



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

████████████████████
Arthur J.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Field Areas and Regions),
Agency.

Appeal No. 2023002854

Hearing No. 440-2021-00358X

Agency No. 1E-554-0004-21

DECISION

Following its April 13, 2023, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. For the following reasons, the Commission REVERSES the Agency's final order.

ISSUE PRESENTED

Whether the AJ properly issued a decision after a hearing finding discrimination regarding Complainant's claim that the Agency was liable for retaliation in violation of Title VII when Complainant was threatened by a co-worker, he informed management officials about the threat, however, they said it was not their concern.

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.

BACKGROUND

During the period at issue, Complainant worked as a Tractor Trailer Operator (TTO) at the Agency's Vehicle Maintenance Facility in Minneapolis, Minnesota. One of Complainant's co-workers was another tractor trailer operator (TTO2). Complainant's direct supervisor was the Supervisor Transportation Operations (STO). Complainant's second-level supervisor was the Manager Transportation Operations (MTO).

In June 2020, Complainant initiated informal EEO counseling regarding discrimination claims involving STO and MTO. In the prior EEO complaint that followed, Complainant accused a co-worker of using the word "nigger." Complainant stated that after he reported this matter, management officials took no action. Complainant claimed that he had been coerced into signing a suspension document without union representation and that managers had followed him on two occasions. During the investigation that followed, STO and MTO were made aware of Complainant's activity because they were interviewed. In December 2020, his prior EEO complaint, designated Agency No. 1E-554-0019-20, was dismissed for failure to state a claim.

On January 20, 2021, TTO2 and Complainant were at the local Processing and Distribution Center (PD&C) as part of their regular delivery duties. TTO2 confronted Complainant accusing him of sending the FBI to investigate him for involvement in the insurrection that had occurred on January 6, 2021.² Their confrontation was witnessed by a PD&C worker, who testified that TTO2 used the words "fuck" and "bitch" at Complainant. According to PD&C worker, as Complainant walked away, TTO2 said words to the effect of "I'll get you."

Via email Complainant reported TTO threatening him to STO. STO initially replied that it was not his concern. Thereafter, STO sent a second reply stating that he would investigate the threat. STO interviewed TTO2 and took his written statement but did not interview Complainant. STO did not interview the PD&C worker because PD&C worker told his supervisor that PD&C worker did not want to give a witness statement.

MTO had previously placed Complainant on emergency placement following an allegation that Complainant had verbally threatened another employee, but MTO did not place TTO2 on emergency placement upon STO informing him about of TTO2's threat against Complainant.

Later, STO told Complainant that STO had given TTO2 a job discussion as a result of investigating TTO's threat against Complainant.

On February 4, 2021, Complainant contacted an EEO counselor about the manner in which the threat against him was handled. Complainant also made another claim that a different supervisor and dispatcher had accused him of preying unsafely between tractor trailers. The parties were unable to reach a resolution of these matters through informal EEO counselling.

² TTO2 did not dispute his presence near the Capitol on January 6, 2021. He claimed that he did not witness any illegal activity there.

On April 12, 2021, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the bases of religion (Muslim) and in reprisal for prior EEO-protected activity (Agency No. 1E-554-0019-20) when:

1. On January 20, 2021, Complainant was threatened by a co-worker, he informed management officials about the threat, but they said it was not their concern; and
2. On February 24, 2021 and March 9, 2021 management and a dispatcher made false accusations about Complainant and targeted him about praying.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. On May 3, 2022, the Agency moved for a decision without a hearing. On June 2, 2022, the AJ assigned to the case denied the Agency's motion with respect to Claim 1. The AJ partially granted the motion, because the AJ dismissed Claim 2 for failure to state a claim. The AJ held a hearing regarding Claim 1, on October 11, 2022, and on November 9, 2022 and issued a decision and order in Complainant's favor on March 8, 2023.

AJ Decision

Regarding the merits of the case, the AJ analyzed whether Complainant made his prima facie case for retaliation.³ The AJ held that the first two elements of the four-part test from Whitmire v. U.S. Postal Serv. EEOC Appeal No. 01A63337 (Sept. 28, 2006) were met, because Complainant had engaged in prior EEO activity of which MTO and STO were aware. The AJ further held that there was temporal proximity between the Complainant's prior EEO activity for which STO and MTO had given affidavits approximately three months before the alleged act or omission of reprisal. The AJ's discussion then focused on the third Whitmire prong whether the Agency's conduct toward Complainant was materially adverse to such a degree that it would dissuade a reasonable person from engaging in EEO activity.

