64 FLRA No. 6

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WAGE AND INVESTMENT DIVISION
AUSTIN, TEXAS
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 72
(Union)

0-AR-3977

DECISION

August 31, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This case is before the Authority on exceptions to an award of Arbitrator Leroy R. Bartman filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The grievance claims that the Agency violated the Rehabilitation Act (Act) of 1973, as amended, 29 U.S.C. § 791 *et seq.*, the parties' collective bargaining agreement (CBA), and other laws, rules, or regulations, by discriminating against the grievant based on his disability, creating a hostile work environment, and retaliation. The Arbitrator sustained the grievance, awarding restoration of leave and compensatory damages.

For the reasons that follow, we deny the exceptions in part, grant them in part, modify the award in part, and remand the award to the parties to seek clarification of the award from the Arbitrator.

1. Member DuBester did not participate in this decision.

II. Background and Arbitrator's Award

A. Background

The grievant had worked for the Agency since 1986. Beginning in the 1980s, the grievant became a patient of Dr. 1, primarily for the treatment of an asthmatic condition, but also for high blood pressure, high cholesterol, and a pre-diabetic condition. During 2002-2003, the grievant's asthmatic condition worsened and did not respond to medication. Dr. 1 referred the grievant to Dr. 2, a specialist in pulmonology, who diagnosed the grievant with "'fixed obstructive changes consistent with COPD'" [2] Award at 8, quoting Union Exhibit (UE) 128. Specifically, Dr. 2 concluded that the grievant suffered from a fixed defect in his lungs. *Id. at* 16. Both doctors found that the grievant's general health, and his asthmatic condition, in particular, were exacerbated by work stress and stress factors in his personal life. In this regard, in support of the grievant's request for disability retirement in 2003, Dr. 2 stated that "'had the amount and consistency of [the grievant's] stress been eliminated or greatly reduced, it is likely that the degree and rate of deterioration in [his] condition . . . would have been lessened or prevented altogether . . . .'" *Id*. at 8, quoting UE 128. Dr. 1, based on the opinion of Dr. 2 and his own observation and treatment of the grievant, concluded that the grievant suffered a significant loss of sleep due to "an inability to *breathe* properly." *Id*. at 16, quoting Transcript (Tr.) at 453.

In November 2001, the grievant filed an equal employment opportunity (EEO) complaint against a previous supervisor alleging discrimination on the grounds of color, and race, and reprisal for EEO activity. The complaint arose out of an incident in which the grievant, as a Union steward, had represented unit employees who alleged sexual harassment by the supervisor. In a deposition taken in connection with that EEO complaint, the grievant's second-level supervisor (supervisor 2) described the grievant as a complainer. *Id.* at 20.

The grievant was a GS-5 Processing Clerk in the Centralized Authorization File (CAF) Unit when he was transferred, as a trainee, in January 2002, to the Refund 1 Unit. As a part of the transfer, the grievant was promoted to GS-5 and ultimately was promoted to GS-6.

2. The Arbitrator noted that COPD, or chronic obstructive pulmonary disease, refers to various pulmonary diseases such as bronchitis, chronic bronchitis, asthmatic bronchitis, and emphysema. Award at 16.

At the same time, a new unit, Refund 2, was created. The different units processed different forms.

The grievant received on-the-job instruction in processing the forms handled by the Refund 1 unit. The grievant experienced difficulty in learning to process the forms, despite having a number of on-the-job instructors (OJI). Eventually, the grievant worked with an instructor from the Refund 2 unit who was able to bring his performance to the point where he achieved "100 percent on his reviews." Award at 20. This instructor was accused by the grievant's first-level supervisor (supervisor 1) of lying about the grievant's performance. *Id.* Supervisor 1 also told the other employees in the Refund 1 unit that the grievant complained about being given conflicting instructions by his previous instructors. Supervisor 1 consistently wrote negative appraisal narratives with respect to the grievant's performance and gave the grievant the lowest possible rating in quarterly, yearly, and close-out performance reviews. *Id.* at 21. These appraisals were based upon a review of all the work produced by the grievant, instead of random samples of that work.

When the grievant was reassigned to the Refund 1 Unit in January 2002, supervisor 1, who supervised that unit, became aware of the grievant's health problems, including his asthmatic condition. *Id.* at 19. In particular, during this period, in a communication with labor relations personnel concerning the grievant's leave usage, supervisor 1 explicitly noted: (1) the grievant's asthma; and (2) the fact that his leave usage appeared to result from stress connected with learning his new job. *See id.* at 19 and UE 130, E-mail from supervisor 1 to Thomas Theis dated April 1, 2002. Supervisor 1 was also aware that during the first 4 weeks that the grievant worked in that unit, the grievant was absent from work for 56 hours as a result of his illness. *Id.* She also knew that, during the period between January and June 2002, the grievant was absent from work for seven days due to his asthma alone. *Id.* The fact that these absences were related to the grievant's health problems were verified by Dr. 1. *Id.* at 16.

Subsequently, at the beginning of June 2002 [3] (the June letter), the grievant requested from supervisor 2 a reassignment because of stress and was instructed by supervisor 2 to revise the letter, leaving out any references to his health, and resubmit it through supervisor 1. *Id.* at 8 and 18-20. He did so at the beginning of July (the July letter). Supervisor 2 subsequently instructed supervisor 1 to inform the grievant that he had been unable to find the grievant a GS-5 position for a reassignment. *Id.* at 9.

In November 2002, the Union contacted the Agency's local reasonable accommodations coordinator (coordinator), informing her of the grievant's June and July requests for reassignment, and asked to meet with her on behalf of the grievant. *Id.* Pursuant to that meeting (the November meeting), the coordinator requested a medical opinion on the grievant's condition from Dr. 1. *Id.* Upon receiving that opinion, the coordinator forwarded it to a physician at the Federal Occupational Health (FOH) office, noting that the grievant was seeking a reasonable accommodation. *Id.* Based on the information provided by Dr. 1, the FOH physician concluded that the grievant had "several medical conditions that qualify as disabilities under [the] Americans with Disabilities Act (ADA) . . . ." *Id*. at 17, quoting UE 13. That physician recommended, among other things, "job restructuring and/or reassignment to [another] position" *Id*., UE 13.

At the beginning of December 2002, the Agency issued a memorandum to the heads of the offices at the facility in an effort to locate a position to which the grievant might be reassigned. The responses indicated that there were no vacancies at the GS-4/5/6 level. *Id.* at 9. In February 2003, the Agency prepared a memo notifying the grievant of a vacancy in a GS-4 position, which would have meant a downgrade. *Id.* The Agency did not issue the memo because a temporary reassignment was being arranged. *Id.* That temporary reassignment took effect in April 2003. During the period from the end of February 2003 to the end of May 2003, however, the grievant missed "whole weeks of work[.]" *Id*. While the grievant was on temporary reassignment, supervisor 1 informed him, by memo, that the Agency had been unable to find him a permanent position at his current grade level, but that a permanent position was available at the GS-4 level. After his temporary reassignment ended the grievant concurred in the reassignment to the GS-4 position. *Id.* at 10.

In addition, during the time the grievant worked for supervisor 1, that supervisor had discussions with the Agency's labor relations office concerning a potential adverse action against the grievant. Moreover, during this period, supervisor 2 sought negative performance documentation "specifically aimed at supporting a performance[-]based action against the [g]rievant." *Id*. at 21. Additionally, the supervisors

3. According to the Arbitrator, in his letter, the grievant requested a reassignment and explained that a "reassignment would ". . .afford [him] the opportunity to deal with [his] personal problems . . . his mother's illness, manage stress over [his] mother's situations, dealing with building contractors . . . as well as taking lots of time off from work . . . and my health . . . ."" Award at 8, quoting UE 124.

sought other "ways to get rid of the grievant[,]" in that they also cooperated in an investigation of the grievant's attendance at his second job so as to compare that attendance to his attendance at work for the Agency. *Id.* (citing Transcript (Tr.) at 679-89).

In March 2003, the Union filed a grievance alleging that the Agency discriminated against the grievant based upon his medical condition in violation of the Act, and Article 4, Section 2 of the parties' CBA.[4] Specifically, the grievance alleged that the Agency violated the Act by failing to provide the grievant with a reasonable accommodation of his disability and subjecting him to a hostile work environment based on that disability. Subsequently, in April 2003, the Union filed a second grievance, alleging, in part, that the Agency acted in reprisal against the grievant for filing an EEO complaint and that the reprisal came in the form of inappropriate performance appraisals. The parties were unable to resolve the grievances and they were consolidated and submitted to arbitration.

B. Arbitrator's Award

The Arbitrator framed the issues in the case as follows:

> 1. Whether the [g]rievant is a "qualified individual with a disability" as defined in the [Act], as amended? If the answer is yes, did the Agency violate the [Act], the [CBA], policy, or other law, rule or regulation when it delayed providing him "reasonable accommodation"? If so, what shall the remedy be?
>
> 2. Whether the Agency subjected the [g]rievant to a hostile work environment in reprisal on the basis of disability and his prior and ongoing involvement in the EEO process in violation of the [Act], the CBA and/or other law, rule, policy, or regulation? If so, what shall be the remedy?
>
> 3. Whether the Agency violated Article 12, Section 9D of the CBA when it subjected the [g]rievant to 100% reviews instead of random samples when it evaluated his performance? If so, what shall the remedy be?

Id. at 7.

As to the first issue, the Arbitrator noted that to be a "qualified individual with a disability" within the meaning of the Act, the grievant needed to demonstrate that he "has a physical or mental impairment that substantially limits one or more major life activities[.]" *Id*. at 15, citing 29 C.F.R. § 1630.2(g). He further noted that a "major life activity" is defined as "[caring] for oneself, performing manual tasks, walking, seeing, hearing, speaking, learning, *breathing*, . . . working." *Id*. at 17 (emphasis added), citing 29 C.F.R. § 1630.2(l).

