



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

[REDACTED]
Jeffrey R.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Pacific Area),
Agency.

Appeal No. 2020002824

Agency No. 4F-967-0006-12

DECISION

On February 26, 2020,² Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 27, 2020, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

ISSUES PRESENTED

The issues presented on appeal concern whether the Agency properly calculated Complainant's entitlement to pecuniary and nonpecuniary compensatory damages.

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

² Complainant claims that he filed an appeal on February 13, 2020, via the EEOC Public Portal. We have no record of that appeal. Nevertheless, we find his mailed filing to be timely.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a City Letter Carrier, Q-01, at the Agency's Main Post Office in Honolulu, Hawaii.

On October 22, 2012 and December 13, 2012, Complainant filed two separate EEO complaints alleging that the Agency discriminated against him on the bases of disability (stroke/hemiparesis) and reprisal for prior protected EEO activity. The Agency ultimately accepted the following claim for investigation:

1. Since on or around January 25, 2012 to the present, Complainant was denied reasonable accommodations (e.g., a spinner knob), which resulted in his inability to perform the duties of his position and the reduction/elimination of his work hours.³

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing on May 3, 2013.

During the pendency of the EEO hearing process, Complainant filed a grievance alleging that the Agency's failure to provide him with reasonable accommodation denied him the opportunity to work, thereby violating the collective bargaining agreement. Though Complainant and the Agency attempted to engage in the interactive process well into 2014, the Agency did not allow Complainant to return to work until April 22, 2015, following an arbitrator's decision in his favor on February 10, 2015.

Specifically, in the February 10, 2015 decision, the arbitrator found that the Agency had denied Complainant a fair chance to demonstrate that he could perform the essential functions of his position. In considering the Agency's argument that Complainant was not qualified due to his inability to efficiently case and deliver mail, the arbitrator noted that the Agency never specifically afforded Complainant the opportunity to drive a postal vehicle with his requested accommodation of a spinner knob. The arbitrator found that had the Agency afforded Complainant his requested accommodation, he would have been a qualified individual with a disability. Further, the arbitrator rejected the Agency's contention that installation of a spinner knob, a permanent modification to a postal vehicle, created an undue hardship. Accordingly, the arbitrator ordered the Agency to make Complainant whole by paying him backpay and benefits.

Approximately two years later, the assigned EEOC AJ held a hearing regarding the matter on May 10-12, 2017 and June 12-14, 2017.

³ At the hearing stage, the assigned Administrative Judge framed the claim as follows: "Did the Agency discriminate against Complainant on the basis of disability or retaliate against Complainant by denying Complainant a reasonable accommodation during the period [between] January 25, 2012 to April 22, 2015."

Following the hearing, the AJ issued a decision on August 24, 2017, finding that Complainant was not a qualified individual with a disability during the period of January 25, 2012 to April 22, 2015, as Complainant was unable to perform the essential functions of his position even with accommodations. Specifically, the AJ determined that since Complainant could not efficiently deliver his route during the March 5-6, 2012 observation period and again during the March to April 2014 observation period, he was not a qualified individual with a disability. The AJ further found that Complainant failed to establish that the Agency retaliated against him based on his protected EEO activity or that he had been subjected to harassment. The Agency subsequently issued a final order fully implementing the AJ's decision. Complainant then filed a timely appeal with the Commission.

On September 6, 2019, the Commission issued a decision reversing the portion of the Agency's final order implementing the AJ's finding of no discrimination on the denial of reasonable accommodation claim. See Jeffry R. v. U.S. Postal Serv., EEOC Appeal No. 0120180058 (Sept. 6, 2019). The Commission found that the Agency failed to provide evidence showing that Complainant was unable to efficiently case and deliver mail. See id. Rather, the Commission noted that Complainant was able to demonstrate his competence when, in the months after his reinstatement in April 2015, he was able to efficiently case and deliver mail using the reasonable accommodations provided as a result of the arbitrator's decision. See id. As such, the Commission concluded that Complainant was indeed a qualified individual with a disability. See id. Regarding the issue of undue hardship, the Commission found no persuasive evidence that providing Complainant with a spinner knob, changing his route, or providing him with street assistance would have resulted in significant difficulty or expense to the Agency. See id. The Commission further concluded that the Agency had violated the Rehabilitation Act by delaying its response to Complainant's request for reasonable accommodation.

