



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

[REDACTED]
Heidi E.,¹
Complainant,

v.

Dr. Kilolo Kijakazi,
Acting Commissioner,
Social Security Administration,
Agency.

Appeal No. 2020003219

Hearing No. 550-2017-00399X

Agency No. SEA-16-0964-SSA

DECISION

Following its April 6, 2020, final order, the Agency filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission). On appeal, the Agency requests that the Commission affirm its rejection of attorney's fees ordered by an EEOC Administrative Judge (AJ). For the following reasons, the Commission MODIFIES the Agency's final order.

BACKGROUND

On April 23, 2019 an AJ issued an Order granting summary judgment in Complainant's favor on her claim that she was subjected to discrimination based on disability (restrictive cardiomyopathy) when her supervisor denied her a reasonable accommodation, treated her disparately, subjected her to a hostile work environment, and violated confidentiality requirements under the Rehabilitation Act. Further, the AJ noted that while Complainant did not allege sex as a basis for harassment, the facts supported a finding of sex-based harassment. The AJ found no discrimination regarding Complainant's claim of reprisal discrimination.

Thereafter, the AJ issued a Decision on Damages After Hearing on December 9, 2019. Complainant filed a Request for Clarification or Reconsideration of Decision on Damages After Hearing. The Agency filed its Response to Complainant's Request for Clarification.

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 January 14, 2020, the AJ issued a Decision on Damages After Hearing, With Clarification. Among other relief, the AJ awarded Complainant all reasonable attorney's fees and costs to which she may be entitled.

The Agency subsequently issued a final order on February 24, 2020, rejecting the AJ's finding that Complainant proved that the Agency subjected her to discrimination. Following issuance of its final order, the Agency filed an appeal requesting the Commission affirm its rejection of the AJ's finding of discrimination and the relief ordered by the AJ. Complainant also timely filed an appeal challenging the relief ordered by the AJ.

In EEOC Appeal No. 2020002437 (March 2, 2021), we found Complainant failed to establish that she was denied a reasonable accommodation, was subjected to disparate treatment, or was subjected to a hostile work environment and thus, she was not entitled to relief for those claims. However, we found the Agency violated the Rehabilitation Act's prohibition against the release of confidential medical information. The Agency was ordered to pay Complainant \$3,000 in nonpecuniary, compensatory damages, provide training to the Attorney Advisor referred to in the decision, and consider taking disciplinary action against the Attorney Advisor referred to in the decision.

Complainant requested that the Commission reconsider its decision in EEOC Appeal No. 2020002437. In EEOC Request No. 2021002730 (September 21, 2021), the Commission denied Complainant's request.

Attorney's Fees

Pursuant to the AJ's Decision on Damages After Hearing, Complainant submitted a verified claim for attorney's fees on January 8, 2020. Complainant requested an hourly rate of \$385 for Attorney 1 and \$485 for Attorney 2. Complainant noted the extensive work done over the years by Attorney 1 and Attorney 2 on this case. Complainant sought a 50% multiplier to her attorney's fees award due to "the degree of success, quality of representation, and long delay caused by the [A]gency." Complainant noted that the submitted fee petition excluded all fees and costs related to a second, currently pending case, EEOC No. 550-2019-00405X. Complainant requested an award of \$254,370.09 in fees for her two attorneys with the 50% multiplier or \$169,580.06 without the 50% multiplier. Further, Complainant sought \$3,861.68 in costs.

The Agency filed its response on February 7, 2020. The Agency argued Complainant's requested fees were excessive. The Agency stated that Complainant sought high hourly rates for her attorneys without sharing the fee agreement between her and her counsel. The Agency claimed that Complainant's attorneys have not provided evidence of the fee amounts they were actually receiving from other clients. Also, the Agency stated Complainant did not present any facts establishing that \$385 and \$485 were the prevailing market rates for the Seattle, Washington area for working on a federal administrative matter.

The Agency requested the Commission reduce the hourly rate for both Attorney 1 and Attorney 2 to \$325. Further, the Agency claimed Complainant failed to justify a fee enhancement.