The Arbitrator found that the grievant had "a physical impairment and disability that substantially limit[ed] one or more of his major life activities, *breathing*[.]" *Id*. (emphasis in original). He concluded that the grievant was a "qualified individual with a disability" within the meaning of the Act. *Id*.

The Arbitrator cited the Agency's "Reasonable Accommodation Policy Statement" and EEOC's "Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodations," No. 915.003 (October 20, 2000) (EEOC October 20 Guidance), noting that these policies were in effect during 2002 and 2003.[5] He noted specifically that these policies require the Agency to make reasonable accommodations for all qualified employees with physical or mental disabilities and to act expeditiously to provide such accommodations. He also noted that, under those policies, an employee with a disability does not need to use particular language to request an accommodation, but that a statement by such an employee that he or she needs an adjustment or change of work is sufficient. The Arbitrator found that the grievant made a sufficient request to supervisor 1 during his conversation with her in May 2002. He also found that supervisor 1's requirement that he reduce his request to writing violated applicable policy.

In this regard, based on "uncontroverted and unrefuted testimony" by the coordinator, the Arbitrator found that supervisor 1 and supervisor 2 had been trained, in January 2002, on reasonable accommodation policy. *Id*. at 18. He also noted the coordinator's statement that, given the training they had received, the grievant's June 2002 letter requesting a job reassignment "should have triggered a need for an interactive process by [supervisor 1] on the [g]rievant's reasonable accommodation request." *Id*. The Arbitrator noted further that supervisor 1 had admitted that she was aware

4. The text of Article 4, Section 2 is set forth in the Appendix to this decision.

5. It is noted that the EEOC October 20 Guidance states that it is to be "read in conjunction with relevant EEOC regulations," including the EEOC's "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the American with Disabilities Act[.]" Opposition, Union Exh. 127 at 2. Also, the Arbitrator found that an Agency EEO Specialist testified that the EEOC October 20 Guidance was in effect during all relevant times. *See* Award at 17.

of the grievant's medical condition and that he had missed work because of that condition. He found, based on this evidence, that the grievant's "oral request" to supervisor 1 and his June letter to supervisor 2 constituted a "clear request for reasonable accommodation due to a medical disability." *Id*. at 19. Consequently, the Arbitrator found that the supervisors "should have attempted to find a reasonable accommodation for the [g]rievant no later than May or June 2002[.]" *Id*. at 20.

The Arbitrator found that the manner in which the supervisors handled the grievant's request violated the Agency's obligation to process such requests "expeditiously." *Id*. at 19. He also concluded that the supervisors were "obligated to engage in a 'good faith' interactive process to learn of the [g]rievant's needs" and to provide him an accommodation" for his disability. *Id.* According to the Arbitrator, by ignoring the grievant's disability and doing nothing, the supervisors violated the Act and applicable Agency policy. In particular, the Arbitrator found that the supervisors "deliberately sought to not accommodate the [g]rievant's request for accommodation[.]" *Id.* at 22. Consistent with these findings and conclusions, the Arbitrator rejected the Agency's claim that it was not aware of the grievant's request, or need, for reasonable accommodation until the November meeting with the Union. The Arbitrator concluded that the Agency's attempt to provide reasonable accommodation after that meeting was too late to satisfy its obligations under the Act and Agency policy. The Arbitrator stated, in this regard, the Agency should have provided the grievant with reasonable accommodation at the time supervisor 1 became aware of his disability and, in any event, not later than May 2002, when the grievant discussed reassignment with that supervisor.

As to the allegation that the Agency acted in reprisal against the grievant and subjected him to a hostile work environment, the Arbitrator noted supervisor 2's statement that the grievant was a complainer in a deposition related to the grievant's EEO complaint. The Arbitrator found that this statement indicated "a preexisting negative bias" against the grievant by supervisor 2. *Id*. at 20. In addition, the Arbitrator found that supervisor 1 and supervisor 2: (1) did not act promptly to resolve the grievant's request for reasonable accommodation; and (2) sought ways "to get rid of the [g]rievant." *Id*. at 21. Specifically, as to the former, the Arbitrator found that the supervisors "deliberately sought to not accommodate the [g]rievant's request for accommodation." *Id.* at 22. As to the latter, the Arbitrator noted that supervisor 2 "requested negative documentation specifically aimed at supporting a performance[-]based action against the [g]rievant." *Id*. at 21. He also noted that evidence as to supervisor 1's discussions with labor relations personnel and the supervisors' investigation of the grievant's attendance at his second job demonstrated that the supervisors intended "to rid themselves of the [g]rievant via the adverse action route[.]" *Id*. In this regard, the Arbitrator found that, as a basis for such an action, the supervisors used 100% reviews of the grievant's work, in violation of Article 12, Section 9.D. of the parties' CBA. [6]

In addition, the Arbitrator noted that supervisor 1: (1) shared the grievant's comments about the inadequacy of his on-the-job training with his colleagues in Refund Unit 1, some of whom had provided that training; and (2) accused the instructor from Refund Unit 2, who had helped the grievant improve his performance, of lying about that improvement so that, as a consequence, the instructor from Refund Unit 2 refused to continue working with the grievant. The Arbitrator specifically found that these actions created "pressures" on the grievant that "contributed to a hostile work environment." *Id.* at 22. The Arbitrator found, in addition, that the supervisors worked together "to put pressure on the [g]rievant through negative performance reviews despite his known medical problems." *Id*. at 23. The Arbitrator found that these actions were "on[-]going and concurrent" with the grievant's outstanding request for reasonable accommodation. *Id*. at 21.

Based on all this evidence, applying a "reasonable person" standard, the Arbitrator concluded that the supervisors "created an atmosphere and work environment which ultimately caused the [g]rievant's health to deteriorate to the point [that] he had to medically retire" at approximately 45 years of age. *Id.* at 22.

The Arbitrator sustained the grievances, finding that the Agency violated Articles 4 and 12 of the parties' CBA. The Arbitrator ordered that the grievant "be made whole for all lost benefits[,]" and annual and sick leave taken in 2002 and 2003, during the period in which he was being subjected to harassment by the supervisors. He also ordered that all the grievant's sick and annual leave be restored and his leave records "adjusted to reflect his absence from work as administrative leave." *Id*. at 23.

In addition, the Arbitrator granted the grievant an award of $200,000 in compensatory damages based on

6. Based on the record, it appears that "100% review" involves review of the grievant's entire work product for a given period of time. The text of Article 12, Section 9D is set forth in the Appendix to this decision.

the lack of a good faith effort by the Agency to comply with the Act. In rendering this award, the Arbitrator found that the Agency's actions contributed to the grievant's medical retirement at approximately age 45 and the consequent loss of earnings.

III. Positions of the Parties

A. Agency's Exceptions [7]

1. The grievant's request for accommodation was insufficient

The Agency contends that the Arbitrator's award is "contrary to law" because the Arbitrator failed to "apply the proper legal" framework in finding that the Agency failed to provide the grievant with a reasonable accommodation and concluding that he was entitled to compensatory damages in the amount of $200,000. Exceptions at 15 and 16.

Specifically, according to the Agency, the Arbitrator "erred" in finding that the grievant had made a sufficient request for reasonable accommodation prior to the November meeting. *Id.* at 16. First, the Agency claims that the Arbitrator's definition of a "reasonable accommodation request as a 'statement that an individual needs an adjustment or a change at work . . .' does not accurately recapitulate the EEOC Guidance." [8] *Id.* at 17 (quoting Award at 18). Citing EEOC enforcement guidance, the Agency claims that "[w]hen an individual decides to request accommodation, that individual must let the employer know that 'she/he needs an adjustment or change at work for a *reason related to a medical condition.*'" *Id.* at 16 (emphasis in original, quoting EEOC "Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the American with Disabilities Act," No. 915.002 (October 17, 2002) (EEOC October 17 Guidance). According to the Agency, the Arbitrator's use of the ellipsis "omits words that materially transform the [EEOC] guidance . . . regarding an employee's obligations in asking for accommodation from an agency." [9] *Id.* Citing, *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 261 (1st Cir. 2001), the Agency asserts that the Arbitrator's definition is "inadequate if the request is a mundane request for a change at the workplace." *Id.*

While disagreeing with the Arbitrator's "definition of a reasonable accommodation request," the Agency acknowledges that an employee seeking an accommodation "does not have to invoke the . . . words 'reasonable accommodation' to request accommodation from an agency." *Id.* However, the Agency argues that the "notice provided to an agency from an employee seeking reasonable accommodation 'must make clear' that the employee wants assistance for *'his or her disability.'*" *Id.* (citing *Taylor v. Phoenixville School District*, 184 F.3d 296, 313 (3rd Cir. 1999) (*Taylor*) (emphasis in exceptions). The Agency asserts that an agency must know of both the disability and the employee's desire for accommodations for that disability. *Id.* at 17. The Agency thus asserts that, under the Act, it is only under an obligation to accommodate a known disability and, where the disability is uniquely within the knowledge of the employee, the employee has the burden of disclosing that disability. The Agency argues that the grievant's June and July letters did not contain sufficient information to put the Agency on notice that the grievant's "request was linked to his purported disability, asthma . . . [,]" and that he was thus requesting accommodation for an asthmatic disability. *Id.* at 19. In support, the Agency cites *Chavis v. United States Postal Service*, EEOC Appeal No. 01983332 (August 16, 2001) (*Chavis*). The Agency thus argues that the grievant's reference in the June letter to his need for a reassignment in order to relieve, among other things, job stress that was affecting his "health" were not "sufficiently direct and specific" to give the Agency notice that he needed reasonable accommodation. Exceptions at 21. In this regard, the Agency asserts that the Arbitrator "appears to have never considered the possibility that the [g]rievant asked for a reassignment because he wanted to ameliorate the level of personal stress in his life, regardless of any medical condition he may or may not have had in Jun/July 2002." *Id.* at 20.