To remedy the finding of discrimination, the Commission ordered the Agency to determine the amount of backpay owed to Complainant between the period of January 25, 2012 to April 22, 2015 and pay Complainant the assessed backpay to the extent it was not mitigated by the arbitrator's award. See id. The Commission also ordered the Agency to conduct a supplemental investigation into Complainant's entitlement to compensatory damages and award Complainant the amount determined. See id.

In accordance with the Commission's order, the Agency conducted a supplemental investigation into Complainant's entitlement to compensatory damages. Complainant requested \$150,600.93 in pecuniary compensatory damages, consisting of the following:

- a. Medical costs/psychotherapy: \$8,304.45 (consisting of \$5,151.60 in psychotherapy sessions from March 26, 2013 to May 22, 2015, and \$3,152.85 in ambulance/emergency room costs for treatment of heatstroke incurred on July 19, 2019 as a result of driving for Uber).
- b. Credit card debts and interest fees: \$77,269.63
- c. Thrift Savings Plan (TSP) investment lost profits: \$16,000.00
- d. Marriage counseling costs: \$462.00

- e. Wife's moving out expenses: \$1,420.00 (incurred on November 29, 2016)
- f. Bank overdraft fees: \$826.39 (incurred from December 22, 2017 to October 15, 2019)
- g. Tax debt and penalties: \$16,128.04 (unpaid taxes from 2016 as a result of driving for Uber; IRS billing statement dated October 2019)
- h. Private stock investment lost profits and dividends: \$15,790.42
- i. Future therapy costs: \$14,400.00 (therapy sessions twice a month for the next four years at \$150.00 per session).

Complainant also sought \$300,000.00 in nonpecuniary compensatory damages for the emotional distress that he sustained as a result of the Agency's failure to provide him with reasonable accommodation. In support of his claim, Complainant submitted numerous letters from his family members, colleagues, and friends who all recounted the emotional toll of the discrimination on Complainant. Additionally, Complainant provided a letter from his therapist stating that Complainant had met with him to discuss his concerns regarding the Agency's refusal to allow him to return to work and the impact of the Agency's actions on his family and lifestyle.

The Agency awarded Complainant a total of \$807.00 in pecuniary compensatory damages, consisting of \$495.00 for individual psychotherapy and \$312.00 for marriage counseling.⁴ In this regard, while Complainant had requested \$5,151.60 in individual psychotherapy costs, the Agency only awarded him \$495.00 in out-of-pocket expenses due to Complainant's failure to request application of the collateral source rule.⁵ The Agency also denied Complainant's request for \$3,152.85 in ambulance/emergency room costs for treatment of heatstroke on July 19, 2019, reasoning that the incident occurred more than four years after Complainant returned to duty on April 22, 2015. The Agency disallowed Complainant's remaining claimed pecuniary losses.

With regard to Complainant's request for \$77,269.63, for credit card debt and interest fees, the Agency reasoned that Complainant failed to show that these debts arose as a result of the Agency's discriminatory actions. Specifically, the Agency found no evidence "indicating when these credit cards were established, when the debt was incurred or when [Complainant] began to carry a balance of [these] credit cards." In denying the claim, the Agency emphasized that it was unreasonable for the Agency to pay for Complainant's continuing credit card debt more than four years after he had been reinstated.

As for Complainant's request for \$16,000.00 in lost TSP profits, the Agency denied it and noted that there was no evidence showing when Complainant took out a TSP loan or for what purpose.

⁴ The cost of one marriage counseling session was denied due to lack of documentation.

⁵ Though Complainant only sought reimbursement for 32 psychotherapy sessions, the Agency determined that Complainant had attended 33 psychotherapy sessions totaling \$5,338.06. The Agency reimbursed him \$495.00 for the out-of-pocket costs (\$15.00 per session) of those 33 sessions.

Furthermore, the Agency found that the screenshots of his TSP balances on October 8, 2014 and April 28, 2017, provided by Complainant, failed to corroborate the rate of return he claimed. Even assuming *arguendo* that it was responsible for Complainant having to take out a loan, the Agency stated that Complainant would have only been entitled to recoup the interest paid, not the principal.

As for Complainant's attempt to recoup his wife's moving expenses, the Agency acknowledged that its discriminatory actions may have caused Complainant and his wife to argue about their financial situation; however, the Agency concluded that it was not liable for Complainant's decision to pay his wife's moving expenses approximately 19 months after he returned to duty.

