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Mauro Dybvik 2800 Spy Glass Drive Chaska, MN 55318 Complainant	)	
and	)	EEOC No(s).:443-07-00075X Agency No(s).:1E-554-0025-06
John E. Potter, Postmaster General, United States Postal Service Agency	)	

ORDER ENTERING JUDGMENT

For the reasons set forth in the enclosed Decision dated January 7, 2008, judgment in the above-captioned matter is hereby entered. A Notice To The Parties explaining their appeal rights is attached.

This office is also enclosing a copy of the hearing decision and/or transcripts for the agency and a copy for complainant and/or his/her representative. The complete investigative file is enclosed.

It is so ORDERED.

Cheryl Kramer
Administrative Judge

For the Commission:

January 8, 2008
Date

Enclosures

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing decision and/or transcripts within five (5) calendar days after the date they were sent via first class mail. I certify that on January 8, 2008, the foregoing copy of the decision and/or transcripts were sent via first class mail to the following:

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Complainant	)	
and	)	EEOC No. 443-07-00075X Agency No. 1-E-554-0025-06
John E. Potter, Postmaster General, U.S. Postal Service	)	
Agency	)	

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ADMINISTRATIVE JUDGE:

Cheryl Kramer
Administrative Judge- EEOC
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I. STATEMENT OF THE CASE

Pursuant to 29 C.F.R. 1614.109 of the Commission's regulations, a hearing was held on a complaint filed by Mauro Dybvik against the United States Postal Service.

Mr. Dybvik will hereinafter be referred to as the Complainant. The United States Postal Service will be referred to as the Agency.

Eight witnesses testified at the hearing held on August 28, 2007. The Complainant offered exhibits one through ten and the Agency offered exhibits 11 through 13. All exhibits were admitted into evidence.

II. ISSUES

Whether Complainant was discriminated against on the basis of his disability (diabetes) when on September 8, 2006, he was reprimanded for being away from his machine when he went to obtain insulin and on September 20, 2006, he received a negative evaluation and was not reappointed to a casual appointment.

III. FINDINGS OF FACT

A preponderance of the evidence establishes the following facts.

1. Complainant began his employment with the Agency in December 2005, as a casual mail handler. Complainant worked from December 5, 2005, to December 23, 2005, at the Metro Hub.
2. Complainant was diagnosed with diabetes mellitus type I at the age of nine. He frequently needs to inject himself with insulin to control his blood sugar levels. *Complainant's Exhibit 1; H.T. p. 27.*
3. Before starting at the Metro Hub, Complainant notified management that he had diabetes. He indicated he had diabetes on the medical questionnaire. *Exhibit 13.* Subsequently he provided a doctor's statement also providing that he had diabetes. The women who took the form told Complainant and his father, who also worked for the Agency, that she would put it in his file. *H.T. p. 37-40, 147; Exhibit 1.*
4. While working at the Metro hub, Complainant checked his blood sugar and administered insulin when necessary. *H.T. p. 40.*
5. On December 21, 2005, an evaluation was completed on Complainant. Of ratings excellent, very good, good, fair and unsatisfactory, Complainant was rated very good on attendance, productivity, and accuracy. On behavior and attitude, he received a rating between very good and good. Complainant was recommended for a career position. *Complainant's Exhibit 2.*
6. Complainant was again hired as a casual employee in June 2006. Before he started his employment, Complainant and his father met with Manager of Distribution Operations Roy Oscarson and showed him Complainant's evaluation from his prior casual appointment and the doctor's statement providing Complainant was a diabetic.

Oscarson stated he would notify the supervisors. *H.T. p. 43-46, 107; 151-53; Exhibit 1.*

7. On June 24, 2006, Complainant again began employment with the Agency as a casual employee, this time loading and sweeping DBCS machines on second floor automation at the Minneapolis main post office. While two employees worked on the machine, frequently one person could operate the machine alone. *H.T. p. 19-20.*

8. Complainant had two weeks of training. His trainers informed him that he could leave the machine to go to the bathroom or get a drink. *H.T. p. 22.* It was customary for one person to operate the machine alone when the second employee working the machine took a break. *H.T. p. 132-33; 160.*

