



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

[REDACTED]  
Myrtie P.,<sup>1</sup>  
Complainant,

v.

Kirstjen M. Nielsen,  
Secretary,  
Department of Homeland Security  
(Headquarters),  
Agency.

Appeal No. 0120180246

Agency No. HS-HQ-22346-2012

**DECISION**

On September 25, 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 August 24, 2017, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Management and Program Analyst at the Agency's Information Technology Services Office facility in Washington, D.C.

On December 19, 2012, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female), disability (physical), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 Section 501 of the Rehabilitation Act of 1973 when:

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<sup>1</sup> 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.

1. During January 2012, management terminated Complainant's telework without justification;
2. In mid-March 2012 and on April 26, 2012, a management official challenged the diagnosis of Complainant's doctors. In late September 2012 and in October 2012, a second management official challenged the diagnosis of Complainant's doctors;
3. Since July 2012, management has denied Complainant required equipment, hardware, software, and formal training;
4. From November 8, 2012, until March 27, 2013, management refused Complainant permission to use her Agency-issued air card for internet access or to use alternative means of communication such as personal email or receiving non-Agency federal civilian assistance in typing non-sensitive issues until the assistive equipment and technologies were fully installed and functional;
5. Beginning on November 8, 2012, management failed to allow Complainant a flexible schedule from 6:00 a.m. to 2:30 p.m. that accommodated her job tasks and appointments starting at 3:00 p.m. with medical offices that closed by 5:00 p.m.;
6. From January 2012 until May 2013, management treated Complainant differently in comparison to male coworkers;
7. Since April 2012, management has constantly attempted to find ways to discredit Complainant and portray Complainant as incompetent rather than dealing with Complainant as a woman with a disability and offering Complainant required assistance as a reasonable accommodation;
8. In late April 2012 and early May 2012, management refused to pay Complainant for compensatory time based on her approved overtime from September 2011, for which Complainant should have been paid during Fiscal Year 2012;
9. Beginning July 2, 2012, management has subjected Complainant to constant harassment in the form of inconsistent and vague instructions and public and private criticisms;
10. On December 4, 2012, management issued Complainant a written warning;
11. On December 5, 2012, management issued Complainant a Letter of Reprimand; and
12. On December 5, 2012, management issued an incomplete PWP without performance expectations and measurements. On December 5, 2012, Complainant told management that the PWP was incomplete. Nonetheless, on December 13, 2012, management signed the PWP even though it lacked performance expectations and measurements.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency's final decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Complainant timely appealed the decision to the Commission. In EEOC Appeal No. 0120141732 (Dec. 30, 2017), the Commission determined that Complainant had been subjected to

discrimination in violation of the Rehabilitation Act. As an initial matter, the decision stated that Complainant provided no *timely* arguments on appeal. However, the decision concluded that the Agency subjected Complainant to discrimination when it revoked Complainant's telework accommodation, inexplicably delayed restoring Complainant's telework for four months, failed to respond to Complainant's requests for assistive technology, software, and training, and subsequently penalized Complainant for its own failure to reasonably accommodate her. Outside of the claims regarding denial of reasonable accommodation and actions taken following the denial of reasonable accommodation, the decision determined that Complainant failed to establish that she was subjected to disparate treatment or harassment.

As remedy, among other things, the decision ordered the Agency to conduct a supplemental investigation regarding Complainant's entitlement to compensatory damages. In addition, the Agency was ordered to compensate Complainant for the fees and costs incurred by work performed by her attorneys.

To these ends, Complainant provided an initial petition for attorney's fees and costs on February 23, 2017. In this first fee petition, her attorneys sought:

- \$34,577.59 in fees for "pre-complaint work"
- \$47,510.72 for "EEO complaint work"
- \$77,340.24 for "EEOC Appeal work"
- \$13,098.30 for "Post EEOC decision work."

The attorneys provided a breakdown of the hours expended for each category of "work." The attorneys also provided the hourly rate for the different attorneys who worked on the matter as well as their resumes and the Laffey Matrix. In addition, the attorneys indicated the following expenses Complainant incurred:

- \$210.30 for "pre-complaint work"
- \$149.40 for "EEO complaint work"
- \$753.93 for "EEOC Appeal work"
- \$9.90 for "Post EEOC decision work."

