



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

████████████████████
Garland C.,¹
Complainant,

v.

Elaine L. Chao,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 0120182009

Hearing No. 470-2014-00052X

Agency No. 2013-24944-FAA-04

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from an EEOC Administrative Judge's (AJ) decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. Additionally, Complainant alleges that the Agency has failed to comply with the AJ's order of remedies regarding a finding that he was subjected to reprisal, pursuant to 29 C.F.R. § 1614.504(a).

BACKGROUND

Complainant began his employment with the Agency in 2009 as an Aviation Safety Inspector (ASI) within the Federal Aviation Administration's (FAA) Ohio Flight Standards District Office in Columbus, Ohio. In April 2012, Complainant was promoted to the position of Supervisor Aviation Safety Inspector (SASI), or Front-Line Manager (FLM). Complainant was involved in a June 2012 verbal altercation with a subordinate employee, which was investigated by management.

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.

On or about November 26, 2012, Complainant had a conversation with a Team Manager (TM), and on November 27, 2012, Complainant informed management that during the conversation, TM told him that her husband (Person A) had been selected as the new Columbus Flight Standards District Office (FSDO) Manager and that Complainant would have to “suck [Person A’s] cock” to get along with him. On November 27, 2012, Complainant informed his supervisor that he had been sexually harassed by TM’s comments.² On December 6, 2012, Complainant was informed that he would be demoted to his previous ASI position and reassigned to work on the NextJets Aviation certificate, which was supervised by Person A.

On March 20, 2013, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him in reprisal for prior protected EEO activity under Title VII when:

1. On or about December 6, 2012, he was demoted by the Assistant Division Manager (ADM) from his position as SASI during his probationary period and placed in the position of ASI; and
2. Subsequent to his placement into the position of ASI, he was micromanaged and his deadlines accelerated without notice by the Flight Standards District Office (FSDO) Manager (Manager).

AJ’s Decisions

After the 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 requested a hearing, and the AJ held a hearing on June 30, 2015 and August 1, 2015.

In a decision dated November 21, 2016, the AJ found that Complainant proved that he was subjected to reprisal when he was demoted and subjected to harassment through micromanagement and accelerated deadlines. On June 20, 2017, the AJ conducted a hearing on damages. In a decision dated October 26, 2017, the AJ ordered the Agency to pay Complainant back pay with interest for the period from his demotion until his salary was mitigated by promotion and/or pay increases;³ to compensate Complainant for any loss to his Thrift Savings Plan (TSP) and pension because of the demotion; to pay Complainant for any negative tax treatment experienced because of lump sum payments; to pay Complainant \$20,000 in non-pecuniary, compensatory damages; to pay Complainant \$810 in pecuniary damages for psychotherapy treatments; to post a notice of the discrimination findings in the Columbus FSDO for 90 days; and to provide EEO training to all supervisors and managers named in the AJ’s decision.

² Complainant’s report of sexual harassment constitutes previous EEO activity for the reprisal claims at issue in this case.

³ Complainant was promoted to a GS-14 position in April 2016.

The AJ, citing Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), noted that Complainant had not submitted a petition for fees, which must include an affidavit from the attorney of record itemizing the attorney's charges for legal services; a list of services rendered itemized by date; the number of hours of work performed; a detail summary of tasks undertaken; the rate charged by attorneys; evidence regarding the reasonableness of claimed hours, such as contemporaneous time records; evidence of the reasonable of the rate, such as affidavits stating that the requested rate is the attorney's normal billing rate; a detailed affidavit from another attorney in the community familiar with the prevailing community rates for attorneys of comparable experience and experience; and documentation of costs. Nevertheless, the AJ ordered Complainant to file a petition for attorney's fees within 30 days of her decision, from which the Agency had to respond in accordance with 29 C.F.R. § 1614.501, and Complainant would have up to 15 days to respond to the Agency's response.

Additionally, the AJ determined that reinstatement was not appropriate in this case because he was promoted to a GS-14 position in April 2016, and he currently worked at the GS-14 level at an annual salary of \$111,395.00. The AJ concluded that the record did not demonstrate that the Supervisory Aviation Safety Inspector position from which he was demoted is substantially equivalent to the Aviation Safety Inspector position he currently holds with respect to duties and responsibilities. The AJ determined that reinstating Complainant to his former Supervisory Aviation Safety Inspector position was not feasible because of the acrimonious working relationship between the parties. However, the AJ concluded that Complainant was not entitled to front pay because he was employed by the Agency at a rate above or commensurate with the pay he would have received in his previous supervisory position.

