



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

[REDACTED]
Maxine C.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Headquarters),
Agency.

Appeal Nos. 2019001571 & 2019003019

Hearing No. 570-2014-00991X

Agency No. 6Z-000-0024-13

DECISION

On September 12, 2018, the Commission determined that the Agency had subjected Complainant to unlawful discrimination as alleged in her equal employment opportunity (EEO) complaint asserting a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. Maxine C. v. U.S. Postal Serv., EEOC Appeal No. 0120162531 (Sept. 18, 2018).

On November 13, 2018, based on the Commission's Order, the Agency issued a final decision concerning Complainant's entitlement to compensatory damages. On December 17, 2018, the Agency issued a final decision concerning Complainant's entitlement to attorneys' fees and costs.

On January 16, and 25, 2019, Complainant filed two appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 13, 2018 and December 17, 2018, final decisions.

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.

ISSUES PRESENTED

The issues presented are whether the Agency properly determined Complainant's entitlement to compensatory damages and attorneys' fees and costs.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Postal Support Employee (PSE) Lockmaker, P-06/A, at the Agency's Mail Equipment Shop in Washington, D.C.

On October 8, 2013, Complainant filed a formal complaint, which was subsequently amended on March 5, 2014, alleging that the Agency discriminated against her and subjected her to a hostile work environment on the basis of sex (female) when her supervisor (S1) sexually harassed her on multiple occasions. For example, Complainant alleged that S1 asked her to lunch; sent unwelcome emails, texts, and made phone calls; showed Complainant pictures of him with naked women; made unwelcome visits to Complainant's work space; made unwelcome comments of a graphic and sexual nature; stuck his tongue out at Complainant, and blew kisses; repeatedly called Complainant into his office and attempted to grope her; asked for hugs and touched her breasts; put Complainant's hand on his thigh, and grabbed her hand and shoved it down his pants; asked Complainant to have sex with him; had conversations with her about leaving his wife; asked Complainant about her lesbian partner and sexual experiences; offered Complainant rides to work and to her doctor's appointments; offered her money for food and transportation; came to Complainant's house to pick her up for work, told her that she should be with him instead of her partner; and, more.

In addition, Complainant alleged that the Agency subjected her to discrimination and a hostile work environment on the bases of sex (female) and in reprisal for prior protected EEO activity as evidenced by multiple incidents including, inter alia, Complainant's co-workers spread rumors about her; Complainant learned that her 108 cards were missing and she had to start all over; the quality of Complainant's lock-making work was audited, and she was threatened with termination; Complainant was escorted out of the facility and has not been allowed back to work; she was issued a seven-day suspension; she received a letter placing her on Emergency Placement without pay; management attempted to dissuade her from filing an EEO complaint; and, she became aware that she was not selected for two City Carrier Assistant positions.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing, but subsequently withdrew her request. Consequently, the Agency issued a final Agency decision (FAD) pursuant to 29 C.F.R. § 1614.110(b).

The FAD concluded that Complainant failed to show that she was subjected to sexual harassment, noting that Complainant admitted to instigating and/or actively participating in some of the allegations.

However, the Agency noted that even assuming that the incidents occurred as Complainant alleged, the Agency found that there was no basis for imputing liability to the Agency. The Agency noted that as soon as Complainant reported the allegations, management undertook a thorough investigation and the alleged harasser, S1, was reassigned and subsequently removed from employment. Further, the Agency noted that it had an effective policy to prevent sexual harassment. As a result, the Agency found that there was no basis for imputing liability and that Complainant's sexual harassment claim failed.

Regarding her non-sexual harassment hostile work environment claim, the Agency determined that the alleged incidents were insufficiently severe or pervasive. Further, the Agency found that there was no evidence that the conduct at issue was based on her protected classes. Regarding her claims of disparate treatment based on her sex and in reprisal, the Agency concluded that Complainant failed to show that management's legitimate, nondiscriminatory reasons were pretextual. As a result, the agency found that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment as alleged. Complainant filed an appeal. Both parties provided appellate briefs.

On September 18, 2018, the Commission issued its decision. Maxine C. v. U.S. Postal Serv., EEOC Appeal No. 0120162531 (Sept. 18, 2018). Regarding Complainant's sexual harassment claims, the Commission determined that Complainant established that she was subjected to unwelcome sexual conduct from S1 which created an offensive and hostile work environment. Concerning whether the Agency should be liable for S1's actions, the Commission stated that an agency is under an obligation to do "whatever is necessary" to end harassment, *to make a victim whole*, and to prevent the misconduct from recurring. See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999) (stating that "remedial measures should be designed to stop the harassment, *correct its effects on the employee*, and ensure that the harassment does not recur") (emphasis added). Based on established case law, and the record, the Commission determined that the Agency's actions failed to fully and effectively correct the effects of the discriminatory harassment. The Commission determined that since the Agency failed to establish an affirmative defense, the Agency was liable for the hostile and offensive work environment created by S1.

