



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

[REDACTED]

Ariel L.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services
(Food and Drug Administration),
Agency.

Appeal No. 2020000530

Agency No. HHS-FDAORAPA-127-17

DECISION

Complainant filed a timely 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, 2019,² final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of 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, in part, and MODIFIES, in part, the Agency's final decision.

ISSUE PRESENTED

The issue is whether the Agency properly determined the amount of non-pecuniary compensatory damages, following its decision that the Agency discriminated against Complainant based on his disability when it failed to provide him with a reasonable accommodation.

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 On October 15, and 16, 2019, Complainant contacted the Commission and stated that he faxed his appeal on July 29, 2019, after he received a copy of the Agency's final decision on June 26, 2019. Complainant subsequently sent a fax confirmation showing that he faxed the Commission on July 25, 2019. As such, we consider Complainant's appeal to be timely.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Consumer Safety Officer at the Agency's Office of Regulatory Affairs in Ontario, California. On November 7, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on disability (physical) when on July 12, 2017, the Agency terminated his telework agreement, which was previously granted as a reasonable accommodation; and on August 21, 2017, he was escorted out of the building and had his government identification card confiscated.

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 EEOC Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant proved that the Agency subjected him to discrimination when it failed to provide him with an effective reasonable accommodation from June 22, 2017, through September 1, 2017. The Agency subsequently informed Complainant that he may be entitled to compensatory damages and gave him an opportunity to provide evidence to establish a claim of compensatory damages.

On November 8, 2018, Complainant requested \$300,000.00 for compensatory damages and the restoration of 260 hours of sick leave and 80 hours of annual leave. Complainant stated that he was devastated thinking that he could not support his family and pay his mortgage. Complainant also stated that he considered suicide to enable his wife to collect his life insurance. In addition, Complainant requested the immediate dismissal of his supervisors, without their pensions or other benefits.

On May 24, 2019, the Agency issued a final decision on Complainant's request for compensatory damages and equitable relief. As an initial matter, the Agency noted that punitive damages are not an available remedy against the federal government. The Agency found that the record showed that Complainant was entitled to the restoration of 135.75 hours of annual leave and 16 hours of "family friendly" leave. The Agency noted that Complainant did not claim any pecuniary compensatory damages or attorneys' fees.

Regarding Complainant's request for non-pecuniary compensatory damages, the Agency found that Complainant did not present any medical documentation, or statements from coworkers or family members, to support his claim. The Agency noted that Complainant's statements were the only evidence of his devastation, depression, sleepless nights worrying about paying bills, and thoughts of suicide. The Agency also noted that the duration of Complainant's harm was approximately six weeks, during which his requests for leave were approved, and that Complainant was not in jeopardy of being required to use unpaid leave. The Agency awarded \$2,500.00 in non-pecuniary compensatory damages, upon considering the nature, severity, and duration of Complainant's harm, as compared to similar Commission decisions.

Complainant filed the instant appeal. The Agency did not respond to Complainant's appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant states that he agrees with the Agency's decision regarding the restoration of his leave and pecuniary compensatory damages. However, Complainant states that he could not accept the award of \$2,500.00 in non-pecuniary damages, which was 0.83% of the allowable \$300,000.00.

Complainant also provided a copy of an email that he sent to the Agency on March 22, 2019, explaining his justification for non-pecuniary compensatory damages. Complainant stated that he did not need to see a doctor to know why he was so devastated by the Agency's action. Complainant stated that his "immediate outlook" was that he would not have gainful employment, with no way to pay for his house, food, or debts. Complainant also stated that he thought that if he committed suicide and made it look like an accident, his family would receive a life insurance payout. On January 3, 2020, Complainant provided a copy of an email that he sent to the Agency on December 16, 2019, regarding his request for a reassignment.³

ANALYSIS AND FINDINGS

Standard of Review

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 Chap. 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").

