

# **Roberta H. Gaston v. U.S. Government Accountability Office**

**Docket No. 99-02**

**Date of Decision: July 27, 2004**

**Cite as: Gaston v. GAO (7/27/04)**

**Before: John P. Mahoney, for the Board, *en banc*; Anne M. Wagner; Michael W. Doheny**

**Discrimination – Disability**

**Disability**

**Reasonable Accommodation**

**Back Pay**

**Ready, Willing and Able**

**Duty to Mitigate**

**Compensatory Damages**

## **DECISION ON CROSS APPEALS FROM THE MARCH 30, 2004 OPINION AND ORDER ON COMPLIANCE**

This matter is before the full Personnel Appeals Board (PAB) on cross appeals from the March 30, 2004 compliance decision of the administrative judge (AJ). In his Opinion and Order, the AJ found the U.S. Government Accountability Office<sup>1</sup> (GAO or the Agency) in non-compliance with the Board's Final Decision of July 18, 2003.<sup>2</sup> Specifically, he ordered the Agency to pay back pay and interest for the period between Petitioner's termination and her reinstatement as well as for the periods of her suspensions in 1996, and awarded \$5,000 in compensatory damages for the failure to accommodate.

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<sup>1</sup> Changed from "General Accounting Office" by GAO Human Capital Reform Act of 2004, Pub.L. No. 108-271 (Jul. 7, 2004).

<sup>2</sup> Neither the Agency nor Petitioner appealed from that Decision, which found GAO liable for violating the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and ordered GAO to restore Petitioner to the *status quo* had it not failed to accommodate her.

Both GAO and Petitioner have appealed from the compliance decision. Their respective arguments are outlined below.<sup>3</sup>

GAO argues that it “produced concrete and substantial evidence that [Petitioner] was not ready, willing and able to work during periods of time after she left GAO,” which Petitioner failed to rebut, thereby establishing that she was not ready, willing and able to perform her duties from the spring of 2000 through the summer of 2002. GAO’s Brief to the Full Board (GAO Brief) at 6. In addition, the Agency contends that Petitioner failed to mitigate her damages under the Back Pay Act, 5 U.S.C. §5596, and that, accordingly, her back pay entitlement should be reduced by amounts earnable with reasonable diligence. GAO also challenges the award of compensatory damages, claiming that: such damages are not available against it under the Americans with Disabilities Act (ADA, 42 U.S.C. §12101 *et seq.*); it was not on notice of such a claim; and Petitioner failed to prove harm to justify such an award. Finally, the Agency reiterates its argument that the Board should review all back pay issues from the time of Petitioner’s separation to the date of the Final Decision, challenging the AJ’s decision, as stated in the September 30, 2003 Order, that the Agency’s limited permission to conduct discovery at the compliance stage was restricted to the period from the close of the hearing forward.

Petitioner has cross appealed on a number of bases. On the major issues now pending before this Board, she argues that: (1) she was ready, willing and able to work during the contested period of the spring of 2000 through summer of 2002; (2) she fulfilled her obligation to mitigate damages; and (3) she was entitled to greater compensatory damages than the \$5,000 awarded in the March 30, 2004 Opinion. In addition, she continues to challenge the accuracy of the back pay calculations made by GAO, and to assert entitlement to reimbursement for the AWOL and LWOP charges she incurred while seeking an accommodation. Moreover, she claims that her back pay should be calculated as if she had received a promotion to Band II, and reasserts her claim for emotional suffering, a claim which her counsel represented to the Agency last year was being limited to the evidence adduced at the hearing.<sup>4</sup>

GAO’s Responsive Brief counters that: it has provided substantial evidence of compliance with applicable back pay requirements; Petitioner is not entitled to back pay at a level above the Band I level from which she retired; Petitioner failed to prove entitlement to back pay for specific instances of LWOP or AWOL; Petitioner is not entitled to newly-claimed financial damages; and Petitioner is not entitled to any emotional damages.