Regarding Complainant's disparate treatment and non-sexual harassment claims, the Commission determined that the Agency had provided legitimate, nondiscriminatory reasons for its actions, which Complainant failed to prove was pretext for discrimination or retaliation. The Commission detailed each incident and noted that, even assuming that the alleged conduct was sufficiently severe or pervasive to create a hostile work environment, Complainant failed to show that the Agency's actions were based on discriminatory or retaliatory animus.

The Commission's September 18, 2018 decision reversed the Agency's final decision as to Complainant's sexual harassment claim and affirmed the Agency's final decision as to Complainant's non-sexual hostile work environment, discrimination, and reprisal claims.

The Commission remanded the matter for further processing and provided that the Agency must determine the appropriate award for compensatory damages and attorneys' fees and costs. Additionally, the Agency was ordered to restore any leave and compensate for any leave without pay taken as the result of the discriminatory harassment. Lastly, the Agency was ordered to provide eight hours of in-person or interactive training to all relevant management staff with a focus on preventing sexual harassment in the workplace and management's obligation after receiving a complaint of sexual harassment.

EEOC Appeal Number 0120162531 – Compensatory Damages

Based on the September 18, 2018 Commission Order, Complainant provided evidence to support her claim that she is entitled to compensatory damages. Complainant provided a sworn declaration that she was still feeling the effects of the sexual harassment over five years later, and that it had changed her life for the worse. Complainant noted that while she initially trusted S1, she later came to believe he was aggressively grooming her for sexual harassment. Complainant attested that the harassment changed her dramatically. She became aggressive, depressed, and insecure. Complainant stated that she was fearful at work both of retaliation from management who knew S1, and from her coworkers who blamed her for the incident. Complainant estimated that she used approximately thirty-three hours of leave in connection with the harassment.

Regarding the toll on her mental well-being, Complainant stated that she first sought counseling in October 2014 and saw three therapists between October 2014 and July 2015. Complainant stated that she was forced to stop therapy due to a shift change at work. Complainant was able to resume therapy again in January 2015, wherein she was diagnosed with Major Depressive Disorder, and prescribed two medications to assist her. Complainant noted that she did not remain on either prescription long due to side effects. In 2018, Complainant was able to resume therapy through the Employee Assistance Program (EAP). Complainant has seen an EAP therapist three times since then. Complainant did not provide any sworn statements from her mental health providers and/or therapists asserting that she was unable to obtain them.

Complainant provided a statement from one medical provider who stated that Complainant was a patient since September 2013. The provider noted that Complainant reported a history of depression during her 2015 annual exam, but that she was being treated by a therapist outside of her practice. The provider noted that neither she nor her organization was treating Complainant for her depression. Complainant clarified that she does not receive mental health therapy from this particular provider.

Complainant also provided sworn statements from her grandmother, mother, and her former partner. All three attested to a severe change in Complainant's mood, personality, and behavior. Complainant's former partner noted that she withdrew from friends and family; increasingly drank alcohol; became negative and argumentative; and, would hide for hours in their bedroom closet. Her partner stated that she had known Complainant for over ten years, and that she had a complete shift in personality following the harassment. Despite attending couples' therapy, she stated that the relationship could not survive, and they separated in 2018.

Complainant's grandmother and mother also attested to her social withdrawal; increased anger and depression; and, overall negative change to her once happy personality. Complainant's mother noted that she encouraged Complainant to seek counseling and anger management, and that Complainant eventually agreed. Complainant's grandmother stated that Complainant wanted to leave the Agency, but she convinced Complainant that she should stay to advance her career. Complainant's grandmother noted that she had begun to see some positive changes in her after she had started a new position within the Agency but felt that it would be several more years before she would be more positive.

Complainant cited to several Commission decisions where award amounts were \$200,000 and more, and she argued that the harm she suffered is comparable. In sum, Complainant argued that the intense, long-lasting emotional distress, accompanied by physical manifestations, along with the sworn statements of her mother, grandmother, and former long-time partner, support an award of non-pecuniary compensatory damages at the highest end of the allowable spectrum, ranging from \$185,000 to \$250,000 and above.

On November 13, 2018, based on the Commission's Order, the Agency issued a final decision concerning Complainant's entitlement to compensatory damages. The Agency determined that the statements submitted by Complainant were suspiciously alike. The Agency also noted that Complainant's statement was markedly different from admissions she had made during her deposition, and often mischaracterized evidence in the record. The Agency acknowledged that Complainant was the victim of sexual harassment but asserted that she was seemingly exaggerating her harm in her request for damages.

Concerning non-pecuniary damages, the Agency determined that the record contained sparse and unpersuasive evidence of any long-term physical or mental condition caused or exacerbated by the harassing behavior. The Agency noted that Complainant allegedly sought counseling in October of 2014, approximately sixteen months after the harassment ceased when S1 was reassigned. Complainant informed the Agency that counseling resulted in a diagnosis of major depressive disorder in January of 2015. The Agency determined that there were too many possible intervening events that could have produced adverse effects on Complainant that would not have entitled her to damages. Moreover, the Agency noted that Complainant failed to provide any documentation from her alleged counselors because she allegedly could not obtain her medical records, which the Agency also found suspect.