As an initial matter, we note that Complainant stated that he accepted the Agency's decision regarding his leave restoration and pecuniary compensatory damages. As such, we find no reason to disturb the Agency's decision and AFFIRM the Agency's determination to restore 135.75 hours of annual leave and 16 hours of "family friendly" leave and provide no pecuniary compensatory damages.

³ The Commission has held that it is not appropriate for a complainant to raise new claims for the first time on appeal. See Hubbard v. Dep't of Homeland Security, EEOC Appeal No. 01A40449 (Apr. 22, 2004). In this case, it appears that Complainant provided information about an unrelated issue that he raised before the Agency. As such, we will not address Complainant's request for a reassignment in this decision.

Non-Pecuniary Compensatory Damages

Non-pecuniary 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, Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be “monstrously excessive” standing alone but should be consistent with the amounts awarded in similar cases. See Ward- Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from 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.

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

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

Here, Complainant provided his own statements that he had trouble sleeping at night, and that he worried that he would be fired and unable to provide for his family. Complainant also stated that he considered suicide for his family to get his life insurance. We find that Complainant's harm lasted almost two months, from June 22, 2017, through September 1, 2017.

In considering the nature, severity, and duration of Complainant's harm, we find that the Agency's award of \$2,500.00 in non-pecuniary compensatory damages was insufficient, and that \$4,500 is a more appropriate award based on prior Commission decisions. See Ludie v. U.S. Postal Service, EEOC Appeal No. 0120170459 (May 9, 2019) (the Commission affirmed an award of \$4,500.00 for worsening depression, stress, and back and shoulder pain for a month or two following the Agency's discrimination); Robledo v. Dep't of Homeland Sec., EEOC Appeal No. 0120113438 (Oct. 21, 2011), req. for recon. den'd EEOC Request No. 0520120132 (May 24, 2012) (\$3,000.00 awarded for anguish, suffering, emotional pain, loss of character, and loss of enjoyment for several weeks after discriminatory denial of leave); Walter v. U.S. Postal Serv., EEOC Appeal No. 01971857 (Sept. 4, 2001) (\$4,000.00 awarded for emotional pain, lowered self-esteem, and sleepless nights due to the agency's failure to accommodate for three months). The Commission has found that an award of non-pecuniary damages may consider the present-day value of comparable awards. Lara G. v. U.S. Postal Serv., EEOC Request No. 0520130618 (June 9, 2017). As such, we find that \$4,500.00 is an appropriate award for Complainant's emotional harm for almost two months.

To the extent that Complainant argues that he should be awarded \$300,000.00, we note that Complainant bears the burden to provide objective evidence in support of his claim. We find that Complainant did not provide any supporting evidence from medical professionals, family members, or friends, and that he provided limited evidence which did not prove that he is entitled to \$300,000.00 in non-pecuniary compensatory damages. As such, we MODIFY the Agency's award of \$2,500.00 in non-pecuniary compensatory damages and award \$4,500.00.

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 to restore 135.75 hours of annual leave and 16 hours of "family friendly" leave; and provide no pecuniary compensatory damages. We also MODIFY the Agency's award of \$2,500.00 in non-pecuniary compensatory damages to \$4,500.00.

ORDER

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

1. Within sixty (60) days of the date this decision is issued, pay Complainant non-pecuniary compensatory damages in the amount of \$4,500.00.

2. Within ninety (90) days of the date this decision is issued, the Agency shall provide eight (8) hours of interactive EEO training for the responsible management officials on the Rehabilitation Act. The training shall emphasize the Rehabilitation Act's requirements with respect to an Agency's duties to provide a reasonable accommodation to ensure that similar violations do not occur.
3. Within sixty (60) days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the responsible management officials. 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 the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
4. The Agency shall immediately post a notice in accordance with the paragraph below.

POSTING ORDER (G0617)

The Agency is ordered to post at its Office of Regulatory Affairs in Ontario, California 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 it must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and

29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled “Right to File a Civil Action.” 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 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).

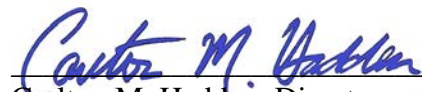
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

November 23, 2020
Date