



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

[REDACTED]  
Michelle C.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 2022000408

Hearing No. 541-2016-00201X

Agency No. 2003-0575-2016101112

**DECISION**

Following its October 28, 2021, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency accepts 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. However, the Agency requests that the Commission affirm its partial rejection of the relief ordered by the AJ. Specifically, the Agency argues that the AJ failed to award Complainant certain equitable relief, as further discussed below. Complainant filed a cross appeal regarding the relief ordered by the AJ. 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 Staff Pharmacist, GS-0660-12, in the Agency's Grand Junction VA Health Care System in Grand Junction, Colorado. Complainant entered duty with the Agency on June 15, 2015. Complainant's first-level supervisor was the Chief of Pharmacy (Chief).

---

<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.

Complainant was diagnosed with anemia. As a result of this condition, Complainant experiences dizziness, dehydration at times, headaches, difficulty with balance, blurred vision, sleep issues, extreme fatigue and heart palpitations. In addition, Complainant's menstrual cycle worsened and she experienced very heavy and extended bleeding. Complainant's symptoms sometimes forced her to take leave. Complainant never took more leave than she had accrued, and she never took leave without pay (LWOP). Agency management allowed Pharmacists to swap shifts, so Complainant did that as much as needed. Complainant first took leave on July 6, 2015.

Complainant was provided the normal initial training, which she completed successfully. One of the Pharmacists who trained Complainant thought Complainant was progressing well and learned the complex computer system quickly. Complainant received a 90-day evaluation and was performing at least adequately, and her verbal feedback was also positive.

In late October 2015, Complainant was out of the office for seven days in a row. The Chief began asking several of Complainant's co-workers about errors she had committed. On November 2, 2015, the Chief issued Complainant a written counseling for a mis-dosing incident that occurred in September 2015.

On November 16, 2015, the Chief wrote a memorandum to Human Resources requesting that Complainant be terminated during her probationary period "due to attendance and conduct." On November 19, 2015, the Human Resources Officer issued Complainant the Notice of Termination During Probationary/Trial Period for unacceptable attendance and conduct, effective December 1, 2015. Complainant requested to resign rather than be terminated and the Chief agreed to her request.

After speaking with a union official, Complainant sent an email to the Chief and the Human Resources Specialist (HRS) requesting reasonable accommodation for her anemic condition. HRS responded requesting additional information and provided a form to begin the interactive process. After HRS responded, the Chief informed Complainant that he wished to receive her resignation by 8:00 a.m. on November 23, 2015, or he would proceed with the termination action. Complainant subsequently submitted her resignation effective November 23, 2015.

On February 23, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of disability (anemia) and in reprisal for prior protected EEO activity when:

1. the Agency failed to accommodate Complainant in November 2015;
2. the Agency subjected Complainant to ongoing harassment from June 2015 to November 23, 2015, by demeaning and penalizing Complainant for taking leave due to her disability, falsifying performance deficiencies, giving her a written counseling, presenting her with a termination letter on November 19, 2015, and forcing her resignation; and

3. the Agency forced Complainant to resign effective November 23, 2015.<sup>2</sup>

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The AJ assigned to the matter held a hearing from November 19 – 21, 2019, and issued a decision on September 30, 2021.

In her decision, the AJ concluded the Agency discriminated against Complainant on the basis of her disability with respect to Claims (1) and (3). The AJ determined that the evidence reflected that once Complainant took more than three days off in a row, the Chief considered her as an individual with a disability and started disciplinary actions and a recommendation to terminate her employment so he would not need to accommodate her. Up until this time, no one had told Complainant that her attendance was unacceptable, or that her switching shifts to cover her need for leave was causing any disruption or problem for the pharmacy. On November 20, 2015, Complainant asked for a reasonable accommodation and HRS asked for additional information. However, later that day, the Chief reminded Complainant that if she did not want to be terminated, she needed to provide her resignation by Monday, November 23, 2015. At that point Complainant felt she had no choice and submitted her resignation. The AJ found that, at a minimum, when the Chief saw that Complainant had requested a reasonable accommodation, he should have put the termination on pause. Instead, he continued and increased the pressure for Complainant to resign. The AJ concluded that the facts also supported that the discipline and the proposed removal were in retaliation for Complainant needing an extended time off to address her condition.

To remedy the discrimination, the AJ awarded Complainant \$110,000.00 in non-pecuniary compensatory damages. The AJ determined that Complainant did not prevail on her hostile work environment claim and reduced the requested attorney's fees by 25 percent awarding her \$125,738.25 and \$4,419.13 in costs. Finally, the AJ ordered the Agency to provide training for supervisors and employees at the Grand Junction VA facility and to post a notice.