The Agency also denied Complainant's claim for \$15,790.42 in lost stock profits and dividends, due to his failure to "provide any evidence other than an unendorsed, unofficial table and a personal list of stocks sold, the date sold, and the share price." The Agency noted that such an expense was not allowable because the stock market, by its very nature, is speculative.

Lastly, the Agency denied Complainant's request for \$826.39 in bank overdrafts, incurred between December 22, 2017 and October 15, 2019, on the grounds that they were imposed more than two years after the Agency's discriminatory action. Complainant's efforts to obtain \$16,128.04 for tax debt was also disallowed by the Agency. Although Complainant described working as an Uber driver, to compensate for his loss of income from 2012 to 2015 and the sale of his stock investments, the Agency found it unreasonable for it to reimburse Complainant for a tax debt incurred years after the discrimination occurred.

Turning to the Complainant's request for compensatory damages, the Agency determined that Complainant was entitled to an award of \$35,000.00 in nonpecuniary compensatory damages. In reaching this amount, the Agency acknowledged that the statements from Complainant, his family members, coworkers, and friends, demonstrated that Complainant was adversely affected by not being allowed to work. However, the Agency also noted that the only medical evidence provided by Complainant was an October 9, 2014 letter from his therapist stating that Complainant was being treated for "anxiety, frustration, and situational mild depression." In the Agency's view, the evidence did not show that its failure to provide Complainant with a reasonable accommodation "caused any long-term or physical or mental condition." To the contrary, the Agency found that the evidence indicated that Complainant's condition "continued to improve during the entire period [that Complainant was] out with [his] medical restrictions becoming less and less stringent." The Agency emphasized that "while medical or other evidence from experts is not necessary to support a claim for nonpecuniary compensatory damages, the lack of such evidence, or of corroborating evidence to support a complainant's testimony, will affect the amount of the award."

Furthermore, while the Agency considered the impact of Complainant's financial strain on him and his family, the Agency found that this burden was mitigated by the fact that Complainant was not the custodial parent.

The Agency also found no evidence to corroborate Complainant's allegation that the financial strain forced him to go to court to request a reduction in his child support payments. Citing prior Commission cases, the Agency determined that "the spectrum of awards in similar cases vary from more modest awards in the \$10,000.00 range up to awards from \$50,000.00 to \$60,000.00." The Agency ultimately concluded that an award in the middle of the spectrum was warranted due, in part, to the lack of corroborating medical evidence and other evidence supporting a higher award. Accordingly, the Agency awarded Complainant \$35,000.00 in nonpecuniary compensatory damages.

The instant appeal followed.

CONTENTIONS ON APPEAL

Through his attorney, Complainant contends that the Agency's final decision on compensatory damages is extremely deficient and fails to fully compensate him for the harm that he suffered and continues to suffer to this day. Complainant maintains that he is entitled to be fully compensated for the harm endured both before and after his reinstatement, because the ripple effects of unemployment extend long after an employee is returned to work.

The Agency opposes the appeal and requests that the Commission affirm its final decision on compensatory damages.⁶

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

When discrimination is found, an agency must provide a remedy that constitutes full, make-whole relief to restore a complainant as nearly as possible to the position he or she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal

⁶ As our regulations do not entitle parties to respond to each other's briefs, we decline to consider Complainant's May 16, 2020, response to the Agency's brief. See Brook V. v. Central Intelligence Agency, EEOC Appeal No. 2019005657 (Aug. 12, 2021).

Serv., EEOC Appeal No. 01933395 (July 21, 1994). To receive an award of compensatory damages, a complainant must demonstrate that he or she has been harmed by an agency's discriminatory conduct; 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 reconsideration denied, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

Compensatory Damages

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to the discriminatory act or conduct. See EEO MD-110 at Chapt. 11, § VII (citing Carey v. Piphus 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; and Goetze v. Dep't of the Navy, EEOC Appeal No. 01991530 (Aug. 23, 2001).

Pecuniary losses are out-of-pocket expenses incurred because of the agency's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other such quantifiable expenses. Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination, or a voluntary settlement, whereas future pecuniary damages are those likely to occur after the resolution of the complaint. See EEO MD-110 at Chap. 11, § VII.B.

In a claim for pecuniary compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, the harm suffered because of the agency's discriminatory action. Objective evidence in support of a claim for pecuniary damages includes documentation showing actual out-of-pocket expenses with an explanation of the expenditure. An agency is only responsible for those damages that are clearly shown to be caused by its discriminatory conduct. To recover damages, a complainant must prove that the agency's discriminatory actions were the cause of the pecuniary loss. Id.