9. Complainant and other employees took unscheduled and assigned breaks from the machine. When Complainant needed to check his blood sugar level, administer insulin, go to the bathroom or get a drink, he asked his partner to leave the machine. No partner complained when he asked to leave the machine. *H.T. p. 22-25.*

10. Because Complainant worked the night shift in 2006, his blood sugar levels were more unbalanced. He administered insulin on his two breaks and in addition needed to check his blood sugar levels approximately twice per night when he felt his blood sugar levels were unbalanced. Complainant knew his levels were unbalanced when he needed to frequently urinate, had blurred vision, leg cramps, shortness of breath or difficulty understanding. To test his blood, which took approximately three minutes, Complainant kept a kit in his locker located at the west end close to where he worked. *H.T. p. 29-32.*

11. On August 21, 2006, Supervisor Greg Packer recommended that Complainant not be reappointed as a casual employee. *ROI Exhibit 4.*

12. In mid to late August, Complainant's work location was switched from the west end to the east end. *H.T. p.190-91.*

13. On August 30, 2006, Dr. Criego wrote that Complainant has type 1 diabetes and required frequent visits over the next 2 to 3 months and that any absences should be excused. *ROI Exhibit 7.*

14. On August 31, 2006, Packer evaluated Complainant. Possible ratings were excellent, very good, good, fair and unsatisfactory. Complainant was rated unsatisfactory on productivity. He was rated fair on behavior and attitude and good on attendance and accuracy. Under the comments section of the evaluation, Packer noted that "employee wanders away from assignments." He was not recommended for a career position. *ROI Exhibit 5.*

15. On September 8, 2006, Complainant was assigned on the east end. He asked his co-worker to leave the machine to check his insulin when his blood sugar was high because he was urinating frequently and drinking a lot of water. His co-worker had no objection. Complainant traveled from the east end to his locker on the west end and then to his car on the third floor to get his insulin. On his way back to the east end, Supervisor Charles Meier asked where he had been. Complainant told him he was a diabetic and had to get his insulin because his blood sugar was high. Meier took Complainant to the office for a job discussion and told him he'd been gone about a half hour. Meier told Complainant to stop leaving the machine and wandering around. Complainant explained that he was trying to correct his sugar levels, not wandering around. *H.T. p. 51-52, 128-29, 182-83, 266-68.*

16. Complainant went to Supervisor Eileen Jones-Thomas to explain the situation. She told him to obtain a doctor's note. When he said he had already submitted a doctor's statement, she told him to "save [his] butt." Later that day, Meier also told Complainant that he should submit documentation regarding his diabetes. *H.T. p. 53, 269.*

17. On September 14, 2007, Complainant submitted a doctor's statement to Greg Packer providing that he was attempting to get his diabetes under control and must adhere to a schedule. Complainant was to eat and test his insulin at 3:00 a.m. and 7:00 a.m. Dr. Criego also requested that Complainant be allowed to perform a blood test when he feels low or strange. *Exhibit 6; H.T. p. 53, 300.*

18. Complainant was allowed to take breaks to accommodate his diabetes.

19. Around September 18, 2006, Complainant was notified that his casual appointment would expire on September 21, 2006.

20. On September 21, 2006, the last day of Complainant's employment with the Agency, he and his dad met with Greg Packer to discuss the negative performance evaluation referring to Complainant's "wandering." It was explained to Packer that breaks were needed to accommodate Complainant's disability and the evaluation was in error. *H.T. p. 69-70.*

III. PRINCIPLES OF LAW

The law governing this case Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 et. seq. Under the Commission's regulations, an agency is required to make reasonable accommodation of the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. § 1630.2(o) and (p).

In order to determine whether Complainant is entitled to a reasonable accommodation, one must first analyze whether complainant is an "individual with a disability" within the meaning of the Rehabilitation Act. An "individual with a disability" is one who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Sitting, standing, lifting, and reaching are also recognized as major life activities. *See* Interpretive Guidance on Title I of the Americans With Disabilities Act, Appendix to 29 C.F.R. § 1630.2(i); *see also Haygood v. United States Postal Service*, EEOC Appeal No. 01976371 (April 25, 2000); *Selix v. United States Postal Service*, EEOC Appeal No. 01970153 (March 16, 2000).

