



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

[REDACTED]
Kyle S.,¹
Complainant,

v.

Tom J. Vilsack,
Secretary,
Department of Agriculture
(Forest Service),
Agency.

Appeal No. 2019005694

Hearing No. 541-2015-00153X

Agency No. FS-2015-00095

DECISION

Following its September 11, 2019 final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. In opposition, Complainant asks the Commission to affirm the AJ's finding of discrimination and award of remedial relief but add an award of backpay. In addition, Complainant asks EEOC to adjust attorneys' fees.

BACKGROUND

In January 2014, Complainant began employment as an Engineering Technician, GS-0802-09, at the Agency's Bridger-Teton National Forest in Jackson, Wyoming.

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.

On December 22, 2014, Complainant filed an equal employment opportunity (EEO) complaint alleging that the Agency subjected him to discrimination on the bases of disability (disabled veteran - neurological condition) and reprisal (requesting reasonable accommodation) when:

1. on October 6, 2014, his request for reasonable accommodations in the form of telework and/or extended use of Leave Without Pay (LWOP) was denied;
2. on October 15, 2014, he was terminated from his Engineering Technician position, effective October 16, 2014; and
3. from about July 7, 2014 until his termination, he was subjected to additional harassing treatment, including his supervisor constantly asking to be kept informed of his wellbeing and activities and then falsely accused Complainant of failing to do so.

The Agency accepted the complaint and conducted an EEO investigation. Thereafter, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC AJ. Complainant timely requested a hearing. The AJ held a hearing on March 6, 7, and 16, 2018, and issued a decision on August 4, 2019, concluding that Complainant had proven discrimination as alleged.

The evidence developed during the investigation and hearing shows that, on January 26, 2014, Complainant began working at the Agency in an excepted service position, subject to a two-year probationary period. Complainant's duties required him, among other things, to drive to remote locations, walk and inspect facilities, and use power tools.² Specifically, Complainant's supervisor (Supervisor1)³ stated that Complainant performed some maintenance himself but also worked with others to perform maintenance for Agency facilities. Supervisor1 stated, during the winter months, a lot of work is done inside rather than in the field. Also, Supervisor1 stated, in the beginning, Complainant worked inside primarily as he got acclimated to the position and gained access to Agency systems. Supervisor1 stated, during the summer, all facilities are accessible and there is more work done in the field. Supervisor1 stated that Complainant seemed to perform his duties well and they had a professional and friendly relationship.

² The physical demands section in the position description for Engineering Technician, GS-9, state: "The work requires some physical exertion such as long periods of standing, walking, and carrying moderately heavy items over rough, uneven, mountainous, or rocky surfaces."

³ Complainant's immediate supervisor, Supervisor1, became a first-time supervisor shortly before Complainant was hired. He did not recall receiving any supervisory or EEO training prior to supervising Complainant.

The Agency appointed Complainant using the Veterans Recruitment Act (VRA) hiring authority. Upon being hired, Complainant provided the Agency with his Department of Veterans Affairs (VA) summary of benefits information indicating that he has a combined service-connected disability rating of 90%. The record shows Complainant was diagnosed with “Gulf War Syndrome/90% neurological damage.” He has an observable limp and tremors, twitches, shakes, and sometimes has trouble formulating words. According to testimony at the hearing, his neurological disability affects his abilities to walk or drive long distances and go to the bathroom.⁴ Complainant also testified that he experienced some depression and anxiety due to his disability. The responsible management officials testified they were aware of Complainant’s medical condition and his status as a disabled veteran.

On July 7, 2014, Complainant was crossing the parking lot at work when he apparently experienced a dizzy spell, lost his balance, and tripped on a curb.⁵ He received treatment that day at an urgent care facility in Jackson, Wyoming. It is undisputed that he called Supervisor1 the next day and stated he had been in the emergency room the night before and could not come in. The supervisor told him to take care of himself and keep him informed.

On July 11, 2014, Complainant and Supervisor1 spoke again on the telephone. Complainant stated that he was going to the VA Medical Center in Salt Lake City for some tests due to what he believed were increased neurological symptoms. His absence was recorded as excused on his time sheet and approved by management. Supervisor1 received further text messages indicating Complainant was ill on July 16 and 17. Complainant left a message for the supervisor on July 17, 2014, indicating he had just left a doctor’s appointment and had more appointments coming up and stated he would have to use LWOP and would keep the supervisor informed. On July 18, Supervisor1 left a message for Complainant asking if he might be interested in the leave donation program. The next day, Complainant left the supervisor a message indicating he was having therapy and did not want leave donations.

On July 21, 2014, Supervisor1 asked Complainant to call him back. Complainant left a return message on July 22, stating he was still waiting for medical results and again asked about LWOP. Supervisor1 returned the call and left message to call him back.

On July 22, 2014, Complainant called the Deputy Forest Manager, his third-level supervisor (Manager1), about his medical condition. Complainant told him that he was dizzy, had headaches and was getting advanced medical care at the Mayo Clinic. Manager1 explained various options that might be available, including LWOP, teleworking and light duty. Manager1 said he would discuss the situation with Human Resources and Supervisor1.

⁴ Complainant stated that he may have an urgency to get to the nearest restroom and he carried an emergency toiletry kit.

⁵ Complainant did not return to work following the July 7, 2014 incident through the termination of his employment.

On July 24, 2014, Supervisor1 sent an email to Complainant with detailed information regarding the Agency's leave options, including a leave request form, and asked him to provide documentation from a medical professional stating that he is or has been under their care and has not been able to come to work or telework. In the email, Supervisor1 stated: "If you do not report to work or request leave (with appropriate documentation if you request sick leave or absence due to a medical condition), disciplinary actions may be taken."

On July 24, 2014, Complainant's wife responded to Supervisor1's email stating that Complainant was undergoing tests and scans on his heart, nerves and brain, and discussed his medical condition, including his difficulty focusing and his intermittent spells of dizziness. She added that they did not know what was causing the health problems but would let Supervisor1 know as soon as they had more information. At the hearing, Complainant's wife stated that the Agency did not indicate allowing Complainant to remain on LWOP would be an undue hardship. Complainant stated that Manager1 later apologized for the harshness of Supervisor1's email.

On August 5, 2014, Complainant submitted a request for LWOP for the period of July 22, 2014 to February 27, 2015.⁶ He indicated that he was a disabled veteran needing medical treatment and referenced his 90% service-connected disability rating and included a VA Benefits Summary Letter.