Again, the attorneys included a list of the expenses along with descriptions for the expenses.

The attorneys then provided a supplemental request for fees and expenses in the amount of \$69,992.25 in fees and \$6,194.48 in expenses. The attorneys noted that there was a change in representation due to the death of one of the attorneys who had been working on the case at hand. The attorneys also noted a 25% reduction in fees associated with the "Compensatory Damages and Remedies) and a 50% reduction in the fees associated with the original "Fee Petition."

The Agency conducted a supplemental investigation regarding Complainant's entitlement to compensatory damages. Complainant provided an affidavit in support of her claim that she

should be awarded \$300,000 in nonpecuniary damages. Complainant provided an affidavit to support her claim. She asserted that from 2013 to her termination in February 2016, she consistently had to struggle with the Agency to maintain her right to telework. She noted that the continuing disputes with the Agency required her to spend time and energy to maintain her basic reasonable accommodation, rather than being able to focus that time and energy on producing an excellent work product. As to the Agency's denial of her flexible schedule and assistive devices, she started to experience severe pain, swelling, cramping and spasms because of the sustained typing. She needed to attend medical appointments which impacted her ability to complete assignments. She was subjected to more scrutiny and dissatisfaction by management.

When focusing on the events alleged in 2011 to 2012, Complainant noted that her injuries were exacerbated by the "continual stream of discrimination that she experienced from [her] employer when [she] returned to work as a person with disabilities." She noted that she was denied almost six months of her right to telework. Complainant stated that the stress of the discriminatory job situation caused her "painful cramps, spasms and swelling throughout [her] body." She stated, "the stress caused twitching, fatigue, inability to sleep, nausea, severe weight fluctuations, vomiting, skin outbreaks, blurred vision, and hormonal changes when my menstruation continued for months." She also stated that the illegal treatment by the Agency exacerbated her previous medical condition of Graves disease that had been in remission. She noted that the physical pain and emotional distress had seriously impacted her disease. She provided a letter from her physician substantiating her assertion. The Doctor stated that Complainant had a history of hyperthyroidism secondary to Graves disease since April 2008. She noted that Complainant's condition had been well controlled until May 2012. At that point, the Doctor found that Complainant's condition was found to be "out of control." Complainant averred that she noticed that the stress at work particularly regarding the reasonable accommodation requests and interactions with management would trigger severe physical episodes. She was then diagnosed with Fibromyalgia. Another physician stated in June 2016 that stress exacerbates her medical condition and would slow down her body from healing.

Complainant provided supporting statements from her mother (Mother), a friend (Former Coworker), and her treating physicians. The Former Coworker noted a change in Complainant from a very positive, outgoing, and self-confident person to a withdrawn, distraught person. The Mother also supported the indication of a change in Complainant from before and after the discriminatory actions. She added that Complainant would lash out at times and had difficulty sleeping.

We note that Complainant dedicated several pages and sections of her affidavit to events that occurred outside of the Commission's finding of discrimination in EEOC Appeal No. 0120141506. Complainant raised additional incidents where the Agency denied her reasonable accommodations such as assistive devices. In addition, Complainant was terminated by the Agency effective February 2016. We note that Complainant has filed another EEO complaint with the Agency regarding these claims which are the subjects of EEOC Appeal No. 0120172637 and an appeal with the Merit Systems Protection Board (MSPB).

In addition, Complainant sought pecuniary damages for loss of earnings from her termination through March 8, 2017; loss of leave from the date of termination; for tax penalty for a lump sum payment; and for out of pocket losses for her job search following her termination from the Agency. Complainant asserted from January 19, 2012 until her termination, she should be compensated for: (1) 498 hours of sick leave, (2) 718 hours of annual leave, (3) 61 hours of compensatory leave, (4) 44 hours of leave without pay, and (5) 122 hours of leave without pay under the Family Medical Leave Act (FMLA). However, the Agency did compensate Complainant for the annual leave and leave without pay for a total of 442 hours of leave, or a cash value of \$24,190.66. In addition, the Agency determined that Complainant was entitled to a bonus of \$2,277.00 for FY2012.