An impairment is substantially limiting when it prevents an individual from performing a major life activity or when it significantly restricts the condition, manner or duration under which an individual can perform a major life activity. 29 C.F.R. § 1630.2(j). The individual's ability to perform the major life activity must be restricted as compared to the ability of the average person in the general population to perform the activity. *Id.*

Determinations regarding whether a complainant is an individual with a disability must be made on a case-by-case basis. *See Bragdon v. Abbott*, 524 U.S. 624, 641-642 (1998). Therefore, complainant cannot be considered an individual with a disability per se, simply because he has been diagnosed with a certain condition. *See Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 565-566 (1999) (requiring analysis of substantial limitation for individual with monocular vision); *Murphy v. United Parcel Service*, 527 U.S. 516, 521-523 (1999) (requiring analysis of substantial limitation for individual diagnosed with severe hypertension); *Sutton v. United Airlines*, 527 U.S. 471, 483 (1999) (requiring analysis of substantial limitation for two individuals who were legally blind without corrective lenses). The Supreme Court prefers to take an individualized approach when determining whether a person with diabetes qualifies as a person with a disability. *Branham v. Snow*, 392 F.3d 896 (7th Cir. 2004).

In cases where the Commission has found a substantially limiting impairment, the diabetes itself has caused debilitating complications; medication has not successfully controlled the condition; or the regimen involved with monitoring and controlling the condition itself imposes a substantial limitation. See *Ortiz v. Social Security Administration*, EEOC Appeal No. 01990911 (January 19, 2001), request for reconsideration denied, EEOC Request No. 05A10357 (May 3, 2002).

IV. ANALYSIS

Complainant has a substantial limitation of the major life activity of eating and the regimen involved with monitoring and controlling diabetes also imposes a substantial limitation.

Complainant was diagnosed with Mellitus Type I diabetes at age nine. His diabetes regimen is perpetual, severely restrictive, and highly demanding. He has to draw blood to test and monitor his blood sugar levels at least five times per day which takes approximately three minutes to complete. However, because his blood sugar levels frequently are too high or too low, he checks his blood sugar levels more frequently than five times per day. *Complainant's Exhibit 1; H.T. p. 27-28.*

When Complainant's blood sugar is too high he has blurred vision, leg cramps making it difficult to walk, shortness of breath, his heart beats fast, his ears pop or frequently urination. Complainant's vision blurred while working at the Agency at least two times per week. He had leg cramps once while working at the Agency. When his blood sugar is too low, he lacks energy, shakes and is jittery and cannot concentrate. When his blood sugar level is too high he injects insulin in the stomach or leg using a needle five times per day. When his blood sugar is too low, he requires candy. Complainant must always monitor what he eats and how it affects his blood sugar. *Complainant's Exhibit 1; H.T. p. 30-31, 56-58, 109, 111, 129-30.* Complainant is significantly restricted as to the manner in which he can eat as compared to the average person in the general population.

Complainant has shown that he has an impairment that substantially limits the major life activity of eating and of caring for oneself. Constant monitoring of his blood sugar level, in combination with the symptoms should the blood sugar level be high or low in addition to maintaining and constantly monitoring his diet, impose a substantial limitation of a major life activity.

See *Lewis v. Dept. of Defense*, EEOC No. 01A24984, (Aug 09, 2004), request for reconsideration denied, EEOC Request No. 05A50076 (Feb. 9, 2005) (Complainant's diabetes was a substantial limitation of a major life activity when he had to adhere to a very strict diet, take medication, and eat small meals throughout the day in accordance with his insulin therapy); *Jambora v. USPS,* EEOC No. 07A40128 (May 16, 2006) (an eating impairment will consider changes or disruptions to Complainant's daily activities relating to the regimen involved with monitoring and controlling the condition). The Seventh Circuit has also held that diabetes substantially limits the major life activity of eating (*Branham*, 392 F.3d at 904) and the major life activity of thinking and caring for oneself. *Nawrot v. CPC Intern,* 277 F.3d 896 (7th Cir. 2002).

A qualified individual with a disability is one who has the skill, experience, education, and other job-related requirements of the position in question, and who, with or without reasonable accommodation, can perform the essential functions of the position. 29 C.F.R. 1630.2(m). Complainant is a qualified individual with a disability when allowed to control his diabetes with insulin or sugar. *H.T. p. 71, 296.*

Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. *Lawlor v. USPS*, EEOC No. 01991164 (Aug. 26, 2002). The employee must show a nexus between the disabling condition and the requested accommodation. *See Wiggins v. United States Postal Service,* EEOC Appeal No. 01953715 (April 22, 1997).

