



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

[REDACTED]
Elise S.,¹
Complainant,

v.

Antony Blinken,
Secretary,
Department of State,
Agency.

Appeal Nos. 2020004019 & 2020004020

Hearing No. 570201400992X

Agency No. DOSF09613

DECISION

Complainant filed a timely appeal to the Equal Employment Opportunity Commission (“EEOC” or “Commission”), pursuant to 29 C.F.R. § 1614.403, from a January 21, 2020 Final Agency Decision (“FAD”) on compensatory damages, concerning an equal employment opportunity (“EEO”) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. § 2000e et seq., and 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 Freight Rate Specialist, GS-2131-09, at the Agency’s Despatch Office, Regional Logistics Center, Bureau of Administration, in Iselin, New Jersey (“Despatch Agency New York”).

On May 13, 2013, Complainant filed a formal EEO complaint which, after multiple amendments, consisted of claims spanning December 2012 through April 2016 alleged discrimination, including a hostile work environment/harassment on the bases of disability (Non-

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.

Hodgkin's Lymphoma,² partial paralysis of the left side of her head due to the removal of a tumor, and hypertension, which is exacerbated by stress) and reprisal for engaging in prior protected EEO activity (requesting a reasonable accommodation, reporting discrimination, and filing EEO complaints). Responding management officials included Complainant's first, second, and third line supervisors ("S1," "S2," and "S3") as well as three Human Resources officials ("HR1," "HR2," and "HR3").

After investigating her complaint, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a FAD or a hearing before an EEOC Administrative Judge ("AJ"). Complainant requested a hearing but subsequently withdrew her request, opting for a FAD instead. The AJ remanded the matter to the Agency for a FAD pursuant to 29 C.F.R. § 1614.110(b). The Agency issued FADs on September 6, 2016, and October 25, 2016, after it was determined that the first FAD did not address all of Complainant's claims. Both decisions concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Complainant appealed both FADs to this Commission. In EEOC Appeal No. 0120170164 (September 25, 2019), the Commission issued a decision finding sufficient evidence to conclude that the Agency subjected Complainant to a hostile work environment/harassment based on reprisal and disability and denied her a reasonable accommodation. In sum, these findings were based on the following relevant facts.

Harassment - Reprisal

The Commission determined that from January through July 2013, S2 subjected Complainant to retaliatory harassment and sent multiple emails to Complainant that were "reasonably likely to deter a reasonable employee from engaging in protected activity." For instance, on January 2, 2013, Complainant inquired why her alternative work schedule (AWS) was removed as a reasonable accommodation, and S2 responded "the way that you were using [AWS] was causing a real burden in the office." On January 29 and 30, 2013, Complainant and S2 had multiple email exchanges, where, among other things, Complainant reported discrimination and retaliation and S2 responded, "I have never seen a more self-serving dissertation regarding a simple matter in my life."

The Commission further determined that Complainant engaged in "protected activity" each time she inquired with S2 about her reasonable accommodation, and, in February 2013 when she began copying HR and upper management, including officials outside her chain of command, on emails alleging discrimination, retaliation, and denial of a reasonable accommodation.

² When not in remission, Complainant's Non-Hodgkin's Lymphoma symptoms, along with side effects from cancer treatments, included neuropathy, nerve damage, chronic fatigue, joint swelling and soreness, nausea, gastrointestinal issues, blurred vision, and anxiety.

The Commission reasoned that the Agency was vicariously liable for S2's discriminatory actions because management either failed to act or subjected Complainant to disciplinary action when she reported discrimination. S2's February 20, 2013 "Memo of Expectations," a March 25, 2013 Letter of Reprimand issued by S3, the Executive Director of the Bureau of Administration, and a May 7, 2013 Proposed Three-Day Suspension, mitigated to a one-day suspension on July 3, 2013, cited Complainant's emails as examples of "disruptive" and "disrespectful" conduct and grounds for disciplinary action.

Harassment - Disability

The Commission also determined that S2 subjected Complainant to harassment based on disability in February and March 2013, when considering two events in particular, alongside the Agency's failure to act in good faith with respect to her reasonable accommodation, and use of disciplinary action as a response to her reports of discrimination. Specifically, beginning in February 2013 Complainant was denied access to the communal employee kitchen for over a month, as a result of asking S2 if she could be excused from the rotating schedule for cleaning the communal kitchen as a reasonable accommodation due to her compromised immune system. The second instance occurred in March 2013, when S2 held Complainant to the Agency's policy of providing 48 hours advance notice to use Annual Leave even though he had just notified all of her colleagues that he only required 24 hours advance notice for their advanced leave requests.

