



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

[REDACTED]
Lydia F.,¹
Complainant,

v.

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

Appeal No. 2020001007

Hearing No. 430201700365X

Agency No. 200406522016103422

DECISION

Complainant timely appealed, pursuant to 29 C.F.R. § 1614.403, from the Agency's Final Order concerning an equal employment opportunity ("EEO") complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as an Advanced Medical Support Assistant ("MSA"), Physical Medicine & Rehabilitation (PM&R), GS-6, at Hunter Holmes McGuire VA Medical Center, in Richmond, Virginia.

On August 4, 2016, Complainant filed a formal EEO complaint alleging that the Agency discriminated against her on the basis of disability (attention deficit order - "ADD" or "ADHD",

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.

major depression, generalized anxiety disorder) when, on March 31, 2016, she was constructively discharged when she learned she was subjected to a proposed termination.²

After investigating her complaint, the Agency provided Complainant with a copy of the report of investigation (“ROI”) and notice of her right to request a hearing before an EEOC Administrative Judge (“AJ”). Per Complainant’s timely request, a hearing was held on August 6, 2019. The AJ issued a Decision and Order on September 10, 2019.³

The evidence developed during the Agency’s investigation and at the hearing shows that in May 2015, Complainant was hired as an Advanced MSA, GS-6, subject to a one-year probationary period. She was one of multiple MSAs who supported the PM&R interdisciplinary care team by scheduling appointments, managing schedules, communicating with an array of parties regarding patient care including physical therapists, physicians, patients, other agencies, and governmental and nongovernmental health facilities.

By Complainant’s account, her duties initially included payroll and she worked at a desk that was in the corner, far enough back so that patients did not approach her with questions. At some point it appears that the prospect of desk reassignments was raised. One MSA with more seniority was vocal about her desire to sit at Complainant’s desk so she would not have to deal with patients. In October 2015, Complainant arrived to work and was informed by that MSA that they were switching desks and that Complainant was no longer responsible for payroll. Complainant’s primary responsibility became contacting veterans to schedule their physical therapy (“PT”) appointments.

It is undisputed that Complainant’s new desk, known as the “front” or “first” desk, faced a busy hallway, and was located closest to the office entry area. The space immediately in front of her desk was a natural congregating area where Care Team members and coworkers would pause to chat on their way in and out. As her work area was visible from the hallway, patients would stop in to ask Complainant questions or to schedule appointments throughout the day. The volume of individuals passing by Complainant’s desk varied but it was ongoing. With her ADD, Complainant said she struggled to maintain focus. However, she soon lagged behind the other MSAs in productivity, accumulating a large backlog of PT contacts.

In October 2015, Complainant disclosed her diagnosis of ADD to her first level supervisor (“S1a”), the Program Director, Physical Medicine, GS-13, and explained how the “chaotic” atmosphere at the first desk was impacting her productivity. S1a told Complainant that he would check with his supervisor, the Director, PM&R Services (“D1”) to see if Complainant could be transferred to the VIP Clinic, where it was quieter.

² Complainant raised two additional claims of disability discrimination, which the AJ dismissed prior to holding a hearing. As Complainant did not challenge their dismissals on appeal, the claims will not be addressed further in this decision.

³ This was a revised version of the AJ’s earlier Decision and Order issued September 3, 2019.

S1a did not suggest that Complainant request a reasonable accommodation for her ADD, which she could have done by contacting Human Resources (“HR”), nor did he raise any alternate accommodation options.

On January 6, 2016, S1a took a leave of absence. It appears that he had not, in fact, inquired about the transfer or followed up with Complainant. However, Complainant did not take further action to obtain an accommodation, based on her belief that S1a would provide a transfer. She was also applying to other positions within the Agency, including lower graded positions to get out of her work environment. Until S1a returned on or about February 23, 2016, Complainant reported to an acting supervisor (“AS”), a Program Director who was otherwise outside her chain of command. Effective February 8, 2016, a Supervisory MSA, GS-8, became Complainant’s first level supervisor (“S1b”), and S1a became Complainant’s second level supervisor.

