



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Karolyn E.,<sup>1</sup>  
Complainant,

v.

Xavier Becerra,  
Secretary,  
Department of Health and Human Services  
(Office of the Secretary - Age Administration),  
Agency.

Appeal No. 2021003151

Hearing No. 570-2017-00623X

Agency No. HHS-OS-0073-2016

**DECISION**

Following its May 5, 2021, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. Specifically, the Agency requests that the Commission reduce the awarded attorney's fees and costs. For the following reasons, the Commission MODIFIES the Agency's final order.

**ISSUES PRESENTED**

The issues are whether substantial evidence supports the Administrative Judge's finding that the Agency retaliated against Complainant when it issued her a Reprimand and whether the awarded attorney's fees and costs should be reduced.

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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 Program Analyst at the Agency's Office of Medicare Hearings and Appeals in Falls Church, Virginia.

On July 7, 2016, Complainant's first-line supervisor (S1) (White, male) issued Complainant a Letter of Counseling (LOC) for inappropriate behavior in the workplace. S1 stated that he was informed that Complainant yelled at a coworker (CW1) for conducting a meeting in her office with another coworker (CW2), rather than a conference room, because CW2's presence in CW1's office made Complainant uncomfortable.<sup>2</sup> When CW1 responded that she would try to give Complainant advance notice of CW2's presence in the future, Complainant allegedly yelled that CW1 was being very inconsiderate and told her to get out of Complainant's office. S1 also noted instances when Complainant refused to follow direct orders. S1 stated that the notice was not a disciplinary action, but future conduct deficiencies could lead to disciplinary action. Report of Investigation (ROI) at 363-7. Complainant testified that after she received the LOC, she contacted an EEO counselor to report a hostile work environment. Hearing Transcript (HT) at 53.

Complainant stated that on August 10, 2016, she met with S1 to discuss her assignments. According to Complainant, S1 changed direction and gave her a short deadline on an assignment, which she did not believe could be met. Complainant stated that she immediately reached out to her second-line supervisor (S2) (White, female), informed her that the interaction with S1 was "combative and unproductive", and requested a reassignment. Complainant stated that she raised a hostile work environment, but S2 rebuffed her concerns and replied that Complainant should learn to work it out with S1. ROI at 179-80.

S1 and S2 stated that they received notification on August 12, 2016, that they had been named as responsible management officials in Complainant's EEO complaint. ROI at 281, 298.

The next day, on August 13, 2016, S2 sent Complainant an email memorializing their August 10<sup>th</sup> conversation. According to S2, from the outset, Complainant was very agitated and spoke in a raised voice. S2 found Complainant's response, to a supervisor communicating priorities and deadlines, to be "aggressive and highly disproportionate". When Complainant asserted that S2 was not taking her concerns seriously, S2 disagreed and explained that she differed with Complainant's assessment of the situation. In response, stated S2, Complainant became more aggressive, began yelling, and stated that she would take the matter to the Agency Secretary.

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<sup>2</sup> Complainant stated that she did "not feel safe" around CW2 after receiving an email from him on March 4, 2016, in which CW2 acknowledged giving Complainant the silent treatment and requested a fresh start from the "kitten experience." ROI at 207, 211. After Complainant adopted a kitten, she learned that she was allergic to cats and CW2 offered to take the kitten. Complainant stated that when she decided to keep the kitten, CW2 called her "emotional and unintelligent." ROI at 368-9.

S2 stated that she would not be threatened, to which Complainant replied, “it is not a threat, it is a promise.” S2 concluded that Complainant’s reaction was “highly hostile, unprofessional, and disproportionate,” and S2 would not tolerate being spoken to like that again. ROI at 387-9.

From August 15, 2016, through August 29, 2016, Complainant noted that she was out on sick leave due to an unrelated matter. ROI at 185. Upon her return, on August 29, 2016, S1 issued Complainant a Reprimand for discourteous behavior. Therein, S1 recounted the August 10, 2016 exchange. The Reprimand would be placed in Complainant’s Official Personnel File (OPF) for two years. ROI at 395-8.