The Agency further asserts that, under the Act, the grievant must establish a nexus between the disability and the requested accommodation as part of his *prima facie* case. *Id.* at 21. According to the Agency, the grievant "did not submit any evidence to establish a nexus between his reassignment requests in June/July 2002 and his purported disability, asthma[,]" and the Arbitrator "did not discuss or reference this required nexus . . . in his award." *Id.* More specifically, the Agency asserts that nothing in the grievant's reassign-

---

7. The Agency requests oral argument. The positions of the parties are thoroughly and extensively presented in the Agency's exceptions and the Union's opposition and thus the record is sufficient to resolve the issues presented. Therefore, oral argument is not warranted. *See, e.g., AFGE, Local 3230*, 59 FLRA 610, 610 n.2 (2004). Accordingly, we deny the Agency's request.

8. The Arbitrator was quoting EEOC October 20 Guidance, Section II. A.(1)). *See* Award at 18. The pertinent text of that section is set forth in the Appendix to this decision.

9. The Agency refers to EEOC Oct. 17 Guidance. The Arbitrator's quote is from the EEOC Oct. 20 Guidance.

ment requests in June or July explains how "asthma . . . had any relationship . . . to his desire [for] a different position" or the requested accommodation. *Id.* at 22. Citing *Myers v. Dep't of Homeland Security,* EEOC Appeal No. 01A23380 (October 30, 2003) (*Myers*), the Agency further asserts that under the Act, it is only required to accommodate the job-related limitations that arise from an employee's disability, but not the disability itself. The Agency maintains that nothing in the June or July letters provided information with respect to the job-related limitations that resulted from the grievant's disability so as to give it notice of "barriers" to the grievant's ability to perform the "essential duties" of his position. *Id.* at 25. In this regard, the Agency asserts that the grievant's asthma was not raised prior to the arbitration proceeding. Rather, according to the Agency, the focus of the June and July letters, and subsequent dealings between the parties, was on the stress the grievant was experiencing in connection with his job. The Agency thus asserts that such stress, without any established relationship to a disability, was insufficient to put it on notice that the grievant was requesting accommodation for a disability.

Further, the Agency asserts that the fact that supervisor 1 knew of the grievant's asthma and considered it a disability does not establish that supervisor 1 or Agency management knew that the grievant's asthma substantially limited the grievant in a major life activity so as to require an accommodation. The Agency maintains that the Agency was required to accommodate the grievant if, and only if, the grievant provided evidence that he was a qualified individual with a disability when he requested reassignment as an accommodation. According the Agency, the grievant did not meet that burden. In particular, the Agency argues, the Arbitrator made no findings as to the grievant's ability "to breathe" as "compared to the average person in the general population in June 2002" so as to demonstrate that the grievant was substantially limited in a major life activity. *Id.* at 31.

2. The Agency's participation in the interactive process was consistent with its legal obligations

The Agency maintains that the Arbitrator also erred as a matter of law in finding that it violated the Act by failing to engage in the interactive process required, in order to determine a reasonable accommodation for the grievant. Citing EEOC and judicial precedent, the Agency asserts that an agency's failure to engage in the interactive process does not, in itself, constitute a violation of the Act. *Id.* at 34. In this regard, the Agency contends that even assuming the grievant was seeking a reasonable accommodation for a disability in June/July 2002, the grievant "had already identified the accommodation he wished: . . . a reassignment[, and thus there] was no need for the [g]rievant and the Agency to engage in the interactive process." *Id.* at 35. Moreover, according to the Agency, the grievant bore the burden of establishing that an inadequate interactive process resulted in the Agency's failure to provide him reasonable accommodation. The Agency asserts that the grievant cannot meet this burden because it provided the grievant with an accommodation for the medical limitations discussed at the November meeting and thus any purported breakdown in the interactive process is "not a basis for imputing liability to the Agency." *Id.* at 35-36. Also, the Agency maintains that in order for it to have a duty to engage in the interactive process the grievant must have provided information sufficient to notify the Agency that he had a disability which limited his ability to perform the essential functions of his job. The Agency asserts that the grievant did not provide such information. *Id.* 37-39.

As to the Arbitrator's finding that the Agency was liable for the "delay" between June and November 2002 involved in processing the grievant's request for reasonable accommodation, the Agency argues that the finding was not based in an application of the appropriate criteria for assessing such a delay. *Id.* at 38-39. Further, the Agency claims that such finding ignores the efforts of supervisor 2 after the July letter to provide the grievant with a reassignment and supervisor 1's approval of the grievant's requests for sick leave.

3. The Agency did not retaliate against the grievant

The Agency contends that the Arbitrator did not apply the appropriate legal framework in determining that the Agency acted in reprisal against the grievant for the grievant's EEO activity. According to the Agency, such a "disparate treatment" claim must be evaluated under a burden-shifting framework. *Id.* at 41 (citing *McDonnell Douglas Corp. V. Green*, 411 U.S. 792 (1973). Specifically, the Agency maintains that the grievant did not establish, and the Arbitrator could not have found, a *prima facie* case of discrimination. *Id.* at 42. The Agency asserts that the Arbitrator relied on Supervisor 2's statement that the grievant was a "complainer" to find that Supervisor 2 was motivated to retaliate against the grievant for his prior EEO activity, but according to the Agency, the Arbitrator "cited no evidence" to establish that Supervisor 2 was motivated to retaliate against the grievant for such activity. *Id.* The Agency thus asserts that there is no proof that supervisor 1 knew of the grievant's EEO activity or that

supervisor 2's actions were motivated by such activity. In this latter regard, the Agency asserts that the record demonstrates that supervisor 2 placed the grievant in the Refund 1 unit, thereby saving his job. Moreover, citing *Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001) (*per curiam*) (*Breeden*), among other cases, the Agency contends that the lapse of time between the grievant's EEO activity and the alleged retaliation was of sufficient length that there can be no reasonable inference that the former was the cause of the latter.

Further, the Agency argues that it offered non-discriminatory reasons for its actions with respect to the nine items listed in the award as supporting a claim of reprisal against the grievant. Exceptions at 45 (referring to Award at 20-21). As to this claim, the Agency contends that the Arbitrator "did not differentiate the Agency's actions he believed were motivated by prior EEO activity from those actions he believed were evidence of 'hostile work environment.'" *Id.* at 46 n.7. "As such, [it] will assume that the Arbitrator listed all of these incidents as support for each claim." *Id.* With respect to its responses to the nine incidents, the Agency asserts that the Arbitrator failed to "address any" of its legitimate non-discriminatory claims and the grievant failed to establish that those reasons were "pretextual." *Id.* at 44 and 52.

4. The grievant was not subjected to a hostile work environment

The Agency contends that, as a matter of law, the Arbitrator erred in finding that the grievant was subjected to a hostile work environment. In this regard, the Agency maintains that the Arbitrator did not identify whether the basis for the hostile environment was the grievant's EEO activity or his disability. *Id.* at 53. Moreover, according to the Agency, the Arbitrator made no finding as to whether the work environment was "objectively hostile." *Id.* at 54. In this regard, the Agency argues that the grievant failed to demonstrate that the Agency's actions were so frequent, humiliating, or intimidating as to interfere with the grievant's ability to perform his work. Further, the Arbitrator failed to find that the alleged hostility was "severe and pervasive." Exceptions at 54, citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). In this connection, the Agency maintains that the Agency actions discussed in the previous section do not amount to conduct sufficiently severe as to result in the creation of a hostile work environment.

5. The award of compensatory damages is contrary to law

The Agency contends that, assuming it is liable for failure to accommodate the grievant's disability, the award of $200,000 in non-pecuniary compensatory damages is excessive as a matter of law. Exceptions at 55. The Agency argues that the Arbitrator failed to apply the appropriate legal criteria in determining the amount of such damages. Specifically, the Agency maintains that the Arbitrator should have assessed whether an award of that magnitude: (1) ran afoul of the bar against non-pecuniary compensatory damage awards that are monstrously excessive standing alone; and (2) is consistent with such damage awards in similar cases. *Id.*

In this regard, the Agency asserts that the Arbitrator failed to compare the harm suffered by the grievant in this case with the harm suffered by plaintiffs in other cases. *Id.* at 55-56. Moreover, according to the Agency, the Arbitrator failed to determine the extent to which the harm suffered by the grievant is traceable to actions of the Agency and how much of the harm is the result of other factors, particularly the stress factors involved in his personal situation. *Id.* at 56-57. In particular, the Agency contends that there is no evidence that the alleged delay in the processing of the grievant's request for accommodation resulted in the grievant succumbing to chronic obstructive pulmonary disease or forced him to take a disability retirement. The Agency also notes that the Equal Employment Opportunity Commission limits non-pecuniary compensatory damage awards to $40,000, except in cases predicated upon evidence of permanent or substantially long-term effects or in cases where the employer's actions had catastrophic effects on a plaintiff. *Id.* at 60.

The Agency contends that, to the extent the Arbitrator's award takes into account any loss of earnings by the grievant as a result of Agency action, the award is in error because there is no evidence in the record of such loss. *Id.* at 61. Further, the Agency argues, the grievant's disability retirement precludes the inclusion of any loss of future earnings in the award of damages. *Id.* Finally, the Agency asserts that the grievant is not entitled to damages because it made a good faith effort to provide him with a reasonable accommodation. *Id.* at 62-63.

6. The award is based on nonfacts

The Agency contends that the award is based on findings that constitute nonfacts. In particular, the Agency argues that the Arbitrator erred as a matter of

fact in finding that the Agency had not made a good faith effort to accommodate the grievant's disability. *Id.* at 64. The Agency also maintains that the Arbitrator erred as a matter of fact in holding that the Agency had not rebutted the testimony of the Agency's reasonable accommodation coordinator. *Id.* at 65. Finally, the Agency asserts that the Arbitrator erred by relying on May 2002, as the date for the beginning of its liability as evidence because he had excluded such evidence after the Agency objected to its introduction. *Id.* at 66.