Nonpecuniary damages are losses that are not subject to precise quantification, including emotional pain and injury to character, professional standing, and reputation. Id. There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be "monstrously excessive" standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr 18, 1996) (citing Carle v. Dep't of the Navy, EEOC. Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from a complainant concerning his or her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

Statements from others including family members, friends, health care providers, other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her 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.

Complainants have the burden of proving the existence, nature and severity of the alleged emotional harm and must also establish a causal relationship between the alleged harm and the discrimination. Absent such proof of harm and causation, a complainant is not entitled to compensatory damages, even in light of a finding of unlawful discrimination. The Commission has held that evidence of emotional distress should include detailed information on physical or behavioral manifestations of the distress, if any, and any other information on the intensity of the distress, information on the duration of the distress, and examples of how the distress affected appellant both on and off the job. Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993).

In considering such cases, the Commission relies on the principle that "a tortfeasor takes its victims as he or she finds them." Wallis v. U.S. Postal Serv., EEOC Appeal No. 01950510 (November 13, 1995), citing Williamson v. Handy Button Machine Co., 817 F.2d 1290, 1295 (7th Cir. 1987). There are two exceptions to this general rule, however. First, when a complainant has a preexisting condition, the agency is liable only for the additional harm or aggravation caused by the discrimination. Second, if the complainant's preexisting condition inevitably would have worsened, the agency is entitled to a reduction in damages reflecting the extent to which the condition would have worsened even absent the discrimination. Wallis, supra, citing Maurer v. U.S., 668 F.2d 98, 99-100 (2d Cir. 1981).

Pecuniary Compensatory Damages

As noted above, although Complainant requested \$150,600.93 in pecuniary compensatory damages, the Agency only awarded him \$807.00. Complainant now seeks \$168,900.93 in pecuniary compensatory damages. For the following reasons, we shall modify the Agency's award of pecuniary compensatory damages.

Past and Future Medical Expenses

On appeal, Complainant reiterates his belief that he is entitled \$8,304.45 in medical costs, as reflected in Exhibit 6 of the complaint file. See Complaint File (Vol. 1) at 195. This amount consists of \$5,151.60 for psychotherapy sessions (from March 26, 2013 to May 22, 2015) and \$3,152.85 in ambulance/emergency room costs for treatment of heatstroke provided on July 19, 2019. Additionally, he seeks \$14,400 in future pecuniary compensatory damages, for psychotherapy over the next four years. In seeking reimbursement for these costs, Complainant seeks full reimbursement, as reflected in Exhibit 6, pursuant to the collateral source rule.

Under the collateral source rule, an agency may not reduce its liability for damages because of payments made to a complainant from a collateral source. A complainant is required only to prove that he or she incurred the expenses to establish his or her entitlement to a corresponding damage award. A complainant need not make the additional showing that he or she paid the expense. The Commission has consistently applied the collateral source rule in determining damages. See *Wallis v. U.S. Postal Serv.*, EEOC Appeal No. 01950510 ((Nov. 13, 1995) (health insurance benefits funded by employer-paid premiums are collateral source funds and, therefore, not subject to offset); *Woodrow B. v. Dep't of Health and Human Servs.*, EEOC Appeal No. 0120143194 (May 13, 2016); see also *Liza B. v. Dep't of Agric.*, EEOC Appeal No. 0120152098 (Aug. 31, 2017) (retirement disability payments not deductible from back pay).

Based on a review of the record, we find that Complainant is entitled to full reimbursement of his past psychotherapy costs. While we understand that the Agency only awarded Complainant \$495.00 because Complainant did not request application of the collateral source rule, we note that on appeal he seeks the full cost of the psychotherapy pursuant to that rule. As we discern no Commission precedent or regulation that would preclude Complainant from raising the collateral source rule for the first time on appeal, we shall award Complainant \$5,151.60 for past psychotherapy costs.⁷

⁷ In assessing this amount, we relied on the table titled "Exhibit 6 (Medical Receipts)," containing Complainant's medical expenses. See Complaint File (Vol. 1) at 195. There, Complainant listed \$8,304.45 in total expenses, of which \$3,152.85 were related to ambulance/emergency room costs for the treatment of heatstroke. Consequently, the remaining sum (\$5,151.60) reflects Complainant's psychotherapy expenses. Since Complainant has invoked the collateral source rule, and the Agency does not dispute Complainant's calculation as reflected in Exhibit 6, we shall award the amount requested. To the extent that the Agency has

As for the costs associated with the use of ambulance/emergency room care provided for the heatstroke suffered by Complainant in July 2019, we reject these expenses. While we understand that Complainant relates his heatstroke to the ripple effects of unemployment (*i.e.*, his need for additional income to pay off his debts), we nevertheless agree with the Agency that the casual link between Complainant working as an Uber driver and the discrimination suffered years earlier is extremely attenuated. For this reason, we shall deny this request.

