Summary

Based on the above, the Commission finds that appellant has established a *prima facie* case of sexual harassment, but that the agency was able to show by clear and convincing evidence that she would not have been reinstated regardless of the harassment. Further, appellant has failed to prove a *prima facie* case of discrimination based on mental handicap, retaliation and sex. Appellant's allegation of constructive discharge is untimely.

Conclusion

Based upon a thorough review of the record and for the foregoing reasons, the Commission concludes that appellant has failed to establish discrimination based on sex, handicap, and/or reprisal. It is therefore the decision of the Commission to AFFIRM the agency's final decision finding no discrimination.

[See RR-C, FEOR p. 1-402 for Statement of Review Rights.]

[1] 29 C.F.R. Part 1614 (57 Fed. Reg. 12634) became effective October 1, 1992. This rule revises the way federal agencies and the Equal Employment Opportunity Commission will process administrative complaints and appeals of employment discrimination filed by federal employees and applicants for federal employment.

[2] The EEO counselor's report fails to indicate that appellant alleged retaliation; however, a reprisal allegation was included in appellant's request for counseling.

[3] In her formal complaint, appellant marked retaliation as the only basis and noted that the EEO counselor had erroneously investigated her complaint as one alleging sex discrimination, when her complaint "was more directly on reprisal." Although the agency's letter accepting appellant's complaint indicated that the only basis alleged was sex discrimination, the investigation encompassed both reprisal and sex discrimination.

[4] The AJ added these bases over the objection of the agency, which requested that the complaint be remanded for a supplemental investigation.

[5] During this period, appellant took 80 hours of sick leave, which included 32 hours of disapproved sick leave, in addition to 32 hours of AWOL.

[6] It is not clear from the complaint file when appellant's resignation letter was received by the agency.

[7] According to hearing testimony, loudspeakers were located throughout the postal facility and were used to page employees.

[8] Appellant testified that she had given this letter to a union official prior to her resignation.

[9] To the extent that appellant intended to raise a claim of hostile environment sexual harassment, such a claim was untimely raised. The Commission apprises the agency, however, that given the AJ's credibility determinations regarding Supervisor 1's testimony and the patently offensive and pervasive nature of the conduct alleged, appellant's allegations may well have resulted in a finding that a hostile environment had existed. We remind the agency of its manifest duty to ensure that conduct such as that of Supervisor 1 does not recur in the future.

¶933062

JACKSON
EEOC Comm.

Richard Jackson v. Runyon, Postmaster General, U.S. Postal Service

EEOC No. 01923399
November 12, 1992

4.0241	***Individual Complaint/Agency EEO Procedure, Informal Adjustment, Offer***
43.0211	***Remedies, Damages, Compensatory***
43.048	***Remedies, Make-Whole***

SUMMARY

To resolve the appellant's complaint alleging sex, color, age, physical handicap, and reprisal discrimination (he was followed and harassed during the performance of his duties by a 2048 supervisor at the direction of a higher-level agency official), the agency forwarded the appellant a settlement agreement, which had been certified as full relief by an appropriate agency official. The agreement provided that appellant would be "treated fair and equally as all other employees" and would be "treated with dignity and respect." There was no evidence that the appellant responded to the agency's offer; thereafter, the agency canceled appellant's complaint for failure to accept a certified offer of full relief. On appeal, the Commission concluded that the agency's offer, in fact, did not constitute an offer of full relief because it failed to address the issue of compensatory damages in the form of medical expenses allegedly incurred by appellant as a result of the stress caused by the agency's alleged harassment. The Commission held, in this precedent-setting decision, that the Civil Rights Act of 1991 makes compensatory damages available to federal sector complainants in the administrative process. The Commission explained that where a complainant shows objective evidence that he or she has incurred compensatory damages, and that the damages are related to the alleged unlawful discrimination, the agency must address the issue of compensatory damages in its offer of full relief. Because the appellant requested damages for medical expenses incurred, the agency, prior to making its offer of full relief, should have requested from the appellant objective evidence of the alleged damages incurred. However, it also held that an agency need only consider the issue of compensatory damages for alleged discriminatory conduct occurring on or after November 21, 1991 (the effective date of the Civil Rights Act of 1991). Thus, because the appellant was not obliged to accept the agency's offer, the agency's decision to cancel the complaint under 29 CFR 1614.107(h) was vacated. The complaint was remanded for further processing.