7. The award fails to draw its essence from the parties' CBA

According to the Agency, the parties incorporated the Act into their CBA. *Id.* at 67. Consequently, the Agency maintains that the Arbitrator was bound to apply precedent under the Act and he failed to do so. Moreover, the Agency argues that the parties' CBA precludes the introduction in an arbitration proceeding of an issue that was not raised in a grievance. *Id.* As the grievance did not allege an oral request for reasonable accommodation in May 2002, the Arbitrator's consideration of evidence regarding that request fails to draw its essence from the CBA. *Id.* Similarly, the Arbitrator's findings as to a hostile work environment prior to June 2002 also concern a matter not raised in the grievance, and thus fail to draw their essence from the CBA.

Further, because the parties' CBA requires that the grievance state the specific nature of any discrimination alleged, the award does not draw its essence from the agreement since the Arbitrator considered evidence prior to the June 2002 matters in the grievance. The Agency argues that, in this respect, the Arbitrator acted outside the scope of his authority.

Finally, the Agency maintains that the Arbitrator improperly restored leave to the grievant for the years 2002-2003 because the Arbitrator found that the hostile work environment created by the Agency came to an end in November 2002, thus providing no basis for restoring any leave used thereafter. Additionally, the Agency contends that the Arbitrator failed to make any specific findings as to the portion of the leave used by the grievant that was traceable to the Agency's discriminatory actions.

B. Union's Opposition

1. The Agency's exceptions are procedurally deficient

The Union contends that the Agency's exceptions were untimely filed under § 2425.1 of the Authority's Regulations. Specifically, the Union claims that it e-mailed a scanned copy of the award to the Agency, and the Agency received it, on May 25, 2005. Consequently, the Agency's exceptions should have been filed on June 27, 2005, and, since they were filed after that date, they are untimely.

The Union also contends that the Agency's exceptions do not comply with § 2425.2 of the Authority's Regulations because they do not contain all the pertinent documents in the case. According to the Union, the Agency submitted selected parts of the record that supported its arguments and conclusions. The Union asserts that "[b]y ignoring contrary evidence and omitting the transcript where it counters its positions, the Agency has failed to provide pertinent documents and is misleading the Authority." Union Opposition at 5.

2. The Agency's exceptions constitute disagreement with the Arbitrator's findings of fact and conclusions of law

The Union contends that the Arbitrator applied the appropriate legal framework for enforcing the Act and that his findings and conclusions are consistent with that framework. Opposition at 7. The Union notes the Arbitrator found that the grievant was a qualified individual with a disability, specifically finding that he was substantially limited in the major life activity of breathing. Moreover, the Union states that the Arbitrator properly found that the grievant had requested an accommodation from the Agency prior to the November meeting. In this regard, the Union maintains that the Agency's arguments are not based in the totality of the evidence, but on a narrow selection of portions of the record. The Union also asserts that the Arbitrator properly relied on the grievant's conversations with supervisor 1 in May 2002 as providing context for the grievant's written request for an accommodation in his June letter.

The Union argues that the Agency "ignore[s]" evidence supporting the Arbitrator's finding that there was a relationship between the grievant's disability and the accommodations that he requested. *Id.* at 12. Specifically, the Union notes that the Arbitrator relied on the testimony of Dr. 1 concerning the effect of work-related stress on the grievant's asthma. According to the Union, the Agency knew of the grievant's asthma before June 2002 and that stress exacerbated his disability. The Union contends that the Agency's exceptions attempt to mislead the Authority into ignoring the context of the grievant's request, relying on the testimony of supervisor 1 and supervisor 2, overlooking contrary evidence in the record that supports the Arbitrator's findings and conclusions.

As to the Agency's arguments with respect to the interactive process, the Union maintains that the Arbitrator did not find that the Agency's failure to engage in that process constituted a violation of the Act. *Id.* at 13. Rather, according to the Union, the Arbitrator based his conclusion that the Agency violated the Act on his finding that the Agency had improperly required the grievant to navigate a series of hurdles in the process of obtaining a reasonable accommodation of his disability. In this regard, the Union argues that the grievant needed only to raise the issue of his disability and request an accommodation in order to trigger the interactive process. The Union claims that the Arbitrator properly found that the grievant did just that. In addition, the Union notes that the grievant suggested accommodations other than a reassignment.

With respect to the Agency's argument that the Arbitrator did not properly hold the grievant to proof by a preponderance of the evidence that he was a victim of reprisal, the Union points out that the Arbitrator specifically stated proof by a preponderance of the evidence as the grievant's burden. *Id.* at 14. The Union also asserts, contrary to the Agency's assertion, that the Arbitrator held that supervisor's 2 reprisal was "causally related to a prior EEO complaint filed against the Agency by the [g[rievant *as well as* to the [g]rievant's need and request for an accommodation." *Id.* at 15 (emphasis in original). Further, the Union argues that the Arbitrator found that supervisors 1 and 2 began trying to get rid of the grievant at the same time that they were delaying action on his request for accommodation. *Id.* at 14. The Union also argues that the Arbitrator found that: (1) the grievant's request for an accommodation for his disability constituted protected activity; and (2) the Agency's reprisal against the grievant and its actions creating a hostile work environment were directed at that protected activity. In this regard, the Union notes that: (1) supervisor 2's affidavit in the EEO case claimed that the grievant attempted to destroy a supervisor who was a subordinate of supervisor 2; and (2) while the Agency focuses on August 2001 - the date the complaint was filed - the investigation and processing of the EEO complaint took place between November 2001 and November 2004 and thus occurred concurrently with activity regarding the grievant's request for accommodation. *Id.* at 16. Finally, as to the Agency's claim that its justification for its actions were never addressed, the Union asserts that the Arbitrator found that the Agency's explanations for its actions with respect to the grievant were not "credible." *Id.*

3. The award of compensatory damages is not excessive

The Union states that the Agency provided no evidence to rebut the Arbitrator's finding that the hostile work environment and "unrelenting pressure" resulting from the actions of the grievant's supervisors caused the grievant's health to deteriorate to the point that he was forced to medically retire. Opposition at 17. Specifically, the Union asserts that the Arbitrator found, based on the testimony of the grievant's doctors and his medical record, that the grievant's asthma, depression, and COPD, with the accompanying side effects of osteoporosis, hypertension, and headaches were directly related to the stress caused by the hostile work environment. *Id.* at 18. According to the Union, the Arbitrator assigned a proper "monetary value" to the "permanent, crippling, life-long pain and suffering caused by the agency's wholly avoidable violation of . . . law . . . ." *Id*.

IV. Preliminary Matters

A. The Agency's exceptions were timely filed

The time limit for filing exceptions to an arbitration award is 30 days beginning on the date the award is served on the filing party. 5 C.F.R. § 2425.1(b). As relevant here, the date of service is the date the arbitration award is deposited in the United States mail. 5 C.F.R. § 2429.27(d). If the award is served by mail, 5 days are added to the period for filing exceptions. 5 C.F.R. § 2429.22. Contrary to the Union's position, it is the date of *service*, not the date of *receipt*, that controls in determining the timeliness of exceptions. *See AFGE, Local 2401*, 58 FLRA 1, 1 (2002) (*Local 2401*).

The Arbitrator's award is dated May 23, 2005 and was served on the Agency by mail. *See, e.g., United States Dep't of Veterans Affairs, Hot Springs, S. D.*, 48 FLRA 804, 805 (1993) ("Absent evidence to the contrary, the date of the arbitration award is presumed to be the date of service.") Consequently, in order to be timely filed, the Agency's exceptions had to be postmarked no later than June 27, 2005. The exceptions were postmarked on that date and, thus, were timely filed. *See, e.g., Local 2401* at 1.

Accordingly, we find that the Agency's exceptions were timely filed.

B. The Agency's exceptions are sufficiently complete

The Authority's regulations provide that "[a]n exception must be a dated, self-contained document which sets forth in full: (a) A statement of the grounds on which review is requested; (b) Evidence or rulings

bearing on the issues before the Authority; [and] (c) Arguments in support of the stated grounds, together with specific reference to the pertinent documents and citations of authorities . . . ." 5 C.F.R. § 2425.2.

The Agency specifically sets forth the legal and private sector grounds on which it relies for claiming that the award is deficient, presents detailed arguments in support of those grounds, and cites substantial legal precedent and portions of the record in connection with its arguments. This constitutes sufficient grounds and sufficient substantive information for the Authority to consider the Agency's exceptions. *See United States Dep't of the Navy, Marine Corps Air Station, Cherry Point, N. C.*, 60 FLRA 155, 157 (2004) (citing *AFGE, Local 1698*, 57 FLRA 1, 2 (2001)). As such, the Agency's exceptions adequately set forth the bases upon which the award is allegedly deficient.

V. Analysis and Conclusions

A. The award's consistency with law

The Agency's exceptions raise issues concerning whether the Arbitrator's determinations that: (1) the Agency is liable for failure to provide the grievant with reasonable accommodation; (2) the Agency subjected the grievant to reprisal and to a hostile work environment; and (3) the grievant is entitled to $200,000 in compensatory damages, are consistent with the Act. The Authority reviews questions of law *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local* 1437, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.*

1. Legal framework: reasonable accommodation

To establish a *prima facie* case of discrimination under the Act, a grievant must show that he or she: (1) has a disability within the meaning of the Act; (2) is qualified to perform the essential functions of the position in question, with or without reasonable accommodation; [10] and (3) was discriminated against because of his or her disability. [11] *See United States Dep't of the Army, Corps of Engr's, Huntington Dist., Huntington, W. Va.*, 59 FLRA 793, 797 (2004) (*Huntington Dist.*) (citing *Austin Serv. Ctr.*, 58 FLRA at 547-48). An agency commits unlawful discrimination by failing to reasonably accommodate a qualified individual with a known disability unless the agency demonstrates that such accommodation would impose an undue hardship on the agency. *See id*.