On February 2, 2016, AS and S1b met with Complainant to discuss her performance, particularly her PT backlog. Complainant explained that “it was extremely chaotic at the first desk, and it was very difficult for me to pay attention at that specific desk having ADD.” She relayed that S1a was inquiring about transferring her to the VIP Clinic. Alternately, she suggested, “if I was able to move my desk away from that first seat with the constant chaos and distractions that it would allow me to do my job effectively.” S1b and AS were unaware of plans to transfer Complainant and did not discuss her alternate suggestion of moving her workspace. Rather, AS reminded Complainant that she was on her probationary period, and that he and S1b would be providing additional feedback, to help her improve her performance. They asked if she required specific training to help her succeed, and Complainant explained that she did not, as she understood her assignments and the Agency’s scheduling system.

After the meeting, S1b and Complainant had a frank discussion. S1b revealed that the other MSAs were frustrated with Complainant, as she gave the impression that she did not care about completing her work, and her lack of productivity increased their workloads. S1b informed Complainant that a transfer to the VIP Clinic was “out of the question” until she completed her PT backlog because she could not leave her PT backlog for someone else to complete. S1b also told Complainant, “to act like she [is] interested in the job that she has now.” Complainant responded, “[y]ou are right. Honestly, I didn't plan on being here this long... I honestly was doing enough to get by and hate being here.” She told S1b that she was actively applying for other jobs, and the “more the [PT] list got backed up the more depressing it was to look at it.”

On February 3, 2016, S1b met with Complainant to discuss her PT backlog. She offered strategies, including, but not limited to, “change your mindset,” providing Complainant with encouragement about tackling the “depressing” PT backlog. S1b also provided an action plan with an initial goal of 34 contacts per 8-hour day. They planned meet weekly to reassess her goals.

On February 12, 2016, S1b and AS met with Complainant, who described the past week as an overall positive experience, and a “wake up call” as she realized she was giving the appearance of someone lacking a good work ethic.

For the next action plan, Complainant would observe S1b on the job, as they shared some responsibilities, and her goal was upped to 50 contacts per day. Complainant agreed, but voiced misgivings, communicating to S1b and AS that her ability to meet the goal depended on the volume of people passing by her desk or interrupting her.

On February 19, 2016, S1b and AS met with Complainant, who now averaged 44 consults a day, nearly double her initial rate. Complainant expressed that it was a struggle to get to 50, due to distractions at her workspace, but she felt good about her overall progress. Going forward, Complainant's goals would be based on percentages, and she was instructed to decrease her PT backlog by 50% by March 4, 2016.

On March 4, 2016, S1b met with Complainant, who revealed that she felt exhausted by the work she was putting in, but happy over her progress decreasing the backlog. S1b provided Complainant with additional suggestions and emphasized that Complainant's pace needed to increase "tremendously." Complainant's new goal was to decrease her PT backlog by 50% including followups with individuals who were already contacted. In order to do so, S1b advised calling "no less than 100 patients a day," and to increase her productivity by "200%."

Also on March 4, 2016, D1 submitted a request to HR to terminate Complainant's employment due to her "inability to perform essential functions of her position." At the time, D1 did not know about Complainant's disability or her accommodation requests, but S1a (who was aware) was the recommending official for her termination. On March 29, 2016, the Chief of HR Management provided Complainant with a memorandum notifying her that she would be terminated during her probationary period effective March 31, 2016.

Complainant and her Union Representative immediately contacted HR and met with S1a, explaining that Complainant's ability to "perform the essential functions of her position" was hindered because she was not provided a reasonable accommodation. They reminded S1a that Complainant requested a reasonable accommodation, yet one was never provided. However, HR did not have a formal request on file, and opted to proceed.

Prior to initiating Complainant's termination, the Agency offered Complainant a GS-5 position in its Prosthetics Service Unit, which Complainant applied for while she was still working as an MSA, GS-6. Complainant's union representative suggested transferring Complainant to the GS-5 position instead of termination. S1b, who had not been involved with the decision, warned S1a and D1 that if they went through with the termination, Complainant might have cause for a grievance since she was certified for the GS-5 position and received the offer before she received the notice of termination. S1a, D1, and HR discussed this option, but ultimately HR determined that it was not feasible to halt the termination process. Complainant tendered her resignation to D1 rather than have a termination on her record.

