

Roberta H. Gaston v. U.S. General Accounting Office

Docket No. 99-02

Date of Decision: March 30, 2004

Cite as: Gaston v. GAO (3/30/04)

Before: Michael W. Doheny, Vice-Chair

Discrimination – Disability

Disability

Reasonable Accommodation

Back Pay

Ready, Willing and Able

Duty to Mitigate

Compensatory Damages

OPINION AND ORDER

This compliance case is before me on the issue of remedies. As set forth below, I find the Respondent in NON-COMPLIANCE with the Board's Final Decision in this case.

In the Final Decision, issued on July 18, 2003, the Board held that GAO violated the Americans with Disabilities Act (ADA), 42 U.S.C. §12101, *et seq.*, by failing to accommodate Appellant's known disability. "As a result of the failure to accommodate, Appellant resigned her position on the effective date of her removal for chronic absenteeism and failure to follow leave restrictions." Final Decision at 25-26. The Board further ruled that "Appellant is entitled to reinstatement retroactive to September 19, 1997. She is entitled to such relief as is necessary to restore her to the *status quo* had the Agency not failed to accommodate." *Id.* at 26.

I. BACKGROUND

On September 4, 2003, Respondent requested clarification of the Board's Final Decision with respect to time limits for reinstatement and completing back pay calculations.¹ Following a

¹ Petitioner's Request for Additional Time to Submit Attorneys' Fees and Costs, filed more than two weeks after the deadline (Aug. 7, 2003) for said submissions, was denied for failure to provide good cause for an extension. Order of Aug. 29, 2003; *see* 4 C.F.R. §28.89. Her simultaneous request for an

status conference with the undersigned Administrative Judge on September 9, 2003, Petitioner was returned to the rolls of GAO on September 19, 2003 and, pursuant to agreement with Respondent, Petitioner was placed on voluntary leave until she becomes eligible for retirement on March 31, 2004. A follow-up status conference was held by telephone on September 25, 2003 between Petitioner,² counsel for Respondent, and the undersigned Administrative Judge.

On September 30, 2003, I issued a Status Conference Report and Order. In pertinent part the Order described the parties' agreement to hold a deposition of Petitioner in Crossville, Tennessee on October 17, 2003.³ The deposition was to be limited to discovery relating to: 1) whether Petitioner was ready, willing, and able to work for the period subsequent to the hearing in the matter (*i.e.*, after October 26, 2000 and up to and including September 12, 2003); and 2) the relief sought by Petitioner that was in addition to the back pay already awarded by the Board. The Order also provided that GAO pay back pay with appropriate adjustments, including deductions, no later than 60 calendar days after the date of the Order and, if there was a dispute about the amount of back pay, interest and/or other benefits, the Agency was ordered to issue a check to Petitioner for the undisputed amount within the 60-day period. Respondent was ordered to notify Petitioner in writing of all actions taken to comply with the Order and the date on which GAO considered that it had fully complied. Petitioner was provided 30 days from GAO's notification of compliance to file a petition for enforcement, if she believed the Respondent was not in compliance.

By letter dated December 1, 2003, counsel for Respondent notified the Board that GAO objected to compensating Petitioner for the period of February 8, 2000 through July 18, 2003. He stated that GAO had concrete evidence that Petitioner "was not ready and/or willing to work" during the aforementioned period. In his attached letter to counsel for Petitioner, Agency counsel advised Petitioner of GAO's calculations. He also advised Petitioner that, until the Board ruled on the amount of back pay to which Petitioner is entitled, GAO was not currently in a position to make any payment for back pay. On December 11, 2003, Petitioner filed a Response to GAO's Compliance with Order of September 30, 2003, asserting that there remained disputes as to back pay entitlements and other relief. By Order of December 18, 2003, the parties were ordered to file full statements of their positions by January 15, 2004 and responsive briefs by February 2, 2004. The Agency was also ordered to submit a compliance report regarding award of back pay.

Having asserted in its December 1, 2003 submission to Petitioner that it was objecting to compensating Petitioner for the period between February 8, 2000 and July 18, 2003, Respondent claimed in its January 15, 2004 Position Statement (Resp. Statement at 2-3) that it now objected to payment of compensation from the date of termination of employment, September 19, 1997 to

extension of time to seek Board review of GAO's interpretation of the Final Decision was granted. She was given until September 12, 2003 to submit a pleading as to the Agency's non-compliance.

² Petitioner had represented herself from the filing of the complaint through the appeal period. On October 24, 2003, C. Douglas Fields, Esq., entered his appearance on behalf of Petitioner.

³ Contrary to the Agency's argument, the Board did not "*sua sponte*" open up these proceedings to allow "limited discovery on the payback issue." See Respondent's Position Statement at 2. Agency counsel initiated this inquiry at the conference on September 9, 2003.

the date of the Board's Final Decision, July 18, 2003. Respondent claimed that pursuant to the Back Pay Act, GAO is not liable for back pay for any period during which Petitioner was not "ready, willing and able" because of an incapacitating illness or injury to perform her duties. *Id.* at 2.

In addition, citing to the Civil Rights Act of 1964, as amended (Title VII), Respondent contended that Petitioner did not comply with 42 U.S.C. §2000e-5(g)(1), which provides that amounts earnable with reasonable diligence in seeking other employment shall operate to reduce the back pay otherwise allowable. Resp. Statement at 6. Thus, as the dispute on back pay presents itself, the issues are whether Petitioner for a relevant period of time was not ready, willing, and able to perform her duties, even with reasonable accommodation, and whether Petitioner had a duty to mitigate the back pay and if so, whether she met that duty.