On October 17, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African American) and sex (female) when:

1. (a) from March 2016 through the present, her supervisors subjected her to an ongoing hostile work environment (hyper-scrutiny, unfair demands, aggressive interaction, false accusations, and unmerited discipline); and (b) during the summer of 2016, her supervisors prevented her from taking a temporary assignment in the Office of the Secretary;<sup>3</sup> and
2. in August 2016, her supervisors issued her a Reprimand in reprisal for filing an informal EEO complaint for the instant case.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an EEOC AJ. Complainant timely requested a hearing. On February 11-12, 2020, the AJ held a hearing regarding claim 2. On April 13, 2020, the AJ issued a Notice of Decision Finding Agency Liability, finding that the preponderance of the evidence established the Agency discriminated against Complainant based on race and/or retaliation. Thereafter, on June 10, 2020, the AJ issued an Interim Decision on Liability and Relief, followed by a Decision on Liability and Relief Including Attorneys’ Fees and Costs on March 31, 2021.

The AJ determined that Complainant established a prima facie case of reprisal when she was issued a Reprimand on August 29, 2016, which was sufficiently close in time to when management officials learned of her EEO activity on August 12, 2016. Further, the AJ found that the Agency proffered legitimate, nondiscriminatory reasons for its action, noting that management issued the Reprimand because of Complainant’s discourteous conduct during a telephone conversation with S2 on August 10, 2016.

However, the AJ was not persuaded by the Agency’s proffered reasons and instead concluded that the action was retaliatory.

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<sup>3</sup> In her Pre-Hearing Report, submitted on November 8, 2019, Complainant withdrew claim 1(a). On February 4, 2020, she withdrew claim 1(b).

Complainant and S2 previously had a close relationship, observed the AJ, where Complainant would often complain that S2 was not doing enough to address Complainant's issues with S1. In the AJ's view, their rapport changed, on August 10, 2016, when Complainant commented that she would take her concerns to the Secretary. S2 felt threatened by Complainant implicating her as a responsible management official in Complainant's EEO complaint and potential complaint to the Secretary, reasoned the AJ.

While the Agency presented Complainant's conduct on August 10, 2016, as disturbing and requiring an urgent response, the AJ noted that S2 did not schedule a follow-up meeting with Complainant the next day. The AJ also found that S2's testimony was not credible or persuasive when she stated that she did not type up her recollection of their conversation until days later, on August 13, 2016, due to competing work demands, computer problems, and an upcoming family vacation. Instead, the AJ determined that S2 was not "threatened," as long as Complainant's complaints were not about her.

The AJ concluded that the Reprimand was issued for the purpose of chilling Complainant's EEO activity. According to the AJ, it was "illogical" that S1 did not place the Reprimand in Complainant's OPF, despite specific language that it would remain in Complainant's OPF for two years. Additionally, the AJ noted S1's efforts to disguise the August 29<sup>th</sup> meeting with Complainant as a one-on-one to catch her up since she had been out of the office, instead of a meeting to discuss the Reprimand. In an email scheduling a July meeting, S1 explained that it was to discuss Complainant's interaction with CW1.

Consequently, the AJ awarded Complainant restoration of 35.5 hours of annual leave, 36.5 hours of leave without pay, and 204 hours of sick leave; \$615.00 in pecuniary compensatory damages; and \$7,500 in non-pecuniary compensatory damages. The AJ also ordered at least eight hours of EEO training for the responsible management officials, as well as the posting of a notice regarding the finding of retaliation.

Complainant requested \$103,536.60 in attorneys' fees and \$2,521.40 in costs. The AJ reduced the attorney's fees award, finding some charges were unsupported. For example, the AJ determined that Complainant did not provide documentation in support of charges for paralegal work. Moreover, other hours were found to be excessive, duplicative, or for clerical work. Noting that attorney's fees are not recoverable for unsuccessful claims, the AJ found it was appropriate to compute fees based on the degree of success. Here, while acknowledging that the claims shared a common core of facts and related legal theories, the AJ noted that Complainant only succeeded in her reprisal claim and therefore it was appropriate to deduct the time attributed to work on claim 1(b). The AJ concluded that Complainant's representative was due \$86,094.60 in fees and \$2,521.40 in costs.

The Agency issued a final order rejecting the AJ's decision and filed the instant appeal. Specifically, the Agency appealed the AJ's finding, that Complainant proved she was subjected to retaliation when the Agency issued her a Reprimand, and the award of attorneys' fees and costs.<sup>4</sup> Complainant opposed the Agency's appeal.