In the same vein, we also find Complainant's arguments for future psychotherapy costs (\$14,400.00) to be unpersuasive. Although Complainant may subjectively believe that he needs psychotherapy sessions twice a month, at \$150.00 per session, for the next four years, the record does not contain objective evidence establishing such a need. As such, we are disinclined to grant this request.

Credit Card Debts and Interest Fees

We turn now to Complainant's request for reimbursement of \$77,269.63 in credit card debts and interest fees, which he relates to the ripple effects of unemployment. Complainant maintains that his financial status was excellent prior to the Agency's discriminatory actions, noting a bank balance of over \$71,000. Due to the Agency's refusal to allow him to work, argues Complainant, he incurred massive debt. But for the discrimination, Complainant contends that he would not have incurred these debts.

Having reviewed the record, including Exhibit 12, we find that Complainant has not shown how these debts were causally related to the discrimination. While Complainant relates the entire \$77,269.63 balance to the "ripple effects of unemployment", he must still provide objective evidence of actual out-of-pocket expenses and the reasons for such expenditures. Complainant has not met his burden to do so. Consequently, we shall not grant Complainant \$77,269.63 for credit card debts and interest fees.

Marriage Counseling Costs

Complainant declined to challenge the Agency's award with respect to marriage counseling. Therefore, we shall not address the issue on appeal.

Wife's Moving Expenses

Complainant seeks \$1,420.00 expended to help his wife relocate. The Commission denies this expense in its entirety. Despite Complainant's assertion that the discrimination negatively impacted his finances which, in turn, affected his marriage, we fail to find the necessary nexus between the Agency's actions and Complainant's decision to pay for his wife's moving expenses.

already paid \$495.00 for his out-of-pocket expenses, the Agency may subtract this amount from the \$5,151.60 owed to Complainant.

Bank Overdraft Fees and Tax Debt/Penalties

In seeking reimbursement for bank overdraft fees (incurred between December 2017 and October 2019) and tax debt (billed in 2019, regarding tax year 2016), Complainant again asserts they are tied to the “ripple effects of unemployment” cause by the Agency’s discrimination.

Complainant reasons that the overdraft fees were the result of financial strain caused by the Agency’s refusal to allow him to work. The strain on his finances resulted in tax debt, as he used “every cent” of his Uber earnings to service his debts, leaving no funds to pay his tax obligations. While we sympathize with Complainant’s circumstances, we nevertheless agree with the Agency that there is not a sufficient causal link between these debts and the discrimination. We note, for example, that Complainant first incurred an overdraft fee on December 22, 2017, approximately two years and eight months after he returned to work. Moreover, the record shows that Complainant incurred the tax debt in 2016, after he had already returned to work. The record does not demonstrate that the Agency’s discriminatory actions are the “but for” proximate cause of Complainant’s overdraft and tax debts.

TSP and Private Stock Lost Profits and Dividends

Complainant contends that on October 7, 2014, he had to withdraw \$30,000 from his TSP as a source of funding. As a result, Complainant argues he lost an estimated \$16,000.00 in profits between October 7, 2014 to April 28, 2017. On appeal, Complaint seeks an additional \$18,000.00 to reflect market changes since his last estimate. In total, Complainant seeks \$34,000.00 “for investment loss as a result of taking out a loan taken as a result of Complainant’s unemployment caused by the Agency’s discrimination.”

Similarly, Complainant believes he is entitled to \$15,790.42 in lost profits and dividends related to his private stock investments, which he was allegedly forced to sell due to his lost work income. Complainant challenges the Agency’s assertion that the losses were due to the speculative nature of the stock market, pointing to “actual data” regarding current-day share prices compared to the prices when the stocks were sold.

