



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Jacki A.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2020002100

Agency No. BOP-2016-0616

DECISION

On January 2, 2020, 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 December 3, 2019 final decision concerning her 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 worked as a Teacher, GS-11, at a Federal Correctional Complex in Coleman, Florida.

On June 28, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African American), disability (injuries to knee, wrist, and chest following fall at work), and reprisal for prior EEO complaints (including a class complaint) when the Agency "failed to attempt to accommodate" her after she presented a return to work notice and then, on June 23, 2016, removed her from employment.

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.

The Agency accepted the complaint and conducted an investigation. Based on the evidence developed during the investigation, on October 2, 2017, the Agency issued a final decision (“FAD1”), finding no discrimination was established as to race or reprisal but concluding Complainant had proven discrimination based on her disability in violation of the Rehabilitation Act. Specifically, FAD1 found, in April 2014, Complainant fell at work and had physical injuries that required multiple surgeries and rehabilitative care for about twenty months. FAD1 found that the Agency improperly terminated Complainant’s employment after she missed a fitness-for-duty examination (“FFDE”), due to lingering effects from a medical treatment, and did not allow her the opportunity to reschedule the FFDE. FAD1 found that Complainant’s requests to reschedule her FFDE equated to a request for reasonable accommodation and management failed to respond to her request or contact her regarding rescheduling. As remedial relief, FAD1 ordered back pay, as appropriate; reinstatement contingent upon the results of an FFDE; calculation of compensatory damages; calculation of attorney’s fees, if applicable; and posting of a notice of the discrimination finding.

On December 3, 2019, the Agency issued a final decision on compensatory damages and attorney’s fees (“FAD2”). FAD2 stated that Complainant submitted her own affidavit as well as ones from family and friends stating that she became depressed and withdrawn after losing her job. FAD2 stated that Complainant asserted that she lost her sense of self-worth; had financial difficulties; had trouble performing daily tasks; experienced anxiety attacks, crying spells, insomnia, marital strain, and exacerbation of her preexisting depression; and had problems with drinking alcohol and smoking. FAD2 stated that Complainant requested \$296,000 in nonpecuniary damages and \$3,574.20 in pecuniary damages (for prescription costs, tax penalty for a retirement fund withdrawal, and a car repossession fee). FAD2 found that Agency actions led to Complainant’s mental suffering over a two-year period. In sum, the Agency awarded \$45,000 in nonpecuniary compensatory damages, \$1,416.54 in pecuniary damages for prescription medication costs and repossession fees; and \$145,000 in attorney’s fees and \$1,645 in legal costs.

The instant appeal from Complainant followed.²

ANALYSIS AND FINDINGS

As an initial matter, we determine that the sole issue currently before us on appeal is whether the Agency, in its December 3, 2019 final decision (FAD2), properly decided the amount of compensatory damages due Complainant as a result of its own finding in FAD1 that there was a violation of the Rehabilitation Act resulting from the failure to reschedule her FFDE and her subsequent removal from employment. We note that it does not appear from her statement on appeal that Complainant is challenging the Agency’s award of attorney’s fees and legal costs in FAD2.

² Complainant is no longer represented by her attorney and now has a non-attorney representative for this appeal.

We add that, while not clear from her brief, to the extent that Complainant also alleges that she was not properly reinstated as required by FAD1's order, the record establishes that Complainant was reinstated to Agency employment effective February 4, 2018. However, because the Office of Workers' Compensation Programs (OWCP) had not released Complainant for full duty, she was placed on leave without pay.³ Shortly thereafter, Complainant submitted medical documentation indicating she needed permanent sedentary work. In February 2019, the Agency advised Complainant that, due to these medical restrictions, she was not qualified for her previous teacher position in the correctional institution setting (where she needed to be able to use a firearm and be called upon to respond to inmates in an emergency situation). The Agency asked if she was interested in a reassignment to a new position within her medical restrictions. In March 2019, Complainant agreed to consider a reassignment, but requested a promotion, a paid move for her family, and reassignment for her husband (who worked at the same prison). The Agency responded that it would not offer a promotion or a reassignment for her spouse. In April 2019, Complainant indicated she was willing to consider reassignment to a position in Atlanta or Glynco, Georgia, or in Grand Prairie, Texas. However, the Agency later asserted it searched for, but could not find, a vacant funded position within the geographical areas Complainant specified. In the current appeal, Complainant appears to be asserting that this was an additional failure to accommodate, now arguing that the Agency has not established why she could not perform as a teacher remotely through telework, so she did not have to be in a correctional institutional setting. We find that this issue is beyond what was raised in Complainant's original complaint and the decision/orders in FAD1. If Complainant wishes to pursue this new claim of failure to accommodate, she should contact the Agency's EEO program to request EEO counseling as a first step to filing a new complaint.

Non-pecuniary Compensatory Damages

Nonpecuniary damages are for losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, II.A.2 (July 14, 1992) (Compensatory Damages Guidance). There is no precise formula for determining the amount of damages for nonpecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (August 29, 1997). The Commission notes that nonpecuniary, compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Id. Furthermore, compensatory damages should not be motivated by passion or prejudice or be "monstrously excessive" standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (March 4, 1999).

³ The record does not indicate what sort of workers' compensation benefits she was receiving during this period, including continuation of pay benefits in lieu of her salary.

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 Service, EEOC Appeal No. 01952288 (April 18, 1996) (citing Carpenter v. Dep't of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995)). Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. See Lawrence, EEOC Appeal No. 01952288. 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.