Denied Reasonable Accommodation

The Commission determined that the medical documentation Complainant submitted to the Agency was sufficient for the Agency grant her reasonable accommodation request for a flexible AWS, including the ability to change her lunch hour on days when she had medical appointments and an "off" day that could be moved within the pay period. For unspecified reasons, the Agency found the documentation insufficient. The Commission determined that the Agency's actions were "not in good faith," reasoning that the documentation provided the same rationale for the accommodation as Complainant's January 2012 letter, which the Agency had previously accepted as sufficient support for an AWS as a reasonable accommodation.

On May 10, 2013, the Agency formally denied Complainant's request. The Commission noted that the Agency further erred in its response by suggesting Family & Medical Leave Act (FMLA) leave as an alternate accommodation to allow Complainant to attend medical appointments. Unlike an AWS, which would allow her to minimize her leave usage, use of FMLA leave would have required Complainant to take unpaid leave or use sick or annual leave. The Commission reminded the Agency that although an employer may choose among effective accommodations, "forcing an employee to take leave when another accommodation would permit an employee to continue working is not an effective accommodation." Denese G. v. Dep't of the Treas., EEOC Appeal No. 0120141118 (Dec. 29, 2016) (other citations omitted).

Based on the record for the underlying complaint, the parties' submissions, and the Agency's compliance records, Complainant was never provided with a reasonable accommodation. Email correspondence between H1 and H2 on May 29, 2013, establishes that Complainant's documentation supported an AWS as a reasonable accommodation. The Commission noted that the Agency's decision to grant an AWS in 2012 established that granting it again would not be an undue hardship.

Remedial Order

The Commission ordered the Agency to take corrective action by immediately initiating the interactive process to provide Complainant with a reasonable accommodation and to investigate and issue a FAD on the amount of compensatory damages owed to Complainant as a result of its discriminatory actions. Among other things, the Commission also ordered the Agency to restore "any leave used as the result of the unlawful harassment or the removal of Complainant's reasonable accommodation," and to "compensate Complainant for any leave without pay ("LWOP") taken as a result of the discriminatory harassment, including the discriminatory one-day suspension served on July 11, 2013, or as a result of the removal of Complainant's reasonable accommodation."

Complainant's instant appeal concerns the Agency's compliance with our orders in EEOC Appeal No. 0120170164.

FAD on Compensatory Damages

In its FAD on Compensatory Damages, the Agency awarded Complainant \$15,000 in nonpecuniary damages, finding her proffered evidence insufficient to support her requested award of \$300,000. Among other things, the Agency reasoned that Complainant did not differentiate the emotional distress she experienced as a result of the Agency's discriminatory actions in the underlying complaint from distress related to her other EEO complaints, or stress she was experiencing due to financial and health issues. Complainant also failed to explain how the documentation of medical expenses she submitted was the result of the harassment and retaliation she experienced between January 2 and July 3, 2013.

The FAD tacitly acknowledges that the Agency never provided Complainant with a reasonable accommodation following its April 9, 2013 denial:

The failure to accommodate here resulted in the complainant having to maintain her normal schedule and use her paid leave to attend medical appointments as opposed to having a flexible schedule to minimize her leave usage. The record does not indicate that the complainant was prevented from attending those appointments, and only in 2016 did she not have sufficient leave to cover her absences.

There is no indication from the FAD that the Agency intended to take steps to correct this failure to comply with the Commission's September 25, 2019 Order. It also suggests that it should only be accountable for the denied accommodation through April 2016, when the most recent claims of discrimination occurred in the underlying complaint.

Agency's Determination on Leave Restoration and LWOP

The Agency determined that Complainant was not entitled to any leave restoration or LWOP compensation, whereas Complainant asserts that she is entitled to 781.75 hours of Sick Leave, 1,424.75 hours of Annual Leave, and 48 hours of LWOP (in other words, all of her leave taken between 2012 and 2019). The Agency based its determination on deficiencies in the evidence Complainant provided, which consisted of an array of medical documents reflecting appointments between 2012 and 2019 accompanied by a handful of Earnings and Leave Statements that included her annual leave usage for 2012 through 2019. The Agency reasoned that Complainant did not identify specific dates and types of leave to be restored as a result of discriminatory acts between January 2 and July 3, or "to address needs related to her disability." The Agency further reasoned that Complainant failed to explain how the appointments in the medical documentation she provided could be attributed to its discriminatory actions, observing that the few appointments documented to have occurred in 2013 appeared to be routine appointments, for a condition that predated the Agency's discriminatory actions.