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<sup>3</sup> The parties’ pleadings on this appeal are repetitive on the issues and the arguments are summarized in this Decision. The Agency noticed its appeal on April 14, 2004. Petitioner’s Request for Reconsideration by the Full Board of the March 30, 2004 Decision was received on April 16, 2004. This pleading constituted both a notice of appeal and an opening brief. GAO’s Brief to the Full Board (opening brief) and Responsive Brief to the Full Board were filed simultaneously on May 7, 2004; Petitioner’s Reply Brief followed on June 1, 2004. The Agency submitted a Reply Brief on June 25, 2004.

<sup>4</sup> See Gaston deposition transcript at 70-72 (Oct. 28, 2003) (GAO Responsive Brief, Attach. F).

Petitioner's Reply Brief argues that she was not allowed to use restored sick leave from September 2003 through March 2004; that GAO should assume the "additional tax liability" resulting from a lump-sum payment of back pay; and that her disability retirement should not be deducted from her back pay award.

GAO counters that Petitioner agreed to use her annual leave to reach retirement eligibility;<sup>5</sup> that the Agency is required to deduct disability payments received by Petitioner from her back pay award; and that there is no basis for GAO to assume Petitioner's "additional tax liability" resulting from her receiving a lump sum award.<sup>6</sup>

Petitioner further notes that although she retired on March 31, 2004, she has not yet received a retirement check.<sup>7</sup> GAO denies intentionally interfering with the Office of Personnel Management's (OPM) processing of Petitioner's retirement forms, claiming that the ongoing back pay dispute prevents resolution of the matter:

The disability retirement annuity payments made to [Petitioner] for almost six years must be deducted from the back pay award and returned to OPM. . . . Until the back pay matter is completed, it appears that [Petitioner] will not receive her retirement annuity checks. GAO has no control over OPM's policies and cannot make an appropriate deduction from the back pay award, if any, until a final decision is rendered.

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<sup>5</sup> Petitioner's argument concerning use of sick leave rather than annual leave to reach her retirement eligibility date is rejected. The September 9, 2003 status conference Order indicated that the Agency would "look into whether Petitioner could retire immediately under GAO's 'early out' authority or utilize annual leave to reach her eligibility date for regular early retirement." The September 30, 2003 Order following the later conference indicated that Petitioner could use "sick and/or annual leave" for that purpose. In the meantime, however, the settlement agreement signed by the parties during the period between the two conferences clearly provided that she would use annual leave until her retirement on March 31, 2004. GAO Response to Order to Show Cause (Jul. 6, 2004), Attach. A.

<sup>6</sup> We agree with the Agency that Petitioner's contentions that her tax liability on back pay should be assumed by GAO and her disability income should not be deducted from her back pay award are clearly without merit and are rejected; in the interest of judicial economy, they will not be addressed in detail. There is no support or authority offered for GAO to assume Petitioner's tax liability. As to disability income, the Final Decision itself (at 26) specified that back pay would be adjusted to account for disability payments. *See also* 5 C.F.R. §550.805(e)(2)(i). Petitioner did not appeal from the Final Decision and is precluded from raising this challenge in the compliance proceedings.

<sup>7</sup> Petitioner's Reply Brief at 3.

GAO's Reply Brief at 3 (citation omitted). This matter has been briefed separately. Our disposition of this compliance appeal removes any barriers that the Agency thought prevented Petitioner's receipt of her annuity<sup>8</sup> as well as her back pay award.

## ANALYSIS

One year ago, on July 18, 2003, this Board issued a Final Decision concluding that the Agency had violated the ADA, by failing to accommodate Petitioner's known disability. The Board found that the failure to accommodate ultimately led Petitioner to resign from employment on the eve of her removal (September 19, 1997) for chronic absenteeism and failure to follow leave restrictions. In reversing the Agency's removal decision, the Board concluded that Petitioner was:

entitled to cancellation of her separation from the Agency. [She] 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. Any entitlement to back pay must be adjusted to account for disability retirement payments received since that time.

Final Decision at 26.