There is no dispute in this case that the grievant is: (1) a qualified individual with a disability; and (2) qualified to perform the essential functions of the positions in question, with or without accommodation. The issues that are the focus of the Agency's exceptions concern whether the grievant properly invoked the accommodation process so as to render the Agency liable for failure to provide him with a reasonable accommodation.

EEOC Oct. 17 Guidance provides that requests for reasonable accommodation do not need to be in writing, and an individual need not mention the Act or reasonable accommodation. *See also* EEOC Oct. 20 Guidance, which provides that an individual need not mention the Act or the phrase "reasonable accommodation." Award at 18, Opposition, Exh. 127 at 5. As the court stated in *Taylor*:

> [W]hile the notice does not need to be in writing, . . . or formally invoke the magic words "reasonable accommodation," the notice must nonetheless make clear that the employee wants assistance for his or her disability. In other words, the employer must know of both the disability and the employee's desire for accommodation for that disability.
>
> These rules are consistent with the statute[,] which says that the employer must make reason-

10. Under the Act, the phrase "'position in question' is not limited to the position actually held by the employee, but also includes reassignment to vacant positions at the employee's current grade level, or if none, positions at the highest available grade level or level below the employee's current grade or level." *Yarbrough v. Glickman*, EEOC Appeal No. 01973593 (December 29, 2000).

11. The standards required for a determination as to whether the Act has been violated are those established under the ADA. *See* 29 U.S.C. §§ 791(g), 794(d); 42 U.S.C. § 12112(9). "When interpreting and applying the Act, the Authority applies the standards of the ADA, which are to be given precedential effect." *United States Dep't of the Treasury, IRS, Austin Serv. Ctr.*, 58 FLRA 546, 547 (2003) (*Austin Serv. Ctr.*). It is noted that on September 25, 2008, Congress amended the ADA (ADA Amendments of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008)). *See* also, EEOC Notice Concerning the [ADA] Amendments Act of 2008. As these amendments became effective January 1, 2009, courts have concluded that such amendments cannot be applied retroactively to conduct that preceded the effective date. *See Moran v. Premier Educ. Group*, 599 F.Supp 2d 263, 271 (D. Conn. 2009) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)) and *Fernandez-Vargas v. Gonzales,* 548 U.S. 30, 37 (2006)). As the conduct in this case preceded the ADA amendments, such amendments do not apply here.

> able accommodations to an employee's "known" disability. . . . What matters under the [Act] are not formalisms about the manner of the request, but whether the employee . . . provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.

Id., 184 F.3d at 313. [12] It is not necessary that the employer have actual knowledge of an employee's disability, or his or her need for assistance, for the request to be legally sufficient. *See Conneen v. MBNA America Bank, N.A*., 334 F.3d 318, 332 (3rd Cir. 2003) (*Conneen*) (". . . circumstances must at least be sufficient to cause a reasonable employer to make appropriate inquiries about the possible need for an accommodation."). "The quantum of information that will be required will . . . often depend on what the employer already knows." *Id.* at 332.

When an employee's request carries with it sufficient information to put the employer on notice that the employee is seeking an accommodation for his or her disability, an interactive process between the employer and the employee is triggered. [13] Given sufficient notice, the employer has a mandatory obligation to engage in the process. *See, e.g., Vinson v. Thomas,* 288 F.3d 1145, 1154 (9th Cir. 2002).

Where the disability and/or need for accommodation is not obvious, the employer may ask for information and documentation about the employee's functional limitations. *Huntington Dist.*, 59 FLRA at 797. [14] *See also* EEOC Oct. 17 Guidance, Question 6 under "Requesting Reasonable Accommodation." For example, because there must be a connection between the disability, and the limitations resulting from the disability, and the requested accommodation, the employer may need to obtain, and the employee to provide, information and/or explanation that would establish the requisite nexus. *See, e.g., Felix v. N.Y. City Transit Auth.*, 324 F.3d 102, 107 (2nd Cir. 2003) (employee "must show a causal connection between the specific condition which impairs a major life activity and the accommodation.")

The employer's duty to provide reasonable accommodation, and potential liability for failure to provide such accommodation, arises when the interactive process is triggered. *See, e.g., Huntington Dist.*, 59 FLRA at 797 (citing *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1988)). An employer must act in a timely manner through the process, and an agency that obstructs or delays the interactive process is not acting in good faith. [15] Under the framework outlined above, an employee demonstrates that an employer violated its obligation to provide a reasonable accommodation because it failed to participate in good faith in the interactive process by showing that:

> (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

Williams v. Phila. Hous. Auth. Police Dept., 380 F.3d 751, 772 (3rd Cir. 2004) (citing *Taylor*, 184 F.3d at 319-20).

2. Application of the reasonable accommodation framework: the Arbitrator's award finding that the Agency failed to provide the grievant reasonable accommodation is not contrary to law

Applying this framework to the Arbitrator's award in this case, the Arbitrator properly concluded that the Agency failed to provide the grievant with a reasonable accommodation for his disability. Specifically, the

12. In *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 803 (7th Cir. 2005) (*Sears, Roebuck & Co*), the court stated that "the 'initial duty to inform the employer of a disability[]' . . . requires at most that the employee indicate to the employer that [he or] she has a disability and desires an accommodation."

13. "Once the employer knows of the disability and the employee's desire for accommodations, it makes sense to place the burden on the employer to request additional information that the employer believes it needs." *Taylor*, 184 F.3d at 315.

14. As the court stated in *Sears, Roebuck & Co*, 417 F.3d at 804: "Where notice is ambiguous as to the precise nature of the disability or desired accommodation, but it is sufficient to notify the employer that the employee may have a disability that requires accommodation, the employer must ask for clarification. . . . In other words, an employer cannot shield itself from liability by choosing not to follow up on an employee's requests for assistance, or by intentionally remaining in the dark."

15. *See* EEOC Oct. 17 *Guidance*, Question 10 under "Requesting Reasonable Accommodation:"

> An employer should respond expeditiously to a request for reasonable accommodation. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed as quickly as possible. Similarly, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of the [Act].

Arbitrator found that the Agency was on notice as to the grievant's disability at the time the grievant requested an accommodation, at least as early as the June letter. In this regard, he found that supervisor 1 "was well aware of the [g]rievant's asthma" as early as January 2002 because of his absence from work as a result of that condition. Award at 19. The Arbitrator noted that supervisor 1 admitted to that knowledge. The Arbitrator's factual findings show that Supervisor 1 testified that she knew the grievant's asthma "'was considered a disability.'" *Id.* (quoting Tr. at 784).

Moreover, the Arbitrator found that "stress" factors the grievant experienced as a result of his work in the Refund 1 unit exacerbated his asthma. *Id.* at 19. The Arbitrator's factual findings also show that supervisor 1 had reason to know of the connection between the grievant's work and his disability because of her discussions with the labor relations office. *See id.* at 5 (Union Exh. 130) and 19 (referring to April 1, 2002 e-mail from Supervisor 1 to an employee, Theis, in the Labor Relations Office (April 1, 2002 e-mail)). In particular, the Arbitrator's factual findings referring to the content of this e-mail reveal Supervisor 1 was aware that the grievant took leave for health reasons when he experienced stress as a result of difficulty in learning his new job in that unit. *See* Award at 19 (referring to April 1, 2002 e-mail). Thus, the Arbitrator's factual findings establish not only that the Agency knew of the grievant's medical disability -- "problems with asthma" -- but had reason to know that there was a connection between that disability and the "stress" he experienced in his job. *Id.* at 19 and 22.

Further, the "grievant's "discussion" with supervisor 1 in May, indicating a need to be "reassign[ed] for reasons of health, and the supervisor"s existing knowledge of the grievant's asthma and the effect of job stress on his asthmatic condition demonstrates that the Agency was aware that the grievant's request for a reassignment in his June letter was a request for an accommodation due to a medical disability. *Id.* at 19 and 20.

As to the Agency claim that the Arbitrator's definition of "a reasonable accommodation request" is inadequate based on the EEOC October 17 Guidance concerning how an individual requests a reasonable accommodation, that is, an individual must let the employer know that an adjustment in work is needed for a reason related to a medical condition, the Agency has not demonstrated that the Arbitrator's application of that phrase as applied in the EEOC October 20 Guidance or the EEOC October 17 Guidance is inconsistent with such Guidance. As discussed above, the Arbitrator's factual findings show that, in the circumstances of this case, the Agency was aware that the grievant's request for a reassignment in his June letter was a request for an accommodation for his disability - problems with asthma. Also, the Agency's reliance on *Chavis* provides no basis for finding that the Arbitrator erred in finding that the grievant's request for a reassignment in his June letter was a request for an accommodation of his disability. According to the Agency, in *Chavis* the EEOC "determined that a complainant's transfer request to another state was not a request for reasonable accommodation." Exceptions at 18. The EEOC's finding in *Chavis* was based on facts that are distinguishable from the instant case. In this regard, the EEOC found that the employee failed to provide medical documentation or to otherwise prove that he sought a transfer to another location as an accommodation for a disability. *See id.* n.2. On the other hand, in this case, the record contains sufficient evidence that establishes that the grievant sought the reassignment as an accommodation for his disability.

Accordingly, based on the above, the Agency's assertions do not establish that the June letter was insufficient to put the Agency on notice that the grievant was requesting an accommodation for a disability, and that there was no connection between the disability and the requested accommodation. *See, e.g.*, *Taylor*, 184 F.3d. at 314-15 (when employer has more than enough background information, the amount of information in an employee's request for accommodation need not be specific and detailed).

