



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

[REDACTED]  
Bryant F.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Customs and Border Protection),  
Agency.

Appeal No. 2020002864

Hearing Nos. 540-2015-00054X  
540-2016-00021X

Agency Nos. HS-CBP-00179-2014  
HS-CBP-02415-2015

**DECISION**

On February 12, 2020, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 27, 2019,<sup>2</sup> final decision on compensatory damages and attorney's fees, concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.* and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 *et seq.* For the following reasons, we MODIFY the Agency's final decision and REMAND the matter for further processing.

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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.

<sup>2</sup> Complainant claimed to have received the Agency's final decision on February 1, 2020. We note that the Agency has not disputed the timeliness of the appeal.

### ISSUE PRESENTED

The issue presented concerns whether the Agency's calculation of compensatory damages and attorney's fees and costs was correct.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Investigative Program Specialist, GS-1801-14,<sup>3</sup> at the Agency's Office of Internal Affairs in Tucson, Arizona.

On February 4, 2014, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the bases of national origin (Hispanic), disability (broken wrist), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973. Complainant subsequently filed a second formal EEO complaint on December 30, 2014, alleging additional claims under the same bases. He raised a total of 24 claims. The Agency, in relevant part, accepted the following claims for investigation.

3. From September 2012 through June 2013, the Assistant Special Agent in Charge (ASAIC-1) placed Complainant on the duty roster while Complainant was on light-duty status;
6. On September 30, 2013, ASAIC-1 ordered Complainant to perform field work in violation of his light-duty limitations;
12. On October 25, 2013, ASAIC-1 assigned Complainant to serve as the primary duty agent during regular duty hours;
15. On October 31, 2013, ASAIC-1 assigned Complainant to provide coverage for him while S1 was on leave from December 30, 2013 through January 3, 2014;
17. On November 6, 2013, ASAIC-1 ordered Complainant to install a covert camera at a port of entry, contrary to his physician's restrictions;
19. On December 18, 2013, the Special Agent in Charge (SAIC) suspended Complainant's authorization to carry a firearm and to earn Administratively Uncontrollable Overtime (AUO);
22. On December 10, 2014, the Labor Employee Relations Specialist asked the local Diversity and Civil Rights Officer whether Complainant had an appointment with her and what the purpose of the meeting was; and

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<sup>3</sup> The Agency subsequently converted all Investigative Program Specialists to GS-1811, Criminal Investigators on January 25, 2015, to give them criminal investigative authority.

24. Beginning in November 2014, management attempted to discharge Complainant constructively by making the work environment so intolerable that a reasonable person would not be able to stay.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the reports of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

During the hearing stage, the AJ assigned to the case consolidated Complainant's two complaints and allowed the parties to engage in discovery. Following discovery, the Agency filed a motion for a decision without a hearing on April 11, 2016. Through his attorney (Attorney-1), Complainant withdrew his hearing request and requested the issuance of a final agency decision on the merits of his complaint. In accordance with Complainant's request, the AJ dismissed the complaint and remanded the matter to the Agency.

On January 11, 2017, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b), which concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. Complainant then appealed the Agency's final decision to the Commission. The Commission docketed the appeal as EEOC Appeal No. 0120171192. Complainant was represented in his appeal by two attorneys (Attorney-1 and Attorney-2) who were not part of the same law firm. During the pendency of Complainant's appeal, Attorney-1 passed away on April 19, 2018.

In Bryant F. v. Dep't of Homeland Sec., EEOC Appeal No. 0120171192 (July 2, 2019), the Commission issued a decision on the merits of the appeal which modified the Agency's final decision in part. The appellate decision found that Complainant had been subjected to discrimination as alleged on claims 3, 6, 12, 15, and 17, concerning his denial of reasonable accommodation claims. The Commission further found that the Agency had subjected Complainant to reprisal in claim 22, when the Agency's Labor Employee Relations Specialist inquired about the purpose of Complainant's EEO meeting. However, the Commission concluded that the preponderant evidence failed to show that Complainant had been subjected to discrimination on the remaining 18 claims, including claims 19 and 24, concerning his AUO pay and constructive discharge claims.

To remedy the findings of discrimination, the Commission ordered the Agency to undertake the following remedial relief: 1) immediately engage in the interactive process with Complainant and provide him with reasonable accommodations; 2) conduct a supplemental investigation into Complainant's entitlement to compensatory damages; 3) provide eight hours of EEO training to the responsible management officials and consider disciplining them; and 4) post a notice of the finding of discrimination.

