



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Carol P.,¹
Complainant,

v.

Isabel Casillas Guzman,
Administrator,
Small Business Administration,
Agency.

Appeal No. 2021004687

Hearing No. 410-2019-00014X

Agency No. 10-18-008

DECISION

Following its August 23, 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 accepts an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. but requests that the Commission affirm its rejection of the AJ's award of nonpecuniary damages and attorney's fees. Specifically, the Agency argues that the AJ's award of \$50,000 in nonpecuniary damages is excessive and that the AJ improperly awarded \$77,800 in attorney's fees. For the following reasons, the Commission AFFIRMS in PART and REVERSES in part the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Customer Service Representative (CSR), GS-1101-09, at the Agency's Office of Disaster Assistance, Field Operations Center – East in Atlanta, Georgia. As a CSR, Complainant was dispatched to declared disaster zones in the United States.

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 November 30, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of disability (chronic osteomyelitis) and in reprisal for prior protected EEO activity when, on October 27, 2017, the Agency terminated her employment. When the Agency terminated Complainant's employment, she was working in a disaster zone in Bonita Springs, Florida.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on April 27 and 28, 2021, and issued a decision on July 13, 2021.

In his decision, the AJ found that, at the time of Complainant's initial hire, Complainant was in a term intermittent appointment, which meant that the Agency could activate Complainant into pay status whenever her services were needed, and deactivate Complainant when her services were no longer needed. Complainant's intermittent appointment could be extended for up to four years, until October 5, 2017. At that time, the Agency wished to keep Complainant on board to service a disaster in Bonita Springs and converted her into a Schedule A temporary appointment. The appointment was scheduled to end on March 31, 2018 but could be extended indefinitely. The AJ noted that a crucial difference between Complainant's Schedule A appointment and her intermittent appointment was that the Agency could not deactivate Complainant during her Schedule A appointment.

Shortly after Complainant's conversion, on October 19, 2017, Complainant's supervisor (S1) notified the team leads that, "if any CSR refuses a work assignment for any issue, they will be released and sent home." On October 26, 2017, the Agency assigned Complainant to a disaster zone in the U.S. Virgin Islands. Complainant's team lead (Team Lead) informed Complainant of her belief that Agency employees were being required to live on cruise or military ships and were required to regularly carry their luggage between ships and work sites. Based on this information, Complainant was concerned that her physical limitations would make it difficult for her to carry out the assignment. Complainant was also concerned she would not be able to access appropriate medical treatment for her chronic osteomyelitis symptoms. Complainant declined the assignment.

Team Lead notified S1 and Complainant's second-level supervisor (S2) of Complainant's limitations and provided management with a screenshot of Complainant's personnel file that indicated Complainant had a medical condition. Team Lead asked that Complainant remain at Bonita Springs. In response, S1 and S2 informed Team Lead that Complainant had not been previously provided reasonable accommodations and therefore the Agency could not deviate from its policy of sending CSRs home if they refused an assignment. Due to the nature of Complainant's Schedule A appointment, the Agency terminated Complainant's employment.

The parties stipulated that Complainant was a qualified individual with a disability. Following the hearing, the AJ concluded that Team Lead's email to S1 and S2 constituted a request for reasonable accommodation, and that the Agency violated the Rehabilitation Act because it failed to consider possible accommodations for Complainant.

The AJ pointed out that the record contained testimony from S2 stating that if Complainant was capable of performing her duties at Bonita Springs, she was also capable of performing the same duties in the U.S. Virgin Islands. As a result, the AJ found that the Agency had denied Complainant reasonable accommodation in violation of the Rehabilitation Act.