Having found that the Agency was obligated to engage in an "interactive process" with the grievant beginning at least with the June letter, the Arbitrator found that, from the point at which the Agency received sufficient notice of the grievant's request for accommodation in the June letter, the Agency "did nothing[]" to provide a reasonable accommodation. Award at 18. In particular, the Arbitrator found that EEOC directives implementing the Act require agencies to "'expeditiously'" process a request for accommodation and that the Agency violated its obligation to act quickly with respect to the request. *Id.* at 18 (quoting EEOC October 20 Guidance). Thus, the Arbitrator found that Supervisors 1 and 2 "were both culpable and should have attempted to find a reasonable accommodation for the [g]rievant no later than . . . June of 2002." *Id.* at 20. Given this, as the Arbitrator found, the Agency's reliance on its later actions does not constitute a defense to its earlier failure to act in good faith towards the June 2002 request. *See* Award at 20 and 22. Also, *see, e.g., Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir.1996) (once an employer has knowledge of an

employee's disability and the employee has requested accommodation, the employer should engage in an interactive process with the employee).

Accordingly, the Agency's arguments do not establish that the Arbitrator erred in finding that the Agency failed to reasonably accommodate the grievant's request for accommodation.

3. Legal frame work: retaliation

The Agency contends that the Arbitrator did not apply the appropriate legal framework in determining that the Agency acted in reprisal against the grievant for the grievant's EEO activity and further asserts that as the Arbitrator "did not differentiate the Agency's actions he believed were motivated by prior EEO activity from those actions he believed were evidence of 'hostile work environment[]'. . . [it would] assume that the Arbitrator listed all of these incidents as support for each claim." Exceptions at 46. Based on the Agency's assertions and the issue as framed by the Arbitrator -- [w]hether the Agency subjected the [g]rievant to a hostile work environment in reprisal on the basis of disability and his prior and on going involvement in the EEO process in violation of the Act, the CBA, and/or other law [] -- we construe the Agency's claim as an assertion that the Arbitrator's finding of reprisal on the basis of the grievant's involvement in the EEO process and his disability violates title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et* seq. (title VII) and the Act. *See, e.g., Singletary v. D.C., et al.*, 351 F.3d 519, 524 (D.C. Cir. 2003) (*Singletary*); *Quiles-Quiles v. Henderson*, 439 F.3d 1, 8 (1st Cir. 2006) (*Quiles-Quiles*) ("The Rehabilitation Act prohibits retaliation against employees for complaining about violations of the Act."); *Coons v. Sec'y of the Treasury*, 383 F.3d 879, 887 (9th Cir. 2004) ("the ADA prohibits an employer from retaliating against an employee who seeks an accommodation in good faith") (citing *Heisler v. Metro. Council*, 339 F.3d 622, 630 n.5) (8th Cir. 2003)). Also, a retaliation claim under the ADA is analyzed under the same framework employed in Title VII cases. *Lovejoy-Wilson v. Noco Motor Fuel, Inc.*, 263 F.3d 208 (2nd Cir. 2001). As the Authority applies the standards of the ADA in applying the Act, we consider the Agency's arguments based on the same framework.

A complainant "can establish a *prima facie* case of reprisal discrimination" under title VII by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. *Buggs v. Powell*, EEOC Appeal No. 01A24607 (November 17, 2003) (*Buggs*) (citing *Shapiro v. Social Security Administration*, EEOC Request No. 05960403 (December 6, 1996)). Consistent with the burden-shifting formula set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a complainant may establish a *prima facie* case of reprisal by showing that: (1) he or she engaged in a protected activity; (2) subsequently, he or she was subjected to adverse treatment by the agency; and (3) a nexus, or causal connection, exists between the protected activity and the adverse action. *See, e.g., Holcomb v. FDIC,* 433 F.3d 889, 903 (D.C. Cir. 2006). *See also Buggs*, which adds the additional element that it must be shown that the employer is aware of the complainant's protected activity. In particular, a violation will be found if an employer retaliates against a worker for engaging in protected activity through threats, harassment in or out of the workplace, or any other adverse treatment that is reasonably likely to deter protected activity by that individual. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 59-66 (2006). *See also Jensen v. Potter*, 435 F.3d 444, 448 (3rd Cir. 2006) (*Jensen*) (majority of Federal circuit courts of appeal hold that a retaliation claim predicated on a hostile work environment is cognizable under title VII).

Also, in *Jensen*, the court stated that "[r]etaliatory conduct . . . violates Title VII when it "'alters the employee's compensation, terms, conditions, or privileges of employment,' deprives him or her of 'employment opportunities', or 'adversely affect[s] his [or her] status as an employee.'" *Id. See also Buboltz v. Residential Advantages, Inc.,* 523 F.3d 864, 868 (8th Cir. 2008) (for discussion of adverse employment action and circumstances that may or may not constitute adverse action).

Proof of a retaliatory motive can be through direct or circumstantial evidence. *Fabela v. Socorro Indep. School Dist.*, 329 F.3d 409, 414-15 (5th Cir. 2003) (*Fabela*) (direct evidence is evidence "if believed, proves the fact [in question] without inference or presumption"); *Chambers v. Geithner*, 2009 EEOPUB LEXIS 234 (2009) (*Geithner*) (direct evidence is an action or statement of an employer which reflects a discriminatory or retaliatory attitude, and which correlates to the challenged act). A violation may also be established indirectly, through circumstantial evidence, where such evidence gives rise to an inference of retaliation and the employer is unable to "produce evidence of a legitimate, non-retaliatory reason for the challenged action, or if the reason advanced" by the employer "is a pretext to hide the retaliatory motive." EEOC Compliance Manual, Section 8, "Retaliation," at 8-17. Initially, this inference arises "where there is proof that the protected activity and the adverse action were related." *Id*.

at 8-18. "Typically," the relation is demonstrated by evidence that: (1) the adverse action occurred shortly after the protected activity, and (2) the person who took the adverse action was aware of the complainant's protected activity before taking the action. *Id*. Generally speaking, for "mere temporal proximity" to constitute "sufficient evidence of causality to establish a *prima facie* case, the "temporal proximity must be 'very close.'" *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273 (2001). However, an inference of retaliation may arise even if the time period between the protected activity and the adverse action was long, if there is other evidence that raises an inference of retaliation. *Howard v. Potter*, 2008 EEOPUB LEXIS 1580.

4. Application of the retaliation framework: the Arbitrator's award finding that the Agency retaliated against the grievant is not contrary to law

There is no dispute that the grievant satisfies the first part of the test for retaliation, as he sought a reasonable accommodation in good faith as well as initiated an EEO complaint under the Agency process. *See, e.g., McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1124 n.19 (9th Cir. 2004) (simply meeting with an EEO counselor is protected activity). It is clear, as well, that supervisor 2, at least, knew of the grievant's EEO activity because he gave a deposition in the EEO case and, as discussed above, the Agency was aware of the grievant's request for a reasonable accommodation for his health.

Further, the Arbitrator's factual findings demonstrate that the employee was subjected to adverse Agency action. In this regard, the Arbitrator's factual findings show that, after the grievant submitted a letter, [16] expressing concerns about, among other things, his health and requesting a reassignment, through supervisor 1 to supervisor 2, that supervisor required the grievant to "rewrite the letter . . . and to leave out any references to his health." Award at 18 and 19. Such action adversely affected the grievant in that it delayed action on his reassignment request for accommodation of his medical condition until November 2002, some six months later and "ultimately caused the [g]rievant's health to deteriorate to the point he had to medically retire." *Id.* at 22.

Further, the Arbitrator's factual findings show that, in response to the earlier EEO complaint, Supervisor 2 "characterize[ed]" the grievant as a "complainer" without any "specific examples[,]" and that such characterization indicated a "pre-existing negative bias" by this supervisor. *Id.* at 20 (referring to Agency Exh. No. 26, which is the Discrimination Report issued November 10, 2004). *See also* Opposition at 16 (referring to Agency Exh. No. 26). The Arbitrator's factual findings show that subsequent to the grievant's request and while the EEO complaint was pending, the Agency "began to seek ways to get rid of the grievant[,]" including seeking an investigation of the grievant's attendance at his second job. Award at 21. Further, the Arbitrator found that the supervisors gave the grievant "negative narratives and all 1s on his mid-year [and] annual . . . ratings of record." *Id.* He also found that supervisor 2 "testified [that] he requested negative documentation specifically aimed at supporting a performance based action against the [g]rievant." *Id.* As the Arbitrator found, these actions were concurrent with the grievant "seeking" a reassignment to accommodate his medical condition and also took place under a supervisor, who the factual findings show, characterized the grievant as "a complainer[,]" after he filed the EEO complaint, and who the Arbitrator further found showed a "pre-existing negative bias" for the grievant. *Id.* at 20 and 21. *See Fabela,* 329 F.3d at 415 (the *McDonnell Douglas* test is inapplicable where the employee presents direct evidence of a retaliatory motive); *Geithner* (once the trier of fact has accepted the direct evidence, liability is established). Accordingly, the Arbitrator's findings establish directly the causation element of the grievant's claim.

As to the Agency's claim that the Arbitrator failed to address any of its legitimate non-discriminatory bases for its actions, the Arbitrator's factual findings reveal that the Arbitrator evaluated the parties' arguments with respect to the claim of reprisal as well as hostile work environment, discussed below, but found the Agency's arguments and theory were "not convincing." Award at 22. *See* Award at 20, 21 and 22. Accordingly, we find that the Agency has not demonstrated that the Arbitrator's award finding that the Agency retaliated against the grievant for filing an EEO complaint and a request for reasonable accommodation is contrary to law.