AJ Findings

Following the hearing, the AJ found that Complainant established constructive discharge, reasoning that the Agency's failure to provide her with a reasonable accommodation was sufficiently abusive in nature to have forced a reasonable person in her position to quit. In support of the decision, the AJ cited to Wagner v. Dep't of Transp., EEOC Appeal Nos. 0120103125 (Dec. 1, 2010), 0120113419 (Nov. 21, 2012) (complainant with hearing impairment constructively discharged as he felt compelled to accept disability retirement when his managers and coworkers refused to speak into the microphone of his assistive technology so that he could understand them). The AJ observed that the Agency could have easily provided Complainant an accommodation in the form of a GS-5 position where she had already been accepted. Yet, the Agency never attempted to locate a substantially equivalent GS-6 position to offer Complainant, so that the GS-5 position could be considered an accommodation if there was no GS-6 available. The evidence indicated that S1a intentionally "set Complainant up to fail," after he became aware of her disability. The AJ noted that the Agency "speedily providing Complainant with the ultimatum of resignation in lieu of termination" was indicative of forced resignation.

The AJ determined that Complainant attempted to initiate the reasonable accommodation process with S1a in October 2015 when she revealed that she had ADD and that she required an accommodation. By stating that he would look into a transfer for Complainant, Complainant had reason to believe that she would be provided an accommodation and did not make further requests. She became aware on February 2, 2015, during the meeting with S1b and AS that her request would not be fulfilled. Citing S1b's testimony, and a memorandum commemorating the February 2, 2016 meeting, the AJ found that Complainant attempted to initiate the interactive process again and placed S1b and AS on notice that she required a reasonable accommodation.

As Complainant's supervisors, S1a, S2b, and AS all had an obligation under the Rehabilitation Act to engage in the interactive process with Complainant. The AJ found that it was not clear from the record the extent to which S1a, S1b, and AS were aware of their obligations, or that in the event an employee needed a reasonable accommodation, they were to direct the employee to file a request with HR. Regardless, this does not excuse the Agency from its obligation, and all three officials had the authority to accommodate Complainant with a less distracting workspace, whether it entailed transferring or not. The AJ also noted that by causing Complainant to believe that he was taking action on her behalf, S1a prevented her from seeking an accommodation through HR or elsewhere between October 25, 2015 and February 2, 2016. The AJ found that keeping Complainant at the front desk with ever increasing goals set her up for failure, and indicated that S1a, who had a major role in Complainant's termination, did so intentionally.

Although S1b and AS were aware of Complainant's ADD and her difficulties working as a result of her desk location, the meetings held on February 3, 12, and 19, and March 4, 2016, ostensibly intended to help Complainant succeed, did not reference transfer or accommodation or the difficulty her with work environment.

The AJ determined that the Agency's actions reflected an attempt to induce Complainant's resignation because HR and Management opted to move forward with Complainant's termination even though they were aware of her selection for a lower graded position and of her prior un-fulfilled reasonable accommodation requests.

Compensatory Damages

The AJ awarded \$5,500 in non-pecuniary compensatory damages based on Complainant's testimony and testimony from Complainant's husband, mother, and friend regarding the impact of the Agency's discriminatory acts on Complainant. The AJ reasoned that Complainant obtained another job with better pay after two months and found that the record was sparse with respect to how much of Complainant's mental distress was attributable to the Agency's actions versus outside factors. By Complainant's own account, she was experiencing issues with her stepson and the stress from being a full-time evening student at the time of her forced resignation. The AJ also emphasized that Complainant's "mental health-related issues," diagnosed in 2013, predated the discriminatory acts.

