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Yaakob G. Hakohane, Complainant, v. Donald H. Rumsfeld, Secretary, Department of
Defense, Agency

Hearing No. 100-95-7171X Appeal No. 01991245 Agency No. 94-03-008

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

2002 EEOPUB LEXIS 940

February 20, 2002

ISSUEDBY: [*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

OPINION:

DECISION

The instant appeal is from the agency's October 28, 1998 decision denying complainant's request for compensatory damages.

BACKGROUND

On April 5, 1994, complainant filed a formal complaint alleging that the agency discriminated against him on the basis of disability when he was removed from his Management Analyst, GS-353-7 position, effective February 4, 1994, during the probationary period of his employment. Complainant further alleged that the agency failed to reasonably accommodate his disability while he was employed, contending that the agency did not provide him with the support that he needed to help him organize and structure his work. The agency accepted the complaint, and after an investigation, complainant requested a hearing before an Administrative Judge (AJ). Following the hearing, the AJ issued a decision finding that the agency discriminated against complainant on the basis of disability by failing to provide him with the accommodations he needed to perform the essential functions of his position and by terminating him when his performance did not meet the agency's expectations. [*2] The agency issued a decision rejecting the AJ's decision and found no discrimination.

Complainant appealed the agency decision finding no discrimination to the Commission. On January 5, 1998, the Commission issued a decision reversing the agency's decision and found that complainant was discriminated against on the basis of disability. *Hakohane v. Department of Defense*, EEOC Appeal No. 01956411 (Jan 5, 1998), *req. for reconsideration denied*, EEOC Request No. 05980348 (July 30, 1998). In the January 5, 1998 decision, the Commission ordered the agency to provide complainant the following remedy (among other remedies):

(3) The agency shall conduct a supplemental investigation pertaining to appellant's entitlement to compensatory damages for the period commencing July 29, 1993. The agency shall afford appellant sixty (60) calendar days to submit evidence in support of his claim for compensatory damages. Within thirty (30) days of its receipt of appellant's evidence, the agency shall issue a final decision determining appellant's entitlement to compensatory damages, together with appropriate appeal rights.

Subsequently, the agency issued a decision dated October 28, 1998, finding [*3] that complainant was not entitled to compensatory damages. The agency found that because complainant did not submit evidence of compensatory damages,

the agency was unable to conduct a supplemental investigation. The instant appeal is from the agency's October 28, 1998 decision. On appeal, complainant requests an award of "compensatory damages in an amount calculated to fairly compensate him for emotional harm suffered as a result of the agency's unlawful discrimination," and \$ 6,370.00 in attorney's fees.

ANALYSIS AND FINDINGS

The agency, in its October 28, 1998 decision, found that complainant had not submitted any evidence that he was entitled to compensatory damages. The agency, on appeal, argues that, pursuant to the Commission's Order in EEOC Appeal No. 01956411, it was complainant's responsibility to gather and submit evidence of the amount of compensatory damages without any action by the agency. However, the agency admits, on appeal, that it received "some affidavits made in 1995 that were attached to [complainant's] first appeal." The agency argues that, although it was aware of the affidavits, the affidavits were never part of the record. We find that the affidavits [*4] attached to complainant's brief in EEOC Appeal No. 01956411 are part of the record and should have been addressed by the agency.

