agency stated that it would restore 20 hours of annual leave for December 5, 2017, and February 6, 2018, and 16 hours of sick leave for March 6, 2018, and May 22, 2018. The Agency declined to restore any additional leave to Complainant, noting that he did not specify the dates on which he took leave or present documentation establishing a connection between the need for leave and the denial of an accommodation. The Agency also ordered eight hours of EEO training for S1, with a specific focus on her obligations under the Rehabilitation Act.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that he established that he was subjected to disparate treatment and a hostile work environment. Regarding the relief awarded by the Agency, Complainant states that he did not submit documentation of his out of pocket medical expenses because the majority of these expenses are covered by his insurance and the Department of Veterans Affairs (VA). Complainant requests \$1,000 to cover past and future copays. Complainant also requests \$85,000 in nonpecuniary compensatory damages for emotional distress and the worsening of his preexisting conditions. According to Complainant, the Agency inappropriately discounted the medical records that stated that his chest pain was aggravated by emotional stress. Complainant notes that, after S1 denied his requests for episodic telework as a reasonable accommodation, his VA disability rating increased from 70 percent to 100 percent. Complainant requests that additional leave be reinstated.

In response to Complainant's appeal, the Agency requests that the Commission affirm its final decisions.

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, 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").

Disparate Treatment and Harassment Claims

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). He must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, *supra*; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995).

To establish a claim of harassment a complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

Reprisal claims are considered with a broad view of coverage. See Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); see also, Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000). Retaliatory actions which can be challenged are not restricted to those which affect a term or condition of employment. Id. Rather, a complainant is protected from any discrimination that is reasonably likely to deter protected activity. Id.; see also, Carroll, supra.

The Agency's legitimate, nondiscriminatory reason for rating Complainant "Fully Successful" was that he met the expectations of his position but did not go above and beyond, as he had the previous fiscal year when he recruited and mentored a new employee and facilitated a memorandum of understanding between the Agency, the Department of Energy, and an outside contractor. As evidence of pretext, Complainant argued that he worked just as hard in FY 2017 as he did the previous fiscal year, when he received an "Outstanding" rating and contended that the only explanation for the "Fully Successful" rating was his reasonable accommodation request. However, Complainant did not address the two projects he worked on in FY 2016 that S1 stated formed the basis for the "Outstanding" rating, and the preponderance of the evidence in the record does not otherwise establish pretext for discrimination.

The Agency's legitimate, nondiscriminatory explanation for the alleged increase in Complainant's workload on January 24, 2018 was that S1 was clarifying the tasks and projects Complainant was responsible for rather than increasing his workload. Complainant characterized the issue as an increase in his workload, and he stated that, because his workload was increased shortly after S1 was contacted by an EEO counselor on January 22, 2018, S1 was retaliating against him. Upon review, we find that Complainant has not established that the Agency's proffered legitimate, nondiscriminatory reason was a pretext designed to mask discriminatory or retaliatory animus.

Regarding Complainant's allegations of harassment, the preponderance of the evidence does not establish that some of the harassment occurred as alleged. S1 denied referring to Complainant as a work husband or accusing him of being a terrorist, and there is no additional evidence in the record corroborating Complainant's allegations.

S1 admitted that she questioned Complainant's effectiveness as an employee, and she did not address Complainant's allegation that she referred to him as overweight, fat, and chunky. Upon review, we find that there is no evident connection between these instances of alleged harassment and Complainant's membership in any protected class. Accordingly, Complainant has not established by preponderant evidence in the record that he was subjected to harassment based on disability and/or reprisal.

Compensatory Damages, Restoration of Leave, and Other Relief

Pursuant to its finding that Complainant was denied a reasonable accommodation, the Agency awarded Complainant \$8,000 in nonpecuniary compensatory damages, ordered the restoration of 20 hours of annual leave and 16 hours of sick leave, and ordered eight hours of EEO training for the responsible management official, S1. 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 she 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. U.S. 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 nonpecuniary 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, 527 U.S. 212 (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 nonpecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3)

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), request 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 the past pecuniary losses, future pecuniary losses, and nonpecuniary losses which are directly or proximately caused by the agency's discriminatory conduct. See EEOC Notice No. 915.002 at 8. Objective evidence of compensatory damages can include statements from the 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 nonpecuniary losses that are incurred as a result of the discriminatory conduct.

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. 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).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. A complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his burden in this regard. 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. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Lawrence, EEOC Appeal No. 01952288.

The Agency awarded Complainant \$8,000 in nonpecuniary compensatory damages. Nonpecuniary losses 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 EEOC Notice No. 915.302 at 10. There is no precise formula for determining the amount of damages for nonpecuniary 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 Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that nonpecuniary 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 Interior, EEOC Appeal No. 01961483 (March 4, 1999). When determining an award of non-pecuniary damages, the Commission may consider the present-day value of comparable awards. Lara G. v. U.S. Postal Service, EEOC 0520130618 (June 9, 2017).

Upon review, we find the \$8,000 awarded by the Agency as nonpecuniary damages to be insufficient. As a result of the Agency's discriminatory action, Complainant experienced chest pain, severe stress, nightmares, insomnia, stomach pain, panic attacks, weight gain, mental anguish, and emotional turmoil that affected his relationship with friends and family. Complainant also stated that the discrimination exacerbated his preexisting conditions, including migraine headaches, depression, PTSD, TBI, GERD, and chronic pain. Complainant averred that, although he was promoted to a position in a different office in October 2018 and no longer reported to S1, his injuries were ongoing and persistent.