Complainant argued that the Agency was aware of his disability on his first day of his employment in 2005. Before starting at the Metro Hub in December 2005, Complainant checked diabetes on the medical questionnaire and provided a doctor's statement for his file. *H.T. p. 37-40, 147; Exhibit 1, 13.* Before Complainant began his casual appointment in June 2006, he and his father showed Manager of Distribution Operations Roy Oscarson the doctor's statement providing that Complainant was a diabetic. Oscarson said he would notify the supervisors. *H.T. p. 43-46, 107; 151-53; Exhibit 1.*

Regardless of whether the Agency knew or should have known of Complainant's diabetes when he first began his casual appointment, there is no argument that as of September 8, 2006, when Meier questioned Complainant's whereabouts and Complainant informed Meier he needed to administer insulin because he was a diabetic and days later on September 14, 2006, when Complainant submitted another doctor's statement, the Agency had knowledge of his disability. The Agency argued, and Complainant admitted, that after September 8, 2006, he was permitted to check his blood sugar levels when needed. *H.T. p. 244-45, 280-81, 300.* However, any alleged "accommodation" made by the Agency was ineffective when Complainant was given a performance appraisal based on the false assessment that he was wandering from his work site.

The Agency had a duty to accommodate Complainant's disability after September 8, 2006, and reevaluate his performance since the negative performance appraisal was based on Complainant's need to check his blood sugar levels. In addition to the unsatisfactory rating on productivity, in the comment section Packer noted that "employee wanders away from

assignments." He was not recommended for rehire. *ROI Exhibit 5.*

The Agency argued that it had no duty to reevaluate Complainant once aware of his disability because he was not a productive accurate worker. *H.T. p. 202.* The Agency argued that Complainant wandered away from the machine for over one hour and made numerous errors. *H.T. p. 175-76, 180-81; 198-99, 209-10, 217.* However, Complainant credibly testified that he only took unscheduled breaks up to 15 minutes to monitor his diabetes. *H.T. p. 61-62.* He never took breaks up to a half hour or hour. Because it was common practice to take breaks after consulting with the partner on the machine, he took breaks without notifying supervisors as did other employees. *H.T. p. 22-23, 25, 132, 196.* Complainant credibly testified that he never took a break to administer insulin and then a second break. *H.T. p. 119.*

Co-worker Johnson, who worked with Complainant a few times and observed him on other machines, corroborated Complainant's testimony. He testified that he never saw or heard about Complainant wandering from his work station. *H.T. p. 133-34; 140.*

Complainant adequately explained the reason supervisors believed he engaged in extensive wandering from the machine. Complainant had a myriad of supervisors. When one supervisor told him to report to another area, the other supervisors were not notified and believed him to be "wandering" the Agency. *H.T. p. 99-100.* Because Complainant took unscheduled breaks for his diabetes, the number and length of the breaks was exaggerated. The Agency testified that he took breaks up to one and a half hours and that he was talked to about these breaks. *H.T. p. 211, 217, 218, 239.* To the contrary, before September 8, 2006, no supervisor spoke to him about wandering away from the machine. *H.T. p. 63.*

Complainant credibly testified that no one told him his performance was lacking or that he was not doing a good job. Supervisors told him how to correct mistakes, but no one said his performance was inferior. To the contrary, employees said he was doing a good job. *H.T. p. 26, 123.*

Co-worker Johnson also testified there was no problem with Complainant' performance. He was accurate and conscientious and his performance was superior to that of some casual employees. *H.T. p. 133-34, 140.* It is not burdensome for a co-worker to go and check his blood sugar. *H.T. p. 142.*

The Agency also argued that even ignoring Complainant's wandering, he would not have been recommended for rehire. *H.T. p. 206, 239, 274-75.* The performance evaluation renders that argument meritless. Complainant received only one unsatisfactory on productivity. Jones testified that Complainant had a productivity problem because he wandered from the machine. *H.T. p. 96.* More importantly the comment on the bottom of the evaluation is telling. It provides, "employee wanders away from assignments." Packer's testimony that lack of productivity weighed greater than the comment on wandering cannot be separated. *H.T. p. 250.* Again, Jones testified that Complainant had a productivity problem because he wandered from the machine and Packer admitted they go hand in hand. *H.T. p. 250.* Therefore, Complainant's unsatisfactory on productivity was directly related the breaks he took to administer insulin or check his blood sugar.

