



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

[REDACTED]
Doyle S.,¹
Complainant,

v.

Debra A. Haaland,
Secretary,
Department of the Interior,
Agency.

Appeal No. 2021003144

Hearing Nos. 570-2015-00024X; 570-2016-01000X

Agency Nos. DOI-OS-13-0145; DOI-OS-14-0184; DOI-OS-15-0745

DECISION

On May 3, 2021, 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 April 6, 2021, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Financial Specialist, GS-14, at the Agency's Office of Financial Management, Office of the Secretary at its Headquarters in Washington, D.C.

Complainant stated that he suffers from Anxiety, Major Depressive Disorder, and Post Traumatic Stress Disorder (PTSD). He previously filed an EEO complaint which was resolved by a settlement agreement in 2012. As part of the settlement agreement, Complainant was granted telework as a reasonable accommodation for his disability. On April 8, 2013, June 17, 2014, and September 23, 2015, Complainant filed three separate EEO complaints (Agency Nos. DOI-OS-

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.

13-0145; DOI-OS-14-0184; DOI-OS-15-0745) alleging that the Agency discriminated against him on the bases of disability (mental) and reprisal for prior protected EEO activity under Section 501 of the Rehabilitation Act of 1973 when, inter alia:

1. On March 28, 2013, Complainant was denied a reasonable accommodation when his telework privileges were revoked;
2. In FY 2013 and 2014, he received a “Minimally Successful” and an “Unsatisfactory” Performance rating, was placed on a Performance Improvement Plan, and denied a performance bonus;
3. On or about May 12, 2014, Complainant’s reasonable accommodation request was denied;
4. On November 17, 2014, Complainant received a Letter of Reprimand;
5. On September 4, 2014, his request for reassignment as a form of reasonable accommodation to the position of Position Analyst, GS-13/14, was effectively denied by his supervisor’s statement that he was on a Performance Improvement Plan, and
6. Beginning in 2013 ongoing through 2015, he was subjected to harassment related to telework, leave, his lunch breaks, and changes to his performance appraisal plan, among other things.

At the conclusion of the investigations, the Agency provided Complainant with a copy of the reports of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing for each complaint.

The AJ assigned to the case joined the three complaints, held a hearing on July 22, 2020, and issued a decision on February 25, 2021. The AJ concluded that the Agency had subjected Complainant to unlawful discrimination by denying him a reasonable accommodation and retaliating against him. The AJ also found that the Agency’s actions created a hostile work environment. The Agency was ordered, by the AJ, to take the following remedial actions:

1. The Agency shall calculate and pay the amount of lost bonuses that resulted from the Minimally Successful and Unsatisfactory appraisals issued and found to be discriminatory.
2. The Agency shall expunge from all personnel and associated Agency records the 2013 and 2014 Minimally Successful Appraisal and the 2015 Unsatisfactory Performance Appraisal and replace them with Satisfactory Appraisals with Satisfactory ratings on each element.

3. The Agency shall expunge from its records the Letter of Reprimand and any other documents associated with the actions found to be discriminatory.
4. The Agency shall pay Complainant the amount of \$200,000 in non-pecuniary damages.
5. The Agency shall restore and pay Complainant for leave taken as a result of the discrimination and retaliation and calculate and reimburse any lost pay as a result of Complainant's use of leave without pay taken during the three-year period from January 2013 through December 2015.
6. The Agency shall require each of the responsible management officials to take eight (8) hours of EEO training in the provisions of the Rehabilitation Act of 1973 with an emphasis on non-discrimination based on disability and the prohibition against retaliation for engaging in protected EEO activity.
7. The Agency shall consider taking disciplinary action against the responsible management officials.
8. The Agency shall pay Complainant's reasonable attorney's fees of \$52,421.70 and costs of \$1,147.00.
9. The Agency will post the attached notice in the Agency's Office of Financial Management, Washington, D.C. office.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant proved that he was subjected to discrimination as alleged. When Complainant filed the instant appeal, the Agency placed its implementation of the relief ordered by the AJ on hold.

