



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

[REDACTED]
Andy B.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2019000791

Agency No. 200406582017103202

DECISION

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 29, 2018, final decision addressing compensatory damages on an equal employment opportunity (EEO) complaint claiming employment 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.

BACKGROUND

During the period at issue, Complainant worked as a Supervisor, GS-12, at the Agency's VA Health Care System facility in Salem, Virginia.

On June 20, 2017, Complainant filed a formal EEO complaint claiming that the Agency discriminated against him on the bases of disability (post-traumatic stress disorder "PTSD" and major depression) and reprisal for prior protected EEO activity when, on May 22, 2017, Complainant was denied a reasonable accommodation.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment

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.

Opportunity Commission Administrative Judge (AJ). Complainant requested a final decision. The Agency's Office of Employment Discrimination Complainant Adjudication (OEDCA) issued a final decision, pursuant to 29 C.F.R. § 1614.110(b), finding that Complainant had demonstrated that the Agency subjected him to discrimination as alleged.

The OEDCA found that the Agency violated the Rehabilitation Act when it failed to provide Complainant with a reasonable accommodation.² The OEDCA further found that the Agency failed demonstrate that it made a good faith effort to accommodate Complainant.

The OEDCA ordered the Agency to conduct a supplemental investigation regarding Complainant's entitlement to compensatory damages as well as other remedies. Complainant v. Dep't. of Veterans Affairs, VA Case No. 2004-0658-2017103202 (Mar. 30, 2018).

On August 29, 2018, the Agency issued a decision relating to the supplemental investigation on compensatory damages awarding Complainant \$5,000 in nonpecuniary compensatory damages. In reaching this amount, the Agency reasoned that Complainant and his wife's testimony was compelling that he suffered some emotional harm and additional symptoms related to his PTSD and depression when the Agency failed to provide him a reasonable accommodation even though Complainant had been treated for these medical conditions since 2007, ten years before the Agency denied Complainant a reasonable accommodation.

The Agency denied Complainant's request for pecuniary damages of \$10,000 for past losses incurred from a basement repair project that began on October 25, 2016. The Agency determined that Complainant failed to demonstrate that the basement repair project was related to the Agency's discriminatory act. The Agency further found that Complainant failed to provide sufficient documentation to support costs incurred from the basement repairs.

The Agency also denied Complainant's request for an unspecified amount for pecuniary damages. The Agency reasoned that Complainant failed to provide documentation to support his belief that his medical conditions would not improve in the "foreseeable future."

The instant appeal followed. On appeal, Complainant, through his attorney, does not submit additional statements or briefs.

² Because the OEDCA determined that the Agency violated the Rehabilitation Act when it denied Complainant a reasonable accommodation, the OEDCA did not address Complainant's retaliation claim because Complainant was already entitled to full relief for the Agency's Rehabilitation Act violation.

ANALYSIS AND FINDINGS

Past Pecuniary Damages

Pecuniary damages are quantifiable out-of-pocket expenses incurred as a result of the Agency's discriminatory actions. Damages for past pecuniary damages will not normally be granted without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals of actual loss and expenses.

We acknowledge Complainant's testimony in his supplemental affidavit, dated March 30, 2018, that he had to take out a \$10,000 home equity line of credit to pay a contractor to remodel his basement in October 2016 because he was "too emotionally and physically exhausted to perform this type of work even though [he has] a construction background and [has] always performed these types of repairs around his home." We concur with the Agency that the record is devoid of evidence that the \$10,000 home equity line of credit to repair Complainant's basement was caused by the Agency's discriminatory act. Additionally, there is no documentation of the actual work conducted on Complainant's basement. The record only contains a written proposal, unsigned by Complainant, projecting that a total of \$6,200 would be required to cover materials and labor necessary to repair the basement. Complainant also has not provided additional documentation for the rest of the claimed amount. Complainant explains, in a notarized statement, that he could not find this documentation but believed that "the remaining work was paid in cash" to an unnamed third party. Thus, we find the Agency properly denied Complainant's request for past pecuniary damages to cover his basement repairs.

Non-Pecuniary 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), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for non-pecuniary damages claims 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 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)).

When a Complainant has a pre-existing condition, the Agency is liable only for the additional harm or aggravation caused by the discrimination. If Complainant's pre-existing 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; the burden of proof is on the Agency to establish the extent of these offsets. Wallis v. U.S. Postal Serv., EEOC Appeal No. 01950510 (Nov. 13, 1995) (citing Maurer v. United States, 668 F.2d 98 (2d Cir. 1981)); Finlay v. U.S. Postal Serv., EEOC Appeal No. 01942985 (Apr. 29, 1997). The Commission notes, therefore, that Complainant is entitled to recover damages only for injury, or additional injury, caused by the discrimination. See Terrell v. Dep't of Housing and Urban Dev., EEOC Appeal No. 01961030 (October 25, 1996); EEOC Notice No. N 915.002 at 12.