The Agency acknowledged that in her submission for compensatory damages, Complainant cited to several Commission decisions in support of obtaining an award of \$200,000 or higher. The Agency detailed and distinguished each of those cases from Complainant's case. In comparison, the Agency cited to several Commission decisions where complainants were awarded \$20,000 awards for non-pecuniary compensatory damages in similar cases. Based on the record concerning the duration of the harm and its effects, including Complainant's submissions, the Agency awarded Complainant \$20,000 in non-pecuniary compensatory damages.

The Agency determined that Complainant did not present any out-of-pocket expenses and therefore did not award any pecuniary compensatory damages. It also noted that Complainant requested 33 hours of restored annual leave and would not challenge the request.

Compliance Regarding Compensatory Damages

On June 14, 2019, the Agency submitted documentation of its compliance to the Commission. A check dated November 29, 2018 for \$20,000 was mailed to Complainant's counsel (Counsel) on December 12, 2018. In accordance with the Commission's September 18, 2018 Order, the Agency sought to restore thirty-three (33) hours of requested annual leave. However, after discussion with Counsel, the Agency later mailed Complainant a check for \$192.62 instead of leave restoration. The Agency noted that it did not provide the eight hours of training as the Mail Equipment Shop closed. Additionally, on June 27, 2014, S1 was removed from the Agency.

EEOC Appeal Number 2019003019 – Attorneys' Fees and Costs

On October 15, 2018, Complainant's counsel (Counsel) submitted a Petition for Attorneys' Fees and Costs (Fee Petition). The Fee Petition sought \$203,094.45 in attorneys' fees and \$6,391.05 in costs. Counsel noted that the usual and customary hourly rates for the attorneys were subject to periodic increases, as reflected in the breakdown. Counsel also requested an increase in hourly rates should the Agency delay payment. Counsel provided the following breakdowns.

| Attorneys' Fees | | | | |
|------------------------|---------------------------|---------------------------|-----------------|---------------------|
| Attorney | Years of Legal Experience | Laffey Matrix Hourly Rate | Number of Hours | Total |
| JP | 31+ | \$613 | 30.10 | \$18,451.30 |
| DW | 31+ | \$613 | 84.70 | \$51,921.10 |
| DW | 21-30 | \$572 | 81.40 | \$46,560.80 |
| JMN | 11-15 | \$491 | 20.95 | \$10,286.45 |
| JMN | 8-10 | \$417 | 119.70 | \$49,914.90 |
| JMN | 7 | \$360 | 61.25 | \$22,050.00 |
| JMN | 6-7 | \$358 | 9.55 | \$3,418.90 |
| JW | 11-15 | \$491 | 1 | \$491.00 |
| Grand Total | | | | \$203,094.45 |

| Costs | |
|-------------------------|-------------------|
| Court Reporter Services | \$5,045.51 |
| Duplicating | 878.00 |
| Long Distance Messenger | 39.00 |
| Internet Research | 54.00 |
| Postage | 120.00 |
| Travel and Subsistence | 21.00 |
| Westlaw/Lexis | 233.54 |
| Total Expenses | \$6,391.05 |

In support of the Fee Petition, Counsel submitted: a detailed declaration from the senior attorney, DW; a detailed spreadsheet with a breakdown on which attorney worked on what task(s), and for how long, with portions highlighted that related to unsuccessful claims that were arguably intertwined with the successful claim; and, receipts associated with requested costs.

On December 17, 2018, the Agency issued a final decision concerning Complainant's entitlement to attorneys' fees and costs. The Agency stated that it would partially deny and accept the requested attorneys' fees and costs. The Agency noted that it was not disputing the hourly rate, but the amount of the total fees requested. For example, the Agency noted that Complainant was the prevailing party on some, but not all of the issues, and that this significantly impacted the fees requested. Additionally, the Agency determined that the claimed amount of attorneys' fees and costs were excessive in light of the simple nature of the claim, particularly since there were no novel or complex legal concepts or analysis and the matter did not go to a hearing.

In determining that the fees requested were excessive, the Agency held that the Fee Petition submitted was deficient for several reasons and did not meet the requirements set forth in Commission precedent for an award of reasonable fees. The Agency argued that the documentation submitted with the Fee Petition failed to sufficiently describe the work performed or identify reasonable hourly rates and associated charges for the work that was purportedly done; the time entries were vague, block billed, contained errors and omissions, billed for tasks unrelated to the EEO process, such as union grievances and attending a Merit Systems Protection Board (MSPB) hearing; billed for tasks Complainant was unsuccessful in arguing; demonstrated irregular billing practices; and a lack of billing judgment. The Agency noted that Counsel argued that certain tasks related to Complainant's retaliation and hostile work environment claims were inextricably intertwined with the sexual harassment claim and therefore should be included in the award. The Agency disagreed, finding the claims easily fractionable.

