



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

[REDACTED]  
Ross H.,<sup>1</sup>  
Complainant,

v.

Megan J. Brennan,  
Postmaster General,  
United States Postal Service  
(Capital Metro Area),  
Agency.

Appeal No. 0720180001

Hearing No. 430-2016-00004X

Agency No. 4K-230-0023-15

**DECISION**

The Equal Employment Opportunity Commission (EEOC or Commission) accepts the Agency's timely appeal following its September 21, 2017 final order. On appeal, the Agency requests that the Commission affirm its rejection of the EEOC Administrative Judge's (AJ) finding of discrimination and separate determination of relief for a 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Customer Service Supervisor, EAS-17, at the Agency's DeBree Station in Norfolk, Virginia. Complainant claimed that he had 27 years of experience at the Agency, including 12 years in management and three and a half years as an EAS-20 and EAS-21 Acting Manager. On October 2, 2014, Complainant applied for an EAS-18 Customer Services Manager position in Norfolk, Virginia under Job Posting No. 80172781. A Review Committee reviewed the applications and made an initial decision regarding who would be interviewed. The Review Committee did not refer Complainant for an interview, and he was not selected for the position.

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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.

On August 7, 2014, Complainant applied for an EAS-20 Customer Services Manager position in Norfolk under Job Posting No. 80414650. Management did not utilize a Review Committee for this selection. Complainant was interviewed for the position by the Selecting Official. The Selecting Official ultimately did not select Complainant for the position and he was notified of his non-selection on November 4, 2014.

On February 25, 2015, Complainant applied for a Postmaster position in Portsmouth, Virginia under Job Posting No. 84283383. Management utilized a Review Committee to review applications. Complainant was not referred for an interview and ultimately was not selected for the position.

On February 2, 2015, Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of race (Caucasian), sex (male), age (53), and in reprisal for prior protected EEO activity when:

1. On October 2, 2014, he was not selected for the Manager Customer Services, EAS-18, position located in Norfolk, Virginia;
2. On October 2, 2014, he was not selected for the Manager Customer Services, EAS-20, position located in Norfolk, Virginia; and,
3. On February 25, 2015, he was not selected for the Postmaster, EAS-22, position located in Portsmouth, Virginia.<sup>2</sup>

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

On October 1, 2015, the AJ assigned to the matter issued an Acknowledgment Order ordering the Agency to provide her and the Complainant a copy of the ROI within 15 days of the Agency's receipt of the Order, if it had not already done so, and scheduling an Initial Conference for January 7, 2016. On October 23, 2015, Complainant submitted a Motion for Sanctions claiming that the Agency had failed to timely develop a complete and impartial record. Complainant noted that the Agency failed to include in the ROI application materials and qualifications of the candidates selected for two positions at issue, failed to identify the candidate selected for a third position, and failed to include interview notes for all three positions. Complainant requested default judgment in his favor as a sanction.

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<sup>2</sup> The Agency dismissed numerous additional claims as untimely raised pursuant to 29 C.F.R. § 1614.107(a)(2). Complainant raised no challenges to the dismissal of these claims before the AJ or on appeal; therefore, the Commission will exercise its discretion and review only those matters specifically raised on appeal.

On November 5, 2015, the Agency responded, acknowledging that the ROI did not include the documents and information Complainant cited, but claimed that the ROI included “pertinent information related to the selection.” For example, the Agency argued that the ROI contained statements from selection officials, applicant rankings, and vacancy announcements. The Agency further claimed that Complainant was not prejudiced or denied justice by the missing documentation. In addition, the Agency argued that other omissions could be cured during discovery.

On November 16, 2015, Complainant responded by stating that discovery was not a replacement for the Agency’s obligation to complete a full investigation and that the Agency’s inadequate investigation would cause him to incur costs. On November 17, 2015, Complainant requested a protective order to prevent the Agency from conducting a supplemental investigation which he claimed constituted a “thinly-veiled attempt to avoid sanctions.” The Agency subsequently suspended the supplemental investigation pending a ruling from the AJ. Complainant withdrew the protective order motion.