Respondent's Compliance Report (Jan. 15, 2004) indicates that within the 60-day period specified by the Board's September 30 Order for payment of undisputed amounts, Petitioner had been paid retroactively only for the period from July 21, 2003 through October 4, 2003. *Id.* at 2.

II. ANALYSIS AND FINDINGS

A. Back Pay

Petitioner's entitlement to back pay is based on both the Back Pay Act, 5 U.S.C. §5596, and the Americans with Disabilities Act, 42 U.S.C. §§12101, *et seq.*⁴ In its claim that Petitioner has not met the prerequisites for back pay, GAO relies in part on both statutes and their judicial progeny. In analyzing Petitioner's rights as well as obligations, I consider both statutes and judicial decisions under them.

1. Ready, Willing, and Able

Respondent states that there is evidence to show that "during certain periods of time, Petitioner could not get out of bed and her condition was 'debilitating.'" Resp. Statement at 4. Respondent introduces medical notes by Dr. Jill Wallner, Petitioner's treating physician, indicating that on April 10, 2000 and May 3, 2000 Petitioner was sleeping up to 17 hours a day, that she felt fatigue, and that her prognosis was poor. *Id.*, Attachment C. In another notation on June 19, 2002, Dr. Wallner stated, "Cont. chronic fatigue—debilitating." On the other hand, Respondent acknowledges that Petitioner testified in her deposition that when she is on her medication she is fine, able to keep all of her appointments, care for her mother and that her condition has been pretty good. Resp. Statement at 5. Petitioner points out that the letter submitting the medical notes (referenced by Respondent) was sent to the Office of Personnel Management (OPM) to verify continuing disability under the Civil Service Retirement System. Such disability benefits are awarded without qualification as to whether there is a reasonable accommodation to her disability. She points out that the quoted excerpts are virtually identical to hearing testimony concerning her fatigue and inability to get out of bed. Petitioner's Reply at 3.

⁴ An employee's remedies for discrimination under the ADA are defined by Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. §12117(a).

The Merit Systems Protection Board (MSPB) has held that in proceedings on a petition for enforcement of an MSPB order, the agency bears the burden of proving that it has complied with the order. *Gay v. U.S. Postal Service*, 49 M.S.P.R. 219, 230 (1991). When the agency disclaims liability for back pay on the basis that the appellant was not ready, willing, and able to work, the Petitioner bears the burden of proving to the contrary. *Redding v. U.S. Postal Service*, 32 M.S.P.R. 187, 191-92 (1987). This burden arises, however, only when the agency first comes forward with "concrete and positive evidence, as opposed to a mere theoretical argument," that the appellant was not ready, willing, and able to return to work during the relevant period in order to put the matter in issue. *Id.* (quoting *Piccone v. United States*, 407 F.2d 866, 876 (Ct. Cl. 1969)); *accord, Davis v. Department of the Navy*, 50 M.S.P.R. 592, 598 (1991) (if the agency presents a "substantial basis for questioning the appellant's ability to work, it is incumbent upon the appellant to show that he was ready, willing and able to work during the period" for which back pay is sought).

The evidence presented by Respondent does not constitute "concrete and positive evidence" and does not present a "substantial basis" for questioning Petitioner's ability to work. Moreover, the evidence on which Respondent relies merely resurrects the arguments it presented during the initial hearing. The question then was not whether Petitioner was disabled, but whether, in spite of her disability, the Agency made reasonable accommodation for the disability. That issue has been decided.⁵

The medical evidence on which Respondent relies was a part of Petitioner's claim for continued eligibility for disability benefits and as such does not constitute evidence of Petitioner's incapacity under the ADA. *See* 62 Comp. Gen. 370, 373 (1983) (record did not disclose affirmative evidence of incapacity, notwithstanding employee's claim of permanent disability in application for disability benefits, where employee contended that throughout the period of his separation he was ready, willing, and able to work). The Agency has not presented sufficient evidence of Petitioner's alleged inability to work during the back pay period to shift the burden to Petitioner.

2. Duty to Mitigate

Respondent also contends that Petitioner is not entitled to back pay because she failed to exercise reasonable diligence in finding other suitable employment to mitigate damages as required by Title VII, 42 U.S.C. §2000e-5(g)(1). As stated above, Petitioner may claim entitlement to back pay under both the Back Pay Act and Title VII. *See Brown v. Secretary of the Army*, 918 F.2d 214, 218 (D.C. Cir. 1990), *cert. denied sub nom. Brown v. Stone*, 502 U.S. 810 (1991).

a. Back Pay Act

The MSPB has consistently held that an improperly discharged employee is not required under the Back Pay Act to seek other employment while appellate administrative proceedings are in progress and the employee is seeking reinstatement. *Harris v. U.S. Postal Service*, 57 M.S.P.R. 1, 3 (1993); *see Butler v. U.S. Postal Service*, 57 M.S.P.R. 168, 171 (1993) (citing *Power v.*

⁵ Respondent did not appeal the Board's Final Decision.

United States, 597 F.2d 258, 264-65 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1044 (1980)); *see also* 62 Comp. Gen. 370, 373 (1983) (employee not obligated to accept alternative employment while administrative appeal before MSPB is pending).

b. Title VII

Although case law that relieves Petitioner from a duty to mitigate back pay until after exhausting her administrative appeals is dispositive, I have also considered arguments concerning Petitioner's responsibilities under Title VII and conclude that she also meets the Title VII requirements for entitlement to back pay.

