

**70 FLRA No. 181**

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

and

NATIONAL TREASURY  
EMPLOYEES UNION  
CHAPTER 52  
(Union)

0-AR-5316

—  
DECISION

October 31, 2018

—  
Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Member DuBester concurring, in part,  
and dissenting, in part)

**I. Statement of the Case**

In this case, we address the Agency's failure to engage in ongoing discussions concerning necessary, reasonable accommodations for the grievant and conclude that the Agency did not satisfy its obligations under the Rehabilitation Act. We further conclude that the Arbitrator's award of \$25,000 in compensatory damages for this failure was reasonable.

As relevant here, the Union filed two grievances on behalf of an individual taxpayer advisory specialist (the grievant) against her supervisor (the supervisor). This case concerns Arbitrator I. B. Helburn's resolution of those two grievances in a single award issued on August 17, 2017. The Arbitrator found that, in various ways, the Agency violated the parties' collective-bargaining agreement, Agency regulations, the Fair Labor Standards Act (FLSA), the Rehabilitation Act, and the Civil Rights Act of 1964 (the Civil Rights Act).

The Agency argues that the Arbitrator exceeded his authority and was biased, and that the award is contrary to law and based on a nonfact. For the reasons explained below, we set aside the Arbitrator's: (1) finding that the Agency violated the Civil Rights Act,

and the accompanying compensatory damages; (2) award of "treble damages" for an FLSA violation; and (3) award of a 30% enhancement on other damages to offset taxes. We reject the rest of the Agency's arguments.

**II. Background**

In September 2011, the Union filed the first grievance (the 2011 grievance), asserting that the supervisor had improperly required the grievant to take fifteen minutes of leave because the supervisor mistakenly thought that the grievant was one minute late for work (the leave incident). But, more broadly, the grievance alleged that the leave incident was the latest indication of a hostile work environment caused by the supervisor's "long[-]standing pattern and practice of . . . abusive, harassing, discriminatory, [and] retaliatory behavior" towards the grievant.<sup>1</sup> The grievance listed other actions that also allegedly contributed to the hostile work environment, including the supervisor yelling at the grievant during a training event (the training incident). The grievance further alleged that the hostile work environment was based on: (1) the grievant's disability; and (2) the grievant's previous participation in the negotiated grievance and equal-employment-opportunity-complaint processes – some of which related to the Agency's denial of the grievant's request for reasonable accommodation for a disability in 2003. The 2011 grievance asserted that these actions violated the Rehabilitation Act, the Civil Rights Act, and the parties' collective-bargaining agreement. The Agency denied the grievance.

In October 2012, the Union filed the second grievance (the 2012 grievance), asserting that the supervisor ordered the grievant to stay beyond her tour of duty, but then refused to pay the grievant overtime (the overtime incident). The grievance asserted that this incident demonstrated the continuation of the hostile work environment that the Union had alleged in the 2011 grievance. According to the grievance, the continued hostile work environment violated the Rehabilitation Act, the Civil Rights Act, and the parties' agreement. And, separately, the grievance asserted that the Agency continued to fail to provide the grievant reasonable accommodation in violation of the Rehabilitation Act, the parties' agreement, and the Agency's internal reasonable-accommodation policies.

The 2012 grievance reached step three of the parties' negotiated grievance procedure in February 2013. In March 2013, the Agency received an official form from the grievant and her physician requesting reasonable accommodation. Later in March 2013, the parties held the step-three meeting on the 2012 grievance. At that

<sup>1</sup> Award at 7.

meeting, the step-three deciding official asked the grievant to provide a physician's letter stating whether the supervisor's actions caused the grievant's disabling medical conditions. In May 2013, the grievant provided the requested letter, and the deciding official denied the 2012 grievance without mentioning the physician's letter that he had requested, or addressing reasonable accommodation for the grievant.

The parties advanced both the 2011 grievance and the 2012 grievance to arbitration before the Arbitrator.

Concerning the 2011 grievance, the Arbitrator credited the grievant's testimony regarding the leave and training incidents. But the Arbitrator found that the leave and training incidents were *not* disparate treatment based on the grievant's disability, and that these incidents were *not* part of a hostile work environment *based on the grievant's disability*.

Next, the Arbitrator addressed whether the Agency retaliated against the grievant, or created a hostile work environment, *based on the grievant's prior protected activity*. The Arbitrator found that the grievant proved her retaliatory hostile-work-environment claim because she established a causal relationship between her 2003 reasonable-accommodation request and the leave and training incidents. Therefore, the Arbitrator found that the Agency violated the Civil Rights Act.