On August 24, 2017, the Agency issued its final decision regarding Complainant's entitlement to compensatory damages and attorneys' fees and costs. The Agency denied Complainant's request for pecuniary damages noting that failed to support her claim that the alleged losses were the direct result of the actions found to have been discriminatory.

The Agency then turned to Complainant's request for \$300,000 in nonpecuniary damages. The Agency acknowledged that Complainant stated that the discriminatory actions exacerbated her previous condition of Graves disease which triggered extreme episodes of physical pain and emotional distress and interfered with her ability recover. The Agency also noted the corroborating evidence provided by Complainant in support of her claim from the affidavits from the Former Coworker and the Mother. The Agency also held that Complainant supplied medical information from the Doctor stating that the work stress exacerbated her conditions. The Agency found a nexus between the denial of reasonable accommodations and harassment pertaining to the denial of accommodations and Complainant's emotional and physical distress. However, the Agency noted that Complainant had included a series of events where were outside of the finding of discrimination issued by the Commission. Based on the evidence provided and the Commission's award of compensatory damages in similar cases, the Agency found Complainant's request for \$300,000 to be excessive. Based on the nature and severity, the Agency found that Complainant was entitled to \$30,000 in nonpecuniary damages.

The Agency then turned to Complainant's claim for attorneys' fees and costs. The Agency noted that Complainant initially requested \$172,526.85 in fees and \$1,123.53 in expenses for work conducted by the Attorneys from "pre-complaint" through February 1, 2017. The Agency accepted the Attorneys' hourly rates as reasonable. However, the Agency noted that the regulations do not provide for fees incurred prior to the filing of the complaint. As such, the Agency rejected Complainant's request for \$34,577.59 in fees and \$210.30 in expenses for "pre-complaint" work.

The Agency then turned to Complainant's request for fees and expenses related to the EEOC appeal, specifically \$77,340.24 for fees and \$753.93 in expenses. Of the fees, the Agency noted that \$66,686.16 was for time spent on Complainant's appeal brief. The Agency noted that EEOC denied Complainant's request for an extension to file an appeal brief. As such, the Agency indicated that Complainant's brief was not considered. In addition, the Agency noted that much

of the exhibits of the appeal brief were already found in the Agency's Report of Investigation. Therefore, the Agency reduced the fees for the appeal brief by \$33,000. In addition, the Agency noted that there were entries for fees related to events that occurred outside of the finding of discrimination such as a disciplinary action which occurred in March 2013. The Agency noted that the fees incurred for the March 2013 disciplinary action totaled \$3,013.84. The Agency disallowed this amount.

Regarding Complainant's initial request for fees, the Agency reviewed the remaining fees requested by the attorneys. The Agency found excessive entries for tasks such as "reviewed OFO's December 2016 decision" and "email communication." The Agency determined that a 50% reduction was in order. Therefore, the Agency summarily stated that it added up all the fees for the EEO complaint, the EEOC appeal, and the post-EEOC decision and divided it in half. As such, the Agency indicated that it would award \$52,317.71 to Complainant in fees without showing its calculations.

The Agency then turned to Complainant's initial claim for expenses. The Agency noted that Complainant requested \$1,123.53 in total and broken down into the following broad categories: \$210.30 for "pre-complaint work;" \$149.40 for "EEO complaint work;" \$753.93 for "EEOC Appeal work;" and \$9.90 for "Post EEOC decision work." The Agency rejected the expenses incurred during the pre-complaint stage of representation. The Agency noted that Complainant sought \$266.55 for Westlaw expenses. The Agency, citing Commission precedent, rejected that expense. As such, the Agency awarded the remaining \$646.68.