A back pay claimant under Title VII generally has a duty to mitigate damages. Specifically, §706(g) of Title VII, 42 U.S.C. §2000e-5(g), provides that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." The burden is on the agency, however, to establish that the employee failed in her duty to mitigate. The Equal Employment Opportunity Commission (EEOC) has generally held that an agency must satisfy a two-prong test to carry its burden of proof. This test requires the agency to show that: 1) Petitioner failed to use reasonable care and diligence in seeking a suitable position; and 2) suitable positions were available that Petitioner could have discovered and for which she was qualified. Where a Petitioner makes no effort to mitigate damages and does not explain the lack of effort, the agency need not meet the second prong. *Simmons v. Runyon*, EEOC Pet. No. 04930005 (Dec. 10, 1993), 1993 WL 1509315 at 3-4 (EEOC).

The duty to mitigate does not require a claimant to "go into another line of work, accept a demotion, or take a demeaning position." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982); *see also Sellers v. Delgado Cmty. Coll.*, 839 F.2d 1132, 1138-39 (5th Cir. 1988) (duty to mitigate does not require claimant to remain in position not "substantially comparable," accepted during pendency of her claim and with which she is dissatisfied, while continuing to seek suitable employment); *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507, 1511 (11th Cir. 1987) ("Title VII requires reasonable diligence in locating employment and mitigating damages; it does not require that a person remain employed despite dissatisfaction"); *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1234-35 (7th Cir. 1986) ("duty to mitigate damages does not preclude a plaintiff from quitting a position in a different business that pays substantially less money"); *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1320-21 (D.C. Cir. 1972) (claimant need not seek employment "not consonant with his particular skills, background, and experience" or involving "conditions that are substantially more onerous than his previous position").

Respondent argues, however, that the Agency has no burden here because Petitioner made "almost no effort"—that is, she failed to use reasonable care and diligence in seeking a suitable position. Resp. Statement at 9. In determining reasonable care and diligence, it is appropriate to consider all the circumstances. *See Sellers v. Delgado Coll.*, 902 F.2d 1189, 1193 (5th Cir.), *cert. denied*, 498 U.S. 987 (1990).

Petitioner moved from her home in the Washington, D.C. suburbs to Crossville, Tennessee approximately two months after she left employment with the Agency. As she explained,

because of her substantially reduced income, she determined that it would be cheaper; her family was there; and, the cost of living would be much lower. Petitioner's Reply to Resp. Statement, Ex. 2 at 20-23. Her affidavit explained that she unsuccessfully sought work through a temporary agency, applied to borrow from her thrift savings plan, and while waiting, moved to Tennessee. She did not begin to receive her disability annuity until after moving, in early 1998. *Id.*, Ex. 3.

Petitioner was a program analyst earning approximately \$57,000 a year when she left GAO in 1997. Pet. Brief, Ex. E. She is admittedly disabled and requires accommodation in her employment. During the back pay period she was receiving approximately \$30,000 per year in disability retirement benefits. Petitioner argues that through her community work she was able to network within Crossville; that she checked the classified advertisements; and that she went to an agency that hired for temporary work. Petitioner makes the argument that there was simply no comparable work in the Cumberland County area for which she could apply. To illustrate that point, she submitted a list of all current positions provided by the local unemployment agency in Cumberland County, a list of jobs from the internet's "America's JOBBANK" website for Cumberland County, the website "careerbuilder.com," postings by the State of Tennessee, as well as classified ads from the local newspaper. Virtually all of the jobs paid less, and in many cases much less, than Petitioner received in disability benefits, let alone what she had earned in her employment with Respondent. The only current opening that might be considered suitable was a statistician position in Nashville, a distance of 110 miles from her home, and that position pays about the same as she received in disability benefits. Pet. Reply at 5-7 and Exs. 2 (at 23-30), 4.

Respondent cites to cases where employers were relieved of the duty to present evidence because employees made no or minimal effort. In those cases, the claimants had held jobs that were readily available, such as public relations officer (*Sellers v. Delgado Coll.*, *supra*, 902 F.2d at 1195) and bartender (*Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2nd Cir. 1998). In *Quint v. A.E. Staley Mfg.*, 172 F.3d 1, 16 (1st Cir. 1999), a decision on which Respondent relies to support its arguments, the court states: "Where an ADA claimant refrains from pursuing alternative employment, we consider it reasonable to presume at the outset that she did so for an articulable reason, perhaps because she possessed information which suggested that a job search would have been futile." Furthermore, courts that have shifted the burden to a claimant have done so where there was evidence other than a mere lack of effort. For example, in *Sellers*, *supra*, several grounds were listed in support of the judge's finding that the plaintiff's efforts were insufficient, including the employer's evidence of the availability of comparable jobs, consisting of a "large number of advertisements for substantially equivalent jobs" to which the plaintiff had failed to respond. *Sellers*, 902 F.2d at 1195.

Respondent, in apparent recognition of the scarcity of suitable employment in Cumberland County and the futility of seeking such employment there, makes much about Petitioner's failure to broaden her search to cities 60 to 100 miles away or in the Washington, D.C. area. Respondent offers no authority to support the proposition that willingness to relocate is required to establish "due diligence" in seeking suitable employment.

In *Gallo v John Powell Chevrolet, Inc.*, 779 F.Supp. 804 (M.D. Pa. 1991), the court noted that the plaintiff may have had better success had she not limited her job search to the immediate

geographic area. The court said that her reluctance to relocate was easily understood since she was married, her husband was employed in the area, and she had two small children for whom to care. Title VII should not be interpreted, the court concluded, as requiring a plaintiff to relocate when no jobs are available in her area if moving would work a substantial hardship on her or her family. *Id.* at 814.

