



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Iliana S.,¹
Complainant,

v.

Matthew G. Whitaker,
Acting Attorney General,
Department of Justice,
Agency.

Appeal No. 0120181195

Agency No. OBD-2015-02261

DECISION

On February 5, 2018, 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 January 5, 2018, final decision concerning her entitlement to damages following a finding of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Senior Policy Analyst, GS-14, at the Agency's Community Relations Service (CRS) in Washington, D.C.

On November 16, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Asian), sex (female), disability (cancer), and in reprisal for prior protected EEO activity. Following an investigation, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant was not subjected to discrimination based on her race, sex, or in reprisal for prior EEO activity. The decision did find, however, that the Agency failed to provide Complainant with a reasonable accommodation when it denied her request for full-time telework.

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.

The Agency found that when Complainant was diagnosed with cancer in September 2010, its then-General Counsel for CRS (GC 1), provided Complainant with full-time telework to allow her to receive treatment and subsequently recover from treatment. A subsequent General Counsel (GC 2) continued Complainant's telework request in March 2015, but when a new General Counsel (GC 3) assumed control of CRS in about April 2015, GC 3 immediately requested additional medical documentation to support Complainant's request for telework. GC 3 required Complainant to submit four letters from her doctor between April and November 2015. Nevertheless, GC 3 revoked Complainant's full-time telework and instructed her to return to work. The record indicates that Complainant departed from the Agency in February 2017.

To remedy the discrimination, the Agency awarded Complainant, among other things, restoration of leave taken as a result of the Agency's failure to accommodate her and proven compensatory damages. On August 23, 2017 and September 12, 2017, Complainant provided documentation to the Agency in support of her request for damages. Complainant requested \$140,600 in compensatory damages and the restoration of 233.5 hours of sick leave to be paid out to her in cash with interest. In support of her claim for compensatory damages, Complainant provided a statement via affidavit, affidavits from her husband and several coworkers, and a letter from her physician.

Complainant's physician stated that he was "perplexed at the extent of explanation that [he] had to provide in each of the letters about [Complainant's] health." Complainant's physician said that Complainant exhibited crying spells during her visits and was emotionally distraught. She had to be prescribed anti-depressant and anti-anxiety medication to help her return to the office. According to Complainant's physician, "it was not conducive to her health when she was required to report to the office."

In her own affidavit, Complainant affirmed that, after GC 3 started requiring increased documentation and revoked her teleworking arrangement, she often wept uncontrollably; felt isolated from her co-workers; struggled with low energy and concentration; and feared that her cancer would return. In addition, Complainant feared that GC 3 would make up some policy to find her unfit for her job. Complainant stated that she developed suicidal thoughts and openly sobbed in front of her supervisors. Even when Complainant took sick leave, GC 3 would still call her after she left the office. When Complainant arrived home after work, she often crawled into bed or laid on the living room couch. Complainant effectively ceded all childrearing duties to her husband and noticed that her children became extremely cautious around her; Complainant understood they wanted her affection, but Complainant admitted to transferring her frustration regarding work onto her children. Complainant's relationship with her husband also suffered.

Complainant's husband corroborated the impact the Agency's failure to accommodate Complainant had on their household. He observed that Complainant had a "shortened temper with angry and bitter emotional outbursts, along with exacerbated migraines and increased fatigue." Further, "each day, when [Complainant] returned home from working in the office, she either disappeared to the bedroom upstairs or had to lie down on the couch and slept for up to two hours. She was unable to perform any of her normal household duties during this time."

Complainant's husband assumed all of the household duties in addition to running his own business. Moreover, because Complainant was unable to function, her husband said that he "had to be the single father" to their children. Complainant's husband said that all of Complainant's symptoms were directly connected to the days that Complainant had to work in the office and increased whenever Complainant had any conflicts with GC 3.

GC 2 provided an affidavit in support of Complainant. GC 2 said that Complainant always provided high quality work and was quick to respond to inquiries at all hours while under his supervision. However, when GC 3 assumed supervisory control and revoked Complainant's teleworking arrangement, GC 2 observed "both a deteriorating emotional and physical change in" Complainant. GC 2 observed that Complainant would at times come to his office and express her frustration and anger. It was clear to GC 2 that Complainant "was suffering from increased depression and severe anxiety working under" GC 3.