The AJ noted that if the threat was not significant, then the Agency's failure to investigate the threat would not constitute a materially adverse action. The AJ determined, however, that the TTO2's actions toward Complainant on January 20, 2021 constituted a sufficiently significant threat. The AJ stated that Complainant's account described TTO2 getting "into his face," screaming, cursing, and accusing Complainant of informing the FBI about his presence near the Capitol on January 6, 2021. Complainant further accused TTO2 of communicating a threat in the form of the words "watch your back" and "I'll get you." The AJ determined that Complainant's version of events was corroborated by PD&C worker who the AJ found to be a credible and disinterested witness. To the contrary, the AJ found that TTO2 was not credible in his denial that he had screamed or that he had taken a threatening posture.

³ Complainant averred that religion was not a factor in Claim 1.

Next, the AJ examined the sufficiency of Agency management's response to Complainant reporting what was found to be a significant threat. The AJ held that the Agency's response was deficient in three aspects. First, neither STO nor MTO placed TTO2 on emergency placement. This failure to implement emergency placement contradicted guidance on emergency placement in the Agency's Employee and Labor Relations Manual. The AJ also cited management's admitted past practice of handling accusations of threats among employees. MTO had testified that normally, the threatening employee would immediately be directed off-duty on emergency placement. Indeed, this is the approach that MTO had taken when Complainant was accused of threatening another employee in the past. However, TTO2 was never put on emergency placement despite Complainant's having reported that TTO2 had threatened Complainant. Second, the AJ noted that in conducting an investigation of Complainant's threat allegation, STO never took a statement from Complainant or interviewed him, although STO took TTO2's statement. The AJ found that this showed STO's unlawfully retaliatory animus against Complainant and evidenced that the investigation was a cursory investigation, designed to assure that no consequence would result from Complainant's threat report. The third reason that the AJ found the STO's investigation into Complainant's threat allegation was inadequate was because STO did not interview PD&C worker although he was aware that PD&C worker had witnessed the event at issue. While PD&C worker had expressed reluctance to giving a statement, the AJ found that STO could have compelled PD&C worker to do so and should have done so in order to obtain an unbiased perspective on what had transpired. Having found that the Agency's deficient threat investigation satisfied the third adverse action component from Whitmire, the AJ held Complainant established a prima facie case of reprisal.

Thereafter, the AJ applied McDonnell Douglas and held that the Agency had not presented a legitimate non-discriminatory reason to justify its conduct following Complainant's threat allegation. The Agency provided no explanation as to why Complainant was not interviewed or why TTO2 was not put on emergency placement. According to the AJ, the Agency's declining to take a witness statement from PD&C worker because he preferred not to do so was an inappropriate reason because applicable policies mandated that Agency employees had to cooperate in management investigations.

Having found the Agency liable for retaliation in not conducting a serious investigation into TTO2s' threat against Complainant, the AJ found that Complainant's testimony of damages and a letter from his spouse merited \$7,500 in compensatory damages.

Complainant had requested for \$665.70 to cover the cost of two depositions he had taken in preparation for the instant case. The AJ's cost award reduced that amount by \$308 because one of the depositions was to support Claim 2, which was dismissed as a result of the AJ's decision on the Agency's motion for a decision without a hearing.

Complainant had requested \$43,600 in attorneys fees (109 hours at a rate of \$400). The AJ reduced the hourly rate to \$381.72 based on the customary rate of \$350 as adjusted for inflation. The AJ reduced Complainant's request for attorneys fees by three hours for a motion to amend that was never filed, and by five hours for work on the deposition related to Claim 2.

The AJ denied that portion of the attorney's fees attributable to hours working on Claim 2. Toward this end the AJ halved the 45 hours that preceded the AJ's dismissal of Claim 2 because complainant did not prevail on that claim. Ultimately, the AJ granted Complainant attorney's fees of \$22,965.02 for 78.5 hours billed at the rate of \$381.72.

The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected him to retaliation discrimination as alleged in Claim 1. The Agency stated its intention to appeal the AJ's award of \$7,500 in damages, of \$29,965.02 in attorney fees to and \$357.50 in costs.