Ultimately, the Agency determined that it would apply an across the board reduction of 30% to the amount of fees requested based on the lack of specificity and clear billing errors. Additionally, since Complainant was only successful in one out of three distinct legal theories, and because the claims for which Complainant was unsuccessful are distinct, fractionable claims, the Agency determined that a further across-the-board reduction of the remaining fees of 50% was appropriate.

| |
|-------------------------------------|
| Total Amount of Fees Billed: |
|-------------------------------------|

| | |
|---|--------------------|
| \$203,094.45 | |
| Initial across the board reduction: | 30% |
| Deducted Amount by 30%: | \$60,928.34 |
| Subtotal \$203,094.45 - \$60,928.34 = | \$142,166.11 |
| Further across the board deduction for unsuccessful claims: | 50% |
| Further Deducted Amount: | \$71,083.01 |
| Total Fees Awarded: | \$71,083.01 |

Regarding costs, the Agency determined that the Fee Petition asked for costs outside of the statutory allowable costs. For example, Counsel requested to be reimbursed for costs totaling \$6,391.05. Specifically, Counsel sought reimbursement for the deposition transcripts of witnesses. However, the Agency determined that several were unnecessary to Complainant's successful sexual harassment claim, i.e. for LL (\$326.69), LS (\$348.07), RJ (\$430.80), DC (\$202.74), and LS (\$467.39). None of those transcripts were cited in any of Complainant's pleadings or briefs in support of her claim of sexual harassment. The Agency determined that these depositions were unnecessary to the case and therefore not compensable. The costs of these depositions, in the amount of \$1,777.69, were denied. The Agency also denied the requested \$233.54 in Lexis legal research. The Agency awarded Complainant \$4,379.82 in costs.

The Agency therefore awarded \$71,083.01 in reasonable attorneys' fees and \$4,379.82 in recoverable costs. The Agency denied the remaining amounts requested by the Fee Petition.

Compliance Regarding Attorneys' Fees and Costs

On January 9, 2019, the Agency sent Counsel a check for \$75,462.83 for the attorneys' fees and costs.

CONTENTIONS ON APPEAL

Compensatory Damages

Complainant's counsel (Counsel) requested a substantial increase in the Agency's award of \$20,000 in damages, requesting an award amount of \$185,000 or higher. Counsel asserted that the \$20,000 award reflected the Agency's persistent refusal to accept responsibility for the sexual harassment at issue. Counsel asserted that the harm suffered will last for "an indefinite time into the future." Counsel argued that the Agency inappropriately focuses on the duration of S1's harassment which was slightly less than three months versus the actual harm she has suffered which she experienced for five years and counting. Counsel asserted that Complainant had clearly provided evidence of severe and long-lasting harm, which supported a far more substantial award, citing to several Commission decisions where award amounts exceeded \$200,000. Factoring inflation those awards were often \$250,000 or more in today's dollar.

Complainant also submitted a supplemental declaration to clarify perceived misunderstandings by the Agency. For example, Complainant asserted that the sexual harassment committed by S1

triggered several negative developments in her life, including anxiety, depression, anger, sleep issues, and severe headaches. Complainant asserted that she attempted to manage her mental health but after two years it became apparent to her that she required professional therapy. Complainant asserted the time lapse was merely her attempts to self-manage, versus a more nefarious reason as suggested by the Agency. Complainant asserted that not seeking immediate help for her mental distress did not negate the harm that she suffered.

Attorneys' Fees and Costs

Counsel argued that the evidence supported the requested \$203,094.45 in attorney's fees, based on 408.65 hours logged, and the \$6,391.05 in costs. Counsel argued that the Agency's calculations were clearly done in error, and that the Commission should *award the full "lodestar" fee, without substantial reduction*. Counsel noted that the Agency did not contest the hourly rates, just the number of hours expended.

Counsel noted that billing entries for work related to Complainant's sexual harassment case totaled to \$180,898.30. Additionally, \$22,196.15 were related, in part, to the unsuccessful claims, but were inextricably intertwined with Complainant's sexual harassment claim, and therefore should be awarded. For example, Counsel argued that witnesses deposed for the sexual harassment claim largely overlapped with Complainant's other claims. Counsel argued that even if the Commission concluded that a reduction is appropriate in connection with the sub-set of billing entries that were linked to Complainant's non-sexual harassment claims, a 50% reduction of those billings, i.e., $\$22,196.15 \times 0.50$ would be \$11,098.08. Reducing this amount from the lodestar would result in a total reduced fee award of \$191,996.37 ($\$203,094.45 - \$11,098.08 = \$191,996.37$). Counsel also stated that should the Commission consider reducing attorney time logged prior to October 8, 2013 (the date Complainant's formal EEO complaint was filed) then it would accept a further fee reduction of \$5,095.00².

The Agency had also reduced the fees after it determined that Counsel had not submitted sufficiently detailed, itemized statement of fees. Counsel argued that the argument was without merit, and that if the Agency truly believed the billing entries were non-recoverable, it could have identified the specific entries instead of slashing fees across the board. Counsel acknowledged that the Agency did specifically cite to a few billings it deemed problematic as examples, but that those accounted for approximately 35-45 hours (or 10% of the overall of the requested fee). Counsel argued that the Agency could have simply reduced the award based on those hours, instead of a blanket reduction. However, Counsel argued that those hours were appropriate and should not be reduced by the Commission.