A coworker (CW1) averred that she observed Complainant in discomfort and frequently bowing her head and supporting her forehead with her hands. CW1 offered to allow Complainant to use her office because it had daylight and Complainant's office did not, but GC 3 refused CW1's offer. CW1 corroborated that GC 3 would contact Complainant multiple times, even though Complainant had taken sick leave and that GC 3's requests often were not urgent and could have waited until Complainant returned to work. CW1 deemed GC 3's treatment of Complainant as inhumane and compromised her dignity.

Another coworker (CW2) said that her office became a safe space for Complainant. CW2 "would give her a hug or a tissue to wipe her tears and a few times she just sobbed in my arms." CW2 averred, "without reservation that [Complainant] was emotionally distressed and traumatized by having to work in the hostile work environment that was created and perpetuated by her boss, [GC 3]."

The Regional Director for CRS averred that when GC 3 revoked Complainant's teleworking arrangement, Complainant transformed "from being generally positive and happy to sounding and appearing very defeated and worrisome." The regional director tried to call Complainant on nights and weekends to check in with her, she "would cry (which she never did before), talk about anxiety, and actually throw up at the thought of having to return to the office every day." The Regional Director said that the treatment lasted from 2015 to 2017, at which point Complainant resigned.

In its January 5, 2018 final decision concerning compensatory damages and sick leave, the Agency concluded that Complainant provided sufficient evidence to warrant \$12,000 in compensatory damages. The Agency also concluded that Complainant was entitled to restoration of 205 hours of sick leave because that was the amount of sick leave that Complainant used after her telework arrangement was revoked on October 5, 2015, until she left the Agency on February 2, 2017. The Agency further said that Complainant provided no justification or rationale for her request to have sick leave paid out in cash with interest.

CONTENTIONS ON APPEAL

Complainant first contends that the Agency's decision to restore 205 hours of sick leave contravenes the Agency's order as set forth in the initial final decision. In the initial final decision, the Agency ordered that "CRS shall determine the number of hours of leave that Complainant took as a result of CRS's failure to provide a reasonable accommodation for her disability, and CRS shall restore those hours of leave to Complainant or award her the equivalent amount of back pay, with interest, in accordance with Complainant's request." Complainant places great emphasis on the latter part of that clause and argues that it is her decision whether to accept restoration of sick leave or award her that amount in cash, with interest. Accordingly, Complainant requests that the Agency's award of 205 hours of sick leave be provided to her in cash, with interest.

Next, Complainant argues that the Agency's compensatory damages award is inappropriate and that she provided more than sufficient justification for a substantial compensatory damages award. Complainant cites Commission precedent that allowed compensatory damages of \$145,000 and \$150,000.

In response, the Agency argues that the law does not permit it to pay out sick leave as a cash award. To the extent its order allowed such a cash award, the Agency asserts that its final decision on damages corrected this error. The Agency maintains that Complainant is only entitled to 205 hours of restored sick leave. The Agency contends that its decision to award \$12,000 in compensatory damages is reasonable and should be affirmed.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

Sick Leave Award

The question of Complainant's sick leave award is made considerably more complicated by the fact that Complainant no longer works for the Agency. There is little evidence on this point. We cannot discern whether Complainant has retired, is working for another federal agency, or has any other ongoing dispute with the Agency over the terms of her separation. Each scenario carries potential ramifications with respect to Complainant's sick leave award so there is a question as to whether restoration of sick leave would provide her with a meaningful remedy.

Although Complainant requests payment for accrued sick leave, it is not clear if she is entitled to such payment. See Cecile S. v. U.S. Postal Serv., EEOC Petition No. 0420120013 (Nov. 4, 2015) (“The Agency provided that, normally, employees are not paid for their sick leave balance prior to termination, but an exception was made for Petitioner.”); Brown v. Dep’t of the Navy, EEOC Petition No. 0420120012 (June 5, 2013) (“While the Petitioner is not entitled to payment for unused sick leave, he is entitled to having his sick leave restored for the purposes of annuity calculations.”). On remand, the Agency should determine whether Complainant would have received payment for accrued sick leave, restoration to her sick leave balance as a federal employee, or sick leave/service credit for annuity purposes. To the extent that Complainant would have received payment for the accrued sick leave, the Agency should pay Complainant for the sick leave that she would have accrued absent the discrimination. To the extent that Complainant would have received sick leave/service credit for annuity or other purposes, the Agency should file a request on Complainant’s behalf with the Office of Personnel Management to adjust Complainant’s sick leave balance accordingly.