The Commission also awarded Complainant provable attorney's fees pursuant to 29 C.F.R. § 1614.501(e).

In accordance with the Commission's order, the Agency commenced a supplemental investigation into Complainant's entitlement to compensatory damages and attorney's fees.

On August 1, 2019, following the issuance of the Commission's decision, Attorney-2 contacted the Agency to advise that she had assumed the caseload of Attorney-1. Attorney-2 claimed that Complainant was entitled to be reimbursed \$17,994.67, for the work that Attorney-1 had performed.

On August 16, 2019, Attorney-2 submitted an affidavit from Complainant concerning his entitlement to damages. Through Attorney-2, Complainant requested \$100,000 in nonpecuniary compensatory damages because the stress that he endured as a result of the Agency's actions caused him to experience numerous days of diarrhea, acid indigestion, acid reflux, and stress related weight loss/sickness. Complainant also claimed that management's actions caused him so much stress and mental anguish that it affected his relationship with his fiancée, which initially resulted in loss of consortium and culminated in the complete breakdown of their relationship. Additionally, Complainant maintained that he experienced pain, disfigurement, and the "indignity of not being able to wipe [his] anus" due to his on the job wrist injury.

With regard to pecuniary compensatory damages, Complainant requested damages in the amount of \$236,247.77. Complainant sought \$235,257.00 for the following: 1) monthly membership in the Federal Law Enforcement Officers Association (FLEOA); 2) AUO pay losses; and 3) AUO High-3 losses. Complainant also claimed an additional \$590.37 in deposition costs, \$400.40 for transcripts, and \$432.17 in costs associated with filing his appeal. He characterized these damages as pecuniary compensatory damages.

The Agency filed a response to Complainant's request for compensatory damages. In its brief, the Agency acknowledged that Complainant was entitled to compensatory damages; however, the Agency argued that Complainant was entitled to no more than \$10,000 in nonpecuniary compensatory damages because the record lacked any corroborating, objective evidence regarding the nature, severity, duration, or causation of the harm. The Agency also vehemently opposed Complainant's request for pecuniary compensatory damages on the grounds that Complainant was seeking pecuniary compensatory damages for claims that he did not prevail on (i.e., claims 19 and 24, concerning his AUO pay losses and constructive discharge claims). Furthermore, the Agency maintained that Complainant was not entitled to recoup AUO pay losses and wages related to the alleged constructive discharge because such matters related to the issue of backpay, which the Commission did not award due to Complainant's failure to prove his allegations. As for Complainant's request to recoup his monthly FLEOA membership fees, the Agency argued that Complainant was not entitled to that award because Complainant did not explain how his monthly membership had any causal connection to the Agency's unlawful actions.

The Agency also filed a separate response to Complainant's request for attorney's fees and costs, wherein the Agency averred that it did not dispute Complainant's entitlement to reasonable attorney's fees and costs despite the passing of Attorney-1.

However, the Agency argued that Complainant was entitled to recoup only \$4,974.45 of his claimed \$17,994.67, as much of Complainant's claimed fees were related to the administrative hearing phase. In this regard, the Agency asserted that Complainant had unnecessarily claimed fees relating to the hearing process, even though he withdrew his hearing request and did not use any of the evidence that he obtained during discovery. The Agency maintained that Complainant could have requested a final agency decision and avoided any fees and costs associated with discovery. Furthermore, the Agency noted that while Attorney-1 had originally billed \$250.00 for one hour of work on February 7, 2017, related to the appeal, Attorney-2 claimed that Attorney-1 had spent five hours working on Complainant's appeal on February 7, 2017, and billed \$1,250.00. For these reasons, the Agency maintained that Complainant was only entitled to attorney's fees in the amount of \$4,974.45. Alternatively, the Agency requested a significant reduction in attorney's fees based on the proportion of successful claims (six out of 24 claims). As for costs, the Agency argued that Complainant was not entitled to reimbursement for costs because Complainant failed to timely file his request.