In consideration of Petitioner's circumstances, I find her efforts, though not extensive, were reasonable. Within Petitioner's commuting area, it is highly unlikely that she could have obtained employment substantially similar to her employment with Respondent. It was not unreasonable, in view of her disability and the need for accommodation, the fact that she was receiving \$30,000 per year in disability benefits and needed to remain with her family for support, that she restricted her job searches to Cumberland County, Tennessee. In any case, I do not find the facts in this case sufficient to relieve Respondent of the burden to show that in fact there was employment comparable to her position with GAO within her commuting area for which she could have applied. Respondent failed to meet this burden.

In accordance with my analysis and findings, Petitioner is entitled to back pay plus interest from the date of her termination, September 19, 1997, to the date of her reinstatement on GAO's rolls.

3. Suspensions

The record supports the conclusion that Petitioner's placement on leave restrictions worsened her attendance difficulties, and ultimately led to her being suspended. Hearing Transcript (TR) 88; *see* Pet. Brief at 6. At that time, her informal accommodation was withdrawn and she was saddled with boilerplate restrictions, not geared in any way to her disability. *See id.* at 7. Petitioner also argues that the restriction on the flexibility of her work hours affected her, since "coming in late and having to stop at 6:00 p.m. makes her slip further behind financially." *Id.* at 11. Thus, her Petition can reasonably be read to encompass reimbursement for the unpaid suspensions she incurred during 1996, when her request for accommodation was met with leave restrictions.

In the Final Decision (at 25) the Board noted its disapproval of the suspensions as follows:

Appellant's inability to comply with the requirement that she perform her duties during the core hours at the workplace resulted—not in an effort to seek accommodation—but in further restrictions and discipline.

The record reflects that the inappropriate discipline imposed on Petitioner while she was seeking accommodation consisted of suspensions of three days between May 21 and May 23, 1996 and 14 days between August 4 and August 17, 1996. Resp. Hearing Exs. 16, 19. I find that Petitioner is entitled to back pay for the unwarranted suspensions. This complies with the Board's order directing that the Agency provide such relief as necessary to restore Petitioner to the *status quo* had it not failed to accommodate her disability. GAO, therefore, must pay Petitioner back pay for those periods of suspension.

4. AWOL/LWOP Charges

As to the claim for reimbursement for Absent Without Leave/Leave Without Pay (AWOL/LWOP) charges, the Agency argues that “Petitioner did not introduce during the hearing any time and attendance documents and/or calculations pertaining to her claim for reimbursement for AWOL/LWOP charges.” Resp. Statement at 15. Respondent contends that Petitioner admitted to a discrepancy between her records and those of the Agency. I find that Petitioner has failed to provide sufficient evidence of her entitlement to back pay for days or hours of LWOP or AWOL. She has not shown a nexus between the discrimination against her and the instances of LWOP or AWOL. In finding the evidence insufficient, I note that the hearing record contains evidence that when Petitioner was charged with either AWOL or LWOP it was often after she provided excuses for her absences unrelated to her disability and/or the Agency’s failure to accommodate her disability. *See, e.g.*, Resp. Hearing Exs. 25, 45, 71-72.

5. Back Pay Calculations

The Agency must calculate the amount of back pay liability by complying with the provisions of 5 C.F.R. §550.805. In its submissions of January 15 and February 2, 2004, Respondent provides detailed support for its calculations of gross back pay and deductions from gross pay covering the period from Petitioner’s termination to her reinstatement. In addition, Respondent has submitted a declaration by Laura A. Chase, Human Capital Associate in GAO’s Human Capital Office who was responsible for making the back pay calculations. Resp. Responsive Brief (Resp. Response) (Attachment). In her declaration, Ms. Chase provides detailed information on the method by which she made her calculations. Petitioner has provided her own calculations. There are differences in the parties’ calculations of gross back pay and deductions. Respondent has provided substantial evidence of its compliance with OPM’s regulations. Petitioner has not adequately supported the basis for her calculations and has not shown that the Agency improperly arrived at its figures. Accordingly, I find the gross pay for the period between September 19, 1997 and July 18, 2003 to be \$377,094.34 and total deductions as determined by GAO of \$297,279.15. *See* Resp. Response at 8 and Attachment (Chase Dec. at Ex. 1).

B. Compensatory Damages

In this compliance phase of the proceedings, a dispute has arisen over the appropriate damages to be awarded Petitioner in light of the Agency’s failure to accommodate her disability. Petitioner requests compensatory damages in the amount of \$100,000, claiming that this amount “does not begin to touch the appropriate figure for physical and mental suffering much less the added expenses of travel, medical appointments, sleep studies, substance abuse assessments and other incidentals incurred to attempt to remain a good employee.” Pet. Brief at 14.

The Agency takes the position that Petitioner is not entitled to any further award of damages “beyond those previously awarded to her by the PAB.” Resp. Statement at 14. GAO argues that the Petition for Review did not encompass compensatory damages, and that even if it did, the record does not support such an award. *Id.* at 18-19. In its Response (at 1-2, 5), the Agency acknowledges that the PAB has authority to award compensatory damages, but denies having

had notice or that such damages were proven. GAO also maintains that the claim is excessive. Petitioner's Reply (at 16) reiterates that Petitioner is entitled to compensatory damages based on the record before the Board.

On February 6, 2004, Respondent's counsel submitted a letter (hereinafter Bielec letter) stating that he had recently and inadvertently come across research showing that compensatory damages "are not statutorily authorized against GAO."⁶ Petitioner's reply, dated February 10, 2004, notes that Respondent's letter relies on selected statutes. Petitioner's counsel also reiterates that the remedies contained in 42 U.S.C. §2000e-16 are inclusive of compensatory damages and not limited to reinstatement and back pay.⁷

In this compliance phase of the case, the following issues concerning damages are pending: jurisdiction, pleading and notice, and entitlement.