On August 25, 2014, Complainant's supervisor responded with a request for medical documentation to support Complainant's request for the extended LWOP. He cited the Agency's policy allowing LWOP for a disabled veteran to seek treatment for a disability arising from military service and indicated that administratively-acceptable evidence was needed to support Complainant's absence from duty and listed the required information. He further indicated that Complainant's physician's reply was required to be postmarked by September 8, 2014. Finally, the response stated that someone would be contacting Complainant regarding the reasonable accommodation process.

On September 4, 2014, Complainant sent an email in response to the request for medical documentation and stated that there were still medical tests to complete and it was difficult to tell when he would be back to work full-time. He attached a Hospital History of Encounters, documenting appointments between July 8 and August 25, 2014, at the Salt Lake City VA Medical Center, and a notification of an appointment for a neurological evaluation at the Mayo Clinic for September 10, 2014. This response was sent to a Human Resources/Employee Relations Specialist (HR Specialist) and the Agency's Director of Civil Rights. The HR Specialist responded to Complainant the next day and stated that the information he provided did not provide sufficient information for management to make a decision on his LWOP request and asked Complainant to provide more specific medical documentation.

⁶ Complainant stated one reason he needed time off was because Salt Lake City VAMC was a five-hour trip one way so, including roundtrip travel and medical visits, he could be gone three days at a time.

Complainant testified that he did not believe he had to provide medical documentation to obtain LWOP because, according to the Agency's policy that Manager1 emailed him on August 5, 2014, he was a certified disabled veteran who was entitled to leave as a matter of right.⁷ He stated that he relied on this information. However, on September 11, 2014, Complainant submitted a note from his doctor excusing him from work from September 7 - 29, 2014. Complainant's wife stated that the Mayo Clinic Neurologist stated he could not provide diagnoses or potential limitations prior to examining Complainant.

On September 5, 2014, an HR Reasonable Accommodation Specialist (RA Specialist) testified that she opened Complainant's reasonable accommodation case. She notified Complainant via email that she would be setting up a conference call with Complainant and Supervisor1 to discuss reasonable accommodation. She provided Complainant with various forms and instructions to submit to her on or before October 6, 2014. After sending the email, the RA Specialist spoke to Complainant via telephone. She confirmed he had received her message and the materials she sent him. RA Specialist testified, when she started to explain the reasonable accommodation process to Complainant, he became agitated and stated that everybody wanted him to provide different types of documentation. He told her he wanted to focus on getting better and wished everybody would leave him alone. She stated he then told her to "fuck off."⁸ The RA Specialist stated, based on this conversation with Complainant, she took no further action and never set up a meeting to discuss possible accommodations for Complainant. The RA Specialist stated that she did not inform Supervisor1 of Complainant's comment. Both Supervisor1 and Complainant's second-level supervisor stated they did not believe a first-level supervisor could approve a subordinate's reasonable accommodation request. On October 6, 2014, the RA

⁷ Manager1 sent Complainant Chapter 30 (Absence Leave) from the Pay Administration, Attendance, and Leave section - FSH 6109.11 - of the Forest Service Handbook (06/17/2006). Provision 33.1(2), states in pertinent part: "The granting of leave without pay is a matter of administrative discretion. Employees, with a few exceptions, cannot demand that they be granted leave without pay as a matter of right. The exceptions where LWOP will be granted are in the cases of: a. Disabled veterans needing medical treatment."

Also, an Occupational Safety and Health Specialist/Veterans Special Emphasis Program Manager (OSHA Specialist) stated, if a disabled veteran gets "ill due to a service-connected disability, they have to be granted leave without pay." OSHA Specialist stated that the Agency treated everyone like a family so that benefit was afforded to everyone. OSHA Specialist stated that he was on LWOP from May 2014 to November 2014 based on a verbal request for relocation to New Mexico and just submitted his payroll with leave as needed. He stated that Manager1, Complainant's third level supervisor, approved it. Manager1 was OSHA Specialist's supervisor.

⁸ Complainant denies telling RA Specialist "fuck off," but acknowledges he was consumed with handling his medical testing and found the contact by various Agency people "extremely confusing."

Specialist sent Complainant notification that she was closing his reasonable accommodation case.

During the hearing, the RA Specialist stated that she was unsure if awarding Complainant continued LWOP would have been an undue hardship on the Agency and that is a determination to be made by an immediate supervisor. HR Specialist stated that it would have been a hardship for Complainant to be absent because the remaining unit employees would have to cover Complainant's duties. She stated, however, the Agency was willing to accommodate him if he provided medical documentation. HR Specialist stated, "if medical documentation is provided to show the need for the leave without pay, even if it's a hardship the Agency will make accommodation and support that need." HR Specialist stated that Complainant failed to provide medical documentation, so the Agency did not reach the stage to assess undue hardship.

During the hearing, Supervisor1 stated that he and other employees performed some of Complainant's duties and that some of Complainant's work was not performed right away. Supervisor1 stated that he does not recall discussing with other management whether it would be an undue hardship to the Agency for Complainant to remain on leave without pay.

A Notice of Termination dated October 15, 2014, from the Acting Forest Supervisor provided that Complainant was being terminated, effective October 16, 2014, because he failed to report for work since July 7, 2014 and had been in a continuous absent without leave (AWOL) status since July 16, 2014. It noted that, although Complainant provided documentation regarding his absence, it was not sufficient. It also provided that Complainant was informed by the Mission Area Designee regarding placement in the Reasonable Accommodation program and the requirement to provide appropriate medical documentation, but he had not provided sufficient documentation by the deadline to be considered for the program. It provided that, because Complainant failed to utilize proper leave requesting procedures and provide administratively-acceptable evidence to support his need to be absent, Complainant was charged approximately 504 hours of AWOL from July 16, 2014 through the effective date of termination.

