



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Nicki D.,¹
Complainant,

v.

Charlotte A. Burrows,²
Chair,
Equal Employment Opportunity Commission,
Agency.

Appeal No. 0720180023
Agency No. 2015-0055

DECISION

Following its April 27, 2018, 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 requests that the Commission affirm its rejection of an independent contract Administrative Judge's (AJ's) finding of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.³ The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. Complainant cross-appealed regarding the relief ordered by the AJ. For the following reasons, the Commission REVERSES the Agency's final order and MODIFIES the relief ordered by the AJ.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

² In the present matter, the Equal Employment Opportunity Commission (EEOC) is both the respondent Agency and the adjudicatory authority. The Commission's adjudicatory function is separate and independent from those offices charged with in-house processing and resolution of discrimination complaints. For the purposes of this decision, the term "Commission" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to the respondent party in this action. The Chair has recused herself from participation in this matter.

³ Where the EEOC is the respondent Agency, in accordance with Commission policy, the case is assigned to an independent contract Administrative Judge not employed by the Commission. See Logan-King v. Equal Emp't Opportunity Comm'n, EEOC Request No. 05A10082 (Jan. 3, 2002).

ISSUES PRESENTED

The issues presented are whether the AJ erred in finding that the Agency subjected Complainant to discrimination when it denied her an effective reasonable accommodation; whether the AJ erred in awarding compensatory damages; whether the AJ erred in limiting Complainant's back-pay award to 2015, instead of until the date of her reinstatement in 2017; and whether the AJ erred in reinstating Complainant at the GS-9 level instead of the GS-12 level.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Equal Opportunity Investigator, GS-1860-07, at the Agency's District Office in Philadelphia, Pennsylvania. She was hired on May 19, 2014, under the Schedule A hiring authority, which allows federal agencies to non-competitively appoint individuals with disabilities. Complainant qualified for Schedule A hiring because she has been diagnosed with secondary progressive multiple sclerosis and uses a wheelchair. As a new hire, Complainant was subject to a 12-month trial period.

Though Complainant lived in Washington, D.C., she commuted to her duty station in Philadelphia daily with the understanding that she would ultimately move to Philadelphia. Following her initial training period, Complainant submitted a reasonable accommodation request to her supervisor (S1) on August 27, 2014.⁴ ROI at 000324. In her request, Complainant informed her supervisor that she needed to telework three days per week so that she could attend physical therapy that was specific to the type of multiple sclerosis that she had. Complainant claimed that the physical therapy she needed was only available in a few locations in the country, with Washington, D.C. being one of those places. The same day, S1 forwarded Complainant's request to the Agency's Disability Program Manager (DPM). Id. at 000369.

When the DPM failed to respond after two weeks, S1 sent the DPM a follow-up email on September 9, 2014, inquiring about the status of the request. ROI at 000368. Complainant also sent the DPM a follow-up email on September 10, 2014. Id. at 000367. The DPM responded to Complainant's email on September 10, 2014. Id. at 000374. In her email, the DPM stated that she had received Complainant's request and was awaiting receipt of medical documentation from Complainant. Id. The following day, Complainant asked the DPM to let her know what form was needed. Id. On September 15, 2014, the DPM advised Complainant that while there was no particular form to complete, Complainant's physician needed to provide a statement explaining the nature of Complainant's disability, its impact on her job, and the recommended accommodation. Id. at 000372.

On September 22, 2014, Complainant emailed the DPM a letter from her physician and requested an immediate response from the DPM because her medical concerns were of an immediate nature. ROI at 000372. The letter stated, in relevant part:

⁴ Though the form is dated August 26, 2014, the record reflects that Complainant did not submit the form until August 27, 2014. ROI at 000369.

Part of the treatment for her [Complainant's] neurologic condition is outpatient physical therapy which she needs to do three times per week. The physical therapy is important to help her maintain the strength and endurance necessary to continue working full-time.

It is my understanding that [Complainant] works as an investigator at the [Agency] and that the majority of her work can be done on the computer. I am writing this letter to request you give her work accommodations so that she can tele-commute from home three times per week. By working from home, she will be able to fully participate in her physical therapy and continue to do her job.

ROI at 000325.

On September 23, 2014, the DPM acknowledged receipt of Complainant's medical documentation. ROI at 000284. However, the DPM took no further action until October 7, 2014. On that date, the DPM attempted to reach Complainant by telephone and left a voicemail when Complainant failed to answer. Id. The following day, the DPM spoke with Complainant and verbally approved Complainant's request to telework, on the condition that Complainant provide documentation of her physical therapy appointment times. Id. Complainant provided the DPM with the requested documentation on November 13, 2014. Id. at 000350-51.

On November 13, 2014, the DPM sent Complainant an email, informing her that her request to telework three days a week would be granted on a temporary basis, effective November 18, 2014. ROI at 000348. The DPM's email advised Complainant that a formal decision letter would follow on November 18, 2014. Id. The following day, S1 sent Complainant a memorandum allowing Complainant to telework on November 17, 2014, on an emergency basis. Id. at 000095.

On November 18, 2014, the DPM issued Complainant a formal decision letter, allowing her to telework for a period of 60 days, effective November 18, 2014 through January 18, 2015. ROI at 000297. The letter advised Complainant that the Agency would reassess the effectiveness of the accommodation at the conclusion of the 60-day period and to ensure there was not undue hardship on the Agency. Id.

At the conclusion of the initial telework period, Complainant sent the DPM an email on January 22, 2015, requesting an extension of the telework accommodation. Id. at 000309. In support of her request, Complainant submitted a letter from her physician dated January 15, 2015. Id. at 000322. In the letter, Complainant's physician stated that Complainant "has had great response over the past several months to the physical therapy but needs to continue doing the physical therapy in order to maintain the benefits she has accrued from it." Id.

Two weeks later, on February 4, 2015, the DPM responded to the request by asking how long Complainant's physician wanted her to telework for three days per week. ROI at 000336. Complainant responded to the DPM by email on February 13, 2015, wherein she emphasized that

her need for telework was ongoing because her disability was permanent. Id. Complainant also clarified that she was only requesting two days of scheduled telework, as she would have the third physical therapy session on the weekend. Id. at 000335. Complainant maintained that she would need this accommodation until she was eligible to telework for two days a week under the Agency's national telework policy.⁵ Id.