CONTENTIONS ON APPEAL

On appeal, the Agency argues that the Agency's actions did not rise to the level that would deter Complainant or any reasonable person from engaging in protected conduct. The Agency argues that Complainant had not been seriously threatened by TTO2, and characterized the underlying incident as a one-time verbal exchange between them. The Agency contends that the Agency appropriately responded to Complainant's report of being threatened by TTO2. The Agency further disputes the AJ's decision for finding STO's investigation deficient in failing to interview PD&C worker. The Agency said that this action was a reasonable because PD&C worker was outside of STO's chain-of-command. The Agency further argues that the AJ has taken a "constellation" view of the facts to reach a finding on retaliation. The Agency questioned whether the AJ's decision was improperly biased against Agency because of TTO2's attendance at the January 6, 2021, rally for the former United States President. The Agency maintains that the AJ should have considered TTO2's written statement as well as there being no problems between Complainant and TTO before or after their confrontation on January 20, 2021.

Next, the Agency distinguished the present case from those cases on which the AJ relied in finding that an inadequate investigations of threat allegations were reprisal. Both cases, involved egregious threats which were not investigated. The case of Rochon v. Gonzalez, 438 F.3d 1211 (D.C. Cir. 2006), involved a failure to investigate death threats against an FBI agent and his spouse. The case of Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321 (6th Cir. 2008), concerned failure to investigate patterns of harassment that included arson upon a complainant's personal vehicle. The Agency contends that TTO2's threat was relatively minor in comparison, and that to allow complainants to find reprisal whenever they disagreed with the outcome of a threat investigation would open floodgates of litigation.

Finally, the Agency contended that temporal proximity was not enough in itself for the AJ to have found a nexus between the Agency's conduct of the investigation and Complainant's prior EEO activity. The Agency asserts that the record explained that TTO2 was not put on emergency placement because Complainant had reported the threat after both their shifts were over. Furthermore, the Agency argues that it did not perceive TTO2 as a serious or immediate threat who merited emergency placement or discipline beyond a job discussion. Additionally, the Agency argues that AJ failed to examine the different circumstances behind Complainant's emergency placement.

The Agency concluded with the assertion that the AJ's decision should be reversed because the evidence did not support the AJ's finding a retaliatory motive in the investigation or in not severely disciplining of TTO2.

Through Counsel, Complainant submits a brief opposing the Agency's appeal. Complainant's Counsel contended that STO's investigation into TTO2's threat was a "sham" because STO declined to interview Complainant and PD&C worker, who was a key witness to the events. Counsel argues that the AJ's decision was supported by a convincing mosaic of circumstantial evidence which showed that STO and MTO were unsympathetic to Complainant's threat allegation because he had filed a prior EEO complaint against them.

Counsel further argues that the record along with Agency policies and regulations showed that Complainant's threat allegation was improperly investigated. Counsel stated that it was proper for the AJ to discredit TTO2's testimony because it was determined that TTO2 lied about not seeing the Capitol's security breached although he was present there throughout January 6, 2021. Counsel called disingenuous the Agency's characterization of TTO2's threat against Complainant as merely "a heat of the moment" exchange between co-workers. Complainant argues that the AJ properly found that the Agency's response to the threat was not serious and the decision should be affirmed. Additionally, Counsel asserts that the temporal causal connection between Complainant's prior EEO activity and the Agency's insufficient response to the threat was sufficient for the AJ to find retaliation. Moreover, because the Agency failed not advanced legitimate non-retaliatory reasons for its handling of the threat the Agency's appellate arguments went to pretext which was not necessary to the AJ's finding.

Finally, Counsel disputes the AJ's reductions of from the total hours granted for attorney's fees because Complainant did not prevail on Claim 2. Counsel argues that his hours spent on Claim 2 were not fractionable from those spent on Claim 1 which was successful. Counsel argues that Claim 2 also involved MTO and PD&C worker's supervisor as a witness who testified concerning Claim 1 and who was deposed for Claim 2. Counsel concludes that Claim 2 was not so distinctly different from Claim 1 as to warrant the AJ's reduction of Counsel's total hours spent on both claims.

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. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not 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.

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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 9, § VI.B. (Aug. 5, 2015).

