



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

[REDACTED]
Beatriz P.,¹
Complainant,

v.

Judith Kaleta,
Acting Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 2020003559

Hearing Nos. 570-2014-01084X, 560-2015-00242X

Agency Nos. 2014-25363-FAA-02, 2015-26109-FAA-05

DECISION

On May 27, 2020, Complainant, through her attorneys, filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) seeking enforcement of an EEOC Administrative Judge's (AJ's) order awarding Complainant \$23,947.50 in attorneys' fees and costs.

ISSUE PRESENTED

Whether the EEOC Administrative Judge (AJ) properly determined Complainant was entitled to \$23,947.50 in attorneys' fees and costs.

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

At the time of events giving rise to this complaint, Complainant worked as an Electronics Engineer at the Agency's Aeronautical Center in Oklahoma City, Oklahoma.

On February 15, 2014, Complainant filed an EEO complaint (Agency No. 2014-25363-FAA-02) alleging that the Agency discriminated against her on the bases of race (Caucasian, Native American), color (White), sex (female), age (over 40), and in reprisal for prior protected EEO activity when:

1. On September 6, 2013, she was not selected for the position of Supervisory Program Manager advertised under Vacancy Announcement No. AAC-INT-13-AFS450-31559;
2. Beginning on November 14, 2013, her manager reassigned some of her work tasks to other branch employees; and
3. On February 3, 2014, she was removed as the AFS-400 Lead for the Established on Required Navigation Performance (EoR or EoRNP) Project for the Atlanta key-site.

Complainant filed a second EEO complaint on March 17, 2015 (Agency No. 2015-26109-FAA-05), alleging that the Agency discriminated against her on the bases of sex (female) and in reprisal for prior protected EEO activity when she was excluded from consideration for the position of Supervisory General Engineer, FV-801-K, advertised under Vacancy Announcement No. AAC-INT-15-AJW2230-39252.

Following the investigations, the Agency provided Complainant with a copy of the reports of investigation and notice of her right to request a hearing before an AJ. Complainant timely filed hearing requests. While the complaints were pending hearings, the AJ consolidated the matters for processing.

Discovery

During the hearing process, Complainant, through her attorneys, submitted her November 21, 2016, Request for Discovery upon the Agency. In her Request for Discovery, Complainant requested all documentation and emails from July 2013 through February 2015, from 10 identified management officials and employees regarding her non-selection for the Supervisory

Program Manager position (claim 1). Complainant also requested all documentation and emails relating to the reassignment of work from her during the period of September 2013 through the present, from six identified management officials and employees (claim 2). She further asked that the Agency provide any emails or other communications regarding her removal as the AFS-400 Lead for the EoR, as well as her removal from other projects (claim 3). Complainant additionally requested that the Agency provide emails from management officials relating to her performance and the reassignment of another employee.

The Agency responded to Complainant's Request for Discovery, and the Agency's Attorney (Attorney 1) notified Complainant that she had produced all emails in response to Complainant's requests. Shortly thereafter, Attorney 1 retired from the Agency and another Agency Attorney (Attorney 2) was assigned to represent the Agency. On April 12, 2017, Attorney 2 filed a response to Complainant's Request for Discovery, writing for nearly each specific discovery request that "[t]he [A]gency [had] no other relevant information other than what [had] been provided in previous discovery in this matter and what is in the [Report of Investigation (ROI)]."

On December 14, 2018, Complainant, through one of her attorneys, sent an email to Attorney 2, writing, in pertinent part, that there were documents identified by the Agency as being produced, but which were never actually provided to her and her attorneys. After the Agency provided Complainant with supplemental documentation on December 18, 2018, a follow-up email was sent by Complainant's attorneys on January 9, 2019, stating that they had "serious concerns that the Agency [had] not responded fully to discovery in this case." Complainant's attorneys further wrote in the January 9, 2019, email to the Agency:

[We] had requested all emails between or among several individuals...regarding the reassignment of work from Complainant and Complainant's performance during the period 2013-2017.... On April 14, 2017, you responded that the Agency had already provided this information in discovery and represented that the Agency did not have further relevant information. The Agency's December 18, 2018, supplement shows that this is not the case, and that relevant information does exist and had not been previously provided to [us] in discovery....