Turning to the 2012 grievance, the Arbitrator determined that the supervisor required the grievant to stay fifteen minutes past her tour of duty and denied her overtime pay. Thus, the Arbitrator found that the Agency owed the grievant – an individual taxpayer advisory specialist covered by the FLSA – compensation and attorney fees under the parties' agreement and the FLSA for "suffered or permitted" overtime.<sup>2</sup>

Next, the Arbitrator found that *the 2012 grievance itself* served as a reasonable-accommodation request because it put the Agency on notice that the grievant sought reasonable accommodation. Consequently, the Arbitrator examined whether the Agency properly addressed the reasonable-accommodation request in the 2012 grievance by investigating the grievant's need for workplace modifications. In that regard, the Arbitrator credited the testimony of the Agency's reasonable-accommodation coordinator that: (1) the grievant provided adequate documentation to establish that she was a qualified individual with a disability under the Rehabilitation Act, including the letter that the grievant's physician provided during the third step of the grievance procedure; and

(2) the grievant's suggested accommodations were reasonable and "legitimate."<sup>3</sup>

Further, the Arbitrator noted that, once management becomes aware of an employee's disability and potential need for accommodation, the Rehabilitation Act and related regulations obligate the Agency to "engage in an informal[, interactive] process with the employee to clarify what the employee needs and identify the appropriate reasonable accommodation."<sup>4</sup> However, the Arbitrator found that, during the processing of the 2012 grievance, the Agency did not engage at all in the interactive process to explore ways to accommodate the grievant. As an example, the Arbitrator noted that the step-three deciding official asked for specific documentation to support the grievant's disability-related claims, but then the official completely ignored that documentation in his grievance response. And the Arbitrator credited the grievant's physician that the supervisor's actions caused, and later exacerbated, the grievant's disability.

Consequently, the Arbitrator found that the Agency failed to address the grievant's 2012 request for reasonable accommodation. He held that this failure violated the Rehabilitation Act, the parties' agreement, and the Agency's internal regulations.

The Arbitrator awarded a variety of remedies, which are discussed further below.

The Agency filed exceptions to the award on September 18, 2017, and the Union filed an opposition on October 23, 2017.<sup>5</sup>

<sup>2</sup> *Id.* at 86.

<sup>3</sup> *Id.* at 88.

<sup>4</sup> *Id.* at 76 (quoting Opp'n, Attach. AB2011, Agency's Post-Hr'g Br. on 2011 Grievance at 43); *see id.* at 84 ("the interactive process").

<sup>5</sup> In addition, each party filed one supplemental submission, which we discuss in note 62 below.

### III. Analysis and Conclusions

The Agency argues that the award is contrary to law in several respects, each of which we discuss in more detail in Parts III.A. through III.C. below.<sup>6</sup>

#### A. The remedy for the overtime incident is contrary to the FLSA, in part.

After finding that the Agency suffered or permitted the grievant to work past her normal tour of duty in connection with the overtime incident, the Arbitrator awarded the grievant “treble damages” for unpaid overtime compensation.<sup>7</sup>

The Agency argues that the FLSA rectifies overtime violations by requiring payment of the overtime compensation itself and an equal amount in “liquidated damages”<sup>8</sup> – not “treble damages.”<sup>9</sup> The Union agrees,<sup>10</sup> and the parties are correct.<sup>11</sup> Accordingly, we modify the award to provide the grievant overtime compensation and liquidated damages,<sup>12</sup> rather than treble damages.<sup>13</sup>

<sup>6</sup> When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Dep’t of the Treasury, U.S. 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. *U.S. DOD, Dep’t of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings, unless the excepting party establishes that they are nonfacts. *E.g., U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012).

<sup>7</sup> Award at 91.

<sup>8</sup> Exceptions at 78-79 (citing 29 U.S.C. § 216(b); *U.S. Dep’t of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.*, 56 FLRA 280, 286 (2000)).

<sup>9</sup> Award at 91.

<sup>10</sup> Opp’n at 24 n.50.

<sup>11</sup> *E.g., U.S. DOJ, Fed. BOP, Fed. Corr. Institution, Jesup, Ga.*, 69 FLRA 197, 203 (2016) (“Under 29 U.S.C. § 216(b), an employer who violates the FLSA is liable to affected employees for both unpaid overtime and liquidated damages unless the employer can establish an affirmative defense . . .”).

<sup>12</sup> Award at 91 (“treble damages” for unpaid overtime). To the extent that the Arbitrator based the treble-damages remedy on contractual violations, our adjustment to the damages amount applies equally to those violations because the relevant contract provision refers to compensation for overtime work “[u]nder the FLSA.” See Award at 3 (quoting pertinent contract provision); *id.* at 89 (“The Agency . . . violated the [parties’] agreement and the [FLSA] when [it] . . . ‘suffered or permitted’ [the grievant to work] . . . overtime.”); see *AFGE, Local 1667*, 70 FLRA 155, 157 (2016) (noting that Authority will apply de novo legal review to arbitrators’ contractual interpretations

#### B. The Arbitrator’s finding of a retaliatory hostile work environment in connection with the 2011 grievance is contrary to the Civil Rights Act.

