



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Barbara S.,<sup>1</sup>  
Complainant,

v.

Louis DeJoy,  
Postmaster General,  
United States Postal Service  
(Great Lakes Area),  
Agency.

Appeal No. 2020002285

Hearing No. 443-2017-00144X

Agency No. 4J-530-0139-16

**DECISION**

Following its February 13, 2020, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its partial rejection of the relief ordered by the AJ following a finding of reprisal in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. Specifically, the Agency declined to implement the portion of the AJ's January 7, 2020 decision awarding Complainant \$43,523.38 in attorney's fees and costs. For the following reasons, the Commission MODIFIES the Agency's final order.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a City Carrier, Q-01, at the Agency's Shorewood Carrier Annex in Milwaukee, Wisconsin.

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<sup>1</sup> 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 December 6, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of disability (foot) and in reprisal for prior protected EEO activity when:

1. on August 27, 2016, and other dates to be specified, Complainant was not accommodated per her medical restrictions;
2. on dates to be specified, she was subjected to increased surveillance by management;
3. on dates to be specified, she was denied overtime opportunities;
4. on dates to be specified, she was not permitted to talk to co-workers;
5. on September 7 and 23, 2016, Complainant was denied pay for Employee Assistance Program (EAP) counseling;
6. On September 19, 2016, and September 30, 2016, she was given an investigative interview;
7. On September 20, 2016, she was accused of deleting and stealing computer files;
8. On September 21, 2016, she was accused of asking an acting supervisor for confidential information;
9. On September 28, 2016, she was sent to two different stations to work and her manager talked to management there about her;
10. On November 1, 2016, her job assignment was changed;
11. On November 2, 2016, Complainant's Change of Schedule (COS) was denied;
12. On November 23, 2016, she was denied Holiday work.<sup>2</sup>

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC AJ. Complainant timely requested a hearing. The parties then began discovery during which the Agency produced certain emails and documents. Following the Agency's motion for summary judgment and Complainant's opposition, the AJ issued an order on October 5, 2018. Therein, the AJ granted summary judgment in favor of the Agency on Claim (1) but denied the Agency's motion with respect to the remaining claims. The AJ also, "based on a review of the record and party submissions," *sua sponte* amended the complaint to add the following allegations based on reprisal for prior protected EEO activity when:

13. on or about November 25, 2016, management refused to provide information during the processing of the instant EEO complaint in order to frustrate Complainant and/or EEO processes;

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<sup>2</sup> Complainant raised two additional allegations, but the Agency dismissed them on the grounds they constituted a collateral attack on the proceedings of another forum. Complainant raised no challenges to the dismissal of these claims; therefore, they will not be addressed herein. In addition, Complainant withdrew Claims (5) and (11) and sex (Female) and race (Japanese-American) as bases of discrimination while the matter was pending before the AJ.

14. on or about November 25, 2016, management obfuscated the truth during EEO processing and/or referred to Complainant and her EEO activity in a derogatory manner; and
15. on or about October 14, 2016, management shared information regarding Complainant with individuals without any legitimate need to know or role in the EEO process.

The AJ held a hearing from August 19 – 21, 2019, and issued a decision on November 4, 2019. The AJ concluded that Complainant failed to prove she was subjected to discrimination as alleged in Claims (1) through (12). However, the AJ found *per se* reprisal as to Claims (13) through (15). Regarding Claim (13), the AJ found that Complainant's supervisor (S1) responded to the EEO Counselor in a manner that was "intended to both prevent the timely and accurate processing of the complaint and frustrate Complainant thereby seeking to prevent Complainant from exercising her right to pursue her complaint of discrimination." Specifically, S1 responded to the EEO Counselor's request for a response to Complainant's allegation by providing evasive answers. The Acting Manager then responded to S1's email noting discrepancies in his answers and said that Complainant had her dates wrong. In response, S1 said, "Yes...make her get the correct dates and frustrate her more." The AJ found these comments constituted interference with the EEO processes.

In Claim (14), the AJ found that Complainant's supervisor (S1) sent an email to the Acting Manager and said that Complainant was "so fucking dumb." The AJ rejected the Agency's contention that S1 was not motivated by Complainant's EEO activity, but rather out of frustration with Complainant based on other matters. The AJ noted that S1's comments "were made as he was responding to EEO affidavits and directly reflect his distaste for Complainant" and that such comments, directed to a subordinate, would clearly deter a reasonable employee from engaging in EEO activity.