The Commission declines to award Complainant the costs associated with such losses. Complainant has failed to prove that he took out a TSP loan because of the Agency’s discriminatory actions. Moreover, even assuming arguendo that Complainant could make that showing, we share the Agency’s confusion as to how Complainant calculated a gain of 60 percent from October 7, 2014 to April 28, 2017, as well as the alleged additional gain (\$18,000) from that period to the date of the instant appeal. Complainant’s speculative, unsupported request is rejected.

Similarly, we find that Complainant failed to persuasively show he was forced to sell his private investments because of the discrimination. Exhibit 14 includes two tables reflecting Complainant’s calculations regarding the alleged losses, as well as a list of the stocks allegedly sold to meet his financial needs.

What is missing, however, is objective evidence that Complainant in fact owned and sold these stocks. The record contains no evidence of such stock transactions. More importantly, Complainant has not proffered persuasive evidence that these stock sales were made because of the discrimination he suffered.

Nonpecuniary Compensatory Damages

Next, we consider Complainant's request for an increase in the Agency's award of \$35,000 in nonpecuniary compensatory damages, to the maximum permitted by statute (\$300,000). Complainant maintains that the Agency's failure to accommodate him for three years caused him to experience the following symptoms: insomnia; confusion; anxiety; hopelessness; depression; isolation; and feeling insufficient as a man. Complainant further asserts that his psychological symptoms physically manifested as backpain and that his experience led him to question whether he should go on with life. Complainant also maintains that the Agency's discriminatory actions caused him severe financial strain, which rendered him so unable to meet his child support obligations that he had to go to court to request a reduction. Complainant emphasizes that his inability to support his non-custodial children affected not only his confidence and self-esteem, but also his relationship with his children and other family members. While Complainant acknowledges that the record contains limited medical evidence, he contends that his assertions are corroborated by statements from his family members, coworkers, and friends. Complainant emphasizes that he had no psychiatric conditions prior to the Agency's discriminatory actions, even after his stroke, as the support that he received from his family and friends helped him to recover from the stroke both physically and emotionally. He maintains that he continues to suffer from the effects of his discriminatory unemployment to this day.

Complainant cites to the following four Commission decisions in support of his request for increased nonpecuniary compensatory damages: Sainz v. Dep't of the Treasury, EEOC Appeal No. 0720030103 (Sept. 19, 2008) (awarding \$100,000.00 in nonpecuniary compensatory damages for three years of harm to complainant who was removed from federal service during his probationary period after sustaining an on-the-job injury to his knee at work); Blount v. Dep't of Homeland Sec., EEOC Appeal No. 0720070010 (Oct. 21, 2000) (upholding AJ's award of \$200,000.00, where agency's failure to accommodate complainant resulted in complainant's inability to work, led to complainant being sued by his ex-wife for child custody, and led to "state legal action" against him); Munno v. Dep't of Agric., EEOC Appeal No. 01A01734 (Feb. 8, 2001) (upholding agency's final decision, which awarded complainant \$250,000 in nonpecuniary compensatory damages related to her non-promotion); and Alene S. v. U.S. Postal Serv., EEOC Appeal No. 0720150038 (Apr. 6, 2016) (reducing AJ's award of \$300,000 in nonpecuniary compensatory damages to \$200,000 on the grounds that complainant's disabilities were preexisting, despite AJ's finding that agency's failure to accommodate rendered complainant completely disabled and unable to work).

Based on our review of the evidence in the record and Commission precedent, we find that Complainant is entitled to \$140,000 in nonpecuniary compensatory damages.