GAO did not appeal that Decision and, indeed, specifically advised Petitioner in a letter dated August 7, 2003 that it had "carefully examined the PAB's decision and will not appeal that decision." Respondent's Compliance Report (Aug. 26, 2003, Attach. A at 1). Since the Agency did not appeal the Board's Final Decision to the Federal Circuit within thirty days of its issuance, that Decision is controlling. *See* 4 C.F.R. §§28.87(f), 28.90(a); 31 U.S.C. §755. Thus, the parties are governed by this Board's conclusion that Petitioner's relief included reinstatement retroactive to her separation and other relief that placed her in the position in which she would have been but for the Agency's failure to accommodate.

### A. Back Pay Entitlement

Upon review of the arguments of the parties, the Board hereby affirms the portion of the March 30, 2004 Opinion and Order concerning back pay. The March 30 Order required full reimbursement for back pay accumulated from the time of Petitioner's separation from GAO through her reinstatement pursuant to the July 18, 2003 Final Decision. As set forth more fully in that Opinion, the Board concludes that Petitioner is entitled to back pay for the entire period.

Petitioner left the Agency as a direct result of the failure to accommodate her known disability. *See* Final Decision at 25-26. We agree with the conclusion of the Administrative Judge that the parties had ample opportunity to pursue all aspects of Petitioner's claim leading up to and during

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<sup>8</sup> It is not clear from the Agency's latest submission (Second Declaration of John A. Bielec, Jul. 20, 2004, at 4 §9), why the annuity has been delayed, especially in light of OPM's view, as stated by GAO, that "mitigation of the back pay had no effect on retirement status."

the four-day hearing.<sup>9</sup> In accordance with Board practice and regulations, the record closed at the conclusion of the evidentiary hearing. *See* 4 C.F.R. §28.63. This is consistent with Personnel Appeals Board practice spanning more than two decades.<sup>10</sup>

Up until the September 2003 status conferences, GAO gave no indication that it sought to deviate from normal Board practice. For example, the Agency’s letter to Petitioner dated August 7, 2003 noted that the Final Decision had reversed GAO’s decision to remove Petitioner and found that she was “entitled to reinstatement retroactive to September 19, 1997 with backpay for the period.” *Id.*, Resp. Compliance Report (Aug. 26, 2003, Attach. A) (emphasis added). The letter further advised Petitioner as follows:

Regardless of whether you return to GAO, you are entitled to backpay for the period September 19, 1997 to July 18, 2003, the date of the PAB decision. Backpay is calculated based on the total gross pay you would have earned if you had remained employed with GAO for the period in question minus any outside earnings; retirement annuity payments (less deductions for life insurance and health premiums); lump sum annual leave payment; and authorized deductions that would have been withheld from your pay including TSP or CSRS retirement deductions; Social Security taxes; Medicare taxes; health benefits; and federal, state and local tax withholding.

*Id.* The letter did alert Petitioner that GAO needed to know about her interim earnings since leaving the Agency, and enclosed a form to be completed to that effect. The form sought no additional information. There was no challenge to Petitioner’s entitlement to back pay.

The Agency’s initial Compliance Report, filed with the Board on August 26, 2003, reiterated the statements made in the August 7, 2003 letter to Petitioner as to the period of eligibility for back pay and method of computation of the award, and went on to state that “[t]he backpay award, even after all deductions are made, will likely be over \$200,000.” Compliance Report at 3. GAO repeated the estimate of back pay in its September 4, 2003 Motion for Clarification,<sup>11</sup>

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<sup>9</sup> A review of the hearing transcript reveals a vigorous litigation approach by two Agency counsel, opposite Petitioner representing herself. The level of counsel preparation and frequency of objections suggest that trial strategy drove the level of record development as to damages and remedy. Such matters are beyond the province of this Board.

<sup>10</sup> The Agency refers to Equal Employment Opportunity Commission (EEOC) practice allowing for bifurcation of liability and relief issues. Bifurcation is not practiced in all EEOC cases; it is left to the discretion of the administrative judge. *See* EEOC, Handbook for Administrative Judges (Jul. 1, 2002), ch. 7, §III G; EEOC, MD-110, ch. 7, §IIID ¶11. Bifurcation was not called for here and is not normal PAB practice, which involves a thorough discovery, hearing and decisionmaking process. Further, in this case GAO only sought bifurcation after the Board’s Final Decision in Petitioner’s favor.