Based on this evidence, the AJ concluded the Agency violated its duties to Complainant under the Rehabilitation Act. First, the AJ determined that it was undisputed that Complainant was a qualified individual with a disability. All the responsible management officials were aware of Complainant's service-connected neurological disability. The AJ stated Complainant was substantially limited in the major life activities of walking, driving, and going to the bathroom. Moreover, the Agency conceded that Complainant had been performing well in his position prior to his absence from work and was not terminated for performance issues. Next, the AJ determined that the Agency failed to engage in the interactive process with Complainant and provide him with the reasonable accommodation of LWOP while he was resolving his medical issues. The AJ determined that the involved management officials were all aware of Complainant's medical issues and that he was undergoing a series of medical evaluations during the period at issue. It was also clear that Complainant was requesting LWOP during this period. The AJ further concluded that Complainant's termination only occurred because of the failure to accommodate which resulted in his absences being charged as AWOL rather than LWOP.

The AJ also concluded that Supervisor1 discriminatorily harassed Complainant by repeatedly threatening him unless he returned to work.

To remedy Complainant for the discrimination, the AJ ordered the Agency to retroactively reinstate Complainant to his position. However, the AJ declined to award Complainant back pay because she determined he failed to mitigate his damages by not seeking alternative employment. The AJ further ordered the Agency to provide Complainant \$200,000 in nonpecuniary compensatory damages to compensate Complainant for his emotional distress and its manifestations. The AJ determined that such an award was supported by substantial evidence, concluding there was established sufficient causation established between the Agency's actions and Complainant's resulting depression, anxiety, feelings of worthlessness, social isolation, physical and mental maladies, and suicidal ideation.

The hearing record shows, on May 16, 2016, a year and a half after his termination, Complainant began meeting with a Licensed Professional Counselor (LPC1). During the hearing, LPC1 stated that she diagnosed Complainant with Major Depressive Disorder and Post Traumatic Stress Disorder (PTSD) and they were caused by Complainant's removal. LPC1 stated that Complainant was sad almost daily; did not gain pleasure from things that used to make him happy; had disrupted sleep; felt others would judge him about his termination; and experienced feelings of guilt, low self-worth, extreme fatigue, and suicidal ideation. LPC1 stated that she met with Complainant 43 times and continues to see him because he has not recovered from his depression and other conditions. LPC1 stated that she uses cognitive behavioral therapy and trauma-related therapy with Complainant.

At the hearing, Complainant testified, following his termination, he lapsed into a depressed state. He stated that many residents of his town work for the Agency and he did not want to go in public because he would encounter Agency employees who were aware of his termination. He stated that he lost confidence; worried about others' judgment of him; second guessed himself; experienced depression, anxiety, guilt, and suicidal thoughts; and feared not being able to provide for his family.

Complainant's wife (CW1) testified, following his termination, Complainant was no longer himself and was "a shell of himself." She stated that he had anxiety, had a hard time getting out of bed, did not want to leave the house for fear of encountering someone from work, and she feared he was suicidal. (CW1 stated that she ensured that the guns in their home were secure.) CW1 stated that Complainant sought therapy after he realized he did not have everything under control and needed help. CW1 stated, prior to therapy, Complainant was drinking alcohol and "self-medicating." CW1 stated that Complainant's symptoms "wane" but are still there.

The AJ determined that the evidence, "establishes that the Agency's discriminatory conduct . . . caused Complainant's emotional harm, loss of enjoyment of life, anxiety, depression [,] suicidal ideation, and mental anguish." The AJ found that the record clearly showed that Complainant was a different person prior to his removal from employment. The AJ found the nature, severity, and duration of the harm warranted \$200,000 when compared to similar cases.

The AJ also awarded \$200,944.10 in attorney's fees and costs. Finally, the AJ ordered the Agency to provide EEO training to the responsible management officials.

Subsequently, the Agency issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected him to discrimination as alleged and filed the instant appeal. On appeal, the Agency argues that the AJ's decision contains numerous mistakes of material fact and law. The Agency asserts that sustaining the decision would require that the Commission conclude that Complainant is a qualified individual with a disability and that he showed a nexus between his alleged disabling condition and request for LWOP as a reasonable accommodation. The Agency also argues that it had legitimate and nondiscriminatory reasons for terminating Complainant and that Complainant was not subjected to harassment. The Agency asserts there is insufficient evidentiary support for the AJ's decision.

The Agency also argues that it acted in good faith in its effort to reasonably accommodate Complainant and, therefore, it should be able to avoid liability for compensatory damages. Alternatively, it argues that the AJ's award of \$200,000 in compensatory damages is excessive and inconsistent with awards in similar cases. It also argues the attorneys' fees and costs awarded are excessive.

In response, Complainant reiterates prior contentions, including noting the facts as stipulated and as found by the AJ. Complainant reiterates the AJ's rationale and conclusions, including with respect to damages. However, Complainant asks the Commission to reverse the AJ's denial of back pay, citing an error in fact and law. Complainant stated that the Agency has the burden to show a complainant failed to mitigate damages, and the Agency failed to do so here. Complainant stated that he attempted to obtain employment by speaking with the town Mayor about openings in the city, as well as the Undersheriff. Complainant stated that no one was receptive to hiring someone in litigation about employment termination. Complainant stated, as a result, he worked for his family's car wash and lube business. He stated that he earned \$29,875.16 in 2015, \$31,858.48 in 2016, and \$33,318.21 in 2017. Complainant stated that he entered the job market by working for his family business as they would have had to pay someone else to perform his duties. Complainant stated, "it shows that [he] was willing to do anything to earn an income for his family." Complainant stated that the AJ erred in assuming that applying for federal jobs is the only way to enter the job market. He stated that he lives in a small town and obtaining employment is different there, such that directly asking others about employment and working for a family business are appropriate. Complainant added, due to depression, withdrawal, and suicidal ideation, it was normal for him not to want to apply for other Agency positions. Complainant stated that the Agency failed to show that there were suitable positions available for which he was qualified and failed to apply.

Also, Complainant asked the Commission to award attorney's fees at the current "Laffey" rates rather than the rates in place when the AJ decision was issued in 2019. Complainant stated that current rates address the delay in payment to legal representation. Complainant requested a total of \$254,289.96 for his attorney, including fees and costs.

