



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Rebecca L.,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal No. 2021001759

Hearing No. 520-2019-00003X

Agency No. IRS-15-1143-F

DECISION

Following its final order, the Agency filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Contact Representative at the Agency's Brookhaven Accounts Management/Wage and Investment Service Center in Holtsville, New York. Her duties consisted of answering the telephone and processing cases received through a data processing system. In the performance of her duties, Complainant consulted with coworkers and the leads on her team.

The Holtsville workspace consisted of adjacent, open cubicles in a large warehouse setting with very high ceilings.

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.

Complainant sat in a cubicle with a half wall. The work shifts overlapped, and other work teams sat two to three feet away from Complainant's team. Complainant and others expressed concerns about poor air quality and ventilation in the warehouse setting. In addition, Complainant stated that the workspace had a vermin infestation.

In 2013, Complainant developed allergies when exposed to certain foods, initially to spicy foods containing pepper, Szechuan peppercorn, ginger, 5-spice powder, pepper powders, especially those made with oils. On August 12, 2013, after seeing an allergist, Complainant informed management about her food allergies and asked that colleagues not bring in pungent foods. The record contains a September 17, 2013 prescription from Complainant's doctor, stating "[Complainant] should avoid airway irritants such as perfume and airborne spices and peppers (capsaicin in red peppers.)" Complainant stated that the symptoms of her allergic reaction was instant and, even after the allergen was removed, the inflammation lingered, affecting her ability to see, swallow, breathe, or concentrate. In addition, if exposed to allergens, Complainant sometimes experienced headaches, tightness in chest, or a facial burning sensation. Complainant stated her sensitivity increased the more she was exposed to an allergen and could result in anaphylactic shock. In response to Complainant's request, management asked Complainant's team members to eat pungent foods in a separate area away from the team workspace.

In 2014, Complainant had minimal allergic reactions as she said management reasonably enforced the pungent food policy. Management informed employees that spicy food products had to be kept in air-tight, covered containers in the workspace.

However, as time progressed, Complainant alleged some employees did not consistently follow the policy. In January 2015, Complainant informed management that she was experiencing more allergic reactions and provided information on the food allergens she should avoid. In addition, Complainant informed management that she had an EpiPen in her workspace in the event of severe reactions.

During this period, Complainant asserted that management told her it would not inform her team members of her allergies and she would need to do so. In addition, Complainant stated that management did not intervene when violations of the food policy were observed and did not alert neighboring teams. Complainant stated that she began experiencing allergen exposures consistently due to colleagues bringing foods with pungent aromas into the workspace. Complainant stated that she had to visit the Agency nurse due to an exposure in March 2015. Complainant stated that she often had to remind her coworkers of the allergen policy; was referred to as the "allergy lady" or "overly sensitive;" and was often isolated or bullied at work. She stated that management did not support her requests and never issued a written policy so that employees and management were aware of how to assist employees with food allergies. Complainant stated that she had to consistently worry about harm in the workplace and wore a scarf or other covering over her eyes and face at times in the workplace.

During a mediation session, management asked Complainant to move to a workspace away from her team. Complainant declined, stating that it would isolate her from her team and make collaboration difficult, and that the request seemed “punitive.” Further, the Agency offered to get a personal air purifier, but Complainant declined, stating it would not control the allergens in an open warehouse setting.

On May 4, 2015, Complainant filed an equal employment opportunity (EEO) complaint alleging (as amended) that the Agency discriminated against her on the bases of disability (Occupational Asthma, Rhinitis, and Conjunctivitis) and retaliation (requesting reasonable accommodation) when:

1. it denied her reasonable accommodation by management failing to enact or enforce measures to limit allergens coworkers brought into Complainant’s workspace;
2. beginning February 2015, colleagues subjected Complainant to hostile work environment harassment when she asked for measures to be taken to limit her exposure to allergens, and, since December 2015, management retaliated against Complainant for asking for reasonable accommodation; and
3. management treated her disparately as to Complainant’s reviews, intentional exposure to allergens, threats and intimidation, failing to select Complainant for developmental and job opportunities, and lower-than-warranted performance appraisal ratings that contained negative comments.

Complainant stated that due to the discrimination, she decided to retire effective January 2018.

The Agency conducted an EEO investigation of Complainant’s complaint. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an EEOC AJ or an immediate final decision. Complainant requested the former. In October 2020, the AJ held a hearing.

On December 1, 2020, following a two-day hearing, the AJ issued a decision concluding the record did not support a finding of discriminatory or retaliatory disparate treatment with regard to Complainant’s developmental and job opportunities, as well as her performance appraisal ratings. However, the AJ determined the record supported a finding that the Agency violated the Rehabilitation Act by subjecting Complainant to hostile work environment harassment and a denial of reasonable accommodation. The parties stipulated that, based on her food allergies, Complainant met the definition of an individual with a disability entitled to coverage under the Rehabilitation Act. The AJ found that Complainant was repeatedly subjected to airborne allergens at work that were at least temporarily debilitating, and that she had to experience symptoms in front of others. The AJ found management’s enforcement of the allergen food policy was “sporadic at best.”