Meier's testimony also sheds light on the Agency's opinion of diabetes. Meier testified that when he confronted Complainant on September 8, 2006, about disappearing from the machine he told Complainant the job discussion had nothing to do with his diabetes but from his wandering. *H.T. p. 269-70.* Again, at this point Meier knew Complainant had gone to check his blood sugar. Even so Meier claimed the discussion had nothing to do with Complainant's diabetes.

Complainant admitted he made errors in getting the mail out of sequence or misplacing it. *H.T. p. 92-93.* His disability affected his job when he had visual problems and needed to excuse himself to check his blood sugar. *H.T. p. 296.* However, his negative evaluation was mainly based on his productivity or "wandering."

Supervisor Greg Packer testified that accuracy on the performance evaluation is defined by machine errors. *H.T. p. 237.* Nonetheless, the Agency found no fault with Complainant's accuracy, which was rated good on his performance evaluation. *Exhibit 4.*

Jones' testimony that Complainant should have been rated unsatisfactory on accuracy, rather than good, was suspect. *H.T. p. 185-86.* Packer admitted that he originally rated Complainant fair on accuracy. After speaking with Jones and Meier, the rating on accuracy went up. *H.T. p. 255.* If Jones' testimony that Complainant had frequent machine errors is to be believed, she would have convinced Packer to rate him lower, not higher, when they discussed his performance.

Further, Agency testimony is contradictory as to why Complainant was sent from the west end to the east end. Jones testified that Complainant was switched to the east end because the pace was slower. *H.T. p. 109-91.* Meier testified to the contrary that Complainant was sent to the east end to monitor his wandering from the machine. *H.T. p. 264-65.* Again the Agency's argument that Complainant was a poor performer in general is discredited.

The Agency also argued Complainant's performance was poor because he was tired from working and going to school. *Agency Closing Brief p. 9.* However, Complainant started working as a casual employee in June 2006, and did not begin school until September 2, 2006. *H.T. p. 301.* Therefore, the majority of time he worked for the Agency he was not in school.

When Complainant met with Packer on his last day of employment to explain that the negative performance appraisal was related to his disability and need to take breaks, there should have been interactive communication at the least. As instructed, Complainant submitted a doctor's statement to Greg Packer on September 14, 2007, providing that he be allowed to eat and test his insulin at 3:00 a.m. and 7:00 a.m. and perform a blood test if he feels low or strange. *Exhibit 6; H.T. p. 53, 300.* Packer testified to the contrary that Complainant never submitted a doctor's note to him, instead stating that Jones was dealing with the situation. *H.T. p. 282-83.*

Packer testified that he followed the five steps to the best of his ability, but after September 8, 2006, never checked with human resources and let Jones deal with the issue. *H.T. p. 282-283.* Jones testified to the contrary that she no longer supervised Complainant after September 8, 2006. *H.T. p. 193.* Further, Jones never reviewed the Agency's reasonable accommodation

process and was unaware of the five step process to evaluate an accommodation for a disability. *H.T. p. 204; Exhibit 9.* Instead of communicating with Complainant to discuss how the poor evaluation was related to Complainant's disability, the Agency did nothing. The Agency failed to engage in the interactive process required for reasonable accommodation.

The Agency argued it had no duty to reduce performance standards and cites to cases involving alcoholic petitioners who asked the Agency to ignore their behavior and misconduct. *Agency's Closing Brief p. 11.* These cases are distinguished from the instant case. Complainant is not asking the Agency to ignore misconduct. As accommodation he asked the Agency to exclude negative references on his performance evaluation related to monitoring his diabetes.

