



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

[REDACTED]
Irina T.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2020001946

Agency No. 200I-0614-2016101883

DECISION

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from an Agency decision, dated November 19, 2019, concerning an award of compensatory damages regarding an equal employment opportunity (EEO) complaint claiming 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 the Agency's decision.

ISSUE PRESENTED

The issue presented is whether the Agency properly determined that Complainant was entitled to an award of \$5,000 in non-pecuniary compensatory damages.

BACKGROUND

During the relevant time, Complainant was employed by the Agency as a Pharmacy Technician at the Veterans Affairs Medical Center (VAMC), Pharmacy Service - Telephone Care Service in Memphis, Tennessee. On May 9, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on her disabilities (diabetes, gastroparesis disease, and chronic pain), and age (57) when:

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

1. By letter dated January 25, 2016, she was ordered by her second line supervisor, the Assistant Chief, Pharmacy Service, GS-14 ("S2" -- age 31), to return to duty no later than January 28, 2016, or face administrative action, up to and including removal.
2. On March 1, 2016, S2 issued Complainant a written reprimand for being absent without official leave (AWOL) for part or all of each workday (except one) from January 4, 2016 through January 27, 2016, and February 5, 2016 -- a total of 115 hours.
3. On February 19, 2016, S2 found that Complainant was ineligible for excused leave under the Family and Medical Leave Act (FMLA) because she did not satisfy a required FMLA waiting period.

Following the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notified her of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). After Complainant did not request a hearing, the Agency issued a final Agency decision, finding no discrimination.

In Irina T. v. Dep't of Veteran's Affairs, EEOC Appeal No. 0120180568 (Apr. 3, 2019), we reversed the Agency's decision with regard to claims 1 and 2. Therein, we found that the Agency discriminated against Complainant based on her disability when the Agency did not reasonably accommodate her by charging her with AWOL and reprimanding her due to her absence from work. In so finding, we noted, in pertinent part, that Complainant was hospitalized due to her blood sugar levels during the time period that she was charged with AWOL and S2 did not dispute the validity of Complainant's illness. We further noted that Complainant had medical documentation excusing her absence for one week of the above AWOL period. We therefore found that Complainant was improperly reprimanded for using up all her leave and being absent from work, as she was hospitalized during the period at issue. We noted, moreover, that in her EEO investigative transcribed affidavit, Complainant stated that being under stress causes her blood sugar level to increase and indicated the Agency's enforcement of its leave policy caused her stress which raised her blood sugar levels.²

In compliance with our decision, the Agency conducted a supplemental investigation with respect to Complainant's entitlement to compensatory damages and presented Complainant with an opportunity to submit evidence of pecuniary and non-pecuniary damages regarding the Agency's failure to provide her with a reasonable accommodation. Complainant however did not submit any evidence regarding her entitlement to compensatory damages and did not respond to the compensatory damage investigator's request for an affidavit.

² We found that Complainant established that she was a qualified individual with a disability under the Rehabilitation Act.

CONTENTIONS ON APPEAL

Complainant did not file a brief on appeal. In response to Complainant's appeal filing, the Agency notes that neither Complainant nor her attorney responded to its repeated requests for objective testimony and evidence in support of her claim for compensatory damages.

ANALYSIS AND FINDINGS

Compensatory Damages

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful discrimination or harassment under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this "make whole" relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

To receive an award of compensatory damages, a complainant must demonstrate that she has been harmed as a result of the agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for recons. denied, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14. Although damage awards for emotional harm can greatly vary, and there are no definitive rules governing amounts to be awarded, compensatory damage awards must be limited to the amounts necessary to compensate the complainant for actual harm, even if that harm is intangible. *Id.* at 7. It should take into account the severity of the harm and the length of the time the injured party has suffered from the harm. *See* Carpenter v. Dep't of Agric., EEOC Appeal No. 01945652 (July 17, 1995). The absence of supporting evidence may affect the amount of damages deemed appropriate in specific cases. *See* Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996).

In Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993), the Commission explained that "objective evidence" of non-pecuniary damages could include a statement by a complainant explaining how she was affected by the discrimination. A complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. *Id.*

Upon review, we find that Complainant has not established that the Agency improperly awarded her \$5,000 in non-pecuniary compensatory damages. In so finding, we note that Complainant did not respond to the Agency's requests for evidence regarding the harm she suffered due to the discrimination. We however take judicial notice that Complainant averred in her EEO investigative transcribed affidavit regarding EEOC Appeal No. 0120180568 that the Agency's enforcement of its leave policy caused her stress which raised her blood sugar levels. We find that the Agency's award is comparable to the Commission's case precedent in similar cases. See Zenia M. v. Dep't of Army, EEOC Appeal No. 0120151690 (Aug. 2, 2017) (\$3,000 in non-pecuniary compensatory damages awarded where complainant presented limited evidence regarding the harm she suffered due to the discrimination); Dybvik v. U.S. Postal Serv., EEOC Appeal No. 0720080028 (June 3, 2008) (\$3,000 award in non-pecuniary compensatory damages when the agency failed to provide complainant with a reasonable accommodation with respect to the monitoring of his blood sugar level); Purl v. U.S. Postal Serv., EEOC Appeal No. 01A23399 (Aug. 15, 2003) (\$5,000 award in non-pecuniary compensatory damages for a two-month delay in providing a reasonable accommodation).

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 decision awarding Complainant \$5,000 in compensatory damages.

ORDER

Within sixty (60) calendar days of the date this decision is issued, and to the extent it has not done so already, the Agency shall pay Complainant \$5,000 in compensatory damages.

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 (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

July 29, 2021

Date