Specifically, Complainant requested:

Total hours awarded by AJ:	336.13
Attorney 1:	310.16 hours x \$621 per hour (current Laffey rate)
Attorney 2:	25.97 hours x \$591 per hour (current Laffey rate)
Total fees awarded by AJ at updated Laffey rate:	\$207,957.63
Total costs awarded by AJ:	+ 3,154.20 (airfare/car rental/lodging)
	\$211,111.83
Total fees-Complainant's appeal:	1,863.00 (3 hours x \$621 per hour)
Total fees-Opposition Response:	40,694.13 (65.53 hours x \$621 per hour) ⁹
Total - attorneys' fees motion:	+ 621.00 (1 hour x \$621 per hour)
	\$254,289.96 Total Fees & Costs Requested

Complainant stated that his counsel, Attorney1 and Attorney2, represented him from October 24, 2014 through July 15, 2019, and then for the instant appeal. Complainant stated that his attorneys "expended a great deal of time and effort over the last five years responding to written orders, filing motions and arguments, attending a deposition in Jackson, Wyoming, responding to Agency motions, and representing Complainant at his hearing." Complainant stated, "[d]ue to the nature of the proceedings, the numerous witnesses involved, the Agency decision to contest every aspect of this case, the undersigned counsel had no choice but to vigorously litigate the case." Complainant noted that he was always open to settlement and mitigation of damages. Complainant stated that his attorneys frequently represent complainants before the Commission and current Laffey rates are customary in Commission litigation. Complainant stated that the facts for all three claims were interrelated. Complainant stated that he prevailed in this matter and achieved "an excellent result" and his attorneys' fees are reasonable. Complainant stated that he hired his attorneys because he wanted an experienced employment attorney with federal sector EEO experience and could not locate one in or near Jackson. Attorney1 provided an affidavit stating that she practiced exclusively in federal sector EEO law since 1991 and Attorney2 provided an affidavit stating that she practiced labor and employment law since 2008.

⁹ On appeal, Complainant provided the dates in October 2019 and number of hours worked each date on his opposition response.

ANALYSIS AND FINDINGS

Standard of Review

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility, that a reasonable fact finder would not credit it. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chapter 9, at § VI.B. (August 5, 2015).

Denial of Reasonable Accommodation

Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p).

After receiving a request for reasonable accommodation, the employer should engage in an informal process with the disabled individual to clarify what the individual needs and identify the appropriate reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance on Reasonable Accommodation), EEOC Notice No. 915.002 (October 17, 2002); see also, Abeijon v. Dep't of Homeland Security, EEOC Appeal No. 0120080156 (Aug. 8, 2012). Protected individuals are entitled to reasonable accommodation, but they are not necessarily entitled to their accommodation of choice. Castaneda v. U.S. Postal Service, EEOC Appeal No. 01931005 (February 17, 1994).

Qualified Individual with a Disability

We find there is substantial evidence of record to support the AJ's conclusion that Complainant was a qualified individual with a disability within the meaning of the Rehabilitation Act.

An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. Melanie F. v. Dept. of Homeland Security, EEOC Appeal No. 0120150163 (May 19, 2017) (citing 29 C.F.R. § 1630.2(g)).

Here, the record shows that both parties stipulated that Complainant was hired as a disabled veteran through the Veteran's Recruitment Act hiring authority, with 90% service-connected disability rating. While this, in and of itself, is not conclusive as to the matter of whether Complainant was an individual with a disability, for the purposes here, it is highly suggestive, especially when viewed in light of the other evidence of record. The Occupational Safety and Health Specialist/Veterans Special Emphasis Program Manager, OSHA Specialist, attested that management was aware that Complainant was disabled because Complainant discussed his condition with them. Complainant attested that he discussed his medical condition with management, including telling them he had neurological problems. OSHA Specialist testified that Complainant's disability was obvious at work, including his limp, tremors, symptoms of eye-twitching, lips quivering, and difficulty speaking. Complainant's therapist and his wife also attested that Complainant visibly shook and had tremors. Therefore, we find the record is sufficient to support the AJ's finding that Complainant was an individual with a disability, as defined above.

A qualified individual with a disability is an "individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). The physical demands section in the position description for Engineering Technician, GS-9 state: "The work requires some physical exertion such as long periods of standing, walking, and carrying moderately heavy items over rough, uneven, mountainous, or rocky surfaces." Complainant's supervisor, Supervisor1, stated that Complainant performed some maintenance himself but also worked with others to perform maintenance for Agency facilities. He added, initially, Complainant worked inside as he got acclimated to the position and gained access to Agency systems. Supervisor1 stated, during the winter months, a lot of work is done inside rather than in the field compared to the summer when all facilities are accessible and there is more work done in the field. Supervisor1 stated that Complainant seemed to perform his duties well. We find the record sufficiently supports the AJ's finding that Complainant was a qualified individual with a disability. Accordingly, we find the Agency had an obligation to provide reasonable accommodation absent a showing of undue hardship.

Reasonable Accommodation – Undue Hardship

We also find the record sufficiently supports the AJ's finding that the Agency failed to provide Complainant reasonable accommodation. While it appears Agency officials made various attempts to engage in an interactive process with Complainant, the Agency has failed to show granting the reasonable accommodation of LWOP would have caused undue hardship.

The record shows Complainant's health was declining related to a service-connected disability for which the Agency generally had information as he was hired under the VRA. Complainant was going through testing to find out why he had increased dizziness that caused the July 2014 tripping incident, and he did not have any definitive diagnosis or prognosis to immediately offer the Agency as he was undergoing extensive medical testing.

Complainant stated, in July 2014, he began going to Salt Lake City VAMC to “see why my disability was changing so rapidly.” Complainant’s wife informed Agency management he was having numerous scans on his heart and brain. Complainant stated, between July and October 2014, no one ever told him that his LWOP was denied or that he was placed on AWOL retroactively, until he received an October termination letter. Complainant stated that his biweekly payroll of LWOP was approved and submitted regularly. Complainant stated, on August 5, 2014, he completed a request for LWOP for the period of July 22, 2014 to February 27, 2015, and provided verification of his 90% veterans disability status. Complainant stated that it became “extremely confusing” when other people from the Agency began contacting him for medical information and documentation.

The instant case appears to be a matter of several managers involved and no one quite sure how to handle the circumstances. The AJ stated, “[a]t the hearing, the managers pointed the finger at each other” regarding how the matter was handled. The record shows the Agency accommodated Complainant by allowing him to be on LWOP and then it stopped and switched his leave to AWOL. On July 8, 2014, Supervisor1 told Complainant to take care of himself and keep him informed. On July 18, Supervisor1 left a message for Complainant asking if he might be interested in the leave donation program. On July 21, 2014, Supervisor1 asked Complainant to call him back and several days later returned Complainant’s call. On July 22, 2014, after Complainant informed Manager1 about his medical condition, Manager1 explained various options that might be available, including LWOP, teleworking and light duty. Manager1 also informed Complainant he would discuss his circumstances with Human Resources and Supervisor1.