As to Claim (15), the AJ noted that S1 forwarded the EEO counselor's email detailing Complainant's allegations, to the Agency's union representative, with a one-word comment, "unreal." S1 then forwarded the email to various members of management stating, "FYI." The AJ found no evidence in the record demonstrating that any of the recipients had a need to know and noted that one of the recipients responded by directing S1 to cease forwarding details of the complaint.

To remedy the reprisal, the AJ ordered the Agency to pay Complainant \$18,000.00 in compensatory damages; provide training and consider disciplining S1; and to start discussions with Complainant regarding her entitlement to attorney's fees.

After the parties were unable to agree on the amount of attorney's fees owed to Complainant, the AJ accepted Complainant's fee petition. Complainant sought \$74,966.50 in attorney's fees and \$2,313.50 in costs. The Agency did not dispute Complainant's statement of costs but disputed the amount of attorney's fees.

The AJ declined the Agency's suggestion that the fee petition contained excessive time entries or that any entry was impermissibly vague. However, because Complainant did not prevail on all of her claims, the AJ agreed that a reduction was appropriate. The AJ noted that the claims on which Complainant prevailed contained legal theories distinct from those on which she did not and were premised on events that occurred after she initiated contact with an EEO counselor. However, the AJ declined to apply a strict *pro rata* deduction because there was a connection between Complainant's prevailing and non-prevailing claims "resulting from how the reprisal was discovered." As the AJ explained, "discovery on claims upon which she did not prevail gave rise to a production of emails/documents which led the [AJ] to *sua sponte* amend to include those issues upon which Complainant prevailed." Notably, "[w]ithout pursuit of the unprevailing claims, and the work associated with it, the Agency's illegal and retaliatory action would not have been discovered and the reprisal unrectified." The AJ concluded that a reduction of 45 percent was appropriate and awarded \$41,231.58 in attorney's fees and \$2,291.80 in costs.

The Agency subsequently issued a final order. In its order, the Agency agreed with the AJ's findings with respect to the merits of Complainant's allegations and agreed to implement the AJ's award of \$18,000 in compensatory damages, training and consideration of discipline for S1, and to post a notice. However, the Agency rejected the AJ's order with respect to attorney's fees.

In accordance with 29 C.F.R. § 1614.110(a), the Agency concurrently filed this appeal.

#### CONTENTIONS ON APPEAL

On appeal, the Agency contends that Complainant was not a prevailing party because she prevailed only on claims that the AJ added to her complaint after the matter was fully briefed for summary disposition; Complainant never raised the allegations in her formal complaint, and the AJ's finding was "based on just a couple of emails [which] amounts to no more than a technical or *de minimus* success." The Agency contends that Commission regulations, authority (specifically, EEO MD-110, at Chapter 11(VI)(B)(1)), and precedent deny Complainant prevailing party status. According to the Agency, "[t]he crux of the prevailing party analysis is whether or not Complainant substantially received the relief she sought" and she could not be a prevailing party because the *per se* retaliation claims was not the primary focus of Complainant's efforts.

The Agency then argues that the fee award was disproportionate because Complainant's "success was extremely limited," involving "a very discrete and isolated set of facts involving just two email strings written after the series of events that comprised her unsuccessful claims, and the fact that the emails were not in any way connected to her unsuccessful claims." The Agency seeks a 75 percent reduction in attorney's fees.

Furthermore, the Agency contends that Complainant should be prevented from accruing attorney's fees after Complainant rejected the Agency's offer to settle the complaint for \$40,001.00. The Agency concludes that Complainant cannot be entitled to attorney's fees incurred after August 17, 2019.

In response, Complainant asserts she was, indeed, a prevailing party because the AJ found in her favor and awarded her damages. Complainant distinguishes the Agency's citation of Ludie M v. U.S. Postal Serv., EEOC Appeal No. 0120170459 (May 9, 2019) and Washington v. Dep't of Veterans Affairs, EEOC Request No. 05A50271 (Nov. 15, 2005). In these cases, Complainant notes that the *per se* violations were discovered by the complainants prior to the formal complaint. Conversely, in this case, "the incriminating evidence was only unearthed through discovery and was not available to [Complainant] when she filed her complaint." Accordingly, the claims were fully intertwined and not fractionable.

Complainant agrees with the AJ's reduction of her fees petition, and notes that the Agency's offer of resolution was inclusive of compensatory damages and attorney's fees which, taking into consideration the AJ's award of \$18,000 in compensatory damages, would result in only \$18,741 in attorney's fees after costs.

### ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a *de novo* standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), at § VI.B. (Aug. 5, 2015).