Turning to remedies, the AJ noted that Complainant's testimony did not warrant reinstatement to the Agency, but nevertheless ordered the Agency to modify Complainant's official personnel file to reflect that Complainant satisfied the term of her Schedule A appointment. The AJ ordered the Agency to provide Complainant with back pay for each full pay period between October 26, 2017, through March 31, 2018, and ordered the Agency to determine "which of the FOC-East employees employed through a Schedule A temporary appointment worked the most hours during the pay period and pay Complainant for the number of hours that employee worked at the rate Complainant would have been paid had she worked that number of hours during the applicable pay period" and take any appropriate deductions. (citing Cotton v. Dep't of the Air Force, EEOC Appeal No. 01932096 (Apr. 21, 1994)). The AJ further ordered the Agency to compensate Complainant for any additional taxes she incurs as a result of receiving back pay as a lump sum payment.

Regarding compensatory damages, the AJ determined that Complainant failed to establish that she was entitled to pecuniary compensatory damages. Regarding non-pecuniary compensatory damages, the AJ deemed credible Complainant's testimony and that of her son and husband, based on their demeanor and the plausibility of their accounts and determined that she was entitled to \$50,000. In determining that a compensatory damages award of \$50,000 was warranted, the AJ credited Complainant's testimony that she was emotionally devastated, the Agency's actions exacerbated her high blood pressure which required additional medication, and that Complainant was unable to sleep and was prescribed Ambien. Further, Complainant and her family encountered financial difficulty and had a hard time paying their mortgage, car note, and water bill. Complainant and her husband encountered marital difficulty and underwent marital counseling. Complainant's son testified that Complainant demonstrated self-doubt and mood swings that he had not seen prior to her termination, and that these changes continued. Further, Complainant was not as joyful. Complainant's husband testified that she rarely cried prior to her termination, but since then, she sobs frequently. Complainant's husband corroborated their son's testimony that she now exhibits sudden mood changes and is still emotionally affected by the termination. As a result, the AJ determined that Complainant was entitled to \$50,000.00 in non-pecuniary compensatory damages and cited to Harvey D. v. Dep't of State, EEOC Appeal No. 0120171079 (Aug. 23, 2018) in support.

The AJ invited Complainant to submit a petition for attorney's fees and heard the Agency's opposition. On July 13, 2021, the AJ issued a decision awarding Complainant \$77,800.00 in attorney's fees. The AJ first noted that the Agency did not contest the hourly rates requested by Complainant's attorneys, and then rejected the vast majority of the Agency's arguments against fees. First, the AJ rejected the Agency's contention that Complainant's attorneys engaged in duplicative billing. The AJ noted that an attorney's review of another's work product can enhance the presentation of a client's case and looked to the overall number of hours expended, which he determined were well within the bounds of reasonableness.

The AJ then rejected the Agency's argument that the case was not sufficiently complex to require two attorneys to attend the hearing on Complainant's behalf. The AJ succinctly reasoned that the Agency saw fit to send two of their own attorneys as well. The AJ largely disagreed with the Agency's argument that the billing entries were not sufficiently detailed and too vague. The AJ did agree with the Agency that three time entries dated February 16, 2019, February 22, 2019, and November 9, 2019, were dates on which time expended on Complainant's case would be unreasonable. Thus, the AJ disallowed a total of two hours and 45 minutes of time.

The Agency subsequently issued a final order affirming the AJ's finding of discrimination but rejecting the compensatory damage and attorney's fees awards.

CONTENTIONS ON APPEAL

On appeal, the Agency does not dispute the AJ's finding of discrimination and focuses its appellate argument on its belief that the AJ abused his discretion in awarding \$50,000.00 in compensatory damages and \$77,800.00 in attorney's fees. The Agency first criticizes the AJ for citing to a single case to support \$50,000.00 in compensatory damages, and points to other Commission decisions awarding far less. The Agency suggests that the testimony given at the hearing supporting Complainant's claim to damages did not support the damages award and contends that several of her symptoms either predated the Agency's actions or were not relevant to the Agency's actions.