Subsequently, the Agency addressed Complainant's supplemental request for \$69,992.25 in fees and \$6,194.48 in expenses. The Agency indicated that the bulk of the fees were expended for development of Complainant's damages submission, namely \$51,460.84. The Agency noted that much of the 760-page submission involved exhibits and documentation involving another EEO complaint and an MSPB appeal. Therefore, the Agency determined that a 70% reduction was appropriate. As such, the Agency awarded only \$20,997.68 of the requested fees. As for the expenses, the Agency found that \$4,250.00 of the expenses went towards the preparation of an Economic Loss Report related to the losses incurred by Complainant due to the Agency's February 2016 termination action. The Agency found this expense to be outside of the finding of discrimination and disallowed this amount. The Agency also reduced the expense request by \$1,836.98 for Westlaw research. As such, the Agency awarded \$107.50 in supplemental expenses.

Therefore, in sum, the Agency awarded Complainant:

- \$26,467.66 in pecuniary damages
- \$30,000 in nonpecuniary damages
- \$73,315.39 in Attorneys' fees
- \$2,505.02 in costs

This appeal followed. Complainant asserted that the Agency failed to pay her in full for the leave expended as calculated by the Agency. Complainant also asserted that the Agency erred in limiting leave restoration to 2012.<sup>2</sup> At a minimum, Complainant asked to receive what was ordered by the Agency.

Arguing that she should have been reinstated, Complainant asserted that subsequent actions were directly related to the finding of discrimination by the Commission. As such, she asked for additional equitable relief in the form of back pay, reinstatement, and payment for her tax liability for the backpay award. However, we note that such remedies are beyond the scope of the instant appeal. Complainant is, in essence, challenging the remedies ordered by the Commission's decision. Such a claim should have been raised in a request for reconsideration. Further, as we have noted above, Complainant has another appeal pending before the Commission and the MSPB regarding additional allegations of violation of the Rehabilitation Act. We note that over half of the Attorneys' 121-page brief involved these issues.

Complainant also argues that she should have been awarded \$300,000 in non-pecuniary compensatory damages. She points to statements regarding the harm she experienced due to the denial of reasonable accommodations and the exacerbation of her medical conditions. In addition, Complainant asserts her professional standing was injured as well pointing to performance appraisals from 2015. Again, she also claims injuries to future earnings as support for a higher award for nonpecuniary damages.

Complainant also challenges the Agency's reduction of 50% fees during the appeal process. Her attorneys argue that the entries were not "vague" nor was it "duplicative." The attorneys also argue that Complainant is entitled for fees as a result of the 2013 disciplinary action and additional work conducted to obtain reasonable accommodations for Complainant outside of the finding of discrimination from the previous decision. As for work conducted prior to the filing of the formal complaint, the attorneys state that Complainant is entitled to at least two hours in fees. Based on the lead attorney's hourly rate of \$505, they assert Complainant should receive \$1,010.00. Then the attorneys argued against the Agency's 70% reduction for the supplemental request for fees as unreasonable. They argued that the entries were not vague or excessive. As such, the attorneys ask for an additional award of \$48,994.57. As for costs, the attorneys only argue that it should be provided with the \$4,250.00 for the financial expert. They do not challenge the Agency's denial for reimbursement for Westlaw research.

The Agency asks that the Commission affirm its final decision regarding compensatory damages and the attorneys' fees and costs.

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<sup>2</sup> Complainant asserted that the Agency failed to comply with the Commission's decision. We note that such a claim is not properly raised here. Complainant needs to raise this with the Compliance Officer or in a Petition for Enforcement.

### ANALYSIS AND FINDINGS

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”).