The AJ stated that the allergen policy was not reduced to writing for distribution and only Complainant's teammates were orally informed of the policy so others in the workplace were unaware.

The AJ further found that coworkers acted with "reckless disregard" for Complainant's condition and that Complainant's ability to work was hampered by her reactions to airborne allergens in the workplace. The AJ found, the record shows that Complainant complained about the matter on various occasions to various management officials but "the Agency failed to take effective steps to rectify the situation." The AJ found that Complainant made suggestions, such as a written policy and employee training, to assist with preventing airborne allergens in the workplace, but management failed to assist. The AJ found that there was a lack of enforcement of the policy and management failed to try to learn or understand Complainant's condition needs. The AJ stated that separating Complainant from her team members would not have been an effective accommodation due to the nature of her work.

The AJ determined that Complainant had her first experiences with airborne food allergies while working at the Agency and that "[the Agency's] conduct clearly triggered and exacerbated Complainant's condition over time." Her list of allergen triggers increased. Complainant experienced physical pain such as difficulty breathing, burning sensations on her face, headaches and chest pain. She sought medical treatment several times over the course of three years for her exposures. Complainant provided documentation from two doctors stating diagnoses, allergen triggers, and potential reactions, including anaphylactic shock.

The AJ found that Complainant suffered harm due to near life-threatening incidents, mental and emotional harm due to physical suffering and not knowing when her allergies would be triggered, and having difficulty getting management to address the issue. Therefore, the AJ awarded her \$75,000 in nonpecuniary compensatory damages. The AJ also awarded \$1,350 in pecuniary damages for medical expenses incurred between 2015 and 2017. The AJ ordered the Agency to provide training to the responsible management officials regarding obligations under the Rehabilitation Act, particularly regarding food allergies. Additionally, the AJ ordered the Agency to provide a neutral reference for Complainant. The AJ awarded \$25,650, as requested by Complainant, in attorney's fees. The award included \$18,150 in attorney's fees to Complainant's attorney and \$7,500 to Complainant for prepaid fees she remitted pursuant to a retainer agreement.

Finally, the AJ ordered the Agency to take the following action:

[I]ssue a new policy or amend a current relevant policy which explicitly states that allergies to food or other odors may be considered a disability under the Rehabilitation Act. The policy is to contain specific safeguards for employees with such allergies. The policy is to contain specific, pro-active, enforcement mechanisms regarding those safeguards. The policy will require the Agency to take all necessary steps to ascertain the nature of a food allergy of an employee. The policy will require that the Agency engage in an interactive process to

determine a reasonable accommodation for the employee. The policy will require that the employee engage in the interactive process as well.

Subsequently, the Agency issued a final order rejecting the AJ's finding as to hostile work environment and denial of reasonable accommodation, and the award of compensatory damages. The Agency argued that it offered Complainant a reasonable accommodation in April 2015, when it offered her a workspace away from allergens and she declined it. The Agency stated that Complainant is not entitled to an accommodation of choice, but rather an effective accommodation. The Agency stated that Complainant's duties did not require her to be near her team members. As to harassment, the Agency stated that there is no evidence that anyone intentionally exposed Complainant to allergens. The Agency stated that Complainant's colleagues ordered and ate food in the workplace and there is no indication of intent based on protected class or severity or pervasiveness. The Agency stated that Complainant's reactions were not severe as she did not need to use an EpiPen, did not need to use leave to seek medical attention, and there were no incidents after March 2015. The Agency stated that the AJ ordered it to implement an overly broad policy regarding food allergies and reasonable accommodation that was not tailored to remedy the discrimination found herein. The Agency stated that it met its obligations pursuant to the Rehabilitation Act. Further, the Agency stated that the AJ's compensatory damages award of \$75,000 should be reduced as Complainant provided only her testimony and minimal medical documentation to support her claim.

Complainant filed a cross-appeal challenging the finding of no discrimination with regard to her developmental opportunities and performance appraisals, as well as the amount of compensatory damages. Complainant seeks \$300,000 in nonpecuniary, compensatory damages and states that the other monetary relief is inadequate. Complainant stated that she was exhausted from performing her job and handling her EEO complaint, and that she experienced sleeplessness, loss of appetite, difficulty concentrating, stress, fear of experiencing a trigger at work, isolation, and fear of sharing her medical condition with others. Complainant stated that the poor air circulation at the Agency could have caused her condition and cited the medications she has to take and related expenses.

STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

ANALYSIS AND FINDINGS

Reasonable Accommodation

Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p).

