



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

[REDACTED]
Gia M.,¹
Complainant,

v.

James N. Mattis,
Secretary,
Department of Defense
(Department of Defense Education Activity),
Agency.

Appeal No. 0120172952

Agency No. DD-FY16-068

DECISION

On August 23, 2017, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 14, 2017, final decision 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Food Service Specialist at the Agency's Murray Elementary School facility in Fort Stewart, Georgia.

In the Agency's earlier decision, dated April 12, 2017, the Agency found that the Agency discriminated against Complainant on the basis of her physical and mental disabilities when the Agency failed to address her request for reasonable accommodation in an appropriate and timely manner.²

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 The Agency concluded that Complainant was physically unable to drive a van, that is was reasonable and necessary for her to use her private vehicle and that she should have received the full Joint Travel Regulation (JTR) mileage for use of her POV. The Agency found that rather

Among other remedies, the Agency awarded Complainant \$500 in non-pecuniary compensatory damages for the harm she suffered as a result of the failure to accommodate her. The Agency reasoned that the factual record did not support the claim that Complainant suffered new or aggravated physical harm from driving a government van during the relevant dates from August 3, 2015, when she first requested a reasonable accommodation until her resignation from her position on July 26, 2016. The Agency concluded the evidence in the record regarding the proximate cause of the “harm” Complainant experienced pointed only to symptoms attendant to Complainant’s frustration regarding the refusal of the Agency to reimburse her for the use of her private vehicle at a higher rate to which she believed she was entitled, the delay in the Agency’s response, and being told that she would not have exclusive use of the government car. The Agency concluded that Complainant’s evidence of a prior history of chronic pre-existing physical and mental ailments goes back to her experiences in the military 16 years earlier.

This appeal followed.

ANALYSIS AND FINDINGS

When discrimination is found, the agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore her as nearly as possible to the position she would have occupied absent the discrimination. See e.g. Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975). A person who established discrimination under the Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. 791 et seq. may receive 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) as part of this “make-whole” relief.

To receive an award of compensatory damages, a complainant must demonstrate that he or she has been harmed as a result of the agency’s discriminatory action; the extent, nature, and severity of the harm; and the duration of, or expected duration of, the harm. Ashlea P. v. United States Postal Service, EEOC Appeal No. 0120141369 (April 19, 2016).

Non-pecuniary losses 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, and loss of health. See EEOC Notice No. 915.002 at 10 (July 14, 1992).³

than accommodating Complainant, the Agency manager attempted to force Complainant to drive a van, knowing that this caused Complainant pain. Once the District obtained a GOV car, Complainant was still not granted full access to it. The Agency found that the eight-month delay in taking action was unreasonable, amounted to a denial of reasonable accommodation and was a clear violation of the disability law.

³ With regard to pecuniary damages, the Agency determined that Complainant was entitled to full reimbursement for her mileage at the higher rate of \$.50 per mile) for using her POV for

Complainant submitted statements and medical evidence to the Agency, in support of her claim of entitlement to non-pecuniary damages of \$150,000.00 for her pain and suffering, including the aggravation of her well-documented medical conditions. Complainant attested that she experienced pain and suffering when she was forced to drive a government van after the Agency was aware of her back and neck medication conditions. She stated she had to take pain medication and had several hospital visits. She averred that she became withdrawn, no longer socialized with friends, and had workplace anxieties and marital strain.

The record also contains a letter dated May 12, 2017, from Complainant's husband, who stated that Complainant pushed herself at work, even when she was in pain. He stated that in August 2015, he told Complainant to request accommodations to make things easier for Complainant's condition. He also stated Complainant started to isolate herself by December 2015 and this affected their family life. Similarly, Complainant's colleague stated in a signed written statement dated May 5, 2017, that Complainant "changed drastically" in her last year and half of work and was "angry, irritable and withdrawn." The colleague stated Complainant was "in a very dark place" and was no longer joining her for their monthly lunch dates. Complainant's therapist diagnosed Complainant as having sleep disturbance, problems with concentration, excessive irritable behavior, feelings of detachment, and diminished interest in participating in activities.