On July 24, 2014, Supervisor1 sent an email to Complainant with detailed information regarding the Agency’s leave options, including a leave request form, and asked him to provide documentation from a medical professional stating that he is or has been under their care and has not been able to come to work or telework. Supervisor1 informed Complainant disciplinary action could result if he did not report to work or request leave. On August 25, 2014, Complainant’s supervisor responded with a request for medical documentation to support Complainant’s request for extended LWOP. He informed Complainant that someone from the Agency would contact him regarding the reasonable accommodation process.

On September 5, 2014, HR Specialist informed Complainant that additional medical documentation was required. Also, the RA Specialist opened Complainant's reasonable accommodation case, notified him that she would be setting up a conference call with Complainant and Supervisor1 to discuss reasonable accommodation, and provided various forms to submit to her by October 6, 2014. Subsequently, RA Specialist spoke to Complainant via telephone to explain the reasonable accommodation process. She testified that Complainant became agitated and stated that everybody wanted him to provide different types of documentation, and later told her to “fuck off.” On October 6, 2014, the RA Specialist sent Complainant notification that she was closing his reasonable accommodation case.

During the hearing, the RA Specialist stated that she was unsure if awarding Complainant continued LWOP would have been an undue hardship on the Agency and that is a determination to be made by an immediate supervisor. HR Specialist stated that it would have been a hardship for Complainant to be absent because the remaining unit employees would have to cover Complainant's duties. She stated, however, the Agency was willing to accommodate him if he provided medical documentation. HR Specialist stated, "if medical documentation is provided to show the need for the leave without pay, even if it's a hardship the Agency will make accommodation and support that need." HR Specialist stated that Complainant failed to provide medical documentation, so the Agency did not reach the stage to assess undue hardship.

During the hearing, Supervisor1 stated that he and other employees performed some of Complainant's duties and that some of his work was not performed right away. Supervisor1 stated that he does not recall discussing with other management whether it would be an undue hardship to the Agency for Complainant to remain on LWOP.

We note also that emails of record show that, in response to Complainant's requests for an accommodation, management assured Complainant that the paperwork would be taken care of and encouraged Complainant to focus on his well-being. Management completed and approved Complainant's timesheets and initially granted him LWOP. However, subsequently, his timesheets were amended to place him on AWOL, and he was terminated as a result.

Based on the above, we find the record sufficiently supports the AJ's finding that the Agency is liable for its failure to reasonably accommodate Complainant's disability. The Agency has failed to provide case-specific evidence proving that granting Complainant reasonable accommodation in the form of LWOP would have caused an undue hardship in these particular circumstances. See U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002). While agencies are obligated to provide reasonable accommodation to a qualified individual with disability, the Rehabilitation Act allows agencies to raise an affirmative defense that the accommodation would impose an undue hardship. See Preston v. U.S. Postal Service, EEOC Appeal No. 0120054230 (August 9, 2007); Enforcement Guidance on Reasonable Accommodation. Generalized conclusions will not suffice to support a claim of undue hardship. Rather, a showing of undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. See Julius C. v. Dep't of the Air Force, EEOC Appeal No. 0120151295 (June 16, 2017); Enforcement Guidance on Reasonable Accommodation. The Agency should have considered and addressed how granting extended LWOP while Complainant and his doctors tried to determine a diagnosis and prognosis would have affected the Agency. They did not do so here.

Disparate Treatment Claims

Complainant has alleged that the Agency treated him disparately based on disability and in retaliation for his request for a reasonable accommodation. A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

Here, we find the record sufficiently supports the AJ's findings that the Agency discriminated against Complainant because of his disability and its proffered reasons for the disputed actions were a pretext designed to mask discrimination and/or retaliatory animus. As discussed above, Complainant was a qualified individual with a disability, was subjected to the adverse actions of denial of telework and LWOP, and ultimately was terminated by the Agency. The Agency offers as its reason for the adverse actions essentially that Complainant stopped coming to work, failed to keep them informed of the circumstances of his absence, and failed to provide sufficient medical documentation to support his request for LWOP and/or telework. However, the record shows that an OSHA Specialist, a non-disabled employee, was granted LWOP without any supporting paperwork or medical documentation and that Complainant was in frequent, if not constant, communication with the Agency's management throughout this time. Complainant also informed management that he did not yet have a diagnosis to form the basis of the requested medical documentation, was treated at a VA hospital, and was transferred to the Mayo Clinic for neurological testing and evaluation. He produced as much medical evidence as he had to support his request. Agency policies allowed for the granting of LWOP under such circumstances and the Agency failed to follow its own policies. OSHA Specialist stated that Manager1, who is Complainant's third level supervisor and engaged Complainant regarding his LWOP, approved OSHA Specialist's nonmedical LWOP. Therefore, we find the record sufficiently supports the AJ's finding that the Agency is liable for treating Complainant disparately based on disability.

Harassment Claim

Complainant also alleged the Agency subjected him to harassment. In considering whether the alleged actions, whether individually or collectively, constitute harassment, the Commission notes that, in Harris v. Forklift Systems, the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), that harassment is actionable if it is sufficiently severe or pervasive that it results in an alteration of the conditions of the complainant's employment. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 at 3 (March 8, 1994). To establish a claim of harassment a complainant must show that:

(1) he belongs to a statutorily protected class; (2) he was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See McCleod v. Social Security Administration, EEOC Appeal No. 01963810 (August 5, 1999) (citing Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)).

Furthermore, in assessing whether the complainant has set forth an actionable claim of harassment, the conduct at issue must be viewed in the context of the totality of the circumstances, considering, *inter alia*, the nature and frequency of offensive encounters and the span of time over which the encounters occurred. See 29 C.F.R. § 1604.11(b); EEOC Policy Guidance on Current Issues of Sexual Harassment, N 915 050, No. 137 (March 19, 1990); Cobb v. Department of the Treasury, Request No. 05970077 (March 13, 1997). However, as noted by the Supreme Court in Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998): “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’” The Court noted that such conduct “must be both objectively and subjectively offensive, [such] that a reasonable person would find [the work environment to be] hostile or abusive, and . . . that the victim in fact did perceive to be so.” Id.; see also Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 752 (1998); Clark County School Dist. v. Breeden, 532 U.S. 268 (2001).