One week later, on February 19, 2015, the DPM informed Complainant that she was working with S1 on the request. ROI at 000306. When Complainant objected to S1's involvement, the DPM advised Complainant that management needed to be involved during the interactive process. Id. at 000305. The DPM also requested clarification as to whether Complainant was requesting continuation of telework because her therapy had been extended, and if so, Complainant needed to submit new therapy schedule to support the request. Id. The DPM emphasized that if Complainant was requesting permanent telework because of her disability "this raises another concern." Id.

On March 3, 2015, the DPM sent Complainant a decision letter dated March 2, 2015, which formally denied her request to telework three days a week on a permanent basis. ROI at 000310 and 000312-14. In denying the request, the DPM emphasized that the Agency previously allowed Complainant to telework from home from November 18, 2014 through January 18, 2015, even though the collective bargaining agreement did not allow new employees to participate in telework. Id. Furthermore, the DPM noted that Complainant had failed to relocate to Philadelphia despite agreeing to do so during the interview. Id. In lieu of the requested accommodation, the DPM allowed Complainant to work from home from March 2, 2015 to March 27, 2015. Id. The DPM informed Complainant that any therapy sessions beyond this period would need to be accommodated through the leave program. Id.

Shortly thereafter, S1 initiated the process to remove Complainant from federal service. On April 15, 2015, S1 prepared a draft letter recommending Complainant for removal. ROI at 000188. The draft letter, in relevant part, stated:

Although the action is performance based, [Complainant] was hired under Schedule A authority and was previously granted a reasonable accommodation of telework so that she could be closer to her therapy appointments since she commutes daily to Philadelphia from Maryland.

Id.

⁵ We note that, while the Agency's policy disallowed probationary employees from teleworking during their probationary period unless an exception was made by management, such restrictions do not apply in the context of providing a reasonable accommodation unless the Agency can show undue hardship.

The draft letter circulated among key Agency personnel, which included the Agency's District Resource Manager and Senior Attorney. See ROI at 000186-188; see also Hearing File Exhibits at 6; and AJ's Decision at 8. Notably, the DPM also received a copy of the draft letter. Id.

On May 5, 2015, Complainant submitted another request for a reasonable accommodation. She asked that she be allowed to telework for five days out of each ten-day pay period due to her permanent physical disability. ROI at 000330. Complainant reported that her multiple sclerosis had deteriorated substantially since the denial of her previous request and that the temporary accommodation provided was not effective, as her medical condition was chronic and permanent and the need for an accommodation was continuous and ongoing. Id. Complainant reported that she was experiencing increased muscle pain, spasticity, weakness, fatigue, and impaired movement that prevented her daily preparation and commute to the office from any distance. Id. Complainant maintained that the reasonable accommodation would enable her to perform the essential functions of her position. Id. Complainant provided medical documentation to support her request. Id.

The DPM unsuccessfully attempted to contact Complainant by telephone on May 6, 2015, to broach the possibility of reassigning Complainant to a different position. In response to the DPM's voicemail, Complainant sent the DPM an email containing the following responses:

1. My most recent examination by my physician was on April 22, 2015. Based on his assessment of my medical condition and his review of my position description, my physician has determined that I can perform the essential functions of the investigator position with the requested accommodation.
2. I am requesting telework as an accommodation for the same number of days that the Equal Employment Opportunity Commission currently allows for non-disabled investigators nationwide.
3. I am not requesting reassignment. My move to the Philadelphia metro area will be effectuated on or about July 1, 2015. However, to reiterate, the need for the accommodation is not and has not been related to commute issues. Instead, it is related to my permanent medical condition and its associated symptoms, which will persist following my arrival to the Philadelphia metro area.

ROI at 000327.

There was no further discussion after that date, as a letter of removal had been circulated, and Complainant was removed from federal service on May 14, 2015, five days before the end of her probationary period.

On September 24, 2015,⁶ Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), national origin (Haitian-American), sex (female), disability (secondary progressive multiple sclerosis), and age (over) when:

1. On or about January 15, 2015, and continuing through May 14, 2015, the Agency failed to engage in the interactive process and/or provide a reasonable accommodation;
2. She was required to report work that she was doing via email on telework days and to identify specific cases and/or projects to be done each day; and she was subjected to verbal and written comments, including:
 - a. “The Agency is not going to pay you to go to physical therapy.”
 - b. “It would not hurt my feelings if you decided being an investigator was not for you.”
 - c. “When you interviewed, it was explained that the position for which you applied was in Philadelphia, you stated during the interview that you would relocate to the area[,] and have not done so to date”;
3. She was removed from her position as an Investigator in the Philadelphia District Office on May 14, 2015, shortly before her probationary period ended; and
4. She was subjected to discrimination in reprisal for engaging in protected activity (requesting a reasonable accommodation) when she was subjected to harassment/hostile work environment and ultimately terminated from her Investigator position with the EEOC Washington Field Office on May 14, 2015.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an independent contractor Administrative Judge (AJ). Complainant timely requested a hearing. The assigned AJ held a hearing into the matter on May 22-23, 2017 and August 3-4, 2017.

On December 30, 2017, the AJ issued a decision finding that the Agency had subjected Complainant to discrimination on the basis of disability when it failed to meet its legal obligation to engage in the interactive process and reasonably accommodate Complainant. Specifically, the AJ found that the DPM had unreasonably delayed Complainant’s request for reasonable accommodation, as the record clearly showed that the DPM had sufficient information as of September 18, 2014, to make a determination regarding Complainant’s telework request; however, the DPM did not reach a decision on the request until November 13, 2014, approximately eight weeks after she had received the requisite information. The AJ emphasized that the November 13, 2014, approval occurred a full 11 weeks from the date of the initial request. The AJ further noted

⁶ As reflected in page 2 of Complainant’s brief in opposition to the Agency’s appeal, prior to the hearing, Complainant withdrew her claims of disparate treatment and hostile work environment based on sex, age, race, and national origin.

that the Agency's unreasonable demands on Complainant with regard to her renewed request for reasonable accommodation in January 2015, resulted in additional delays and periods when Complainant was not allowed to telework. The AJ concluded that these delays were unwarranted and resulted in the denial of an effective reasonable accommodation to address Complainant's disabilities.

In reaching this conclusion, the AJ criticized the DPM's handling of Complainant's requests for reasonable accommodation. Here, the AJ found that the DPM had made a litany of mistakes, which included: making erroneous assumptions regarding Complainant's disability; violating Agency policies; and otherwise failing to satisfy the Agency's obligations under the Rehabilitation Act. The AJ also criticized the DPM for failing to have an adequate understanding of whether the essential functions of Complainant's job duties could be performed through telework. Notably, the AJ found that the DPM's failure to understand the nature of Complainant's requests for reasonable accommodation resulted in the DPM not knowing that Complainant was wheelchair-bound until after the Agency had removed Complainant from federal service. The AJ further found that the DPM was not truthful in her testimony, particularly with regard to her knowledge of Complainant's pending removal. The AJ concluded that a finding of discrimination was warranted due to the DPM's actions/inactions.