As neither party challenges the AJ's decision regarding liability, the only matter before us is the AJ's order for relief, specifically the AJ's decision regarding attorney's fees.

We first address the Agency's contention that its offer of resolution limits the amount of attorney's fees. The Agency's argument results from a misreading of our regulations. An offer of resolution is valid for 30 days, and prevents the accrual of attorney's fees at the expiration of the 30 days only if "the relief awarded in the administrative judge's decision, the agency's final decision, or the Commission decision on appeal is not more favorable than the offer." 29 C.F.R. § 1614.109(c)(3).

In this case, the AJ's decision resulted in relief more favorable than the offer of resolution. Therefore, Complainant is not barred from further recovery of attorney's fees.

We now turn to the Agency's argument that Complainant was not a prevailing party. As with its argument regarding an offer of resolution, the Agency's argument regarding Complainant's prevailing party status again results from a misreading of our guidance. EEO MD-110, Chapter 11(VI)(B)(1) does indeed discuss a two-part test that Complainant needs to meet to be a prevailing party. First, Complainant must have substantially received the relief sought. Second, there must be a determination that the complaint was the catalyst motivating the Agency to provide the relief sought. Id. The Agency does not seriously contest the second prong but contends that Complainant did not substantially receive relief sought because the relief awarded to her was based on claims not part of her complaint and therefore not a primary focus of her efforts.

However, the Commission notes that EEO MD-110, Chapter 11(VI)(B)(2) provides that relief on the merits must "materially alter the legal relationship between the parties by modifying the agency's behavior in a way that directly benefits the complainant. A nominal monetary damages award is sufficient to satisfy this requirement. Id. As noted above, the AJ awarded, and the Agency accepted, a compensatory damages award of \$18,000. This is sufficient to satisfy the first element of the prevailing party test. We further conclude that the Agency's narrow reading of what constitutes a prevailing party does not hold up to scrutiny. If we were to accept the Agency's position, then attorney's fees would be unavailable or limited to any complainant who seeks to amend a complaint after it has been filed. Such a position is not congruent with the objectives of the EEO processes and would effectively nullify the portions of our regulations that permit such amendments.

We also disagree with the Agency's contention that Complainant's prevailing claims were so disconnected from her unsuccessful claims, or were only technical violations, so as to render the AJ's 45 percent reduction insufficient. A review of the emails at issue demonstrate that the emails were not simply a technical or *de minimis* violation. S1 was responding directly to Complainant's allegations and, as a result of Complainant's exercise of her EEO rights, chose to insult Complainant's intelligence in front of other management officials. S1 then openly admits he was evasive and deceptive in his responses to the EEO counselor. S1's actions are the very sort that anti-retaliation provisions are designed to prevent. But for Complainant's efforts to prosecute her claims, S1's malfeasance would have never been discovered. We find that the attorney's competent representation of Complainant and development of the evidence led directly to the AJ's *sua sponte* raising of retaliation as a basis mid-way through the hearing process. See Johnson v. Dep't of the Treasury, EEOC Appeal No. 0720080019 (June 4, 2010). Complainant's efforts, therefore, lend support to the AJ's decision to reduce her attorney's fees by 45 percent and not further. We agree.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final order and REMAND the matter for further action in accordance with the ORDER below.

### ORDER

To the extent it has not done so already, the Agency is ordered to take the following remedial actions:

1. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$18,000.00 in compensatory damages.
2. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$41,231.58 in attorney's fees and \$2,291.80 in costs.
3. Within 60 days of the date this decision is issued, the Agency shall the Agency shall consider taking appropriate disciplinary action against the responsible management official identified as S1. The Commission does not consider training to be disciplinary. The Agency shall report its decision to the Compliance Officer. 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 the responsible management official has left the Agency's employ, the Agency shall furnish documentation of his departure date(s);
4. Within 90 days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive training to the responsible management official identified as S1 on the requirements of Title VII of the Civil Rights Act of 1964, with an emphasis on reprisal. The training shall be mandatory and conducted by a qualified trainer familiar with EEO instruction.

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 Agency's remedies and corrective action have been implemented.

### POSTING ORDER (G0617)

The Agency is ordered to post at the Shorewood Carrier Annex in Milwaukee, Wisconsin 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).

#### ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he 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 receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

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

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0920)

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

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

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

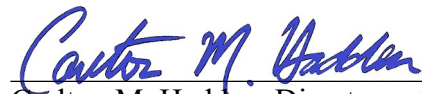
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

April 14, 2021  
Date