On December 27, 2019, the Agency issued its final decision on Complainant's entitlement to compensatory damages and attorney's fees and costs. Having reviewed Complainant's affidavit and supporting documentation, the Agency determined that Complainant was entitled to a total of \$15,000.00 in nonpecuniary compensatory damages, consisting of \$10,000.00 for the Agency's failure to provide reasonable accommodation (claims 3, 6, 12, 15, and 17) and \$5,000.00 for the Agency's act of reprisal (claim 22). In this regard, the Agency determined that awarding Complainant \$10,000.00 was appropriate for the denial of reasonable accommodation because such amount was consistent with other Commission cases where the Agency failed to provide reasonable accommodations for 16 months. Similarly, the Agency determined that the award of \$5,000.00 for the single act of reprisal was consistent with other Commission cases.

The Agency, however, denied Complainant's request for pecuniary compensatory damages because Complainant's claim was based upon his alleged loss of AUO pay and retirement compensation. In denying Complainant's request, the Agency emphasized that the Commission "awards only compensatory damages and not backpay."

With regard to attorney's fees, the Agency denied Complainant's request in its entirety because Attorney-2 failed to provide her resume and evidence that: 1) she is an attorney in good standing; 2) Attorney-1 is deceased; and 3) she has been authorized to assume Attorney-1's representation of Complainant in the present case. The Agency also denied Complainant's request to recoup costs in the amount of \$1,422.94, consisting of \$590.37 in deposition costs, \$400.40 for transcripts, and \$432.17 in costs associated with filing his appeal, because the Agency found that Complainant not only failed to show that he incurred these costs, but that they were reasonable.

In summary, the Agency awarded Complainant a grand total of \$15,000.00 in nonpecuniary damages, but declined to award Complainant any pecuniary damages, attorney's fees, and/or costs. The instant appeal followed.

### CONTENTIONS ON APPEAL

Through Attorney-2, Complainant asserts that the Agency's award of \$15,000.00 does not sufficiently compensate him for the harm that he sustained. Rather, Complainant contends that he is entitled to the maximum \$300,000.00 in nonpecuniary compensatory damages, as he was denied reasonable accommodation "from September 2012 until he retired in September 2016[,] and he was retaliated against due to his disability." Furthermore, Complainant vehemently disputes the Agency's decision to deny his request for attorney's fees and costs. He maintains that the Agency was aware that Attorney-2 was representing him, as Attorney-2 had successfully represented him in the underlying OFO appeal. Complainant also asserts that his request for attorney's fees in the amount of \$17,994.67 and costs in the amount of \$1,422.94 was not unreasonable and well below the usual costs for EEO cases, which generally exceed \$30,000.00.

The Agency opposes the appeal and reiterates many of the same arguments it had previously raised in response to Complainant's request for compensatory damages and attorney's fees/costs. In opposing the appeal, the Agency emphasizes that Complainant's brief misstated the Commission's finding when he argued that he had been denied reasonable accommodation from September 2012 to September 2016. The Agency maintains that contrary to Complainant's contention, the Commission only found that the Agency failed to reasonably accommodate Complainant for the period between September 2012 and January 2014 (*i.e.*, the time period covered in claims 3, 6, 12, 15, and 17). Thus, the Agency asserts that Complainant is only entitled to compensation for this period.

With regard to Complainant's request for \$300,000.00 in nonpecuniary compensatory damages, the Agency asserts that there is no basis to disturb the original award of \$15,000.00, as Complainant did not cite to even a single Commission case in support of his claimed entitlement to the maximum award and failed to provide additional facts, declarations, evidence or arguments regarding the extent, nature, severity, or duration of his harm. As for Complainant's entitlement to attorney's fees and costs, the Agency contends that it properly denied Complainant's request, as Attorney-2 failed to provide evidence of her good standing as an attorney or show that she was authorized to take over representation of Complainant following the death of Attorney-1. However, the Agency asserts that even with the documentation provided by Attorney-2, Complainant is not entitled to attorney's fees in excess of \$4,974.45.

### STANDARD OF REVIEW

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

parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

### ANALYSIS AND FINDINGS

When discrimination is found, an agency must provide a remedy that constitutes full, make-whole relief to restore a complainant as nearly as possible to the position he or she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). To receive an award of compensatory damages, a complainant must demonstrate that he or she has been harmed by an agency's discriminatory conduct; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsideration denied, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14.

