



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

[REDACTED]
Denese G.,¹
Complainant,

v.

Steven T. Mnuchin,
Secretary,
Department of the Treasury,
Agency.

Appeal No. 0120172618

Agency No. IRS-12-0707-F

DECISION

On August 1, 2017, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 29, 2017 final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

BACKGROUND

During the relevant time, Complainant worked as a GA-11 Revenue Officer within the Agency's Small Business/Self-Employed (SBSE) Division in Miami, Florida. Believing that she was subjected to discrimination based on her disability (diabetes) and in reprisal for prior protected EEO activity, Complainant filed a formal EEO complaint on September 13, 2012.

Thereafter, the Agency issued a decision finding no discrimination. Complainant appealed the decision to the Commission. In a prior decision, the Commission affirmed the finding of no discrimination regarding some claims.² However, the Commission also determined that Complainant was denied a reasonable accommodation, subjected to disparate treatment, and

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.

² Claims (1), (2), (3), (4), (6), (8), (9), (12) and (14).

harassed.³ See Complainant v. Dep't of Treasury, (Internal Revenue Service) EEOC Appeal No. 0120141118 (Dec. 29, 2016). Among the remedies ordered, the Agency was to conduct a supplemental investigation and issue a new decision regarding Complainant's entitlement to compensatory damages. See id.

On June 29, 2017, in compliance with our order, the Agency issued a final decision.

In her request, Complainant sought \$100,000.00 in non-pecuniary compensatory damages, restoration of leave, back pay, lost contributions to the Thrift Savings Plan, \$135,796.80 in attorney's fees, and \$1,107.75 in costs. The Agency distinguished Complainant's case from those she cited in support of her compensatory damages request, and granted her \$30,000.00 in non-pecuniary damages and \$1,150.00 in pecuniary damages.

Regarding attorney's fees, the Agency found the number of hours expended to be excessive. The Agency observed that 471.7 hours were spent on a "fairly straightforward case," where no depositions were taken, there was no hearing, and there were no novel legal questions. Therefore, the Agency reasoned that an across-the-board reduction of thirty percent was appropriate. In sum, the Agency granted Complainant \$95,057.76 in fees and the full amount of requested costs.

Complainant filed the instant appeal. The Commission has the discretion to only review those issues specifically raised in an appeal. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (MD-110), at 9-10. We note that Complainant only disputes the reasonableness of attorney's fees awarded, and therefore our decision will only address this issue.

ANALYSIS AND FINDINGS

Standard of Review

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

³ Claims (5), (7), (10), (11), (13), and (15).

Attorney's Fees

Attorneys' fees will be computed by determining the "lodestar": the number of hours reasonably expended multiplied by a reasonable hourly rate. EEO MD-110, at Ch. 11, § VI.F.1; Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998). In determining the number of hours expended the Commission recognizes that the attorney "is not required to record in great detail the manner in which each minute of his time was expended." Id. However, the attorney does have the burden of identifying the subject matters on which he or she spent time by submitting sufficiently detailed and contemporaneous time records to ensure that the time spent was accurately recorded. Id.

Further, a reasonable fee award may be assessed in light of factors such as: (1) the time required (versus time expended) to complete the legal work; (2) novelty or difficulty of the issues; (3) the requisite skill to properly handle the case; (4) the degree to which the attorney is precluded from taking other cases; (5) the relief sought and results obtained; and (6) the nature and length of the attorney-client relationship. See Cerny v. Dep't of the Army, EEOC Request No. 05930899 (Oct. 19, 1994). Complainant is only entitled to an award for time reasonably expended. The amount of time actually expended is not necessarily the amount of time reasonably expended. Elvin v. Dep't of Labor, EOC Request No. 01943425 (Aug. 31, 1995). Rather, "billing judgment" is an important component in fee setting, and hours that would not be properly billed to a private client are also not properly billed to the agency pursuant to a successful EEO claim. Id. The attorney for the prevailing party should make a "good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary." See Bernard, EEOC Appeal No. 01966861.

On appeal, Complainant argues that Agency improperly reduced the amount of attorney's fees on the bases that she did not prevail on all claims and that the number of hours "appears" excessive. Complainant contends that her claims are not fractionable because all the claims stem from a common core set of facts and related legal theories.