Decision

Introduction

On July 7, 1992, Richard Jackson (hereinafter referred to as appellant) timely initiated an appeal to the Equal Employment Opportunity Commission (EEOC) from the final decision of the Postmaster General, United States Postal Service (hereinafter referred to as the agency), received on July 6, 1992. The agency's decision cancelled appellant's complaint pursuant to

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29 C.F.R. § 1613.215(a)(7) for failure to accept an offer of full relief. Appellant's appeal was initiated pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, § 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq.* This appeal is accepted for decision by the Commission in accordance with EEOC Order No. 960, as amended.

Issue Presented

The issue presented herein is whether the agency properly cancelled appellant's complaint on the grounds that appellant failed to accept a certified offer of full relief.

Background

A review of the record reveals that appellant filed a formal complaint dated April 3, 1992, alleging discrimination on the bases of sex (male), color (black), age (44), physical handicap (high blood sugar, hypertension, heart condition), and reprisal (prior EEO activity), when on or about January 10, 1992, he was followed and harassed during the performance of his duties by a 204B supervisor (hereinafter Supervisor A), at the direction of a higher-level agency official (hereinafter Supervisor B). During EEO counseling, appellant requested, *inter alia*, a written apology, that Supervisor B be transferred out of the Maintenance Unit, that the harassment stop and he be treated with dignity and respect, and damages for medical expenses.

By letter of May 20, 1992, the agency forwarded to appellant a settlement agreement, which had been certified as full relief by an appropriate agency official on May 13, 1992. Appellant was informed that if he failed to accept the agency's offer within fifteen days, his complaint would be subject to cancellation under applicable Regulations. 29 C.F.R. § 1613.215(a)(7). The settlement agreement provided that appellant would be "treated fair and equally as all other employees" and would be "treated with dignity and respect." There is no evidence in the record that appellant responded to the agency's offer.

Thereafter, the agency issued a final agency decision (FAD) dated June 26, 1992, cancelling appellant's complaint for failure to accept a certified offer of full relief in accordance with 29 C.F.R. § 1613.215(a)(7). This appeal followed.

On appeal, appellant, through his representative, indicates that all he has been offered by management is a "formula of trite phrases." Appellant reasserts that Supervisors A and B treated him in a discriminatory manner; in addition, appellant contends that his allegations were given only a cursory investigation by the agency. Finally, appellant states that this particular incident as well as other incidents involving Supervisor B have caused appellant needless stress. Appellant states that he suffers from high blood pressure, and that this incident in particular has exacerbated his condition to the extent that he has had to seek additional medical care. Appellant contends that the cost of transportation to the doctor, the cost of necessary medication, and a portion of the doctor's fees should be borne by the agency. Appellant also requests an apology from Supervisor B.

Analysis and Findings

Pursuant to EEOC Regulation 29 C.F.R. § 1614.107(h), (formerly 29 C.F.R. § 1613.215(a)(7)), an agency may cancel a complaint if the complainant rejects a certified offer of full relief. The agency must provide written certification to the complainant at the time the offer is presented that the offer constitutes full relief. When the complainant refuses to accept the agency's offer within fifteen calendar days of its receipt, the agency may cancel the complaint. In the instant case, the agency cancelled appellant's complaint when appellant did not respond to the agency's certified offer of full relief. Therefore, the dispositive issue concerns whether or not the agency's offer constituted full relief for the allegations raised in appellant's complaint.