Here, we find the record sufficiently supports the AJ’s finding that the Agency subjected Complainant to a hostile work environment because of his disability. Our finding is based on management continuing to make demands and threaten disciplinary action by telephone and email, knowing that Complainant had a serious medical condition and needed more testing and evaluation in order to provide a specific diagnosis. Complainant had a neurological condition that, at least on July 7, 2014, began to show symptoms of deteriorating. On July 7, he had the dizzy spell that caused him to trip on the curb. He sought to find out what was causing intermittent dizziness, headaches, difficulty focusing and to see if it could be corrected to return to a normal life including returning to work. He was seeing neurologists for his condition, including the one who sent the request for September absence. Complainant sought to show the Agency that he was actively trying to find out the problem in hopes that he could return to work. During that time, Agency management was giving Complainant conflicting information and pressing him for medical information and documentation he did not have. We agree with the AJ’s determination that, from the perspective of a reasonable person, the Agency subjected Complainant to a hostile work environment and, because he was also terminated, is vicariously liable.

REMEDIES

Reinstatement and Backpay

The AJ ordered the Agency to reinstate Complainant to the position of Engineering Technician, GS-09, or a substantially equivalent position, at the grade and step where he would have been absent the discriminatory termination. EEOC Regulation 29 C.F.R. § 1614.501 provides for such reinstatement when there has been a finding of discrimination.

The purpose of a backpay award is to restore a complainant to the income he would have otherwise earned but for the discrimination found. See *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 418-19 (1975); *Davis v. U.S. Postal Service*, EEOC Petition No. 0490010 (Nov. 29, 1990). A backpay claimant generally has a duty to mitigate damages. However, the Agency has the burden to establish, by a preponderance of the evidence that a complainant has failed to mitigate his damages. See 29 C.F.R. 1614.501(d); *McNeil v. U.S. Postal Service*, EEOC Petition No. 04990007 (December 9, 1999). The Commission recognizes that precise measurement cannot always be used to remedy the wrong inflicted, and therefore, the computation of back pay awards inherently involves some speculation. *Hanns v. U.S. Postal Service*, EEOC Petition No. 04960030 (September 18, 1997). However, uncertainties involved in a backpay determination should be resolved against the Agency which has already been found to have committed the acts of discrimination. *Id.*; see also *Davis v. U.S. Postal Service*, EEOC Petition No. 04900010 (November 29, 1990). If an agency believes that a complainant did not do enough to mitigate lost wages, it must prove so by a preponderance of the evidence. See, e.g., *McNeil v. U.S. Postal Service*, EEOC Petition No. 04990007 (December 9, 1999); *Beaton v. Department of Justice*, EEOC Petition No. 04A30044 (January 13, 2004); *Arica C. v. Department of the Army*, EEOC Appeal No. 2019002357 (September 22, 2020).

In opposition to the Agency's appeal, Complainant stated that the Agency has the burden to show he failed to mitigate damages, and that it failed to do so here. Complainant stated that he attempted to obtain employment by speaking with the town Mayor and Undersheriff about openings in the city. Complainant stated that no one was receptive to hiring someone in litigation about employment termination. Complainant stated, as a result, he worked for his family's car wash and lube business. He stated that he earned \$29,875.16 in 2015, \$31,858.48 in 2016, and \$33,318.21 in 2017. Complainant stated that he entered the job market by working for his family business as they would have had to pay someone else to perform his duties. Complainant stated, "it shows that [he] was willing to do anything to earn an income for his family." Complainant stated that the AJ erred in assuming that applying for federal jobs is the only way to enter the job market. He stated that he lives in a small town and obtaining employment is different there, such that directly asking others about employment and working for a family business are appropriate. Complainant added, due to depression, withdrawal, lack of confidence, and suicidal ideation, it was normal for him not to want to apply for other Agency positions. Complainant argued that the evidence did not show that there were suitable positions available for which he was qualified and failed to apply. In addition, Complainant noted that he initially thought that his termination would be resolved quickly.

We find that the AJ erred in not awarding Complainant backpay. The Agency failed to prove, by a preponderance of the evidence, that Complainant did not do enough to mitigate lost wages. The record shows that Complainant worked for his family's "business enterprise"¹⁰ and earned \$29,875.16 in 2015, \$31,858.48 in 2016, and \$33,318.21 in 2017. We find that Complainant is entitled to backpay from the effective date of termination to the date Complainant ceased working for and earning wages at his business enterprise or alternative outside employment, the date of reinstatement, or the date he declined reinstatement, whichever is earliest. We acknowledge that Complainant requested LWOP from July 22, 2014 through February 27, 2015 so that should be considered in backpay calculations, as appropriate.

Nonpecuniary Damages

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to a discriminatory act or conduct. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) at Chapter 11, § VII (citing Carey v. Phipps, 435 U.S. 247, 254 (1978) (purpose of damages is to "compensate persons for injuries caused by the deprivation of constitutional rights")). Types of compensatory damages include damages for past pecuniary loss (out-of-pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm). See EEO MD-110 at Chapter 11, § VII.B.

Non-pecuniary losses are losses that are not subject to precise quantification, including emotional pain and injury to character, professional standing, and reputation. See EEO MD-110 at Chapter 11, § VII.B (internal citations omitted). 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 (August 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 (March 4, 1999).

In the instant case, the Agency appeals the AJ's award of \$200,000 for Complainant's non-pecuniary losses. The Agency stated that Complainant is not entitled to compensatory damages because it acted in good faith to provide Complainant reasonable accommodation. The Agency stated that it engaged in the interactive process with Complainant and, at some point, he became upset and refused to participate in the interactive process. Further, the Agency stated that Complainant failed to establish a nexus between his emotional distress and other mental health conditions with the Agency's adverse actions. The Agency stated that Complainant's emotional harm was due to uncertainty from his neurological condition (fear that it would be life-long and he would be bound to a wheelchair), and Complainant sought mental health care more than a year after his termination solely for the purpose of this litigation.

¹⁰ See 5 C.F.R. § 550.805(e)(1).

The Agency stated that LPC1's testimony was not credible as she admitted that she did not take into consideration the uncertainty of Complainant's neurological condition in her assessments. The Agency stated that the AJ's award was "monstrously excessive" and not consistent with similar cases. The Agency stated, if compensatory damages are warranted, they should be no more than \$10,000 considering that Complainant's primary concern was the uncertainty of his neurological condition.