After receiving a request for reasonable accommodation, the employer should engage in an informal process with the disabled individual to clarify what the individual needs and identify the appropriate reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance on Reasonable Accommodation), EEOC Notice No. 915.002 (October 17, 2002); see also, Abeijon v. Dep't of Homeland Security, EEOC Appeal No. 0120080156 (Aug. 8, 2012). Protected individuals are entitled to reasonable accommodation, but they are not necessarily entitled to their accommodation of choice. Castaneda v. U.S. Postal Service, EEOC Appeal No. 01931005 (February 17, 1994).

We find the record sufficient to support the AJ's finding that Complainant was a qualified individual with a disability within the meaning of the Rehabilitation Act. Complainant was able to answer telephones and work with a database to assist Agency clients. It was not until she was exposed to food allergen triggers that she experienced physical symptoms, such as difficulty breathing, headaches, chest tightness, reduced sight, facial burning, and difficulty concentrating. At the hearing, the parties stipulated that Complainant is entitled to coverage under the Rehabilitation Act. Based on the above, we find the Agency had an obligation to provide reasonable accommodation absent a showing of undue hardship.

We find the Agency failed to provide case-specific evidence proving that reasonable accommodation would cause an undue hardship in the particular circumstances. See U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002). While agencies are obligated to provide reasonable accommodation to a qualified individual with disability, the Rehabilitation Act allows agencies to raise an affirmative defense that the accommodation would impose an undue hardship. See Preston v. U.S. Postal Service, EEOC Appeal No. 0120054230 (August 9, 2007); Enforcement Guidance on Reasonable Accommodation. Generalized conclusions will not suffice to support a claim of undue hardship.

Rather, a showing of undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. See Julius C. v. Dep't of the Air Force, EEOC Appeal No. 0120151295 (June 16, 2017); Enforcement Guidance on Reasonable Accommodation. The Agency should have considered and addressed with specificity how enacting and enforcing a policy requiring employees to eat at least pungent foods outside of the workspace shared with Complainant would have affected the Agency. They did not do so here.

The Agency has also argued that it offered Complainant an alternative accommodation which it claims would have been effective. This offer was to move Complainant to workspace that was away from other staff to prevent her exposure to allergens. We conclude, however, that substantial evidence supports the AJ's conclusion that this proffered alternative accommodation of isolating Complainant would not have been effective due to the nature of her work and need to interact frequently with her coworkers.

Where a discriminatory practice involves the provision of a reasonable accommodation, compensatory damages may be awarded if the Agency fails to demonstrate that it made a good faith effort to provide the individual with a reasonable accommodation for his disability. 42 U.S.C. § 1981a(a)(3); Gunn v. U.S. Postal Service, EEOC Appeal No. 0120053293 (June 15, 2007). Here, we are inclined to find that colleagues and management did not take Complainant's allergic condition seriously and failed to honor or enforce the verbal policy, called Complainant "allergy lady" or dismissed her as "overly sensitive," and isolated or taunted her. Complainant stated that management did not support her requests and never issued a written policy so that employees and management were aware of how to assist employees with food allergies. Complainant stated that she had to consistently worry about exposure to allergens in the workplace and wore a scarf or other cover over her eyes and face at times in the workplace. Based on the weight of the evidence, we find adequate support for the provision of compensatory damages in this case.

Harassment

To establish a claim of harassment a complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

Here, we find that Complainant established discriminatory harassment based on management's failure to enact and enforce a policy that prohibited at least foods with pungent smell from the workspace shared with Complainant. The prohibited area could have been distinguished in a manner that did not identify Complainant. However, with the Agency instructing Complainant to inform her coworkers of her allergy restrictions rather than management issuing a general policy, it does not appear medical confidentiality was of concern for the Agency. The Agency sought to seat Complainant in an unoccupied area away from her team, which Complainant stated was punitive. Perhaps, in addition to the breakrooms, courtyards, and cafeteria, the unoccupied areas could have been provided for eating instead. Colleagues were dismissive or circumspect of Complainant's condition and did not honor the verbal policy. The AJ found that Complainant was repeatedly subjected to airborne allergens at work that were temporarily debilitating and that she had to experience symptoms in front of others. The AJ found management's enforcement of the allergen food policy was "sporadic at best." The AJ stated that the allergen policy was not reduced to writing for distribution and only Complainant's teammates were informed of the policy.

Disparate Treatment

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For Complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, non-discriminatory reason for its actions. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, non-discriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Department of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Department of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Washington v. Department of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Here, we find, assuming arguendo, Complainant established a prima facie case of discrimination, the evidence of record fully supports the AJ's conclusion that Complainant failed to show, by a preponderance of the evidence, that the articulated reasons are a pretext for discrimination.