This amount takes into account the severity of the harm suffered and is consistent with prior Commission precedent. See Holland v. Soc. Sec. Admin., EEOC Appeal No. 01A01372 (Oct. 2, 2003) (affirming AJ's award of \$100,000.00 where statements from complainant and his psychiatrist showed that the agency's discriminatory actions exacerbated complainant's preexisting psychiatric condition and caused him severe emotional injury for a period of five years as a result of the agency's failure to accommodate him; present day value: \$147,569.19), req. for recons. den. EEOC Request No. 05A40191 (June 29, 2004); Durinzi v. U.S. Postal Serv., EEOC Appeal No. 01A41946 (July 28, 2005) (increasing agency's award of \$10,000.00 in nonpecuniary compensatory damages to \$120,000.00 because statements from complainant and her family members showed that complainant suffered severe harm to her physical, emotional, and financial wellbeing, as a result of the agency's failure to accommodate her for a period of six years; present day value: \$167,657.93), req. for recons. den. EEOC Request No. 05A51158 (Oct. 19, 2005); and Emiko S. v. Dep't of Transp., EEOC Appeal No. 0120161130 (July 19, 2016) (increasing award of \$50,000.00 in nonpecuniary compensatory damages to \$150,000.00, where the agency's failure to accommodate complainant's visual disability led to revocation of complainant's job offer and subsequently led to approximately seven years of professional, emotional, and financial insecurity until the EEOC ordered her reinstatement; present day value: \$170,181.57), req. for recons. den. EEOC Request No. 0520160486 (Nov. 2, 2016). We have adjusted our award to reflect key differences between the instant case and the three cases cited above, to include consideration of the duration of the harm, the present day value of the awards, and our determination that Complainant's emotional distress did not exist prior to the discrimination. After careful consideration of these factors, we conclude that an award of \$140,000.00 is warranted.⁸

In considering the cases referenced by Complainant, Blount, Munno, and Alene S., *supra*, we find the facts before us include some significant distinctions.

In Blount, the complainant lost custody of his child and faced "state legal action" against him. While we recognize that Complainant alleges that the Agency's discrimination brought him to the brink of financial ruin and caused him to seek a reduction in his child support payments, we do not find these circumstances to be equivalent to losing custody of a child and being sued by the state. Given these differences, we find that Blount to be distinguishable from the instant case. See Blount v. Dep't of Homeland Sec., EEOC Appeal No. 0720070010 (Oct. 21, 2000).

With regard to Munno, we note that the Commission did not make any independent findings regarding the emotional harm that complainant suffered or whether the agency's award of \$250,000.00 in nonpecuniary compensatory damages was warranted.

⁸ Our award considers a variety of facts, including the present value of the cases cited. See Lara G. v. U.S. Postal Serv., EEOC Request No. 0520130618 (June 9, 2017). In awarding Complainant \$140,000, we did not consider whether the Agency's attempts to accommodate Complainant constituted a good faith effort, as our decision in EEOC Appeal No. 0120180058, already found that the Agency did not make a good faith effort to provide Complainant with reasonable accommodation.

Rather, in that case, the Commission discussed whether the agency's refusal to implement the AJ's recommendation to promote complainant to a Senior Executive Service (SES) position was justifiable given the complainant's emotional state. Since the Commission did not discuss the adequacy of the agency's award of \$250,000.00 in Munno, we find Complainant's reliance on that case to be unpersuasive. See Munno v. Dep't of Agric., EEOC Appeal No. 01A01734 (Feb. 8, 2001).

In Alene S., the agency's discriminatory actions exacerbated the complainant's preexisting conditions to such an extent that she was rendered completely disabled and unable to work. Here, however, the record clearly shows that Complainant was able to return to work and perform the essential functions of his position.

In addition to considering Complainant's arguments for an increase to the Agency's award, we also evaluated the Agency's reasoning in granting less than requested by Complainant. As noted above, the Agency pointed to a lack of medical documentation to justify the reduction. We find, however, that Complainant has provided sufficient non-medical documentation to support a greater award. See Franklin v. U.S. Postal Serv., EEOC Appeal Nos. 07A00025 and 01A03882 (Jan. 19, 2001) (awarding complainant \$150,000.00 (present day value: \$233,868.93) in nonpecuniary compensatory damages despite his failure to adduce any medical evidence, as the record showed that after he was forced into disability retirement, he suffered "extensive symptoms of emotional distress, resulting in changes in complainant's personality, the ending of his marriage, severe strains in his relationships with those close to him, including his children, and diminished enjoyment of life").

In summary, we find that an award of \$140,000.00 takes into account the nature, severity, and duration of Complainant's suffering, is consistent with other nonpecuniary compensatory damages awards given in similar cases and is not "monstrously excessive" standing alone or derived from passion or prejudice.

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 decision and direct the Agency to comply with the ORDER below.

ORDER

Within sixty (60) calendar days from the date this decision is issued, to the extent the Agency has not done so already, the Agency shall pay Complainant:

1. \$5,151.60 in past pecuniary compensatory damages; and
2. \$140,000.00 in nonpecuniary compensatory damages.

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)

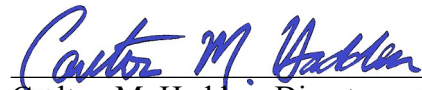
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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 13, 2021
Date