Complainant appealed both the FAD Compensatory Damages and the Agency's separately issued determination on leave restoration and compensation for LWOP. She also challenges the Agency's overall compliance with the Commission's September 25, 2019 Order, particularly regarding its obligation to provide Complainant with a reasonable accommodation.³

ANALYSIS AND FINDINGS

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").

³ Typically, compliance matters are addressed through a Petition for Enforcement, which Complainant also submitted, but was not docketed. We will address the matter of compliance with the order to provide a reasonable accommodation in order to determine compensatory damages and leave restoration.

Compensatory Damages

Scope of Damages

As an initial matter, a question of interpretation exists over the duration of time Complainant was denied a reasonable accommodation, which is relevant to determining non-pecuniary compensatory damages and for reinstatement of leave and compensation for LWOP. The Commission's September 25, 2019 decision definitively identifies April 9, 2013 as the date the Agency denied Complainant's request for an AWS as a reasonable accommodation, so we decline to consider Complainant's earlier claims. The Agency does not dispute Complainant's allegation that it never provided the April 9, 2013 accommodation, but asserts that it was no longer required to do so after April 2016. We find this conclusion erroneous, given the date of the Commission's Order, Complainant's continued requests for the accommodation, and the fact that the Agency has never, at any point offered evidence, or even suggested that Complainant no longer needed the April 9, 2013 reasonable accommodation of an AWS.

In December 2018, Complainant's circumstances changed when her cancer returned, and she began chemotherapy. As this would necessarily increase the amount of leave taken for medical appointments, we have taken it into consideration in our analysis of Complainant's leave reinstatement and LWOP compensation. Based on the submissions of both parties, we conclude that Complainant's relapse did not impact the duration of time beyond April 9, 2013, where Complainant was denied a reasonable accommodation. There is no evidence that the Agency provided Complainant with her April 9, 2013 reasonable accommodation by this point.⁴

Following the Commission's September 25, 2019 Order, in November and December 2019, Complainant notified the Commission that the Agency had yet to "immediately engage in the interactive process with Complainant and provide her with a reasonable accommodation for her disability." On January 23, 2020, in response to a demand letter from the Commission, the Agency offered the following explanation: "[the Agency's Office of Civil Rights ('S/OCR')]" conducted a conference call with the Disability and Reasonable Accommodation Division of Human Resources. A case manager was assigned to the Complainant to reinstate the interactive accommodation process." The Agency provided an identical response in two subsequent updates submitted to the Commission. The record reflects that Complainant continued to inquire about obtaining a reasonable accommodation.

⁴ EEOC Hearing No. 570202000275X (Jan. 27, 2021) (resolved via settlement agreement) (Complainant alleged she was denied use of a vacant office as a request for a reasonable accommodation (compromised immune system due to chemotherapy) from December 10, 2018, through June 19, 2019. Given that neither party references this request for a reasonable accommodation in relation to satisfying compliance with the September 25, 2019 Order, for purposes of determining compensatory damages the December 2018 request for a reasonable accommodation does not negate the April 9, 2013 request) (Agency No. DOS027019).

The reports of compliance submitted by the Agency to establish that it complied with the Commission's Order to provide Complainant with a reasonable accommodation, do not contain adequate information to refute Complainant's allegations that it never did so. The Agency's compliance submissions contain duplicative information, and evidence related to an unrelated complaint. It did not respond when the Commission provided an opportunity to clarify its reports. The matter was ultimately closed following a change in circumstances, as Complainant went on full-time telework sometime in the summer of 2020.⁵

For purposes of calculating Compensatory damages, Complainant was denied a reasonable accommodation between April 16, 2013 and her placement on full-time telework in the summer 2020, just over 7 years.

Pecuniary Damages

Pecuniary losses are out-of-pocket expenses incurred as a result of the Agency's unlawful action and may include medical expenses. Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination, or a voluntary settlement. EEO MD-110 at 11-23 (Aug. 5, 2015) (internal citations omitted). A complainant must provide objective evidence to successfully support a claim for pecuniary damages, in the form of appropriate documentation of actual out-of-pocket expenses (e.g. itemized receipts) accompanied by an explanation of the expenditure linking it to the Agency's discriminatory actions. *Id.* In other words, the Agency is only responsible for those damages that are clearly shown to be caused by the Agency's discriminatory conduct. To recover damages, the Complainant must prove that the employer's discriminatory actions were the cause of the pecuniary loss. *Id.* A complainant's general uncorroborated testimony is insufficient to support an award of past pecuniary damages. Valentine v. Dep't of Justice, EEOC Appeal No. 07A30098 (Dec. 10, 2003).