On February 26, 2020, the AJ issued an Order on Attorney Fee Petition. Thereafter, due to a typographical error, the AJ issued an Order on Attorney Fee Petition, Revised on February 26, 2020. The AJ found the total hours listed by Attorney 1 and Attorney 2 were reasonable. The AJ also found the hourly rates of \$385 for Attorney 1 and \$485 for Attorney 2 were reasonable. The AJ found the itemizations from the attorneys were sufficiently detailed and did not contain duplication of efforts. Further, the AJ found Complainant has not shown that a fee enhancement was called for in the case. The AJ awarded Complainant a total of \$169,580.06 in attorney's fees for Attorney 1 at the rate of \$385 per hour and for Attorney 2 at the rate of \$485 per hour. The AJ awarded costs for Complainant's attorneys in the amount of \$3,861.68.

In an April 6, 2020 final order, the Agency declined to implement the AJ's February 26, 2020 decision on attorney's fees. In its final order, the Agency informed Complainant of her right to file a separate appeal of the final order. The Agency also filed the subject appeal.

On appeal, the Agency argues that the AJ improperly issued a decision on attorney's fees in favor of Complainant's attorneys, which awarded \$169,580.06 in fees and \$3,861.68 in costs. First, the Agency contends that the AJ's attorney's fee award is based on an erroneous finding of discrimination following the improper issuance of a decision without a hearing in Complainant's favor. The Agency notes at the time it filed this appeal, it had already filed an appeal rejecting the AJ's finding of discrimination and the relief ordered by the AJ under EEOC Appeal No. 2020002437 and that its argument on this first point is tied to the success of that appeal. Second, the Agency claims that the AJ abused her discretion because Complainant failed to present sufficient evidence establishing the reasonableness of the requested fees for her attorneys. The Agency notes that the AJ correctly denied Complainant's request to enhance her fee request by 50 percent. However, the Agency claims the AJ erred when determining a reasonable hourly rate for Complainant's attorneys because she ignored the absence of the fee agreement containing the "agreed upon rate" between Complainant and her attorneys. The Agency also argues that Complainant's attorneys failed to provide evidence of the fee amounts they were actually receiving from paying clients.

Further, the Agency argues that the AJ abused her discretion when she concluded that Complainant's attorneys presented sufficient evidence of the prevailing market rate. The Agency claims Attorney 1 provided only one attorney fee award showing an hourly rate of \$325, which it contends falls short of establishing the prevailing market rate in the community. The Agency notes that Attorney 2 failed to provide any evidence of attorney fee awards by a court or an agency showing that his requested hourly rate was reasonable. The Agency argues Attorney 2's self-serving declaration was insufficient to support his requested hourly rate.

In response to the Agency's appeal, Complainant claims that the Agency cannot show that the AJ abused her discretion in awarding Complainant's counsel their reasonable hourly rates.

Complainant argues that the Agency ignored the evidence presented by Complainant's counsel that their rates are reasonable and prevailing market rates. Complainant notes that Attorney 1 presented a recent fee petition where two local courts granted her then-current hourly rate, and an attorney declaration from Person X, a prominent Seattle plaintiff-side employment law attorney. Person X's declaration was originally submitted in December 2015 in support of a fee petition in the U.S. District Court in the Western District of Washington. Complainant notes in the four years since the filing in December 2015 and January 2020, Attorney 1 and Attorney 2 both increased their hourly rates by only \$60. Complainant argues the AJ correctly applied the lodestar method to determine her attorneys' reasonably hourly rates.

ANALYSIS AND FINDINGS

By federal regulation, the 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).

There is a strong presumption that the number of hours reasonably expended multiplied by a reasonable hourly rate, the lodestar, represents a reasonable fee, but this amount may be reduced or increased in consideration of the degree of success, quality of representation, and long delay caused by the agency. 29 C.F.R. § 1614.501(e)(2)(ii)(B). The circumstances under which the lodestar may be adjusted are extremely limited, and are set forth in EEO MD-110, Ch. 11 § VI.F. A fee award may be reduced: in cases of limited success; where the quality of representation was poor; the attorney's conduct resulted in undue delay or obstruction of the process; or where settlement likely could have been reached much earlier, but for the attorney's conduct. Id. The party seeking to adjust the lodestar, either up or down, has the burden of justifying the deviation. Id.

