



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

[REDACTED]  
Liza B.,<sup>1</sup>  
Complainant,

v.

Sonny Perdue,  
Secretary,  
Department of Agriculture  
(Food Safety and Inspection Service),  
Agency.

Appeal No. 0120181084

Appeal No. 0120152098

Hearing No. 560-2012-00108X

Agency No. FSIS-2011-00410

**DECISION**

On February 8, 2018, 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 December 23, 2017 final decision concerning her entitlement to attorney's fees and cost.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Food Inspector (Slaughter), GS-7 at the Tyson Foods chicken processing plant in Noel, Missouri.

On April 7, 2011, Complainant filed an equal employment opportunity (EEO) complaint. The Agency defined the issue, in relevant part, as whether Complainant was discriminated and harassed based on her disability when, on February 15, 2011, she was issued a notice of proposed removal.

---

<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.

Just after starting the investigation of the complaint, the Agency sustained the proposed removal, which became effective on April 19, 2011. The Agency did not update the definition of the complaint.

Following the investigation, Complainant initially requested a hearing before an EEOC Administrative Judge (AJ), but later withdrew her request. The EEOC AJ ordered the Agency to issue a final decision on the complaint with appeal rights to the Merit Systems Protection Board (MSPB), as the issuance of Complainant's now effectuated removal made it a mixed case.

On September 30, 2014, the Agency issued a final decision (FAD 1). Citing 29 C.F.R. § 1614.107(a)(5), the Agency found that the proposed removal was not an adverse action because it was a proposal to take a personnel action. However, treating failure to accommodate as an independent claim, the Agency also found that it had failed to reasonably accommodate Complainant. It found, in relevant part, that management discriminated against Complainant based on disability when, after denying her the respirator, it failed to engage further in the interactive process and consider any alternative accommodation options.

As relief, the Agency provided Complainant an opportunity to submit evidence showing she sustained compensatory damages and, if represented by counsel, to submit a verified statement of attorney fees and costs within 30 days of receipt of the decision. However, at the time, Complainant was not represented by her attorney (Attorney). As remedy, the Agency did not offer to resume the reasonable accommodation process or to reinstate Complainant. It provided appeal rights to this office, not the MSPB. Complainant did not appeal FAD 1.

Thereafter, Complainant, now represented by an attorney, submitted her evidence of compensatory damages, and requested back pay. Thereafter, the Agency issued FAD 2. The Agency characterized FAD 1 as finding management discriminated against Complainant based on disability when she was issued a notice of proposed removal because of a failure to accommodate her disability. In FAD 2, the Agency found that once there is a finding of discrimination, there is a strong presumption of an award of back pay, and awarded Complainant back pay from the time she was terminated to being approved for Social Security disability (SSD) retirement. The Agency concluded back pay should be cut off after Complainant was approved for SSD retirement because approval requires proof that an individual is incapable of working. Since Complainant retired on SSD before she was actually terminated, the Agency's award formula resulted in the payment of no back pay.

The Agency awarded \$384 in past pecuniary damages. Finding that Complainant stated she had severe stress, deep depression, lack of concern for her appearance, lack of desire to engage in social pursuits, crying fits, fear, difficulty concentrating, and memory issues, the Agency awarded Complainant \$5,000 in nonpecuniary damages. The Agency in FAD 2 did not notify Complainant of her right to request attorney fees and gave appeal rights to EEOC.

Complainant appealed FAD 2. Complainant argued that she should be awarded more compensatory damages, back pay with interest from the date she stopped working until the date the Agency accommodates her or determines that accommodation is not possible, and attorney fees. She argued that under the collateral source rule, SSD retirement payments should not be deducted from back pay.

In Liza B. v. Dep't of Agriculture, EEOC Appeal No. 0120152098 (Aug. 31, 2017), the Commission modified FAD 2, finding that Complainant was entitled to back pay and identified the back pay period and issues that the Agency should investigate in order to determine back pay. The Commission also ordered the Agency to pay Complainant \$715.80 in pecuniary damages and \$22,500 in nonpecuniary damages.

The Commission did not directly address Complainant's request for fees and costs for the work done by the Attorney. However, the Commission included an order which stated that if Complainant was represented by an attorney, "she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint" citing 29 C.F.R. § 1614.501(e).

On September 28, 2017, the Attorney submitted a statement of fees to the Agency for \$25,445 based on 72.7 hours of work performed at an hourly rate of \$350. The Agency responded to Complainant's request on October 26, 2017, asserting that fees should not be granted because FAD 2 did not provide for them.

In its third final decision (FAD 3), the Agency found that the Attorney's hourly rate of \$350 was reasonable. However, the Agency reduced the Attorney's billed hours by 3.4 hours finding that his entry for December 18, 2015, was duplicative of the work conducted on November 3, 2015 and December 14, 2015. Further, the Agency excluded 19.4 hours for work completed before the appeal. The Agency held that because Complainant did not appeal FAD 2's denial of attorney's fees, she was not entitled to any hours incurred from December 12, 2014 to June 4, 2015. As such, the Agency determined that Complainant was entitled to fees in the amount of \$17,465.00 for 49.9 hours at an hourly rate of \$350.

This appeal followed. Complainant's attorney asks that the Commission reverse the Agency's reduction of 22.8 hours. The Agency asked that the Commission affirm FAD 3.

### 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”).

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).

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), 11-13. (Aug. 5, 2015). 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.

As noted, the Agency has agreed that Complainant’s attorney’s hourly rate of \$350 was reasonable. Therefore, the only issue before the Commission is the Agency’s decision to reduce the hours expended by 3.4 hours as duplicative and 19.4 hours for work conducted prior to FAD 2. Upon review, we find that the Agency has not shown that the hours should be adjusted down by 3.4 hours. The Agency asserted that these hours were duplicative. However, we find that these hours are reasonable for research. The attorney provided very detailed information as the specific research he was engaged in during the 3.4 hours on December 18, 2014. He also provided a list of cases and topics he researched, including back pay, collateral source, and compensatory damages. As such, we find that the Agency erred in adjusting the hours down by 3.4 hours.

The Agency also cut 19.4 hours asserting that Complainant is not entitled to these hours expended prior to the appeal of FAD 2. The Agency argued that Complainant did not appeal what is characterized as FAD 2’s denial of attorney’s fees. We disagree with the Agency’s reasoning. Our previous decision clearly noted that Complainant asserted that she was entitled to attorney’s fees and costs. Although the previous decision did not express state in the decision that the Agency’s decision to deny fees and cost was erroneous, the decision did provide an order stating that Complainant was entitled to fees and costs incurred in the processing of the complaint. The Commission’s order did not limit the fees to those incurred after the issuance of FAD 2. Accordingly, we find that the Agency erred in limiting the award of fees and reducing the hours expended by 19.4 hours.

Accordingly, we grant the Complainant's request for \$25,445 in attorney's fees for 72.7 hours expended at an hourly rate of \$ 350.

### CONCLUSION

Therefore, we MODIFY the Agency's final decision and REMAND the matter in accordance with the ORDER below.

### ORDER

To the extent it has not already done so, within 30 calendar days of the date this decision is issued, the Agency shall pay Complainant attorney's fees in the amount of \$25,445. In addition, we note that Complainant is entitled to additional attorney's fees and costs incurred in the processing of the instant appeal. Therefore, the Agency shall process an additional claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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).

### 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.

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).

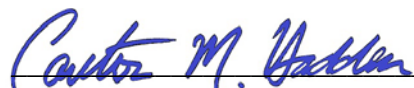
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

May 14, 2019  
Date