With regard to Complainant's removal, the AJ determined that the Agency had removed Complainant from federal service based on discriminatory reasons. While the Agency had argued that Complainant was removed during her probationary period because she could not perform the essential functions of her position, the AJ found the Agency's explanation to be unpersuasive, as the record showed that Complainant had been rated "Fully Successful" for the period of May 19, 2014 through September 30, 2014, and there were no emails or other documentation noting any performance deficiencies. Furthermore, the AJ noted that S1, who was the only individual who had any knowledge of Complainant's performance deficiencies, had since retired and refused to testify. The AJ concluded that without S1's testimony, the "record, or lack thereof," persuasively established that Complainant's removal was on the basis of her disability.

The AJ also concluded that the evidence established that Complainant was subjected to discrimination in reprisal for engaging in protected activity (requesting a reasonable accommodation) when she was terminated from her Investigator position with the Agency. The AJ's decision to find reprisal relied on the close proximity between Complainant's request for an extension of her accommodation both in January and February of 2015 and again in May of 2015 and her subsequent termination, along with the finding that the Agency provided little to no evidence of performance problems.

However, the AJ declined to find that Complainant had been subjected to a hostile work environment based on her disability. In this regard, the AJ determined that "while [S1] may have been tough and often even abrasive to Complainant with respect to her work and even with reference to her disability, the evidence fails to establish the requisite severity and pervasiveness necessary to establish a hostile work environment."

To remedy the findings of discrimination, the AJ awarded Complainant non-pecuniary compensatory damages in the amount of \$200,000. See Final Decision of Administrative Judge, dated April 2, 2018. In assessing this amount, the AJ acknowledged that the award was in the upper tier of damages in similar cases; however, the AJ found that such an award was appropriate considering the circumstances. In particular, the AJ noted that Complainant's medical treatment was intended to delay the advancement of her progressive disease. The AJ found that the Agency's failure to accommodate Complainant "effectively not only denied her much-needed treatment to treat the progression of her disease, but quite naturally caused emotional distress as a result." The AJ also found that the Agency's actions (or inaction) emotionally devastated Complainant because she lost "her shot" for a profession, caused Complainant to fall into depression, strained her familial relationships, and even caused her contemplate suicide. The AJ concluded that an award of \$200,000 in non-pecuniary compensatory damages was appropriate and consistent with similar awards in McCormick v. Dep't of Justice, EEOC Appeal No. 0720100040 (Nov. 23, 2011), Augustine S. v. Dep't of Homeland Sec., EEOC Appeal No. 0720110018 (Oct. 22, 2015) and Blount v. Dep't of Homeland Sec., EEOC Appeal No. 0720070010 (Oct. 21, 2009). In addition, the AJ also ordered the Agency to reinstate Complainant, award her backpay, and pay her out-of-pocket losses in the amount of \$932.47 and attorney's fees in the amount of \$198,043.70.

The Agency subsequently issued a final order on April 27, 2018, implementing only the AJ's finding of no discrimination on claim 2.⁷ The Agency rejected the AJ's finding that Complainant had proven that the Agency subjected her to discrimination as alleged. The Agency also maintained that it would delay the payment of any amounts ordered (back pay, out of pocket costs, attorneys' fees and compensatory damages) pending the outcome of the appeal. The Agency did, however, comply with the AJ's order to provide Complainant interim relief when it offered to reinstate Complainant, effective April 30, 2018, pending the outcome of the appeal. This appeal followed.

CONTENTIONS ON APPEAL

On appeal, the Agency contends, among other things, that the AJ committed errors of both law and fact that require reversal of both the liability and damages decisions. The Agency argues that the decision improperly evaluated the evidence and drew erroneous legal conclusions by finding that Complainant was removed from her position due to her disability and reprisal. The Agency also asserts that it engaged in good faith exchanges with Complainant regarding her requests for accommodation, and that Complainant, a probationary employee, received multiple accommodations for her disability.

Further, the Agency argues that there was no violation of the Rehabilitation Act and, therefore, the decision regarding remedies is erroneous. The Agency asserts that Complainant was simply unable to effectively perform the essential functions of her position. Accordingly, the relief ordered was inappropriate, unwarranted, and should be vacated. In the alternative, the Agency

⁷ Because Complainant has not challenged the AJ's finding of no discrimination on claim 2, we will not address the claim.

maintains that, if the liability determinations are not reversed, the remedies awarded should be modified appropriately.

In response, Complainant contends, among other things, that the AJ's decision that she was subjected to discrimination is supported by substantial evidence and should not be disturbed. Complainant, however, also filed a cross-appeal maintaining that she should have been awarded back pay from the time of her termination until her reinstatement instead of the shorter time-period set by the AJ. She also maintains that the AJ erred in reinstating her at the GS-9 step 1 level, instead of the GS-12, step 2, level she would have occupied absent the discrimination.

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 for 29 C.F.R. Part 1614 (MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

ANALYSIS AND FINDINGS

Preliminary Matters

As an initial matter, we note that Complainant has requested that the Agency's appeal be dismissed. Complainant argues that the Agency failed to provide her with interim relief and failed to determine the accommodations she needed before the reinstatement. Upon review, however, the record shows that the Agency offered Complainant reinstatement in accordance with the AJ's Order regarding interim relief and that Complainant initially accepted the offer. According to Complainant's attorney, "[o]n Friday, April 27, 2018, at 2:25 p.m., [the District Director of the Philadelphia District Office] telephoned [Complainant] to inquire whether [she] could report to work the following Monday, April 30, 2018. [Complainant] said it would be difficult for her to make arrangements to start work on April 30, so they arranged she would begin work on Wednesday, May 2, 2018."

Complainant's attorney also stated that the Agency's representative attempted to contact her on April 25, 26, and 27, to discuss, among other things, Complainant's reinstatement. As such, we find no merit to Complainant's contention that the Agency's appeal should be dismissed because

it was filed before Complainant was provided interim relief. On the day the Agency issued a final order rejecting the AJ's decision and filed its appeal, Complainant had accepted the Agency's offer of reinstatement. Accordingly, we deny Complainant's request to dismiss the appeal.