Where a discriminatory practice involves the provision of a reasonable accommodation, compensatory damages may be awarded if the Agency fails to demonstrate that it made a good faith effort to provide the individual with a reasonable accommodation for his disability. 42 U.S.C. § 1981a(a)(3); Gunn v. U.S. Postal Service, EEOC Appeal No. 0120053293 (June 15, 2007). While we have concerns regarding the Agency's managerial confusion in handling the instant matter, we are not inclined to find that the Agency acted in bad faith, as the record clearly shows that the Agency sought to assist Complainant with various options for his absences, at least until Complainant told the RA Specialist to leave him alone. Complainant asserted that he was consumed with handling his medical testing and found the contact by various Agency people "extremely confusing." Based on our finding that the Agency engaged in the interactive process in good faith, we find Complainant is not entitled to compensatory damages for denial of reasonable accommodation.

However, we find that Complainant is entitled to compensatory damages for discriminatory disparate treatment and harassment. We find that \$100,000 is appropriate to compensate Complainant for the nature, severity, and duration of harm experienced here. The record sufficiently supports the AJ's finding that the Agency's discrimination and harassment caused Complainant to experience emotional harm, loss of enjoyment of life, anxiety, loss of confidence, depression, suicidal ideation, PTSD, and mental anguish. The record contains testimony from Complainant, his spouse, and the Licensed Professional Counselor with whom Complainant began therapy sessions on May 16, 2016. The record shows, prior to starting therapy and immediately after his termination, Complainant self-medicated - drinking alcohol. Self-medicating delayed Complainant's start of therapy. Complainant had more than 43 sessions with LPC1 and, as of the hearing in 2018, she continued sessions with him, stating he still had symptoms of depression and PTSD. LPC1 testified that Complainant's mental health symptoms resulted from his termination.

The award of \$100,000 is consistent with awards in other cases where complainants suffered similar symptoms. See, e.g., Karry S. v. Dep't of the Air Force, EEOC Appeal No. 0120182301 (November 21, 2019) (\$100,000.00 in non-pecuniary compensatory damages where Complainant suffered a tarnished reputation, anxiety, mental anguish, stress, weight loss, night sweats, insomnia and physical effects related to discriminatory harassment and removal); and Margaret L. v. Dep't of Veterans Affairs, EEOC Appeal Nos. 0120150582 (April 17, 2018) (\$100,000 in non-pecuniary compensatory damages awarded where Agency's harassment and subsequent termination caused depression, anxiety, crying spells, paranoia, trouble concentrating, isolation, and the need for mental health counseling).

Other Remedial Relief

The AJ also ordered the Agency to post notice of the finding of discrimination; provide Complainant an accommodation, if needed, upon reinstatement; and conduct training to all staff, including managers, regarding the Rehabilitation Act and reasonable accommodation process, as well as additional training for management on processing reasonable accommodation requests. We find these remedies to be appropriate as ordered.

Attorney's Fees and Costs

In appropriate circumstances, this Commission may award a complainant reasonable attorney's fees and other costs incurred in the processing of a complaint regarding allegations of discrimination in violation of the Rehabilitation Act. See 29 C.F.R. § 1614.501(e)(1). Indeed, a finding of discrimination raises a presumption of entitlement to an award of attorney's fees, and any such award of attorney's fees or costs must be paid by the agency that committed the unlawful discrimination in question. See 29 C.F.R. §§ 1614.501(e)(1)(i), (ii).

To determine the precise amount of fees and costs due, the complainant's attorney must submit to the agency a verified statement of attorney's fees (including witness fees, if applicable) and other costs, as appropriate. See 29 C.F.R. § 1614.501(e)(2)(i). This statement must be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. Id. The agency or an EEOC Administrative Judge must then issue a decision determining the amount of attorney's fees or costs it deems to be due and include in this decision the specific methods applied in determining the amount of this award. See 29 C.F.R. § 1614.501(e)(2)(ii)(A). If the complainant is dissatisfied with this decision, he may appeal it to EEOC. Id.

The precise amount of attorney's fees due in these situations is typically determined by multiplying the number of hours reasonably expended by the attorney in question by a reasonable hourly rate. See 29 C.F.R. § 1614.501(e)(2)(ii)(B); see also Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). This amount is often referred to as the "lodestar." "There is a strong presumption that this amount represents the reasonable fee," though "[i]n limited circumstances, this amount may be reduced or increased in consideration of the degree of success, quality of representation, and long delay caused by the agency." 29 C.F.R. § 1614.501(e)(2)(ii)(B). All hours reasonably spent in processing the complaint are compensable, but the number of hours should not include excessive, redundant or otherwise unnecessary hours. EEO MD-110 at Chapter 11, § VI.F. A reasonable hourly rate is based on prevailing market rates in the relevant community for attorneys of similar experience in similar cases. Id.

Pursuant to EEOC Regulation 29 C.F.R. § 1614.501(e)(i), the assigned AJ awarded Complainant attorney's fees of \$197,789.90 and \$3,154.20 in costs, for \$200,944.10 total fees and costs. In so doing, the AJ used current *Laffey* Matrix rates¹¹ for attorneys in the D.C. area.¹²

¹¹ The Laffey Matrix is a "matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks . . . prepared by the Civil Division of the United States Attorney's Office

The AJ noted that, based on her review of the attorneys' fee petition and her knowledge of the course of the proceedings, the hours expended by Complainant's counsel were very reasonable for a case that encompassed discovery, a settlement conference, a dispositive motion, and a hearing.

The Agency does not dispute the hourly rate awarded based on the *Laffey* Matrix but asserted "excessive and redundant billing" for hours expended. The Agency requests, if discrimination is found, a 20% across-the-board reduction in fees.

Conversely, Complainant asked the Commission to award \$254,289.96 in attorneys' fees and costs. Complainant requested:

Total hours awarded by AJ:	336.13
Attorney 1:	310.16 hours x \$621 per hour (updated Laffey rate)
Attorney 2:	25.97 hours x \$591 per hour (updated Laffey rate)
Total fees awarded by AJ at updated Laffey rate:	\$207,957.63
Total costs awarded by AJ:	+ 3,154.20
	\$211,111.83
Total fees-Complainant's appeal:	1,863.00 (3 hours x \$621 per hour)
Total fees-Opposition Response:	40,694.13 (65.53 hours x \$621 per hour)
Total fees-attorneys' fees motion:	+ 621.00 (1 hour x \$621 per hour)
	\$254,289.96 TOTAL FEES AND COSTS

for the District of Columbia (USAO) to evaluate requests for attorney's fees in civil cases in District of Columbia courts. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees." USAO Attorneys Fees Matrix — 2015-2021, Explanatory Note 1.