The Arbitrator sustained the 2011 grievance’s claim of a hostile work environment in retaliation for her 2003 reasonable-accommodation request (the 2011 retaliation finding),<sup>14</sup> but the Agency contends that the grievant “failed to prove a causal link between her prior protected EEO activity and [her] adverse treatment.”<sup>15</sup>

After finding that the grievant’s 2003 reasonable-accommodation request was protected activity, the Arbitrator essentially concluded that any and all adverse treatment that the grievant suffered thereafter necessarily had some causal connection to her 2003 protected activity. But because the grievant’s protected activity and adverse treatment occurred eight years apart, the Arbitrator’s conclusion on causation required something more to support it.<sup>16</sup> None of the Arbitrator’s other findings establish the necessary causal link. For example, the Arbitrator did not find that, after the grievant’s 2003 reasonable-accommodation request, the supervisor treated the grievant worse than she had

where, for example, the contract’s wording “mirrors” statutory wording).

<sup>13</sup> It is undisputed that the FLSA applies to the grievant’s position of individual taxpayer advisory specialist. But, for the first time in its exceptions, the Agency contends that the grievant’s *flexible schedule* makes her ineligible for suffer-or-permit overtime. Exceptions at 77. In contrast, the Union contends that the grievant actually works a *fixed schedule*, and that the Agency’s arguments are barred. Opp’n at 23-24 & n.48. At arbitration, the Union specifically requested suffer-or-permit overtime compensation, Award at 45, and the Agency did not raise the grievant’s schedule type or allege that it made her ineligible for suffer-or-permit overtime, see Opp’n, Attach. AB2012, Agency’s Post-Hr’g Br. on 2012 Grievance at 20-22, 40-41. Consequently, the Arbitrator did not make *any* findings regarding the grievant’s schedule type. Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority “will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator.” 5 C.F.R. §§ 2425.4(c), 2429.5. Accordingly, we dismiss these Agency arguments. Further, the Agency argues that the Union is not entitled to attorney fees because the Agency did not violate the FLSA, Exceptions at 79, but because we dismiss the Agency’s arguments challenging the FLSA violation, we deny the Agency’s attorney-fees argument as well. <sup>14</sup> See Award at 81-83.

<sup>15</sup> Exceptions at 28.

<sup>16</sup> *Cf., e.g., Garth N. v. Maybus*, EEOC Doc. 0120142878, 2017 WL 527271, at \*5 (2017) (“[Causal] nexus may be shown by evidence that the adverse treatment followed the protected activity *within such a period of time* and in such a manner that a retaliatory motive is inferred.” (emphasis added)).

before that request. Nor did the Arbitrator explain why he concluded that the grievant's adverse treatment likely stemmed from her reasonable-accommodation request *eight years earlier*.<sup>17</sup>

Because the Arbitrator's factual findings are insufficient to satisfy the causation standards for retaliation under the Civil Rights Act, we set aside the 2011 retaliation finding.<sup>18</sup> We likewise set aside the corresponding remedy of \$225,000.<sup>19</sup> Further, to the extent that the remedy of "pecuniary damages" for lost wages, therapy costs, medication expenses, and lost sick and annual leave applies to the time period covered by the 2011 grievance, we set aside that portion of the damages.<sup>20</sup> Moreover, the Arbitrator directed the Agency to either reassign the supervisor outside the grievant's chain of command or permit the grievant to transfer to a budgeted position in a different Internal Revenue Service unit. As there is no longer a Civil Rights Act violation to support it,<sup>21</sup> we also set aside this remedy.<sup>22</sup>

<sup>17</sup> Contrary to the dissent's assertion, our analysis does not focus "solely" on temporal-proximity considerations. Dissent at 13. First, we note that, although the Arbitrator found that the supervisor treated the grievant poorly in several respects, the Arbitrator did nothing to *link* that treatment to the grievant's earlier protected activity. He merely asserted, without support, that such a link existed based on the poor treatment itself. Second, we note that the lack of temporal proximity between the 2003 reasonable-accommodation request and the 2011 grievance likewise does not support finding a violation.