Full relief is defined as that relief that would have been available to appellant had he prevailed on every issue in his complaint. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). In *Albemarle*, the court held that the purpose of Title VII is to make victims whole. *Albemarle*, 422 U.S. at 418-19. This requires eliminating the particular unlawful employment practice complained of, as well as restoring the victim to the position he or she would have occupied were it not for the unlawful discrimination. *Albemarle*, 422 U.S. at 420-21. Accordingly, the offer of full relief must be evaluated in terms of whether or not it includes everything to which the complainant would be entitled if a finding of discrimination were entered with respect to all of the allegations in the complaint. *Deborah Merriell v. Department of Transportation*, EEOC Request No. 05890596 (August 10, 1989) [90 FEOR 3034].

In this case, the agency's offer provides that appellant will be treated fairly and in the same manner as other employees, and that he will be treated with dignity and respect. The agency's offer, however, fails to address the issue of compensatory damages in the form of medical expenses allegedly incurred by appellant as a result of the stress caused by the agency's alleged harassment. The Commission finds that the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, ("CRA") makes compensatory damages available to federal sector complainants in the administrative process. This conclusion is based upon a thorough examination of the statute's language and policy considerations.

Where the complainant shows objective evidence that he or she has incurred compensatory damages, and that the damages are related to the alleged unlawful discrimination, the agency must address the issue of compensatory damages in its offer of full relief.[1] Here, the appellant has stated that he suffered stress from the agency's alleged harassment, and that this stress resulted in his seeking additional medical care for his high blood pressure. The record shows that in the pre-complaint counseling process, the appellant requested damages for medical expenses incurred. Accordingly, prior to making its offer of full relief, the agency should have requested from the appellant objective evidence of the alleged damages incurred. In this case, such proof could have taken the form of receipts and/or bills for medical care, medication and transportation to the doctor. In addition, the agency should have requested that appellant provide objective evidence linking these damages to the alleged unlawful discrimination. Such a showing would have been sufficient to require the agency to address the issue of compensatory damages in its offer of full relief. The relief offered by the agency, however, did not address the issue of compensatory damages. The Commission finds therefore that the agency's offer does not constitute full relief.[2]

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When a federal agency or the EEOC finds that a federal employee has been discriminated against, the agency must provide full relief.[3] *See* 29 C.F.R. § 1614.501(a); 29 C.F.R. Part 1613, Appx. A. Under the CRA, this would include a payment of compensatory damages to an identified victim of discrimination on a make-whole basis for any losses suffered as a result of the discrimination. *See* EEOC Notice No. 915.002, "Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991" (July 14, 1992). The Commission has recognized that the basic effectiveness of its law enforcement program, whether in the private or federal sector, is dependent upon securing prompt, comprehensive and complete relief for individuals affected by violations of the statutes it enforces. *See* 29 C.F.R. Part 1613, Appx. A.

Section 102 of the CRA permits a complaining party pursuing an "action" under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, or the federal employment sections of the Rehabilitation Act of 1973, 29 U.S.C. § 791, to recover compensatory damages in the case of intentional discrimination. While it may be argued that the term "action" as used in the CRA refers only to a civil action in court, such an interpretation is not supported by the statutory language of the CRA as a whole and the principles of statutory interpretation.

Subsection 102(a)(1) of the CRA provides that: "In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5) against a respondent who engaged in unlawful intentional discrimination ... the complaining party may recover compensatory and punitive[4] damages ... in addition to any other relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent." Subsection 102(a)(2) provides that: "In an action brought by a complaining party under the powers, remedies, and procedures set forth in ... section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. § 794a(a)(1)) ... against a respondent who engaged in unlawful intentional discrimination ... under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791) and the regulations implementing section 501, or who violated the requirements of section 501 of the Act or the regulations implementing section 501 concerning the provision of a reasonable accommodation ... the complaining party may recover compensatory and punitive damages ... from the respondent."

