



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

[REDACTED]  
Yvette H.<sup>1</sup>  
Complainant,

v.

Lauren M. McFerran,  
Chairman,  
National Labor Relations Board,  
Agency.

Appeal No. 2020003499, 2020003500

Hearing Nos. 570-2018-00837X, 570-2017-00763X

Agency Nos. HDQ-18-02, HDQ-16-13

**DECISION**

On May 20, 2020, the Agency filed two appeals from an EEOC Administrative Judge's (AJ) Decision on Attorney's Fees and Costs, dated May 1, 2020, pursuant to 29 C.F.R. § 1614.403. The decision concerned a February 25, 2020 settlement agreement executed to resolve Complainant's two equal employment opportunity (EEO) complaints asserting violations 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. The Commission may, in its discretion, consolidate two or more complaints of discrimination concerning the same complainant. See EEOC Regulation 29 C.F.R. § 1614.606. Accordingly, the Commission exercises its discretion to consolidate the aforementioned cases herein. For the following reasons, the Commission REVERSES the Agency's final order.

**ISSUES PRESENTED**

The issue presented is whether the AJ properly determined the amount of attorney's fees and costs to which Complainant is entitled.

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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.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Financial Analyst at the Agency's facility in Washington, D.C. On September 26, 2016, and October 30, 2017, Complainant filed two formal complaints of discrimination alleging that the Agency subjected her to a hostile work environment and discriminated against her on the bases of race (African-American), sex (female), religion (Christian), disability (mental) and reprisal for prior protected EEO activity. Following an investigation into both complaints, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an AJ. Complainant timely requested a hearing. While the matter was pending with the AJ, on February 25, 2020, the parties entering into a settlement agreement.

The settlement agreement stated that the Agency would pay Complainant a lump sum of \$40,000 and restore 580 hours of leave to Complainant as sick leave. Additionally, the settlement agreement stated that the AJ would determine the amount of reasonable attorneys' fees and costs, which would not exceed \$85,000.

On March 26, 2020, Complainant submitted a detailed fee petition seeking \$84,690.50<sup>2</sup> in attorney's fees<sup>3</sup> and \$2,240.68 in costs. On April 27, 2020, the Agency responded to Complainant's fee petition, arguing: 1) that Complainant was not a "prevailing party" entitled to fees and costs; and 2) even if Complainant were entitled to attorney's fees and costs, her fees should be significantly reduced to \$30,692.60.

On May 1, 2020, the AJ issued an Order of Dismissal dismissing the complaints with prejudice pursuant to the executed February 25, 2020 settlement agreement. That same day, the AJ issued a Decision on Attorney's Fees and Costs. The AJ noted that Complainant was considered a prevailing party for the purposes of awarding attorney's fees and costs because Complainant was able to obtain measures of relief (lump sum payment and leave restoration) as reflected in the agreement. The AJ considered reductions from Complainant's originally sought amount of \$86,252.90. After a review of the parties' filings, the AJ determined that Complainant was entitled to \$64,021.09 in reasonable attorney's fees and \$2,240.68 in costs.

On May 20, 2020, the Agency issued its final decision stating that it would not adopt or implement the AJ's May 1, 2020 Decision on Attorney's Fees and Costs, pursuant to 29 C.F.R. § 1614.110(a).

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<sup>2</sup> The AJ mistakenly stated the requested amount as \$84,690.51, the difference of one cent.

<sup>3</sup> Complainant's attorney noted that total fees amounted to \$86,252.90, but that she would abide by the \$85,000 limit. Accordingly, the fee petition noted that 4.2 hours worked on the matter were excluded. This reduction, of \$1,562.40 brought the total requested to \$84,690.50.

### CONTENTIONS ON APPEAL

On appeal, the Agency asserts that the AJ's decision was inconsistent with Commission case law. The Agency noted that the AJ viewed the \$40,000 lump sum as a form of compensatory damages that indicated that Complainant was a prevailing party. The Agency argues that the lump sum was not earmarked as compensatory damages and was merely a product of settlement negotiations that did not indicate that Complainant prevailed on any claims. The Agency requests that the Commission find that the AJ erred in his calculations and award no fees, or alternatively award Complainant \$30,692.62 in attorney's fees. The Agency did not contest the costs awarded.

In response, Complainant asserts that the AJ's May 1, 2020 Decision was appropriate. Complainant does not contest the AJ's award of \$64,021.09 in reasonable attorney's fees and \$2,240.68 in costs. However, Complainant seeks an additional \$4,511.40 in reasonable attorney's fees for responding to the Agency's May 20, 2020 appeal.

### 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 (EEO MD-110) at Chap. 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

#### *Attorneys' Fees*

The Commission's regulations authorize the award of reasonable attorney's fees and costs to a prevailing complainant. 29 C.F.R. § 1614.501(e); see also EEO MD-110 at Chap. 11, § I. Fee awards are typically calculated by multiplying the number of hours reasonably expended times a reasonable hourly rate, an amount also known as a lodestar. See 29 C.F.R. § 1614.501(e)(ii)(B); Blum v. Stenson, 465 U.S. 886, 899 (1984); Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

All hours reasonably spent in processing the complaint are compensable, but the number of hours should not include excessive, redundant or otherwise unnecessary hours. EEO MD-110 at Chap. 11, § VI. F. A reasonable hourly rate is based on prevailing market rates in the relevant community for attorneys of similar experience in similar cases. Id. An application for attorney's fees must include a verified statement of attorney's fees accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. Id.