<sup>11</sup> GAO requested clarification of “the time period in which petitioner had or has to exercise her right to return to GAO and whether petitioner’s continuing refusal to accept GAO’s offer may be regarded as a rejection thereof.” Motion at 3 ¶8.

stating that “counsel has advised petitioner on several occasions that her recovery would likely be over \$200,000,” and that “Petitioner clearly understood that she would likely recover over \$200,000, that her acceptance or rejection of reemployment with GAO would have no effect on the back pay calculation and that she would receive credit towards service time and retirement from September 19, 1997, to July 18, 2003.” Motion for Clarification at 2 ¶6.

Petitioner’s own contemporaneous submission to the Board revealed that she took the Agency’s letter and Compliance Report at face value. Thus, her Request for Additional Time to Submit Attorneys’ Fees and Costs and to File Motion for Board’s Review of GAO’s Interpretation of Board’s July 18, 2003 Decision represents that Petitioner’s conversations with Agency counsel revealed that “GAO considers payment of back wages from 1997 to the date of the Board’s decision (less any compensation that I received from OPM or other employment while on disability retirement) and an offer of reemployment sufficient compensation. . . .”

The settlement agreement reached by the parties in September 2003<sup>12</sup> also evidences an understanding that back pay remained an issue of calculation, not entitlement. See Settlement Agreement at 2 (GAO’s Response to Order of Show Cause (Jul. 6, 2004), Attach. A) (“[P]etitioner and GAO will continue to pursue and calculate the back pay entitlement”) (emphasis added). There was no suggestion in the agreement of a pending challenge to entitlement.

Counsel for Respondent represented to Board Member Doheny in the September 9, 2003 status conference that a question had arisen as to Petitioner’s having been “ready, willing and able to work” during the full period after she left GAO. That representation was the impetus for allowing limited discovery<sup>13</sup> following the Final Decision of July 18, 2003. The AJ cautioned Agency counsel that such an inquiry at that stage in the proceedings required clear evidence on which to proceed—the discovery was not to be a fishing expedition. As stated in the Status Conference Report for September 9, Petitioner agreed to be deposed “concerning information relevant to the computation of back pay entitlement.” At the same conference, counsel for the Agency informed Petitioner that the August 2003 letter from GAO, noting the estimate of back pay (\$200,000), could form the basis for a loan application to provide interim financial relief.

The parameters of the limited discovery were clearly spelled out in the Report following the second compliance conference (Sept. 25, 2003). See Status Conf. Report (Sept. 30, 2003) at 2. The Report expressly provided:

The back pay coverage extends from the date Petitioner left GAO in September 1997 until she returned to GAO’s workforce in September 2003.

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<sup>12</sup> The agreement was signed by the parties during the period between the two status conferences: Petitioner signed on Sept. 16, and Agency counsel on Sept. 22 and 24, 2004.

<sup>13</sup> In light of the Agency’s request, the AJ also allowed limited discovery on relief Petitioner sought in addition to back pay.

The matter of resolving back pay relief is bifurcated. From September 1997 until the last date of the hearing in this matter—October 26, 2000—Petitioner’s status as being ready, willing and able to work, has already been determined for the reasons stated in the Board’s July 18, 2003 opinion. As a result, there is to be no discovery regarding back pay due to Petitioner prior to that time.

Respondent and Petitioner have agreed to hold a deposition of Petitioner. . . . The scope of the deposition is limited to discovery relating to two matters. First, Respondent may seek concrete information relating to Petitioner’s being ready, willing and able to work for the period of time subsequent to the hearing in this matter until September 12, 2003. The parties should keep in mind that during this period Petitioner was on Civil Service Disability Retirement and had been adjudged by this Board as being a person with a disability who could perform her job with accommodation. Second, Respondent may seek discovery with regard to relief sought by Petitioner that is in addition to the back pay already awarded by this Board.