<sup>18</sup> See *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 964 (2015) (setting aside an arbitrator's determination that an agency retaliated against an employee in violation of the Civil Rights Act where the arbitrator's underlying factual findings did not satisfy the standard for a reprisal claim). In another case involving the same Agency, Union, and Arbitrator as this one, we likewise set aside a finding that the Agency violated the Civil Rights Act because of insufficient findings to establish a violation. *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 70 FLRA 680, 684 (2018) (Member DuBester dissenting).

<sup>19</sup> Award at 91.

<sup>20</sup> *Id.*

<sup>21</sup> The Union implicitly concedes that this remedy was based on the Arbitrator's finding that the Agency violated the Civil Rights Act. See Opp'n at 108 (arguing that the Authority should deny exceptions challenging the remedy of supervisory reassignment or employee transfer because the Authority has upheld a similar arbitral remedy for a violation of the Civil Rights Act (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 59 FLRA 787 (2004))).

<sup>22</sup> Because we are setting aside the 2011 retaliation finding and the corresponding remedies, we need not address: (1) the Agency's other challenges to the 2011 retaliation finding and related remedies, e.g., Exceptions at 22-67; or (2) the Union's assertions that the Authority's Regulations bar some of those challenges, e.g., Opp'n at 17-23, 25 (citing §§ 2425.4(c), 2429.5).

C. The Agency violated the Rehabilitation Act when it failed to address the grievant's 2012 reasonable-accommodation request.

Under the Rehabilitation Act, "an agency's duty to provide reasonable accommodation is an ongoing one."<sup>23</sup> For example, an employee "may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation."<sup>24</sup> Thus, the "duty to provide reasonable accommodation is . . . not exhausted by one effort."<sup>25</sup> Relatedly, the Authority has recognized that the interactive process "involves a dialogue . . . [that] is usually initiated when an employee *indicates in some way*, . . . that he or she has a disability for which an accommodation is needed. An agency's duty to provide reasonable accommodation is *triggered at that point*."<sup>26</sup>

In connection with the 2012 grievance,<sup>27</sup> the Arbitrator found that the Agency's deliberate failure to engage in the interactive process and address the grievant's 2012 reasonable-accommodation request was a discrete act that violated the Rehabilitation Act

<sup>23</sup> *U.S. Dep't of the Army, Corps of Eng'rs, Huntington Dist., Huntington, W. Va.*, 59 FLRA 793, 797 (2004) (Army) (citing *Ralph v. Lucent Techs., Inc.*, 135 F.3d 166, 171-72 (1st Cir. 1998) (*Ralph*); *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC Notice No. 915.002 (Oct. 17, 2002) (*Guidance*), "Other Reasonable Accommodation Issues" (Question 32)).

<sup>24</sup> *Id.* (quoting *Mitchell v. Potter*, EEOC Doc. 01A03170, 2001 WL 1103813, at \*3 (2001)).

<sup>25</sup> *Id.* (omission in *Army*) (quoting *Ralph*, 135 F.3d at 172).

<sup>26</sup> *Id.* (emphases added) (citations omitted).

<sup>27</sup> The Agency argues that the Arbitrator's determination that the 2012 grievance included a reasonable-accommodation request is based on a nonfact. Exceptions at 67 n.37, 101. To the extent that this determination is a factual finding, the parties disputed that issue below. Compare Opp'n, Attach. UB at 19, with Opp'n, Attach. AB2012 at 55-56. As such, this argument does not provide a basis for finding that the award is based on a nonfact. *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993). But even if we considered whether this determination was clearly erroneous, the plain wording of the grievance supports it. See Opp'n, Attach. UX 4M at 359 ("The Agency violated the Rehabilitation Act . . . when the [A]gency failed to follow the reasonable[-]accommodation process and provide accommodations necessary to ameliorate the grievant's medical condition."), 360 ("request[ing] . . . [pecuniary and c]ompensatory damages . . . for the physical and mental injuries [the grievant] has suffered . . . [under] the Rehabilitation Act").

(the discrete-act theory),<sup>28</sup> as well as proof of an ongoing hostile work environment that violated the Rehabilitation Act.<sup>29</sup> Either theory will independently support the Arbitrator's award of \$25,000.<sup>30</sup> We begin by examining the discrete-act theory of recovery.<sup>31</sup>

The Agency contends that the Arbitrator erred when he found that the grievant raised a timely reasonable-accommodation claim in the 2012 grievance.<sup>32</sup> But the Agency had reason to know, when it received the 2012 grievance, that it should have engaged the grievant in the interactive process to determine reasonable accommodation. Not only did the 2012 grievance refer to "reasonable accommodation" specifically, but it also expressly alleged that the Agency was in violation of the Rehabilitation Act.<sup>33</sup> Consistent with applicable precedent,<sup>34</sup> we uphold the Arbitrator's finding that the 2012 grievance triggered the Agency's interactive-process obligations.<sup>35</sup>

<sup>28</sup> *E.g.*, Award at 88 ("The Agency's failure to engage in the interactive process in this instance or to take steps to consider the reasonable accommodation request beyond a denial by inaction rises to discrimination based on . . . disability."); *see also id.* at 90 (finding that Agency "ignored or dismissed the [2012] reasonable[-]accommodation request[,] and . . . [this] disability discrimination justifies the smaller award of non-pecuniary damages").