Furthermore, we find that the AJ erred in taking an adverse inference against the Agency for S1's failure to participate in the EEO process. We note that the S1 had retired at the time of hearing. Given that the Agency could not compel S1 to testify, we find that an adverse inference was not warranted. Nevertheless, we find that even absent this adverse inference, there is substantial evidence in the record to support the AJ's decision. We turn now to the merits of the complaint.

Claim 1 - Reasonable Accommodation

The Rehabilitation Act of 1973 prohibits discrimination against qualified disabled individuals. See 29 C.F.R. § 1630. In order to establish that the Agency denied Complainant a reasonable accommodation, Complainant must show that: (1) she was an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she was qualified individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (Oct. 17, 2002) ("Enforcement Guidance"). 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. See 29 C.F.R. §§ 1630.2(0) and (p).

Our analysis begins with the threshold question as to whether Complainant was an individual with a disability within the meaning of the regulations. An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include such functions as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; and the operation of a major bodily function. 29 C.F.R. § 1630.2(i). An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to the ability of most people in the general population. 29 C.F.R. § 1630.2(j)(1)(ii).

Here, we find no dispute as to whether Complainant was an individual with a disability. In this regard, we note that Complainant qualified for Schedule A hiring due to her disability of multiple sclerosis. The record reflects that her chain of command was aware of her disability.

Having found that Complainant meets the threshold requirement which would entitle her to the protections of the Rehabilitation Act, Complainant must also show that she was a "qualified" individual with a disability within the meaning of 29 C.F.R. § 1630.2(m). The regulation defines such an individual as a disabled person who, with or without a reasonable accommodation, can perform the essential functions of the position in question. We agree with the AJ that she was.

Our review of the record here reveals that Complainant's work performance became problematic only after she requested a continuation of telework. Up until her midyear review, she had received a "Fully Successful" rating. While the Agency argued that S1 emailed Complainant regarding concerns about her work, and perhaps S2 also noticed issues with Complainant's work after S1 alerted her to her concerns, the record does not show that Complainant received any official warnings, counseling, or training regarding her performance. As such, we find that Complainant was a qualified individual with a disability.

However, to the extent that Complainant received notification of her performance deficiencies, we agree with the AJ that the deficiencies were related to the Agency's failure to timely provide Complainant with reasonable accommodation. Here, we note that Complainant was denied the opportunity to telework until November 18, 2014, which caused her to delay her therapy sessions. The record further reflects that Complainant's therapy sessions were also disrupted in Spring 2015 due to the Agency's failure to approve her request to telework until March 2015. Given that the purpose of the Rehabilitation Act is to allow an individual with a disability to work with or without reasonable accommodation, we would be remiss to allow the Agency to rely on Complainant's alleged performance deficiencies, during periods when she did not have an accommodation, as a basis for finding her not qualified. We therefore conclude that Complainant was indeed qualified based on her demonstrated performance, as reflected in her September 2014 evaluation.

We further agree with the AJ that this case hinges upon whether the Agency provided an effective reasonable accommodation. To be entitled to a requested accommodation, an employee must demonstrate it would be both reasonable and effective to help the employee perform the essential functions of the position. Rose v. U.S. Postal Serv., EEOC Appeal No. 01A45063, (Feb. 3, 2005). Qualified individuals with disabilities are entitled to reasonable accommodation, but the agency is free to choose the accommodation as long as it is effective. Goodman v. U.S. Postal Serv., EEOC Appeal No. 0120044371 (May 2, 2007).

We concur in the AJ's determination that the Agency did not provide an effective reasonable accommodation. Specifically, we note that the Agency failed to acknowledge that Complainant's condition was a permanent condition and not something that could be corrected during a set time period. Moreover, the record shows that the DPM made multiple assumptions and mistakes with regard to Complainant's request. For example, the DPM was not aware that Complainant used a wheelchair; she believed that Complainant's request involved an issue with her commute and not her disability; and she mistakenly confused the requirements of the CBA with the reasonable accommodation requirements. While it is true that Complainant initially was allowed to telework, no plan was developed for how to handle Complainant's ongoing requests. The Commission has consistently found that, although an employer may choose among effective accommodations, "forcing an employee to take leave when another accommodation would permit an employee to continue working is not an effective accommodation." Denese G. v. Dep't of the Treasury, EEOC Appeal No. 0120141118 (Dec. 29, 2016).

Having reviewed the record, we conclude that the Agency's failure to engage in the interactive process resulted in the Agency's failure to provide Complainant with an effective accommodation.

See Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1123, 1139 (9th Cir. 2001) (holding that when employer fails “to engage in the interactive process, liability is appropriate if a reasonable accommodation without undue hardship to the employer would otherwise have been possible”). We also concur in the AJ’s determination that, had the DPM interacted with Complainant, an accommodation could have been provided to Complainant without undue hardship to the employer. See also Broussard v. United States Postal Service, EEOC Appeal No. 01997106 (Sept. 13, 2002), req. to recon. den., EEOC Request No. 05A30114 (Jan. 9, 2003) (an agency cannot be held liable *solely* for a failure to engage in the interactive process; liability for a failure to engage occurs when failure to engage in the interactive process results in agency’s failure to provide reasonable accommodation).

Furthermore, we find that the DPM’s and S1’s proposal that Complainant take leave did not constitute a reasonable accommodation here, as there was an alternative accommodation that would have allowed Complainant to continue working a full day and would not have resulted in an undue hardship to the Agency. Specifically, we find that the Agency has not shown that it would have incurred a significant difficulty or expense if it had allowed Complainant to continue to telework. There is no evidence that this proposed accommodation would have been “unduly disruptive to other employees’ ability to work.” The Agency’s assertion that allowing Complainant to telework “would not be fair to the other employees” does not establish undue hardship. Id. Therefore, we find that the Agency failed to provide Complainant with reasonable accommodation from March 27 to May 14, 2015. See also Lloyd E. v. Dep’t of Transp., EEOC Appeal No. 0120150325 (Aug. 17, 2017).

We also agree with the AJ that the Agency’s failure to provide Complainant with an interim accommodation constitutes an independent basis of liability. While we are mindful of the Agency’s contention that the 11-week delay in providing Complainant with reasonable accommodation was due to Complainant’s own five-week delay in responding to the DPM’s October 8, 2014 request, we note that the interactive process is a two-way street. Under our regulations, when all the facts and circumstances known to the agency make it reasonably likely that an individual will be entitled to reasonable accommodation, but the accommodation cannot be provided, the agency shall provide an interim accommodation that allows the individual to perform some or all of the essential functions of his or her job, if it is possible to do so without imposing undue hardship. See 29 C.F.R. § 1614.203(d)(3)(Q). As we noted in our Final Rule on Affirmative Action for Individuals with Disabilities in Federal Employment, interim accommodations play a crucial role in preserving the requesting individual’s ability to work, as they may be necessary in order to avoid, for example, a worsening of symptoms, exacerbation of a medical condition, or pain.⁸ Given the facts and circumstances in this case, we agree with the AJ that the Agency unlawfully violated the Rehabilitation Act when it failed to provide Complainant with an interim accommodation during the pendency of the interactive process.