² A reduction of \$4,696.80 in connection with all of JMN's time prior to October 8, 2013, and a reduction of \$796.90 in connection with 1.3 hours (out of 3.3 hours total) logged by JP prior to October 8, 2013; $\$4,696.80 + \$796.90 = \$5,493.70$. But awarding mediation-related fees in the amount of \$398.70 results in a total maximum fee reduction of \$5,095 for time logged prior to October 8, 2013 (i.e., $\$5,493.70 - \$398.70 = \$5,095$).

Counsel also refuted the Agency's assertion regarding "duplicative work" as not meritorious. Counsel noted that as detailed, the case was primarily staffed by one senior attorney, DW, and one less-senior attorney, JMN. Responsibilities were allocated in a reasonable manner to avoid overlapping effort. For example, JMN conducted all depositions, whereas DW took the lead in drafting the key sections of the brief. If both attorneys listed a task it was due to reasonable consultation and editing reviews. Additionally, DW focused almost exclusively on Complainant's sexual harassment claim, while JMN worked on the non-sexual harassment portion of the complaint. Counsel also noted that in the exercise of billing judgment, several billings for time spent during the intake process, compiling and proofreading documentation, and more (over \$8,000) was not included in the Fee Petition.

Regarding costs, Counsel argued that the five depositions totaling \$1,777.69 were appropriate and should be awarded. Counsel argued that it was important to take each deposition in order to explore all possible aspects of Complainant's sexual harassment claim. Even though the depositions in question did not result in testimony utilized in Complainant's sex harassment briefing, it was reasonable for Complainant's counsel to obtain deposition testimony from those witnesses in order to thoroughly investigate possible evidence supporting Complainant. Additionally, the Agency rejected the claimed cost of \$233.54 in connection with Lexis research as overhead. However, Counsel argued that the search was an itemized computer research that was expended in addition to costs related to Complainant's representation and should be recoverable.

Agency's Response to Complainant's Appeals

The Agency asserted that Complainant's appellate brief mischaracterized portions of the Agency's final decision, ignored relevant evidence, and contradicted statements previously made in her deposition. For example, the Agency noted that during the deposition, Complainant acknowledged that she often laughed about incidents, and found other incidents to be "weird". In contrast, when seeking damages, Complainant swore that this event was the worst thing that has ever happened to her. The Agency argued that the contradicting statements are troubling and warrant lesser damages. Additionally, the Agency noted that medical records submitted by Complainant should be viewed with skepticism given the lengthy time between the events at issue and when Complainant saw and was diagnosed by her mental health provider. Moreover, given the amount requested, the Agency found it odd that Complainant did not provide any statements from her alleged mental health provider. Further, the Agency argued that Complainant and her witnesses' submissions in support of damages appear to be suspiciously orchestrated and thereby less reliable.

Concerning the requested attorneys' fees and costs, the Agency argued that the matter was a relatively simple sexual harassment case that did not involve novel or complex legal concepts and did not go to a hearing. The Agency found the Fee Petition was wrought with overbilling, duplicative time entries, overstaffing, improper staffing at the highest billing rates, excessive time, and erroneous entries billing the Agency for time spent prior to filing of the written complaint and on unsuccessful claims and unrelated matters. The Agency argued that it properly reduced the requested attorneys' fees and costs based on the record. The Agency requested that the Commission affirm its decisions.

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, (EEO MD-110) 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 AND FINDINGS

Compensatory Damages

To receive an award of compensatory damages, Complainant must demonstrate that she has been harmed as a result of 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 (EEOC Notice No. 915.002) (July 14, 1992), at 11-12, 14. Compensatory damages may be awarded for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) which are directly or proximately caused by the agency's discriminatory conduct. EEOC Notice No. 915.002 at 8. The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part. Id. at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. Id. at 14, see Goetze v. Dep't. of the Navy, EEOC Appeal No. 01991530 (Aug. 23, 2001).

In Carle v. Dep't of the Navy, the Commission explained that “objective evidence” of non-pecuniary damages could include a statement by the complainant explaining how he or she was affected by the discrimination. EEOC Appeal No. 01922369 (Jan. 5, 1993). Statements from others, including family members, friends, and health care providers could address the outward manifestations of the impact of the discrimination on the complainant. Id. Complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. Id. Non-pecuniary damages must be limited to the sums necessary to compensate the injured party for the actual harm and should take into account the severity of the harm and the length of the time the injured party has suffered from the harm. Carpenter v. Dep't of Agric., EEOC Appeal No. 01945652 (July 17, 1995).

Non-pecuniary

In support of her compensatory non-pecuniary damages request for \$185,000 to \$200,000 or more, Complainant provided statements from her grandmother, mother, former partner, and herself, that following the Agency's discriminatory action, she was depressed, angry, and withdrawn. Complainant asserted that the sexual harassment had changed her life for the worse. She asserted that she was aggressively sexually groomed, and her once cheerful disposition became dark, depressive, and angry. While Complainant had provided statements from family members, she did not include any statements from any of her mental health providers. The only medical documentation included was one from her physician, who noted that Complainant informed the physician of her depression, but that she was neither diagnosed or treated for it at that facility. In explanation for the missing documentation, Complainant asserted that despite her attempts, she was unable to obtain any statements from her mental health providers.