The record reflects that Complainant's ADD, anxiety, and depression were diagnosed in 2013, and her doctor increased the dosage of her anxiety medication in July 2015, all predating her October 2015 move to the front desk, which necessitated the reasonable accommodation. Working as an MSA at PM&R was a source of anxiety in Complainant's life well before the October 2015 move to the front desk. Contemporaneous notes taken by Complainant's treating psychiatrist, dated July 1, 2015, August 26, 2015, and October 22, 2015, all state in various ways that Complainant hated her job as an MSA and found it stressful. Complainant's statements in the record that partially attribute the psychological toll of working in PM&R to a pervasive negative atmosphere among the MSAs due to chronic understaffing, and due to S1a's condescending and rude behavior, none of which are grounds for relief.

When calculating the award, the AJ relied on the Commission's decisions on compensatory damages in Reddy v. Department of Veterans Affairs, and Starr R. v. General Services Administration, where, like the instant complaint, the complainants were denied a reasonable accommodation by the agency, the evidence provided to support their compensatory damages consisted of testimonials, and outside factors impacted the analysis of how much of the harm the complainants experienced was attributable to the denied accommodation. See Starr R. v. Gen. Servs. Admin., EEOC Appeal No. 0120143031 (Jan. 12, 2017) (\$12,000 awarded where complainant experienced a seizure, and the agency took over 4 months to provide a reasonable accommodation (full time telework), and the evidence established emotional harm during the period when the accommodation was denied, but that the ongoing emotional harm the complainant attributed to the denied accommodation was more likely based on other factors), Reddy v. Dep't of Veterans Affairs, EEOC Appeal No. 0120111751 (Feb. 23, 2012) (\$6,500 partially awarded for emotional harm due to management improperly accessing the complainant's medical records, and in part where the denial of a reasonable accommodation (space to perform his physical therapy exercises) exacerbated the symptoms physical disability to

an unspecified extent). Despite the AJ's analysis of Complainant's constructive discharge, neither case involves constructive discharge, nor forced resignation.

The Agency accepted the AJ's decision. Thereafter, Complainant appealed on the issue of compensatory damages, arguing that an award of \$100,000 would be more appropriate.

ANALYSIS AND FINDINGS

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 EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

Compensatory Damages

In order to establish an entitlement to compensatory damages, the burden is on a complainant to submit evidence to show that the agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. See Complainant v. U.S. Postal Serv., EEOC Request No. 05980311 (February 26, 1999). Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. United States Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from Complainant concerning her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

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

Complainant has the burden of proving the existence, nature and severity of the alleged emotional harm. Man H. v. Dep't of Homeland Sec., EEOC Appeal No. 0120161218 (May 2, 2017). Complainant must also establish a causal relationship between the alleged harm and the discrimination. *Id.* Absent such proof of harm and causation, a Complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. *Id.* See also e.g. Wilda M. v. U.S. Postal Serv., EEOC Appeal No. 0120141087 (Jan. 12, 2017) (awards for emotional harm are warranted only if Complainant establishes a sufficient causal connection between the Agency's illegal actions and her injury).

Complainant's suggested award of \$100,000 in compensatory damages is excessive. Her statement in support of compensatory damages describes job-specific stressors and events that did not arise from the denied reasonable accommodation. For instance, she describes workplace bullying by the other MSAs from May 2015 through on or about December 2015. Complainant also recounts that on March 3, 2016, S1a issued a performance appraisal which stated, "needs improvement to be considered fully successful," and was dismissive when Complainant pointed out how dramatically she'd improved over the past 5 weeks. S1a allegedly reminded Complainant of her backlog and commented, "we all know you have issues focusing" using air quotes for "issues focusing." While S1a's alleged conduct, and that of the other MSAs could reasonably cause emotional distress, it is outside the scope of the AJ's finding of discrimination. Complainant is only entitled to recover for emotional harm arising from the denial of a reasonable accommodation, and the resulting constructive discharge.