Complainant submitted documentation establishing that she purchased \$280.88 worth of prescription medicine between December 31, 2017 and September 3, 2019, and documentation of medical appointments, procedures, and tests, as well as medical bills from 2012 through 2019. Complainant claimed that she was owed \$54,453 in out-of-pocket medical expenses from 2012 through 2019. However, Complainant failed to provide anything more than general uncorroborated testimony as evidence linking these expenses to the Agency's discriminatory actions. For this and other appropriate reasons, the Agency properly determined that Complainant is not entitled to pecuniary damages.

⁵ Based on an August 6, 2020 Memorandum, provided by the Agency, stating, "February 5, 2020, DRAD confirmed with Complainant's current supervisor that Complainant was afforded one day of telework per week for a year, and use of a vacant office. [Complainant] is now on full-time telework," The same compliance report includes email communications between Complainant's attorney and S/OCR, dated May 29, 2020, which state, among other things, "We have seen no evidence of any relief such as reasonable accommodations." The Agency does not include its response (if any) in the report.

Non-Pecuniary Damages

When discrimination is found, the respondent Agency must provide the employee with a remedy that constitutes full, make-whole relief to restore the employee as nearly as possible to the position he or she would have occupied absent 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). The Commission is authorized to award compensatory damages as part of the “make whole” relief for intentional discrimination. Compensatory damages, however, are limited to the amount necessary to compensate an injured party for actual harm caused by the Agency's discriminatory action, even if the harm is intangible. Damiano v. U.S. Postal Serv., EEOC Request No. 05980311 (Feb. 26, 1999). Compensatory damages should consider the extent, nature and severity of the harm and the length of time the injured party endured the harm. *Id.*, Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991 (EEOC Damages Guidance), EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14. 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 (Feb. 26, 1999).

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). Documentation 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). 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. Dept. 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, Complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. *Id.* See also e.g. Wilda M. v. United States 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).

When a Complainant has a pre-existing condition, the Agency is liable only for the additional harm or aggravation caused by the discrimination. If Complainant's pre-existing 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; the burden of proof is on the Agency to establish the extent of these offsets. Wallis v. United States Postal Serv., EEOC Appeal No. 01950510 (Nov. 13, 1995) (citing Maurer v. United States, 668 F.2d 98

(2d Cir. 1981)), Finlay v. United States Postal Serv., EEOC Appeal No. 01942985 (Apr. 29, 1997). The Commission notes, therefore, that Complainant is entitled to recover damages only for injury, or additional injury, caused by the discrimination. See Terrell v. Dep't of Housing and Urban Dev., EEOC Appeal No. 01961030 (Oct. 25, 1996): EEOC Notice No. N 915.002 at 12.

The record contains sufficient evidence to establish that Complainant experienced emotional distress as a result of the Agency's discriminatory actions, and that she is entitled to relief. Complainant's requested amount of \$300,000 is not supported by the evidence she provided. However, the Agency's award of \$15,000 is also inappropriate given the duration of time Complainant was denied a reasonable accommodation.

Along with the previously referenced documentation of medical appointments, Complainant provided an affidavit consisting of multiple narratives where she asserts that she has experienced ongoing physical and mental harm as a result of the Agency's actions "since 2012." The affidavit did not specify any other dates, but we were able to ascertain a general timeline from references to events, the report of investigation, and the dates on her medical documents. In addition, Complainant provided statements from her cardiologist and her physician confirming that she was experiencing symptoms of anxiety during the relevant time frame, and which she attributed to her hostile work environment.

In the affidavit, Complainant testified that since 2012, she has been in a sustained state of mental anguish. She began experiencing anxiety attacks accompanied by chest pain, shortness of breath, heart palpitations, elevated blood pressure, headaches, fatigue, and nausea. She had difficulty sleeping, and when Complainant was able to fall asleep, she ground her teeth so hard that she eventually had to have several removed. Her relationship with her partner became strained, as she was constantly thinking of her work situation. Complainant testified that she "would breakdown in front of family and friends from the emotional effects of the harassment." She isolated herself, and even had fleeting suicidal ideation "at some very low points." Complainant explained that the stress and anxiety arising from the discrimination "put [her] body and mind under severe duress and [her] immune system responded negatively," exacerbating her condition, and, eventually causing her cancer to relapse. Complainant has not provided medical evidence specifically connecting her relapse to the events in the underlying complaint.

