



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

[REDACTED]
Marybeth C.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services
(Health Resources and Services Administration),
Agency.

Appeal No. 0120170811

Agency No. HHS-HRSA-0244-2015

DECISION

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 9, 2016, final decision on damages concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

ISSUES PRESENTED

The issues presented are: 1) whether the Agency properly awarded Complainant \$30,000 in non-pecuniary compensatory damages; 2) whether the Agency properly awarded Complainant past pecuniary compensatory damages in the amount of \$2,202.20; and 3) whether the Agency properly restored Complainant's leave in the amount of 94.5 hours.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Human Resources Specialist, GS-13, at the Agency's facility in Rockville, Maryland.

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.

On May 7, 2015, Complainant filed an EEO complaint, as amended, alleging that the Agency discriminated against her, denied her a reasonable accommodation, and subjected her to a hostile work environment based on her disability (musculoskeletal issues with her back, hip and leg; depression, anxiety) and in reprisal for her prior protected EEO activity. Following 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 EEOC Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant proved that the Agency subjected her to discrimination as alleged.

In its decision, the Agency specifically found that Complainant established that she was denied accommodation for her disability when:

- 1) On March 2, 2015, management informed Complainant that it would no longer accommodate Complainant by collecting completed cases from the printer or accept emails of completed cases when Complainant was teleworking;
- 2) Management denied Complainant's request for increased amount of telework to four days per week; and
- 3) On August 5, 2015, Complainant requested a reasonable accommodation to telework up to three days per week and her request was denied on October 8, 2015.

The Agency found, however, that Complainant did not establish she was subjected to a hostile work environment or discrimination with regard to her remaining claims.² The Agency thereafter completed its supplemental investigation concerning Complainant's entitlement to compensatory damages. Complainant, her spouse, son, and daughter submitted sworn statements for the supplemental investigation. They attested that Complainant experienced social withdrawal, disengagement from family, depression, anxiety, nightmares, sleeping problems, a fear of being fired, and the aggravation of her physical condition, among other symptoms, as result of the Agency's denial of accommodation. Complainant also attested that she visited her psychiatrist and went to the Emergency Room (ER) when she overdosed on medication prescribed for her anxiety caused by the discrimination. The Agency thereafter issued its final decision regarding Complainant's entitlement to remedies.

Agency's Decision on Remedies

In its decision on remedies, the Agency awarded Complainant non-pecuniary compensatory damages in the amount of \$30,000 and pecuniary compensatory damages in the amount of \$2,202.20.

² The Commission affirmed the Agency's decision in Marybeth C. v. Dept of Health and Human Services, EEOC Appeal No. 0120162505 (Oct. 20, 2016).

The Agency also found that Complainant was entitled to reimbursement for 94.5 days of leave, encompassing 14.5 hours of sick leave, 47 of hours annual leave, and 33 hours of Leave without Pay (LWOP).³

In awarding Complainant \$30,000 in non-pecuniary compensatory damages, the Agency noted that Complainant asserted she was harmed by the Agency's failure to provide reasonable accommodation for her back, hips, and leg conditions. The Agency noted that Complainant also asserted that she suffered from anxiety, depression, fearfulness, hopelessness, and had distanced herself from her family. The Agency observed that Complainant maintained that she suffered excruciating pain commuting to work and blamed the harm she suffered on the denial of accommodation for a period of 13 months.

The Agency found, however, that Complainant's emotional harm was not exclusively caused by her denial of accommodation. In so finding, the Agency noted that Complainant was subjected to stressors not related to her denial of accommodation, and her anxiety and fear were related to the difficulties with her workload that occurred prior to the denial of accommodation. The Agency additionally observed that Complainant's anxiety, depression, and fear of losing her job related to her poor job performance, rather than the denial of accommodation. The Agency also considered that Complainant was unsuccessful on her claims of disparate treatment and harassment, and therefore found that Complainant was not entitled to damages for emotional harm on her unsuccessful claims.

The Agency nevertheless observed that Complainant's commute to and from work caused her to experience pain and suffering. The Agency found that Complainant credibly claimed that her commute caused her stabbing pains in her back and legs while driving. The Agency also observed that Complainant would not fix dinner and would go straight to bed after her commute home from work, and she felt her situation could have been avoided if she had just been provided with the accommodation she requested. The Agency further considered that Complainant provided medical documentation establishing her emotional and physical condition at the beginning of the discriminatory period. The Agency also found that Complainant provided corroboration from her husband and two children concerning the harm that she suffered due to the denial of accommodation.

In awarding Complainant \$2,202.20 in pecuniary damages, the Agency found that Complainant incurred \$35 for her visit to her psychiatrist and \$135 in ER costs. The Agency additionally found that Complainant was entitled to mileage costs in the amount of \$32.20 for her trip to her psychiatrist and the ER. The Agency also found that Complainant was entitled to mileage for the 44 days that she was required to commute to work in the amount of \$2,000.