Subsection 102(a)(2), cited above, expressly permits a complaining party to recover damages for violations of the Rehabilitation Act through the federal sector regulations and procedures providing administrative relief under the Rehabilitation Act. Accordingly, the term "action" in this subsection includes both court actions and the administrative process.[5] This language clearly provides compensatory damages in the administrative process for actions brought under the Rehabilitation Act. Although subsection 102(a)(1) does not make reference to the federal sector regulations implementing the Civil Rights Act of 1964, there is nothing in the legislative history of the CRA to indicate that Congress intended to treat the individuals protected by these two statutes differently. The Commission finds that the most plausible reason for the failure of subsection 100(a)(1) to mention the administrative process is that Section 717 of the Civil Rights Act of 1964 explicitly provides for an administrative complaint process, while section 501 of the Rehabilitation Act lacks such a provision. The difference in the language of the two subsections is merely a statutory recognition by the drafters of the CPA that the administrative complaint process under the Rehabilitation Act derives from, and is patterned on, the administrative procedure authorized under section 717 of Title VII of the Civil Rights Act of 1964, as amended.

Further support for the conclusion that compensatory damages are recoverable in the administrative process comes from the definition of "complaining party" in subsection 102(d)(1)(A).[6] That subsection defines the term "complaining party" for purposes of section 102 as follows:

> The term "complaining party" means—in the case of a person seeking to bring an action under subsection (a)(1), the [EEOC], the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964. ... [7]

Complaining party is similarly defined in section 102(d)(1)(B) for persons bringing an "action or proceeding" under the Rehabilitation Act or the Americans with Disabilities Act.

The definition of complaining party provided by subsection 102(d)(1)(A) relates directly back to subsection 102(a)(1) and expressly includes within the group of persons bringing an "action" under subsection 102(a), any person who may bring an action or proceeding under Title VII. Complaining party, as defined, is consistent with subsection 102(a)(2). The definition of a complaining party defines the scope of subsection 102(a)(1) to provide complainants with an option to pursue their damage remedy in either an "action or proceeding."

It is a cardinal principle of statutory interpretation that courts are required to give effect to every clause and word of a statute, if possible. *See United States v. Menasche*, 348 U.S. 528 (1955); *R.E. Dietz Corp. v. United States*, 939 F.2d 1, 5 (2d Cir. 1991). When read together, subsections 102(a)(1), 102(a)(2), and 102(d) permit a complaining party under Title VII or the Rehabilitation Act to obtain compensatory damages in either an action or proceeding. The plain meaning of the term "proceeding" includes administrative proceedings.[8]

The Supreme Court's decision in *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980), is instructive as to the meaning of the term "proceeding" as it is used by Congress. In that case the Court addressed for the first time issues that arise when administrative proceedings are used to enforce civil rights. The Court authorized an award of attorney's fees in federal court litigation for work performed in State administrative proceedings. The Court focused on the requirement in Title VII that complainants first pursue state administrative remedies before filing an action in federal district court. Having successfully enforced her rights at the State administrative level, the plaintiff sought recovery of attorney's fees in federal court under Title VII's fees provision. The Court decided that use of the words "action or proceeding" included in Title VII's fee provision indicated Congress' intent to authorize fee awards for work done in administrative proceedings and, therefore, the availability of attorneys' fees would not depend on whether the claimant succeeded at the administrative level or prevailed in court.[9] Thus, Congress' use of the words "or proceeding" was more than surplusage.

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The holding in *New York Gaslight Club* that the words "or proceeding" is more than surplusage supports the conclusion that the use of the same words in section 102(d)(1)(A) is an expression of Congress' intent to provide damages in the administrative process. Had Congress intended to require complainants to file civil actions to recover damages, it simply could have used language in subsections 102(a)(2) and 102(d) identical to that in subsection 102(a)(1) and not mentioned other proceedings and actions under the regulations.

Another relevant concern of the Supreme Court in *New York Gaslight Club* was that if fees were not awarded for conclusive administrative proceedings, the result would be the filing of unnecessary lawsuits. The existence of an incentive to file a complaint in federal court, such as the availability of a fee or damage award, would ensure that almost *all* Title VII complainants would abandon the administrative process for the courts as soon as possible.