Any request for documents submitted to Petitioner by Respondent is to be confined to the two areas of inquiry delineated above.

#### 1. Ready, Willing and Able

GAO challenges the decision of the AJ that Petitioner was ready, willing and able to work throughout the period since she left GAO. Respondent’s argument relies on statements made by Petitioner’s physician as part of her medical documentation in support of Petitioner’s continuation on disability retirement during the pendency of this case. The Agency claims that for at least the period from the spring of 2000 through summer of 2002, Petitioner was not ready, willing and able to work. For this argument GAO relies in part on the notes of Petitioner’s physician, from three dates in the spring of 2000. As the AJ informed Respondent in the Status Conference Report, that period prior to the close of the evidentiary hearing was excluded from the limited discovery allowed post-Final Decision, because the Agency should have developed and pursued that line of inquiry at the hearing. *See* 4 C.F.R. §28.63. We agree with the conclusion that Petitioner’s status as being ready, willing and able to work for the period prior to the close of the hearing had been determined by the Board’s Final Decision of July 18, 2003.

We also agree with the AJ’s conclusion as to the remainder of the period, *i.e.*, the Agency has not established through concrete and positive evidence that Petitioner was not “ready, willing and able” to perform her job for specific periods, and thus, there is no diminution of back pay entitlement due Petitioner on this theory. *See generally* Broida, Guide to MSPB Law & Practice at 3104-05 (2003). For the post-hearing period, GAO cites two notes from Petitioner’s medical records. For June 19, 2002, the notation “[c]ont. chronic fatigue – debilitating” appears on the medical chart. On August 5, 2002, Petitioner’s physician wrote to OPM in support of

Petitioner's continued eligibility for disability retirement. GAO quotes selectively from this document, pointing to the statement that Petitioner's "medical condition is largely unchanged. . . . At this time, my prognosis is for no marked improvement in [Petitioner's] chronic fatigue or sleep problems. . . . It is doubtful, however, that [she] could perform all of the duties of her former government job." GAO Brief at 5.

Taken in full context, the letter to OPM clearly was carefully worded to preserve Petitioner's disability entitlement and is based on the assumption that no suitable accommodation existed for her job with GAO. Thus, the letter concluded:

It is doubtful, however, that [Petitioner] could perform all of the duties of her former government job, especially the requirement that she be able to travel on government business. . . . [B]ecause of the chronic fatigue and sleep problems, I doubt that [Petitioner] could maintain acceptable attendance in any position with a rigid work schedule.

Letter to OPM at 2 (GAO's Brief, Attach. A) (emphasis added). The Agency's application of a rigid work schedule in light of Petitioner's known disability and efforts to seek flexibility underlay the Board's finding of an ADA violation. GAO's selective quotation from this medical document in support of Petitioner's continuation on disability retirement suggests that the Board's conclusion, contained in its July 18, 2003 Final Decision, that the Agency failed to accommodate Petitioner's known disability in this case has yet to be honored by the Agency.

Moreover, in addition to not sufficiently raising an issue as to Petitioner's being ready, willing and able to work, the documentation submitted by the Agency falls squarely within the type of evidence the Supreme Court described in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999). In that case, involving both a claim under the social security disability insurance program (SSDI) and a claim for an ADA violation, the Supreme Court held that "an ADA suit claiming that the plaintiff can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) *without* it." *Id.* at 1602 (emphasis in original). An individual with a disability is not precluded from simultaneously pursuing entitlement to disability benefits and remedies for discrimination under the ADA. Like the social security disability process, the federal disability qualification process is highly fact specific. A disability application and a request for accommodation are not mutually exclusive. As one commentator noted:

For eligible employees, disability retirement is an option when an agency is unable to accommodate the disabling condition. However, an employee is not required to choose between asking for reasonable accommodation and applying for disability retirement. As a matter of law, the actions are not mutually exclusive. However, the employee may be required to explain any factual discrepancies between the two actions.

Hadley, *Guide to Federal Sector EEO Law & Practice* (2002) at 1216 (citing *Cleveland v. Policy Mgmt. Sys.*).