Non-Pecuniary Compensatory Damages

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., or 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. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

To receive an award of compensatory damages, Complainant must demonstrate that she has been harmed as a result of the Agency's discriminatory action; the extent, nature and severity of the harm; and the duration or expected duration of the harm. Complainant v. Dep’t of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for recon. den’d, EEOC Request No. 05940927 (Dec. 8, 1995); EEOC's Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 at 11-12, 14 (July 14, 1992) (“Guidance”). Complainant is required to provide objective evidence that will allow an Agency to assess the merits of her request for damages. See Complainant v. Dep’t of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Furthermore, the award should take into account the severity and duration of the harm. Carpenter v. Dept. of Agric., EEOC Appeal No. 01945652 (July 17, 1995).

Section 102(a) of the 1991 Civil Rights Act authorizes an award of compensatory damages for non-pecuniary losses, such as, but not limited to, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health.

We note that damage awards for emotional harm are difficult to determine and that there are no definitive rules governing the amount to be awarded in given cases. A proper award must meet two goals: that it not be “monstrously excessive” standing alone, and that it be consistent with awards made in similar cases. See Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989).

Non-pecuniary losses 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 EEOC Notice No. 915.302 at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep’t of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997).

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 Complainant concerning 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, and 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.

In this case, we find that the Agency’s award of \$12,000 in compensatory damages does not adequately compensate Complainant for the harm she suffered. Complainant provided clear and corroborated evidence of emotional and physical harm that began following GC 3’s removal of her reasonable accommodation and continued for at least 16 months until Complainant resigned from the Agency. Complainant’s physician remarked that he thought the decision and explanation given to revoke Complainant’s teleworking was senseless. Complainant’s husband vividly described the initial and continuing impact that GC 3’s decision had on Complainant and on her family as a whole. The Regional Director said that Complainant physically threw up at the prospect of having to go into the office.

Based on the evidence in support of harm Complainant suffered over a 16-month stretch, we think Complainant is entitled to \$75,000 in compensatory damages. This amount is in line with similar cases. See Emmett W. v. Dep’t of Agric., EEOC Appeal No. 0120143098 (May 3, 2016) (awarding \$80,000 where complainant experienced exacerbated PTSD, depression, sleeplessness, anger, stress, weight loss, familiar strain, and humiliation); Mardell B. v. Soc. Sec. Admin., EEOC

Appeal No. 0120172035 (Oct. 31, 2017) (awarding \$70,000 where complainant suffered exacerbated medical conditions, became depressed, suffered emotionally, and experienced physical changes because of the discrimination). Based on the foregoing, we find that an award of \$75,000 in nonpecuniary, compensatory damages more adequately compensates Complainant for the harm she suffered as a result of the Agency's failure to reasonably accommodate her disability.

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 take the following remedial actions:

1. Within 60 calendar days of the date this decision is issued, the Agency is ordered to issue payment to Complainant in the amount of \$75,000 as non-pecuniary damages.
2. Within 45 calendar days of the date this decision issued, the Agency is ordered to investigate whether Complainant would have been eligible to receive payment for accrued sick leave or would have received sick leave/service credit for annuity or other purposes following her resignation from the Agency. If Complainant would have received payment for the accrued sick leave, the Agency is ordered to pay Complainant for the 205 hours of sick leave that she would have accrued absent the discrimination, with interest. If Complainant would have received sick leave/service credit for annuity or other purposes, the Agency is ordered to notify the Office of Personnel Management of the adjustments to Complainant's sick leave balance.

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 be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include evidence that the corrective action has been implemented.

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).

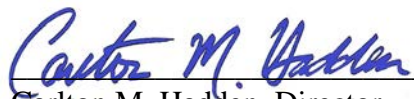
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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 12, 2019
Date