The Agency argued that considering the large amount of non-pecuniary damages that Complainant was seeking, it found the request to be sparse and unpersuasive of any long-term physical or mental condition caused or exacerbated by the harassing behavior. The Agency noted that Complainant allegedly sought counseling in October of 2014, approximately sixteen months after the harassment ceased when S1 was reassigned. Complainant was not diagnosed with major depressive disorder until January of 2015. Here, Complainant noted that she did not seek counseling immediately due to attempts to self-manage, and that the gap between the harassing events and counseling should not be utilized against her. The Agency acknowledged Complainant's attempts to self-manage her care but argued that there were simply too many possible intervening events that could have produced adverse effects on Complainant that would not have entitled her to damages. For example, during the gap time, Complainant was placed in two emergency placements for improper conduct, suspended, and was not selected in two job applications. The Agency argued that any of those work-related incidents, or unknown personal affairs, could have triggered Complainant's counseling sixteen months after the sexually harassing behavior had ended. Moreover, the Agency noted that Complainant failed to provide any documentation from her alleged mental health providers because she allegedly could not obtain her medical records.

In her submission for compensatory damages, Complainant cited to several Commission cases in support of obtaining an award of \$185,000 - 200,000 or higher. For example, Complainant cited to Glockner v. Dep't of Veterans Affairs, EEOC Appeal No. 07A30105 (Sept. 23, 2004) as comparison. In that matter, the complainant was demoted, denied the opportunity to work overtime, given less-than-choice assignments, shunned by peers, and scheduled to work in conflict with religious beliefs. Those claims also occurred over a much longer period of time than the sexual harassment involved in Complainant's claim. In addition, the decision in Glockner noted the "extensive testimony about the physical, mental, and professional harm" experienced by the complainant, including severe intestinal distress, serious sleep disturbances, depression, crying spells at work, and isolation. Complainant also cited to Augustine S. v. Dep't of Homeland Sec., EEOC Appeal No. 0720110018 (Oct. 22, 2015) (complainant was involved in a decade-long, failure to accommodate and harassment leading to a forced disability retirement).

Comparatively, Complainant was not subjected to a decade long harassment. Several more cases were cited to in Complainant's request, however we agree with the Agency that those cases were distinguishable from Complainant's case.

Based on the record the Agency awarded Complainant \$20,000 in non-pecuniary compensatory damages. In determining this amount, the Agency cited to several reasons, and notably cited to the lack of medical documentation. We agree with the Agency that Complainant's medical documentation did not show the extent of Complainant's pain and suffering. We also note that even though Complainant was made aware that her supporting documentation did not provide specificity, she did not provide any additional information on appeal. We find that cases cited to by Complainant's counsel are distinguishable from her case. In reviewing this matter, we find that the Agency's award of \$20,000 is in line with prior Commission decisions. See Ashlea P. v. U.S. Postal Serv., EEOC Appeal No. 0120141369 (Apr. 19, 2016) (Complainant awarded \$20,000 in compensatory non-pecuniary damages when she experienced anxiety & gastrointestinal difficulties during the harassment, & Complainant's daughter indicated that Complainant was reluctant to go to work, was sullen and despondent, and did not want to spend time with family); see also Yun C. v. U.S. Postal Serv., EEOC Appeal No. 0120141368 (Oct. 13, 2015) (Complainant did not provide medical documentation but provided sworn statements from herself and her mother attesting to her anxiety, mental anguish and feelings of unworthiness. Complainant was awarded \$20,000 in compensatory non-pecuniary damages).

Based on the record, we determine that Complainant's request for \$ 185,000.00 to \$ 250,000 (or more) is not consistent with the Commission's prior cases based on the facts of this case. We conclude that Complainant is entitled to \$20,000 in non-pecuniary damages, as initially awarded by the Agency.

Pecuniary Damages

For claims seeking pecuniary damages, such objective evidence should include documentation of out-of-pocket expenses for all actual costs and an explanation of the expense, e.g., medical and psychological billings, other costs associated with the injury caused by the agency's actions, and an explanation for the expenditure. EEOC Notice No. 915.002 at 9.

Complainant did not seek pecuniary damages, as noted by the Agency. As such, the Agency did not award any pecuniary damages. No further discussion is necessary.

Attorneys' Fees and Costs

The Commission's regulations authorize the award of reasonable attorney's fees and costs to a prevailing complainant. 29 C.F.R. § 1614.501(e); see also EEO MD-110, at Chap. 11, § I. Fee awards are typically calculated by multiplying the number of hours reasonably expended times a reasonable hourly rate, an amount also known as a lodestar. See 29 C.F.R. § 1614.501(e)(ii)(B); Blum v. Stenson, 465 U.S. 886, 899 (1984); Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

All hours reasonably spent in processing the complaint are compensable, but the number of hours should not include excessive, redundant or otherwise unnecessary hours. EEO MD-110 at Chap. 11, § VI. F. A reasonable hourly rate is based on prevailing market rates in the relevant community for attorneys of similar experience in similar cases. Id. An application for attorney's fees must include a verified statement of attorney's fees accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. Id. In this case, the Agency did not dispute the rate, but the amount of time that was compensable.