On January 21, 2016, the AJ issued a Notice of Intent to Grant Complainant’s Motion for Sanctions and Notice of Intent to Issue a Default Judgment. Therein, the AJ determined that the Agency had failed to provide any persuasive reason for its failure to include basic information regarding its selections. Further, the AJ found that it was disturbing that the Agency would suggest that since Complainant was aware of the identity of the third selectee, it was forgivable that the Agency failed to identify the selectee in the ROI. Additionally, the AJ noted that it was equally disturbing that the Agency would suggest that the proper resolution of an inadequate investigation was the discovery process – clearly at the cost of Complainant – which was a blatant violation of the Commission’s regulations. Thus, the AJ found that a sanction in the form of default judgment against the Agency was appropriate in the instant case. The AJ ordered the Agency to discontinue any supplemental investigations as it violated the Commission’s regulations, would taint the EEO process, and was mounted as an attempt to backtrack and remedy a matter currently under review by the AJ without prior approval. The AJ provided the parties until February 11, 2016 to submit comments regarding the Notice. On February 10, 2016, the Agency opposed the Notice.

On December 20, 2016, the AJ issued an Order Scheduling Hearing on Damages finding that default judgment was appropriate and that Complainant had established a prima facie case of discrimination. On June 6 and 7, 2017, the AJ held a damages hearing. On August 15, 2017, the AJ issued an Order Granting Default Judgment and Order on Relief. In the decision, the AJ first determined that Complainant failed to provide supportive testimony and evidence regarding out-of-pocket expenses. Therefore, the AJ found that Complainant had not established an entitlement to pecuniary damages. Next, the AJ determined that Complainant’s testimony regarding non-pecuniary damages was credible. The AJ noted that Complainant provided credible testimony regarding his depressed outlook on life, avoidance of socialization, and feelings of anger and despair. Further, the AJ found that Complainant’s testimony was believable about the effects of his depressed mood on his family and his inability to socialize and enjoy life such as he had before the Agency’s actions. As a result, the AJ awarded Complainant

\$25,000.00 in non-pecuniary compensatory damages. The AJ further awarded Complainant placement in a Manager, Customer Services, EAS-20, position in the Norfolk, Virginia area or a mutually agreed-upon position for which Complainant was qualified. In addition, the AJ ordered the Agency to provide Complainant back pay with interest with other benefits including step increases from November 4, 2014 to the date of the AJ's decision. Further, the AJ ordered the Agency to restore all sick and annual leave taken during the period in question, pay \$91,328.30 in attorneys' fees and \$3,756.11 in costs. Finally, the AJ ordered the Agency to provide training regarding the EEO process to the affected Agency departments.

On September 21, 2017, the Agency issued a final order rejecting the AJ's default judgment decision and the relief ordered. Simultaneously, the Agency filed the instant appeal.

#### CONTENTIONS ON APPEAL

On appeal, the Agency contends that the AJ erred by granting default judgment in favor of Complainant. The Agency argues that it was not put on notice for such a sanction because there was no pending order which the Agency failed to follow and the AJ did not give the Agency opportunity to cure any alleged defects. Further, the Agency claims that the AJ abused her discretion in determining default judgment was a proper sanction. The Agency argues that the AJ leapt to the most severe available sanction for its failure to provide specific documents in its ROI, which contained over 600 pages of documents. The Agency states that supplementing the investigation would have been relatively simple and issuing a default decision after not allowing any real opportunity for the Agency to cure the defects does not protect the integrity of the EEO process. Further, the Agency claims that the AJ erred in not allowing the Agency sufficient time to respond to Complainant's fee petition. Next, the Agency argues that the AJ awarded excessive non-pecuniary compensatory damages. The Agency contends that Complainant and his wife testified that much of Complainant's stress stemmed from financial problems related to his children in college and not from any alleged discriminatory act by the Agency. In addition, the Agency argues that the AJ erred in awarding Complainant full attorneys' fees and costs. The Agency claims that there was evidence of duplication of work, non-legal and clerical work, and other non-recoverable fees and costs. Thus, the Agency requests that the Commission reduce the awarded attorneys' fees by 65 percent. Accordingly, the Agency requests that the Commission affirm its final order and remand this matter for a hearing on liability.