The AJ's award of \$5,500 in compensatory damages is also inappropriate. At the outset, the AJ did not give sufficient consideration to the demoralizing and humiliating nature of Complainant's forced resignation. We have previously found awards in the \$5,500 range to be an appropriate amount of compensatory damages for employees whose pre-existing conditions were aggravated by an agency's denial of reasonable accommodation, taking into consideration outside factors and the duration of the denial. See Phillis W. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120180863 (Jun. 5, 2019) (\$5,000 awarded for exacerbation of pre-existing physical disability as a result of the Agency's delay of over a year in replacing ergonomic chair as a reasonable accommodation) citations omitted, see also, Chara S. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019001100 (July 16, 2020) (\$6,000 award where Complainant failed to establish that the three-week delay in granting reasonable accommodation was the proximate cause complainant's disability-related injury, also noting that complainant's emotional distress could be attributed to outside factors), Freddie M. v. Dep't of Def., EEOC Appeal No. 2020002968 (Dec. 30, 2020) (\$5,000 awarded to complainant with bilateral degenerative knee impairment who was denied a parking space as a reasonable accommodation for 7 months, because the evidence indicated that the denial of an accommodation "contributed in small part to Complainant's emotional pain, depression, and irritability," particularly his termination, which was not at issue and could not be a basis for recovering damages). In the instant case, Complainant not only established that the symptoms of her mental health conditions were exacerbated as a result of the Agency's discriminatory acts, she also provided sufficient evidence connecting the Agency's actions to additional emotional harm.

Further, the AJ's analysis of complainant's prior diagnoses of her mental health conditions seems to assume that her symptoms were continuous, stating, "[s]ince 2013, Complainant has experienced sleep impairments, anxiety symptoms (e.g., heart pounding or racing, trembling or shaking, etc.), and ADHD symptoms (e.g., difficult sustaining attention in tasks)." The record reflects that Complainant's mental health was monitored by a psychiatrist and she underwent treatment, including pharmaceuticals, for her mental health conditions throughout the relevant timeframe. Thus, the award amount that the AJ calculated underestimates the extent to which Complainant's symptoms were exacerbated as a result of the denied accommodation and constructive discharge.

Our reading of the record indicates that the denial of a reasonable accommodation exacerbated her mental health conditions and amplified Complainant's stressors outside of work, not the other way around. For instance, Complainant withdrew from one of her courses as a result of stress due to working without a reasonable accommodation, decreasing the likelihood that Complainant's status as a full-time student could be blamed for the exacerbation of her depression and anxiety. Considered with the record, the testimonial evidence Complainant provided successfully connects the denials of a reasonable accommodation and resulting constructive discharge to emotional harm and the exacerbation of her mental health conditions, particularly for the period between February and May 2016. The evidence reflects that she withdrew from friends and family, including her children, she avoided social situations, stopped her daily phone conversation with her mother, and lost interest in sex with her husband. Complainant also struggled to eat, a manifestation of her depression and anxiety.

The initial October 2015 denial of a reasonable accommodation placed Complainant in a stressful atmosphere for a prolonged amount of time, and, as the AJ put it, set her up for failure. Moreover, as an individual with ADD, the energy and effort required to resume focus on a task after an interruption in an area with numerous interruptions all day, supports Complainant's account of continuous elevated anxiety while at the front desk.

During February and March 2016, the final two months of her employment, Complainant's anxiety and depression were exacerbated, when she was denied a reasonable accommodation again, yet assigned goals that were unrealistic without a reasonable accommodation. The record reflects that Complainant was consumed with meeting the goals, worked diligently, increased her output, and followed the Agency's advice, such as changing her attitude, as evidenced by her positive statements in the weekly meeting records. Without a reasonable accommodation, she fell short every week. Complainant recounts her humiliation at the weekly meetings after working as hard as she could then being told it was not enough. The weekly meetings became a major source of anxiety for Complainant with ongoing effects, including feelings of inadequacy. In two months, Complainant lost 19 pounds, went from a friendly demeanor to rarely smiling, causing coworkers and patients alike to ask her if she was ok. During this time frame, Complainant withdrew from a course almost immediately after she started it because she was concerned she would fail, as work took up so much of her energy.