#### *Compensatory Damages*

As a preliminary matter, we note that Complainant, on appeal, has not expressly challenged the Agency's decision to deny his request for pecuniary compensatory damages. Rather, our review of Complainant's appellate brief shows that Complainant only raised the following two issues on appeal: 1) whether the Agency's award of \$15,000.00 in nonpecuniary compensatory damages was sufficient to compensate him for the harm that he sustained; and 2) whether the Agency properly denied his request for attorney's fees and costs. As we see no compelling reason to disturb the Agency's decision on pecuniary compensatory damages, we shall exercise our discretion to focus on the matters that Complainant has expressly raised on appeal, *i.e.*, nonpecuniary compensatory damages and attorney's fees and costs. EEOC Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § IV.A (Nov. 9, 1999) ("Although the Commission has the right to review all of the issues in a complaint on appeal, it also has the discretion to focus only on those issues specifically raised on appeal."); see also Complainant v. Dep't of the Navy, EEOC Appeal No. 0120131940 (July 23, 2015).

#### *Nonpecuniary Compensatory Damages*

We now turn to Complainant's request for nonpecuniary compensatory damages. Damage awards for emotional harm are difficult to determine and there are no definitive rules governing the amount to be awarded in given cases. A proper award must meet two goals: that it not be "monstrously excessive" standing alone, and that it be consistent with awards made in similar cases. See Cygnar v. City of Chicago, 865 F.2d 827, 848 (7<sup>th</sup> Cir. 1989). As noted above, Section 102(a) of the 1991 Civil Rights Act authorizes an award of compensatory damages for nonpecuniary losses, such as, but not limited to, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health.

To receive an award of nonpecuniary compensatory damages, Complainant must demonstrate that he was 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 recons. den., EEOC Request No. 05940927 (Dec. 8, 1995); Guidance on Compensatory Damages, at 11-12, 14. Complainant is required to provide objective evidence that will allow an Agency to assess the merits of her request for damages. See Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Furthermore, the award should take into account the severity and duration of the harm. Carpenter v. Dep't of Agric., EEOC Appeal No. 01945652 (July 17, 1995). In determining compensatory damages, the Commission strives to make damage awards for emotional harm consistent with awards in similar cases.

While we acknowledge Complainant's request for \$300,000.00 in nonpecuniary compensatory damages, we find that such an award would be "monstrously excessive" given the facts in the case and inconsistent with similar Commission cases. In so finding, we agree with the Agency that the record does not show that Complainant was denied reasonable accommodation from September 2012 until he retired in September 2016. Rather, as discussed in the underlying appellate decision, Complainant was only denied reasonable accommodation from September 2012 to November 6, 2013 (i.e., the time period covered in claims 3, 6, 12, 15, and 17).<sup>4</sup>

Having considered the record, including Complainant's contentions regarding the harm that he sustained, we find that an award of \$28,500.00 would sufficiently compensate Complainant for his injuries related to the denial of reasonable accommodation and would not be "monstrously excessive" given existing Commission precedent. See Marguerite W. v. Dep't of Labor, EEOC Appeal No. 0120142727 (Dec. 21, 2016) (\$30,000 awarded when complainant experienced physical discomfort and humiliation after his computer monitor, which was given as an accommodation, was taken away); Michelle G. v. Dep't of Vet. Aff., EEOC Appeal No. 0120162187 (June 20, 2018) (affirming agency's award of \$30,000.00, where complainant was denied use of a space heater as a reasonable accommodation for approximately three years, which exacerbated her neuropathy, increased her anxiety/depression, caused her to become agitated and withdrawn, and suffer weight loss, skin breakouts, etc.); see also Rafalski v. U.S. Postal Serv., EEOC Appeal No. 0120093891 (Mar. 15, 2012) (\$20,000 awarded when complainant's back condition was aggravated after his request for accommodation in the form of an ergonomic chair was denied); Price v. Dep't. of Justice, EEOC Appeal No. 07A20104 (Sep. 24, 2003) (\$25,000 where complainant experienced stress, embarrassment, and mental anguish); Flowers v. U.S. Postal Serv., EEOC Appeal No. 01A43114 (Oct. 7, 2004), req. for recon. den., EEOC Request No. 05A50243 (Jan. 11, 2005) (\$20,000 where complainant established that, despite other contributing factors, discrimination resulted in sleeplessness, depression, emotional distress, anxiety, loss of enjoyment of life and strained family relationships).

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<sup>4</sup> We note that the underlying incidents in claims 3, 6, 12, 15, and 17 occurred between September 2012 (claim 3) to November 6, 2013 (claim 17), and did not extend all the way to January 2014, as noted in the Agency's appellate brief.