³ The Agency also awarded Complainant attorney's fees in the amount of \$58,271.20, and costs in the amount of \$170.60. Complainant does not contest the Agency's award of attorney's fees and costs herein.

The Agency further noted that Complainant requested reimbursement for annual leave, sick leave, and LWOP for the times when she found it too painful to commute to work. The Agency observed that Complainant requested to be reimbursed for 140.5 hours of leave encompassing 21.5 hours of sick leave, 70 hours of annual leave, and 49 hours of LWOP. The Agency noted, however, that Complainant provided no documentation showing her entitlement to the 140.5 hours of leave. The Agency therefore found that, based on the consideration that Complainant provided no supporting documentation, Complainant was only entitled to 94.5 hours of leave encompassing leave 14.5 hours of sick leave, 47 hours of annual leave and 33 hours of LWOP.

CONTENTIONS ON APPEAL

On appeal, Complainant, through her counsel, believes that the Agency's award of \$30,000 in non-pecuniary compensatory damages is grossly inadequate. Complainant maintains that the Agency subjected her to discrimination when a management official no longer collected her completed cases from the printer, and repeatedly denied her requests to telework. Complainant states the Agency's discrimination caused her to experience intense anxiety, deep depression, constant fear, and hopelessness, among other symptoms. She also asserts that the denial of telework caused her to experience severe physical pain in her back and legs as a result of having to drive herself to the office. Complainant further maintains that she experienced nightmares, trouble sleeping, and headaches because she fell behind in her work due to the lack of accommodation. She states that she became so severely socially withdrawn that it affected her relationships with her husband and children. Complainant asserts that due to the lack of accommodation she had to sit in her car for her commute, which caused her to experience stabbing pain throughout her lower back and down her legs. Complainant contends that her husband's statement corroborates her account of the emotional and physical pain she suffered as a result of the discrimination. Complainant moreover asserts that her son and daughter have also corroborated the emotional harm she experienced due to the Agency's denial of accommodation.

According to Complainant, she also had to visit the ER on December 31, 2015, because she overdosed on medication that she had been prescribed for her diagnosed "situational anxiety." Complainant further maintains that the harm has continued and is ongoing, as she still experiences intense feelings of sadness, anger, and frustration due to the denial of accommodation. Complainant therefore requests to be compensated for non-pecuniary damages from March 2, 2015, when her manager stated that her accommodation would no longer be provided, through the present. As such, Complainant believes that the Agency erred in suggesting that her period for relief ended on August 5, 2016. Complainant further asserts that the Agency erred again in failing to consider the fact that she was told she could no longer telework because she was given a reprimand. Complainant believes that an award of \$200,000 in non-pecuniary compensatory damages is more comparable to Commission precedent and that of the federal courts.

Complainant additionally requests the full restoration of her leave, which she was forced to take as a result of the denial of accommodation. Complainant specifically argues that the Agency erred in finding that she did not submit documentation to support her request for leave.

Complainant maintains that the Agency should have instead provided her official leave records for the period at issue, but it did not do so. Complainant therefore asserts that the Agency improperly reduced the number of hours she requested by 46 hours. She lastly asserts that the Agency erred in reducing her request for past pecuniary damages by \$530 due to the lack of documentation. Complainant believes that her own statement provided evidentiary support for the full mileage reimbursement amount.

ANALYSIS AND FINDINGS

Non-pecuniary Compensatory Damages

Non-pecuniary compensatory damages are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Guidance on Damages), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for non-pecuniary damages includes statements from complainant and others, including family members, co-workers, and medical professionals. See *id.*; see also Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993).

Non-pecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency's discriminatory actions. See Carter v. Duncan-Higgans, Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance on Damages at 13. Additionally, the amount of the award 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 Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

In the instant case, Complainant and her family members averred that Complainant experienced social withdrawal, disengagement from family, depression, anxiety, nightmares, sleeping problems, a fear of being fired, and the aggravation of her physical condition, among other symptoms, as result of the Agency's denial of accommodation. We note that Complainant's request to telework was denied for over a year, and she asserts that the emotional harm she experienced has continued.