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, at Chap. 11, §VI. F. 1. 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. at Chap. 11, § VI. F. 2.

Pre-Complaint

EEOC Regulation 29 C.F.R. § 1614.501(e)(1)(iv) provides, in pertinent part, that agencies are not required to pay attorney's fees on services performed during the pre-complaint process. An attorney may reasonably expend up to two hours to determine whether to represent a complainant. Nenita S. v. Dep't. of Veterans Affairs, EEOC Appeal No. 0120151925 (May 23, 2017).

The record reflects that the formal complaint was not filed until October 8, 2013. Here, the Agency had not specified a reduction of such hours, instead opting for across-the-board reductions. However, we shall exclude all hours expended prior to that date. The record demonstrated that JMN's hours prior to October 8, 2013 amounted \$4,696.80, JP's hours amounted to \$2,022.90. We will reduce this entire amount, save for two hours at JP's rate of \$613 per hour.

Additionally, the record demonstrated that Counsel had expended \$398.70 in fees prior to October 8, 2013 in connection with seeking mediation. The Commission has a longstanding policy of encouraging parties to make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in the administrative process. See Green, et al. v. Dep't of Agric., EEOC Appeal No. 01973651 (June 27, 2000); see also Complainant v. Dep't of Justice, EEOC Appeal No. 0720170027, (Dec. 14, 2017). We therefore provide the \$398.70 in attorneys' fees for time spent seeking mediation.

We therefore reduce the requested attorneys' fee amount of \$203,094.45 by \$5,095³.

³ A reduction of \$4,696.80 in connection with all of JMN's time prior to October 8, 2013, and a reduction of \$796.90 in connection with 1.3 hours (out of 3.3 hours total) logged by JP prior to

Reduction based on Lack of Specificity and Duplicative Entries

In the instant matter, the Agency determined that it would apply an across the board reduction of 30% to the amount of fees requested. Complainant's counsel argued that the Agency could have identified problematic hours instead of issuing a blanket wide reduction. Regarding the specificity required in a fee request, the Commission has held:

In determining the number of hours reasonably 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. However, the attorney does have the burden of identifying the subject matters in which she spent her time, which can be documented by submitting sufficiently detailed contemporaneous time records to ensure that the time spent was accurately recorded. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary.

Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998). Here, the Agency excluded hours expended without explaining or stating which specific entries were found to be too vague. While the Agency cited a few examples of hours it found problematic, it chose not to do so for the entire billing statement submitted. Instead choosing to simply issue a blanket reduction. We note that the party seeking to adjust the lodestar, either up or down, has the burden of justifying the deviation.

As noted on appeal, the Agency provided a few sample entries where it argued Counsel was clearly engaging in block billing, duplicative entries, or were simply too vague. In response to this, Counsel disputed the statements made, but stated that had the Agency found *those entries* to be problematic, it could have issued a reduction based on *those hours*, instead of an across-the-board reduction. Based on our review, we disagree with the Agency that the law firm's time/billing entries were insufficiently specific, duplicative, and/or excessive. Micheline L. v. U.S. Postal Serv., EEOC No. 0120151957 (Aug. 8, 2017) (awarding fees of \$219,015, based on 448.50 compensable hours; rejecting Agency's across-the-board reductions of 40% and 50%). While Counsel used short hand in its record for billing, for the most part we could discern what the attorneys were working on at any given time.

Accordingly, we decline to affirm the Agency's 30% across the board cut to the requested attorneys' fees.

October 8, 2013; $\$4,696.80 + \$796.90 = \$5,493.70$. But awarding mediation-related fees in the amount of \$398.70 results in a total fee reduction of \$5,095 for time logged prior to October 8, 2013 (i.e., $\$5,493.70 - \$398.70 = \$5,095$).

Unsuccessful Claims

In addition to reducing the requested fee amount by 30%, the Agency further reduced the fees by 50% for the unsuccessful claims. The Agency noted that since Complainant was only successful in one out of three distinct legal theories, and because the claims for which Complainant was unsuccessful are distinct, fractionable claims, a further reduction of the remaining fees of 50% was appropriate.

Attorney fees may not be recovered for work on unsuccessful claims. The fact that a complainant did not prevail on every aspect of her complaint does not, in itself however, justify a reduction in the hours expended where the claims are intertwined, making it impossible to segregate the hours involved in each claim. Hensley, at 433, 448. Courts have held that fee applicants should exclude time expended on “truly fractionable” claims or issues on which they did not prevail. Nat’l Ass. of Concerned Veterans (NACV) v. Sec. of Defense, 675 F.2d 1319, 1337 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 the Fee Petition, Counsel had highlighted \$22,196.15 worth of work that was related, in part, to the unsuccessful claims. However, Counsel argued that they were inextricably intertwined with Complainant’s sexual harassment claim, and therefore should be awarded in full. However, Counsel conceded that it would accept a 50% reduction of the related fees. In this matter, the Commission’s earlier decision determined that regarding Complainant’s disparate treatment and non-sexual harassment claims, the Agency had provided legitimate, nondiscriminatory reasons for its actions, which Complainant failed to prove was pretext for discrimination or retaliation. Maxine C. v. US Postal Serv., EEOC Appeal No. 0120162531 (Sept. 18, 2018). The billing record highlights tasks that clearly relate to these unsuccessful claims. However, we also find that the Agency has not successfully demonstrated that the work claimed was completely separate and fractionable. We note that while many of Counsel’s highlighted bills relate to the unsuccessful claims, some also highlight work that arguably was intertwined with Complainant’s successful sexual harassment claim.