The Agency awarded \$5,000.00 in nonpecuniary damages. We find, however, that an award of \$15,000.00 is more consistent with the amounts awarded in similar cases. A July 27, 2017 psychology note indicates that Complainant “reported continued increased anxiety over the past month, indicating that work stressors continue to cause high levels of anxiety.” An August 25, 2017 psychology note states that Complainant experienced increased stress “due to [his] daughter and wife having medical appointments.” The psychology note further indicates that Complainant “continues to wait to hear back about his request for reasonable accommodation” and the psychologist provided Complainant with “anxiety reducing exercises” to help Complainant “get through the waiting process.” A September 15, 2017, psychology note indicates that the psychologist instructed Complainant on the “effects of stress on blood flow and digestion” after Complainant “report[ed] difficulties with constipation.”

In his supplemental affidavit, Complainant states that he used to participate in local mountain trail races, but has not been able to train again for these events since July 2016 because he is too “mentally and physically exhausted to do so.” Complainant further states that he “feels hopeless” and has seen a therapist “to help with coping strategies for increased anxiety and stress levels.” Complainant further states that he has experienced “frequent and severe flare ups of irritable bowel syndrome” and he has “extreme fatigue from lack of sleep due to anxiety and stress” from not having a reasonable accommodation since July 2016.

In her affidavit dated April 27, 2018, Complainant’s wife states that “1 ½ years ago,” she noticed “a considerable difference in [Complainant’s] behaviors and mood at home.” Complainant’s wife states that Complainant told her “1 year” ago that “he requested to be moved to a new position because of his health, but he could not get an answer and [Complainant indicated] that he felt trapped and doomed to fail at his current job.” As a result, Complainant’s wife states that he has “become very withdrawn from social interactions and he rarely talks any more to [her] or [their] kids.” Complainant’s wife further explains that Complainant “rarely sleeps at night,” he has not “had the desire to be intimate in well over a year,” and she has “never seen [Complainant] so emotionally broken” over their 15 years of marriage.

We concur with the Agency that this award should *only* encompass the harm Complainant sustained by the discriminatory act at issue to the extent that this discriminatory act exacerbated Complainant’s preexisting psychiatric diagnoses. In this case, it is evident from the record that

Complainant was diagnosed with PTSD and depression in 2007 and his pre-existing conditions worsened, during the period that the Agency delayed responding to his reasonable accommodation request. Although the psychology notes indicate that the Agency's discriminatory act and other factors contributed to Complainant's worsening condition, Complainant's wife's testimony supports that the Agency's discriminatory act initiated the progression of Complainant's worsening condition. We find an award of \$15,000 is neither monstrously excessive nor the product of passion or prejudice and is consistent with prior EEOC precedent. Dalton C. v. Dep't. of Health and Human Services, EEOC Appeal No. 0120170077 (Mar. 27, 2018) (Commission awarded \$15,000 and found that complainant had established that his preexisting conditions worsened as a result of the agency's failure to accommodate him even though complainant provided limited medical evidence regarding the exacerbation of his preexisting conditions); Starr R. v. General Services Administration, EEOC Appeal No. 0120143031 (Jan. 12, 2017) (EEOC affirmed the Agency's award of \$12,000.00 in nonpecuniary compensatory damages when Complainant experienced more seizures than normal and her health declined even though the evidence suggested that the increased seizures were primarily caused by the stress of processing the EEO complaint and the workplace environment and not the denial of a Complainant's request for reasonable accommodation).

Future Pecuniary Damages

Future pecuniary damages are losses likely to occur after the resolution of the complaint. MD-110 at 11-23 (citing EEOC Damages Guidance). We note that in Complainant has not submitted any documentation to support his belief that his medical condition will not improve in the foreseeable future. Thus, we concur with the Agency's denial of these future pecuniary damages.

CONCLUSION

The Agency's August 29, 2018 final decision concerning compensatory damages is hereby MODIFIED. The matter is REMANDED to the Agency for compliance with the following ORDER.

ORDER

To the extent, it has not already done so, the Agency is ORDERED to take the following actions as set forth in VA Case No. 2004-0658-2017103202 as modified herein:

1. Within sixty (60) calendar days from the date this decision is issued, the Agency shall pay Complainant \$15,000.00 in nonpecuniary damages.
2. The Agency shall pay reasonable attorney's fees for the processing of this complaint, including this appeal as set forth in the paragraph below entitled "Attorney's Fees."

The Agency is further directed to submit a report of compliance, as provided, in the statement entitled "Implementation of the Commission's Decision."

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.

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of 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.

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 (R0610)

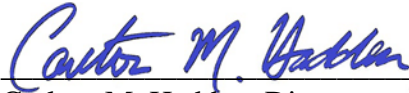
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **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

March 15, 2019

Date