In response, Complainant contends that the AJ's issuance of default judgment as a sanction was not an abuse of discretion. Complainant notes that the Agency had ample notice and several opportunities to show good cause before the AJ issued default judgment. More specifically, Complainant points out that he submitted letters to the Agency and the EEO investigator in which he identified specific documents that should have been included in the ROI. In addition, Complainant adds that the Agency was on notice on November 5, 2015, that the AJ believed that Complainant's Motion for Sanctions "appeared to have merit" and again on January 21, 2016, where the AJ informed the parties that they would have until February 11, 2016, to submit comments regarding her intent to issue default judgment. Complainant argues that given the egregious omissions from the record, default judgment was an appropriate sanction.

Complainant contends that there is substantial record evidence supporting the AJ's award of relief and attorneys' fees. Complainant notes that the Agency is not required to respond to a fee petition and the AJ did not commit any procedural errors in her decision. With respect to the attorneys' fees and costs, Complainant argues that the fee petition reflects work performed by a small staff where other staff members stepped in at various stages to ensure the appropriate legal services were provided and to keep costs low. Complainant asserts that his attorneys' firm carefully reviewed its billing entries and classified as "no charge" instances where it was appropriate or where services were duplicative. Accordingly, Complainant requests that the Commission reverse the final order and order the Agency to implement the AJ's decision and relief ordered.

### 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. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether 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. See 29 C.F.R. § 1614.405(a).

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 for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

### ANALYSIS AND FINDINGS

#### *The AJ's Imposition of Sanctions*

The Commission notes that Commission regulations and precedent provide AJs with broad discretion in matters relating to the conduct of a hearing, including the authority to issue appropriate sanctions, including a default judgment. See 29 C.F.R. § 1614.109(e); EEO MD-110, at Ch. 7 (Aug. 5, 2015); Matheny v. Dep't of Justice, EEOC Request No. 05A30373 (Apr. 21, 2005). An AJ must distinguish between conduct that does not warrant the imposition of a sanction and conduct which does.

Here, the AJ sanctioned the Agency for its failure to conduct a complete and thorough investigation into Complainant's complaint. Specifically, the record was lacking application materials or qualifications of the selectees for the positions at issue in claims (1) and (2), the identity of the selectee for the position at issue in claim (3), and interview notes for any of the positions. At a minimum, a record for a non-selection case such as this should include the

identities of applicants who made the best qualified list or were selected, application materials and qualifications of those who made the best qualified list or were selected, statements from all recommending and/or selecting officials, and interview panel notes. Here, the record was clearly deficient as basic evidence related to the selections and the selection processes was not included. These omissions deprived Complainant of any realistic opportunity to demonstrate that his qualifications were superior to those of the selectees or otherwise prove his case.

EEOC Regulation 29 C.F.R. § 1614.108(b) requires, inter alia, that the Agency develop an impartial and appropriate factual record upon which to make findings on the claims raised in the complaint. One purpose of an investigation is to gather facts upon which a reasonable fact finder may draw conclusions as to whether a violation of the discrimination statutes has occurred. *Id.*; EEO MD-110, at Ch. 6, § IV.B. An investigation must include “a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the Complainant’s group as compared with the treatment of similarly situated employees...and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant.” *Id.* at § IV.C. Also, an investigator must identify and obtain “all relevant evidence from all sources regardless of how it may affect the outcome.” *Id.* at § VI.D.

The Agency has provided no explanation for its failure to appropriately investigate Complainant’s claims. The Agency claimed that Complainant was not prejudiced by these omissions and that discovery was available to supplement the record. The Commission stresses that the purpose of discovery is to perfect the record in the hearing process, but it is not a substitute for an appropriate investigation. Moreover, the Commission notes that every complainant does not choose the option of requesting a hearing. The regulations found at 29 C.F.R. § 1614.108(b) squarely place the responsibility for an accurate, complete investigation, completed within 180 days, upon the Agency. Complainant requested twice during the investigation that the Agency include the specific information and documents that were subsequently omitted. Based on the Agency’s failure to develop a complete factual record, the Commission finds that the AJ properly determined that sanctions were appropriate.

#### *Determination of Sanction*

The Commission’s sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party’s failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep’t of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Several factors are considered in tailoring a sanction and determining if a particular sanction is warranted: (1) the extent and nature of the non-compliance, and the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice; and (4) the effect on the

integrity of the EEO process. Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (Mar. 1, 2007). If a lesser sanction would suffice to deter the conduct and to equitably remedy the opposing party, it may constitute an abuse of discretion to impose a harsher sanction. See Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000).

