



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

████████████████████
Samuel C.,¹
Complainant,

v.

Rick Perry,
Secretary,
Department of Energy,
Agency.

Appeal No. 0120182178

Agency No. 16-0090-HQ-PI; 17-0084-HQ-IA & 17-0102-HQ-IA

DECISION

On June 14, 2018, Complainant filed a premature appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), concerning the denial of a request for supplemental attorney fees connected to seeking compliance with his settlement agreement closing his 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.²

BACKGROUND

At the time of events giving rise to his complaint, Complainant was employed by the Agency. On October 12, 2017, the parties entered into a settlement agreement, effective October 20, 2017. In relevant part, the Agency agreed to zero out Complainant's negative sick and annual leave balances and provide contemporaneous confirmation thereof [by Monday, November 20, 2017].

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 Thereafter, the Agency issued a final Agency decision (FAD) dated August 29, 2018, denying Complainant any supplemental attorney fees, perfecting his appeal.

On January 12, 2018, Complainant filed a notice of breach with the Agency. Therein, by and through counsel, Complainant explained as follows. On November 25, 2017, he received a letter from the Defense Finance and Accounting Service (DFAS) that the Agency overpaid him \$4,706.67, which was now his debt. DFAS provides payment services to the Agency. Complainant forwarded this information to the Agency on December 13, 2017. The Agency responded that payroll was making timecard changes under the settlement agreement, erroneously created a debt, and DFAS was working on making a correction. Also, Complainant was not given documentation that his negative leave balance was zeroed-out.

In a final Agency determination dated February 12, 2018, the Agency found that it breached the settlement agreement because while its Office of General Counsel received notice that on December 27, 2017, Complainant's leave balances were at zero and his debt had been offset in full, the zeroing out was untimely and Complainant was not given contemporaneous confirmation thereof. The Agency found because of this, Complainant was entitled to reasonable attorney fees.

On March 16, 2018, Complainant's attorneys, who worked in the same law firm, submitted a fee petition to the Agency which included itemized billing entries for time expended representing Complainant from January 3, 2018, after the effective date of the settlement agreement, through the date of the fee petition.³

On May 15, 2018, the Agency issued a FAD awarding all the above fees requested, i.e., \$11,044.80. By May 17, 2018, the Agency contacted Complainant's attorneys to get banking information to make electronic payment, and on May 17, 2018, notified Complainant's attorneys that payment would be processed immediately. While the record does not reflect when payment was made, an internal Agency email dated June 12, 2018, indicates payment was already made, and Complainant's attorneys don't contend payment was delayed.

On June 26, 2018, Complainant's successor lead attorney filed a supplemental fee petition with the Agency, requesting an additional \$3,907 in fees. This was for work representing Complainant after the fee petition was submitted through June 26, 2018. After the March 2018 fee petition was filed, the lead attorney representing Complainant departed the law firm, and the supplemental fee petition was for work expended by the successor lead attorney taking over the case, i.e., reviewing the file, sending introductory client emails to Complainant, and notifying the Agency of the new lead attorney. It also included the successor lead attorney asking the Agency about status, thereafter reviewing the FAD which awarded all fees previously requested, communicating with Complainant, providing the Agency payment information for the fees, preparing the supplemental fee petition, and an additional two hours of time (\$820) that the new lead attorney anticipated she would expend ensuring payment of the supplemental fees.

In its FAD dated August 29, 2018, the Agency denied all supplemental fees requested. The Agency reasoned in part that it awarded Complainant all the fees initially requested in its May 15, 2018, FAD, and the request for supplemental fees was unreasonable. The instant appeal followed.

³ When the settlement agreement was made, Complainant was represented by a different law firm.

Complainant argues, by and through his successor lead attorney, that his supplemental fee request for \$3,907 should be approved, and the FAD reversed. In opposition to the appeal, the Agency requests the Commission to deny additional fees.

ANALYSIS AND FINDINGS

An applicant for attorney fees is entitled only to an award for time reasonably expended. It does not follow that the amount of time expended is the amount of time reasonably expended. Consequently, the Commission may not award fees where time was spent engaged in nonproductive work. Those preparing an attorney fees petition must use their professional “billing judgment.” Harris v. Department of Agriculture, EEOC Appeal No. 01921207 (Mar. 31, 1993).

Here, Complainant submitted his request for attorney fees on March 16, 2018, arising from the Agency’s prior finding that it breached its settlement agreement with him. The Agency acted on his fee request by issuing a FAD on May 15, 2018, awarding in full the \$11,044.80 in fees requested, and promptly paid them. The Agency issued its May 15, 2018 FAD within the regulatory 60-day time limit of the date it received the fee petition. 29 C.F.R. § 1614.501(e)(2)(i). Given this, we find that Complainant’s successor lead attorney’s supplemental fee request for \$3,907 for additional fee litigation activity was unreasonable, she did not exercise professional billing judgment, and the additional work was nonproductive.

Accordingly, the August 29, 2018 FAD is AFFIRMED.

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 (S0610)

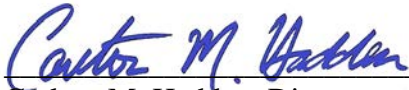
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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. If you file a request to reconsider and also file a civil action, **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

November 15, 2018

Date