



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Jeffrey K.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Customs and Border Protection),  
Agency.

Appeal No. 2020004403

Agency No. HS-CBP-02506-2017

**DECISION**

On July 30, 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 July 1, 2020, final decision concerning his entitlement to compensatory damages and attorney's fees following a 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 AFFIRMS the Agency's final decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Seized Property Specialist, GS-1801-12, with the Agency in Riverside, California. On December 4, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability (Chronic Fatigue Syndrome) when:

1. beginning on June 15, 2017, management ignored and delayed its processing of Complainant's reasonable accommodation request; and
2. on November 17, 2017, management denied Complainant's request to work a flexible schedule.

---

<sup>1</sup> 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.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In the decision, the Agency concluded that Complainant failed to prove that Agency management denied him a reasonable accommodation as alleged in Claim (2). However, the Agency concluded that management unreasonably delayed its processing of Complainant's reasonable accommodation request as alleged in Claim (1). Regarding Claim (1), the Agency explained that "management was largely responsible for a pattern of multiple delays . . . interrupting the progress of the reasonable accommodation interactive process" and noted that the accommodation ultimately offered to Complainant was "not complex." As a result, the Agency found that management's unreasonable delay constituted a violation of the Rehabilitation Act. To remedy the violation, the Agency ordered, among other things, a supplemental investigation to determine whether Complainant was entitled to compensatory damages and reasonable attorney's fees and costs.

The Agency provided Complainant with the opportunity to submit evidence supporting a claim for compensatory damages and attorney's fees. In a decision on July 1, 2020, the Agency noted that Complainant failed to submit any documentation following its final decision. However, the Agency accepted that Complainant submitted some evidence during the initial investigation into his complaint and awarded Complainant \$3,000 in non-pecuniary compensatory damages. The Agency determined that Complainant had submitted no evidence of incurring out-of-pocket expenses and therefore awarded him no pecuniary compensatory damages. Likewise, the Agency found Complainant was not entitled to attorney's fees and costs because there was no evidence that he retained counsel, nor did he submit any supporting evidence. The instant appeal followed.

### CONTENTIONS ON APPEAL

On appeal, Complainant argues that he needed to retain an attorney for purposes of appeal, and therefore is entitled to attorney's fees. Complainant argues that the record contains significant evidence that he suffered harm as a result of the Agency's actions, and that \$300,000 is an appropriate compensatory damages award.

### ANALYSIS AND FINDINGS

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under the Rehabilitation Act may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of "make whole" relief. 42 U.S.C. § 1981a(b)(3).

To receive an award of compensatory damages, a complainant must demonstrate he or she has been harmed as a result of the agency's discriminatory action; the extent, nature, and severity of the harm; and the duration of, or expected duration of, the harm. Ashlea P. v. U.S. Postal Service, EEOC Appeal No. 0120141369 (Apr. 19, 2016).

Regarding pecuniary damages, Complainant failed to provide any evidence of out-of-pocket expenses connected to the Agency's delay in granting him reasonable accommodation. Thus, we agree with the Agency that Complainant did not establish that he was entitled to pecuniary damages because he has not shown that any such damages were caused by the discrimination at issue.

Non-pecuniary losses are 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 on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.302 at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm, and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice, or be "monstrously excessive" standing alone, but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from complainant concerning his 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.

In this case, Complainant provided limited testimony during the investigation describing the difficulties he felt in trying to obtain reasonable accommodations. Complainant asserted he suffered undue stress that aggravated his chronic fatigue syndrome symptoms, and that he went to the hospital for heart palpitations but did not provide any medical records. While the investigative record contains a statement from Complainant's physician in support of Complainant's reasonable accommodation request, that statement contains no evidence demonstrating any harm Complainant may have suffered as a result of the Agency's delay in granting him reasonable accommodation. Complainant did not afford himself of the opportunity to provide further evidence in support of a compensatory damages award following the Agency's decision partially finding in his favor.

In light of the foregoing principles, we find that an award of \$3,000 is appropriate under the particular circumstances presented in this case. An award of \$3,000 takes into account the nature, severity, and duration of Complainant's suffering, as well as his pre-existing medical conditions. This amount is also consistent with other non-pecuniary compensatory damages awards given in similar cases and is not "monstrously excessive" standing alone, nor derived from passion or prejudice. See Brendon L. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120160256 (Apr. 20, 2018) (\$3,000 awarded where complainant submitted scant evidence supporting exacerbation of physical and emotional conditions due to agency's retaliatory acts); Barbie W. v. Dep't of the Army, EEOC Appeal No. 0120171302 (Apr. 9, 2019) (\$2,000 awarded where complainant experienced physical and psychological distress as a result of retaliation but submitted minimal medical documentation in support); Pamila R. v. U.S. Postal Serv., EEOC Appeal No. 0120182822 (Nov. 6, 2019) (complainant awarded \$2,000 for stress and sleeplessness supported only complainant's affidavit).

Finally, we note that Complainant also did not submit any evidence in support of an award of attorney's fees following the Agency's partial finding in his favor. Thus, the Agency's decision not to award attorney's fees was proper. Further, as Complainant is not a prevailing party on appeal, he is not entitled to attorney's fees in this matter.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision on compensatory damages and REMAND the matter to the Agency for further action in accordance with this decision and the ORDER herein.

### ORDER (C0618)

Within 60 days of the date this decision is issued, to the extent it has not already done so, the Agency shall pay Complainant \$3,000 in non-pecuniary compensatory damages.

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.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory.

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

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

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

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision.

If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



---

Carlton M. Hadden, Director  
Office of Federal Operations

January 19, 2022  
Date