



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Marybeth C.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Threat Reduction Agency),
Agency.

Appeal No. 2020001726

Agency No. DTRA13J9012

DECISION

On December 6, 2019, Complainant filed an appeal of the Agency's November 4, 2019 final decision concerning her entitlement to attorney's fees and costs. For the following reasons, the Commission AFFIRMS the Agency's final decision.

BACKGROUND

Complainant, a GS-13 Science and Technology Manager at the Agency's Diagnostic, Detect, and Disease Surveillance Division facility in Fort Belvoir, Virginia, filed a formal EEO complaint alleging that the Agency subjected her to discrimination and a hostile work environment on the bases of national origin (Cypriot-American), sex (female), disability, age (58), and reprisal (prior EEO activity) as evidenced by multiple incidents.

Following a hearing, an EEOC Administrative Judge (AJ) found in Complainant's favor with respect two of her claims. Namely, the AJ concluded that Complainant proved that the Agency subjected her to discrimination on the basis of disability when it held her telework in abeyance for three months and that it unlawfully retaliated against her when Agency officials had a general discussion about her prior protected EEO activity. However, the AJ concluded that Complainant failed to sustain her burden of proof with respect to all other claims and all other bases of discrimination.

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.

The AJ awarded Complainant \$5,000 in non-pecuniary compensatory damages; \$1,991.14 in pecuniary compensatory damages; and \$28,662.00 in attorney's fees. In addition, the AJ ordered the Agency to consider disciplining the responsible management officials; to provide training for those officials; and to post a notice. The Agency's final order fully adopted the AJ's decision.

Complainant appealed the Agency's final order arguing that the AJ's decision did not go far enough in numerous respects. In Ikossi v. Dep't of Defense, EEOC Appeal No. 0120180749 (Aug. 20, 2019), the Commission rejected Complainant's arguments but found that Commission precedent supported a higher non-pecuniary compensatory damages award. Accordingly, we increased the amount of non-pecuniary compensatory damages to \$10,000.

Following our previous decision, Complainant petitioned the Agency for \$54,979.40 in attorney's fees for work performed on Complainant's appeal. On November 4, 2019, the Agency issued a final decision denying the attorney's fees request in full. The matter herein pertains to Complainant appeal of the Agency's November 4, 2019 decision on attorney's fees.

ANALYSIS AND FINDINGS

To establish entitlement to attorney's fees, the complainant must first show that he or she is a prevailing party. See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources, 532 U.S. 598 (2001). A prevailing party for this purpose is one who succeeds on any significant issue and achieves some of the benefit sought in bringing the action. Davis v. Dep't of Transp., EEOC Request No. 05970101 (Feb. 4, 1999) (citing Hensley v. Eckerhart, 461 U.S. 427, 433 (1983)).

Contrary to the Agency's assertion, we find that Complainant is a prevailing party in the instant matter for purposes of awarding attorney's fees. While Complainant did not prevail in four out of five arguments on appeal, she was successful in obtaining a higher compensatory damages award which turned out to double the original amount awarded by the AJ. Accordingly, we do not agree with the Agency contention that Complainant's success on appeal was only nominal. We also disagree with the Agency's claim that Complainant's attorney's efforts on appeal played no role in our decision to increase the non-pecuniary compensatory damages awarded.

While we conclude that Complainant is a prevailing party with respect to her claim for attorney's fees, it is undisputable that she was not successful with respect to four (out of five) issues that were raised on appeal. Attorney's fees may not be recovered for work on unsuccessful claims. Hensley, 461 U.S. at 434-35. Courts have held that attorney fee applicants should exclude time expended on "truly fractionable" claims or issues on which they did not prevail. See Nat'l Ass'n of Concerned Veterans v. Sec'y of Defense, 675 F.2d 1319, 1327 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 cases where a claim for relief involves "a common core of facts or will be based on related legal theories," however, a fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Id. at 435. "The hours spent on unsuccessful claims should be

excluded in considering the amount of a reasonable fee only where the unsuccessful claims are distinct in all respects from the successful claims.” See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) at, Chap. 11, § 6.A.7 (citation omitted).

We find that the Agency is entitled to an across-the-board reduction of Complainant’s attorney’s fees claim by 80 percent given the fact that Complainant was only successful in one out of five clearly distinct issues raised on appeal. See Lillas Beckford v. Soc. Security Admin., EEOC Appeal No. 0120061174 (July 17, 2008) (Commission upheld an AJ’s 50% reduction of attorney’s fees due to the complainant’s partial success). The total amount of attorney’s fees requested (\$54,979.40) is reduced by 80 percent to \$10,995.88.

CONCLUSION

Upon review of the record, the Commission MODIFIES the Agency's final decision regarding Complainant's entitlement to attorney's fees and REMANDS the matter to the Agency for further action in accordance with the ORDER below.

ORDER

Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$10,995.88 in attorney's fees.

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 (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

August 3, 2021

Date