The instant case is more in line with *Olison v. Dept. of Veterans Affairs*, EEOC Appeal No. 07A40001 (April 28, 2005). In *Olison* the AJ found, and the agency agreed with the AJ's decision, that the agency provided complainant with a reasonable accommodation when it granted complainant's requests for intermittent leave, sick, annual, and LWOP; but then rendered its reasonable accommodation ineffective when it disciplined her for using the reasonable accommodation, treating her as a sick leave "abuser." *Id.* Similarly, the Agency's accommodation was ineffective when Complainant was not recommended for rehire for leaving the machine to monitor his diabetes and the Agency presented no evidence of undue hardship. Therefore, it is concluded that the agency failed to provide complainant with a reasonable accommodation.

V. CONCLUSIONS OF LAW

In conclusion, complainant having shown that the Agency's alleged "accommodation" was ineffectual, it must be concluded that he was discriminated against on the basis of his disability when on September 8, 2006, he was reprimanded for being away from his machine when he went to obtain insulin and on September 20, 2006, he received a negative evaluation and was not reappointed to a casual appointment.

VI. REMEDY

A. BACKPAY, REINSTATEMENT & ACCOMMODATION

It is recommended that complainant be reappointed to a casual position. Complainant should be and awarded back pay pursuant to 29 C.F.R. 1614.501(c), from the time he would have been reappointed as a casual employee to the expiration of the casual appointment.1 The agency shall

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1 The person who has been discriminated against must receive a sum of money equal to what would have been earned by that person in the employment lost through discrimination (gross back pay) less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted (net interim earnings). H.T. p. 71-74. The difference between gross back pay and net interim earnings is net back pay due. Net back pay accrues from the date of discrimination, except where the statute limits recovery, until the discrimination against the individual has been remedied. Payne v. Dept. of Veterans Affairs, EEOC Appeal No. 01A42405 (Aug. 24, 2004).

determine whether absent discrimination, complainant would have been hired as a casual worker subsequently, and if so, compute back pay for these periods as well. *Gill v. USPS*, EEOC Appeal No. 01A12899 (Sept. 24, 2002).2

In addition, the Agency shall cancel the performance evaluation dated August 31, 2006, and expunge any adverse materials relating to it in accordance with 29 C.F.R. 1614.501(c) (3) & (4).

It is recommended that the Agency engage in an interactive process with complainant and reasonably accommodate his need to monitor his blood sugar levels.

B. COMPENSATORY DAMAGES

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes a claim of unlawful discrimination may receive, in addition to equitable remedies, compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and nonpecuniary losses (e.g. pain and suffering, mental anguish). *Damiano v. United States Postal Service*, Request No. 05980311 (December 16, 1997); *Kelly v. Department of Veterans Affairs*, Appeal No. 0951729 (July 29, 1998).

1. Causation

To receive an award of compensatory damages a Complainant must demonstrate that he or she has been harmed as a result of the agency's discriminatory action. *Wilson v. Widnal, Secretary, Dept. of the Air Force*, EEOC No. 01955269, 97 FEOR 3208 (July 29, 1997).

The record contained sufficient evidence to establish a causal relationship between the Agency's failure to accommodate Complainant and his anxiety. Complainant testified that the failure to be rehired caused him to become upset, and cry. *H.T. p. 76-77.* He had trouble sleeping, anxiety attacks almost every night, did not eat and was embarrassed for his father who worked at the Agency. *H.T. p. p. 79.* After problems at home and being kicked out of the house, he went to counseling. On December 23 and December 28, 2006, Complainant saw a psychiatrist regarding the Agency's negative performance evaluation and failure to reappoint him. *Complainant's H.T. p.76-77.*

2. Non-pecuniary Damages

Damages for non-pecuniary losses should reflect the extent to which the Agency directly or proximately caused the harm and the nature and severity of the harm. *Rountree v. Glickman, Secretary, Dept. of Agriculture*, EEOC No. 01941906, 95 FEOR 3223 (July 7, 1995).

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2 The Agency argued that it could only retain seven out of twenty casual employees. *H.T. p. 251.* However, the Agency failed to show by clear and convincing evidence that Complainant would not have been reappointed as a casual employee even absent discrimination. 29 C.F.R. 1614.501(c).

Having determined that complainant proved he suffered anxiety causally connected to the agency's action, the amount of compensatory damages to be awarded for that harm must be determined. The amount of a compensatory damage award is limited to the sums necessary to compensate complainant for the actual harm caused by the agency's discriminatory action and should take into account the severity of the harm and the length of time that the injured party has suffered the harm. *Jackson v. United States Postal Service*, EEOC Appeal No. 01972555 (April 15, 1999).