<sup>29</sup> *Id.* at 91.

<sup>30</sup> *Id.* The Agency does not challenge the amount of these damages, but we note that the amount is less than awards in several comparable cases. *E.g.*, *Marguerite W. v. Perez*, EEOC Doc. 0120142727, 2016 WL 7666501, at \*4 (2016) (awarding \$30,000 for failure to engage in interactive process and make good-faith effort to accommodate employee over three months); *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 66 FLRA 228, 230 (2011) (discussing award of \$35,000 for "unreasonable . . . delay" in providing reasonable accommodation).

<sup>31</sup> Under this theory, we will not address the Agency's challenges that concern only a hostile work environment, rather than a standalone denial of reasonable accommodation (i.e., discrete act). *E.g.*, Exceptions at 6, 27-28, 62, 67, 68, 69, 72-73.

<sup>32</sup> Exceptions at 6; *see* Award at 69.

<sup>33</sup> *See* Award at 84 (noting that "the 2012 grievance states in relevant part, 'The [A]gency violated the Rehabilitation Act . . . when the [A]gency failed to follow the reasonable[-]accommodation process and provide accommodation necessary to ameliorate the grievant's mental condition.'"); *see also id.* at 88.

<sup>34</sup> *E.g.*, *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 64 FLRA 39 (2009) (*IRS*). In *IRS*, an employee with chronic asthma gave his supervisor a letter "request[ing] . . . a reassignment because of stress." *Id.* at 40. The arbitrator found that, because the supervisor knew of the employee's asthma, the letter "should have triggered . . . an interactive process." *Id.* at 42. On exceptions, the Authority rejected the assertion that the grievant had not made a sufficient reasonable-accommodation request. *Id.* at 43.

<sup>35</sup> *See Army*, 59 FLRA at 797 (citing *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998); *Guidance*,

In addition, the Agency contends that the grievant's requested accommodations were not reasonable.<sup>36</sup> But the Arbitrator credited the testimony of the Agency's reasonable-accommodation coordinator that the grievant identified "legitimate" bases for modifications,<sup>37</sup> and that testimony is consistent with precedent from the Equal Employment Opportunity Commission (EEOC) that "[a]djusting supervisory methods is a form of reasonable accommodation."<sup>38</sup> As one example, the EEOC cited a modification that the grievant requested – to put "instructions . . . in writing."<sup>39</sup> Further, the grievant requested that her supervisor "stay out of [her] personal space . . . [and] speak to [her] in a normal, rather than a raised, tone of voice,"<sup>40</sup> which resembles an accommodation that a federal court found reasonable for someone with the same disabling conditions as the grievant.<sup>41</sup> As such, the Agency does not identify a basis for finding that providing the requested accommodations would have been unreasonable in the circumstances of this case.<sup>42</sup>

Moreover, the Agency argues that no objective evidence showed that the failure to address the 2012 accommodation request harmed the grievant.<sup>43</sup> But the Arbitrator credited the letter from the grievant's physician, as well as the grievant's own testimony,<sup>44</sup> that the supervisor's "behavior" not only "triggered [the grievant's] disability,"<sup>45</sup> but also

EEOC Notice No. 915.002, "Requesting Reasonable Accommodation" (Question 1)).

<sup>36</sup> Exceptions at 74-75.

<sup>37</sup> Award at 88.

<sup>38</sup> *Complainant v. Holder*, EEOC Doc. 0120090011, 2014 WL 586587, at \*3 (2014) (citing *Enforcement Guidance: The Americans with Disabilities Act & Psychiatric Disabilities*, EEOC Notice No. 915.002 (Mar. 25, 1997), "Is adjusting supervisory methods a form of reasonable accommodation?" (Question 26)).

<sup>39</sup> *Id.*; *see* Opp'n, Attach., Union's Ex. 18 at 59B ("All directions to the employee should be put in writing . . .").

<sup>40</sup> Award at 88.

<sup>41</sup> *Heath v. Brennan*, No. 2:13-CV-00386-JDL, 2015 WL 2340781, at \*8 (D. Maine May 14, 2015) (unreported) (finding that an employee's request for supervisors to "avoid stressful confrontations" and "be sensitive when communicating" with him could be a reasonable accommodation, given his "PTSD, depression, and anxiety").