5. Legal framework: hostile work environment:

The purposes and remedial frameworks of title VII, the ADA, and the Act are similar. Because title VII and the ADA provide relief from a hostile work environment for persons in a protected class, courts have recognized that the Act also provides a cause of

16. *See* Award at 8 (referring to Union Exh. 124, where the grievant in requesting a reassignment expressed, among other things, his concerns about job training issues, his health -- that is, added stress related to his job performance).

action for disability-based harassment. *See, e.g., Quiles-Quiles*, 439 F.3d at 7; *Mannie v. Potter*, 394 F.3d 977, 982 (7th Cir. 2005) (*Mannie*); *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364 (8th Cir. 2003); *Soledad v. United States Dep't of Treasury*, 304 F.3d 500, 506-07 (5th Cir. 2002) (*Soledad*); *Flowers v. S. Reg'l Physicians Servs., Inc.*, 247 F.3d 229, 232-235 (5th Cir. 2001) (*Flowers*); *Fox v. General Motors Corp.*, 247 F.3d 169, 178-79 (4th Cir. 2001) (*Fox*); *Silk v. City of Chi., et al.*, 194 F.3d 788, 803-04 (7th Cir. 1999) (*Silk*); *Walton v. Mental Health Ass'n of Se. Pa.*, 168 F.3d 661, 666-67 (3rd Cir. 1999) (*Walton*); *Hiller v. Runyon*, 95 F.2d Supp. 1016, 1022-23 (S.D. Iowa 2000) (*Hiller*).

A claim of a hostile work environment, or harassment, based on disability requires a showing that: (1) the grievant is a qualified individual with a disability under the Act; (2) he/she was subject to unwelcome harassment; (3) the harassment was based on his/her disability or a request for an accommodation; (4) the harassment was sufficiently severe or pervasive to alter the conditions of his/her employment and to create an abusive working environment; and (5) the Agency or should have known of the harassment and failed to take prompt effective remedial action. *See, e.g., Soledad*, 304 F.3d at 506; *Walton*, 168 F.3d at 667; *Hiller*, 95 F. Supp. 2d at 1023. To demonstrate a hostile work environment, the grievant must show that the environment is "objectively hostile or abusive" and that he/she "perceived it as a hostile or abusive environment." *Walton*, 168 F.3d at 667 (citing *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 22 (1993) (*Harris*)). Stated differently, the grievant must demonstrate that "the workplace was both subjectively and objectively hostile." *Mannie*, 394 F.3d at 982. *See also Fox*, 247 F.3d at 179; *Silk*, 194 F.3d at 804. "An objectively hostile environment is one that a reasonable person would find hostile or abusive." *Mannie*, 394 F.3d at 982.

In assessing whether any given circumstances are objectively hostile, "the disability based harassment must 'be sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment.'" *Flowers*, 247 F.3d at 236 (citing *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 563 (5th Cir. 1998)). *See also Mannie*, 394 F.3d at 982; *Silk*, 194 F.3d at 804; *Walton*, 168 F.3d at 667. In making that assessment, it is necessary to consider all the circumstances, including "'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Walton*, 168 F.3d at 667 (quoting *Harris*, 510 U.S. at 23). *See also Flowers*, 247 F.3d at 235; *Fox*, 247 F.3d at 178; *Silk*, 194 F.3d at 804.

6. Application of the hostile work environment framework: the award is consistent with law

As noted above, there is no dispute that the grievant is a qualified individual with a disability under the Act. With respect to the second element of the framework, the Arbitrator concluded that the supervisors were motivated by hostility to the grievant because of their deliberate efforts to establish the basis for an adverse action against the grievant. Specifically, the Arbitrator noted the following: (1) supervisor 2 "characterized" the grievant as a "complainer[;]" (2) supervisors 1 and 2's discussions with the labor relations staff which indicated management's efforts to rid themselves of the grievant through an "adverse action[;]" and (3) the monitoring of the grievant's performance through "100 % reviews" of his work with the intent to "remove the [g]rievant based upon [his] performance reviews[.]" Award at 21, 22 and 23. The Arbitrator found that the grievant felt the impact of these pressures on his health because, as the testimony of the grievant's doctor and other medical evidence reveal, the grievant's deteriorating health was "directly related to the stress caused by the hostile work environment he worked in." *Id.* at 23. Moreover, "objective evidence" in the record indicates that the grievant subjectively felt the impact of the supervisors' hostile actions because, as the Arbitrator found, their actions "created an atmosphere and work environment which ultimately caused the [g]rievant's health to deteriorate to the point [that] he had to medically retire." *Id.* at 22. The Arbitrator's findings and conclusions therefore meet the second requirement of the hostile environment framework.

The Arbitrator found that the actions evidencing the supervisors' hostile intent toward the grievant were "on[-]going and concurrent" with the grievant's request for reasonable accommodation. *Id.* at 21. Specifically, the Arbitrator found that the supervisors did "nothing" in response to the grievant's initial request for reasonable accommodation, instead placing barriers in the way of that request. *Id.* at 19. The supervisors' failure to act on the request, following closely on the request itself, establish a temporal nexus between the supervisors' hostile actions and the grievant's request and his disclosure of his disability. The Arbitrator's findings in this regard support the conclusion that the supervisors' hostile actions toward the grievant were because of his disability and his request for accommodation of that disability, the third requirement of the hostile work environment framework.

As to the fourth requirement, the Arbitrator specifically found that a "reasonable person" would have found the grievant's work environment to be hostile. *Id.* at 23. The Arbitrator found that the supervisor's delay in acting on the grievant's request for accommodation exacerbated his medical condition. The Arbitrator also found that the supervisors worked together to put pressure on the grievant through negative performance reviews. As noted above, undisputed evidence in the record indicates that: (1) the grievant's performance was consistently documented by means of 100% review during the time the grievant worked under supervisor 1; and (2) the grievant's mid-performance year, annual, and close out ratings of record were the lowest possible ratings. *See* Award at 21, 22 and 23. *See, e.g., McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453, 460 (6th Cir. 1997) ("'[f]ailure to consider the possibility of reasonable accommodation for [known] disabilities, if it leads to discharge for performance inadequacies resulting from the disabilities, amounts to a discharge solely because of the disabilities.'") (quoting *Borokowski v. Valley Central School Dist.*, 63 F.3d 131, 143 (2nd Cir. 1995)).

The Arbitrator also concluded that the actions to alienate others towards the grievant were motivated by hostility toward the grievant related to his request for an accommodation of his disability. *See* Award at 22.

The Arbitrator concluded that the cumulative effect of all these "pressures" on the grievant resulted in the "deteriorate[ion]" of his physical condition. *Id.* Failing to act on the grievant's request, and subjecting him to consistent documentation of his performance by 100% review of his work product, all in the face of evidence that these pressures were resulting in job-related stress that "exacerbated his medical condition" -- asthma --and caused him to take significant amounts of leave, demonstrates that the "negative, hostile environment" to which the grievant was subjected was severe and pervasive and altered his working conditions. *Id.* at 23. The effect of all these circumstances is such that a "reasonable person" would "conclude" that they were sufficiently severe or pervasive to alter the conditions of his employment and to create an abusive working environment that "contribute[ed] to the [g]rievant's medical retirement at approximately age 45." *Id.* Thus, the Arbitrator's findings and conclusions meet the fourth requirement of the framework.

Consequently, the Agency's challenges to the Arbitrator's hostile work environment finding do not establish that the award is contrary to law. [17]

7. Legal framework: compensatory damages

To receive an award of compensatory damages, the grievant must demonstrate that he has been harmed as a result of the Agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. *See, e.g.*, *Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 [Section 102]*, EEOC Notice No. 915002 (July 14, 1992), at 11-12, 14 (*EEOC Enforcement Guidance*). *See also Campbell v. Gonzales*, EEOC Appeal No. 01A40538 (September 1, 2005). Section 102 provides, however, that "an agency is not liable for compensatory damages in cases of disability discrimination where it demonstrates that it made a good faith effort to accommodate the complainant's disability." *See Mack v. West*, EEOC Appeal No. 01983217 (June 23, 2000) (*Mack*). The amount of compensatory damages awarded should reflect the extent to which the Agency's discriminatory action directly or proximately caused harm to the grievant and the extent to which other factors may have played a part. *Enforcement Guidance*, at 8, 11-12. *See also McCoy v. Nicholson*, EEOC Appeal No. 01A43628 (September 22, 2005); *Williams v. Potter*, EEOC Appeal No. 07A50008 (March 30, 2005) (award reduced because complainant had other stressors in her life); *Hartley v. Veneman*, EEOC Appeal No. 01972242 (December 22, 2002) (*Hartley*). Moreover, the amount of non-pecuniary damages should reflect the nature and severity of the harm to the grievant, and the duration or expected duration of the harm. *See, e.g., Hartley*. Awards of non-pecuniary compensatory damages in excess of $100,000 have resulted when the emotional damage has been catastrophic, leaving an employee unable to work for years to come, if ever. *See Mack*.

Where a complainant has a pre-existing condition, such as the grievant in this case, the agency is liable only for the additional harm or aggravation caused by the discrimination. *See Heffley v. Potter*, EEOC Appeal No. 07A40138 (March 17, 2005). *See also McDonnell v. Johnson*, EEOC Appeal No. 01A33904 (December 4, 2003); *Carpenter v. Slater*, EEOC Appeal No. 01971161 (March 17, 2000) (agency's discriminatory conduct severely exacerbated employee's pre-existing problems). Moreover, where that pre-existing condition inevitably would have worsened, the agency is entitled to a reduction in damages reflecting the extent to which the condition would have worsened even absent the dis-

17. The Agency does not challenge the award as it concerns the satisfaction of the fifth requirement of the hostile work environment test. As such this requirement is not addressed further.

crimination. *Id*. The burden of proof is on the agency to establish the extent to which it is entitled to a reduction in the award. *Id*. Conversely, the fact that a complainant suffered from a pre-existing condition does not in and of itself serve to reduce the amount of compensatory damages suffered by an employee where there has been no showing that the employee suffered from the aggravated physical manifestations of the condition at issue in the case prior to the discrimination. *See Durrant v. West*, EEOC Appeal No. 01971885 (September 15, 2000).