⁸ See <https://www.federalregister.gov/documents/2017/01/03/2016-31397/affirmative-action-for-individuals-with-disabilities-in-federal-employment>.

In reaching this conclusion, we considered the Agency's contention that the DPM's verbal approval of Complainant's requested accommodation on October 8, 2014, constituted an interim accommodation. However, we find such contention to be unpersuasive. In this regard, we note that the October 2014 verbal approval was expressly conditioned on Complainant's submission of medical documentation, which Complainant did not provide until November 13, 2014. Given that Complainant did not fulfill the condition precedent of the verbal approval until November 13, 2014, it stands to reason that the verbal approval could not have been in effect prior to November 13, 2014. Furthermore, the record reflects that even though the DPM received Complainant's medical documentation on November 13, 2014, she did not allow Complainant to telework until November 18, 2014. Indeed, we note that S1 authorized Complainant to telework on November 17, 2018, on an emergency basis because the DPM did not allow Complainant to telework prior to November 18, 2014. We therefore reject the Agency's contention that Complainant was afforded an interim accommodation.

We also considered the Agency's reference to Melodee M. v. Dep't of Agric., EEOC Appeal No. 0120142984 (Jan. 24, 2017) to support its contention that the delay in providing Complainant with accommodation was not unreasonable. There, the Commission declined to hold the agency liable for a five-month delay in the reasonable accommodation process because the Commission found that the delay was excusable in light of complainant's own failure to timely provide supporting medical documentation to the agency.

However, we find the Agency's reliance on Melodee M., *supra*, to be unpersuasive. In this regard, we note that the Commission, in Melodee M., *supra*, made no mention as to whether the complainant was afforded an interim accommodation. Furthermore, we note that in the cases where the Commission excused an agency's delay, the Commission did so because the agency provided the complainant with an interim accommodation. *Cf. Dwight B. v. Dep't of Vet. Aff.*, EEOC Appeal No. 0120170053 (Sept. 21, 2018); and Wendel v. U.S. Postal Serv., EEOC Appeal No. 0120090538 (Sept. 9, 2010). Given that our regulation at 29 C.F.R. § 1614.203(d)(3)(Q), clearly obliged the Agency to provide interim accommodations,⁹ we decline to follow Melodee M., *supra*. For the above reasons, we conclude that the Agency failed to reasonably accommodate Complainant.

Claims 3 and 4 – Removal Action

We turn now to claims 3 and 4 concerning Complainant's removal from federal service. For Complainant to prevail on her claim of disparate treatment, she must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an

⁹ As discussed above, our regulation at 29 C.F.R. § 1614.203(d)(3)(Q) requires federal agencies to provide interim accommodations when all the facts and circumstances known to the agency make it reasonably likely that an individual will be entitled to reasonable accommodation, if it is possible to do so without imposing undue hardship.

inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14.

To establish a prima facie case of disability discrimination under a disparate treatment theory, Complainant must demonstrate that: (1) she is an “individual with a disability” (2) she is “qualified” for the position held or desired; (3) she was subjected to an adverse personnel action under circumstances giving rise to an inference of disability discrimination and/or denied a reasonable accommodation. See Josiah M. v. U.S. Postal Serv., EEOC Appeal No. 2019003865 (Feb. 14, 2020).

To establish a prima facie case of disparate treatment on the basis of reprisal, Complainant must show that: (1) she engaged in a protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120132503 (Aug. 28, 2014), citing Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 253 (1981). Petitioner must ultimately prove, by a preponderance of the evidence, that the agency's explanation is pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

This established order of analysis, 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, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, concerning the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See Herb E. v. Equal Emp. Opp. Comm'n., EEOC Appeal No. 0120171699 (Nov. 27, 2019); see also Charlie K. v. v. Equal Emp. Opp. Comm'n., EEOC Appeal No. 0120142315 (Jan. 24, 2017), req. for recons. den., EEOC Request No. 0520170235 (Dec. 19, 2017); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Servs., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Having reviewed the record, we find that the Agency has articulated legitimate, nondiscriminatory reasons for its actions.¹⁰ With regard to the removal action, our review of the record shows that

¹⁰ As the Agency has articulated a legitimate, nondiscriminatory reason for its actions, we need not address the AJ's finding that Complainant established a prima facie case of discrimination. However, we nevertheless agree with the AJ that Complainant has established a prima facie case of discrimination because the record shows that Complainant was qualified individual with a

the Agency removed Complainant from federal service due to her poor performance. Specifically, the Agency alleged that Complainant, among other things, failed to: understand the laws enforced by the Commission; follow her supervisor's instructions; ensure the accuracy and completeness of case data in the Integrated Management System; provide sufficient analysis; and properly assemble case files. The Agency also alleged that Complainant was not receptive to constructive criticism.

As the Agency has articulated legitimate, nondiscriminatory reasons for its actions, Complainant now bears the burden of establishing that the Agency's stated reasons were merely a pretext for discrimination. See, e.g., Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996). Indicators of pretext include, but are not limited to, discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, comparative or statistical data revealing differences in treatment across various protected-group lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Melissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015).

In arguing pretext, Complainant contended that the removal action was pretext for discrimination based on disability. Specifically, Complainant disputed S1's characterization of her work, and she maintained that S1 poisoned S2's impression of her by selectively providing S2 with biased feedback. Complainant also maintained that no management official other than S1 observed her work performance. Complainant asserted that S1 subjected her discrimination because she had requested a reasonable accommodation.