The type of objective evidence which may be used in assessing the merits of a request for compensatory damages includes statements from the complainant concerning her emotional distress and statements from others, including family members, friends and health-care providers who could address any outward manifestations or physical consequences of emotional distress. Other objective evidence would include documents showing out-of-pocket expenses related to the injury. *Carle v. Department of the Navy*, EEOC Request No. 05900795 (Aug. 23, 1990).

The commission noted that for a proper award of nonpecuniary damages, the amount of the award should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. *Jackson v. United States Postal Service*, EEOC Appeal No. 01972555 (April 15, 1999); *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989).

See Yonker v. Dept. of Transportation, EEOC No. 01A05979 (January 9, 2001) (Commission awarded $6500 when many of complainant's injuries were only partially caused by the reprisals); *See Jackson v. United State Postal Service*, Appeal No. 01972555 (April 15, 1999) (non-pecuniary damages reduced to $30,000 when strong piercing racial statements permeated the atmosphere of the facility and complainant presented evidence from physicians, family members and friends concerning physical and emotional harm including anxiety, embarrassment, weight gain and humiliation, depression, high blood pressure, fatigue, sleeplessness, and forgetfulness sustained as a direct result of racial harassment); *Weatherspoon v. United States Dept. of Agriculture*, EEOC Appeal No. 01966395 (March 4, 1999) (appellant entitled to non-pecuniary damages in the amount of $1000 when she testified that she experienced headaches, an upset stomach, became distrustful, withdrawn and defensive but did not seek treatment nor present any supporting evidence); *Erving v. Dept. of the Army,* EEOC Appeal No. 01961314 (January 8, 1999) (given the scant amount of evidence concerning appellant's emotional harm, the Commission concluded that appellant was entitled to non-pecuniary damages in the amount of $2000); *White v. Dept. of Veterans Affairs*, EEOC Appeal No. 0950342 (June 13, 1997) ($5000 was an appropriate award of nonpecuniary damages when the evidence submitted was sparse but included a statement from a psychologist stating that appellant's treatment at work caused him to suffer anxiety, depression, emotional fatigue and insomnia); *DeMeuse v. United States Postal Service*, EEOC Appeal No. 01950324 (May 22, 1997) ($1500 was a reasonable award when complainant experienced embarrassment and humiliation when his supervisor frisked him for no apparent reason); *Mullins v. United States Postal Service*, EEOC Appeal No. 01954362 (May 22, 1997) ($10,000 awarded where evidence established that complainant's depression which included features of helplessness, loss of concentration, poor memory, anxiety, attention, difficulty with trust, paranoia, low self-esteem, withdrawn behavior, loss of initiative and hostility was directly related to emotional damage complainant suffered as a result of sexual

harassment and reprisal).

In *Lawrence v. United States Postal Service*, EEOC Appeal No. 01952288 (April 18, 1996), the commission stated that neither evidence from a health-care provider nor expert testimony in general is a mandatory prerequisite for recovery of compensatory damages for mental or emotional distress. It emphasized however, that the absence of supporting evidence may affect the amount of nonpecuniary damages deemed appropriate in specific cases. In *Lawrence*, the Commission authorized an award of $3000 in compensatory damages for emotional harm where appellant averred that she suffered from weight loss, nausea, stomach problems and headaches as a result of sexual harassment. *Id.*

Given complainant's credible testimony of anxiety as a result of the failure to accommodate and his two visits at a psychiatrist, but his sparse testimony of the physical manifestations of the anxiety and sparse supporting medical documentation, it is recommended that complainant receive $3000 in non-pecuniary damages. In reaching this amount, I considered the nature and severity of the discrimination, as well as the nature and severity of complainant's emotional pain and suffering, and the scant amount of evidence concerning complainant's emotional harm and related symptoms.

C. ATTORNEY'S FEES

Complainant filed a Memorandum in Support of Complainant's Fee Petition on December 12, 2007. On January 4, 2007, the Agency notified me that the parties agreed to reduce Complainant's attorney fees by $1,000, to $28,208.75. *See Agency's letter dated January 4, 2008).* Therefore, Complainant is awarded attorney fees in the amount of $28,208.75.