When the Agency failed to issue a final order within forty days of receipt of the AJ's decision, the AJ's decision finding that Complainant proved that the Agency subjected him to discrimination became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i).

Complainant's Motion for Attorney's Fees

In a Motion dated November 13, 2017, Complainant stated that he "represented himself pro se in this litigation as [he] severed his professional relationship with The Employment Law Group (TELG)," but the law firm represented him from January 2013 until March 2014. Complainant further stated that he reached out to the law firm to determine attorney's fees, but the firm had not responded to his request. However, Complainant maintained that, while being represented by an attorney from the firm, all expenses were "precisely maintained" in a monthly expenditure report that is "well within the lodestar method of reporting cost accountability."

Complainant also submitted an affidavit statement that stated that he hired TELG in January 2013 and signed an agreement with the firm to pay partners \$395 per hour, and associates \$235 to \$285 per hour to review, investigate, and prosecute his case. Complainant further stated that he contacted multiple attorneys, the Ohio State Bar Association (OSBA), and completed a Google search that confirmed that the TELG's rates were "usual and customary in the industry."

Based on the expenditure report, Complainant requested \$72,226 in attorney's fees for the work of seven attorneys from January 2013 until March 2014. This request reflected the charges of seven attorneys. Four of the attorneys were partners and charged \$395 per hour, and three attorneys were associates who charged \$235 per hour. The partners had 17, 19, 21, and 23 years of experience. One associate had five years of experience, another had less than one year of experience, and the third associate had an unknown amount of experience.

Agency's Response to Complainant's Motion for Attorney's Fees

In its December 20, 2017 response, the Agency maintained that Complainant failed to submit an affidavit from his former counsel. The Agency further maintained that Complainant's attorney's hourly rate should not be based upon the prevailing rate for Washington, D.C., which is where TELG is located. The Agency also maintained that Complainant's documentation was silent as to the prevailing rate for Columbus, the location of the Agency facility at issue in this case. The Agency notes that Complainant's petition does not address why he chose counsel outside his local area or establish that the rates charged by his attorneys are similar to the rates of other attorneys in Ohio for similar services. The Agency further notes that Complainant's Motion does not contain any documentary evidence of the reasonableness of his former attorney's rate, or an affidavit from another attorney in the community familiar with the prevailing rates for attorneys of comparable experience and expertise.

Additionally, the Agency maintained that the Ohio State Bar Association's (OSBA) publication The Economics of Law Practice in Ohio in 2013 is the most useful resource for determining prevailing rates for Ohio counsel, and this resource contains rates for attorneys by practice area, region, and years of experience. The Agency further maintained that based on the OSBA publication, \$210 is the median hourly rate for Ohio law firms in 2013 with seven to 10 attorneys, and TELG is an eight-attorney firm. The Agency contended that the OSBA report also found that Ohio lawyers with one to two years of experience had an average hourly rate of \$153 per hour; lawyers with three to five years of experience had a rate of \$174 per hour; lawyers with six to ten years of experience an average rate of \$207 per hour; lawyers with 11 to 15 years had an average rate of \$232 per hour; and lawyers with 16 to 25 years of experience had a rate of \$233 per hour. The Agency also maintained that for employment law firms in downtown Columbus, the average hourly rate in 2013 was \$313 per hour, with a median rate of \$288 per hour.

The Agency further maintained that Complainant claimed attorney's fees for some work that was not compensable. The Agency noted that Complainant filed his complaint in March 2013, but \$19,016.03 of his claimed attorney's fees pertain to work performed from January 11, 2013 until March 2013. Additionally, the Agency maintained that Complainant's attorneys claimed excessive hours of work performed on ascertaining case status and preparing discovery materials. The Agency argued that claimed time spent on mailing discovery documents is clerical, not legal; therefore, \$272 in these expenses should be disallowed.

Finally, the Agency maintained that Complainant's attorneys billed in a duplicative fashion for the same task, including 12 occasions on which the same meetings and conference calls were separately billed by three or four attorneys.