The record reflects that the AJ credited Complainant's version of events. In this regard, while the AJ considered the Agency's explanation that Complainant's removal was due to performance reasons, the AJ found that the probative evidence failed to support that assertion. Having reviewed the record, the AJ found that the Agency's removal action was based on discriminatory animus because the record clearly showed that Complainant performed at the "fully successful" level in the months prior to her request for reasonable accommodation, but that assessment in the months following Complainant's requests for reasonable accommodation declined. In rejecting the Agency's assessment of Complainant's work, the AJ noted that the Agency did not provide Complainant with any specific warnings about her performance, did not issue her any performance letters, and never counseled her in an official setting. Furthermore, the AJ credited the hearing testimony of Complainant's third-level supervisor, who testified that the removal action was based on the erroneous assumption that Complainant was receiving reasonable accommodation. The AJ concluded that the Agency, in failing to timely provide Complainant with reasonable accommodation, had essentially deprived Complainant of the opportunity to demonstrate acceptable performance. The AJ reasoned that to hold Complainant accountable for performance deficiencies during periods when she did not have accommodations would be contrary to the Rehabilitation Act's purpose of allowing individuals with disabilities to work with or without accommodation.

disability who was removed from federal service shortly after requesting reasonable accommodation.

As for Complainant's reprisal claim, the AJ found that the evidence established that Complainant was subjected to discrimination in reprisal for engaging in protected activity (requesting a reasonable accommodation) when she was terminated from her Investigator position with the Agency. The AJ's decision to find reprisal relied on the close proximity between Complainant's request for an extension of her accommodation both in January and February of 2015 and again in May of 2015 and her subsequent termination, along with the finding that the Agency provided little to no evidence of performance problems.

On appeal, the Agency contends that the AJ erred in finding that Complainant was deprived of the opportunity to show that she could perform the essential functions of her position with or without accommodation. To the contrary, the Agency vehemently maintains that Complainant in fact was receiving her requested accommodation when her performance deficiencies manifested. Furthermore, the Agency asserts that Complainant's second-level supervisor independently reviewed Complainant's work and found it to be deficient.

After careful consideration, we find substantial evidence to support the AJ's decision. While we considered the Agency's contention that Complainant in fact was receiving accommodations when her performance deficiencies manifested, we agree with the AJ that the probative evidence fails to show that the Agency effectively accommodated Complainant. In this regard, we note that Complainant first requested reasonable accommodation on August 27, 2014 and was removed from federal service on May 14, 2015. The record reflects that during this 260-day period, the Agency only allowed Complainant to telework for a total of 85 days (November 18, 2014 – January 18, 2015 and March 2, 2015 – March 27, 2015). Given that Complainant was not allowed to telework for the vast majority this period, we agree with the AJ that the Agency's failure to accommodate played a significant role in Complainant's performance deficiencies. Moreover, while we acknowledge that there is a dispute as to whether acted S1 acted with discriminatory animus, and whether S1's discriminatory animus tainted the decisions of S2 and 3, we note that the AJ considered the evidence presented by the parties, weighed the evidence, and concluded that S1's discriminatory animus irreparably tainted the removal action. As we find substantial evidence to support the AJ's decision, we decline to second guess the AJ's findings of fact. Accordingly, we conclude that Complainant has successfully shown that the Agency's articulated reasons were pretext for discrimination on the alleged bases.

Remedies

Back Pay

Based on the finding of discrimination, Complainant is entitled to full relief in the form of back pay and benefits as authorized by Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. §2000e et seq. Awards of back pay in Title VII cases are governed by 5 C.F.R. 550.801 et seq. See 29 C.F.R. 1614.501(b)-(c). The purpose of a backpay award is to restore to Complainant the

income she would have otherwise earned but for the discrimination. See Albemarle Paper Co. v. Moody, 442 U.S. 405, 418-19 (1975); Davis v. United States Postal Service, EEOC Petition No. 04900010 (November 29, 1990).

Further, the applicable regulations provide that amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce the backpay otherwise allowable. Thus, Complainant has a duty under Title VII to mitigate or lessen damages by making a “reasonable good faith effort to find other employment.” This means that Complainant was required to seek a substantially equivalent position; that is, a position that afforded virtually identical compensation, job responsibilities, working conditions, status and promotional opportunities as the position she was discriminatorily denied. See Weaver v. Casa Gallardo, Inc., 922 F 2d 1515 (11th Cir. 1991); Todd v. United States Postal Service, EEOC Petition No. 04920007 (Aug. 27, 1992).

Usually, a back-pay award runs until a complainant is reinstated into the position he or she lost due to the discrimination suffered. In this case, however, the AJ, limited the back-pay award due to failure to mitigate concerns. Specifically, the AJ ended the back-pay period as of the date Complainant stopped trying to find employment, which by Complainant’s own testimony was the last time that she sent resumes out in December 2015.

In finding that Complainant did not mitigate her damages after she stopped sending resumes out to obtain employment, the AJ observed that Complainant provided few details and no real explanation as to why she stopped looking for employment. Therefore, the AJ limited the award of back pay for failure to mitigate. We find that the AJ’s decision is supported by the record and Commission precedent. Accordingly, we agree with the AJ’s finding to limit back pay to the time period before Complainant stopped seeking employment.

Reinstatement/Grade Level

Similarly, we agree with the AJ that Complainant should be reinstated at the GS-9 step 1 level and not the GS-12 step 2 level. The AJ explained that the reinstatement level was tied to the back-pay date. Specifically, Complainant was not awarded back pay from the time that she was terminated until her reinstatement offer because of the mitigation concerns discussed above. As such, for the time that she was credited, she would have attained the GS-9, step 1 level, not the GS-12 level. We find substantial evidence in the record supports this finding.

Compensatory Damages

Under section 102 of the Civil Rights Act of 1991, compensatory damages may be awarded for pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. However, this section also provides that an agency is not liable for compensatory damages in cases of disability discrimination where it demonstrates that it made a good faith effort to accommodate the complainant’s disability. A good faith effort can be demonstrated by proof that the agency, in consultation with the disabled individual, attempted to identify and make a reasonable accommodation. See Elise S. v. Dep’t of State, EEOC Appeal No. 0120170164 (Sep.

25, 2019). Having reviewed the record, we find that the record contains substantial evidence to support the AJ's determination that the Agency did not engage good faith, as the record clearly shows that the Agency, through its DPM, repeatedly failed to provide Complainant a timely accommodation and repeatedly violated its obligation to provide Complainant with an interim accommodation while awaiting her medical documentation. Consequently, we find that the Agency is liable for compensatory damages.

We note that compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to the discriminatory act or conduct. See EEOC Management Directive - 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")). A complainant who establishes his or her claim of unlawful discrimination may receive, in addition to equitable remedies, compensatory damages for past and future pecuniary losses (*i.e.*, out of pocket expenses) and non-pecuniary losses (*e.g.*, pain and suffering, mental anguish). 42 U.S.C. § 1981a(b)(3). For an employer with more than 500 employees, such as this agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000.00. *Id.* In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that the Commission has the authority to award compensatory damages in the federal sector EEO process.