Taking into consideration the relatively short time Complainant held her position, and her initial lack of personal investment, the record still reflects that her constructive discharge caused her emotional distress. Complainant states that she was deeply humiliated, and her depression was exacerbated when, upon her “resignation” she had to go to the front desk and publicly pack her things, with people asking her what happened. The circumstances of the constructive discharge were particularly demoralizing because the Agency essentially rejected Complainant a second time when it rescinded its offer of a lower graded position. Despite her initial attitude of just doing enough to “get by,” Complainant was forced to resign after demonstrating dramatic improvement after working as hard as she could for weeks, literally exhausting herself. Under these circumstances, termination for performance issues and denial of an opportunity to keep working at a lower grade for less money would have also been demoralizing.

Complainant also argues that even though she obtained better paying job two months later (and had access to her husband’s health insurance) she was still harmed by her two months of unemployment. At the time of her constructive discharge, Complainant was not in a secure financial position, so her debt increased. She could not afford medical bills, and she received demanding calls and letters from credit card companies and a notice from an attorney that her debts were passed on to a collection agency. The financial stress exacerbated Complainant’s anxiety and depression and put a strain on her marriage. She said she and her husband verbally fought, and it became a struggle to stay calm when talking to him or their children.

Complainant also establishes that once she started work at her new job, she continued feel the impact of the denied reasonable accommodation, and constructive discharge. The humiliation over the circumstances of her “resignation” followed her, as she felt acutely embarrassed whenever anyone asked about her previous job. Complainant’s prior feelings of being constantly on edge, in fear of criticism and losing her job resurfaced when she returned to work, even after receiving satisfactory performance reviews. Complainant also describes a lack of confidence in herself and her work that did not exist prior to the denial of a reasonable accommodation and constructive discharge.

We conclude that \$20,000 is an appropriate award of non-pecuniary compensatory damages under the circumstances of this case and considering the emotional harm and exacerbation of Complainant’s mental health conditions that resulted from both the denial of a reasonable accommodation and the constructive discharge. This award is not motivated by passion or prejudice, not “monstrously excessive” standing alone, and is consistent with the amounts awarded in similar cases. See Wagner v. Dep’t of Transp., EEOC Appeal No. 0120113419 (Nov. 21, 2012) (discussed above and by AJ for the instant complaint) (\$15,000 awarded for denial of reasonable accommodation and harassment which led to constructive discharge, where one-page letter from the complainant’s psychologist attributed his clinical depression, difficulty sleeping, unhappiness, and loss of appetite to the Agency’s discriminatory acts) citing Sellers v. Dep’t of Veterans Affairs, EEOC Appeal No. 01964003 (Oct. 3, 2000) (\$13,000 awarded to a complainant who showed that she suffered additional physical and mental problems as a result of the agency's failure to provide reasonable accommodation and forcing complainant to accept a reassignment to a downgraded position over removal) see also Pamala L. v. United States Postal

Serv., EEOC Appeal No. 0120181511 (Sept. 27, 2019) (\$25,000 awarded where the complainant was denied a reasonable accommodation for approximately four and a half years, resulting in physical pain and severe emotional distress, noting that it was difficult to tell, from the record to what extent the to which the denied accommodation aggravated the complainant's preexisting conditions) citing Minna Z. v. Dep't of the Air Force, EEOC Appeal No. 0720160009 (March 10, 2017) (\$25,000 awarded where the agency failed engage in the interactive process, instead reassigning the complainant to a "light duty" position and forcing her to work outside her restrictions for several years, finding the discrimination caused the complainant to suffer from insomnia, depression, migraine headaches, anxiety, harm to her reputation, and aggravation of pre-existing physical and mental conditions).

CONCLUSION

Accordingly, we MODIFY the Agency's award of non-pecuniary compensatory damages. The matter is REMANDED to the Agency for payment of non-pecuniary compensatory damages in accordance with the following ORDER.

ORDER

The Agency is ordered to take the following remedial action:

1. Compensatory Damages. To the extent it has not already done so, **within thirty (30) calendar days** of this decision, the Agency shall pay Complainant \$20,000 in non-pecuniary compensatory damages for unlawfully denying her requests for a reasonable accommodation and subjecting her to constructive discharge.
2. Compliance Report. The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation as evidence that the corrective action has been implemented.

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (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

September 16, 2021

Date