<sup>42</sup> Further, the Agency has never asserted that providing the requested accommodations would constitute an "undue hardship." *IRS*, 64 FLRA at 49 ("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." (emphases added)).

<sup>43</sup> Exceptions at 91.

<sup>44</sup> Award at 90 ("[Grievant's] own testimony elaborated on the . . . conditions with which she was afflicted.").

<sup>45</sup> *Id.* at 87.

“exacerbated” it.<sup>46</sup> Because the Agency failed to explore accommodations, the Arbitrator determined that the Agency denied the grievant any “possibility of ameliorating” the conditions that exacerbated her disability.<sup>47</sup> As such, we find that the Agency’s failure to engage in the interactive process and provide reasonable accommodation harmed the grievant.

In sum, we uphold the Arbitrator’s findings that: (1) the Agency failed to engage in the interactive process; (2) the Agency’s failure violated the Rehabilitation Act because there were reasonable modifications available to ameliorate the grievant’s disability; and (3) the Agency’s violation harmed the grievant. Thus, we reject the Agency’s challenges to the award of \$25,000.<sup>48</sup> And because the discrete-act theory of recovery is sufficient by itself to support the \$25,000 award, we do not address the Agency’s various challenges to the Arbitrator’s alternate theory for awarding \$25,000 – a hostile work environment.<sup>49</sup> However, we agree with the Agency that the 30% enhancement on damages that the Arbitrator awarded to cover tax consequences is unlawful here,<sup>50</sup> so we set aside that remedy.<sup>51</sup>

D. We deny the Agency’s nonfact and exceeded-authority exceptions, in part, and dismiss them, in part.

As discussed previously, the Arbitrator found that the Agency knew of the grievant’s desire for

reasonable accommodation no later than the date on which the Union filed the 2012 grievance because that grievance referred to the grievant’s ongoing need for accommodation. In his award, the Arbitrator also refers to the grievant’s subsequent 2013 reasonable-accommodation request.<sup>52</sup> The Agency interprets the award’s reference to the 2013 request as the Arbitrator making a finding regarding whether the Agency “properly addressed the [g]rievant’s [2013] request for reasonable accommodation.”<sup>53</sup> And the Agency challenges this alleged finding as being based on a nonfact and exceeding the Arbitrator’s authority.<sup>54</sup> The Agency’s arguments reflect misunderstandings of the award. A full reading of the award demonstrates that the Arbitrator resolved whether the Agency failed to address the 2012 reasonable-accommodation request – not the 2013 request.<sup>55</sup> Thus, we reject these arguments.<sup>56</sup>

E. Neither the Arbitrator’s findings against the Agency, nor his emails in June and July 2017, show that the Arbitrator was biased.

The Agency argues that the Arbitrator’s adverse rulings, as well as emails that he sent the parties in June and July 2017 about reassigning cases, show that the Arbitrator was biased.<sup>57</sup> As relevant here, to establish that an arbitrator was biased, the excepting party must demonstrate that there was partiality or corruption on the part of the arbitrator.<sup>58</sup> A party’s assertion that an arbitrator’s findings were adverse to that party, without more, does not demonstrate that an arbitrator was

<sup>46</sup> *Id.* at 90; *see also id.* at 30 (letter from grievant’s physician).

<sup>47</sup> *Id.* at 90.

<sup>48</sup> *Id.* at 91. As mentioned in note 30 above, the Agency does not challenge this specific amount of compensatory damages. Rather, the Agency argues that the Authority should set aside the \$25,000 award because the failure to address the 2012 reasonable-accommodation request did not harm the grievant, and because the remedy constitutes unlawful “punitive damages” against the Agency. Exceptions at 92. But we have rejected the Agency’s argument about harm to the grievant. And we reject the Agency’s punitive-damages argument because the Arbitrator clearly characterized this sum as “non-pecuniary damages,” which are not punitive damages. Award at 91.

<sup>49</sup> *See* note 31 above.

<sup>50</sup> Complainants may receive “an award to cover additional tax liability from a lump[-]sum payment of back[.]pay,” but there is no “entitlement to awards to cover tax liability for compensatory damages.” *Rodriguez v. Peake*, EEOC Doc. 0720080064, 2009 WL 224764, at \*1 (2009) (emphasis added) (citing *Van Hoose v. Pirie*, EEOC Docs. 01990455 & 01982628, 2001 WL 991925, at \*3-4, 7 (2001); *Goetze v. Pirie*, EEOC Doc. 01991530, 2001 WL 991923, at \*3-4, 5 (2001); *Holler v. Pirie*, EEOC Docs. 01990407 & 01982627, 2001 WL 991924, at \*3-4, 11 (2001)).

