



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

[REDACTED]
Odis H.,¹
Complainant,

v.

Patrick M. Shanahan,
Acting Secretary,
Department of Defense
(Defense Finance & Accounting Service),
Agency.

Appeal No. 0120171383
Hearing No. 470-2012-00214X
Agency No. DFAS000982011

DECISION

On March 17, 2017, Complainant filed an appeal from the Agency's final order concerning an award of attorney's fees pursuant to a finding of employment discrimination. We accept Complainant's appeal pursuant to 29 C.F.R. § 1614.405(a). For the reasons that follow, we AFFIRM the Agency's final order.

ISSUES PRESENTED

The issues presented are whether the EEOC Administrative Judge erred in determining the appropriate amount of attorney's fees and costs to which Complainant was entitled; and whether the notice the Administrative Judge ordered be posted in Complainant's workplace required more explicit instructions to the Agency and a wider distribution.

BACKGROUND

Complainant worked as a Supervisory Financial Specialist at the Agency's eData Storage and Delivery Mission facility in Columbus, Ohio. On October 21, 2011, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when on or about July 1, 2011, he received a fully successful annual performance appraisal.

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.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, a hearing was held on May 21-22, 2013. On October 13, 2016, the AJ issued a preliminary decision in favor of Complainant, and ordered him to submit an attorney fees petition, which his attorney filed on October 27, 2016. In his affidavit, Complainant's primary attorney claimed 360.70 hours for his own services which he billed at \$250 per hour, 221.8 hours for his associate attorney's services which he billed at \$185 per hour, and 24.4 hours for his paralegal's services which he billed at \$125 per hour for a total attorney's fee bill of \$134,258. The Agency filed an opposition to Complainant's fee petition on November 21, 2016. In the opposition, the Agency requested a 75% across-the-board reduction of the requested \$134,258.00 in attorney fees. The Agency reasoned that the fee petition contained excessive, duplicative, and unreasonable billable hours.

On December 13, 2016, the AJ issued a decision determining that the Agency subjected Complainant to discrimination as alleged. In addition to other forms of relief, the AJ ordered the Agency to pay Complainant's attorney fees and costs in the amount of \$70,719.00. The AJ's award reduced the total number of hours claimed by 50%, which thereby reduced the attorney's fee award to \$68,829.00. Additionally, the AJ awarded Complainant \$1,890 in costs and expenses. In total, the Agency was required to pay Complainant \$70,719.00. The AJ found that Complainant's counsel provided enough documentation to establish the reasonableness of the billing rate and therefore declined to make any adjustments to the hourly rate. Alternatively, the AJ found that the requested total hours were excessive, redundant and unnecessary, and therefore had to be reduced. The Agency was also ordered to post a notice in the workplace regarding the discrimination finding for a period of sixty consecutive days.

The Agency issued a final order adopting the AJ's decision on January 30, 2017. The Agency sent, and Complainant received the \$70,719.00 for attorney's fees on March 8, 2017.

Complainant subsequently filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that to be made whole, the Commission must award him relief that includes the full amount of fees requested in the initial fee petition of \$134,548.00 and costs of \$1890.00. Additionally, Complainant requests more explicit requirements for the notice that was posted in his workplace and a wider distribution. In addition to his contention that the Agency's award does not constitute make whole relief, Complainant contends that the amount of the award does not encourage lawyers to undertake these types of cases, and he further argues that the complexity of his case was minimized by both the Agency and the AJ.

In response to Complainant's appeal, the Agency requests that the Commission affirm the AJ's decision to reduce the attorney's fee award by 50% as it was not an abuse of discretion and was warranted based on the circumstances surrounding the hours claimed in the fee petition.

The Agency contends that Complainant's argument regarding the notice has no merit as the notice was posted from February 13 – May 30, 2017, on two bulletin boards within the Information Technology workspace in a very visible area.

STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held. An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

ANALYSIS AND FINDINGS

On appeal to the Commission, the burden is squarely on the party challenging the AJ's decision to demonstrate that the AJ's factual determinations are not supported by substantial evidence. See id. at Ch. 9, § VI.C. In this case, this means that Complainant has the burden of pointing out where and why the AJ's findings are not supported by substantial evidence. Cf. id. (pointing out that “[t]he appeals statements of the parties, both supporting and opposing the [AJ's] decision, are vital in focusing the inquiry on appeal so that it can be determined whether the [AJ's] factual determinations are supported by substantial evidence.

Attorney's Fees

An agency is required to award attorney's fees for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 29 C.F.R. § 1614.501(e); Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998). Attorney's fees are computed by determining the lodestar, i.e., the number of hours reasonably expended multiplied by a reasonable hourly rate. 29 C.F.R. § 1614.501(e)(2)(ii)(B); EEO Management Directive for 29 C.F.R. Part 1614 (MD-110) at 11-5 (citing Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). All hours reasonably spent in processing the complaint are compensable, and the number of hours should not include excessive, redundant or otherwise unnecessary hours. MD-110 at 11-5 (citing Hensley, 461 U.S. at 434; and Bernard, EEOC Appeal No. 01966861). The presence of multiple counsel at a hearing may be considered duplicative in certain situations, such as where one or more counsel had little or no participation. MD-110 at 11-5 (citing Hodge v. Dep't of Transportation, EEOC Request No. 05920057 (Apr. 23, 1992)).

