



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Randolph T.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2020004200

Agency No. ARMEADE16NOV04373

DECISION

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

ISSUE PRESENTED

The issue presented is whether the Agency properly determined Complainant's entitlement to compensatory damages.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Motor Vehicle Operator at the Agency's National Security Agency (NSA) Motor Vehicle Operations Section in Fort Meade, Maryland. Complainant maintained that he has been diagnosed with heart and lung disease, and Chronic Obstructive Pulmonary Disease (COPD), among other conditions. Report of Investigation (ROI), at 120-21.² Complainant also maintained that he has a collapsed lung and required the use of a portable oxygen tank due to his conditions. Id.

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 The page numbers refer to the "bates stamp" numbers on the bottom right of each page.

As a result of Complainant's conditions, the Agency provided Complainant with route N-11 as a reasonable accommodation in September 2014. Id. at 122. Complainant maintained that his assignment to the N-11 route adequately accommodated his conditions, as he simply shuttled people a half mile to their cars from the NSA Visitor's Center at a low rate of speed. Id. Complainant maintained, however, that the Agency removed him from the route on September 12, 2016 and assigned him to highway truck driving duties. Id. at 126. Complainant explained that after the Agency removed his accommodation, he could no longer use his portable oxygen tank and the highway driving of his new position required more physical exertion than he could bear, given his collapsed lung and other conditions. Id.

On January 7, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (physical), and in reprisal for requesting a reasonable accommodation, when:

1. On September 9, 2016, management rescinded Complainant's reasonable accommodation and failed to provide him with an effective accommodation, and on March 2, 2017, they denied Complainant's request for a reasonable accommodation; and
2. In December 2016, Complainant's Commercial Driver's License (CDL) expired while he was trying to obtain medical information and certification required to renew his license.

Following the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge. When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

Agency's Decision Finding Discrimination

On December 18, 2019, the Agency issued its final decision, finding that Complainant established that he was denied reasonable accommodation for his disability with regard to claim 1. The Agency found that Complainant was a qualified individual with a disability and that management officials violated the Rehabilitation Act when they failed to engage in an interactive process upon Complainant's request for a reasonable accommodation.

The Agency noted that while the record revealed that there was interaction regarding Complainant's request, virtually none of the interaction was with Complainant. The Agency determined that once Complainant's existing accommodation could no longer be granted, management officials should have immediately engaged with Complainant in the interactive process, which would have potentially identified another route to accommodate Complainant.

The Agency also noted that despite concerns for passenger safety, no management official performed an individualized assessment to determine if Complainant's continued employment would pose a significant risk of substantial harm. The Agency determined that it failed to engage in the interactive process with Complainant, resulting in a failure to accommodate in violation of the Rehabilitation Act. The Agency therefore concluded that Complainant proved that he was discriminated against on the basis of his disability when, beginning in September 2016, management officials failed to engage in the interactive process with the Complainant and failed to provide him with an effective reasonable accommodation. The Agency however found no discrimination with regard to claim 2.

As a result of the finding of discrimination with regard to claim 1, the Agency ordered remedial relief, including compensatory damages and reasonable attorney's fees and costs.

EEOC Appeal No. 2020002139

Complainant subsequently appealed the Agency's decision to the Commission with regard to claim 2. In EEOC Appeal No. 2020002139, we, however, affirmed the Agency's decision in all respects. We specifically affirmed the Agency's decision finding that Complainant proved that he was discriminated against on the basis of his disability when, beginning in September 2016, management officials failed to provide Complainant with an effective reasonable accommodation. We further affirmed the Agency's finding that Complainant was not discriminated against on the basis of disability or reprisal with regard to claim 2.

Like the Agency in its decision, we ordered the Agency to provide Complainant with compensatory damages and attorney's fees and costs, among other remedies ordered.

Complainant's Evidence Submitted in Support of Compensatory Damages³

The Agency subsequently provided Complainant with a notice of his right to submit evidence in support of his claim for damages. Complainant thereafter submitted his signed statement dated January 31, 2020. Therein, Complainant stated, in pertinent part, that his health problems were discussed during his interview wherein he was assured that he would be accommodated.

Complainant attested that after the Agency removed his reasonable accommodation, he was assigned to a truck route, which he believed was a very dangerous route for him given his medical conditions. He believed that the Agency took away his reasonable accommodation and assigned him to the dangerous route, which put the public's safety at risk as well as his own, in an attempt to make him retire. According to Complainant, he had no choice but to retire due to the Agency's removal of his accommodation.

³ We note that the Agency did not provide the Commission with the evidence Complainant submitted in support of his request for compensatory damages or provide a supplemental report of investigation. We note, however, that Complainant attached this evidence to his brief on appeal. We remind the Agency of its obligation to provide a complete record to the Commission.