¹² The Commission has held that if a party does not find counsel readily available in the locality of the case with whatever degree of skill that may reasonably be required, it is reasonable for the party to go elsewhere to find an attorney. See Harden v. Social Security Administration, EEOC Appeal No. 0720080002 (August 12, 2011). The burden is on the agency to show that a complainant's decision to retain out-of-town counsel was unreasonable. Id. Complainant stated that he could not find experienced federal EEO representation in or near Jackson, Wyoming.

Complainant stated that his two attorneys represented him from October 24, 2014 through July 15, 2019¹³ and then for the instant appeal. Attorney1 was his primary attorney logging 310.16 hours and Attorney2 was secondary accruing 25.97 hours. Complainant stated that his attorneys “expended a great deal of time and effort over the last five years responding to written orders, filing motions and arguments, attending a deposition in Jackson, Wyoming, responding to Agency motions, and representing Complainant at his hearing.” Complainant stated, “[d]ue to the nature of the proceedings, the numerous witnesses involved, the Agency decision to contest every aspect of this case, the undersigned counsel had no choice but to vigorously litigate the case.” Complainant noted that he was always open to settlement and mitigation of damages. Complainant stated that his attorneys frequently represent complainants before the Commission and current Laffey rates are customary in Commission litigation. Complainant stated that the facts for all three claims were interrelated. Complainant stated that he prevailed in this matter and achieved “an excellent result” and his attorneys’ fees are reasonable. Complainant stated that he hired his attorneys because he wanted an attorney with Federal Sector EEO experience (Attorney1 has practiced exclusively in federal sector EEO law since 1991) and he could not locate one in or near Jackson, Wyoming.

Based on the above, we find the AJ’s award of attorneys’ fees (based on hours expended prior to appeal) reasonable and at the current Laffey rate of \$621 for Attorney1 and \$532 for Attorney 2.¹⁴ We also find Complainant is entitled to additional attorney’s fees and costs related to this appeal. However, the submission for 65.53 hours expended on opposition to Agency appeal are not detailed as those previously submitted at the hearing stage and seem somewhat unnecessary on their face. Hence, we find a 20% across-the-board reduction of Total Fees – Opposition Response of 40,694.13 (65.53 hours x \$621 per hour) is appropriate, which results in \$32,555.30 (reduction of \$8,138.83) for Total Fees – Opposition Response.

As outlined below, we find \$244,618.90 appropriate for Total Fees and Costs through appeal:

Total hours awarded by AJ:	336.13
Attorney1:	\$192,609.36 (310.16 hours x \$621 per hour)
Attorney2:	+ 13,816.04 (25.97 hours x \$532 per hour)
Total fees for Attorneys:	\$206,425.40
Total costs awarded by AJ:	+ 3,154.20
	<u>\$209,579.60</u>

¹³ Complainant provided an invoice for services from October 14, 2014 through July 14, 2019. The invoice also contained expenses for airfare, lodging, car rental for travel to Jackson for Attorney1 and a witness for depositions and EEOC hearing.

¹⁴ The USAO Attorney’s Fees Matrix for 2020-21 is \$621 per hour for 21-30 years of experience (Attorney1) and \$532 for 11-15 years of experience (Attorney2).

Total fees-Complainant's appeal: 1,863.00 (3 hours x \$621 per hour)
Total fees-Opposition Response: 32,555.30 (65.53 hours x \$621 per hour – 20%)
Total fees-attorneys' fees motion: + 621.00 (1 hour x \$621 per hour)

\$244,618.90 TOTAL FEES & COSTS

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final order and REMAND the matter to the Agency for remedial relief.

ORDER

To the extent it has not already done so, the Agency shall provide the following remedial relief **within sixty (60) calendar days, unless otherwise noted, of the date of this decision.**

- I. The Agency shall pay Complainant \$100,000.00 in nonpecuniary, compensatory damages.
- II. The Agency shall reinstate Complainant to the position of GS-9, Engineering Technician or a substantially equivalent position, at the grade and step where he would have been absent the discrimination. The Agency's job offer of reinstatement shall include a notice that, if Complainant either does not respond or declines the job offer within 15 days of receipt, his right to receive further back pay and other benefits based on the job offer shall terminate as of that date. If the offer is accepted, the Agency shall place Complainant into the position no later than 30 days from that date of acceptance.
- III. Upon reinstating Complainant to his position, the Agency shall immediately initiate the reasonable accommodation process with Complainant to assist him in identifying any accommodation he may need and accommodate him accordingly.
- IV. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501, no later than 60 calendar days from the date of this decision. Back pay shall be paid from the effective date of Complainant's termination in October 2014 through the date Complainant ceased working for and earning wages at his business enterprise or alternative outside employment, the date of his reinstatement, or the date he declined reinstatement, whichever is earliest. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within 60 calendar days of

the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

- V. The Agency shall provide 16 hours of mandatory in-person training on the Rehabilitation Act to Supervisor1, the Deputy Forest Supervisor, and the Acting Forest Supervisor as well as the RA Specialist. The training must include how to process reasonable accommodation requests from employees.
- VI. The Agency shall consider disciplinary action against Supervisor1, the Deputy Forest Supervisor, and the Acting Forest Supervisor, if they are still employed by the Agency. The Commission does not consider training to be a disciplinary action. If the Agency decides to take disciplinary action, it shall identify the actions 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 any of them has left the Agency's employ, the Agency shall furnish documentation of the departure date(s).
- VII. The Agency shall pay Complainant \$244,618.90 in attorney's fees and costs for representation through the instant appeal.

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).

POSTING ORDER (G0617)

The Agency is ordered to post at its Bridger-Teton National Forest facility 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).

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).

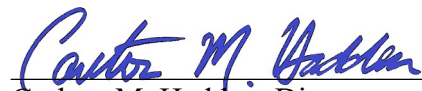
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

July 26, 2021
Date