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr 18, 1996) (citing Carle v. Dep't of the Navy, EEOC. Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from a complainant concerning his or her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. *Id.*

Statements from others including family members, friends, health care providers, other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. *Id.* Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. *Id.* The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. *Id.* The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. *Id.*

Complainants have the burden of proving the existence, nature and severity of the alleged emotional harm and must also establish a causal relationship between the alleged harm and the discrimination. Absent such proof of harm and causation, a complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. The Commission has held that evidence of emotional distress should include detailed information on physical or behavioral manifestations of the distress, if any, and any other information on the intensity of the

distress, information on the duration of the distress, and examples of how the distress affected appellant both on and off the job. Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). In addition to a detailed statement by the individual claiming emotional distress damages, other evidence of such damages could include statements by health care professionals, such as physicians, psychologists, psychiatrists, therapists or counselors, as well as friends, family or coworkers who could attest to the existence, nature and severity of appellant's distress, its duration and causation.

The Commission has held that an award of non-pecuniary damages should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)). Similarly, when determining an award of non-pecuniary compensatory damages, the Commission may consider the present-day value of comparable awards. Thus, an AJ who is awarding damages should consider the amounts that the Commission awarded in prior cases involving similar injuries and should determine whether circumstances justify a higher or lower award. The AJ should adjust the award upward or downward according to the relative severity of the complainant's injury. The AJ may then take into consideration the age of the comparable awards and adjust the current award accordingly. See Lara G. v. United States Postal Service, EEOC Request No. 0520130618 (June 9, 2017).

Here, the AJ determined that an upper tier award of \$200,000 was warranted because the Agency's actions (or inaction) caused Complainant profound emotional distress consisting of: depression; isolation; withdrawal; sleeplessness; eating disorders; paranoia; and emotional separation from family members. The AJ emphasized that these symptoms did not preexist Complainant's employment with the Agency. To the contrary, the AJ noted that Complainant joined the Agency in May 2014, without any debilitating emotional issues and was well-adjusted, self-assured, enthusiastic, passionate, and optimistic despite her progressive disability. The AJ found that Complainant's mental and physical health began to decline in August 2014 when the Agency repeatedly delayed her requests for reasonable accommodation. The AJ concluded that the Agency's actions (or inaction) "effectively not only denied [Complainant] her much-needed treatment to treat the progression of her disease, but quite naturally caused emotional distress as a result."

The Agency disagrees with the AJ's award assessment, and on appeal, the Agency argues that Complainant is not entitled to award above \$40,000.00, much less \$200,000.00. In arguing that the Commission should reduce the award, the Agency maintains that Complainant's emotional distress preexisted the Agency's discriminatory actions, as Complainant characterized her progressive multiple sclerosis as "hell on earth" and admitted that "depression wasn't foreign to [her]." Furthermore, the Agency disputes the AJ's finding that Complainant's pain and suffering lasted from August 2014 through August 4, 2017. To the contrary, the Agency notes that Complainant actually reported that her mental health improved in August 2016, when she moved to Philadelphia. The Agency contends that the AJ's decision "fails to note, much less account for, the changes following relocation." Finally, the Agency takes issue with the AJ's reliance on

McCormick v. Dep't of Justice, EEOC Appeal No. 0720100040 (Nov. 23, 2011), Augustine S. v. Dep't of Homeland Sec., EEOC Appeal No. 0720110018 (Oct. 22, 2015) and Blount v. Dep't of Homeland Sec., EEOC Appeal No. 0720070010 (Oct. 21, 2009). In this regard, the Agency argues that the AJ should not have relied on these cases because the instant case is distinguishable from the cited cases. The Agency contends that “[i]f Complainant is entitled to compensatory damages at all, the amount awarded should not exceed \$10,000.00.

In opposing the appeal, Complainant contends that the AJ's award was reasonable and consistent with Commission precedent. In this regard, while Complainant acknowledges the Agency's contention that her condition was preexisting, she contends that the AJ fully considered this contention, but the AJ nevertheless found that Complainant was “well-adjusted in the face of her disability and in fact was self-assured, enthusiastic, passionate, and indeed optimistic concerning her employment with the Agency.” Further, Complainant argues that the Agency, in attempting to link her depression to her terminal condition, callously ignored her testimony that she fell into deep depression after the Agency threw her out “like a piece of trash” and caused her to feel like her life ended. Complainant requests that the Commission reject the Agency's request to reweigh the evidence on damages, which the AJ duly considered and found to merit upper tier damages in the amount of \$200,000.000.

Having reviewed the record, we find the AJ's award of \$200,000.00 in non-pecuniary compensatory damages to be excessive. While we acknowledge the harm that Complainant suffered due to the Agency's discriminatory actions, we emphasize that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish an agency for its discriminatory actions. Given the facts in this case, we find the award to be “monstrously excessive.” We also agree with the Agency that the facts in this case are materially distinguishable from the three cases cited by the AJ. See McCormick v. Dep't of Justice, EEOC Appeal No. 0720100040 (Nov. 23, 2011) (upholding AJ's award of \$200,000.00 in non-pecuniary compensatory damages because the complainant sustained damage to her back as a result of psychologically induced spasms); Augustine S. v. Dep't of Homeland Sec., EEOC Appeal No. 0720110018 (Oct. 22, 2015) (upholding AJ's award of 250,000.00 in non-pecuniary compensatory damages where complainant suffered extensive harm as a result of a decade-long failure by the agency to engage in the interactive process or provide reasonable accommodation); and Blount v. Dep't of Homeland Sec., EEOC Appeal No. 0720070010 (Oct. 21, 2009) (upholding AJ's award of \$200,000.00 in non-pecuniary compensatory damages where agency's failure to accommodate resulted in complainant's inability to work, which, in turn caused complainant's ex-wife to sue him for custody of their child and for child/spousal support).

Furthermore, we find that Complainant's emotional distress and physical ailments preexisted the Agency's discriminatory actions. While we acknowledge the AJ's finding that Complainant remained upbeat and optimistic despite her progressive disease, we note that Complainant admitted that “depression wasn't foreign to [her]” as she was suffering from secondary multiple sclerosis, which, in Complainant's view, was the worst phase of the progressive disease. Though the record clearly shows that Complainant remained strong in the face of adversity, the fact remains that Complainant's emotional distress was initially secondary to the progressive nature of the disease

and only subsequently exacerbated by the Agency's actions. As for the AJ's finding that the Agency's actions (or inaction) "effectively not only denied [Complainant] her much-needed treatment to treat the progression of her disease," we conclude that AJ erred in reaching this conclusion as the AJ made a medical finding without citing to medical evidence. For these reasons, we are disinclined to hold the Agency entirely liable for the full extent of her emotional distress and physical harm related to a preexisting condition.