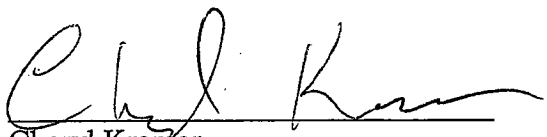
D. OTHER REMEDIES

It is recommended that the Agency provide EEO training for all employees on disability discrimination. The training shall be mandatory and conducted by a qualified trainer familiar with EEO instruction.

It is also recommended that Agency officials be notified not to retaliate against Complainant when he is reappointed to a casual position. *Complainant's Closing Brief p. 10.*

It is recommended that the Agency post at its Minneapolis, Minnesota facility copies of the attached Notice. Copies of the Notice, after being signed by the Agency's duly authorized representative, should be posted by the Agency immediately upon receipt, and be maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily placed. The Agency should take reasonable steps to ensure that the Notices remain visible to employees during all of the time that they are posted.

Signed and dated this 7th day of January 2008.



Cheryl Kramer
Administrative Judge

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
An Agency of the United States Government

This Notice is posted pursuant to an Order dated by the United States Equal Employment Opportunity Commission (EEOC) which found that a violation of **Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 et. seq.** has occurred at this facility.

Federal Law requires that there be no discrimination against any employee or applicant for employment because of the person's DISABILITY, RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN OR AGE with respect to hiring, firing, promotion, compensation or other terms, conditions or privileges of employment. Title VII also prohibits retaliation against an employee because the employee participated in EEO activities.

The United States Post Office supports and will comply with such Federal law and not take action against individuals because they have exercised their rights under law.

The United States Post Office will ensure that management officials will abide by the requirements of all federal equal employment opportunity laws.

The United States Post Office will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, Federal equal employment opportunity law.

Date Posted: _____

Posting Expires: _____

29 C.F.R. Part 1614

NOTICE TO THE PARTIES

TO THE AGENCY:

Within forty (40) days of receiving this decision and the hearing record, you are required to issue a final order notifying the complainant whether or not you will fully implement this decision. You should also send a copy of your final order to the Administrative Judge.

Your final order must contain a notice of the complainant's right to appeal to the Office of Federal Operations, the right to file a civil action in a federal district court, the name of the proper defendant in any such lawsuit, the right to request the appointment of counsel and waiver of court costs or fees, and the applicable time limits for such appeal or lawsuit. A copy of EEOC Form 573 (Notice of Appeal/Petition) must be attached to your final order.

If your final order does not fully implement this decision, you must simultaneously file an appeal with the Office of Federal Operations in accordance with 29 C.F.R. 1614.403, and append a copy of your appeal to your final order. See EEOC Management Directive 110, November 9, 1999, Appendix O. You must also comply with the Interim Relief regulation set forth at 29 C.F.R. § 1614.505.

TO THE COMPLAINANT:

You may file an appeal with the Commission's Office of Federal Operations when you receive a final order from the agency informing you whether the agency will or will not fully implement this decision. 29 C.F.R. § 1614.110(a). From the time you receive the agency's final order, you will have thirty (30) days to file an appeal. If the agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the agency's (40) day period for issuing a final order. See EEO MD-110, 9-3. In either case, please attach a copy of this decision with your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the agency at the same time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the agency.

WHERE TO FILE AN APPEAL:

All appeals to the Commission must be filed by mail, hand delivery or facsimile.

BY MAIL:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

BY PERSONAL DELIVERY:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
1801 L Street, NW
Washington, D.C. 20507

BY FACSIMILE:

Number: (202) 663-7022

Facsimile transmissions of more than ten (10) pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

Pursuant to 29 C.F.R. § 1614.504, an agency's final action that has not been the subject of an appeal to the Commission or a civil action is binding on the agency. If the complainant believes that the agency has failed to comply with the terms of this decision, the complainant shall notify the agency's EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The agency shall resolve the matter and respond to the complainant in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the agency has complied with the terms of its final action. The complainant may file such an appeal 35 days after serving the agency with the allegations of non-compliance, but must file an appeal within 30 days of receiving the agency's determination. A copy of the appeal must be served on the agency, and the agency may submit a response to the Commission within 30 days of receiving the notice of appeal.