### CONTENTIONS ON APPEAL

#### *Agency's Contentions*

On appeal, the Agency argues that the AJ's finding should be reversed because Complainant did not engage in EEO activity, on August 10, 2016, and therefore was not subjected to retaliation. According to the Agency, on August 10, 2016, Complainant did not disclose or oppose discriminatory treatment. Rather, she simply raised concerns about S1's personality and/or management style, without even implying that S1 was discriminating against her because of her protected classes.

The Agency states that the AJ did not separately analyze what effect learning of Complainant's EEO complaint had on S1 and S2, aside from noting that it occurred between Complainant's misconduct and S2's memorialization of the August 10, 2016 meeting. Moreover, the Agency contends that S2 initiated disciplinary action against Complainant on August 10, 2016, during a discussion of Complainant's misconduct with Complainant's third-line supervisor (S3) and a Labor and Employment Relations representative (LERR) where they considered issuing a Letter of Reprimand, days before S1 learned of Complainant's protected activity on August 12, 2016.

While the AJ stated that she did not find S2's testimony "credible or persuasive", the Agency argues that she did not base this determination on S2's demeanor during her testimony. Rather, the AJ relied upon the content of S2's testimony at the hearing; specifically, the testimony regarding what prompted S2 to memorialize her August 10, 2016 conversation with Complainant. The Agency notes that, where credibility determinations are based on the content of witness testimony, the Commission may assess the evidence for itself, and does not need to defer to the AJ's credibility determinations, citing Elda S. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120182544 (Aug. 6, 2020).

The Agency asserts that the AJ's finding of pretext for retaliation relies on nothing more than the AJ's substitution of her own business judgment for that of the Agency. For example, the AJ indicated that, on August 11, 2016, S2 should have recalled Complainant from telework to discuss the matter. However, Complainant would not have learned that she was to report to the office until August 11, 2016, after already starting her workday at her alternate duty station.

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<sup>4</sup> We note that the Commission has the discretion to review only those issues specifically raised in an appeal. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 9, § IV.A.3 (Aug. 5, 2015). Therefore, because the Agency only challenges the AJ's finding of retaliation and the awarded attorneys' fees and costs, this appeal is limited to those issues.

In another instance, argues the Agency, the AJ found that S2 should have balanced her workload differently to prioritize memorializing the August 10, 2016 meeting. The AJ also stated that S1 should have provided Complainant with advance notice of the meeting and placed the Reprimand in Complainant's OPF.

The Agency argues that neither the record nor the AJ's decision reveal any contradictory or inconsistent testimony from Agency witnesses; irrationality or implausibility in the Agency's explanation for its actions; retaliatory statements; preferential treatment of similarly situated employees; deviations from Agency policies or procedures; or any other form of pretext for retaliation. In the Agency's view, the AJ's reasoning contradicts the well-established principle that an AJ should focus on the Agency's motivation for the action, and not substitute her judgment for the Agency's regarding how a situation should be handled. As such, the Agency requests that the Commission reverse the AJ's finding of liability.

Alternatively, the Agency argues that the attorneys' fees award should be reduced by 66% due to Complainant's limited degree of success. The Agency notes that, while the AJ took some deductions, she failed to exclude costs that pertained solely to a claim on which Complainant did not prevail. Complainant achieved only limited success because she withdrew two of her three claims prior to the hearing, and the AJ found no race or sex discrimination with respect to claim 2. Instead, asserts the Agency, Complainant only prevailed on her claim that the Reprimand was retaliatory, a matter that only constitutes, at most, one third of her complaint. Further, the Agency argues that the successful Reprimand claim is fractionable because it is a discrete event that involves facts and legal theories that are distinct from the other two claims.

With regard to costs, the Agency contends that Complainant included deposition expenses for witnesses who provided testimony for claim 1(b) and such costs, totaling \$490.20, should be deducted.

### *Complainant's Contentions*

Through her attorney, Complainant counters that substantial evidence supports the AJ's determination that learning Complainant initiated an EEO complaint, from the EEO Counselor's notice, was a motivating factor in the issuance of the Reprimand. Complainant asserts that, while the Agency argued that Complainant did not engage in protected opposition on August 10, 2016, neither S1 nor S2 took any steps to discipline Complainant prior to learning of her EEO activity on August 12, 2016. Complainant reiterates that she established a prima facie case of retaliation for the Reprimand with substantial evidence.