With respect to specific incidents of discrimination, Complainant testified that once she realized her reports of discrimination were disregarded by management, and upon S2 denying her access to the kitchen, her anxiety increased because she believed Management viewed her as a "bad apple" and was taking steps to "get rid of" her. She had a constant fear of losing her job and was preoccupied by fear that she would be unable to provide for her family. Complainant no longer felt safe at work and had a sense of "impending doom" each time she went to the office. While at work she felt she had to "walk on eggshells." Complainant also felt humiliated by S2's public response when she asked to be relieved of her kitchen cleaning duties as a reasonable accommodation and felt that her professional reputation was damaged when she was issued and served the retaliatory suspension.

While we do not doubt Complainant experienced emotional distress as a result of the Agency's discriminatory acts in the underlying complaint, Complainant fails to establish the extent and severity of this distress, as she does not differentiate it from other concurrent causes of emotional distress. In her affidavit, Complainant references matters that cannot be considered in this determination of compensatory damages, as they were not raised in the underlying complaint (e.g. harassment by colleagues). She also attributes her emotional distress to events that were addressed in separate EEO complaints, and to events raised in the underlying complaint that the Commission determined were not motivated by discrimination or retaliation. We agree with the Agency's suggestion that many of Complainant's symptoms of emotional distress that she experienced after December 2018 could be attributable to her relapse and subsequent chemotherapy treatment. Likewise, Complainant describes anxiety arising from finances, which she has not shown to be attributable to the Agency. We note that Complainant testified that following her relapse she experienced anxiety for herself and her family, explaining "my cancer can become fatal at any point."

With respect to harm Complainant experienced due to the Agency's discriminatory harassment and retaliation that occurred from January 2 through July 11, 2013 only, the FAD on Compensatory Damages provides a well-reasoned analysis with pertinent recent case law supporting an award of \$15,000. Citing Bernard S. v. Dep't of Health & Human Servs., EEOC Appeal No. 0120181509 (Sept. 17, 2019) (increasing award of \$13,000 to \$15,000 for retaliatory harassment resulting humiliation in front of coworkers, anxiety attacks, sleep problems, and withdrawal from family, where the complainant provided minimal testimony, it was evident that other work and life stressors were contributing factors, and complainant did not fully establish a link between the harm he experienced and the discriminatory actions), Davina W. v. Dep't of Justice, EEOC Appeal No. 0120142526 (July 26, 2016) (\$15,000.00 award --specifying that the remedy was limited as some of the discriminatory events were addressed in a grievance--for retaliation that occurred for a period of 6 months, where the complainant experienced humiliation in front of coworkers, threats of termination, and developed anxiety attacks, marital problems, social withdrawal, and lowered self-esteem), and Wagner v. Dep't of Trans., EEOC Appeal No. 0120113419 (Nov. 21, 2012) (\$15,000 awarded for a complainant was subjected to a hostile work environment and denied a reasonable accommodation, to which the complainant attributed his sleeplessness and diagnosis of clinical depression, as there was no contemporaneous medical documentation concerning the diagnosis, and where other work issues outside the complaint contributed to the harm Complainant experienced). The Agency also provided examples of how a complainant's pre-existing condition mitigated the amount of nonpecuniary damages they received. Citing Andy P. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019000791 (Mar. 15, 2019) (\$15,000 award for delayed reasonable accommodation that exacerbated the employee's pre-existing mental health conditions and produced stomach ailments, fatigue, hopelessness, marital problems, and social withdrawal, where other factors found to have contributed to symptoms) citing Dalton C. v. Dep't of Health and Human Servs., EEOC Appeal No. 0120170077 (Mar. 27, 2018) (\$15,000 where the complainant had established that his pre-existing conditions worsened as a result of the agency's failure to accommodate him despite offering limited medical evidence and where he also attributed his symptoms to other issues).

Because Complainant's evidence indicates multiple other potential sources for the emotional distress symptoms she experienced, so the harm described is not entirely attributable to the Agency, \$15,000 is appropriate.

Conversely, the FAD on Compensatory Damages does not address the harm resulting from the April 9, 2013 denied reasonable accommodation in any meaningful way. Some of the Agency's referenced cases include denial of reasonable accommodation, but these cases cannot reasonably be compared to the events in the underlying complaint. In Dalton C., the denial of a reasonable accommodation lasted for approximately 4 months. In Wagner, the complainant was subjected to harassment and denied an accommodation for about a year and a half. For Andy P., the agency was found to have acted in bad faith by delaying the provision of a reasonable accommodation, indicating that, unlike the instant case, the reasonable accommodation was ultimately provided. By contrast, Complainant was denied a reasonable accommodation for over 7 years.