1. Jurisdiction

This Board has authority to award compensatory damages to a party prevailing against GAO under the ADA. The ADA was expressly made applicable to GAO through the Congressional Accountability Act, which amended the relevant ADA provision to specifically include GAO among the instrumentalities of Congress subject to the ADA. Pub.L. No. 104-1, §201(c)(3) (1995). After that amendment, section 509 of the ADA, 42 U.S.C. §12209, reads as follows:

The General Accounting Office, the Government Printing Office, and the Library of Congress shall be covered as follows:

(1) In general

The rights and protections under this chapter shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities

The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1).

* * *

(5) Enforcement of employment rights

⁶ The Board notes that Respondent's submission of a letter to the Administrative Judge for the Board, subsequent to briefing, does not conform to its procedural rules. The PAB's regulations provide that supplemental pleadings be submitted in motion form, make clear the action being requested, and include a proposed order. 4 C.F.R. §28.21(b); PAB *Guide to Practice* at 21; see Fed.R.Civ.P. 7(b)(1). This formal procedure provides the Board and opposing party with clear notice as to the issue at hand and the action being sought.

⁷ Petitioner's Brief (at 3) cites the Supreme Court's decision in *West v. Gibson* in support of EEOC's authority to award compensatory damages in cases involving federal employees. The Bielec letter makes no reference to this Supreme Court precedent.

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any employee of an instrumentality of the Congress who alleges a violation of the rights and protections under sections 12112 through 12114 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(Emphasis added).

Thus, as the Agency notes,⁸ the remedies provided in 42 U.S.C. §12209(5) are those set forth in Title VII at 42 U.S.C. §2000e-16. That provision states in pertinent part:

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as well effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

42 U.S.C. §2000e-16(b).

Through the General Accounting Office Personnel Act (GAOPA), Congress vested the Personnel Appeals Board with authority to act in place of EEOC for matters involving prohibited discrimination in employment. 31 U.S.C. §732(f)(2)(A) (GAOPAB “has the same authority over oversight and appeals matters as an executive agency has over oversight and appeals matters”).

The Supreme Court shed light on the remedy provision of §2000e-16 in 1999, holding that the phrase “appropriate remedies, including reinstatement or hiring of employees with or without back pay” was inclusive and not restricted to reinstatement/hiring and back pay. *West v. Gibson*, 527 U.S. 212, 217 (1999) (emphasis added). The Court went on to state that compensatory damages were within the ambit of that provision. Following enactment of the compensatory damages amendment to Title VII in 1991 (CDA amendment), victims of intentional employment discrimination in the private sector or federal government could recover compensatory damages, under 42 U.S.C. §1981a(a)(1). The Supreme Court reasoned as follows:

The language, purposes, and history of the 1972 Title VII extension and the 1991 CDA convince us that Congress has authorized the EEOC to award compensatory damages in Federal Government employment discrimination cases. Read literally, the language of the statutes is consistent with a grant of that authority. The relevant portion of the Title VII extension, namely, §717(b), says that the EEOC “shall have authority” to enforce §717(a)

⁸ See Bielec Letter at 2.

“through *appropriate* remedies, including reinstatement or hiring of employees with or without back pay.” 42 U.S.C. §2000e-16(b). After enactment of the 1991 CDA, an award of compensatory damages is a “remedy” that is “appropriate.”

West v. Gibson, 527 U.S. at 217 (emphasis in original).

In reaching this conclusion, the Supreme Court noted that the relevant provision of §2000e-16 explicitly names “certain equitable remedies, namely, reinstatement, hiring, and back pay, and it does not explicitly refer to compensatory damages. But the preceding word ‘including’ makes clear that the authorization is not limited to the specified remedies there mentioned; and the 1972 Title VII extension’s [extending coverage to federal employees] choice of examples is not surprising, for in 1972 (and until 1991) Title VII itself authorized only equitable remedies.” *Id.* at 217. In the Court’s view, the meaning of “appropriate” had evolved with the evolution of Title VII itself, such that in context, it “most naturally refers to forms of relief that Title VII itself authorizes—at least where that relief is of a kind that agencies typically can provide.” *Id.* at 218. The *West v. Gibson* decision further explained that this was not only a permissible reading of Title VII, but also “the correct reading.” *Id.* The Court reasoned that Congress had designed an administrative dispute resolution system to encourage “quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court.” *Id.* at 219. If the definition of “appropriate” remedy under §2000e-16 did not include compensatory damages, the remedial scheme established by Congress for federal employee complaints would be undermined. *Id.*

The Supreme Court also discussed the sovereign immunity argument, finding:

There is no dispute . . . that the CDA waives sovereign immunity in respect to an award of compensatory damages. Whether, in light of that waiver, the CDA permits the EEOC to consider the same matter at an earlier phase of the employment discrimination claim is a distinct question concerning how the waived damages remedy is to be administered. Because the relationship of this kind of administrative question to the goals and purposes of the doctrine of sovereign immunity may be unclear, ordinary sovereign immunity presumptions may not apply. In the Secretary’s view here, for example, the EEOC’s preliminary consideration, by lowering the costs of resolving disputes, does not threaten, but helps to protect, the public fisc. Regardless, if we must apply a specially strict standard in such a case, which question we need not decide, that standard is met here. We believe that the statutory language, taken together with statutory purposes, history, and the absence of any convincing reason for denying the EEOC the relevant power, produce evidence of a waiver that satisfies the stricter standard.

For these reasons, we conclude that the EEOC possesses the legal authority to enforce §717 through an award of compensatory damages.

Id. at 222-23.