AJ's Decision on Attorney's Fees

On March 15, 2018, the AJ issued a decision in which she denied Complainant's request for attorney's fees. The AJ reasoned that Complainant was not entitled to attorney's fees because he failed to submit a verified statement of fees and costs with his petition, in accordance with 29 C.F.R. § 1614.501(e)(2) and MD-110. The AJ noted that Complainant failed to submit an affidavit executed by the attorney of record that itemized attorney's fees for legal services, and his attorney's refusal to submit an affidavit meant that there was insufficient evidence to support the reasonableness of the hours attorneys expended or the reasonableness of the hourly rate. Additionally, the AJ noted that Complainant was not represented by TELG at the liability or damages stages of the hearing, and the claimed attorney's fees for the period prior to the hearing was not proven by Complainant's submissions to be reasonable.

On May 22, 2018, the Agency issued a final order fully implementing the AJ's attorney's fees decision.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ should have reinstated him to his SASI position, or a comparable position. Complainant contends he should have been awarded more non-pecuniary, compensatory damages. Complainant further contends that the Agency failed to award him appropriate attorney's fees. Complainant further contends that the Agency failed to comply with the AJ's order to compensate him for the tax consequences of receiving a lump sum payment. Additionally, Complainant contends that the Agency failed to comply with the AJ's order to award him attorney's fees and costs.

In response, the Agency contends that Complainant's appeal of the AJ's decision on remedies should be dismissed as untimely because Complainant did not file it within 30 days of the date the AJ's decision became the Agency's final action. The Agency alternatively argues that the AJ did not err in failing to reinstate Complainant to his supervisory decision and awarding him \$20,000 in non-pecuniary, compensatory damages. Additionally, the Agency contends that Complainant has not provided necessary documentation showing how lump sum payments in 2017 and 2018 affected his tax liability. Finally, the Agency contends that Complainant failed to demonstrate his entitlement to attorney's fees because his attorneys did not submit the required verified affidavit attesting to the reasonableness of their billing.

ANALYSIS AND FINDINGS

Appeal of AJ's Decision on Reinstatement and Compensatory Damages

The Agency contends that Complainant's May 23, 2018 appeal of the AJ's decision on reinstatement and compensatory damages should be dismissed as untimely because he did not file it within 30 days of the date the AJ's decision became the Agency's final action. The record reveals that on October 30, 2017, the AJ mailed a copy of her decision on reinstatement and compensatory damages to the parties. The Agency acknowledges that it did not issue a final order within 40 days after receipt of the AJ's decision, and therefore, the AJ's decision became final on or about December 12, 2017.

However, we have recently held that there is no regulatory provision that sets a specific time limitation for filing an appeal in circumstances such as this wherein an AJ's decision becomes final by operation of 29 C.F.R. § 1614.109(i). Avery S. v. Dep't of the Treasury, EEOC Request No. 2020000221 (Jan. 22, 2020). Rather, the time for Complainant to file an appeal in this instance is governed by the doctrine of laches, "an equitable remedy under which an individual's failure to diligently pursue their actions can bar their claims." Avery S., EEOC Request No. 2020000221 (quoting O'Dell v. Dep't of Health and Human Serv. EEOC Appeal No. 05901130 (Dec. 27, 1990)). Here, we conclude that the relatively brief period of time between the AJ's decision and Complainant's appeal (approximately seven months) does not warrant the application of the doctrine of laches to dismiss the appeal as untimely filed. See Avery S., EEOC Request No. 2020000221. Therefore, we will address the matters of reinstatement, front pay, and non-pecuniary compensatory damages raised by Complainant on appeal.

Reinstatement and Front Pay

In this case, the AJ found that reinstating Complainant to his previous Supervisory Aviation Inspector position was not feasible because of the "acrimonious relationship between the parties." However, the AJ only found that two Agency officials engaged in unlawful discrimination in this case: ADM and the FSDO Manager.

Upon review of this matter, we do not find that this case involves the type of acts of extraordinary acrimony and bias that would make reinstatement inappropriate. We do not find substantial evidence supports any finding of such acrimony that reinstatement would be inappropriate. We note that the Commission generally prefers reinstatement into an appropriate position to an award of front pay. See Millard v. U.S. Postal Serv., EEOC Appeal No. 1991535 (May 31, 2001). Moreover, Complainant requests to be reinstated to his previous Supervisory Aviation Safety Inspector position. We find that the AJ's conclusion that Complainant cannot be reinstated is not supported by substantial evidence. Thus, we shall order the Agency to offer Complainant reinstatement to his previous position of Supervisory Aviation Safety Inspector.