The *amicus* brief for the Government in the *Cleveland* case explained the important public policy considerations involved in allowing an individual to pursue disability benefits and an ADA claim simultaneously:

If the SSA denied benefits to a disabled individual based on speculation that he would prevail in an ADA suit, he would be deprived of financial support for the lengthy period until the suit was resolved. . . . [P]roviding benefits to a disabled person who might be able to return to work if he prevailed in an ADA suit advances the common goal of the Social Security Act and the ADA to facilitate the return of people with disabilities to the work force, . . . by providing vital financial support while the person pursues his remedy under the ADA.

Many ADA cases . . . turn on disputes over reasonable accommodations rather than whether the plaintiffs could work without any accommodations. Any such case is potentially one in which the employee is eligible for disability benefits under the Social Security Act but able to work with reasonable accommodation under the ADA.

Brief for the United States & EEOC at 11-12. These same public policy considerations, including the fact-specific resolution of the ability to work with accommodation, are at play here.

Moreover, the notes submitted by GAO from Petitioner's physician were written to support her continuation on disability while this case was pending. In particular, the OPM letter, considered in its entirety, is written in the context of Petitioner's condition and the Agency's failure to accommodate her condition. Moreover, turning back to Petitioner's retirement application (Resp. Hearing Ex. 83 at 5), Petitioner stated at that time: "My agency has been unable to grant an accommodation for me that would mitigate my absences due to the medical conditions." The supervisor's supporting statement notes that Petitioner's "[u]ncertain availability and frequent use of paid and unpaid leave limited the assignment of significant job responsibilities and placed greater burden of work on other members of assignment team." *Id.* at 7. It further describes the efforts to accommodate her condition as "[l]iberal leave usage approved and flexible starting time authorized at employee's election."<sup>14</sup> *Id.*

Following a thorough review of the record in this case, the full Personnel Appeals Board held that GAO failed to accommodate Petitioner's known disability and that she was entitled to reinstatement. The July 18, 2003 Final Decision found that the Agency's meager efforts at accommodation were not sufficient under the ADA. The evidence the Agency now relies on to

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<sup>14</sup> The record reveals that "flexible starting time" in this case was limited to an enter-on-duty time between 6:00 a.m. and 9:15 a.m. for an employee living outside of Baltimore with a disability that impaired her sleep. *See* Final Decision at 10; R.Ex. 8 at 1.

deny liability for periods of back pay merely repeats the statements needed to sustain Petitioner's disability retirement while this litigation was ongoing. Her doctor's statements are not inconsistent with Petitioner being "ready, willing and able" to work with an accommodation for her disability, as the ADA requires. Accordingly, we affirm the Opinion of the AJ that Petitioner was "ready, willing and able" to work throughout the period in question.

## 2. Duty to Mitigate

The Agency continues to argue that Petitioner failed to exercise her duty to mitigate damages, and, therefore, her entitlement to back pay should be reduced. We agree with the conclusion of the AJ that in the circumstances of this case Petitioner sufficiently met this requirement. In addition, we also believe that GAO went beyond the parameters of the limited discovery order of September 30, 2003 by pursuing this matter over the past ten months and continuing to use this argument as a shield from its obligation to calculate and award the back pay due to Petitioner.

In acceding to GAO's request to conduct limited discovery, the AJ clearly delineated in his September 30 Order (at 2) that "[t]he scope of the deposition is limited to discovery relating to two matters. First, Respondent may seek concrete information relating to Petitioner's being ready, willing and able to work for the period of time subsequent to the hearing in this matter until September 12, 2003. . . . Second, Respondent may seek discovery with regard to relief sought by Petitioner that is in addition to the back pay already awarded by this Board." This limited permission clearly did not encompass discovery as to mitigation.