The Commission concludes that the AJ's sanction of default judgment in favor of Complainant was not an abuse of discretion. Default judgment is an appropriate sanction for the Agency's egregious failure to conduct an appropriate investigation. In other appeals of default judgments issued by AJs for failure to comply with the requirements of the 29 C.F.R. Part 1614 process, the Commission has affirmed the default judgments, in the interest of protecting the integrity of the EEO process. See Complainant v. Dep't of the Air Force, EEOC Appeal No. 0720090009 (June 5, 2015); Royal v. Dep't of Veterans Affairs, *supra*; Reading v. Dep't of Veterans Affairs, EEOC Appeal No. 07A40125 (Oct. 12, 2006); Lomax v. Dep't of Veterans Affairs, EEOC Appeal No. 0720070039 (Oct. 2, 2007), *req. for recon. den.*, EEOC Request No. 0520080115 (Dec. 26, 2007); Elston v. Dep't of Transp., EEOC Appeal No. 07A50019 (Oct. 18, 2005), *req. for recon. den.*, EEOC Request No. 05A60283 (Jan. 5, 2006); Rhinesmith v. Dep't of the Treasury, EEOC Appeal No. 07A10103 (Jan. 28, 2003), *req. for recon. den.*, EEOC Request No. 05A30509 (May 13, 2003).

In addition, the Agency argued that the AJ erred by not giving it notice of the potential for sanctions. The Commission is not persuaded that the Agency was given inadequate notice that sanctions may be imposed. Complainant submitted a motion seeking sanctions on October 23, 2015. The Agency responded to that motion on November 5, 2015. The record indicates that the AJ informed the parties that Complainant's motion "appeared to have merit" on January 7, 2016. On January 21, 2016, the AJ issued a Notice of Intent to Grant Complainant's Motion for Sanctions and Notice of Intent to Issue a Default Judgment. The AJ provided the parties until February 18, 2016 to respond to the Notice. The Agency responded to the Notice on February 10, 2016. Thus, the Commission finds that the Agency was given adequate notice that sanctions, including default judgment, could be imposed.

### *Entitlement to Relief*

After deciding to issue a default judgment for a complainant, the Commission must determine if there is evidence that establishes the complainant's right to relief. One way to show a right to relief is to establish the elements of a prima facie case. See Royal, EEOC Request No. 0520080052; see also Matheny v. Dep't of Justice, EEOC Request No. 05A30373 (April 21, 2005).

In order to prevail on a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978).

Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13.

Here, the record reveals that Complainant has established a prima facie case of discrimination and reprisal. The record shows that Complainant applied for and was found qualified, but ultimately was not selected for the three positions at issue. Furthermore, the selectees for the positions at issue in claims (1) and (2) were African-American females. Their ages and protected EEO activity were not known. With respect to the position at issue in claim (3), the Agency's deficient investigation failed to identify the third selectee; however, Complainant indicated that he learned that the selectee was an African-American male. Complainant did not know the third selectee's age or prior protected EEO activity. Accordingly, the Commission agrees with the AJ that Complainant has established a prima facie case of discrimination based on race and sex with respect to claims (1) and (2) and based on race with regard to claim (3).

### REMEDIES

When discrimination is found, the Agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore him as nearly as possible to the position he would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination 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, 119 S.Ct. 1906 (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. § 1981a(b)(3).

The Commission notes that the Agency only challenges the AJ's award of non-pecuniary compensatory damages and attorneys' fees and costs. The Commission will exercise its discretion and review only those issues specifically raised on appeal.

#### *Non-Pecuniary Damages*

Non-pecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil



Rights Act of 1991, EEOC Notice No. 915.302 at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the Agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be “monstrously excessive” standing alone, but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from Complainant concerning his emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

Here, the AJ awarded Complainant \$25,000.00 in non-pecuniary compensatory damages, finding that Complainant presented credible testimony establishing that he experienced stress, sleeplessness, chest pains, hopelessness, loss of outgoingness, anger, a depressed outlook on life, and aggravation of teeth grinding because of the Agency's discriminatory non-selections. The Agency argued that Complainant and his wife testified that much of Complainant's stress stemmed from other financial problems unrelated to its actions and that damages in the range of \$5,000.00 to \$7,000.00 would be more appropriate.