#### *Restoration of Leave*

As an initial matter, we note that Complainant argued that she should have been provided with additional reimbursement for the use of leave or LWOP. The Agency has indicated that it has already calculated that amount and issued Complainant payment as part of her equitable relief. We note that restoration of leave is not available as a component of compensatory damages because restoration of leave constitutes an equitable remedy. Whiting v. ACTION, EEOC Request No. 05900093 (June 27, 1990); McGowan-Butler v. Dep’t of the Treasury, EEOC Request No. 05940636 (Sept. 9, 1994). The decision in EEOC Appeal No. 0120141732 ordered the Agency to “restore all leave taken by Complainant as a result of the Agency’s failure to accommodate Complainant, including but not limited to when Complainant’s telework accommodation was revoked between January 2012 and July 2, 2012, and after Complainant was removed from her flexible schedule on November 8, 2012.” We note that Complainant sought restoration of leave from January 2012 until her termination in February 2016. We find that Complainant’s request for additional leave exceeded equitable relief ordered in the Commission’s decision. Had Complainant wanted to challenge the order issued by the Commission, she should have requested reconsideration. She failed to do so. Upon review, we hold that Complainant has not established that the Agency's award of back pay for her use of leave and LWOP was incorrect. To the extent it has not done so already, we order the Agency to pay Complainant \$26,467.66 for leave used and provide the EEOC Compliance Officer with proof of the payment.

#### *Compensatory Damages*

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful discrimination or harassment under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this “make whole” relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress



afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 19814(b)(3).

To receive an award of compensatory damages, a complainant must demonstrate that she 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. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for recons. denied, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14. Although damage awards for emotional harm can greatly vary, and there are no definitive rules governing amounts to be awarded, compensatory damage awards must be limited to the amounts necessary to compensate the complainant for actual harm, even if that harm is intangible. Id. at 7. It should take into account the severity of the harm and the length of the time the injured party has suffered from the harm. See Carpenter v. Dep't of Agric., EEOC Appeal No. 01945652 (July 17, 1995). The absence of supporting evidence may affect the amount of damages deemed appropriate in specific cases. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996).

#### Pecuniary Damages

Complainant requested reimbursement for out-of-pocket expenses for loss of earnings from her termination through March 8, 2017; loss of leave from the date of termination; for tax penalty for a lump sum payment; and for out-of-pocket losses for her job search following her termination from the Agency. We note that the finding at hand solely involved events that occurred from January 2012 to December 2012. Complainant was terminated on February 9, 2016. Each of the alleged expenses sought by Complainant occurred outside of the events found by the Commission to have violated the Rehabilitation Act. As such, we determine that Complainant has not shown a nexus between the expenses expended and the finding of discrimination. Accordingly, we affirm the Agency's denial of pecuniary damages.

#### Non-Pecuniary Damages

Next, we turn to the Agency's award of nonpecuniary damages. In Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993), the Commission explained that "objective evidence" of non-pecuniary damages could include a statement by a complainant explaining how she was affected by the discrimination. A complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. Id.

As noted above, we find that the Agency properly found a nexus between Complainant's experienced harm and the Agency's discriminatory actions. We agree that Complainant is not entitled to \$300,000 in nonpecuniary damages as such an award would be excessive. Complainant asserted that her "standing" was harmed by the Agency's decision to terminate her. We remind Complainant that the only finding before the Commission at this time is the finding

of denial of reasonable accommodations and actions taken following the denial of reasonable accommodation from January 2012 to December 2012. As such, we decline Complainant's request for \$300,000 in nonpecuniary damages.

However, at the same time, we find that the Agency failed to adequately consider the effects of these discriminatory actions and the affect the stress had on Complainant and her medical conditions. We note that the Doctor particularly indicated in May 2012 that Complainant's Graves disease which was once controlled was no longer. Complainant also stated, "the stress caused twitching, fatigue, inability to sleep, nausea, severe weight fluctuations, vomiting, skin outbreaks, blurred vision, and hormonal changes when my menstruation continued for months." The Mother and the Former Coworker also provided corroborating affidavits stating the change in Complainant following the denial of reasonable accommodations. Based on the totality of evidence, we find that the Agency's determination that Complainant was entitled to \$30,000 in nonpecuniary damages is not sufficient to address the harm suffered by Complainant and is not consistent with the Commission's decisions in comparable cases.