The Agency had ample opportunity to pursue any question about duty to mitigate during the four-day evidentiary hearing in October 2000; GAO counsel failed even to raise this line of inquiry at that time. The limited discovery authorization in September 2003 did not extend to the duty to mitigate, nor should the Agency's purported indicia of a need to inquire about Petitioner's being "ready, willing and able" to work be used to excuse a belated effort to unravel or curtail back pay liability. Indeed, the AJ's Order of September 30, 2003 required the Agency to award back pay within 60 days, and if there was a dispute as to amount, "to issue a check to Petitioner for the undisputed amount" within that timeframe. Order at 3. GAO's recalcitrance on this issue—maintaining throughout that all back pay entitlement is in dispute despite the Board's July 18, 2003 Final Decision—suggests a reluctance if not a refusal to accept the full consequences of the full Board's decision finding that the Agency had failed to accommodate Petitioner's disability. This approach also has left Petitioner for one year in the position of wondering whether the official communication she received from Agency counsel in August 2003, estimating back pay at more than \$200,000, would ever be honored. For several months, Petitioner and her then-counsel were forced to counter GAO's arguments in this regard. More recently, this continued assertion on the Agency's part has delayed Petitioner's receipt of her regular retirement benefits and placed her in an even more tenuous financial situation. While the Agency exceeded permissible bounds in pursuing this settled question, we nevertheless address the merits of this issue below and conclude that even if this issue were properly raised, in the circumstances of this case Petitioner satisfied her duty to mitigate damages.

As detailed in the March 30, 2004 Opinion on compliance, for financial reasons Petitioner left the Baltimore/Washington commuting area and returned to her hometown in Tennessee a few

months after her separation from the Agency. In the interim, she had unsuccessfully sought work through a temporary agency, applied to borrow from her thrift savings plan, and while waiting, moved back to Tennessee, where she lived with family members. She began receiving a disability annuity only after moving, in early 1998. *See* March 30, 2004 Opinion at 9-11.

Petitioner's current financial state serves to highlight her rationale for retreating to her hometown and its associated lower costs. With disability retirement cancelled because of the Board's July 2003 Decision and the Agency's continued attempts to relitigate back pay entitlement, Petitioner has yet to receive regular retirement benefits to which she became entitled as of March 31, 2004. Under all the circumstances of this case, for the reasons provided in the March 30, 2004 Opinion and Order, we affirm the AJ's conclusion that Petitioner is entitled to full back pay from the date of her termination through her reinstatement to GAO's rolls.

The Agency repeatedly has raised its obligation to the American taxpayer as a potential shield against making the back pay award in this case. The obligation to the American taxpayer, however, includes faithful compliance with the anti-discrimination laws enacted by Congress. Such compliance—rather than efforts to deprive a successful claimant of her remedy when discrimination has been established—is what ultimately serves to protect the public purse.

### 3. Appropriate Band Level

Petitioner argues that her back pay award should be computed as if she had obtained a promotion to the Band II level during the period she was away from GAO. The Agency is correct that because such a promotion is discretionary, there is no basis for the Board to award back pay at the higher level. Petitioner has not established either a statutory mandate or facts clearly showing that she would have been promoted absent the Agency's unlawful action in this case. As the Federal Circuit has noted, "[o]nly if some provision of law mandates a promotion during the interim period, or perhaps if the employee could 'clearly establish' that he would in fact have been promoted, would the agency be required to reinstate him at that higher level." *Boese v. Department of Air Force*, 784 F.2d 388, 390 (Fed. Cir. 1986). Under that standard, Petitioner's back pay is properly premised upon her Band I status. *See also Walker v. Department of Army*, 90 MSPR 136, 145-46 (2001).

### 4. Annuity and Back Pay Calculations

Since Petitioner officially left GAO's rolls on March 31, 2004, the continued dispute by the Agency as to back pay liability has resulted in delay in Petitioner's obtaining a regular annuity from OPM. We agree with the conclusion of the AJ that as of the date of the compliance Opinion and Order (Mar. 30, 2004), the Agency had evidenced substantial compliance with OPM's regulations concerning calculation of gross back pay and deductions. *See* 5 C.F.R. §550.805. Petitioner's challenges to the calculations were not supported; she did not establish that the Agency had improperly arrived at its figures. Accordingly, we affirm the AJ's conclusion that the gross pay for the period between September 19, 1997 and July 18, 2003 is \$377,094.34 and the total deductions as determined by GAO are \$297,219.15.