Complainant explained that he purchased a single-family home in 2012 and he needed the income from his position to meet his financial obligations. Complainant stated that he had planned to work until at least the age of 66, when he would receive the maximum amount of his retirement benefits.

Complainant further maintained that the removal of his accommodation caused him to experience sleep disturbances, anger, and anxiety, which affected his ability to perform his job in a safe manner. He also explained that he started drinking alcohol at night because that was the only way he could get to sleep. He stated that he subsequently sought professional medical help at the VA Mental Health Clinic wherein he was evaluated by a doctor and provided with counseling as well as prescription sleep medication.

Complainant additionally submitted a signed statement from a friend who has known him over 50 years. In her statement, she specifically noted that the removal of Complainant's accommodation affected Complainant mentally, physically, and financially. She explained that she noticed a change in Complainant after the removal of his accommodation and he was no longer the happy, positive, and confident person he used to be. She described Complainant appearing angry, depressed, discouraged, stressed, and anxiety ridden during the period of time after his accommodation was removed. She further stated that she was informed by Complainant that he had no alternative but to retire due to his accommodation being removed. She maintained that she had conversations with Complainant about his increasing stress levels regarding his possible inability to make mortgage payments on a house he purchased a few years earlier.

Complainant also submitted a signed statement from his younger sister, explaining that Complainant had not planned to retire until age 66 at the earliest. She explained that Complainant had purchased a home in 2012 and he did not think he could afford his mortgage payments on his retirement benefits. She further averred that she recommended that Complainant seek professional help regarding his mental state, as he was having issues with anger and trouble sleeping due to the removal of his accommodation. She explained, moreover, that Complainant said he had to retire because he could no longer physically perform the duties of his position due to the removal of his reasonable accommodation.

Complainant additionally attached medical documentation in support of his claim for compensatory damages, reflecting that he visited the VA's Mental Health Clinic on March 21, and 27, 2017, as well as on April 25, and 26, 2017. The medical documentation noted that Complainant's accommodation was taken away, which resulted in Complainant feeling depressed, angry, and stressed. The documentation also noted that Complainant was prescribed medication for his sleep related issues.

Agency's final Decision on Compensatory Damages

On May 27, 2020, the Agency issued its final decision on Complainant's entitlement to compensatory damages. In its decision, the Agency found that Complainant was entitled to an award of \$15,000 in non-pecuniary compensatory damages.

In reaching this amount, the Agency considered that Complainant experienced depression, sleep deprivation, and anger as result of the removal of his accommodation. The Agency also found that the duration of harm caused by its actions lasted approximately 16 months from September 7, 2016, through his retirement on December 31, 2017. The Agency noted that its award of \$15,000 in non-pecuniary compensatory damages took into consideration the nature and severity of the harm suffered (emotional and physical), the cause of the harm, and the amount of time Complainant suffered the harm.⁴

CONTENTIONS ON APPEAL

Complainant's Brief on Appeal

On appeal, Complainant, through his attorney, maintains that he is entitled to an award of more than \$15,000 in non-pecuniary compensatory damages. Complainant believes that his case is comparable to prior Commission cases wherein \$50,000 to \$95,000 was awarded. Complainant also maintains that his award in non-pecuniary compensatory damages should be increased further to take the rate of inflation into account. Complainant also contends that the Agency's failure to provide him with accommodation caused him to retire early, which amounted to a constructive discharge. Complainant therefore believes that he is entitled to equitable relief associated with a constructive discharge, including back pay and reinstatement. Complainant maintains that even without a finding of constructive discharge, he is still nevertheless entitled to equitable relief, as his early retirement flowed directly from the denial of accommodation.

Agency's Response

In response, the Agency contends that the award of \$15,000 in non-pecuniary compensatory damages is consistent with Commission case precedent. The Agency specifically asserts that Complainant had consumed alcohol to help with his sleep issues for years prior to the denial of his accommodation, and he also had previously been prescribed sleep medication. The Agency also maintains that the award of \$15,000 should not be adjusted for inflation as the Agency has cited to recent Commission comparable cases in support of its decision. The Agency contends, moreover, that its December 18, 2019, decision ruled on the merits of Complainant's claims, which did not include claims of involuntary retirement or constructive discharge. The Agency further asserts that its May 27, 2020, decision found no evidence pertaining to claims of constructive discharge or involuntary retirement, and therefore he is not entitled to any relief with regard to such claims.

⁴ The Agency, in its May 27, 2020, decision, also awarded Complainant \$14,535 in attorney's fees. Complainant, through his attorney, has not challenged the amount of attorney's fees awarded by the Agency on appeal.