Upon review of the record, the Commission is unpersuaded by the Agency's appellate arguments. Indeed, the Commission finds that an award of \$30,000.00 is more appropriate under the circumstances. The Commission notes that the award is comparable to awards in prior Commission decisions. See Dallas D. v. U.S. Postal Serv., EEOC Appeal No. 0120150319 (Mar. 24, 2017) (\$30,000 awarded where complainant experienced emotional and mental distress, exacerbation of his pre-existing conditions, anxiety, and isolation from his family and social gatherings); Complainant v. Dep't of Agric., EEOC Appeal No. 0120131896 (May 22, 2014), req. for recon. denied, EEOC Request No. 0520140443 (Feb. 6, 2015) (\$30,000 awarded where complainant's non-selection resulted in interference with family life, loss of enjoyment of life, decreased, and increased blood pressure); Frazier v. Dep't of Agric., EEOC Appeal No. 0120100064 (Mar. 31, 2011) (\$25,000 awarded where complainant's non-selection resulted in sleeplessness, depression, familial withdrawal, loss of interest, and hospitalization after an apparent heart attack). The Commission finds that this amount takes into account the severity of the harm suffered, and is consistent with prior Commission precedent. Finally, the Commission finds this award is not “monstrously excessive” standing alone, is not the product of passion or prejudice, and is consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal

Serv., EEOC Appeal No. 01972555 (Apr. 15, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

### *Attorneys' Fees and Costs*

The Commission initially notes that the Agency argues that the Commission should reverse the AJ's decision awarding attorney's fees to Complainant because the AJ issued a decision before it had an opportunity to respond to Complainant's submitted fee petition. Commission regulations provide that the Agency may respond to a complainant's petition for attorney's fees, but there is no mandatory requirement that the agency should be able to state its objection before an award is calculated. 29 C.F.R. § 1614.501(e)(2). Accordingly, the Commission finds that the AJ did not commit any procedural error by issuing a decision awarding attorneys' fees and costs to Complainant prior to the Agency's response.

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. The number of hours should not include excessive, redundant, or otherwise unnecessary hours. *Id.* A reasonable hourly rate is based on "prevailing market rates in the relevant community" for attorneys of similar experience in similar cases. *Id.* The hours spent on unsuccessful claims should be excluded in considering the amount of a reasonable fee only where the unsuccessful claims are distinct in all respects from the successful claims. EEO MD-110, Ch. 11, § VI.F.1. Successful and unsuccessful claims are not fractionable when they are closely intertwined and involve the same common core of facts. See Mannon v. U.S. Postal Serv., EEOC Appeal No. 0720070074 (Apr. 4, 2012).

The Commission and courts generally use the Laffey Matrix to determine the hourly rate for Washington, D.C. area attorneys. Laffey v. Northwest Airlines Inc., 572 F. Supp. 354 (D.D.C. 1983), rev'd in part, 746 F.2d 4 (D.C. Cir. 1984). The Laffey matrix is a chart compiled yearly by the United States Attorney's Office in the District of Columbia. It provides a schedule of hourly rates prevailing in the Washington, D.C. area in each year, going back to 1981, for attorneys at various levels of experience. Piper v. U.S. Dep't of Justice, 339 F. Supp. 2d 13, 24 n. 8 (D.D.C. 2004).

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 relief sought and results obtained; and (5) the nature and length of the attorney-client relationship. See Cerny v. Dep't of the Army, EEOC Request No. 05930899 (Oct. 19, 1994).

The AJ granted Complainant's full request of \$91,328.30 in attorneys' fees and \$3,756.11 in costs. The Agency challenges the AJ's award of attorneys' fees as excessive and based on duplicative work or unrecoverable fees. First, the Agency argued that 21 different individuals were listed in the fee petition as performing work on Complainant's case which resulted in double billing. Complainant's attorney explained that other staff stepped in to assist with matters

when attorneys, paralegals, and other support staff were unavailable and to keep the case moving. Further, Complainant's attorney stated that the firm carefully reviewed its billing entries and classified as "no charge" numerous instances such as when an individual attended a meeting, deposition or hearing and such attendance was for educational purposes; when services provided were primarily administrative in nature; when services performed took longer than what was expected; and for services that were duplicative. The Agency identified one example of what it claimed to be duplicative billing, but claimed the fee petition contained multiple additional instances of double-billed time. The Commission finds that substantial record evidence supports the AJ's finding that Complainant's requested attorneys' fees were neither excessive nor based on duplicative work. The record reveals that what the Agency characterized as a duplication of effort is nothing more than consultations between attorneys, which occurs regularly in legal practice.