Furthermore, complainant has shown a good faith effort to supply the agency with information, despite the agency's inaction. By letter dated September 17, 1998, complainant's attorney contacted the agency regarding compensatory damages. Specifically, the September 17, 1998 letter notes that complainant's attorney contacted the agency by letter dated September 3, 1998, regarding the matter but did not get a response. Complainant argues that, subsequently, complainant's attorney placed a telephone call to the agency regarding the matter and the agency did not return the telephone call. Complainant's attorney then wrote the September 17, 1998 letter recounting the events, and again, asked the agency to "kindly contact [him] as soon as possible to advise" him on the steps the agency is taking and any necessary steps complainant must take. The agency responded by letter dated September 23, 1998, assuring complainant that "the agency is reviewing [complainant's] entitlement to compensatory damages" and will comply with all aspects of the order. Complainant's [*5] attorney wrote another letter dated September 24, 1998, stating that he had left three telephone messages for the agency that had not been returned. Complainant's attorney, in the September 24, 1998 letter, demands the agency conduct an investigation regarding compensatory damages and requested, again, that the agency call him "right away." Complainant's attorney contacted the agency again by letter dated October 1, 1998. The agency responded by letter dated October 22, 1998 stating that "the agency is continuing to review [complainant's] entitlement to compensatory damages." On October 28, 1998, the agency representative wrote a letter to complainant's attorney stating: "My job as the agency representative is not to provide you with legal advice on compliance with the EEOC's Order in this case - it might be malpractice to do so." On the same day, the agency issued the instant decision to deny compensatory damages.

Complainant, in good faith, attempted to provide the agency with information regarding compensatory damages. The agency admits to having at least "some affidavits made in 1995" regarding compensatory damages. The burden, pursuant to the Commission's Order in EEOC Appeal [*6] No. 01956411, is on the agency to conduct the supplemental investigation. The agency had enough evidence and willingness on the part of complainant to conduct a supplemental investigation, yet failed to conduct the investigation, or even advise complainant on the necessary course of action to take. Moreover, the agency has not attempted to rebut complainant's evidence submitted in 1995, or the evidence submitted with the instant appeal. Therefore, we find that complainant's entire submission of evidence of compensatory damages is properly before the Commission for review and we shall determine whether complainant is due any compensatory damages.

Where a discriminatory practice involves the provision of a reasonable accommodation, compensatory damages may not be awarded where the employer demonstrates good faith efforts to identify and reasonably accommodate complainant. *Pitchford v. United States Postal Serv.*, EEOC Appeal No. 01973982 (Dec. 12, 2000) (citing 42 U.S.C. § 1981a(a)(3)).

The agency has not claimed or shown a good faith effort to make the reasonable accommodations in this matter. Further, the Commission found, in its January [*7] 5, 1998 decision, that the agency was notified by the Virginia Department of Rehabilitative Services (VDRS) as to what accommodations were necessary. *Hakohane*, EEOC Appeal No. 01956411. Specifically, VDRS advised the agency that necessary accommodations included clear instruction, written and oral feedback, involvement in the continued development of the internship program, and a mentor. *Id.* VDRS also suggested job coaching. *Id.* The agency provided oral feedback, but failed to implement any other suggested accommodation. *Id.*

The record contains substantial evidence of the serious emotional effects of both the agency's failure to reasonably accommodate complainant over an extended period of time and its termination of him during the probationary period. Complainant submitted objective evidence through his own affidavit and affidavits from professionals in the medical field which attest to the physical, emotional, and behavioral manifestations of his emotional distress caused by the agency's failure to accommodate and the discriminatory termination. According to these affidavits and complainant's brief on appeal, complainant suffered from anxiety, distress, panic attacks, [*8] feelings of loss of control, upset, anger, disappointment, interference with concentration, confusion, despair, fear, shame, embarrassment, degradation, sadness, humiliation, dread, and a "loss of momentum in life." The statements show that complainant suffered extreme feelings of depression, paranoia, panic and self-doubt as a result of being fired from employment that he spent years to obtain. The evidence shows that he was shocked by being handcuffed and escorted out to the agency's facility by an armed guard, after being paraded around the grounds for approximately fifteen minutes. After his termination, he had an episode which resulted in hospitalization for a form of mania. Complainant states that the termination caused the "break up" with his longtime girlfriend with whom he dated for 10 years, and separation from his longtime roommate. Complainant also states that he suffers from financial fears, suffers from a loss of sleep and had trouble getting out of bed after the termination. Complainant feels a loss of self sufficiency which increased his humiliation and sense of worthlessness when forced to apply for government benefits to support himself.