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

Back Pay and Reinstatement

We note that Complainant, on appeal, requests back-pay, reinstatement, among other equitable relief related to the impact his early retirement had on his salary, pension, and social security benefits. We however remind Complainant that neither the Agency nor did we in our prior decision find discrimination involving a claim of constructive discharge. As such, our prior decision in EEOC Appeal No. 2020002139 did not provide Complainant with back pay or reinstatement as a remedy. We note that Complainant did not file a request for reconsideration to the Commission addressing the remedies awarded. Accordingly, we find that Complainant is not entitled to back pay or reinstatement here.

Non-Pecuniary Compensatory Damages⁵

Non-pecuniary losses are losses that are not subject to precise quantification, including emotional pain and injury to character, professional standing and reputation. There is no precise formula for determining the amount of 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 nonpecuniary 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).

⁵ Complainant did not request pecuniary compensatory damages.

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 his burden in this regard. Id. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

In the instant case, Complainant submitted statements from a friend, a family member, as well as medical documentation from his visits to the VA Mental Health Clinic. The statements and medical documentation reflect that Complainant experienced depression, stress, anger, anxiety, sleeplessness, a loss of self-worth, alcohol dependency, as well as an aggravation of his physical medical conditions. We also note that Complainant was provided with prescription sleep medication as a result of his visits to the VA Mental Health Clinic. In addition, Complainant explained that after the Agency removed his accommodation, he could no longer use his portable oxygen tank and the highway driving of his new position required more physical exertion than he could bear, given his collapsed lung and other conditions. We find the evidence Complainant provided in support of his request for compensatory damages reflects that the aggravation of his physical and mental conditions was clearly the result of the removal of his accommodation.

Due to the harm Complainant suffered as a result of the Agency's actions, we find that the Agency's award of \$15,000 in non-pecuniary compensatory damages is insufficient to compensate him. In so finding, we note that the Agency found in its December 18, 2019, decision that no management official performed an individualized assessment to determine if Complainant's continued employment would pose a significant risk of substantial harm. As such, while there was no finding of constructive discharge in this case, the Agency does not dispute that it left Complainant without an accommodation for 16 months and that it failed to evaluate Complainant's employment or to engage in the interactive process with Complainant during this period at all. According to Complainant, he was assigned to a position during this time period which aggravated his physical medical conditions, leaving him with no viable options or alternatives.

We therefore find that Complainant has established that his stress and anxiety over his financial situation, including the payment of his mortgage, was a consequence of the Agency's removal of his accommodation and its failure to engage in the interactive process with him

In consideration of the severity and duration of the harm Complainant experienced as a result of the Agency's lengthy and indefinite delay in providing him with an effective accommodation, we find that an award of \$70,000 is a more appropriate amount of non-pecuniary damages in this case. This award is not monstrously excessive and adequately compensates Complainant for his pain and suffering. See Augustine V. v. U.S. Postal Serv., EEOC Appeal No. 2020001847 (Aug. 16, 2021) (\$70,000 in non-pecuniary compensatory damages awarded due to the Agency's continued and indefinite delay in providing complainant with a reasonable accommodation, resulting in complainant experiencing depression, anxiety, anger, and sleeplessness, among other conditions); Mardell B. v. Soc. Sec. Admin., EEOC Appeal No. 0120172035 (Oct. 31, 2017) (\$70,000 awarded where the agency's two-year delay in providing complainant with accommodation caused her to suffer emotionally, become depressed, and change physically); See Pasquale D. v. Dep't of Homeland Sec., EEOC Appeal No. 0120160892 (Apr. 12, 2018) (complainant awarded \$60,000 where agency discrimination resulted in anxiety attacks, mood swings, nightmares, insomnia, difficulty concentrating, loss of self-esteem, alcohol dependency, weight gain, paranoia, and diminishment of self-worth.); Irvin W. v. Dep't of State, EEOC Appeal No. 0120141773 (Oct. 28, 2016) (\$60,000 awarded where complainant experienced anxiety, irritability, headaches, social withdrawal, and exacerbation of pre-existing conditions); and Complainant v. Dep't of Transp., EEOC Appeal No. 0720140022 (Sept. 16, 2015) (\$60,000 awarded where complainant suffered sleeplessness, anxiety, stress, and depression, as a result of the Agency's discriminatory actions).⁶

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.

ORDER

Within sixty (60) calendar days of the date this decision is issued, and to the extent it has not done so already, the Agency shall pay Complainant \$70,000 in non-pecuniary 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).

⁶ We decline to make an upward adjustment to account for inflation, given the recentness of the comparable award cited in Augustine V. v. U.S. Postal Serv., EEOC Appeal No. 2020001847 (Aug. 16, 2021).

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).

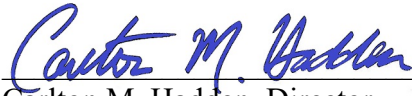
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

December 13, 2021

Date