Based on the record, we find that an award of \$25,000 in nonpecuniary compensatory damages would be more appropriate and consistent with amounts awarded in similar cases. See Kiara R. v. U.S. Postal Serv., EEOC Appeal No. 0120152620 (Aug. 10, 2017) (award of \$25,000 where failure to accommodate caused emotional distress, sleeping problems, recurrent headaches,

nausea, anxiety, and isolation from coworkers); Minna Z. v. Dep't of the Air Force, EEOC Appeal No. 0720160009 (March 10, 2017) (\$25,000 awarded where denial of reasonable accommodation resulted in insomnia, depression, migraines, anxiety, diminished quality of life, damaged relationships with friends and family, and aggravation of preexisting mental and physical conditions); Flowers v. U.S. Postal Serv., EEOC Appeal No. 01A43114 (Oct. 7, 2004), request for recon. denied, EEOC Request No. 05A50243 (Jan. 11, 2005) (\$20,000 where complainant established that, despite other contributing factors, discrimination resulted in sleeplessness, depression, emotional distress, anxiety, loss of enjoyment of life and strained family relationships). An award of \$25,000 will adequately compensate Complainant for the harm he suffered because of the discrimination.

Complainant also requested past and future pecuniary damages for out of pocket medical expenses. Pecuniary losses are out-of-pocket expenses that are incurred as a result of the employer's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. See EEOC Notice No. 915.002 at 14. Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination, the issuance of a full-relief offer, or a voluntary settlement. Id. at 8-9. Future pecuniary losses are losses that are likely to occur after resolution of a complaint. Id. at 9. For claims seeking pecuniary damages, such objective evidence should include documentation of out-of-pocket expenses for all actual costs and an explanation of the expense, e.g., medical and psychological billings, other costs associated with the injury caused by the agency's actions, and an explanation for the expenditure. Id. at 9. Complainant has not provided any documentation of his past out-of-pocket expenses or provide support for his request for future pecuniary damages. Accordingly, we find that the Agency properly concluded that Complainant failed to present any evidence that he was entitled to pecuniary damages.

Complainant requested the restoration of 150 hours of leave, including for June 14-15, 2017, December 5, 2017, January 16, 2018, February 6, 2018, February 13-14, 2018, February 27, 2018, March 6, 2018, and May 22, 2018. The Agency's final decision on relief stated that the Agency would restore 10 hours of annual leave taken by Complainant on December 5, 2018, 10 hours of annual leave taken on February 6, 2018, eight hours of sick leave taken on March 6, 2018, and eight hours of sick leave taken on May 22, 2018. We find that June 14 and 15, 2017, is outside of the timeframe of the instant EEO complaint, and Complainant also has not established that he asked S1 to telework because of his disability on these dates. The record reflects that, to minimize his leave usage, on February 12, 2018, Complainant requested to telework on February 13 and 14, 2018, after two-hour medical appointments. When his request was denied, he took 20 hours of sick leave for these days. Although Complainant asked to telework on these days for medical appointments, it is not clear whether these appointments were routine or were scheduled to address a flare up of disability symptoms. We therefore find that Complainant has not established that he was denied a reasonable accommodation on these dates.

According to the record, Complainant took 10 hours of annual leave on January 16, 2018, which was the day of his initial interview with the EEO counselor,² and he took 10 hours of sick leave on February 27, 2018. There is no evidence in his record reflecting that Complainant requested to telework on either of these dates because of his disability, and we decline to order the Agency to restore leave for these dates. Accordingly, we agree with the Agency's determination to restore 20 hours of annual leave and 16 hours of sick leave to Complainant.

Finally, the Agency ordered eight hours of EEO training for S1, which we find appropriate. In our Order, we also order the Agency to consider discipline against S1 and to post a notice.

CONCLUSION

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 decision on liability, and we MODIFY the Agency's final decision on relief and REMAND the case to the Agency for further processing in accordance with this decision and the ORDER below.

ORDER

The Agency is ORDERED to take the following remedial actions:

1. Within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant \$25,000 in nonpecuniary compensatory damages, less any amount already paid to Complainant as compensatory damages.
2. To the extent that it has not already done so, within 60 calendar days of the date this decision is issued, the Agency shall restore 20 hours of annual leave and 16 hours of sick leave to Complainant.
3. To the extent that it has not already done so, within 90 calendar days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive EEO training to S1, with a special emphasis on the Rehabilitation Act and the Agency's obligation to reasonably accommodate employees with disabilities.
4. Within 60 calendar days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against S1. 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(s) for its decision not to impose discipline. If S1 has left the Agency's employment, then the Agency shall furnish documentation of her departure date.

² To the extent that Complainant is asking for restoration of leave for his appointment with his EEO counselor, if Complainant was on duty that day, the appropriate course of action would have been to request a reasonable amount of official time. See 29 C.F.R. § 1614.605(b).

5. Within 30 calendar days of the date this decision is issued, the Agency shall post a notice in accordance with the statement entitled "Posting Order."

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). Further, the report must include evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Project Management Office, Office of Water, Washington, D.C. Headquarters 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).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/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 receipt of this decision**. 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 (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the 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, 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 (T0610)

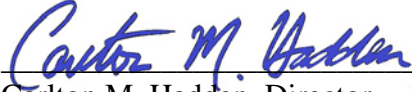
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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

November 23, 2020

Date