At the outset, we note that on appeal neither party challenges the AJ's decision to deny a 50% multiplier to Complainant's request for attorney's fees. Thus, we do not address that determination by the AJ.

Hourly rate

The Supreme Court has held that a reasonable hourly rate is to be determined by the "prevailing market rates in the relevant community." Blum v. Stenson, 465 U.S. 886, at 895 (1984). The burden is on the fee applicant to produce satisfactory evidence that the rate requested is comparable to those prevailing in the relevant community. Blum, 465 U.S. at 895, n. 11.

Documentation to show the reasonableness of an hourly rate include the following: an affidavit stating that the requested rate is the attorney's normal billing rate, a detailed affidavit of another attorney in the community familiar with prevailing community rates for attorneys of comparable experience and expertise, a resume, a list of cases handled, or a list of comparable cases where a similar rate was accepted. EEO MD-110, at Ch. 11 § VI.G.

The AJ found Attorney 1 was entitled to a reasonable hourly rate of \$385 and Attorney 2 was entitled to a reasonable hourly rate of \$485. Upon review, we find Complainant has presented insufficient evidence to establish that the requested hourly rates for Attorney 1 and Attorney 2 are reasonable. Although not dispositive, we note Complainant did not provide a copy of the fee agreement in this case. In support of her requested rate, Attorney 1 provided her declaration, her resume, a state court opinion and a declaration from Attorney X in another case. In her declaration, Attorney 1 stated that she began charging \$325 per hour in 2013, in 2017 her hourly rate increased to \$350, and in 2019, with 10 years of employment law experience, her hourly rate increased to \$385 per hour. Attorney 1 did not provide evidence that she received the requested rate of \$385 in other cases. However, Attorney 1 provided a copy of an April 24, 2015 decision from the Thurston County Superior Court awarding her a rate of \$285 per hour for work done in 2011 and at a rate of \$325 per hour for work done in January 2013. The Thurston County Superior Court also noted that Attorney 1 was awarded a rate of \$325 per hour for work she performed in a failure to accommodate disability case by the same court. In a December 2, 2015 declaration from Attorney X in a case from the U.S. District Court Western District of Washington at Seattle, Attorney X attested that Attorney 1's requested rate of \$325 per hour was reasonable based on his own experience with her and his knowledge of other lawyers with similar years of experience. We note in the fee petition submitted, Attorney 1 bills for hours from October 7, 2015 through January 7, 2020, all at the rate of \$385 per hour. Based upon our review of the record, we find the rate of \$325 per hour to be a reasonable rate in this case for Attorney 1.

Additionally, we find that Attorney 2 failed to support the requested rate of \$485 per hour. In his declaration Attorney 2 noted that he was "familiar with many lawyers at the top of my field in Seattle, including their litigation styles and reputations, as well as, in general terms, the rates they charge." Attorney 2 stated that the rates set by his law firm "are consistent with the market rates charged by experienced and skilled law firms in Seattle who handle these types of cases." He noted that "[w]e regularly charge hourly clients these same hourly rates as requested here. That is, we ask for and receive these rates." Further, Attorney 2 states his "billable rate is \$485 per hour." Attorney 2 does not identify any cases in which he received an award at the requested rate of \$485 per hour. However, we note in the December 2, 2015 declaration from Attorney X in a case from the U.S. District Court Western District of Washington at Seattle, Attorney X stated that he is familiar with Attorney 2's skill, knowledge, and experience and attested that Attorney 2's requested rate of \$425 per hour was reasonable. Based upon our review of the record, we find the rate of \$425 per hour to be a reasonable rate in this case for Attorney 2.