Regarding number of hours, Complainant asserts that the Agency has not provided evidence to support its argument. Further, Complainant states it exercised billing judgment in not seeking fees for time spent on updating internal files, secretarial services, preparing bills for clients, or other tasks unrelated to litigation. Complainant asserts that many billing entries were designated "no charge" (NC) when deemed to be duplicative, excessive, or administrative. Specifically, 112.2 hours (\$26,822.20) were considered "NC". While no depositions were taken, Complainant argues that time was spent on discovery, noting that the complaint included fifteen incidents and efforts were made to limit the scope of discovery into Complainant's medical history. With respect to the use of multiple attorneys, Complainant asserts that this was done "to avoid delays when attorneys were on leave, unavailable, or . . . no longer worked for the firm." Complainant maintains that this model of junior attorney/senior attorney helps to reduce overall expenses to the client.

In response to the appeal, the Agency reiterates its belief that the hours requested are excessive. According to the Agency, “other than drafting a complaint, reviewing the Report of Investigation, and engaging in written discovery, there was no significant litigation in this case.” There were no depositions, no hearing and no motion for summary judgment. In the Agency’s view, the discovery was “routine and perfunctory.” The bills reflected that eight attorneys, four law clerks, and ten paralegals worked on a “routine disability discrimination case involving failure to grant reasonable accommodation and various discrete acts by a manager.” The Agency argues that where such excessive hours are found, an across-the-board reduction, without a detailed analysis, is appropriate. The Agency challenges Complainant’s assertion that the complaint involved “nuanced” issues. Finally, the Agency states that Complainant, not the Agency, bears the burden of showing the request for fees was reasonable and not excessive.

Upon a close review of Complainant’s fee request, the Commission observes that the first fifteen pages of the document reflect hours bills *prior* to the filing of the formal EEO complaint on September 13, 2012. Moreover, there is no indication that these entries are related to a determination as to whether to represent Complainant. 29 C.F.R. § 1614.501(e)(iv) provides for the payment of attorney's fees incurred as a result of “services performed by an attorney after the filing of a written complaint, provided that the attorney provides reasonable notice of representation to the agency, administrative judge or Commission, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant.” Further, “[a]gencies are not required to pay attorney's fees for services performed during the pre-complaint process” *Id.* Complainant’s attorney has requested approximately thirty-five hours (11.5 hours at the attorney rate, and 23.7 hours at the paralegal/law clerk rate) for work done through September 13, 2012. Consequently, we find that \$6,998.40⁴ in fees should be deducted from the total requested. See Stance v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120080515 (June 24, 2010)(Commission affirmed denial of fees for 1.7 hours of work performed prior to filing of complaint and not undertaken in reaching decision to represent the complainant); Aston v. Dep’t of Agriculture, EEOC Appeal No. 01870989 (Jan. 22, 1988)(Commission affirmed denial of fees incurred prior to filing complaint).

Next, we consider the Agency’s decision to apply an across-the-board reduction of thirty percent on the grounds that the hours billed were excessive.⁵ We find that, particularly because the case did not involve depositions, a hearing or novel issues, the hours requested are excessive. Therefore, the Agency’s across-the-board reduction was appropriate. When the thirty percent reduction is applied to the revised total fees (\$128,798.40 = \$135,796.80 - \$6,998.40), we find that Complainant is entitled to \$90,158.88 in attorney’s fees.

⁴ This amount reflects 23.7 hours at the paralegal/law clerk hourly rate of \$157.00, and 11.5 hours billed by the identified attorney at the \$285 hourly rate stated in his affidavit.

⁵ Although Complainant argues on appeal that the Agency’s reduction was also based, albeit in her view improperly, on her partial success, the Agency maintains that its decision was only based on excessive hours.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we **MODIFY** the Agency's final decision regarding attorney's fees. The matter is **REMANDED** to the Agency in accordance with the **ORDER** below.

ORDER

Within thirty (30) calendar days of the date this decision was issued, to the extent it has not already done so, the Agency shall pay directly to Complainant's attorney \$90,158.88 in attorney's fees.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must submit a report of compliance.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

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 in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (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:



Carlton M. Hadden, Director
Office of Federal Operations

March 5, 2019

Date