The Agency awarded \$30,000 in non-pecuniary damages for Complainant's harm. We find, however, that an award of \$50,000 is more consistent with the amounts awarded in similar cases. See Danita P. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120172149 (July 18, 2018) (Commission awarded \$50,000 in non-pecuniary damages where the agency's failure to provide telework for over a year caused complainant to experience problems sleeping, headaches, disengagement from family, and higher blood pressure; Augustine S. v. Dep't of Agriculture, EEOC Appeal No. 0120152598 (Dec. 8, 2017) (Commission awarded \$50,000 in non-pecuniary damages where the agency's denial of accommodation resulted in complainant not wanting to

socialize with family and worrying that he could be fired); Kevin B. v. Dep't of Health and Human Services, EEOC Appeal No. 0720170014 (Apr. 24, 2017) (Commission awarded \$60,000 in non-pecuniary compensatory damages when the agency's denial of accommodation resulted in a worsening in complainant's medical condition and sleeping problems as well as anxiety, pain and suffering); Complainant v. Dep't of Justice, EEOC Appeal No. 0120123467 (April 3, 2015) (\$50,000 in non-pecuniary damages for disability discrimination and retaliation, including the failure to provide reasonable accommodation, where Complainant testified that she suffered stress, shock and humiliation, which manifested itself in absences from work, headaches, rashes, weight fluctuations, depression, anxiety, insomnia, and nightmares); and Sartini v. Dep't of Veterans Affairs, EEOC Appeal No. 0120112305 (Sep. 19, 2012) (awarding complainant \$50,000 in non-pecuniary damages when the agency denied him a reasonable accommodation, which resulted in depression, weight gain, anxiety, paranoia, and marital trouble that continued to the present day).

As such, after considering the awards in similar cases and all of the relevant factors discussed above, we find that Complainant is entitled to non-pecuniary compensatory damages in the amount of \$50,000. We find this amount meets the goal of not being "monstrously excessive" and being consistent with the amounts awarded in similar cases, as described above.

Past Pecuniary Compensatory Damages

Damages for past pecuniary damages will not normally be awarded without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals, or other proof of actual losses or expenses. EEOC Guidance on Damages.

Here, Complainant sought a total of \$2,732.20 in past pecuniary compensatory damages, encompassing: 1) \$55.70 in expenses associated with visiting her psychiatrist; 2) \$146.50 in expenses associated with her ER visit on December 31, 2015; and 3) \$2,530 in mileage reimbursement for at least 44 days when her telework was not approved. The Agency, however, lowered the total amount to \$2,202.20 based on the consideration that Complainant provided no supporting documentation. The Agency specifically awarded Complainant \$135 for the ER costs she incurred and \$35 in expenses for visiting her psychiatrist. The Agency further reimbursed Complainant \$32.20 in mileage associated with her trips to her psychiatrist and the ER. The Agency also found that Complainant was entitled to mileage for the 44 days that she was required to commute to work in the amount of \$2,000.

Here, Complainant believes the Agency erred in not reimbursing her the full amount of her request. Notwithstanding, we note that Complainant, on appeal, does not dispute that she provided limited documentation and particularly provided no documentation with regard to her request for mileage reimbursement for the 44 days she was required to commute to work. We therefore will not disturb the Agency's award of \$2,202.20 in pecuniary damages.

Restoration of Leave

In the instant case, Complainant requested reimbursement for leave she was forced to take as a result of the discrimination. She specifically requested to be reimbursed for a total of 140.5 hours of leave encompassing 21.5 hours of sick leave, 70 hours of annual leave, and 49 hours of LWOP. The Agency reduced the amount of leave it awarded Complainant finding that Complainant provided no supporting documentation. The Agency therefore found that Complainant was only entitled to 94.5 hours of the leave she requested.

Upon review, we note that Complainant does not dispute that she did not provide documentation supporting her request for the restoration of her leave. But Complainant asserts that the Agency should have instead provided her official leave records for the period at issue and it did not do so. While we find that Complainant has met her burden in establishing that she used leave as a result of the discrimination, we do not find evidence in the record sufficient to identify a specific amount of leave she took as a direct result of being denied accommodation. Contrary to Complainant's assertions, she, rather than the Agency, has the burden of proof in this regard. See Henley v. Dep't of Justice, EEOC Appeal No. 01A22186 (Nov. 7, 2002) (complainant not entitled to additional restoration of leave where evidence did not identify specific amount of leave complainant took as direct result of discrimination), request for recon. den'd, EEOC Request No. 05A30364 (Mar. 10, 2003). Accordingly, we decline to disturb the Agency's awarded restoration of leave in the amount of 94.5 hours.

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 decision.

ORDER

The Agency is ordered, to the extent it has not already done so, to take the following remedial actions **within sixty (60) calendar days** of the date this decision is issued:

- 1) Pay Complainant \$50,000 in non-pecuniary compensatory damages;
- 2) Pay Complainant \$2,202.20 in pecuniary compensatory damages;
- 3) Reimburse Complainant for 94.5 days of leave, encompassing 14.5 hours sick leave, 47 hours annual leave, and 33 hours of LWOP; and
- 4) Pay Complainant attorney's fees in the amount of \$58,271.20, and costs in the amount of \$170.60.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

ATTORNEY'S FEES (H1016)

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 the date this decision was issued. 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 (K0618)

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.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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

June 11, 2019

Date