Hours Billed

A review of the attorney's fees petition shows that a total of 445.24 hours were billed (344.17 hours for Attorney 1 at a rate of \$385 per hour, 99.69 hours for Attorney 2 at a rate of \$485 per hour, and 1.38 hours for an unidentified person named "Sara" at a rate of \$400 per hour) for a total of \$169,580.06 in attorney's fees. Upon review, we find the AJ erred in awarding the full number of hours requested. We note that there is an entry on the fee petition on October 29, 2018 for someone named "Sara" for 1.38 hours at a rate of \$400 per hour. However, there is no indication who that person is, nor is there a declaration from this person. In addition, we note in her January 8, 2020 Complainant's Statement of Attorney's Fees and Costs, Complainant only requested attorney's fees for the work done by Attorney 1 and Attorney 2. Further, in Attorney 1's declaration, she stated that "[a]lthough several legal assistants and paralegals performed work on this case over the past three years, Complainant does not request fees for their time." Thus, 1.38 hours is excluded from the award of attorney's fees.

Attorney's fees may not be recovered for work on unsuccessful claims. Hensley, 461 U.S. at 434-35. Courts have held that 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." EEO MD-110, at Ch. 11 § VI.F (citing Hensley, 461 U.S. at 440).

In the present case, we find a reduction in the remaining hours billed is warranted given the billing at the full hourly rate for travel time² and the fact that Complainant did not prevail on the majority of her claims which we find were fractionable from the claim that the Agency violated the Rehabilitation Act's prohibition against the release of confidential medical information upon which she succeeded. Thus, we reduce the total hours billed by Attorney 1 and Attorney 2 by 75%. Specifically, from the 344.17 total hours billed by Attorney 1 we subtract 258.13 hours ($344.17 \times .75 = 258.13$) for a total award of 86.04 hours. As discussed above, we determine the reasonable hourly rate for Attorney 1 is \$325. Thus, Attorney 1 is awarded a total amount of \$27,963 in attorney's fees (86.04 hours x \$325 hourly rate). In addition, of the 99.68 total hours billed by Attorney 2 we subtract 74.76 hours ($99.68 \times .75 = 74.76$) for a total award of 24.92 hours. As discussed above we find the reasonable hourly rate for Attorney 2 is \$425.

² Commission decisions have found that an attorney's travel time is not compensable at an attorney's full reasonable hourly rate but is instead compensated at half the attorney's reasonable hourly rate. See Mica B. v. General Services Administration, EEOC Appeal Nos. 2019000424, 2019001054 (Aug. 12, 2020).

Thus, Attorney 2 is awarded a total of \$10,591 in attorney's fees (24.92 hours x \$425 hourly rate). Therefore, the total attorneys' fees awarded to Complainant is \$38,554 (\$27,963 + \$10,591).

Attorneys' Costs

A prevailing party is entitled to recovery of costs, including witness fees, transcript costs, and printing and copying costs. 29 C.F.R. § 1614.501(e)(2)(ii)(C). In addition, we have held that recoverable costs may include reasonable out-of-pocket expenses incurred by the attorney during the normal course of representation, such as costs associated with mileage, postage, telephone calls, and photocopying. Diaz v. Dep't of Justice, EEOC Appeal No. 0120101054 (Jul. 18, 2012) (citing Poquiz v. Dep't of Homeland Sec., EEOC Appeal No. 0720050098 (Apr. 10, 2008), request for recon. denied 0520080524 (Jun. 19, 2008)). We note the Agency does not raise a specific objection to the total costs claimed. Upon review, we find Complainant has provided sufficient documentation to support all of the costs claimed. Thus, we find the AJ properly awarded full costs in the amount of \$3,861.68.

CONCLUSION

We MODIFY the Agency's final order and direct the Agency to comply with this decision and the Order herein, which modifies the AJ's decision.

ORDER

To the extent it has not already done so, the Agency shall take the following action:

1. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$38,554 in attorney's fees.
2. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$3,861.68 in costs.

ATTORNEY'S FEES (H1016)

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

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).

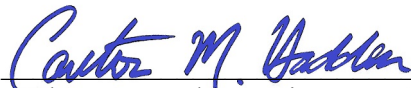
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

September 23, 2021

Date