While these actions were still pending, Complainant filed another EEO complaint regarding the Agency's denial of his July 29, 2016 reasonable accommodation request, which allegedly culminated in his termination for medical inability on August 7, 2016. The AJ assigned to that case found that the Agency had denied Complainant a reasonable accommodation and subjected him to discrimination and a hostile work environment based on his disability and prior protected EEO activity. See EEOC Hearing No. 570-2018-00280X (Order, April 15, 2021). That AJ awarded Complainant compensatory damages including, inter alia, back pay and any additional benefits for the period July 29, 2016 through August 7, 2016, when the Agency placed him on leave without pay or AWOL status.² See April 15, 2021 Order.

² According to the Commission's records, this matter is the subject of a pending appeal, EEOC Appeal No. 2021003582.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the AJ's order should be modified to restore and pay him for any leave taken between January 2013 and July 29, 2016, instead of from January 2013 through December 2015. Complainant argues that he was unable to return to work and in a leave without pay status as a direct result of the Agency's discriminatory actions which resulted in his November 2015 breakdown and subsequent hospitalization. Complainant also seeks to have the Agency implement all relief ordered by the AJ.

In response, the Agency contends that the AJ in this case properly found that the reimbursement of lost pay in these cases ended in December 2015 as Complainant's most recent claim occurred in November 2015.

ANALYSIS AND FINDINGS

When discrimination is found, the Agency must provide Complainant with a remedy that constitutes full, make-whole relief to restore him as nearly as possible to the position he would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). It must therefore provide a remedy unless it can show, by clear and convincing evidence, that Complainant would not have been entitled to that remedy even absent discrimination. Brown v. Dep't of the Navy, EEOC Petition No. 0420120012 (June 5, 2013) (citing Davis v. Dep't of Justice, EEOC Request No. 05931205 (Sept. 1, 1994); Day v. Matthews, 530 F.2d 1083, 1085 (D.C. Cir. 1976)); see also 29 C.F.R. § 1614.501(c)(2).

The purpose of a back pay award is to restore to Complainant the income he would have otherwise earned but for the discrimination. See Albemarle Paper Co.; Davis v. U.S. Postal Serv., EEOC Petition No. 04900010 (Nov. 29, 1990). Back pay should include all forms of compensation and must reflect fluctuations in working time, overtime rates, penalty overtime, Sunday premium and night work, changing rate of pay, transfers, promotions, and privileges of employment to which Complainant would have been entitled but for the discrimination. See Ulloa v. U.S. Postal Serv., EEOC Petition No. 04A30025 (Aug. 3, 2004) (citing Allen v. Dep't of the Air Force, EEOC Petition No. 04940006 (May 31, 1996)); Perez v. U.S. Postal Serv., EEOC Petition No. 04A40041 (March 3, 2005).

The Commission recognizes that precise measurement cannot always be used to remedy the wrong inflicted and that the computation of back pay awards inherently involves some speculation. Hanns v. U.S. Postal Serv., EEOC Petition No. 04960030 (Sept. 18, 1997). Nonetheless, uncertainties involved in a back pay determination should be resolved against the Agency, which has already been found to have committed the acts of discrimination. Id.; see also Klook v. U.S. Postal Serv., EEOC Petition No. 04A40012 (June 16, 2004).

In this case, the Agency implemented the AJ's finding that Complainant was denied a reasonable accommodation and subjected discrimination and a hostile work environment. The Agency, therefore, must provide Complainant with make-whole relief that places him in the position he would have occupied absent the discrimination.