ANALYSIS

Disparate Treatment Based on Reprisal/Retaliation

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons for its action were a pretext to mask discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

Substantial evidence supports the AJ's determination that Complainant established a prima facie case of retaliation. A complainant may establish a prima facie case of reprisal by showing that: (1) he engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). On appeal, the Agency has disputed that Complainant was subjected to adverse treatment. However, we find that adverse treatment occurred in the form of STO initially telling Complainant that a threat from a co-worker was not his concern. Although the MTO soon thereafter instructed STO to investigate the threat, the Agency's investigation was superficial in that STO only took a statement from TTO2 who has sought to minimize his aggression toward Complainant. The Agency's justification for STO not seeking a statement from Complainant, was non-existent. Meanwhile the Agency's explanations for why PD&C worker was never interviewed by STO were not persuasive. By contrast, when Complainant and PD&C worker testified at the hearing, the AJ found they evidenced that TTO2's threat was adequately serious and egregious. Credible testimony confirmed that TTO2 had angrily yelled and cursed in Complainant's face while accusing him of informing the FBI about his presence at the Capitol on January 6, 2021. TTO2 concluded their confrontation by telling Complainant to watch his back or by telling Complainant "I'll get you." We concur with the AJ that STO's hasty conduct of the threat investigation and the resulting job discussion showed management bias in favor of TTO2 and animus against Complainant.

AJ correctly found that TTO2's threat warranted emergency placement but management's response was tepid. Here, management's omission in not conducting a serious investigation into the threat against Complainant was a form of reprisal against Complainant for having previously filed complaints against management. As did the AJ, we find the denials of retaliatory motivation from STO and MTO were unpersuasive. We hold that the Agency's acts and omissions in reaction to Complainant's reporting that TTO2 had threatened him amounted to adverse treatment.

In this case, the AJ found credible Complainant's testimony regarding TTO2's threat against him as well as his testimony that management's tepid response to his report of the threat left him unprotected. The AJ also found credible the corroborating testimony of PD&C worker that TTO2's threat was serious and egregious. Meanwhile, the AJ found the testimony of MTO and STO in denying they acted with retaliatory intent was not credible. On appeal, the Agency has sought to impeach the credibility of Complainant and PD&C worker with the same arguments that it made during the hearing that were already considered and rejected by the AJ during the hearing. However, the Agency has not presented documentary evidence or other objective evidence that contradicts any testimony, nor shown that the testimony so lacks in credibility that a reasonable fact finder would not credit it. As such, we find no reason to disturb the AJ's credibility determinations.

Furthermore, we find that a causal nexus was established between Complainant's prior EEO activity in late 2020, and the Agency's aforementioned adverse treatment in January 2021. Contrary to the Agency's appellate position, when establishing a prima facie case of retaliation under Title VII, temporal proximity is sufficient to infer a causal nexus between the employee's protected activity and an adverse action on the part of an employer. Clark Cty. School Dist. v. Breeden, 532 U.S. 268, 273 (2001) (noting that "cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be "very close""). In the present matter, Complainant's prior EEO claims against MTO and STO had caused them to give sworn statements a few months before Complainant reported TTO2's threat. That prior EEO matter had been concluded only in the month before the Agency's handling of TTO2 threatening Complainant.

In addition, we find that STO's decision to not put TTO2 on emergency placement was evidence of pretext for reprisal discrimination. An Agency's departure from, or failure to apply its policies, without explanation, can be probative of pretext. Carl M. v. Consumer Fin. Protection Bureau, EEOC Appeal No. 0120160005 (Nov. 16, 2017). The Agency's policy stipulates that emergency placement is appropriate when an employee has communicated a threat to harm a co-worker. Here, MTO testified that in similar instances, emergency placement for the employee who communicated the threat was "almost immediate." Apparently, the Agency followed this approach and MTO had put Complainant on emergency placement when another co-worker had accused Complainant of threatening them. We were not convinced by the Agency's efforts to justify why TTO2 was not put on emergency placement following Complainant's threat accusation.

In sum, the AJ correctly determined that the Agency's acts and omissions at issue had the effect of chilling EEO activity. EEOC Regulation 29 C.F.R. § 1614.101(b) provides that no person shall be subject to retaliation for opposing any unlawful discriminatory practice or for participating in any stage of the EEO complaint process. The statutory anti-retaliation provisions prohibit any materially adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). Although petty slights and trivial annoyances are not actionable, we find that management's declining to hold a co-worker accountable for threatening a complainant would reasonably deter a person from engaging in EEO-protected activity. Accordingly, we REVERSE the Agency's final order rejecting the AJ's finding of reprisal discrimination.

Attorney's Fees

By federal regulation, an agency is required to award attorney's fees and costs 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 EEO MD-110, Ch. 11 § VI.F. 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.