The Commission has found that certain discriminatory actions result in harm that is "intuitively obvious." For instance, in Donte L. v. Dep't of Justice, the complainant was involuntarily transferred, adding an additional 30 miles (up to 2 hours) to his commute. EEOC Appeal No. 2019005117 (Jan. 22, 2020). The Commission affirmed the AJ's award of \$20,000 per year for each year the complainant was subjected to the longer commute, for a total of \$90,000 in compensatory damages. In response to the agency's appellate argument that the complainant did not provide sufficient evidence to support this amount, the Commission observed, "the Agency disregards the length of time Complainant suffered as a result of the Agency's actions [and] the impact that the increased commute had on his quality of life." *Id.*, citing Marybeth C. v. Dep't of Health & Human Servs., EEOC Appeal No. 0120170811 (Jun, 11, 2019) (awarding \$50,000 in non-pecuniary damages where, as a result of the agency's failure to accommodate a complainant by refusing her requests for telework, she suffered an unnecessary commute for over a year). Here, the April 9, 2013 reasonable accommodation would have minimized Complainant's leave usage. It is intuitively obvious that the prolonged denial of this accommodation would harm Complainant's quality of life by limiting her flexibility and ability to take time off. Medical documentation is not necessary to establish that placing constraints on an individual's ability to make scheduling decisions regarding their medical care, and impeding their ability to make future plans, would cause stress and anxiety, as indicated in Complainant's testimony.

Even taking into consideration insufficient medical evidence and alternate causes of emotional distress during the relevant time frame, the Commission has found evidence of harm where the duration of the denial is "prolonged." See, e.g. Elene K. v. Soc. Sec. Admin., EEOC Appeal No. 0120170703 (Mar. 27, 2019) (increasing the agency award of \$40,000 to \$65,0000 "for an extended period [of over 2 years], the Agency's failure to accommodate Complainant caused her to experience physical discomfort/pain, deterioration of her medical condition, emotional distress, loss of enjoyment, and negative impacts on familial relationships" based on testimony from the complainant and one witness) citing Selma D. v. Dep't of Educ., EEOC Appeal No. 0720150015 (Apr. 22, 2016) (increasing AJ award of \$40,000 to \$65,0000 where the agency's failure to provide telework, a modified work schedule, and cubicle as reasonable

accommodations for a period of 3 years until the complainant's early retirement, resulted in aggravation of her preexisting medical conditions as supported by medical and testimonial evidence), see also, Durinzi v. United States Postal Serv., EEOC Appeal No. 01A41946 (Jul. 28, 2005) (increasing agency award of \$10,000 to \$120,000 where statements from complainant and her family members showed that she suffered severe harm to her physical, emotional, and financial wellbeing as a direct result of the agency's to provide the complainant with a reasonable accommodation for 6 years), Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998) (noting that "the serious deleterious effects of this prolonged deprivation cannot and must not be underestimated," awarding \$80,000 for non-promotion and the agency's failure to install readily available software and assistive devices that the complainant required as a reasonable accommodation to do his job, based on testimonial evidence). We note that in spite of its evidentiary deficiencies, Complainant's affidavit reflects that her physical and mental symptoms of anxiety and depression were ongoing, lasting well beyond the January 2 through July 11, 2013 period of harassment and retaliation, and she repeatedly testifies in her affidavit that the Agency's denial of an AWS as a reasonable accommodation was a specific cause of her emotional distress.

To the extent that it acknowledges the prolonged nature of Complainant's denied reasonable accommodation, the FAD on Compensatory Damages implies that Complainant was not harmed as a result, reasoning that Complainant's requests to use leave were not denied. The undisputed purpose of the AWS as a reasonable accommodation was to *minimize the amount of leave* Complainant was forced to use for medical appointments. Moreover, the Agency's FAD on Compensatory Damages does not factor in its own tacit admission (based on its own suggested time frame concluding in April 2016) that it denied Complainant a reasonable accommodation for *years*.

