



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

[REDACTED]
Clay W.,¹
Complainant,

v.

Ryan D. McCarthy,
Secretary,
Department of the Army,
Agency.

Appeal No. 2019001846

Hearing No. 541-2013-00039X

Agency No. ARCARSON12MAY01904

DECISION

Complainant filed an appeal from the Agency's October 15, 2018, final decision concerning the award of attorney's fees for 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. For the following reasons, the Commission AFFIRMS the Agency's final decision.

BACKGROUND

At the time of events giving rise to his complaint, Complainant worked as a Social Services Assistant Coordinator, GS-0101-11, at the Agency's Army Community Services, Soldier Family Assistance Center located in Fort Carson, Colorado. His appointment was for a two-year term, with a not-to-exceed date of February 29, 2012. In June 2012, Complainant filed a complaint in which he alleged that the Agency discriminated against him on the basis of sex and/or in reprisal for prior protected EEO activity when his term appointment was not extended beyond February 29, 2012; between December 2011 and February 2012, he was subjected to a hostile work environment; from January 17 to 27, 2012, he was denied the opportunity to attend training; and from May 2010 to February 2012, his term appointment was not converted to permanent status. An EEOC Administrative Judge (AJ) rendered a default judgment against the Agency.

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 August 26, 2015, the AJ issued an interim bench decision on damages. On November 30, 2015, the AJ issued a decision on attorney's fees and damages. On January 15, 2016, the Agency issued a final order fully implementing the AJ's remedial relief.

Complainant appealed the Agency's final order to the Commission. In EEOC Appeal No. 0120161031 (Jun. 21, 2018), request for reconsideration denied, EEOC Request No. 0520180499 (Sep. 27, 2018), the Commission modified the final order to include payment of reasonable attorney's fees incurred by the Complainant in the processing of the appeal.

On July 17, 2018, Complainant's attorney, A-1, submitted an itemized hourly attorney's fees billing statement totaling \$49,153.75 for work performed between September 9, 2015 and July 12, 2018, along with a supporting affidavit. The total attorney's fees of \$49,153.75 was based on an hourly rate of \$400.00 per hour. A-1 indicated that, as of January 2016, his hourly rate increased to \$450.00, but that he was unable to adjust his billing program to make this change in the middle of a case.

On August 14, 2018, the Agency representative responded that 23 hours for drafting and revising Complainant's brief while billing legal research separately is excessive. The Agency representative argued that excluding legal research, only five hours should be awarded for drafting and revising the brief. The Agency representative also argued that the May 30, 2017 charge of \$100.00 for .25 hours spent on "E-mails and call with client regarding opening of his position" should be denied because Complainant did not have a position with the Agency at the time.

Subsequently, the Agency issued the October 15, 2018, decision at issue here. The Agency found that although A-1 stated that his hourly rate increased from \$400.00 to \$450.00 in January 2016, he did not provide documentary evidence of the reasonableness of his new rate, such as an affidavit of another attorney in the community familiar with prevailing community rates for attorneys of comparable experience and expertise, a resume, or a list of comparable cases where a similar rate was accepted; therefore, the Agency found that the previously approved rate of \$400.00 was appropriate in determining the amount of attorney's fees.²

With regard to the time claimed for drafting and revising the appeal brief (23.05 hours), the Agency found that a 50% reduction was appropriate based on A-1's level of experience. Therefore, the Agency reduced the hours to 11.5 for those services, which reduced the amount of the fees by \$4,600.00. With respect to A-1's May 30, 2016, charge of \$100.00 for 0.25 hours incurred for "E-mails and call with client regarding opening of his position," the Agency found that this charge should be denied because, at that time, Complainant did not have a position with the Agency and a discussion of a non-existent position was not relevant to Complainant's case. According to the Agency, if the communication concerned the status of an Agency position sought or formerly held by Complainant, the communication post-dated the filing of his opening and reply briefs. Therefore, the Agency subtracted a total of \$4,700.00 from the fee request and awarded of \$44,453.75 in attorney's fees.

² The Agency noted that the AJ had previously approved the \$400.00 rate as reasonable.

Complainant, on appeal, argues that: (1) the final decision was untimely under the regulations; and (2) there was no basis for the reduction in fees for the brief. With respect to the \$100.00 reduction for May 30, 2016 charge for emails and the call to Complainant concerning his position, A-1 stated that, with respect to this appeal, Complainant agrees with this reduction.

ANALYSIS AND FINDINGS

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”).

Because Complainant is not contesting the \$100.00 reduction for emails and the call to Complainant regarding his position, we will not address this issue further in this decision.

By federal regulation, an agency is required to award attorney's fees and costs for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. EEOC Regulation 29 C.F.R. § 1614.501(e)(1)(ii). To determine the proper amount of the fee, a lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983). 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 Ch. 11 § VI.F.

Although there is a strong presumption that the lodestar represents the reasonable fee, such fee “may be adjusted upward or downward, taking into account (among other factors) the degree of success” achieved by complainant. Id.

At the outset, notwithstanding the fact that the Agency addressed the issue in its final decision, we find no evidence that A-1 is challenging the Agency’s application of \$400.00 as the hourly rate. Although A-1 indicated that the amount he charged increased in January 2016, there is no indication that he was requesting that the Agency increase his rate to \$450.00. We note in this regard that his billing information for the entire period listed \$400.00 an hour as the requested rate for each entry, and the total sought, \$49,153.75, was based on an hourly rate of \$400.00 per hour. Furthermore, he raised no such challenge on appeal.

With respect to Complainant’s first contention on appeal, he maintains that the Agency processed this matter in an untimely manner. Complainant notes that the Agency’s final decision was issued on October 15, 2018, almost three months after Complainant submitted his verified fee request.

We find that the Agency's untimeliness did not prejudice Complainant, the minimal delay here did not result in an unconscionable delay in justice or adversely affect the integrity of the EEO process as a whole.

Regarding his second contention, Complainant states that:

[t]he only basis for reducing the fees was the amount of time taken to draft the opening brief. The opening brief was 14 pages and contained numerous calculations. It included such things as the miscalculation of lost pay, whether interest should have been awarded, and calculating the tax penalty offset. The agency simply said that 23 hours was too much time for such a complicated brief and reduced the award to 11.5 hours. Such conclusory assertions do not support a reduction in hours.

Upon review of the fee petition and after reading the brief itself, we find that 23.05 hours to draft and revise a 14-page appeal brief is excessive. Unlike the case cited by Complainant, Arnold v. U.S. Postal Serv., EEOC Appeal No. 01A40708 (Jul. 2, 2005), where the Commission found that the agency offered nothing to support its position, other than its conclusory assertion, that the complainant's attorneys spent an excessive amount of time on research and procedural matters, in the instant case we find that the Agency provided a basis for its determination that a reduction was appropriate, i.e., that someone with A-1's level of experience should not have taken 23.05 hours to prepare and revise a brief. We also note that Complainant was unsuccessful in many of the issues he raised on appeal in his brief, i.e., front pay; the 9 percent interest rate he sought on his back-pay award; pre-judgment interest; late payment interest; pre-complaint attorney fees that were not already awarded by the AJ; and expert witness fees. Therefore, we find the Agency's reduction was reasonable.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency final decision.

ORDER

The Agency, within 30 days of the date this decision is issued, to the extent it has not already done so, shall pay Complainant \$44,453.75 in attorney's 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). Further, the report must include supporting documentation that the corrective action has been implemented.

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 (S0610)


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. 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

July 21, 2020
Date