GAO's procedures for discrimination complaint processing, Order 2713.2, incorporate the rules governing claims under the ADA, including the option of bringing a charge to the PAB. As the Agency notes, the remedy provision cited within the ADA, 42 U.S.C. §2000e-16, is broadly worded. Its inclusive language encompasses compensatory damages, as the EEOC has concluded and the Supreme Court upheld in *West v. Gibson*. Because that remedy provision applies to GAO, the PAB has authority to award compensatory damages to a prevailing party.

2. Notice of Damages Claim

GAO argues that it lacked notice that Petitioner was seeking compensatory damages in this action and that, accordingly, it would be "unfair and prejudicial to GAO" to allow her to pursue such a claim at this juncture. Resp. Statement at 18. The Agency further states that if it knew Petitioner were claiming compensatory damages, "discovery propounded, expert designations, and cross-examination of Petitioner at hearing would all have taken into consideration such damages." *Id.*⁹

A complainant need not specifically request compensatory damages if his or her factual allegations put the agency on notice that such harm may have resulted from the alleged wrong. *See Barnett v. Rubin*, EEOC App. No. 01943513 (Feb. 15, 1995), 1995 WL 70159 (EEOC). In the case at hand, the *pro se* Petition for Review requests the following remedies:

(a) the salary I would have earned for all the Absent Without Leave charges I incurred from 1989 through September 19, 1998 [sic];

(b) the sum of \$100,000 for the repayment of the debts I incurred, including a Chapter 13 bankruptcy, which directly resulted from my inability to obtain an accommodation and the additional medical expenses I was forced to incur when GAO made my continued employment conditional on my seeking medical care which my doctors declared unnecessary.

(c) payment of my attorney's fees;

(d) my immediate placement on full retirement or a sum equivalent to the salary I would have earned between September 19, 1998 [1997] (the date of my forced resignation) and my earliest retirement date of November 25, 2004 (my 55th birthday) when I

⁹ This point, however, goes to the sufficiency of proof at trial, not to whether Petitioner had raised the issue in the underlying Petition and thus placed the Agency on notice of the claim. Furthermore, Respondent was given another opportunity to question Petitioner as to additional relief requested through the limited deposition conducted in October 2003.

would have had 30 years of federal service had I not been forced to resign.

Petition at 7. While inartfully worded, the Petition plainly encompasses more than back pay alone and the Agency was on notice of this fact from the outset. She specifically requested reimbursement for AWOL time over a nine-year period, “the sum of \$100,000 for the repayment of . . . debts . . . incurred . . . which directly resulted from [her] inability to obtain an accommodation and the additional medical expenses [she] was forced to incur” in seeking to meet the Agency’s requirement for documentation of her request for accommodation. The plain meaning of this request calls for “make whole” relief that places Petitioner in the position she would have been in but for the failure to accommodate.

This Board embraced this reading of the Petition in the July 18, 2003 Final Decision (at 25-26). Accordingly, the Agency was on notice that Petitioner sought \$100,000 for repayment of debts incurred because of her inability to obtain an accommodation and the additional medical expenses resulting from the Agency’s persistent demand for medical explanation and support for her request. Whether the Agency was on notice of more than a claim for pecuniary damages is a closer question. The reference to \$100,000 in the prayer for relief and the reference in the Petition (at 4) to a doctor’s conclusion that stress had resulted from Petitioner’s employment situation combine to minimally meet this notice requirement. In light of Petitioner’s *pro se* status, I will address the evidence on this point in the following section on Petitioner’s entitlement to damages.

3. Petitioner’s Entitlement to Damages

As set forth above, this Board stands in the place of EEOC for GAO employees and is, accordingly, authorized to award compensatory damages as part of the make whole relief for intentional discrimination in violation of Title VII, as amended. Compensatory damages may include relief both for pecuniary as well as non-pecuniary losses. *Jackson v. Henderson*, EEOC App. No. 01972555 (Apr. 15, 1999), 1999 WL 256160 at 5 (EEOC).

Non-pecuniary losses are losses not subject to precise quantification, and include emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, credit standing, or character and reputation. *Conner v. England*, EEOC App. No. 01996212 (Feb. 14, 2002), 2002 WL 265554 at 9 (EEOC). EEOC has noted that damage awards for emotional harm are difficult to determine and no definitive rules govern the amount to be awarded. *Id.* Generally, non-pecuniary damages are limited to the “sums necessary to compensate the injured party for actual harm, even where the harm is intangible;” such an award should take into account the severity of the harm and length of time that the injured party has suffered from the harm. *Id.* (citing *Carter v. Duncan-Higgins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984)). An award must meet two goals—“that it not be ‘monstrously excessive’ standing alone, and that it be consistent with awards made in similar cases.” *Conner v. England, supra*, at 9. Assessment of compensatory damages must be based on the damage to the complainant—not the misconduct of the agency—since punitive damages are not allowed against the Federal Government. *Id.*

In EEOC cases, an agency is permitted to obtain objective evidence from the complainant to assess the merits of a request for emotional distress damages. *Lawrence v. Runyon*, EEOC App. No. 01952288 (Apr. 18, 1996), 1996 WL 197403 at 4 (EEOC) (citing *Carle v. O'Keefe*, EEOC App. No. 01922369 (Jan. 5, 1993), 1993 WL 1504728 (EEOC)). Objective evidence may include statements from the complainant concerning her emotional pain, inconvenience, mental anguish, loss of standing, and the like, as well as statements from other witnesses such as family, co-workers, and medical providers. *Id.* at 5. Such statements should include “detailed information on physical or behavioral manifestations of the distress,” its duration, and examples of how the distress affected the complainant on a day-to-day basis. *Id.* at 4 (quoting *Carle, supra*). The complainant must also demonstrate a link between the agency’s discriminatory action and the alleged distress. *Id.* at 5. Statements from a health care provider are not required for recovery of compensatory damages. *Id.*