Instead, we determine that an award of \$65,000 is more consistent with the Commission precedent. *See, e.g., Mardell B. v. Soc. Sec. Admin.*, EEOC Appeal No. 0120172035 (Oct. 31, 2017) (awarding \$70,000 in nonpecuniary damages to Complainant who was denied reasonable accommodation in which Complainant became depressed, suffered emotionally and experienced physical changes due to the discrimination); *Dayle H. v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120140883 (Jan. 17, 2017) (awarding \$65,000 to Complainant who suffered from stress, nervousness, anxiety, personality changes, sleeplessness, & other emotional distress due to the denial of reasonable accommodation); *Selma D. v. Dep't of Educ.*, EEOC Appeal No. 0720150015 (Apr. 22, 2016) (awarding Complainant \$60,000 who sought treatment for exacerbation of post-traumatic stress disorder, depression, stress, & elevated blood pressure caused by the stress created by Agency's discriminatory actions).

#### *Attorney's Fees and Costs*

By federal regulation, the 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. EEOC Regulation 29 C.F.R. § 1614.501(e)(1)(ii). To determine the proper amount of the fee, a lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983). We note that the Agency did not challenge the Attorneys' hourly rates.

There is a strong presumption that the number of hours reasonably expended multiplied by a reasonable hourly rate, the lodestar, represents a reasonable fee, but this amount may be reduced or increased in consideration of the degree of success, quality of representation, and long delay caused by the agency. 29 C.F.R. § 1614.501(e)(2)(ii)(B). The circumstances under which the lodestar may be adjusted are extremely limited and are set forth in Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 11-7 (November 9,

1999). A fee award may be reduced: in cases of limited success; where the quality of representation was poor; the attorney's conduct resulted in undue delay or obstruction of the process; or where settlement likely could have been reached much earlier, but for the attorney's conduct. Id. The party seeking to adjust the lodestar, either up or down, has the burden of justifying the deviation. Id. at p. 11-8.

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 Management Directive for 29 C.F.R. Part 1614 (MD-110), at 11-15 (Nov. 9, 1999) [ update for new md110]. 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. An application for attorney's fees must include a verified statement of attorney's fees accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. MD-110 at 11-9. While the attorney is not required to record in great detail the manner in which each minute of his time was expended, the attorney does have the burden of identifying the subject matters on which he spent his time by submitting sufficiently detailed and contemporaneous time records to ensure that the time spent was accurately recorded. See Spencer v. Dep't of the Treasury, EEOC Appeal No. 07A10035 (May 6, 2003). The attorney requesting the fee award has the burden of proving, by specific evidence, entitlement to the requested fees and costs. Koren v. U.S. Postal Serv., EEOC Request No. 05A20843 (Feb. 18, 2003).

#### Fees and Costs for Pre-complaint

EEOC Regulation 29 C.F.R. § 1614.501(e)(1)(iv) provides, in pertinent part, that agencies are not required to pay attorney's fees on services performed during the pre-complaint process. An attorney may reasonably expend up to two hours to determine whether to represent a complainant. Nenita S. v. Dept. of Veterans Affairs, EEOC Appeal No. 0120151925 (May 23, 2017). According to the prior law firm's billing invoices, the lead counsel's hourly rate in Complainant's case was \$505.00. Consequently, we will authorize an award of \$1,010.00. In addition, we concur with the Agency's denial of Complainant's claim for fees incurred at the pre-complaint stage.

#### Fees for EEO Complaint, EEOC Appeal, and Post EEOC Decision

Complainant sought \$77,340.24 in fees associated in the processing of her appeal. Initially, in the instant case, we concur with the Agency's finding that Complainant's Attorneys are not entitled to fees and costs related in total for their appeal brief which was untimely filed. See Nannie D. v. Dep't of the Army, EEOC Appeal No. 0720150021 (April 28, 2016) (upholding the AJ's denial of fees for an untimely filed brief). As such, we concur with the Agency's reduction of \$33,000 for fees incurred regarding the untimely appeal which is roughly a 50% reduction. The Agency also correctly pointed out that some of the entries by the Attorneys involved events unrelated to the finding of discrimination such as a disciplinary action from March 2013. As such, we concur with the Agency's further reduction of \$3,013.84. We find that the Agency's

award of \$41,326.40 in fees for work conducted by the Attorneys on Complainant's EEOC Appeal is proper.