In addition, the Agency acknowledged that, in support of her claim for compensatory damages, Complainant provided copies of medical documents from several providers. According to one report (Progress Notes from the VA regarding her treatment on July 28, 2015), Complainant was on various psychiatric medications for irritability, anger, sleep disorder, pain, depression and anxiety and that she reported having three panic attacks in the last month. By January 21, 2016, the VA noted that Complainant was taking 16 outpatient VA medications, had five pending medications and was taking four non-VA medications for a total of 25 medications. In a series of treatment notes for appointments Complainant attended between June 13, 2016 (shortly before leaving the Agency) and May 2017, one doctor described Complainant's condition as loss of cervical lordosis [an inward curvature] and advanced degenerative disc disease. He also treated her for her neck and back pain. Complainant told the doctor her pain started several years in the past.

In the Agency's April 12, 2017 decision, it found that Complainant was subjected to discrimination for a period of eight months. The Agency, in its decision on relief, dated April 14, 2017, attempts to minimize the length of time Complainant was harmed, noting that there was no evidence that she ever drove a government van. We are not persuaded by the Agency's attempt to recant its finding of discrimination or limit the duration of the time of injury.

business reasons as opposed to the lower rate (\$0.19 per mile) when a government vehicle was available. The time period relevant to the finding is from August 3, 2015 to July 26, 2016. On appeal, Complainant has requested that this award be enforced.

Based upon our review of the record, and Commission precedent, we find that Complainant is entitled to \$10,000 in non-pecuniary damages. An award of \$10,000 takes into account the nature, severity, and duration of Complainant's suffering, as well as her pre-existing medical conditions, some of which were exacerbated by the failure to accommodate. This amount is also consistent with other non-pecuniary compensatory damages awards given in similar cases and is not "monstrously excessive" standing alone, nor derived from passion or prejudice. See Complainant v. Department of Homeland Security, EEOC Appeal No. 07A30094 (February 19, 2004) (\$10,000 awarded where Complainant experienced an exacerbation of physical ailments as well as low self-esteem, depression, anxiety and marital strain) and Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120070384 (June 19, 2009) (\$10,000 awarded where Complainant experienced stress, humiliation, anxiety, sleeplessness and depression).

We note that, on appeal, Complainant attempts to recover additional damages unrelated to the Agency's finding of a denial of reasonable accommodation. She now raises for the first time on appeal a claim of constructive discharge.⁴ However, the record shows that Complainant resigned her position and did not raise this constructive discharge claim in a timely manner. While we are aware that, in its decision, the Agency stated that Complainant's resignation was reasonable, this does not necessarily equate to a finding that she was constructively discharged. We decline to award her back pay or damages for loss of future earnings.

CONCLUSION

For the reasons stated above, we conclude that Complainant is not entitled to other past or future pecuniary damages, but is entitled to an award of \$10,000 in non-pecuniary damages. We therefore MODIFY the Agency's final decision regarding the amount of compensatory damages and ORDER the Agency to take corrective action in accordance with this decision, which also incorporates by reference the relief ordered in the Agency's April 12, 2017 merits decision on liability, and the Order below.

⁴ She seeks \$2,4440.00 and \$23,308.92 for 18 pay periods ending April 12, 2017. In addition, she requests recovery of future loss of earnings in the amount of \$64,697.00.

ORDER

The Agency is ordered to take the following remedial action within sixty (60) days of the date of this decision:

1. The Agency should authorize and pay the appropriate mileage reimbursement for Complainant's use of her POV for duty-related travel from August 3, 2015, until the date of her resignation. Complainant's POV mileage reimbursement at the full JTR rate is estimated to be \$.50 per mile. (rather than the reduced rate of .19 per mile). Consistent with the liability decision, full reimbursement sought as reasonable accommodation by Complainant would have amounted to less than \$1,000 extra for the entire covered period.
2. The Agency shall tender to Complainant the sum of \$10,000.00 in non-pecuniary damages.

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). Further, 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.

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 tends 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).

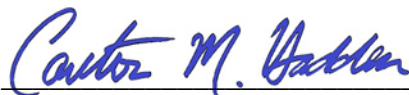
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

February 8, 2019

Date