<sup>51</sup> To the extent that the Agency’s “punitive damages” argument concerns the tax-enhancement remedy, *see* Exceptions at 96-98, because we are setting aside that remedy on other grounds, we need not address this argument.

<sup>52</sup> Award at 88.

<sup>53</sup> Exceptions at 105-06.

<sup>54</sup> *Id.*

<sup>55</sup> *See* Award at 88.

<sup>56</sup> *AFGE, Council of Prison Locals #33, Local 0922*, 69 FLRA 351, 353 (2016) (*AFGE*) (misunderstanding does not show award is based on a nonfact); *U.S. DHS, U.S. CBP*, 66 FLRA 838, 844 (2012) (*DHS*) (misunderstanding does not establish that arbitrator exceeded authority). In several parts of the Agency’s exceptions, the Agency relies on documents that it successfully moved to exclude from the record at arbitration. *E.g.*, Exceptions at 14 n.9. To the extent that this reliance on excluded documents is a basis for the Agency’s exceptions, we dismiss that portion of the exceptions under §§ 2425.4(c) and 2429.5 the Authority’s Regulations because it is inconsistent with the Agency’s position at arbitration. *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 69 FLRA 176, 178 (2016).

<sup>57</sup> *E.g.*, Exceptions at 79 n.43 (alleging that Arbitrator’s erroneous award of treble damages in connection with the overtime incident shows bias), 106 n.60 (asserting that, because Arbitrator accepted a Union document into the record but denied the Agency permission to present a responsive document, Arbitrator was biased); *id.* at 7, 107 n.60, 112-17 (arguing that Arbitrator’s emails show bias).

<sup>58</sup> *AFGE, Local 3438*, 65 FLRA 2, 3 (2010) (citing *U.S. Dep’t of VA, Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 398 (1996)).

biased.<sup>59</sup> Thus, the Agency's identification of several arbitral determinations that did not favor it does not, by itself, show bias.<sup>60</sup>

As for the emails that the Agency cites, they concerned reassigning cases, for which hearings had not been held, due to the Arbitrator's retirement. These emails show that the Arbitrator acted scrupulously to *avoid* any potential bias.<sup>61</sup> We find that the emails do not establish that the Arbitrator exhibited partiality, and we deny the bias exception.<sup>62</sup>

#### IV. Decision

We grant the Agency's contrary-to-law exception to the extent that it challenges the amount of FLSA damages,<sup>63</sup> the finding of a Civil Rights Act violation and the associated remedies,<sup>64</sup> and a tax-related enhancement to damages.<sup>65</sup> We reject the Agency's contrary-to-law challenges to the award of FLSA attorney fees,<sup>66</sup> and to the finding of a Rehabilitation Act violation and the associated remedies,<sup>67</sup> and we dismiss the challenge to the grievant's suffer-or-permit overtime eligibility.<sup>68</sup> Further, we deny the Agency's nonfact,<sup>69</sup> bias,<sup>70</sup> and exceeded-authority exceptions,<sup>71</sup> except for the Agency's excluded-documents argument, which we

dismiss.<sup>72</sup> Finally, we modify the award in the ways specified above.

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<sup>59</sup> *AFGE, Local 3354*, 64 FLRA 330, 332 (2009) (citing *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 56 FLRA 381, 384 (2000)).

<sup>60</sup> *See id.*

<sup>61</sup> Exceptions, Attach. 8 at 2.

<sup>62</sup> On October 23, 2017, the Union requested leave to file – and did file – a motion “to submit new evidence to clarify the record.” Union’s Mot. at 1. On November 2, 2017, the Agency filed a response to the Union’s motion, but did not request leave to file its submission. The Authority’s Regulations do not provide for the filing of supplemental submissions, but § 2429.26 of the Regulations provides that the Authority may, in its discretion, grant leave to file “other documents” as it deems appropriate. 5 C.F.R. § 2429.26; *see also AFGE, Local 3652*, 68 FLRA 394, 396 (2015) (*Local 3652*). Generally, a party must request leave to file a supplemental submission, *e.g.*, *AFGE, Local 3571*, 67 FLRA 178, 179 (2014), and explain why the Authority should consider the submission, *Local 3652*, 68 FLRA at 396 (citing *U.S. Dep't of Transp., FAA*, 66 FLRA 441, 444 (2012)). For the reasons previously explained, we find the existing record sufficient to resolve all of the Agency's exceptions. Under these circumstances, we deny the Union's motion and do not consider the Agency's response to it.

<sup>63</sup> *See* Part III.A. and note 12.

<sup>64</sup> *See* Part III.B. and notes 21-22.

<sup>65</sup> *See* p. 9 and notes 50-51.