Complainant contends that the AJ did not substitute her own judgment for the Agency's but found that S1 and S2 retaliated against Complainant after assessing the credibility of all the witnesses. Further, argues Complainant, the AJ's credibility findings are consistent with the record. The AJ correctly rejected the Agency's argument that S2 began considering the issuance of discipline on August 10, 2016, states Complainant. Specifically, Complainant argues that S2 did not inform S3 of inappropriate conduct by Complainant or a desire to discipline her.

In Complainant's opinion, the AJ's finding of pretext was based on credibility determinations, inconsistencies in the Agency's arguments, and was supported by substantial evidence. For example, S1 did not ask for Complainant's account of the August 10<sup>th</sup> meeting with S2. Had he decided to move forward with discipline prior to learning of Complainant's EEO activity on August 12<sup>th</sup>, argues Complainant, S1 would have engaged in fact-finding with Complainant on August 10 or 11, 2016. Complainant asserts that the AJ properly focused her analysis on the management officials' motivation for issuing the Reprimand and that the finding of pretext is supported by substantial evidence.

Regarding attorneys' fees and costs, Complainant contends that the AJ did not abuse her discretion and the award should be affirmed. Complainant states that the AJ already reduced the attorneys' fees by approximately \$20,000.00, and that the Commission should reject the Agency's request for further reduction.

Complainant asserts that claim 1(a) cannot be considered "distinct in all respects" from the successful claim and, thus, is not fractionable. Complainant states that the hostile work environment claim also involved the July 2016 LOC, which was addressed at the hearing with both parties examining CW1 about her July 2016 interaction with Complainant. This examination, argues Complainant, was foundational to the reasonableness of the Reprimand. Further, Complainant notes, the Agency claimed that it addressed the counseling "to establish that a letter of Reprimand was the appropriate level of discipline for Complainant's actions described therein". The AJ's decision discussed the counseling multiple times, states Complainant, as it was relevant to the successful claim. Complainant argues that the time spent litigating claim 1(a) cannot be considered "fractionable" from the successful claim (claim 2).

### ANALYSIS AND FINDINGS

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

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015). In this case, the AJ found Complainant's testimony credible and S2's testimony not credible. On appeal, the Agency argues that the AJ based her determination on the content of S2's testimony at the hearing, thereby allowing the Commission to assess the evidence for itself without deferring to the AJ's credibility determinations.

However, the Agency has not presented any documents or other objective evidence that contradicts any testimony, nor shown that the testimony so lacks in credibility that a reasonable fact finder would not credit it. As such, we find no reason to disturb the AJ's credibility determinations.

### *Disparate Treatment*

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Service v. Aikens, 460 U.S. 711, 715-716 (1983).

We find that substantial evidence supports the AJ's determination that Complainant established a prima facie case of retaliation. A complainant may establish a prima facie case of reprisal by showing that: (1) she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). On appeal, the Agency argues that Complainant did not engage in EEO activity because she did not disclose or oppose discriminatory treatment on August 10, 2016. However, it is undisputed that Complainant engaged in protected EEO activity when she initiated the instant EEO complaint, and S1 and S2 confirmed that they learned of Complainant's EEO complaint on August 12, 2016. ROI at 281, 298. Complainant was subsequently subjected to adverse action when the Agency issued her a Reprimand on August 29, 2016.

When establishing a prima facie case of retaliation under Title VII, close temporal proximity is sufficient to infer a causal nexus between an employee's protected activity and an adverse action on the part of an employer. See Clark County School Dist. v. Breeden, 532 U.S. 268, 273 (2001) (noting that "cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close'").



In this case, the Agency issued Complainant the Reprimand 17 days after learning of her EEO activity and we find that this close temporal proximity is sufficient to infer a causal nexus. Accordingly, we find that Complainant established a prima facie case of reprisal.

It is undisputed that the Agency proffered legitimate, nondiscriminatory reasons for issuing the Reprimand. S1 testified that he issued the Reprimand because S2 reported to him that Complainant yelled and was discourteous to her. Since Complainant had previously been counseled for similar behavior, the next appropriate step in the disciplinary process was a reprimand. HT at 243.