In this case, the Agency claims that the “record is void” of any evidence to establish entitlement to compensatory damages, and that accordingly, Petitioner is not entitled to “any further award of damages.” Resp. Statement at 14, 19. Respondent argues that Petitioner failed to show “specific and discernable harm in such a way that illustrates the type and degree of harm.” *Id.* at 19. Specifically, the Agency states that Petitioner failed to call any medical experts or introduce any evidence to support an award of compensatory damages. *Id.* at 20. Respondent further argues that Petitioner failed to connect any emotional distress to her employment circumstances. *Id.* at 20. “[T]he record is void of any evidence demonstrating that Petitioner incurred additional pain and suffering separate and apart from the depression and sleep disorder she claimed needed to be accommodated. [A]ny type of emotional distress discussed during the hearing or referenced in the medical reports was not shown to have been caused by GAO, but was instead associated with Petitioner’s prior medical condition.” Resp. Response at 4.

Petitioner claims that “[t]he record not only discloses a basis for awarding compensatory damages but subtly shows the mental stress, anxiety, humiliation, frustration, embarrassment, financial loss and damage to reputation experienced by” Petitioner. Pet. Brief at 9. “In trying to comply with GAO’s demands in 1996 and 1997 . . . [Petitioner] had thirty-six doctor appointments, a substance abuse evaluation, a sleep study, obtained eleven physician’s responses and still received notice of termination.” *Id.* at 11. She further argues that:

These demands to perform, these rejections of documentation, these requirements for a capable adult employee to check in and check out and provide excuses, to have private matters disclosed, to be sent home on suspension, to be reviewed for intentional leave abuse, accused of substance abuse, being alone, without pay; to go through bankruptcy, to beg for relief and be rebuffed with a command to comply are humiliating, embarrassing, depressing and damaged her reputation. [Petitioner] suffered anxiety, mental anguish, frustration, despair and felt betrayed.

Id. at 13. “The \$100,000 compensatory damage request does not begin to touch the appropriate figure for physical and mental suffering much less the added expenses of travel, medical appointments, sleep studies, substance abuse assessments and other incidentals incurred to

attempt to remain a good employee.” *Id.* at 14. These additional costs refer to pecuniary damages which will be discussed below.

Respondent is correct that there is little evidence of record of Petitioner’s damages, although she was provided the opportunity at trial and a limited opportunity during the compliance phase to supply such evidence. A review of the record reveals that Petitioner’s evidence of damages caused by the Agency’s actions includes a medical report dated October 6, 1996 from Dr. Edward Dworkin which stated that “[i]t is very likely that the stress of her work situation is directly affecting her symptoms of depression, including insomnia.” Pet. Hearing Ex. 6. Petitioner’s hearing exhibits also included an unsworn statement attached to her 1996 performance appraisal stating that “[t]he stress involved in pursuing the suit and seeking an accommodation has only exacerbated the conditions for which [she was] in medical treatment; i.e. sleep disorder, depression and chronic fatigue syndrome.” Pet. Hearing Ex. 52. Similar reference appears in Respondent’s Hearing Exhibit 75, in which Petitioner’s supervisor e-mailed her as follows:

You called me at 12:53 pm today and told me that you had just then woke up. You said that you had taken a sleeping pill because of nerves over this whole situation. You stated that there was no way you could make it in to work and you would see me tomorrow.
You should record 8 hours AWOL on your time sheet for today.

(Emphasis added). Petitioner also submitted evidence of having advised the Agency, in response to the first proposed suspension, that the imposition of leave restrictions was causing her to fall further behind financially. In particular, she noted that the requirement that she request annual leave by 9:00 a.m. was leading to denial of the ability to use accrued leave and, thus, to non-pay status. *See* Pet. Hearing Ex. 62.

The record could have been more fully developed, through such means as testimony from Petitioner’s mother, with whom she lives, or a direct and detailed statement from Petitioner, as to the impact on her caused by the failure to accommodate. Nevertheless there is sufficient evidence to recognize that Petitioner did suffer compensable injury as a result of the Agency’s action. As her counsel points out, the Agency’s actions were demeaning and damaging to Petitioner’s reputation. *See* Pet. Brief at 10-13. She endured leave restrictions, suspensions, and ultimately, the removal action when she sought an accommodation from the Agency. Her professional reputation and employment record were directly impacted by these actions. Petitioner did testify that “other than the stress that had built up by 1996 and 1997, the depression was under control. At least that was the general thinking.” TR 527. Petitioner reiterated that stress caused by these actions was an underlying problem at that time:

[PETITIONER]: The stress at work was becoming more of a problem. . . .
JUDGE GULIN: So what is it that caused the stress? It was the—
[PETITIONER]: The leave restrictions.

...

With the institution of the leave restriction, where I had to phone in by 9:00 a.m. if I had overslept, I felt that that was an intentional requirement that, in order to officially document a violation to effect a removal.

In my letter to Henry Hinton I explained to him that I am oversleeping, and it seemed unreasonable to me to expect me to control the length of time I oversleep.

JUDGE GULIN: Okay. You felt that that restriction doomed you to failure, I believe were the words you used.

[PETITIONER]: Yes.

TR 530-31.