In the last several weeks, under pressure from the Board to explain why it should not be found in breach of the Board's Final Decision of July 18, 2003, GAO has been discussing with OPM various offset arrangements and contingencies so that Petitioner's retirement payments could commence. In response to the Board's July 13, 2004 Order requiring GAO to present an updated and detailed report on its efforts to secure Petitioner's annuity, the Agency stated that it had made an arrangement with OPM. Pursuant to that arrangement, OPM would subtract an amount (not disclosed in GAO's pleading) from Petitioner's monthly annuity as a means of recouping the disability monies paid to Petitioner. GAO is liable for repaying OPM these monies because the Board's decision found the Agency in violation of the ADA. Since the \$297,219.15 deductions figure already includes the disability retirement payments made to Petitioner, any monies deducted from her pension for this purpose are to be restored to the net back pay award we have ordered. Finally, the back pay award is to be adjusted to include interest for the additional time since the calculations were made.

#### B. Compensatory Damages

In his March 30, 2004 Opinion and Order, the AJ awarded Petitioner \$5,000 in compensatory damages. Upon review of that decision, we affirm the award as set forth by the Administrative Judge. We agree that compensatory damages are available against GAO for violations of the ADA through the broad language of 42 U.S.C. §2000e-16, as interpreted by the Supreme Court in *West v. Gibson*, 527 U.S. 212, 217 (1999). In this case, the Petition for Review placed the Agency on notice that she sought \$100,000 and that she was alleging that stress had resulted from her employment situation. In light of Petitioner's *pro se* status, this was sufficient to place the Agency on notice that she sought compensatory damages.

We also agree with the AJ's analysis of the evidence of damages in this instance. While the record on this issue was not extensive, there was sufficient testimony and documentary support for a nominal award to compensate for the Agency's actions that were demeaning, stress-inducing, and damaging to Petitioner's reputation. *See* March 30, 2004 Opinion and Order at 22-26. In her appeal, Petitioner argues that an award of \$100,000 would not be excessive. The record in this case simply does not support such an award. Based upon our review of the record, and consideration of the arguments of the parties, we affirm the Administrative Judge's determination to award Petitioner \$5,000 in compensatory damages for the Agency's failure to accommodate.<sup>15</sup>

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<sup>15</sup> In a footnote on compensatory damages, GAO challenges the AJ's conclusion that reimbursement for the periods of the suspensions in 1996 was an appropriate part of the make-whole relief in this case. We agree with the AJ that the three-day and 14-day suspensions constituted inappropriate discipline imposed on Petitioner while she was seeking accommodation; these very actions formed the predicate for the unlawful removal action. This conclusion complies with the Board's order of July 18, 2003 directing that the Agency provide such relief as necessary to restore Petitioner to the status quo had it not failed to accommodate.

## **CONCLUSION**

The compliance decision of March 30, 2004 is hereby **affirmed**. Accordingly, GAO is **ordered** to pay back pay and interest for the period between termination and reinstatement in accordance with the findings of this Board. In addition, as previously determined by the Administrative Judge, the Agency 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. GAO is required to make payment within 20 days from the date of this Order. At the same time, GAO must file with the Board and serve on Petitioner a compliance report showing that it has taken the action required. *See* 4 C.F.R. §28.88.

Because of the ongoing difficulty in Petitioner's obtaining her retirement annuity, GAO must file a specific compliance report within 10 days of issuance of this decision, detailing the further steps it has taken to facilitate this process through OPM. That report is to contain the date upon which Petitioner can expect to receive her regular monthly annuity check as well as the date upon which she can expect to receive a check for her annuity between March 31, 2004 and the date her regular monthly annuity commences.

Finally, the stay of the attorney's fees request, imposed at the request of GAO, is hereby lifted. In accordance with the Board's regulations, the Agency has twenty days from the date of issuance of this decision to file its response to the fee request filed by Petitioner's former counsel on April 8, 2004. *See* 4 C.F.R. §28.89.

**SO ORDERED.**