On February 4, 2019, after holding a discovery conference with the parties, the AJ determined that the Agency never conducted a comprehensive search for the requested emails. As a result, the AJ issued an order on February 8, 2019, directing the Agency to search for the emails, as requested by Complainant's attorneys beginning in November 2016. The AJ ordered the Agency to produce the emails by March 8, 2019, and notified the Agency that it must preserve all documentation relative to the EEO complaints filed by Complainant. The AJ specifically warned the Agency that an adverse inference could be taken if the Agency failed to comply with her order.

The Agency thereafter produced documentation from February 12, 2019, through November 22, 2019. Complainant, through her attorneys maintained, however, that the additional documentation produced by the Agency during this period was not responsive to the discovery requests. Complainant specifically maintained that while the Agency finally provided emails from 2013 through January 2014, the Agency conducted its email search using terms that were too narrow, resulting in only a single document relating to her non-selection. Complainant further asserted that while the Agency produced 4,500 additional documents on November 22, 2019, a vast majority of the documentation produced was not relevant to the information she and her attorneys had been seeking. According to Complainant, the Agency then supplemented and provided more documentation on December 16, 2019, which enabled her to file a pre-hearing report with multiple exhibits attached, all of which were obtained through her supplemental discovery efforts.

Meanwhile, Complainant filed a motion for sanctions, a supplemental motion for sanctions, and a second supplemental motion for sanctions, maintaining that the Agency failed to comply with the AJ's February 8, 2019, order. Complainant specifically requested that the AJ take an adverse inference or issue a default judgment against the Agency as a sanction for the Agency's failure to preserve relevant responsive email documentation, despite having been put on notice.

The AJ subsequently notified the parties on December 3, 2019, that she was denying Complainant's motions for sanctions against the Agency. The AJ notified the parties, however, that while she declined to take an adverse inference or default judgment against the Agency as a form of sanction, she reserved the issue of attorney's fees and costs associated with the work performed related to the sanction motions until after the scheduled hearing.

Withdrawal of Hearing Request and AJ's Order for Attorneys' Fees and Costs

On January 8, 2020, Complainant, through her attorneys, notified the AJ that she was withdrawing her request for a hearing pertaining to Agency No. 2014-25363-FAA-02 (Hearing No. 570-2014-01084X), which was scheduled for January 22-24, 2020. Complainant, however, asked the AJ not to close her hearing request as to Agency No 2015-26109-FAA-05 (Hearing No. 560-2015-00242X).² Complainant nevertheless requested that the AJ grant her motion for attorneys' fees and costs related to her requests for sanctions work prior to granting her withdrawal of her hearing request.

On January 13, 2020, the AJ issued an order granting Complainant attorneys' fees and costs related to her motions for sanctions work. In her order for attorneys' fees and costs, the AJ noted that Complainant timely initiated discovery in October 2016, subsequently learning that there were emails responsive to her discovery requests that had not been produced by the Agency. The AJ noted that management officials failed to preserve relevant responsive emails, despite having been put on notice to preserve the emails at least three months in advance. The AJ found that the Agency did not engage in a good faith effort when it responded to Complainant's requests for production of the relevant emails. In so finding, the AJ observed that the Agency used search terms that were too narrow in scope to capture the relevant emails, and Complainant's attorneys had to negotiate with the Agency as to the search terms. The AJ also considered that it took the Agency over three years to respond to Complainant's discovery requests.

The AJ, in her January 13, 2020, order, therefore directed Complainant's attorneys to submit a verified petition of attorneys' fees and costs. The AJ also instructed the Agency to issue a final decision, on her order for attorneys' fees and costs, for the Agency to determine whether it would adopt her order, and if it declined to adopt her order, it must file an appeal with the Commission.

In accordance with the AJ's instruction, Complainant then submitted her verified petition for attorneys' fees and costs requesting \$23,947.50. The AJ thereafter issued an order on February 27, 2020, for the Agency to pay Complainant the requested \$23,947.50 in attorneys' fees and costs and for the Agency to issue a final decision on the merits regarding Agency No. 2014-

² On February 27, 2020, the AJ issued a decision by summary judgement in the Agency's favor regarding Agency No 2015-26109-FAA-05 (Hearing No. 560-2015-00242X), finding no discrimination. Complainant has not contested the AJ's decision.