The Agency's compliance reports for the underlying complaint establish that the Agency continued to delay providing Complainant's reasonable accommodation, after it received the Commission's September 25, 2019 Order. See Augustine V. v. United States Postal Serv., EEOC Appeal No. 2020001847 (Aug. 16, 2021) (increasing agency award of \$25,000 to \$70,000, noting the agency's "lengthy and continued delay in providing [the complainant] with an effective accommodation" after being ordered to do so, and that the agency was unable to show that it ever fully accommodated the complainant) citing Mardell B. v. Soc. Sec. Admin., EEOC Appeal No. 0120172035 (Oct. 31, 2017) (increasing agency award of \$25,000 to \$70,000 where, after ordering the agency to provide complainant with a reasonable accommodation the agency's two-year delay caused her to suffer emotionally, become depressed, and change physically as well as exacerbate her underlying condition), see also Knight v. United States Postal Serv., EEOC Appeal No. 01976645 (Oct. 25, 2000) (award of \$36,850 for emotional distress (depression, shortness of temper, frequent uncontrollable crying, insomnia, nightmares, and strained relationships with others) and inconvenience, based on multiple testimonials, where the agency's policy of automatically sending home a complainant with epilepsy following each seizure amounted to a failure to accommodate, affirming AJ's award of \$1,250 for each month the complainant was subjected to the discriminatory policy and ordering an additional \$1,250 for

each month the agency continued to inflict distress by subjecting her to the discriminatory policy following the AJ's decision).

While \$15,000 in nonpecuniary damages is an appropriate award for the discriminatory events in 2013, Complainant went 6 additional years without a reasonable accommodation, impacting her quality of life. We find an additional \$10,000 for each year she went without a reasonable accommodation to be a more reasonable amount.

A total amount of \$75,000 takes into account the severity of the harm suffered and is consistent with prior Commission precedent. This award is not "monstrously excessive" standing alone, is not the product of passion or prejudice, and is consistent with the amount awarded in similar cases. See Jackson v. United States Postal Serv., EEOC Appeal No. 01972555 (Apr. 15, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

Reinstatement of Leave and LWOP

The Agency erred in its finding that the Earnings and Leave Statements Complainant provided were not specific enough to warrant any reinstatement of sick or annual leave, or compensation for LWOP. Among the handful of statements she provided, were the Earnings and Leave Statements for December 29, 2012, January 12, and 26, 2013, July 13, 2013, January 11, 2014. When considered with the timing and nature of the harassment, retaliation, and denied accommodation Complainant experienced in 2013, these particular statements sufficient to connect the Agency's discriminatory acts to an increase in leave usage by Complainant.

In 2012 and 2013, Complainant's cancer was in remission, but she still required extensive medical appointments. The only major health difference of record was that Complainant was provided with a reasonable accommodation of an AWS for 10 months in 2012, and she had yet to experience the hostile work environment found in the underlying complaint. In 2012, Complainant used a total of 44.25 hours of Sick Leave, 65.50 hours of Annual Leave and no LWOP. We note that 9.75 hours of that sick leave amount was for the first two weeks of January 2013, due in part to a medical procedure, but also coinciding with the hostile work environment. In 2013, Complainant used 205.50 hours of Annual Leave, and 134.25 hours of Sick Leave, and 8 hours of LWOP. Complainant used a total of 29.27 hours of sick leave in January alone. Halfway through the year, in July 2013, Complainant already used 75.75 hours of Sick Leave and 121.50 hours of Annual Leave, essentially double her total Annual and Sick Leave for 2012.

Complainant's affidavit provides enough information to establish that during and immediately after the Agency's discriminatory actions, she experienced significant emotional distress, with physical and mental symptoms supporting a need to use additional leave throughout 2013. Statements from her cardiologist and physician confirm that Complainant suffered heart palpitations and anxiety during this time frame. We also find Complainant's assertion that the emotional distress did not cease upon the issuance of the July 3, 2013 suspension to be reasonable.

After serving the retaliatory suspension on July 11, 2013 (a source of professional humiliation for Complainant), Complainant continued to work in the same space where she experienced the harassment and retaliatory acts, and report to the individual responsible for the harassment. Complainant's leave usage following the April 9, 2016 denial of an AWS as a reasonable accommodation would necessarily be a factor in the sustained increase after the Agency's discriminatory actions as well.

For January 2 through December 31, 2013, Complainant is entitled to the difference in the amount leave taken in 2012, when she was not subjected to discrimination and a denied accommodation, which amounts to reinstatement of 140 hours of Annual Leave, 90 hours of Sick Leave, and compensation for 8 hours of LWOP.

