



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Jamie K.,¹
Complainant,

v.

Tom J. Vilsack,
Secretary,
Department of Agriculture,
Agency.

Appeal No. 0120140785

Agency No. OIG-2006-02653

DECISION

On November 12, 2013, Complainant filed an appeal when the Agency failed to issue a final decision on his request for attorney's fees and costs. For the following reasons, the Commission finds in favor of Complainant.

BACKGROUND

Complainant filed an EEO complaint in 2006, in which he alleged that he had been discriminated against on the bases of his race (African-American) and in reprisal for his prior protected EEO activity when he was awarded a "Fully Successful" performance rating. The Agency issued a final decision finding no discrimination, and Complainant appealed to the Commission. In 2010, we reversed, finding that Complainant had been the victim of reprisal, and, among other things, ordered the Agency to award Complainant attorney's fees and costs. See EEOC Appeal Nos. 0120064535 & 0120091986 (Apr. 23, 2010).

Complainant submitted a petition for attorney's fees and costs in the amount of \$29,669.95. That amount included the fees incurred by Complainant's attorney preparing the petition. After deducting for travel time and a duplicate billing entry, the Agency awarded and paid Complainant \$22,289.15. The difference (leaving aside the travel and duplicate time, which

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

were not appealed) was based upon the Laffey matrix² hourly rate used by Complainant in his lodestar calculation. Complainant's attorney used the Laffey rate in effect in 2010, when the petition was submitted, rather than the rate in effect in 2006-2007, when the work was actually performed. The difference was \$5,219. Complainant appealed the attorney's fee award to the Commission. On July 19, 2013, in EEOC Appeal No. 0120112135, we held that the market rates used in the calculation of attorney's fees are the current market rates when the fee petition is filed and not the historic market rates at the time the work was performed. We ordered the Agency to pay the \$5,219 difference sought by Complainant.

On July 24, 2013, Complainant's attorney wrote to the Agency's Director, Office of Adjudication, regarding our July 19, 2013 decision. In the letter, Complainant noted that in addition to the attorney's fees awarded by the Commission for the work done prior to August 27, 2010 (the date of Complainant's petition for fees arising from the earlier decision), Complainant was entitled to the attorney's fees he incurred in successfully appealing the Agency's attorney's fee award decision.

Complainant's petition for fees included an affidavit by his attorney, an itemized fee statement, and the most recent Laffey matrix, which identified the rates in 2013 (when the petition was prepared). The itemized time entries were for 2011 (when the appeal was prepared) and 2013, and the rates that were applied in the petition for all of the time expended were those applicable in 2013, when the petition was prepared. In the supplemental petition for attorney's fees, Complainant claimed \$4,928.50 for fees incurred preparing the earlier appeal and the instant petition for fees, and \$169.23 in costs, for a total of \$5,097.73. The petition was served on the Agency by e-mail on July 24, 2013. Complainant received no response to the petition for attorney's fees, though he did receive the \$5,219 ordered by the Commission.

On August 20, 2013, Complainant sent another e-mail to the Agency stating that he had sent a petition to them on July 24, 2013, that he had received no response, and that he was re-sending the letter and attachments. In the e-mail, Complainant noted that if he did not receive a response he would have to take the necessary steps to preserve his rights. On August 20, 2013, Complainant received notice that the Agency received the e-mail. To date, the Agency has not replied to either the July 24 or the August 20 petitions for attorney's fees. Complainant filed the instant appeal.

² The Laffey matrix, which has its origins in the case of Laffey v. Northwest Airlines Inc., 572 F. Supp. 354 (D.D.C. 1983), reversed in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), is a chart compiled yearly by the United States Attorney's Office in the District of Columbia. It provides a schedule of hourly rates prevailing in the Washington, D.C., area in each year, going back to 1981, for attorneys at various levels of experience. Piper v. U.S. Dep't of Justice, 339 F. Supp. 2d 13, 24 n. 8 (D.D.C. 2004); see also Ela O. v. Nat'l. Sec. Agency, EEOC Appeal No. 0720130021 (Oct. 30, 2015).

ANALYSIS AND FINDINGS

It is well-settled that Complainant is entitled to the attorney's fees and costs that he incurred during the successful prosecution of the previous appeal. See, e.g., Stance v. Veterans Affairs, EEOC Appeal 0120080515 (June 24, 2010); Mohr v. Veterans Affairs, EEOC Appeal 0720050057 (Feb. 23, 2007). In the petition served on the Agency by e-mail on July 24, 2013, and August 20, 2013, Complainant claimed \$4,928.50 for fees incurred preparing the earlier appeal and the instant petition for fees, and \$169.23 in costs, for a total of \$5,097.73. We find that the Agency erred in not awarding Complainant the attorney's fees he incurred in successfully appealing the Agency's initial attorney's fee award decision in EEOC Appeal No 0120112135 (July 19, 2013).

Because Complainant is again successful in obtaining attorney's fees and costs in the instant appeal, he may submit another fee petition to the Agency for the costs incurred during this current appeal, if he has not done so already. The Agency is advised to promptly respond to Complainant's petition.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein and in the absence of any contentions from the Agency, we award Complainant the attorney's fees and costs incurred during the appeal process, as detailed herein.

ORDER

The Agency is ordered to pay Complainant \$5,097.73 in outstanding attorney's fees and costs, in addition to the fees incurred related to the current appeal, which have not been specified in the record.

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered

corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0416)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. The requests may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

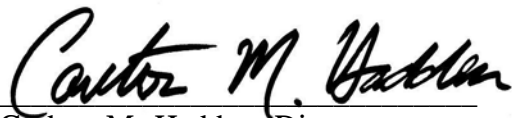
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

November 23, 2016

Date