Petitioner made repeated efforts to secure medical documentation to support her request for accommodation, because the Agency found her submissions lacking but did not actively engage in the process. In describing the Agency's call for further medical documentation, Petitioner testified that she "felt that the time limits placed on these responses were a further way to document my failure to follow leave procedures, failure to comply with GAO requests." TR 533.¹⁰ In addition, when Petitioner had notified her supervisor of foreclosure proceedings on her condominium during the period when all her leave requests had to be approved, and suffered the embarrassment of having the reason for the leave request shared with other employees who merely needed to know that the leave had been okayed, her response was to send an immediate objection to the supervisor. TR 186; *see* Pet. Hearing Ex. 24. Clearly this action caused unnecessary embarrassment in the workplace.

The EEOC has awarded non-pecuniary compensatory damages in a number of cases which we compare to the instant case. *See, e.g., Lawrence v. Runyon*, EEOC App. No. 01952288 (Apr. 18, 1996), 1996 WL 197403 at 6 (EEOC) (\$3,000 awarded where complainant presented primarily non-medical evidence that she was embarrassed, humiliated, and distraught by harassment); *White v. Brown*, EEOC App. No. 01950342 (June 13, 1997), 1997 WL 333055 at 8, 10 (EEOC) (\$5,000 awarded for emotional distress, including depression, emotional fatigue, nightmares, and insomnia, related to hostile environment lasting approximately 18 months); *Benson v. Glickman*, EEOC App. No. 01952854 (June 27, 1996), 1996 WL 375760 at 4 (EEOC) (\$5,000 awarded where relatives and colleagues testified regarding embarrassment, humiliation, and stress complainant suffered at work showing "tenuous" connection with challenged actions, *i.e.*, denial of promotional opportunities, proposed suspensions and the like); *Conner v. England*, EEOC App. No. 01996212 (Feb. 14, 2002), 2002 WL 265554 at 10 (EEOC) (\$5,000 awarded to complainant who argued that agency's discriminatory actions affected his emotional health).

On the other end of the spectrum, \$100,000 or more was awarded in the following cases: *Finlay v. Runyon*, EEOC App. No. 01942985 (Apr. 29, 1997), 1997 WL 221819 at 8-9, 12 (EEOC) (\$100,000 awarded where agency's actions resulted in severe psychological injury over four years that was expected to continue indeterminately, including depression, frequent crying, loss

¹⁰ In detailing her efforts to obtain medical documentation that the Agency would find sufficient, Petitioner also indicated that she suffered stress. *See* TR 542-43.

of charm, lethargy, social withdrawal, concern for physical safety, recurring nightmares and memories of harassment, a damaged marriage, stomach distress, and headaches); *Brinkley v. Runyon*, EEOC App. No. 01953977 (Jan. 23, 1998), 1998 WL 37083 at 9 (EEOC) (\$110,000 awarded where, as a result of the agency's discrimination, complainant suffered chronic, major depressive disorder, including need for hospitalization); *Holland v. Barnhart*, EEOC App. No. 01A01372 (Oct. 2, 2003), 2003 WL 22346114 at 18-19 (EEOC) (\$100,000 awarded based on complainant's statement, supported by statement from treating psychiatrist, that constructive discharge exacerbated pre-existing psychiatric condition for more than five years).

Petitioner's references to stress, Dr. Dworkin's notation that stress was exacerbating the situation, together with the Agency's action—discipline up to and including removal—render an award of some compensatory damages appropriate. In reaching this conclusion, we recognize that testimony or sworn statements from friends or relatives or further medical records would have buttressed Petitioner's argument that she has suffered mental stress, anxiety, humiliation, frustration, embarrassment, financial loss and damage to reputation as she now claims. Further, there is little basis to determine the frequency and severity of any of her damages or to determine how much can be attributed to the Agency's actions versus Petitioner's original symptoms. Nevertheless, as noted above, difficulty of quantification neither obviates the need for nor precludes an award of compensatory damages. Under these circumstances, an award of \$5,000 compensatory damages is in order. *See, e.g., McCorkle v. Potter*, EEOC App. No. 07A30109 (Jan. 21, 2004), 2004 WL 189610 at 2 (EEOC) (awarding \$10,000 for emotional suffering, unsupported by medical evidence, resulting from removal later reduced to suspension).

A complainant may also recover past out-of-pocket expenses incurred as a result of intentional discrimination. The amount to be awarded can be determined by "receipts, records, bills, cancelled checks, confirmation by other individuals, or other proof of actual losses and expenses." EEOC Enforcement Guidance: Compensatory and Punitive Damages Available under §102 of the Civil Rights Act of 1991 (Jul. 14, 1992). Petitioner makes a claim for pecuniary damages in the form of reimbursement for "additional medical expenses [she] was forced to incur when GAO made [her] continued employment conditional on [her] seeking medical care which [her] doctors declared unnecessary." Petition at 7. However, the record is void of any medical bills, or receipts from prescriptions or even any evidence that she made payments to medical professionals. There is insufficient evidence to award pecuniary damages to Petitioner regarding any medical costs she has paid out as a result of the Agency's actions.

III. CONCLUSION

The Agency is hereby **ordered** to pay back pay and interest for the period between termination and reinstatement in accordance with the findings of this Opinion. In addition, it is **ordered** to pay back pay and interest for the periods of the three-day and 14-day suspensions in 1996, and to pay Petitioner \$5,000 in compensatory damages for the failure to accommodate. The Agency will make payment within 30 days from the date of this Order. At the same time, the Agency will file with the Board and serve on opposing counsel a compliance report showing that it has taken the action required. *See* 28 C.F.R. §28.88. Within 20 days of receipt of such compliance

report, counsel for Petitioner may submit a request for the award of reasonable attorney's fees and costs incurred in connection with this compliance proceeding. *See* 28 C.F.R. §28.89.

SO ORDERED.