Because we find that reinstatement is the appropriate remedy here, there is no reason to address whether front pay is an appropriate alternative to reinstatement.

Non-Pecuniary, Compensatory Damages

When discrimination is found, an agency must provide a complainant with a remedy that constitutes full, make-whole relief to restore him as nearly as possible to the position she 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). To receive an award of compensatory damages, a complainant must demonstrate that he has been harmed by the agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. *Rivera v. Dep't of the Navy*, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsideration denied, EEOC Request No. 05940927 (Dec. 11, 1995); *Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14. Compensatory damages may be awarded for the past pecuniary losses, future pecuniary losses, and non-pecuniary losses which are directly or proximately caused by the agency's discriminatory conduct. *Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991* (Enforcement Guidance), EEOC Notice No. 915.002, at 8 (July 14, 1992).

Objective evidence of nonpecuniary compensatory damages can include statements from the complainant concerning his or her 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. Statements from others, including family members, friends, health care providers, or other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. *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)).

In this case, Complainant testified that, because of the discrimination at issue in this case, he feels embarrassed, ashamed, very isolated, disgraced, and paranoid. He further testified that because of the discrimination, he has become reclusive, is no longer gregarious, and feels "sheer humiliation." Additionally, Complainant's psychotherapist testified that Complainant has been her patient since March 2016, and in her professional opinion, Complainant's EEO case exacerbated his "psychological stressors" and symptoms such as Post-Traumatic Stress Syndrome (PTSD). The psychotherapist further testified that she recommended that Complainant remain in psychotherapy for an undermined amount of time in the future. She stated that she observed an increase in symptoms such as irritability, weight loss, difficulty sleeping, avoidance, volatility, reclusiveness, and nightmares experienced by Complainant as his EEO case progressed. The psychotherapist stated that over the previous 17 months, approximately 80 percent of Complainant's treatment focused on his EEO case.

However, the AJ noted that Complainant was arrested and incarcerated for assault in April 2016, but at the hearing, his psychotherapist declined to answer questions related to whether any other stressors contributed to Complainant's PTSD. Additionally, the AJ noted that the psychotherapist testified that Complainant suffered from PTSD related to childhood trauma prior to his demotion, and the psychotherapist's testimony was "conclusory and did not explain how the Agency's actions were the direct and proximate cause of the symptoms he presented." AJ's Decision, p. 8. The AJ further noted that evidence indicated that Complainant suffered from preexisting stressors before his 2012 demotion, and he did not seek therapeutic help until March 2016. The AJ concluded that there was insufficient evidence to hold the Agency completely responsible for Complainant's current psychological and emotional trauma, but he was entitled to \$20,000 in non-pecuniary, compensatory damages attributed to the Agency's discrimination.

Upon review, we likewise find that Complainant failed to prove what percentage of his PTSD and other emotional trauma was attributable to the Agency's actions. Additionally, we find that Complainant has experienced damages similar to that suffered by employees in who received a similar amount of non-pecuniary, compensatory damages. Utt v. U.S. Postal Serv., EEOC Appeal No. 0720070001 (Mar. 26, 2009) (\$25,000 in non-pecuniary damages awarded where complainant provided testimony that as a result of discrimination he suffered from stress, low self-esteem, difficulty sleeping and weight gain); Reid v. Dep't of Veterans Affairs, EEOC Appeal No. 0720070077 (Nov. 13, 2009) (\$20,000 in non-pecuniary damages awarded where complainant suffered damage to her professional reputation and emotional distress that affected her family due to discriminatory nonselections).

Moreover, 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)). Therefore, we conclude that the AJ's award of \$20,000 in non-pecuniary, compensatory damages is supported by substantial evidence.

Adverse Tax Consequences

Additionally, the AJ ordered the Agency to calculate the amount of negative tax liability he will experience because of the lump sum payments made by the Agency within 75 days of her decision. On appeal, Complainant contends that the Agency has not compensated him for the additional tax liability associated with his lump sum. As such, we find that Complainant is essentially claiming that the Agency failed to comply with the AJ's order regarding tax liability that became the Agency's final action. Complainant is not appealing the AJ's decision regarding this issue. Instead, Complainant is asserting a claim, pursuant to 29 C.F.R. § 1614.504(a), that the Agency failed to comply with the AJ's decision and final Agency action regarding tax liability.