In circumstances such as this, the Commission relies on the principle that "a tortfeasor takes its victims as he or she finds them." Wallis v. U.S. Postal Serv., EEOC Appeal No. 01950510 (November 13, 1995), citing Williamson v. Handy Button Machine Co., 817 F.2d 1290, 1295 (7th Cir. 1987). There are two exceptions to this general rule, however. First, when a complainant has a preexisting condition, the agency is liable only for the additional harm or aggravation caused by the discrimination. Second, if the complainant's preexisting condition inevitably would have worsened, the agency is entitled to a reduction in damages reflecting the extent to which the condition would have worsened even absent the discrimination. Wallis, *supra*, citing Maurer v. United States, 668 F.2d 98, 99-100 (2d Cir. 1981).

Based on our review of the evidence in the record and based upon Commission precedent, we find that Complainant is entitled to \$85,000 in non-pecuniary, compensatory damages. This amount takes into account the severity of the harm suffered and is consistent with prior Commission precedent. See Geraldine B. v. Dep't of Agriculture, EEOC Request No. 2019004795 (Jan. 25, 2021) (on reconsideration award reduced from \$250,000 to \$90,000 where complainant experienced insomnia, weight gain, "worst depression" she had ever experienced, loss of sleep and nightmares, stopped going to church and socializing with friends, depression strained family relationships, causing complainant to miss the birth of her granddaughter, her inability to work caused family to have to cut back on food and dip into savings over three-year period); Les B. v. Dep't of Commerce, EEOC Appeal No. 2019003393 (Sept. 14, 2020) (agency award of \$65,000 increased to \$85,000 awarded where complainant felt fear, anxiety, anger, anxiety, shame, bitterness, confusion, defeat, dejection, depression, devastation, discouragement, distrust, and pressure, separated from his wife and children, felt suicidal when he received termination, and medical testimony established that his mental health status worsened as a result of his interactions with agency management); Iliana S. v. Dep't of Justice, EEOC Appeal No. 0120181195 (June 12, 2019) (agency award of \$12,000 increased to \$75,000 where complainant experienced deteriorating emotional state, anxiety and depression requiring medication, wept uncontrollably, developed suicidal thoughts, detached from her children and husband, became unable to participate in child-rearing and household duties). We will therefore award Complainant \$85,000.00 in non-pecuniary compensatory damages.

The AJ also found, and we agree that Complainant established, and she had pecuniary losses in the amount of \$932.47 that were causally connected to the Agency's discrimination and therefore should be recoverable.

Restoration of Leave

The AJ relied on Henley v Department of Justice, EEOC Appeal No. 01A22186 (2002), which stands for the proposition that a complainant must demonstrate a causal connection between the need to take leave and the Agency's discrimination, and that a Complainant must identify a "specific amount of leave" taken because of the discrimination. Id. at pg. 5. The AJ determined that Complainant was not entitled to restoration of leave because she did not identify a specific amount of leave that she took as a direct result of discrimination. We find that this case can be distinguished from Henley, and therefore disagree with the AJ's finding here. In the instant case, Complainant was told that she would have to use leave after March 27, 2015, for her appointments. As such, we find that the record is specific enough to show that all leave taken after March 27, 2015 until her termination on May 14, 2015, should be restored as leave related to the Agency's discriminatory practices.

Attorneys' Fees and Costs

We agree with the AJ that as a prevailing party, Complainant is entitled to attorneys' fees and cost, and that the attorneys' fees submitted in the amount of \$198,043.70 are reasonable in terms of time and rate, and that Complainant has substantiated costs in the amount of \$11,578.16. We will therefore order these amounts to be paid.

Other Requested Relief

We agree with the AJ that a referral of this matter to the Office of Special Counsel is not warranted. We disagree, however, with the AJ's finding that disciplinary action against those involved should be not be considered. The Commission has long held that disciplinary action against the parties involved should be considered when a finding of discrimination is made.

CONCLUSION

Accordingly, we REVERSE the Agency's final order finding that it did not discriminate against Complainant, but we MODIFY the remedies that were awarded to Complainant with respect to compensatory damages and leave. Accordingly, we REMAND this matter for further processing in accordance with the decision and the Order below.

ORDER

The Agency is ordered to take the following remedial actions within one hundred and twenty (120) calendar days from the date this decision is issued:

1. Pay Complainant back pay and interest thereon from May 15 to December 31, 2015, at the GS-9, Step 1 Level, for an Investigator position in the Agency's Philadelphia District Office.

2. Offer Complainant the position of Investigator in its Philadelphia District Office at the GS-9, Step 1 level, effective April 30, 2018, with reasonable accommodation. Complainant shall have fifteen (15) days from the date of the offer to accept or reject the position. If Complainant should reject the Agency's offer of a position, the date of her rejection shall be the end date for any back pay due Complainant. If Complainant accepts the offer of a position, the Agency shall engage in the interactive process to determine reasonable accommodation for Complainant's disability.

Pursuant to the Order of the AJ, upon reinstatement, Complainant shall be credited for the time previously served in employment with the Agency and any conditions relative to her previous placement as a probationary employee shall end five (5) days after such reinstatement.¹¹

3. Reimburse Complainant \$932.47 in out-of-pocket expenses.
4. Pay Complainant's attorneys' fees in the amount of \$198,043.70 and costs in the amount of \$11,578.16.
5. Pay Complainant \$85,000.00 in non-pecuniary compensatory damages.
6. Restore Complainant's leave taken from March 27 through May 14, 2015.
7. Ensure that the management officials involved in the failure to accommodate Complainant and her subsequent termination receives at least 8 hours of EEO training with a focus on reasonable accommodation, if it has not already done so.
8. Consider taking disciplinary action against the management officials involved in the failure to accommodate Complainant and her subsequent termination (i.e., S1, S2, S3, and the DPM). The Commission does not consider training to be disciplinary action. The Agency shall explain the basis for its determination whether to impose discipline, and shall identify what action, if any, was taken. If the responsible management officials are no longer employed by the Agency, then the Agency shall provide evidence of their date(s) of departure.

The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision is issued. 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

¹¹ This condition corresponds to the Agency's action in terminating Complainant five days prior to the expiration of her probationary period.

(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 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). The report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Philadelphia District Office 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 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:

/s/ Rachel See

Rachel See
Acting Executive Officer
Executive Secretariat

September 18, 2021

Date