We shall also affirm the Agency's award of \$5,000.00 for injuries that Complainant sustained as a result of the Agency's reprisal because we find such award to be consistent with similar Commission cases. See Schofield v. Dep't of Homeland Sec., EEOC Appeal No. 0120120076 (Jan. 3, 2013) (affirming AJ's award of \$5,000.00, where management subjected complainant to reprisal by interfering with his protected EEO activity); Eleni M. v. Dep't of Transp., EEOC Appeal No. 0720160021 (July 25, 2018) (affirming AJ's award of \$5,000.00 in nonpecuniary compensatory damages, where complainant was issued a letter of counseling in reprisal for her protected EEO activity); and Ludie M. v. U.S. Postal Serv., EEOC Appeal No. 0120170459 (May 9, 2019) (affirming AJ's award of \$4,500.00, where complainant's supervisor sent complainant a letter accusing her of attempting to bully and intimidate management by filing various complaints that allegedly slandered the names of management).

We therefore award Complainant a combined grand total of \$33,500.00 in nonpecuniary compensatory damages for the harm that he sustained as a result of the Agency's actions.<sup>5</sup> In assessing this amount, we note that Complainant has not cited to any Commission cases for our consideration supporting a higher award.

#### *Attorney's Fees and Costs*

The Commissions regulations state that in cases where a complainant prevails on claims alleging discrimination in violation Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.* and the Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 *et seq.* there is a "presumption of entitlement to an award of attorney's fees." 29 C.F.R. § 1614.501(e)(i). EEOC Regulations provide that "The amount of attorney's fees shall be calculated using the following standards: The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate." 29 C.F.R. § 1614.501(e)(2)(ii)(B).

Though the Agency denied Complainant's request for attorney's fees based on technical grounds, such as Attorney-2's failure to provide a resume and show that she is a member in good standing with the state bar, we find such technical denials to be inconsistent with both our regulations and case law, which impose a strong presumption of entitlement to attorney's fees for the prevailing party in an EEO case. In Wynn v. Dep't of the Treasury, EEOC Appeal No. 0120063627 (Feb. 8, 2007), we addressed a similar factual pattern, where the agency disallowed attorney's fees on the grounds that the attorney of record in that case was an inactive member of the bar, and not a member in good standing. Though the Commission ultimately found the attorney to be in good standing with the state bar, the Commission was unpersuaded by the agency's reliance on minor technical grounds as the basis for the denial.

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<sup>5</sup> Our award of \$33,500.00 takes into consideration the present value of past awards. See Lara G. v. U.S. Postal Serv., EEOC Request No. 0520130618 (June 9, 2017).

In finding the Agency's denial to be unwarranted, the Commission emphasized that the agency adduced no evidence showing that the attorney's bar status had any effect on Complainant's underlying entitlement to attorney's fees. Given the strong presumption of entitlement, we too are disinclined to deny Complainant's request to recoup attorney's fees based on minor technical grounds. We note that the Agency itself acknowledged in its response to Complainant's request for attorney's fees that Complainant was indeed entitled to attorney's fees; however, the Agency's final decision unilaterally denied Complainant's request for attorney's fees. We ultimately agree with both Complainant and the Agency's original position that Complainant, as the prevailing party, is entitled to attorney's fees and costs.

As the Agency did not dispute Attorney-1's hourly rate of the \$250.00, the sole question that remains for us to decide is whether Complainant can recoup \$17,994.67 for 71.50 hours of work that Attorney-1 performed prior to his death. Here, Complainant has asserted that his claimed amount of \$17,994.67 was reasonable because most EEO cases can easily exceed \$30,000.00. The Agency vehemently opposed Complainant's request and asserted that a deduction of \$12,020.22 from Complainant's claimed amount was warranted because these fees were incurred during the administrative hearing process and rendered unnecessary when Complainant withdrew his hearing request. The Agency also asserted that an additional \$1,000.00 deduction was warranted because Attorney-2 billed \$1,250.00 for the work that Attorney-1 performed on February 7, 2017, even though Attorney-1 himself billed only \$250.00. The Agency maintained that after accounting for these deductions, Complainant was only entitled to \$4,974.45 or in the alternative, a reduction based on the proportion of successful claims.