The Agency argues that the AJ erred by substituting her own judgment for the Agency's business reasons for issuing the Reprimand. However, we find that the AJ did not substitute her own judgment; rather, the AJ found the management officials' proffered reasons were not worthy of belief. For example, the AJ noted that while the Agency represented that Complainant's behavior was disturbing and required an urgent response, S2 did not schedule a timely follow-up meeting or memorialize their conversation until after she was notified of Complainant's EEO activity. The AJ also observed that neither S1 nor S2 completed the employment action soon after the incident or placed the Reprimand in Complainant's OPF. Consequently, the AJ determined that the Agency's actions were "illogical" and management's responses were not persuasive.

We find that substantial evidence supports the AJ's determination that the Agency's proffered reasons were pretexts for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

S2 testified that when she spoke with LERR on August 10, 2016, he indicated that a reprimand would be the appropriate next step. HT at 172. However, we find that this testimony is inconsistent with other evidence. The record shows that S2 emailed S3 on August 10, 2016, to inform her of a "brewing situation" due to an employee's request for a reassignment. Hearing Exhibit 35. S2 also emailed LERR on August 10, 2016, writing that Complainant raised issues regarding S1's deadlines, prioritization of work, and holding Complainant accountable. S2 explained to LERR that she wanted to "respond in writing to the concerns raised on the call." Hearing Exhibit 36. At the end of the day, on August 10, 2016, S2 sent S3 a follow-up email to inform her that she was unable to schedule a meeting with Complainant for the next day because she had computer issues and Complainant had already finished her workday. Hearing Exhibit 34.

We find that the email evidence shows that at the end of the day on August 10, 2016, after S1 spoke with S3 and LERR, her plan was to conduct an in-person discussion regarding Complainant's behavior, and there is no mention of a reprimand.

S2 also provided contradictory testimony that LERR<sup>5</sup> recommended that she meet with Complainant in-person to discuss her conduct, but she did not recall if she met with Complainant prior to the issuance of the Reprimand. HT at 164-5, 190. We find that S2's inconsistent testimony about LERR's recommended next step, in addition to the email evidence showing that S2 had no plans to issue a reprimand to Complainant following her discussion with LERR on August 10, 2016, demonstrates pretext for discrimination.

In addition, we agree with the AJ that S1's decision to not place the Reprimand in Complainant's OPF is evidence of pretext for discrimination. An Agency's departure from, or failure to apply its policies, without explanation, can be probative of pretext. See Carl M. v. Consumer Financial Protection Bureau, EEOC Appeal No. 0120160005 (Nov. 16, 2017). The Agency's policy stipulates that reprimands shall be maintained in an employee's OPF for a determined length of time not to exceed two years. ROI at 414. Here, S1 testified that he did not place the Reprimand into Complainant's OPF nor contact Human Resources to initiate the process. HT at 310-11. We note that S1 did not offer an explanation for his deviation from the Agency's policy of including a reprimand to the OPF, additional indication of pretext.

The AJ determined that the Reprimand was intended to chill Complainant's EEO activity. EEOC Regulation 29 C.F.R. § 1614.101(b) provides that no person shall be subject to retaliation for opposing any unlawful discriminatory practice or for participating in any stage of the EEO complaint process. The statutory anti-retaliation provisions prohibit any materially adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006). Although petty slights and trivial annoyances are not actionable, adverse actions such as reprimands, threats, negative evaluations, and harassment are actionable. Enforcement Guidance on Retaliation at II.B. We find that the issuance of the Reprimand was an adverse action that would reasonably deter a person from engaging in protected activity. As such, we REVERSE the Agency's final order rejecting the AJ's finding of retaliation.

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

By federal regulation, an 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).

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<sup>5</sup> LERR did not testify at the hearing.

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, Chap. 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.

On appeal, the Agency argues the Commission should make additional reductions to the AJ's award of attorney's fees. The First Circuit in Coutin v. Youna & Rubicam, 124 F.3d 331, 337 (1st Cir. 1997), provides guidance as to the appropriate standard of review for an AJ's determination of attorney's fees:

We review fee awards deferentially, according substantial respect to the trial court's informed discretion. See Brewster v. Dukakis, 3 F.3d 488, 492 (1st Cir. 1993). We will disturb such an award only for mistake of law or abuse of discretion. See United States v. Metropolitan Dist. Comm'n, 847 F.2d 12, 14 (1st Cir. 1988). In this regard, an abuse of discretion occurs "when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." Foster v. Mydas Assocs., Inc., 943 F.2d 139, 143 (1st Cir. 1991) [internal quotation marks and citations omitted], 124 F.3d at 336.