The Agency subsequently issued a final order. In the final order, Agency accepted the AJ's finding of discrimination, and agreed to implement all of the relief ordered by the AJ. However, the Agency concluded that the AJ failed to "include equitable relief including reinstatement, back pay, and expunction of personnel records for the finding of disability discrimination and forced resignation (constructive discharge)." Accordingly, the instant appeal comes from the Agency seeking an order from the Commission granting further relief.

#### CONTENTIONS ON APPEAL

On appeal, the Agency argues that Complainant is entitled to reinstatement and back pay.

---

<sup>2</sup> Complainant withdrew her claim of race discrimination while the complaint was before the EEOC Administrative Judge (AJ).

The Agency notes that Complainant was unemployed between November 23, 2015, and January 8, 2017, and that Complainant's testimony showed that she attempted to mitigate her unemployment. The Agency further argues that the Commission consistently awards expunction of personnel records that were the result of discriminatory actions, but the AJ failed to do so. The Agency seeks an order directing it to expunge written counseling issued to Complainant on November 2, 2015.

In response, Complainant agrees with the Agency's request, but seeks additional relief. Complainant seeks additional compensation to account for any increase in tax liability she may incur as a result of the back pay award and Complainant renews her request for past pecuniary damages in the amount of \$14,498.23. Complainant explains that she had to pay an early termination fee of \$4,351.68 to break the lease to her apartment when she moved out of Colorado because of her constructive discharge from the Agency. Complainant references her testimony at the hearing in which she attests she did not have a license to practice in Colorado and that there were few facilities in Colorado that would permit her to practice without a Colorado license. Complainant appears to have dropped her request to be compensated for furniture she purchased in Colorado, but still seeks the cost of replacement furniture in Florida in the amount of \$2,420.74. Complainant adds that she drove 1,610 miles from Colorado to her family's home in Alabama, and seeks the IRS mileage rate, a total of \$925.75. Lastly, Complainant seeks \$5,800.06, which is the cost she incurred to stay in hotels in Florida when she obtained alternate employment but did not yet have housing. To work in Florida, Complainant had to obtain Florida licensure. Complainant asserts this cost approximately \$1,000.

The Agency responds that Complainant's request for past pecuniary damages is too attenuated from its discriminatory actions and further argues that Complainant does not show that she first tried to look for alternate employment in Grand Junction. The Agency relies on Barrington v. U.S. Postal Service, EEOC Appeal No. 0120101822 (Feb. 23, 2011), where we declined to award moving expenses because the complainant's "choice to sell her home out of fear and before she received unemployment benefits, withdrew a hardship loan, or searched for other jobs attenuates the link between the Agency's discrimination and the sale."

### ANALYSIS AND FINDINGS

As an initial matter, we note that neither party challenges the AJ's finding of discrimination. We find that substantial record evidence supports the AJ's finding of discrimination and we AFFIRM the Agency's final order in that regard. In this appeal, the Agency is asking us to award more relief to Complainant. Additionally, Complainant is seeking additional remedies as well.

When discrimination is found, an agency must provide a complainant with a remedy that constitutes full, make-whole relief to restore the complainant as nearly as possible to the position she 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); Lazaro G. v. Dep't of Commerce, EEOC Appeal No. 0120170802 (May 17, 2019), req. for reconsid. den'd EEOC Request No. 2019004115 (Sept. 17, 2019); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994).

#### *Reinstatement, Back Pay and Tax Liability*

The Agency and Complainant agree that Complainant should be reinstated and receive a back pay award. We agree that Complainant should be offered reinstatement and will include that in our order below. While the Agency identifies the dates that Complainant was unemployed and states that Complainant mitigated her unemployment, the record does not contain a back pay calculation that is ripe for our review. Accordingly, as part of our remand to the Agency, we will order the Agency to engage with Complainant and determine the appropriate amount of back pay due to Complainant.

The parties also agree, as do we, Complainant is entitled to reimbursement for the higher tax consequences of the lump sum back payment. The Commission has held that an award to cover additional tax liability from a lump sum payment of back pay is available to complainants. Goetze v. Dep't of the Navy, EEOC Appeal No. 01991530 (Aug. 22, 2001); Holler v. Dep't of the Navy, EEOC Appeal Nos. 01982627 and 01990407 (Aug. 22, 2001); Van Hoose v. Dep't of the Navy, EEOC Appeal Nos. 01982628 and 01990455 (Aug. 22, 2001). In the case of a lump sum back pay award, individuals are compensated for the extra tax that they are required to pay as a result of receiving a lump sum pay award, as opposed to the actual amount of taxes that they would have paid if they had received the funds over a period of time, usually several years. It is the receipt of the funds in one lump sum that causes the extra tax liability, not the back pay award itself.