Next, the Agency claimed that Complainant's attorneys billed for multiple hours of clerical work performed by paralegals. The Agency points to an example where time was charged for serving documents on the Agency, calculating deadlines, and scheduling meetings. While Complainant's attorney claims that it reviewed its billing entries to eliminate matters that were primarily administrative, the Commission has identified a total of 8.2 hours of work performed by paralegal and support staff that appeared to be clerical in nature. Accordingly, the Commission finds that the award of attorney's fees should be reduced by \$1,287.40 for these non-compensable tasks.

Finally, the Agency challenges the AJ's award of costs that included reimbursement for travel expenses. Included in the travel expenses were charges for airfare and lodging for Complainant's attorney to fly from Atlanta, Georgia to her office in Silver Spring, Maryland. Complainant's attorney argues that such expenses are compensable and that an attorney is entitled to full reimbursement of fees if the travel was necessary. Furthermore, Complainant's attorney explains that she was the lead attorney in this case and that even though she moved to Georgia while the matter was pending, it was reasonable for her to stay on the case given the relationship she had developed with Complainant and the additional fees that would have resulted while a new attorney learned the record. The record shows that Complainant's attorney billed for travel to depositions and the hearing and submitted supporting documentary evidence. Complainant's attorney noted that she exercised billing judgment by listing half of the travel time as "No Charge." The Commission finds that this comports with the Commission's position that an award of attorney's fees for time spent traveling should be compensable at a reduced rate of one half the attorney's normal hourly rate. See Black v. Dep't of the Army, EEOC Appeal No. 01943642 (Feb. 27, 1996). Accordingly, the Commission finds that substantial record evidence supports the AJ's finding that these charges are properly compensable.

### CONCLUSION

After a review of the record in its entirety, including consideration of all statements submitted on appeal, the Commission REVERSES the Agency's final order finding no discrimination and rejecting the AJ's order of relief.

The Commission MODIFIES the AJ's award of remedies. The matter is REMANDED to the Agency for remedial action in accordance with this decision and the Order below.

ORDER

The Agency is ordered to take the following remedial action to the extent that it has not already done so:

1. Within sixty (60) calendar days of the date this decision is issued, the Agency shall place Complainant in the position of Manager Customer Service, EAS-20, in the Norfolk, Virginia area or a mutually agreed-to position for which Complainant is qualified, with the effective date of November 4, 2014;
2. Within sixty (60) calendar days of the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within 60 calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for clarification or enforcement of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. Within sixty (60) calendar days of the date this decision is issued, the Agency shall pay Complainant \$30,000.00 in non-pecuniary compensatory damages.
4. Within sixty (60) calendar days of the date this decision is issued, the Agency shall calculate and restore to Complainant any leave used during the period in question as a result of the unlawful discrimination. Complainant shall cooperate with the Agency and provide it with information respecting what leave he took as a result of the discrimination.
5. Within sixty (60) calendar days of the date this decision is issued, the Agency shall pay \$90,040.90 in attorneys' fees and \$3,756.11 in costs.
6. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide at least eight (8) hours of in-person or interactive training to its managers and staff at the National EEO Investigative Services Office in Tampa, Florida regarding their responsibilities concerning case processing and developing a complete and impartial investigative record.

7. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the responsible National EEO Investigative Services Office management officials. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure dates.
8. The Agency shall post a notice in accordance with the Order below.

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 evidence that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its National EEO Investigative Services Office in Tampa, Florida of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must 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)), he 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 (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)

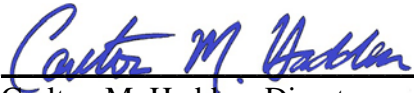
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

May 17, 2018

Date