Our review of complainant's [*9] evidence in support of compensatory damages indicates that it is detailed, credible, and corroborated. We find that the evidence is sufficient to show that the agency's failure to reasonably accommodate complainant and discriminatorily terminate complainant caused the emotional distress detailed by complainant. The agency has submitted no evidence to rebut complainant's evidence showing causation and harm.

Section 102(a) of the 1991 Civil Rights Act authorizes an award of compensatory damages for all post-act pecuniary losses, and 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. To receive an award of compensatory damages, a complainant must demonstrate that he 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. *Rivera v. Department of the Navy*, EEOC Appeal No. 01934157 (July 22, 1994); *req. for reconsid. denied*, EEOC Request No. 05940927 (December 8, 1995); *EEOC's Enforcement Guidance: Compensatory and Punitive Damages* [*10] *Available Under Section 102 of the Civil Rights Act of 1991*, EEOC Notice No. 915.002 at 11-12, 14 (July 14, 1992) ("Guidance"). A complainant is required to provide objective evidence that will allow an agency to assess the merits of his request for damages. *See Carle v. Department of the Navy*, EEOC Appeal No. 01922369 (January 5, 1993).

The award should take into account the severity and duration of the harm. *Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652 (July 17, 1995). Non-pecuniary and future pecuniary damages are limited to an amount of \$ 300,000.00. The Commission notes that for a proper award of non-pecuniary damages, 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 Ward-Jenkins v. Department of the Interior*, EEOC Appeal No. 01961483 (March 4, 1999) (citation omitted).

In determining compensatory damages, the Commission strives to make damage awards for emotional harm consistent with awards in similar cases. Insofar as complainant submitted evidence of emotional distress, we note that the Commission [*11] has awarded compensatory damages in cases somewhat similar to complainant's case in terms of the harm sustained. *See e.g., Carpenter*, EEOC Appeal No. 01945652 (July 17, 1995) (failure to reasonably accommodate - awarding \$ 75,000 in non-pecuniary damages for deterioration in complainant's medical and emotional condition resulting in his disability retirement; specific harm included: aggravation of asthma, panic attacks, insomnia, digestive problems, loss of spirit, social withdrawal, feelings of hostility and irritability, and loss of libido); *Bernard v. Department of Veterans Affairs*, EEOC Appeal No. 01966861 (July 17, 1998) (failure to reasonably accommodate and failure to select complainant for a lateral reassignment - awarding \$ 80,000 in non-pecuniary damages for trouble sleeping and onset of grinding and clenching of teeth at night; complainant also suffered irritability, anger, humiliation, fear, moodiness, embarrassment, was short-tempered and hopeless which resulted in a break up with an 11 year relationship with his girlfriend).

The Commission finds this case analogous to the above referenced cases with respect to the nature, severity, and duration of the harm. [*12] After considering the nature of the agency's discriminatory failure to reasonably accommodate complainant and the agency's discriminatory termination of complainant, in conjunction with the un rebutted evidence of non-pecuniary damages submitted by complainant, the Commission finds that complainant is entitled to non-pecuniary compensatory damages in the amount of \$ 90,000.00. Complainant has not claimed that he suffered any pecuniary damages. Finally, we note that this award is not motivated by passion or prejudice, is not "monstrously excessive" standing alone, and is consistent with the amounts awarded in similar cases. We further find that since there is a finding of discrimination, and complainant prevailed here, complainant is entitled to additional attorney's fees for the instant appeal pursuant to the Order herein.

The agency's decision is REVERSED and REMANDED for further processing in accordance with this decision and Order herein.

ORDER

Within 30 days of the date this decision becomes final, the agency is ORDERED to pay complainant non-pecuniary compensatory damages in the amount of \$ 90,000.00. Proof of payment must be sent to the Compliance Officer, as referenced [*13] herein.