On remand, once the back pay award is calculated, the Agency shall give Complainant the opportunity to provide evidence concerning her entitlement to compensation for any increased tax liability for the back pay award. Complainant, who bears the burden of proof, must submit evidence showing the difference between the taxes that she paid on the lump sum payment and the taxes that she would have paid had the salary been earned over time. See Dellinger v. U.S. Postal Serv., EEOC Appeal No. 07A40040 (Sept. 29, 2005) (burden of proof to establish amount of additional tax liability is on complainant); Darlene F. v. Soc. Sec. Admin., EEOC Petition No. 0420140010 (Apr. 8, 2016). Complainant must show more than the total tax liability arising from receipt of the lump-sum award; she must show the differential between this tax burden and the taxes that she would have paid if she had received the back pay as part of her salary. Johnson v. Env'tl. Prot. Agency, EEOC Petition No. 0420060035 (Nov. 5, 2007). Complainant must "provide exact and detailed calculations showing the amount she is claiming." Emerson, *supra*.

#### *Past Pecuniary Damages*

Pecuniary damages are quantifiable out-of-pocket expenses incurred as a result of the Agency's discriminatory actions.

Damages for past pecuniary damages will not normally be granted without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals of actual loss and expenses.

In a claim for pecuniary, compensatory damages, a complainant must demonstrate, through appropriate evidence and documentation, the harm suffered because of the agency's discriminatory action. Objective evidence in support of a claim for pecuniary damages includes documentation showing actual out-of-pocket expenses with an explanation of the expenditure. The agency is only responsible for those damages that are clearly shown to be caused by the Agency's discriminatory conduct. To recover damages, a complainant must prove that the employer's discriminatory actions were the cause of the pecuniary loss. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 11, § VII.B.2.

In this matter, the Agency does not dispute the calculations presented by Complainant, but rather disputes whether Complainant is entitled to compensation for the various expenses she seeks. We agree with the Agency that Complainant should not be compensated for costs associated with moving from Colorado to Alabama, and then moving to, living in, and working in Florida. Although Complainant, in her testimony, contends that her lack of a license prevented her from obtaining employment in Colorado, Complainant does not provide any evidence she attempted to remain and find alternative employment. As such, Complainant has not adequately demonstrated her efforts to obtain employment in Colorado and therefore the link between the Agency's actions and Complainant's efforts in Alabama and Florida appear too speculative and attenuated to allow relief.

### 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 in accordance with the Order below.

### ORDER

To the extent it has not already done so, the Agency is ordered to take the following remedial action:

1. Within 30 calendar days of the date this decision is issued, the Agency shall retroactively reinstate Complainant to the position of a Staff Pharmacist, GS-0660-12, at the Agency's Grand Junction VA Health Care System in Grand Junction, Colorado, or a substantially similar position where Complainant currently resides, effective as of November 23, 2015. The retroactive reinstatement shall include all seniority, promotions, and grade and step increases to which Complainant would have been entitled but for the discrimination. The Agency shall afford Complainant 15 days to determine whether to accept reinstatement. Should Complainant reject the offer of reinstatement, Complainant's entitlement to back pay shall terminate as of the date of rejection.

2. The Agency shall pay Complainant back pay with interest for the period November 23, 2015, to January 8, 2017. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501, no later than 60 calendar days after the date this decision was issued. 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.
3. 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. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within 60 calendar days of the date the Agency determines the amount it believes to be due. 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."
4. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$110,000.00 in non-pecuniary compensatory damages.
5. Within 30 days of the date this decision is issued, the Agency shall expunge from Complainant's personnel file the November 2, 2015 Written Counseling.
6. Within 60 days of the date this decision is issued, the Agency shall pay Complainant attorney's fees in the amount of \$125,738.25 and costs in the amount of \$4,419.13;
7. Within 90 days of the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive EEO training to the official identified as the Chief of Pharmacy regarding disability discrimination and management officials' obligation to engage in the interactive process in response to employees' requests for reasonable accommodation.
8. Within 60 calendar days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the Chief of Pharmacy. 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 the responsible management official has left the Agency's employ, the Agency shall furnish documentation of her departure date.
9. The Agency shall immediately post a notice in accordance with the paragraph below.

### POSTING ORDER (G0617)

The Agency is ordered to post at its Grand Junction VA Health Care System in Grand Junction, Colorado 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

July 26, 2022  
Date