The Agency then added the fees for the EEO Complaint, EEOC Appeal, and Post EEOC Decision and then reduced them by 50%. A review of the fees indicated that the attorneys have several entries for "EEO Administrative Proceeds," "Fact Research," "Read messages between client and Agency," "daily report," "Communications with Third Parties" and the like. As such, we find that the entries were vague. However, we find that the Agency's reduction of 50% to be too severe. As such, we shall permit a 25% reduction on the fees for the EEO Complaint, EEOC Appeal, and Post EEOC Decision. Therefore, we award the attorneys \$35,633.04 for EEO Complaint work, \$30,994.80 for EEOC Appeal work, and \$9,823.73 for post-EEOC Decision work.

#### Supplemental Request for Fees

The attorneys submitted a supplemental request for fees and expenses in the amount of \$69,992.25 in fees. The attorneys noted that there was a change in representation due to the death of one of the attorneys who had been working on the case at hand. The attorneys also noted a 25% reduction in fees associated with the "Compensatory Damages and Remedies" and a 50% reduction in the fees associated with the original "Fee Petition." The Agency subjected an additional 70% across the board reduction finding that the fee request was vague and unnecessary. We find Agency's 70% reduction was after the Attorneys already made reductions to its fees. As such, we find that a 70% reduction on top of reductions already applied to the fees by the attorneys is excessive. However, we note that there are a number of entries by the attorneys for work involving "Experts." We have previously noted that the Financial Expert was not related to the finding of discrimination in this case at hand. As such, we shall reduce the fee award by 15%. As such, we shall provide Complainant with \$59,493.41 for the Supplemental request for fees.

#### *Legal Costs*

As noted above, the Commission agreed that the attorneys are not entitled to costs related to work in the pre-complaint stage. As such, we denied the request for \$210.30 for "pre-complaint work." The Agency allowed the request for fees in the amount of \$149.40 for "EEO complaint work" and \$9.90 for "Post EEOC decision work." We see no reason to challenge these decisions.

As for the claims for expenses in the amount of \$753.93 for "EEOC Appeal work" and \$6,194.48 in Supplemental expenses, the Agency disallowed expenses for Westlaw and work conducted by the attorneys for an Economic Loss Study regarding Complainant's termination. As for the Economic Loss Study, we find that this was not required as the termination was beyond the scope of the finding of discrimination in the case at hand. Accordingly, we reduce the expenses by \$4,250.00.

The Agency also rejected expenses used for Westlaw research. We note also that previous Commission decisions have affirmed a reduction or exclusion of a request for costs associated with Westlaw online legal research. See Bell v. Dep't of the Navy, EEOC Appeal No. 0720080024 (June 25, 2008); Foti v. U.S. Postal Serv., EEOC Appeal No 07A30091 (Oct. 5, 2004). The Attorneys did not challenge the reduction. As such, we concur with the Agency. In addition, we note that the attorneys did not provide receipts or other adequate documentation, that they are entitled to reimbursement for Westlaw research or postage. Lampkins v U.S. Postal Serv., EEOC Appeal No. 0720080017 (Dec. 8, 2009) (finding that Complainant's attorney failed to support reimbursement for fees associated with Westlaw research for lack of documentation).

As such, we award Complainant fees and costs for her attorneys in the following amounts:

- Pre-complaint fees: \$1,010.00
- EEO Complaint fees: \$35,633.04
- EEOC Appeal fees: \$30,994.80
- Post EEOC Decision fees: \$9,823.73
- Supplemental fees: \$59,493.41
- Costs: \$2,505.02

Total: \$139,460.00

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final decision and REMAND the matter in accordance with the ORDER below.

ORDER (C0618)

Within sixty (60) calendar days of the date this decision is issued, the Agency is ordered to pay Complainant \$65,000 in non-pecuniary compensatory damages and \$139,460.00 in attorney's fees and costs.

Within thirty (30) calendar days of the date this decision is issued, to the extent the Agency has not done so already, the Agency is ordered to pay Complainant \$26,467.66 as reimbursement for leave used related to the discrimination finding.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

### ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she 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 (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.

### 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

March 19, 2019

Date