We note that the Commission has held that an award to cover additional tax liability from a lump sum payment of back pay is available to complainants. See Felicidad S. v. U.S. Postal Serv.,

EEOC Appeal No. 0120180637 (June 4, 2019); Goetze v. Dep't of the Navy, EEOC Appeal No. 01991530 (Aug. 22, 2001); Holler v. Dep't of the Navy, EEOC Appeal Nos. 01982627 and 01990407 (Aug. 22, 2001); Van Hoose v. Dep't of the Navy, EEOC Appeal Nos. 01982628 and 01990455 (Aug. 22, 2001). When back pay is awarded in a lump sum, individuals are compensated for the extra tax that they are required to pay as a result of receiving a lump sum pay award, as opposed to the actual amount of taxes that they would have paid if they had received the funds over a period of time, usually several years. Felicidad S. v. U.S. Postal Serv., EEOC Appeal No. 0120180637. It is the receipt of the funds in one lump sum that causes the extra tax liability, not the back pay award itself.

However, Complainant, who bears the burden of proof, must submit evidence showing the difference between the taxes that she paid on the lump-sum payment and the taxes that she would have paid had the salary been earned over time. See Dellinger v. U.S. Postal Serv., EEOC Appeal No. 07A40040 (Sept. 29, 2005) (burden of proof to establish amount of additional tax liability is on complainant); Darlene F. v. Soc. Sec. Admin., EEOC Petition No. 0420140010 (Apr. 8, 2016). Complainant must show more than the total tax liability arising from receipt of the lump-sum award; he must show the differential between this tax burden and the taxes that he would have paid if he had received the back pay as part of her salary. Johnson v. Env'tl. Prot. Agency, EEOC Petition No. 0420060035 (Nov. 5, 2007). Complainant must "provide exact and detailed calculations showing the amount he is claiming." Emerson S. v. U.S. Postal Serv., EEOC Petition No. 0420130026 (Nov. 20, 2015)

The Agency maintains that Complainant has not provided documentation showing how lump sum payments in 2017 and 2018 have affected his tax liability, and therefore, the Agency cannot calculate the tax consequences of the lump sums. We note that at the AJ's June 2017 damages hearing, Complainant submitted a copy of a document reflecting the 2017 tax bracket for single filers. Additionally, Complainant submitted documentation reflecting that his salary in 2017 was \$111,395, which placed him into the 28 percent tax bracket that would have resulted in \$24,172 in taxes. Complainant maintained that in 2017, he would receive \$392,467 in back pay beyond his current salary of \$111,395, for a total of \$503,862 in pay for 2017. He stated that the back pay placed him into the 39.6 percent tax bracket, and he would pay \$155,347 in taxes on his combined regular salary and lump sum award, which meant he was liable for an additional tax burden of \$131,175.

Upon review, we find that the record is inadequately developed for us to determine Complainant's entitlement to compensation for adverse tax consequences. Significantly, the record does not contain any documentation establishing that Complainant has received back pay. At the AJ's damages hearing, Complainant asserted that he would receive \$392,467 in back pay, but there is no documentation establishing that the Agency paid him this purported amount. In fact, at that time, the AJ had not yet ordered the Agency to pay Complainant back pay, and the record does not indicate the amount of back pay Complainant ultimately received. Further, the record does not contain any documentation establishing that Complainant has paid additional taxes because of the back pay award, such a copy of Complainant's tax returns during the relevant period. Without this crucial information, we cannot calculate the adverse tax consequences of the back pay award.

The AJ did not specify the procedure for Complainant to submit evidence on adverse tax consequences, and there is no evidence the Agency provided him with any guidance on how to do so. There is no evidence that the Agency ever addressed Complainant's entitlement to compensation or adverse tax consequences, as ordered by the AJ. As such, we determine that the Agency should now provide Complainant with an opportunity to submit evidence regarding adverse tax consequences, as well as supplement the record with all pertinent evidence on this matter.

Attorney's Fees

Title VII authorizes an award of reasonable attorney's fees. 29 C.F.R. § 1614.501(e). To establish entitlement to attorney's fees, complainant must first show that he or she is a prevailing party. Buckhannon Bd. and Care Home Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598 (2001). A prevailing party for this purpose is one who succeeds on any significant issue, and achieves some of the benefit sought in bringing the action. Davis v. Dep't of Transportation, EEOC Request No. 05970101 (February 4, 1999) (citing Hensley v. Eckerhart, 461 U.S. 427, 433 (1983)).