Accordingly, we decline to affirm the Agency’s across-the-board deduction, and we also decline to award Counsel’s request of \$22,196.15 (either in full or 50% as suggested by Counsel). Instead, we determine that a 75% reduction of the requested \$22,196.15 is appropriate for the unsuccessful claims. Therein, we modify the fee provided and reduce \$16,647.11⁴ from the original requested amount.

⁴ \$22,196.15 x .75 = \$16,647.11. Therein, the amount requested is reduced by \$16,647.11.

Total Attorneys' Fees

Complainant's attorneys requested \$203,094.45 in attorneys' fees. We declined to affirm the Agency's across the board 30% reduction, and then further 50% reduction. Instead, we reduce the requested fee amount by \$5,095.00 for pre-complaint work, and \$16,647.11 for the unsuccessful claims. $\$203,094.45 - (\$5,095.00 + \$16,647.11) = \$181,352.34$

On January 9, 2019, the Agency had remitted a check totaling \$75,462.83 to Complainant's counsel. A portion of that check, specifically \$71,083.01, was designated for attorney fees. Based on that check, the Agency owes an additional \$110,269.33 to Complainant.

Costs

A prevailing complainant is entitled to recovery of her costs in prosecuting the claims on which she prevailed. These include copying, postage, travel expenses, and so forth. 29 C.F.R. § 1614.501(e)(2)(ii)(C). Reasonable costs incurred directly by the prevailing complainant are compensable. Costs must be proved in the same manner as fees, and the complainant must provide documentation, such as bills or receipts. See EEO MD-110, Chap. 11, § VI.E.

Counsel requested reimbursement for \$6,391.05 in costs. The Agency deducted \$1,777.69 for five depositions that it determined were not used in Complainant's sexual harassment claim. Additionally, the Agency reduced \$233.54 for Lexis Nexis legal research as overhead.

Regarding the denied deposition costs, Counsel argued that the five depositions totaling \$1,777.69 was appropriate and should be awarded. Counsel argued that it was important to take each deposition in order to explore all possible aspects of Complainant's sexual harassment claim. We agree with Complainant's counsel. Even though the depositions in question did not result in testimony utilized in Complainant's sex harassment brief, it was reasonable for Complainant's counsel to obtain deposition testimony from those witnesses in order to thoroughly investigate possible evidence supporting Complainant. In the practice of law, time must often be devoted to matters that may not ultimately be reflected in a final work product, but attorney time, if reasonably expended, is nevertheless compensable. Amaro v. U.S. Postal Serv., EEOC Appeal No. 01A43288 (July 20, 2005). Moreover, legal research often goes up blind alleys before yielding fruit. Micheline L. v. U.S. Postal Serv., EEOC Appeal No. 0120151957 (Aug. 8, 2017).

Regarding the deduction of \$233.54 for the Lexis Nexis legal research as overhead, Counsel argued that the search was an itemized computer search that was expended in addition to costs related to Complainant's representation and should be recoverable. The Agency argued otherwise finding the costs associated with Lexis Nexis legal research as unrecoverable overhead costs. We agree with the Agency.

We find that the cost associated with maintaining an online legal research service is properly characterized as “overhead.” Alene S. v. U.S. Postal Serv., EEOC Appeal No. 0720150038 (Apr. 6, 2016); Bell v. Dep't of the Navy, EEOC Appeal No. 0720080024 (June 25, 2008); see also Mohar v. U.S. Postal Serv., EEOC 0720100019 (Aug. 29, 2011) (acknowledging that there have been decisions awarding online legal research services as separately reimbursable, but noting that such decisions issued “some years ago”, when use of such services “was not nearly as commonplace as it is today”).

Complainant’s counsel is entitled to costs in the amount of \$6,157.51⁵. In the instant matter, the Agency had remitted a check totaling \$75,462.83 to Complainant’s counsel on January 9, 2019. A portion of that check, specifically \$4,379.82, was designated as costs. Since we have determined that the Agency had improperly reduced the five depositions costs at \$1,777.69, Complainant’s counsel is now entitled to this amount in fees.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we have MODIFIED the Agency’s decisions. The Agency shall comply with the ORDER below.

ORDER

To remedy its discrimination against Complainant, the Agency shall take the actions the following actions:

1. To pay Complainant \$1,777.69 in costs.
2. To pay Complainant \$110,269.33 in attorneys’ fees.

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 (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

⁵ \$6,391.05 - \$233.54 (Lexis Nexis legal research) = \$6,157.51.

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 (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B

(Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)


This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

July 7, 2020
Date