For the foregoing reasons, the Commission finds that in the context of an offer of full relief, the agency's offer must address compensatory damages where the complainant shows some objective evidence that he or she has incurred compensatory damages, and that the damages are related to the alleged unlawful discrimination. The agency need only consider the issue of compensatory damages for alleged discriminatory conduct occurring on or after November 21, 1991. Because the appellant in this case made a claim for damages related to the alleged discriminatory conduct of the agency, the agency should have requested from the appellant some objective proof of the alleged damages incurred, as well as objective evidence linking those damages to the adverse actions at issue, prior to making its offer of full relief. Therefore, appellant was under no obligation to accept the agency's offer, and the agency's decision to cancel the complaint for failure to accept a certified offer of full relief was improper and is VACATED. *See* 29 C.F.R. § 1614.107(h). The complaint is hereby REMANDED to the agency for further processing from the point processing ceased in accordance with this decision and applicable Regulations.

Conclusion

Based upon a review of all the evidence of record, the decision of the Equal Employment Opportunity Commission is to VACATE the agency's final decision, which cancelled appellant's complaint for failure to accept an offer of full relief. The complaint is hereby REMANDED to the agency for further processing in accordance with this decision and the Order below.

Order

The agency is ORDERED to process the remanded allegations in accordance with 29 C.F.R. § 1614.108. The agency shall acknowledge to the appellant that it has received the remanded allegations within thirty (30) calendar days of the date this decision becomes final. The agency shall issue to appellant a copy of the investigative file and also shall notify appellant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the appellant requests a final decision without a hearing, the agency shall issue a final decision within sixty (60) days of receipt of appellant's request. A copy of the agency's letter of acknowledgement to appellant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

Implementation of the Commission's Decision

[See ICD, p. I-403.]

[See RR-A, FEOR pp. I-401-402 for Statement of Review Rights.]

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[1] The Commission has determined that compensatory damages are available for alleged discriminatory conduct occurring on or after November 21, 1991 (the effective date of the CRA). See Commission Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct (December 27, 1991).

[2] The Commission notes appellant's request for an apology; however, the Commission has held that an apology is not a necessary element of full relief. *See Shirley Hoskinson v. United States Postal Service*, EEOC Request No. 05880752 (February 2, 1989). Furthermore, a further assurance of no future harassment by any particular official, which the agency is already obligated by law to ensure, is not necessary. *Reynaldo Gonzalez v. Clayton Yeutter, Secretary, Department of Agriculture*, EEOC Request No. 05910801 (September 6. 1991) [92 FEOR 3083].

[3] Congress extended Title VII's protection to federal employees in 1972. "The provisions adopted by the committee will enable the Commission to grant full relief to aggrieved employees, or applicants. . . . Aggrieved employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under title VII." S. Rep. No. 415. 92d Cong., 1st Sess. 16 (1971).

[4] Subsection 102(b)(1) prevents complainants from seeking punitive damages against a government, government agency or political subdivision.

[5] During the Senate debate on the CRA, an amendment concerning Congress' exemption from civil rights laws was considered. That amendment used the term "action" to mean administrative action. 137 Cong. Rec. Section 15350 (daily ed. Oct. 29, 1991).

[6] Under accepted canons of statutory interpretation, statutes must be interpreted as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous. *Boise Cascade Corp. v. U.S.E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991) (quoting Sutherland Stat. Const. §§ 46.05, 46.06 (4th ed. 1984)). Specific words within a statute may not be read in isolation of the remainder of that section or the entire statutory scheme. *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987).

[7] CRA, Section 102(d)(1)(A).

[8] The term "proceeding" is defined as including both juridical business before a court as well as administrative proceedings before agencies and tribunals. Black's Law Dictionary 1083 (5th ed. 1979).

[9] 447 U.S. at 61-62, 66.

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