During the supplemental investigation for compensatory damages, Complainant requested \$296,000 in non-pecuniary, compensatory damages for mental suffering due to financial strain, marital strain, emotional distress, insomnia and nightmares, anxiety attacks, hypertension, crying and shaking spells, suicidal ideation, humiliation, fear of loss of her career, feelings of hopelessness, isolation from family and friends, loss of enjoyment of life, loss of sexual desire, loss of appetite, and weight loss. Complainant stated that she was devastated that the Agency did not allow her to reschedule her FFDE resulting in her termination from employment. She said that her removal was “traumatic [and t]hinking about it today [two years later] still makes [her] sick.” She stated that she experienced anxiety attacks, crying and shaking spells, suicidal ideation, humiliation, fear that her career was over, feelings of hopelessness, insomnia, nightmares, isolation from family and friends, loss of enjoyment of life, marital strain, loss of sexual desire, loss of appetite, and weight loss. Complainant stated that her removal exacerbated her pre-existing depression and anxiety such that her medication dosages had to be increased and she experienced for the first-time physical manifestations, such as high blood pressure. Complainant also averred that, following her removal, she started drinking “hard liquor” daily and smoking cigars. She stated that she was not able to tend to normal household tasks, such as paying bills on time, so her family was evicted from their home and her car was repossessed. She also had to borrow money from family and friends and withdraw money from her retirement fund. Summarily, Complainant stated, “[s]ince my termination [a two-year period], my relationships have been taxed, my professional reputation has been tarnished, my health is poor, and my finances are in shambles.” She stated that she will need medical care and prescriptions for the foreseeable future.

Complainant's husband, a family friend, and her mother-in-law all submitted statements reiterating Complainant's assertions of the many negative effects the Agency's actions had on her physically and emotionally. Complainant also provided letters from two doctors stating that she was diagnosed with Generalized Anxiety Disorder, Insomnia due to stress, and Hypertension. The medical documentation also stated that her medications were increased over a two-year period following her termination and that Complainant received ongoing mental health counseling.

Complainant has the burden of proving the existence, nature and severity of the alleged emotional harm. Man H. v. Dep't of Homeland Security, 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.

The Agency, in FAD2, has conceded that Complainant has adequately established the necessary evidentiary link between its discriminatory acts and her alleged harm. Therefore, the only issue to be decided is the amount of non-pecuniary damages to be awarded.

Based on the foregoing, we find that an award of \$85,000 is more appropriate than the \$45,000 awarded by the Agency. We find \$85,000 in nonpecuniary, compensatory damages more adequately compensates Complainant for the documented two years of emotional and physical harm she suffered as a result of the denial of accommodation (failure to reschedule FFDE) and subsequent removal action. It is not “monstrously excessive” standing alone and is consistent with prior Commission precedent. See Kristopher M. v. Dep’t of the Treasury, EEOC Appeal No. 2019001911 (March 3, 2020) (\$75,000 awarded where Complainant experienced emotional distress and physical pain and suffering due to the Agency’s failure to provide reasonable accommodation); Scott K. v. U.S. Postal Service, EEOC Appeal No. 0120182127 (February 20, 2020)(\$85,000 in nonpecuniary, compensatory damages awarded to Complainant for physical and mental pain and suffering, Major Depressive Disorder, aggression and irritability, insomnia, anxiety, and crying episodes he experienced as a result of the Agency’s failure to provide reasonable accommodation and the resulting denial of work); Billy B. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120132680 (November 19, 2015) (\$85,000 in nonpecuniary, compensatory damages awarded to Complainant where the Agency denied reasonable accommodation to and removed Complainant from employment which result in emotional distress and exacerbation of Post-Traumatic Stress Disorder.)

While Complainant may feel she is entitled to more, this award considers the nature of the Agency's action, the degree of harm Complainant experienced, the fact that she appears to have been suffering from some degree of depression and anxiety prior to the discrimination, and the amount of supporting evidence Complainant offered. The Commission notes that nonpecuniary, compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for its discriminatory actions.

Pecuniary Damages

Pecuniary losses are out-of-pocket expenses incurred because of an agency's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination. EEO MD-110 at Chap. 11, §VII.B.2. Future pecuniary damages are losses likely to occur after the resolution of the complaint. 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. The agency is only responsible for those damages that are clearly shown to be caused by the Agency's discriminatory conduct. Id.

Complainant claims monetary losses of \$1,031.54 for prescription medication, \$2,157.66 for a tax penalty, and a \$385 fee to recover her repossessed car. In total, she requested \$3,574.20 in past pecuniary damages. We affirm the Agency's determination that Complainant is entitled to the \$1,031.54 she provided evidence that she spent on prescription medication. We also affirm the Agency's decision to award her car repossession fee of \$385 because her depression kept her from being organized and on top of the payments. Complainant also requests, and the Agency denies, \$2,147.66 resulting from a tax penalty for early withdrawal from her retirement account. Such expenses can be recovered if they are "a result of the discrimination," Karen v. United States Postal Servs., EEOC Appeal No. 0120101822 (Feb. 23, 2011). We disagree with the Agency and conclude that it is likely that Complainant's need to withdraw from her retirement funds was directly related to the discriminatory termination of her employment. As such, we will order the Agency to pay Complainant a total of \$3,574.20 in pecuniary damages.

CONCLUSION

Accordingly, the Agency's final order is MODIFIED. The Agency is directed to implement the following corrective action in accordance with the ORDER below.

ORDER

Within sixty (60) calendar days of the date this decision is issued, to the extent that it has not already done so, the Agency shall pay Complainant a total of \$85,000 for nonpecuniary compensatory damages and \$3,574.20 in pecuniary damages. The amount currently due Complainant for these awards shall be offset by any damages payments already made by the Agency to Complainant.

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).

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

September 23, 2021

Date