25363-FAA-02, as Complainant withdrew her request for a hearing solely on that matter. The AJ ordered the Agency to pay the attorneys' fees and costs within 30 days of her order becoming final, and for the Agency to separately issue a final decision on the merits within 60 days of her ruling. Thereafter, on March 4, 2020, the Agency filed an appeal with the Commission which was docketed as EEOC Appeal No. 2020002627, maintaining that the AJ improperly ordered it to pay Complainant the \$23,947.50 in attorneys' fees and costs. The Agency, however, withdrew the appeal on March 17, 2020, noting that it would instead later issue a final decision on the matter. EEOC Appeal No. 2020002627 was administratively closed.

Agency's Final Decision regarding Agency No. 2014-25363-FAA-02

On June 16, 2020, the Agency issued its final decision, finding that Complainant did not establish that she was subjected to discrimination with regard to Agency No. 2014-25363-FAA-02, as alleged.³ In its decision, the Agency declined to review the rulings made by the AJ related to discovery, noting that Complainant voluntarily withdrew from the hearing process. As such, the Agency declined to award Complainant the \$23,947.50 in attorneys' fees and costs. The Agency did not resubmit an appeal with the Commission.

Meanwhile, Complainant filed the instant appeal on May 27, 2020, noting that the Agency failed to pay her the ordered \$23,947.50 in attorneys' fees and costs.

CONTENTIONS ON APPEAL

On appeal, Complainant, through her attorneys, contends that the Agency failed to issue a final order regarding the attorneys' fees and costs by April 7, 2020, within 40 days of the AJ's February 27, 2020, order. Complainant, therefore, asserts that the AJ's order became final on April 7, 2020. As such, per the AJ's order, the Agency had 30 days thereafter to pay her the attorneys' fees and costs in the sum of \$23,947.50. Complainant argues that the Agency failed to comply with the AJ's order by May 7, 2020, or thereafter. She is, therefore, seeking enforcement of the AJ's February 27, 2020, order directing the Agency to pay her \$23,947.50 in attorneys' fees and costs related to the work performed by her attorneys in connection with her motions for sanctions.

³ Complainant has not contested the Agency's June 16, 2020, decision finding no discrimination.

In response, the Agency maintains, in pertinent part, as it contended in its June 16, 2020, final decision, that Complainant voluntarily withdrew from the hearing process. The Agency, therefore, asserts that Complainant chose to extinguish all outstanding hearing matters, including matters related to prehearing determinations and discovery. The Agency additionally contends, inter alia, that it did not receive Complainant's attorneys' fee petition, that it adequately responded to Complainant's discovery requests, and that the amount of fees awarded was excessive.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS

On appeal, herein, Complainant is seeking enforcement of the AJ's February 27, 2020, order directing the Agency to pay her \$23,947.50 in attorneys' fees and costs related to her motions for sanctions. We note that the Agency, in its June 16, 2020, final decision, declined to review the rulings made by the AJ as to the attorneys' fees and costs, asserting that all discovery matters were extinguished because Complainant voluntarily withdrew from the hearing process.

We find, however, that while the AJ's January 13, 2020, order for attorneys' fees and costs was an interim order related to pre-hearing discovery, the AJ nevertheless finalized the order in her February 27, 2020, order dismissing Complainant's hearing request. In finalizing her order, the AJ noted in pertinent part:

The hourly attorney fees sought by the attorneys for Complainant adhere to the Laffey Matrix and I hereby conclude the hourly fees are reasonable and well documented. Therefore, I conclude,

consistent with the reasoning in my Order dated January 13, 2020, Complainant is entitled to an award of fees in the amount of \$23,947.50. Therefore, within thirty days of this order becoming final, the Agency shall pay to Complainant's attorneys, the sum of \$23,947.50, in and [sic] for her attorney fees incurred in this matter in association with the additional discovery required as a result of the Agency's failure to preserve and produce documents, all as set forth in my Orders of February 8, 2019, and January 13, 2020.

AJ's February 27, 2020, Order at 2.