The remaining Earnings Statements Complainant provided only offer an annual snapshot of her leave usage for 2015, 2016, 2017, 2018, and 2019. She also includes an Earnings Statement from October 12, 2019, without explanation. These statements reflect a continuation of increased leave usage but lack necessary details and proximity to the harassment and retaliation for full reinstatement. Complainant's testimony conveys that she was physically and emotionally impacted for years following the denied accommodation and harassment, but she does not provide dates or even a general timeline so we can contextualize the leave usage. Unlike the documents provided for 2013, there were no findings of concurrent instances of discriminatory or retaliatory harassment. Moreover, the Earnings and Leave Statements Complainant provided do not directly correspond with the dates specified on the medical invoices and records Complainant submitted.

That said, the ongoing impact the denied accommodation had on Complainant's leave usage cannot be overlooked. The purpose of the April 9, 2013 reasonable accommodation in the form of an AWS was to minimize leave due to medical appointments. If Complainant was denied an AWS, she would have been forced to use annual and sick leave, and possibly take LWOP when she otherwise would not have had to do so. In the interest of ensuring Complainant is made whole, some amount of leave reinstatement and LWOP compensation is necessary for duration of the time she was denied a reasonable accommodation.

For January 1, 2014 through November 31, 2018, Complainant is entitled to reinstatement of 30% of all Sick Leave and Annual leave, and compensation for 30% of all LWOP. Recognizing that Complainant's change in circumstances when she underwent chemotherapy would impact her leave usage, we find Complainant is entitled to reinstatement of 15% of all Sick Leave and Annual Leave, and compensation for 15% or all LWOP taken between December 1, 2018 and July 1, 2020, the approximate time she went on full time telework.

Back Pay

On appeal, Complainant claims she is entitled to back pay. The Commission's previous decision did not award Complainant back pay. If Complainant believed that the Commission's prior decision improperly limited her ability to recover damages, Complainant could have filed a request for reconsideration with the Commission to address that matter. See 29 C.F.R. § 1614.405(c). Complainant did not do so. Accordingly, she is not entitled to back pay (including her requests for a lump sum payment to offset tax consequences, and TSP contributions).

Other Requested Relief

Complainant also claims that she is entitled to a grade increase from GS-9 to GS-14, and front pay for a "minimum" of two years because she was denied (unspecified) opportunities to advance in her career. Other than her own speculations about her colleagues, Complainant offers no evidence that would support a grade increase or front pay. Complainant's requests for relief related to denied promotions and performance awards, are not only unsupported, but inappropriate, given that Complainant raised these matters as discrimination claims in the underlying complaint and the Commission affirmed the Agency's finding that no discrimination occurred for those claims. Complainant's other requests for relief are denied.

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 action and REMAND the matter for further processing in accordance with the ORDER below.

ORDER (C0618)

The Agency is ordered to take the following remedial action:

1. Compensatory Damages. Within **thirty (30) days** of this Decision, to the extent that it has not already done so, the Agency shall pay Complainant \$75,000 in non-pecuniary compensatory damages,
2. Restoration of Leave and Compensation for LWOP. Within **thirty (30) days** of this Decision, the Agency shall:
 - a. Restore 140 hours of Annual Leave and 90 hours of Sick Leave that Complainant used in 2013 and compensate Complainant for the 8 hours of LWOP she used in 2013.
 - b. Restore 30% of the total amounts of Annual Leave and Sick Leave used by Complainant and compensate Complainant for 30% of the total amount of LWOP used by Complainant from January 1, 2014 through November 31, 2018.

- c. Restore 15% of the total amounts of Annual Leave and Sick Leave used by Complainant and compensate Complainant for 15% of the total amount of LWOP she used from December 1, 2018 through July 1, 2020.
3. Tax Liability. If applicable, the Agency shall also pay Complainant a lump sum for tax consequences arising from a payment of compensatory damages or LWOP compensation. Complainant is responsible for providing the Agency with tax documentation establishing the amount owed in order to receive the lump sum payment(s).
4. Attorney Fees. The Agency shall pay Complainant reasonable attorney's fees and costs, as she is the prevailing party. These fees include legal efforts by Complainant's attorney to obtain Complainant's reasonable accommodation in accordance with the September 25, 2019 Order, including the November 1, 2019 letter and December 6, 2019 Petition for Enforcement.

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 of the Agency's calculation of back pay and other benefits due Complainant, including 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)

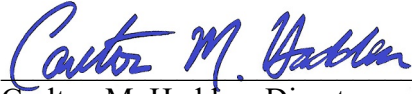
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from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



Carlton M. Hadden, Director
Office of Federal Operations

November 22, 2021

Date