A reasonable hourly rate is based on prevailing market rates in the relevant community for attorneys of similar experience in similar cases. MD-110 at 11-6 (citing Cooley v. Dep't of Veterans Affairs, EEOC Request No. 05960748 (July 30, 1998)).

Excessive Billing

All hours reasonably spent in processing the complaint are compensable, but the number of hours should not include excessive, redundant or otherwise unnecessary hours. EEOC MD-110 at 11-15. The Commission has ruled that, when reviewing fee petitions which contain many excessive, redundant, unnecessary or inadequately documented expenditures of time, in lieu of engaging in a line-by-line analysis of each charge claimed, the Commission may calculate the number of hours compensable by applying an across-the-board reduction to the number of hours requested. See Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998).

After careful review of Complainant's Counsel's fee petition, we find that Complainant has not established that the amount awarded by the AJ was inappropriate. Like the AJ, we find that several billing entries were excessive. Counsel provided documentation which "tracked" the time spent conducting various activities over the course of representing Complainant in the underlying matters. We agree with the AJ's determination that many of the entries should have been reduced. Specifically, time spent on the following activities seems unreasonable: discovery (56.85 hours); motion and brief writing (101 hours); and co-counsel conferencing (135.10 hours) seem unusually high for the nature of the representation and the matters at issue, i.e., litigating a basic federal sector sex discrimination and reprisal case for eight months.

We find that the 606 hours of claimed attorney and paralegal time appears unreasonably excessive on their face, and that the record supports the AJ's determination that Complainant's Counsel spent unnecessary time and attention on issues which were not novel, and which should have been expected in this type of case. The record indicates that many times Complainant's Counsel conferenced with the other attorney when he could have simply completed the task himself and reduced the number of billed hours. Duplicative entries were submitted for the two attorneys working on the case, when the activities billed were individual tasks. In sum, two attorneys were not necessary, and Complainant's counsel, individually, should not have required 606 hours to represent Complainant through the formal complaint process. See Toy v. Dep't of Homeland Sec., EEOC Appeal No. 07A20122 (Sep. 29, 2004).

While we agree that an across-the-board reduction in billable hours was appropriate, we agree with the AJ's assessment that the Agency's request for an across-the-board reduction of 75 percent was excessive based on the instant facts, and that the 50 percent across-the-board reduction the AJ implemented was more appropriate and in line with Commission precedent. See Toy (finding that a 60 percent across-the-board reduction of attorney's fees was warranted when complainant's fee petition contained calculation of hours for activities already completed or no longer needed due to withdrawn claims); Watts v. Dep't of Agriculture, EEOC Appeal No. 0120093410 (June 11, 2012)(finding that a 60 percent across-the-board reduction of attorney's fees was warranted where some of the counsel's hours were excessive in a non-selection case, and there was no evidence to

support the reasonableness of the requested hourly rate and excessive hours expended). Therefore, we find that the AJ's award of fees in the amount of \$68,829.00, and \$1,890 in costs and expenses for a total of \$70,719.00 was appropriate.²

The Notice

The AJ's order states in relevant part:

"The Agency shall post the attached notice ... for a sixty consecutive calendar day period in conspicuous places where it is visible to employees of DFAS Indianapolis."

We find that the record supports a conclusion that the Agency fully complied with the AJ's order with respect to posting a notice informing the employees of DFAS Indianapolis of the discrimination finding. We find no evidence in the record, or anything presented on appeal, to dispute the fact that the Agency posted the notice from February 13 – May 30, 2017, which was longer than the required 60-day period. The notice was posted within the Information Technology Department on two different bulletin boards in a very visible area. Complainant provided no information to refute these facts. Instead, he contends that the notice was posted in areas that he has not worked in since 2009, and that it was not posted where other information, such as, employee rights and responsibilities. We find nothing in the record to dispute the Agency's contention that it complied with the AJ's order; therefore, we find no basis to order any additional action as it pertains to the notice.³

CONCLUSION

After a careful review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Commission to AFFIRM the Agency's final decision implementing the AJ's determination of the award amount of attorney's fees and costs. We conclude that Complainant is entitled to attorney's fees in the amount of \$68,829.00, and costs in the amount of \$1890.00. We further find that the Agency complied with AJ with regard to the notice with was posted in the workplace, and that no additional positing is required.

ORDER

The Agency, to the extent that it has not already done so, is ORDERED to take the following remedial action within one hundred twenty (120) calendar days of the date this decision is issued:

² The Commission notes that neither Complainant on appeal nor the Agency in its opposition, contests the request and award of \$1890.00 in costs. Therefore, we find no basis to disturb the award.

³ We note that Complainant, if he thought the AJ's order regarding the notice was not adequate, could have filed an appeal on this aspect of the remedy, but he did not.

The Agency shall tender to Complainant attorney's fees in the amount of \$70,719.00.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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 (M0617)

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.

A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. 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. Complainant's request 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 agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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)

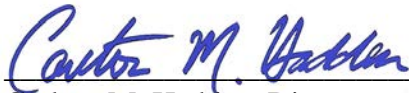
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this 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:

A handwritten signature in blue ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

March 28, 2019

Date