Additionally, "[a]n award of compensatory damages must be based on objective evidence." *PTO*, 52 FLRA at 373 (citing *Lawrence v. Runyon*, EEOC Appeal No. 01952288) (*Lawrence*)). Objective evidence includes:

> statements from the complainant concerning his/her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other nonpecuniary losses . . . . Statements from others, including family members, friends, and health care providers could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Objective evidence also may include documents indicating a complainant's actual out-of-pocket expenses related to medical treatment, counseling, and so forth, related to the injury allegedly caused by discrimination.

Id. Further, "[t]he grievant's own testimony, along with the particular circumstances of the case, may be sufficient to sustain [his] burden of proving damages due to emotional distress." *Id*.

Finally, an award of compensatory damages should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. *See Hartley* (citing *Jackson v. United States Postal Service*, EEOC Appeal No. 01972555 (April 15, 1999); *Cygnar v. City of Chi.*, 865 F.2d 827, 847-48 (7th Cir. 1989)).

8. Application of the compensatory damages framework: the record is insufficient to determine whether the award of compensatory damages is contrary to law

The Arbitrator awarded the grievant $200,000 in compensatory damages because he found that: (1) the Agency did not make a good faith effort to accommodate the grievant's disability prior to November 15, 2002; (2) during the period May to November 2002, the Agency subjected the grievant to harassment and a hostile work environment.

The Arbitrator cited no evidence as the basis for this award and made none of the findings that would be necessary under the legal framework outlined above in order to substantiate the award. *See PTO*, 52 FLRA at 374. Specifically, the Arbitrator did not rely on any of the testimonial or documentary evidence in the record that establishes that the grievant is entitled to compensatory damages or to the amount of those damages. When an arbitration award does not sufficiently explain an arbitrator's determination on a pertinent statutory requirement, the Authority examines the record to see if it permits the Authority to resolve the matter. *See, e.g., United States Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.,* 58 FLRA 87, 91-92 (2002). If it does not, the Authority remands for further proceedings to assure that the resolution of the matter is consistent with law. *See id. See also United States Dep't of Transp., Fed. Aviation Admin.*, 61 FLRA 634, 636 (2006). Here, the record does not permit us to make the determination of whether the amount of compensatory damages awarded is consistent with law.

With respect to the award, we further note that, although the Arbitrator did not set forth specific findings as required, his findings and the size of the award suggest that a part of this sum may be punishment for the Agency's conduct toward the grievant and for his loss of future earnings. In this regard, we note that punitive damages are not available in discriminatory conduct cases brought against Federal agencies. *See Castillo v. Norton*, EEOC Appeal No. 01990818 (July 16, 2002); *EEOC Enforcement Guidance* at Section II. B. Further, as to loss of future earning, we note that "proof of entitlement to loss of future earning[s] capacity involves ëevidence suggesting that [an individual's] injuries have narrowed the range of economic opportunities available to [them].'" *Stephens v. Jackson*, EEOC Appeal No. 01A53933 (March 24, 2006) (citing *Gorniak v. Nat'l R.R. Passenger Corp.*, 889 F.2d 481, 484 (3rd Cir. 1989)). Also, courts require evidence that the impairment of earning capacity be shown with reasonable cer-

tainty or reasonable probability and there must be evidence which will permit the factfinder to arrive at a pecuniary value for the loss. *Id.* (citations omitted).

Accordingly, the portion of the award concerning compensatory damages is remanded to the parties for resubmission to the Arbitrator, absent settlement, for his clarification of the grievant's entitlement to compensatory damages based on the framework outlined above. *Id. See also United States Dep't of the Treasury, Internal Revenue Serv., Oxon Hill, Md.*, 56 FLRA 292, 300 (2000).

Further, the Agency's claim that the Arbitrator erred in restoring the grievant's leave for the period 2002-2003 appears to be a claim that the award is inconsistent with legal limitations on the Arbitrator's remedial authority, rather than an essence exception. As noted above, an agency is liable for the harm directly or proximately caused by its actions. The Arbitrator made no findings linking the scope of the leave awarded and the scope of the Agency's illegal activity and the record does not permit the Authority to make such determination. To this extent, the award must also be remanded. On remand, the Arbitrator should specify the amount of leave awarded the grievant and the manner in which the Agency's illegal actions are responsible for the use of that leave.

B. The award is deficient, in part, on the ground of nonfact

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *United States Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). The Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at hearing. *Id*. at 594 (citing *Nat'l Post Office Mailhandlers v. United States Postal Service*, 751 F.2d 834, 843 (6th Cir. 1985)).

An arbitrator's legal conclusions cannot be challenged on the ground of nonfact. *See, e.g., NTEU, Chapter 143*, 60 FLRA 922, 931 (2005). The Agency's claim that the Arbitrator erred, as a matter of nonfact, in finding that the Agency did not make a good faith effort to accommodate the grievant's disability constitutes a challenge to the Arbitrator's legal conclusions. Specifically, the exception disputes the Arbitrator's conclusion that the Agency failed to properly initiate and participate in the required interactive process with the grievant. Moreover, as recommended above, the Arbitrator's conclusions in this regard are consistent with law. Consequently, the Agency's exception does not provide a basis for finding the award deficient.

Disagreement with an arbitrator's determinations regarding the credibility of witnesses also provides no basis for finding an award deficient on the ground of nonfact. *See, e.g., United States Dep't of the Army, Norfolk Dist., Army Corps of Engineers, Norfolk, Va.*, 59 FLRA 906, 909 (2004). The Agency's claim that the Arbitrator erred in finding that it failed to rebut the coordinator's testimony essentially challenges the Arbitrator's conclusion that the coordinator's testimony was more credible than that of witnesses on whose testimony the Agency relies. Consequently, the Agency's exception does not provide a basis for finding the award deficient. *Id*.

Finally, as to the Agency's exception concerning the Arbitrator's reliance on evidence he had excluded, we note that the Arbitrator sustained the Agency's objection to the grievant's testimony concerning his oral conversation with supervisor 1 in May 2002 requesting a reassignment. Moreover, in discussing the Agency's objection, the Union attorney stated that, in introducing that testimony, she was not "making a claim." Tr. at 526. In context, it appears that the Union attorney was stating that she was not seeking to amend the grievance to allege a failure to accommodate retroactive to May 2002. As such, the Arbitrator ignored the Union's concession that the Agency's accommodation liability would begin in June 2002. Accordingly, to the extent that the award finds the Agency liability for failure to accommodate the grievant begins in May 2002 rather than June 2002, the award is deficient. Thus, the award is modified to reflect that the Agency's liability for failure to accommodate the grievant's disability commences with the date of the June letter.

C. The award is not deficient on essence grounds

For an award to be deficient as failing to draw its essence from the parties' agreement, it must be established that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of an arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *United States Dep't of Labor (OSHA)*, 34 FLRA 573 575 (1990).

The Agency's argument that the Arbitrator was bound by the parties' CBA to apply precedent under the

Act simply restates its claims regarding the award's consistency with law, previously addressed. Consequently, there is no need to address this argument here.

Similarly, the Agency's contentions as to the Arbitrator's finding that the Agency's failure to accommodate the grievant's disability began in May 2002 has been previously addressed.

As to the Agency's claim that the award fails to draw its essence from the CBA because the Arbitrator's findings as to a hostile work environment concerned matters not raised in the grievance, the Agency fails to specify the matters to which it refers. Specifically, nothing in the grievance alleging a hostile work environment specified a date on which the alleged harassment began or ended. Thus, the Agency fails to demonstrate that the Arbitrator's award fails to draw its essence from contractual provisions regarding the scope of matters submitted to arbitration.

For similar reasons, the Agency's claim that the award fails to draw its essence from contractual provisions concerning grievances related to discrimination provides no basis for finding the award deficient. The Agency fails to establish that the discrimination claims addressed by the Arbitrator were not the claims alleged in the grievance. Moreover, to the extent that this exception concerns the Arbitrator's finding with respect to May 2002, that finding concerned only the Agency's liability for failure to accommodate. It did not concern the beginning or duration of the hostile work environment created by the Agency. Consequently, the Agency's claim in this regard fails to provide a basis for finding that the award is deficient.

VI. Decision

The Agency's exceptions are denied to the extent that the exceptions challenge the portions of the award finding that the Agency violated the Act by failing to provide the grievant with reasonable accommodation; retaliated against the grievant for filing an EEO complaint and an accommodation request; and created a hostile work environment. The Agency's exception that the award is deficient on essence grounds also is denied. Consistent with this decision, the Agency's nonfact exception is denied in part, and the award is modified in part. With respect to the award of compensatory damages and the restoration of leave, this portion of the award is remanded to the parties for resubmission to the Arbitrator, absent settlement, for further findings consistent with this decision.

APPENDIX

1. Article 4, Section 2 of the parties' collective bargaining agreement provides as follows:

> The Employer shall not:
>
> A. Discriminate for or against any employee or applicant for employment:
>
> 1. on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964; and
>
> 2. on the basis of age, as prohibited under Sections 12 and 15 of the Age Discrimination in Employment Act of 1967;
>
> 3. on the basis of sex, as prohibited under Section 6(d) of the Fair Labor Standards Act of 1938;
>
> 4. on the basis of handicapping condition, as prohibited under Section 501 of the Rehabilitation Act of 1973;
>
> 5. on the basis of marital status or political affiliation, as prohibited under any law, rule or regulation.

2. Article 12, Section 9(D) of the parties' collective bargaining agreement provides as follows:

> (D) In selecting cases for review, the Employer will select a reasonable sample of the employee's work. The supervisor will consider any particular case(s) the employee asks him or her to review.

3. Section II. A(1) of the EEOC Guidance provides, in relevant part, the following:

1. May an agency require that individuals with disabilities use particular words to request a reasonable accommodation?

No. A request for accommodation is a statement that an individual needs an adjustment for a change at work or in the application process for a reason related to a medical condition. Agencies may not require, for example, that individuals mention the Rehabilitation Act or use the phrase "reasonable accommodation." The agency's procedures should make this point clear.

. . . .

Exceptions, Attachment 127.

Purposely Left Blank

Purposely Left Blank

Purposely Left Blank