As an initial matter, we disagree with the Agency that the hours that Attorney-1 expended at the hearing stage were unwarranted by virtue of Complainant's subsequent decision to withdraw her hearing request. While we have long held that the number of hours requested should not include excessive, redundant, or otherwise unnecessary hours,<sup>6</sup> we recognize that evidence obtained during the discovery process can play a crucial role in determining whether to proceed all the way to a hearing. We therefore do not find that the time that Attorney-1 expended to gather information needed to decide whether to continue the hearing process was unnecessary. Given the circumstances in this case, we conclude that Complainant is not precluded from presumptively recovering the fees that Attorney-1 billed during the hearing process. See Harmony E. v. U.S. Postal Serv., EEOC Appeal No. 0120160122 (Jan. 24, 2017) (finding compensable the hours that complainant expended to gather information needed to decide whether to continue the hearing process, as the claimed hours were not unnecessarily expended).

With regard to the \$1,000.00 deduction, we find that the Agency properly deducted this amount, as Attorney-2 failed to provide any explanation as to why she charged \$1,250.00 for the work that Attorney-1 performed on February 7, 2017, when Attorney-1 himself charged only \$250.00. Based on our calculations, we find that Complainant is presumptively entitled to recover a total of \$16,994.67.

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<sup>6</sup> See Henstey v. Eckerhart, 461 U.S. 424, 434; Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998).

We note that the Commission has held that one method of addressing the appropriate amount of attorney's fees when a complainant is not completely successful is to take a percentage across-the-board reduction of compensable time billed. Blinick v. Dep't of Hous. and Urban Dev., EEOC Appeal No. 07A20079 (Feb. 3, 2004). Even if a complainant did not prevail on every aspect of his or her complaint, that does not, in itself, justify a reduction in the hours expended where the successful and unsuccessful claims are closely intertwined. Id. "Claims are fractionable or unrelated when they involve distinctly different claims for relief that are based on different facts and legal theories." Id.

Having reviewed the record, we agree with the Agency that a reduction of 75 percent is warranted, as we find that the claims that Complainant prevailed on, *i.e.*, denial of reasonable accommodation and per se reprisal claims, are indeed fractionable from his remaining unsuccessful 18 claims, concerning his allegations of disparate treatment and harassment. As his claims are fractionable, we conclude that Complainant is entitled to recoup \$4,248.67 in attorney's fees, reflecting the proportion of his successful claims. See Jenkins v. U.S. Postal Serv., EEOC Appeal No. 01A33198 (Dec. 8, 2004) (finding that complainant's claim of retaliatory harassment, on which she prevailed, to be fractionable from her unsuccessful claims involving constructive discharge, denial of reasonable accommodation, discipline, and suspension).

As for Complainant's request to recoup \$590.37 in deposition costs, \$400.40 for transcripts, and \$432.17 in costs associated with filing his appeal, we note that the Agency has argued on appeal that Complainant is not entitled to recoup these costs due to his failure to timely file his request. While we are mindful of the Agency's argument, we note that the Agency's final decision did not deny the claimed costs based on timeliness. Rather, the Agency denied the claims due to Complainant's apparent failure to substantiate his claimed costs. We shall therefore address whether the Agency's denial on this basis was proper.

In order to recover costs, Complainant must provide adequate documentation of the costs incurred. Canady v. Dep't of the Army, EEOC Request No. 0580226, (December 27, 1989). Here, Complainant claimed \$590.37 in deposition costs, \$400.40 for transcripts, and \$432.17 in costs associated with filing his appeal; however, Complainant did not include bills or invoices or details about how the final costs were determined. Because Complainant failed to do so, we find that Complainant is not entitled to recoup these costs. See Childs v. Dep't of Veterans Affairs, EEOC Appeal No. 01994951 (May 16, 2002) (denying recovery of costs due to complainant's failure to provide adequate documentation).

Based on the foregoing, we hereby award Complainant a total of \$33,500.00 in nonpecuniary compensatory damages, minus any payments already made, and \$4,248.67 in attorney's fees.

### 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 decision and direct the Agency to comply with the ORDER below.

### ORDER

Within one hundred and twenty (120) calendar days from the date this decision is issued, the Agency shall:

1. Pay Complainant a total of \$33,500.00 in nonpecuniary compensatory damages, minus any payments already made; and
2. Pay Complainant a total of \$4,248.67 in attorney's fees.

### 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).

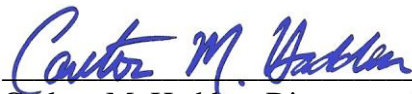
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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:



Carlton M. Hadden, Director  
Office of Federal Operations

July 21, 2021

Date