The Agency gave Complainant opportunities just not all the ones she sought, management received complaints about Complainant's ability to accept feedback and get along with others so they were reluctant to place her in a developmental opportunity, and an element of her performance appraisal was lowered.

Remedial Relief

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to a discriminatory act or conduct. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) at Chapter 11, § VII (citing Carey v. Phipps, 435 U.S. 247, 254 (1978) (purpose of damages is to "compensate persons for injuries caused by the deprivation of constitutional rights")). Types of compensatory damages include damages for past pecuniary loss (out-of-pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm). See EEO MD-110 at Chapter 11, § VII.B.

Non-pecuniary losses are losses that are not subject to precise quantification, including emotional pain and injury to character, professional standing, and reputation. See EEO MD-110 at Chapter 11, § VII.B (internal citations omitted). 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 (August 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 (March 4, 1999).

In the instant case, the Agency appeals the AJ's award of \$75,000 for Complainant's non-pecuniary losses, stating that Complainant is not entitled to an award or at least a lower award based on evidence submitted. Complainant appealed the AJ's award, stating \$75,000 is insufficient and requesting \$300,000.

We find that Complainant is entitled to compensatory damages for denial of reasonable accommodation and discriminatory harassment. We find that \$75,000 is appropriate to compensate Complainant for the nature, severity, and duration of harm experienced here. The record sufficiently supports the AJ's finding that the Agency's denial of reasonable accommodation and harassment caused Complainant to experience exhaustion at work, sleeplessness, loss of appetite, difficulty concentrating, stress, fear of experiencing a trigger at work, isolation, and fear of sharing her medical condition with others. The AJ stated that Complainant was not an "eggshell" complainant but did experience emotional harm directly caused by the Agency's actions.

The \$75,000 in nonpecuniary, compensatory damages adequately compensates Complainant for the harm she suffered as a result of the denial of accommodation and discriminatory harassment.

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

While Complainant may feel she is entitled to more; this award considers the nature of the Agency's action, the degree of harm Complainant experienced, and the amount of supporting evidence Complainant offered. The Commission notes that nonpecuniary, compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action.

Other Remedial Relief

The AJ also awarded \$1,350 (based on \$450 per year in medical expenses related to airborne allergens Complainant experienced at work) in pecuniary, compensatory damages for medical expenses between 2015 and 2017; issuance of a new policy or amendment to current reasonable accommodation policy regarding consideration of food or odor allergies under the Rehabilitation Act and how to appropriately address; training for the responsible management officials regarding obligations under the Rehabilitation Act, particularly regarding food allergies; provision of a neutral reference for Complainant; and \$25,650, as requested by Complainant, in attorney’s fees. We find these remedies to be appropriate as ordered, especially as the record shows colleagues and Agency management displayed such utter disregard for Complainant’s medical condition and information on how to address such conditions may prove helpful in the future.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the final agency decision and REMAND the matter to the Agency for remedial relief.

ORDER

To the extent it has not already done so, the Agency shall provide the following remedial relief **within sixty (60) calendar days, unless otherwise noted, of the date of this decision.**

- I. The Agency shall pay Complainant \$75,000 in nonpecuniary, compensatory damages.
- II. The Agency shall pay Complainant \$1,350 in pecuniary damages.
- III. The Agency shall issue a new written policy or amend a current relevant policy which explicitly states that allergies to food or other odors may constitute a disability under the Rehabilitation Act. The policy is to contain specific safeguards for employees with such allergies. The policy is to contain specific, pro-active, enforcement mechanisms regarding those safeguards. The policy will require that the Agency engage in an interactive process to determine the nature of the allergy and reasonable accommodation for the employee.
- IV. The Agency shall provide at least four (4) hours of mandatory training on the provision of reasonable accommodation under Rehabilitation Act to the responsible management officials in this case. The training must have a general emphasis on determining coverage under the Rehabilitation Act and processing reasonable accommodation requests from employees, and have a specific emphasis on accommodating airborne irritant allergies (such as to food smell, odor, and fragrances) in the workplace.
- V. The Agency shall consider disciplinary action against the responsible management officials involved in Complainant's denial of reasonable accommodation and discriminatory harassment. The Commission does not consider training to be a disciplinary action. If the Agency decides to take disciplinary action, it shall identify the actions 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 them has left the Agency's employ, the Agency shall furnish documentation of the departure date(s).
- VI. The Agency shall pay \$25,650 in attorney's fees, which includes \$18,150 in attorney's fees directly to Complainant's attorney and \$7,500 to Complainant for prepaid fees she remitted pursuant to a retainer agreement.
- VII. The Agency shall provide a neutral reference (including dates of Agency employment, position held, and retirement as reason for end of employment) to those who inquire about Complainant's Agency employment.

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).

POSTING ORDER (G0617)

The Agency is ordered to post at its Holtsville, New York facility 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 (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

November 4, 2021
Date