Therefore, in this appeal, the Commission will determine if the AJ erred as a matter of law or abused her discretion.

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 Chap. 11 § VI.F (citing Hensley, 461 U.S. at 440).

The Agency asserts that the attorney's fees should be reduced by 66% due to the limited degree of success. The Agency argues that the successful retaliatory Reprimand claim is fractionable because it is a discrete event that involves different facts and legal theories from Complainant's other two claims, and the AJ erred when she held that "the claims in this case share a common core of facts and are based on related legal theories."

However, we find that the AJ did not err because the alleged harassment was related to the issued Reprimand. Specifically, Complainant harassment's claim included the discussion with S1 about Complainant's interaction with CW1, the LOC, and Complainant's conversation with S1 on August 10, 2016. ROI at 181-2.

We find that these prior events are not truly fractionable from the Reprimand because Complainant's conversation with S1 on August 10, 2016, was the trigger for Complainant's conversation with S2 on August 10, 2016. In addition, S1 testified that he and S2 wanted to discipline Complainant because she was previously counseled for discourteous conduct, the LOC based on Complainant's interaction with CW1. HT at 263. S1 further testified that S2's account of Complainant's behavior during the August 10<sup>th</sup> call was "consistent with what [he] already knew about" Complainant, and they decided to move forward with the Reprimand. HT at 265-6.

While the Reprimand was a discrete act, it did not involve different facts from Complainant's harassment claim. We find that the AJ properly excluded the attorney's fees for the unrelated events of claim 1(b) and did not err or abuse her discretion regarding the attorneys' fees. The Agency has not shown that a reduction of 66% is warranted. As such, we REVERSE the Agency's final order rejecting the AJ's award of \$86,094.60 in attorney's fees.

Regarding costs, the Agency states that \$490.20, in deposition costs for witnesses related to claim 1(b), should be deducted. Complainant did not dispute the Agency's contention. Accordingly, we find that a deduction for these depositions is appropriate and MODIFY the awarded costs from \$2,521.40 to \$2,031.20.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that substantial evidence supports the AJ's finding that the Agency retaliated against Complainant when it issued her a Reprimand, as well as the AJ's determination of attorney's fees. However, we find that the awarded costs should be reduced to remove charges related to a withdrawn claim. Therefore, we MODIFY the Agency's final order and we ORDER the Agency to provide the remedies as specified in the Order herein.

### ORDER

The Agency is ordered to take the following remedial action:

1. Within 60 days of the date this decision is issued, the Agency will rescind the Reprimand issued on August 29, 2016.

2. Within 60 days of the date this decision is issued, the Agency shall restore 35.5 hours of annual leave, 36.5 hours of leave without pay, and 204 hours of sick leave; and pay Complainant \$615.00 for pecuniary compensatory damages, \$7,500 for non-pecuniary compensatory damages, \$86,094.60 for attorneys' fees, and \$2,031.20 for costs.
3. After the Agency has provided Complainant with the non-pecuniary compensatory award, Complainant shall have sixty (60) calendar days following the end of the tax year in which the final payment is received to calculate the adverse tax consequences of any lump sum award, if any, and notify the Agency. Following receipt of Complainant's calculations, the Agency shall have sixty (60) days to issue Complainant a check compensating her for any adverse tax consequences established, with a written explanation for any amount claimed but not paid.
4. Within 90 days of the date this decision is issued, the Agency shall provide eight (8) hours of interactive EEO training to S1 and S2, with an emphasis on the Agency's obligation to not retaliate against employees who have engaged in protected EEO activity.
5. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against S1 and S2. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employment, then the Agency shall furnish documentation of their departure date(s).
6. Within 30 days of the date this decision is issued, the Agency shall post notices in accordance with the paragraph below.

POSTING ORDER (G0617)

The Agency is ordered to post at its Office of Medicare Hearings and Appeals in Falls Church, Virginia copies of the attached notice. Copies of the notices, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

### ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency.

The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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

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

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

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

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0920)

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

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

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

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

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

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

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint.

If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



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Carlton M. Hadden, Director  
Office of Federal Operations

October 19, 2021  
Date