On appeal, Complainant's Counsel argues EEOC should increase attorney's fees by rejecting the AJ's reductions to the award of attorney's fees. The First Circuit in Coutin v. Youna & Rubicam, 124 F.3d 331, 337 (1st Cir. 1997), provides guidance as to the appropriate standard of review for an AJ's determination of attorney's fees:

We review fee awards deferentially, according substantial respect to the [AJ's] informed discretion. See Brewster v. Dukakis, 3 F.3d 488, 492 (1st Cir. 1993). We will disturb such an award only for mistake of law or abuse of discretion. See U.S. v. Metropolitan Dist. Comm'n, 847 F.2d 12, 14 (1st Cir. 1988). In this regard, an abuse of discretion occurs "when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when

all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.” Foster v. Mydas Assocs., Inc., 943 F.2d 139, 143 (1st Cir. 1991)

Therefore, on this appeal, we will determine if the AJ erred as a matter of law or abused his discretion.

Attorney's fees may not be recovered for work on unsuccessful claims. Hensley, 461 U.S. at 434-35. Courts have held that fee applicants should exclude time expended on “truly fractionable” claims or issues on which they did not prevail. See Nat’l Ass’n of Concerned Veterans v. Sec’y of Def., 675 F.2d 1319, 1327 n.13 (D.C. Cir. 1982). Claims are fractionable or unrelated when they involve distinctly different claims for relief that are based on different facts and legal theories. Hensley, 461 U.S. at 434-35. In cases where a claim for relief involves “a common core of facts or will be based on related legal theories,” however, a fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. *Id.* at 435. “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, at Chap. 11 § VI.F (citing Hensley, 461 U.S. at 440).

Here the AJ reduced Complainant’s attorney fees to reflect that Claim 1 on which he had prevailed was fractionable from his other unsuccessful Claim 2. Having reviewed the record, we find that the AJ properly reduced the claimed attorney’s fees to account for 30.5 hours attributable to work on Claim 2. We disagree with Complainant’s Counsel that Claim 1 and Claim 2 were not fractionable. Claim 1 alleged retaliatory inaction, particularly by STO in handling TTO2’s threat against Complainant. By contrast, Claim 2 concerned a different supervisor and a dispatcher making anti-Muslim comments that Complainant was absent from duty because he was praying between the tractor trailers.

The AJ’s the finding of discrimination in Claim 1 was based on a different legal theory that Complainant’s unsuccessful Claim 2. We concur with the AJ’s decision to reduce the claimed attorney's fees and costs to reflect Complainant’s lack of success on Claim 2. Mario G. v. Dep’t of the Air Force, EEOC Appeal No. 0120180942 (June 11, 2019) (affirming the agency’s decision to reduce the claimed hours, where complainant prevailed one claim involving a single instance of reprisal but not on the other discrimination claims). Accordingly, we find that Complainant's attorney is entitled to attorney’s fees of \$29,965.02.

CONCLUSION

Based on a thorough review of the entire record and all contentions on appeal, we REVERSE the Agency’s final order rejecting the AJ’s finding of discrimination regarding Claim 1. This matter is REMANDED to the Agency for further processing in accordance with the following ORDER.

ORDER

To the extent it has not already done so, the Agency shall take the following actions as set forth in the AJ's decision, and modified herein:

1. **Within sixty (60) calendar days** from the date this decision is issued, the Agency shall pay Complainant \$7,500 in compensatory damages.
2. **Within ninety (90) calendar days** of the date this decision is issued, the Agency shall provide 4 hours of remedial training to MTO at the Agency's Minneapolis Vehicle Maintenance Facility regarding the Agency's obligations under Title VII.

The training shall include an emphasis on non-retaliation. For assistance in obtaining the necessary training, the Agency may contact the Commission's Outreach, Training and Engagement Division via email, at FederalTrainingandOutreach@eoc.gov. The Agency shall provide the Compliance Officer with proof of attendance, as well as the contents and materials it used for the training.

3. **Within sixty (60) calendar days** from the date this decision is issued, the Agency shall pay Complainant \$357.50 in costs and \$29,965.02 in attorney's fees.
4. The Agency shall post a notice at set forth in the section below entitled "Posting Order."

POSTING ORDER (G0617)

The Agency is ordered to post at its Minneapolis Vehicle Maintenance Facility copies 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).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0124)

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 their 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

July 8, 2024
Date