The fee award is ordinarily determined by multiplying a reasonable number of hours expended on the case by a reasonable hourly rate, also known as a "lodestar." See 29 C.F.R. §1614.501(e)(2)(ii)(B); Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998). In determining the number of hours expended the Commission recognizes that the attorney "is not required to record in great detail the manner in which each minute of his time was expended." Id. However, the attorney has the burden of identifying the subject matters on which he spent his time by submitting sufficiently detailed and contemporaneous time records to ensure that the time spent was accurately recorded. Id.

To determine entitlement to attorney's fees, a complainant's attorneys shall submit a verified statement or affidavit of attorney's fees and other costs. 29 C.F.R. 1614.501 e(iv)(2). The attorney's statement should itemize charges for legal services. In this case, Complainant filed a petition for attorney's fees and expenses with the AJ on November 13, 2017. Despite requesting that his attorneys submit a verified statement itemizing and attesting to the validity of their fees, Complainant's attorneys failed to cooperate with his attempt to provide such a statement. However, Complainant submitted invoices from Washington, D.C. legal firm TELG that reflected that he incurred \$72,226 in attorney's fees for this case.

Upon review, we determine that the invoices submitted by Complainant are not a substitute for the required verified statement from his attorneys. Therefore, we find that Complainant failed to provide proper evidence to support his petition for attorney's fees, and we find that the AJ properly determined that Complainant is not entitled to attorney's fees and costs.

We shall restate the AJ's orders of relief in our Order as modified. Neither party challenges any of the other remedies ordered by the AJ (and we note the Agency did not file an appeal from the AJ's decision) and therefore we shall restate those unchallenged remedies in the Order.

CONCLUSION

The Agency's decision finding that Complainant was retaliated against when he was demoted and harassed is **AFFIRMED**. The Agency's decision awarding \$20,000 in non-pecuniary, compensatory damages is **AFFIRMED**. The remedies are **MODIFIED**. We **REMAND** the matter so that the Agency may comply with the Order herein.

ORDER

To the extent it has not already done so, the Agency shall:

1. Within 60 days from the date this decision is issued, the Agency shall offer Complainant reinstatement to his former position of Supervisory Aviation Safety Inspector, at the Agency's facility in Columbus, Ohio, or a substantially equivalent and agreeable position, retroactive to the date of his demotion on or about December 6, 2012. Complainant must respond to the Agency's offer in writing within 15 days of receipt of the offer. Should Complainant reject the offer of reinstatement, entitlement to any additional back pay attributed to the reinstatement shall terminate as of that date of refusal.
2. Within 60 days from the date this decision is issued, the Agency shall determine the appropriate amount of additional back pay, with interest, and other benefits (such as Thrift Savings Plan and FERS pension) due Complainant (if any), 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. The Agency shall pay the amount within 60 days from the date of that determination of the appropriate amount. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall pay Complainant the undisputed amount within 60 days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification 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 30 days from the date the back pay amount is paid to Complainant, the Agency shall request that Complainant submit his claim for compensation for all additional income-tax liability associated with lump sum payments. The Agency shall afford Complainant 60 days to submit his claim and supporting documents. The burden of proof to establish the amount of additional tax liability, if any, is on Complainant. The calculation of additional tax liability must be based on the taxes Complainant would have paid had he received the back pay in the form of regular salary during the back pay period, versus the additional taxes he paid due to receiving the back-pay in a lump-sum award. Thereafter, the Agency shall issue a decision regarding claimed additional tax liability within 60 days after the time period expires for Complainant to submit his claim for additional tax liability.
4. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$20,000 in non-pecuniary, compensatory damages.

5. Within 90 days of the date this decision is issued, the Agency shall provide 8 hours of in-person or interactive EEO training to TM, ADM, Person A, and FSDO Manager (as identified in the AJ's order dated October 26, 2017), with emphasis on the prohibition against retaliation.
6. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against TM, ADM, Person A, and FSDO Manager (as identified in the AJ's order dated October 26, 2017). 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 any of the responsible management officials have left the Agency's employment, then the Agency shall furnish documentation of their departure date(s).

POSTING ORDER (G0617)

If the Agency has not already done so, it is ordered to post at its Columbus, Ohio 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 CFR § 1614.503(f) for enforcement by that agency.

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 (T0610)

This decision affirms the Agency’s final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant’s Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

January 29, 2020

Date