The AJ instructed the Agency to restore and pay Complainant for any leave taken as a result of the discrimination and reimburse him for any lost pay as a result of Complainant's use of leave without pay from January 2013 to December 2015. We find that, in order to properly restore Complainant to the position he would have been in absent the discrimination, the AJ's award of back pay should be modified to require the Agency to pay Complainant for the leave taken from January 2013 through July 29, 2016. The AJ found that Complainant credibly testified that the Agency's actions resulted in his hospitalization and his inability to work from November 2015 through the time of the hearing. At the hearing on damages, Complainant explained that the Agency's refusal to accommodate his disabilities and the harassment he experienced led to his suffering a nervous breakdown in November 2015. See Damages Hearing Tr. at 33-35, 55-57. As a result of his breakdown, Complainant was hospitalized on November 25, 2015, for approximately 10 weeks. See Damages Hr'g Tr. at 55-57, 60-62. Further, according to Complainant, he felt he would only be able to return to work in July 2016 with additional accommodations. See Damages Hr'g Tr. at 61-62.

Contrary to the Agency's contention, the mere fact that Complainant did not assert any additional claims against the Agency between November 2015 and July 2016, does not foreclose his ability to obtain damages for that time period. The record clearly establishes that Complainant was unable to work between November 2015 and July 2016 as a direct result of the Agency's discrimination. See 15-0745 Report of Investigation (ROI) at 367-68; 372-75. Additionally, the record indicates that, even while Complainant was unable to work during that time, the Agency continued its pattern of hostility towards Complainant. Management officials repeatedly sent Complainant emails to his personal email address, questioning him about his leave status and stating he needed to return to work or risk termination. See Damages Hr'g Tr. at 57-58. Had it not been for the Agency's discriminatory actions, the evidence indicates that Complainant would have continued to work. Therefore, he is entitled to the restoration of leave and back pay for his use of leave without pay from January 2013 through July 29, 2016. See Heid B. v. Dep't of Health and Human Services, EEOC Appeal No. 0120181119 (Nov. 15, 2018).

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 order implementing the AJ's Order regarding damages.

ORDER

To the extent that it has not already done so, the Agency is ORDERED to take the following actions within 60 calendar days of the date this decision is issued, unless otherwise specified:

1. The Agency shall calculate and pay the amount of lost bonuses, with interest, that resulted from the Minimally Successful and Unsatisfactory appraisals issued and found to be discriminatory. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision." The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
2. The Agency shall expunge from all personnel and associated Agency records the 2013 and 2014 Minimally Successful Appraisal and the 2015 Unsatisfactory Performance Appraisal and replace them with Satisfactory Appraisals with Satisfactory ratings on each element.
3. The Agency shall expunge from its records the Letter of Reprimand and any other documents associated with the actions found to be discriminatory.
4. The Agency shall pay Complainant the amount of \$200,000.00 in non-pecuniary compensatory damages.
5. The Agency shall restore and pay Complainant for leave taken as a result of the discrimination and retaliation and calculate and reimburse any lost pay as a result of Complainant's use of leave without pay taken during the period from January 2013 through July 29, 2016.
6. Within ninety (90) calendar days of the date this decision is issued, the Agency shall require each of the responsible management officials to take eight (8) hours of in-person or interactive EEO training in the provisions of the Rehabilitation Act of 1973 with an emphasis on non-discrimination based on disability and the prohibition against retaliation for engaging in protected EEO activity.

7. The Agency shall consider taking disciplinary action against the responsible management officials. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employment, then the Agency shall furnish documentation of their departure date(s).
8. The Agency shall pay Complainant's reasonable attorney's fees of \$52,421.70 and costs of \$1,147.00.
9. Within thirty (30) calendar days of the date this decision is issued, the Agency shall post the attached notice in the Agency's Office of Financial Management, Washington, D.C. office, in accordance with the statement entitled "Posting Order."

The Agency shall also process any request for attorney's fees and costs incurred as a result of this appeal, in accordance with the statement entitled "Attorney's Fees."

The Agency is directed to submit a report of compliance, as provided in the paragraph entitled "Implementation of the Commission's Decision." The report must include evidence that the corrective actions have been implemented. The agency shall send a copy of the report and all its enclosures to the Complainant.

POSTING ORDER (G0617)

The Agency is ordered to post at its Office of Financial Management, Office of the Secretary in Washington, D.C. copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency.

The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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

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

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

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

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

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

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

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

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

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


This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title.

Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

March 17, 2022
Date