As such, because we find that the AJ issued her dismissal to include her order for attorneys' fees and costs,⁴ the Agency was required to notify Complainant whether it intended to implement the AJ's ruling - and simultaneously appeal such a ruling, if not - within 40 days of receiving the ruling. See 29 C.F.R. § 1614.110(a) (providing that when an AJ "has issued a decision ... the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the [AJ's] decision. The final order shall notify the complainant whether or not the agency will fully implement the decision of the administrative judge . . .").

We note that on March 4, 2020, the Agency filed an appeal with the Commission, EEOC Appeal No. 2020002627, maintaining that the AJ improperly ordered it to pay Complainant the \$23,947.50 in attorneys' fees and costs. At that time, however, the Agency was bound by 29 C.F.R. § 1614.110(a) to issue a final order within 40 days and to notify Complainant whether the Agency intended to implement the AJ's order for attorneys' fees and costs. The Agency withdrew the appeal on March 17, 2020, noting that it would instead later issue a final agency decision on the matter.

⁴ Cf. Otis B. v. Soc. Sec. Admin., EEOC Appeal No. 0120180819 (Mar. 12, 2020) (because the AJ never finalized an interim order that directed the agency to pay complainant attorney's fees related to a sanctions motion, there was no final order from the AJ to enforce); Jaleesa P. v. Dep't of Energy, EEOC Appeal No. 2019000491 (Dec. 7, 2020) (the AJ's order for attorney's fees and costs ordered as a sanction was an interim order and never finalized by the AJ in his dismissal, and as a result there was no current order before the Commission on appeal).

The Agency did not issue a final order or take final action specifically regarding the AJ's order. While the Agency did issue a final decision on June 16, 2020, it was issued beyond the requisite 40 days, and the final decision declined to review the rulings made by the AJ as to the attorneys' fees and costs.

As such, we find that the Agency did not take final action on the AJ's finalized order for attorneys' fees and costs in a timely manner. Therefore, as the Agency failed to take final action within 40 days of receipt of the AJ's ruling, the AJ's order instructing the Agency to pay Complainant the \$23,947.50 in attorneys' fees and costs became the Agency's final action by operation of law. See 29 C.F.R. § 1614.109(i) (clarifying that if "an agency does not issue a final order within 40 days of receipt of the [AJ's] decision . . . then the decision of the [AJ] shall become the final action of the agency."); see also Riddick v. Dep't of Vet. Affs, EEOC Appeal No. 0720110011 (Nov. 18, 2011) (stating that the AJ's finding of discrimination was accepted by the agency pursuant to 29 C.F.R. § 1614.109(i) due to the agency's failure to address the matter in its final order), req. for recon. den'd, EEOC Request No. 0520120196 (May 10, 2012); Herb E. v. Equal Emp't Opportunity Comm'n., EEOC Appeal No. 0120171699 (Nov. 27, 2017) (noting that when an agency failed to issue a final order within 40 days of receipt of the AJ's decision, the AJ's decision became the agency's final action pursuant to 29 C.F.R. § 1614.109(i)).

As the AJ's ruling became the Agency's final order by operation of by law, we decline to entertain the Agency's arguments on appeal, *inter alia*, as to discovery, its alleged non-receipt of the fee petition, and whether the amount of attorneys' fees awarded was excessive. The Agency had the opportunity to address such matters within 40 days of the AJ's ruling and failed to do so. Therefore, we conclude that the Agency is not in compliance with the ruling to pay Complainant the attorneys' fees and costs.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we ORDER the Agency to pay Complainant the \$23,947.50, plus interest, as set forth in the order below. See Madelaine G. v. Dep't of State, EEOC Appeal No. 2020000241 & Petition No. 2019005970 (Sept. 2, 2020) (finding that complainant was entitled to interest that accrued because of the agency's delay in awarding backpay, compensatory damages, and attorneys' fees that resulted in a loss of value of those obligations).

ORDER

To the extent it has not already done so, the Agency shall, within 30 days of the date this decision is issued, pay Complainant \$23,947.50 in attorneys' fees and costs. The Agency shall also pay Complainant for any interest that accrued because of the Agency's delay in awarding Complainant the attorneys' fees to which she is legally entitled.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H0124)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), they are 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 receipt of this decision. 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 (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).

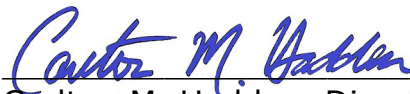
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0124)

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

February 3, 2025
Date