<sup>66</sup> *See* note 13.

<sup>67</sup> *See* Part III.C. and notes 30-31, 42, 48.

<sup>68</sup> *See* note 13.

<sup>69</sup> *See* Part III.D. and note 27.

<sup>70</sup> *See* Part III.E.

<sup>71</sup> *See* Part III.D.

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<sup>72</sup> *See* note 56.

**Member DuBester, concurring in part and dissenting in part:**

I agree with the majority's determination to uphold various of the Arbitrator's findings, including the Arbitrator's finding that the Agency violated the Rehabilitation Act when it failed to address the grievant's 2012 reasonable-accommodation request. I also agree that the award's "treble-damages" remedy should be modified, and that the thirty-percent enhancement to offset taxes should be set aside.<sup>1</sup>

However, contrary to the majority, I would uphold the Arbitrator's finding that the Agency violated the Civil Rights Act for the annual-leave incident grieved in 2011. Although a number of years elapsed between the grievant's protected activity and the Agency's 2011 retaliatory behavior, the Arbitrator's findings show that there was a "pattern of antagonism"<sup>2</sup> establishing the required causal connection. "Cases in which the required causal link has been at issue have often focused on the temporal proximity between the employee's protected activity and the adverse employment action . . . . [H]owever, . . . where there is a lack of temporal proximity, circumstantial evidence of a 'pattern of antagonism' following the protected conduct can also give rise to the inference[, as may] the proffered evidence, looked at as a whole."<sup>3</sup>

Recognizing such a pattern in the period following the grievant's protected conduct, the Arbitrator's undisputed findings amply support the Arbitrator's conclusion that the grievance's "retaliation allegation" against the grievant's supervisor "has been proven."<sup>4</sup> Those findings make clear that the grievant's protected activity, a reasonable-accommodation request that the grievant's supervisor denied, was "one of many reasons for a long-standing *pattern of retaliation* by [the supervisor]

against the [g]rievant."<sup>5</sup> As the Arbitrator found, the supervisor was not "an equal opportunity harasser."<sup>6</sup> Rather, she "singled out" the grievant.<sup>7</sup> The grievant "was not simply one among equals[;] the [g]rievant was [the supervisor's] target more than others."<sup>8</sup> Although the supervisor "treated women employees horribly," the supervisor treated the grievant "especially" horribly.<sup>9</sup> The grievant "got the butt of everything. . . . [The supervisor] had a vendetta against the [g]rievant . . . [and] an unhealthy preoccupation with [the grievant]."<sup>10</sup> And the record is replete with specific factual findings backing up these characterizations.

Ignoring the proper legal standard and the Arbitrator's detailed, undisputed findings, the majority erroneously concludes that the requisite causal link between the Agency's retaliatory behavior and the grievant's protected activity is unproven. I disagree. The majority's Civil-Rights-Act analysis focuses solely on "temporal-proximity" considerations. But, as discussed above, "the absence of immediacy between the cause and effect does not disprove causation."<sup>11</sup> Because the majority's truncated Civil-Rights-Act analysis is legally incorrect, and fails to give appropriate deference and weight to the Arbitrator's factual findings, I dissent from that determination. And I would therefore reach the remaining issues raised by the Agency and the Union relating to the Arbitrator's Civil-Rights-Act violation findings.

<sup>1</sup> Award at 91-92.

<sup>2</sup> See *Taylor v. Solis*, 571 F.3d 1313, 1323 (D.C. Cir. 2009) (A "pattern of antagonism" would permit "a reasonable jury to infer [the employer] was retaliating against [the plaintiff employee].").

<sup>3</sup> *Kachmar v. Sungard Data Systems, Inc.*, 109 F.3d 173, 177 (3d Cir. 1997) (*Kachmar*) (citations omitted); accord *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920-21 (3d Cir. 1997) ("[A] plaintiff can establish a link between his or her protected behavior and [the alleged retaliation] if the employer engaged in a pattern of antagonism in the intervening period."); see also, e.g., *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 895 (9th Cir. 2005) ("Although a lack of temporal proximity may make it more difficult to show causation, 'circumstantial evidence of a 'pattern of antagonism' following the protected conduct can also give rise to the inference.'" (citations omitted)); *Hysten v. Burlington N. & Santa Fe Ry. Co.*, 296 F.3d 1177, 1184 (10th Cir. 2002) (same).

<sup>4</sup> Award at 83.

<sup>5</sup> *Id.* (emphasis added).

<sup>6</sup> *Id.* at 78.

<sup>7</sup> *Id.* at 78, 80.

<sup>8</sup> *Id.* at 78

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Kachmar*, 109 F.3d at 178.