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 at Chap. 11, §VI. F. 1. 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 Chap. 11, § VI. F. 2.

The Commission has repeatedly held that a complainant who prevails through a negotiated settlement is entitled to attorney's fees and costs under the same standards as any other prevailing party. Miller v. U.S. Postal Serv., EEO Appeal No. 0120092915 (Feb. 18, 2010) (citing to Cerny v. Dep't of the Army, EEO Appeal No. 01930575 (Oct. 19, 1994)). To be considered a "prevailing party," a complainant must obtain at least some relief on her claim resulting in a material alteration of the relationship between the parties. Id. Here, Complainant was able to obtain \$40,000 as a lump sum, and restoration of 580 hours of sick leave valued at approximately \$24,000. Accordingly, Complainant has obtained a measure of relief entitling her to be considered a "prevailing party" for the purposes of an award of attorney's fees and costs. Id.

#### *Pre-complaint*

EEOC Regulation 29 C.F.R. § 1614.501(e)(1)(iv) provides, in pertinent part, that agencies are not required to pay attorney's fees on services performed during the pre-complaint process. An attorney may reasonably expend up to two hours to determine whether to represent a complainant. Nenita S. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120151925 (May 23, 2017). Here, a review of the entries at issue reveal a minimal amount of time spent deciding on whether to offer representation to Complainant, approximately 1.7 hours. Thus, the AJ determined, and we agree, that the expenditure of 1.7 hours requested was reasonable. Accordingly, we will not reduce any pre-complaint hours.

#### *Duplicative, Excessive, or Vague Fees*

Regarding redundancy, excessiveness or vague requests, the Commission has held:

In determining the number of hours reasonably expended, the Commission recognizes that the attorney is not required to record in great detail the manner in which each minute of his time was expended. However, the attorney does have the burden of identifying the subject matters in which he spent his time, which can be documented by submitting sufficiently detailed contemporaneous time records to ensure that the time spent was accurately recorded. Counsel for the

prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary.

Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998). In this matter, the Agency asserted that there was a list of alleged duplicative and excessive work completed in this matter. The total amount for all the excessive and duplicative tasks listed by the Agency was \$38,910.43. In order to remedy the excessive time spent by Complainant, the Agency requested a 50% reduction of \$19,455.22. The AJ agreed with the Agency, that a number of tasks were excessive, and reduced Complainant's fee request by \$19,455.22. Based on the record, we find no reason to disturb the AJ's reduction for excessive hours.

Additionally, the Agency requested a reduction of \$1,214.20 for work completed that was vague or unrelated to Complainant's EEO litigation. For example, tasks that were labeled "unreasonable deadlines," "standards of conduct," and "FOIA requests." The AJ also agreed that these tasks were not related to Complainant's EEO complaint and reduced the total by another \$1,214.20. Again, we find no reason to alter the AJ's determination.

Although the Agency requested a reduction of 2.2. hours for time spent by other listed attorneys, the AJ declined to make the further reduction. The Agency argued that those attorneys simply served as mentors and failed to substantively contribute to the complaint. However, the record demonstrates that those senior attorneys provided experience and expertise when discussing settlement strategies that were pertinent to Complainant's successful settlement negotiations. Therefore, we agree with the AJ that Complainant clearly demonstrated that the time expended by the senior attorneys was pertinent to the resulting settlement agreement.

### *Costs*

A prevailing complainant is entitled to recovery of her costs in prosecuting the claims on which she prevailed. These include copying, postage, travel expenses, and so forth. 29 C.F.R. § 1614.501 (e)(2)(ii)(C). Reasonable costs incurred directly by the prevailing complainant are compensable. Costs must be proved in the same manner as fees, and the complainant must provide documentation, such as bills or receipts. See EEO MD-110 Chap. 11, § VI.E.

In the instant case, there is no dispute regarding the costs incurred. As such, we grant Complainant's request for reimbursement \$2,240.68 in costs.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REMAND the matter to the Agency in order to comply with the Order below.

### ORDER

The Agency is ORDERED to take the following remedial action:

1. Within **sixty (60) calendar days** of the date this decision becomes final, the Agency shall pay Complainant \$64,021.08 for reasonable attorney's fees and \$2,240.68 in costs as ordered by the AJ's May 1, 2020 Decision on Attorney's Fees and Costs.
2. Complainant is entitled to an award of reasonable attorney's fees incurred in the processing of this appeal. Complainant's 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 this decision becoming final. Within **sixty (60) calendar days** of the date of the attorney's verified statement, the Agency shall determine payment of reasonable attorney's fees for the time Complainant's attorney expended on the appeal.

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).

### 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 30, 2021

Date