The Agency maintains its position that Complainant's two attorneys performed the same service and therefore engaged in duplicative billing. The Agency refers to 18 entries in the fee petition, totaling 25 hours and 15 minutes that consist of discussions and meetings between the two attorneys, and to three entries totaling three hours and 45 minutes that consisted of Complainant's senior attorney reviewing drafts of a junior attorney's work. The Agency contends the AJ erred by citing only one case to support his position that the attorneys did not engage in duplicative billing, but cites only a single case of its own to support the proposition that "duplicative services and supervisory review of an associate's services by a partner are not compensated." Further, the Agency contends that the time spent by a junior attorney to draft Complainant's response to the Agency's motion for summary judgment was excessive and unreasonable, and that the AJ provided no analysis or rationale for approving the work. To this end, the Agency continues its argument that the attorney's fees petition was not sufficiently detailed or reasonable.

The Agency maintains that the complaint was not sufficiently complex to warrant work by two attorneys and that the AJ did not support his rationale with case law. The Agency suggests that the AJ's logic requires any case to be deemed complex if "more than one attorney is working or has worked on it regardless of the actual issues and facts of the case," and that it "belies logic." The Agency suggests that the matter "was quite simple and a standard run-of-the-mill Rehabilitation Act case."

In response, Complainant argues that the record and hearing testimony contained substantial evidence demonstrating Complainant's entitlement to such an award, contradicting the Agency's attempts to minimize the evidence.

Complainant suggests that the AJ's reliance on Harvey D. was appropriate because that case cited to at least two other decisions with similar compensatory damages awards. Complainant further identifies several other decisions awarding \$50,000 or more where an Agency's failure to accommodate a disability caused similar symptoms, as supported by similar evidence. Complainant argues that, although modest, the AJ's award of \$50,000 was appropriate in this matter.

Complainant turns to the Agency's arguments against her request for attorney's fees and points out that the quotations relied on by the Agency are incomplete and require context. For example, on April 26, 2021, the Agency contended that 7.5 hours were dedicated to a discussion between Complainant's two attorneys when, in fact, the entry reveals that the senior attorney also prepared for trial, reviewed the report of investigation, and prepared testimony. The junior attorney also reviewed witness examinations and prepared for trial. Complainant further argues that, even if the hours were found to be duplicative, the proper relief would be to deduct four hours and 15 minutes of time because one attorney would still be permitted to bill for the time expended.

Complainant also notes that EEOC Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) recognizes that the presence of multiple counsel is not necessarily duplicative. Complainant provides additional detail on how the presence of both attorneys enhanced their representation of Complainant and led to a successful outcome.

In support of her position that the hours expended were reasonable, Complainant notes that the complaint file was almost 500 pages long and that the record contains seven depositions. Further, Complainant notes that the 33 hours expended in developing a summary judgment brief has been approved as reasonable, citing a case in which the Commission approved 40 hours for a summary judgment brief. See Emiko S. v. Dep't of Transp., Appeal No. 0120161130 July 19, 2016). Complainant further denies that the fee petition contained entries that were too vague and notes that the Agency misquoted certain entries, leaving out context.

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 EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

At the outset, we note that the Agency does not challenge the AJ's finding of discrimination and only disputes the \$50,000.00 awarded in non-pecuniary compensatory damages and the \$77,800.00 awarded in attorney's fees. Accordingly, we AFFIRM the finding of discrimination. We will now address the remedies awarded.

Non-Pecuniary Compensatory Damages

Non-pecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance on Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.302 at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm, and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice, or be "monstrously excessive" standing alone, but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from complainant concerning his emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

In this case, we are presented with two competing legal arguments. On the one hand, the Agency argues that the record contains insufficient evidence demonstrating an entitlement to \$50,000 because the AJ cited but one case, Harvey D. On the other hand, Complainant notes that Harvey D. provided a window into the Commission's approach by citing to several other cases that reached a similar result. Complainant goes on to cite several more cases supporting her position.²

² See Russel v. U.S. Postal Serv., EEOC Appeal No. 0720110025 (Nov. 17, 2011) (\$175,000); Franklin v. U.S. Postal Serv., EEOC Appeal Nos. 07A00025, 01A03882 (Jan. 19, 2001) (\$150,000); Miguel G. v. U.S. Postal Serv., EEOC Appeal No. 2020000182 ((Mar. 4, 2020) (\$150,000); Emiko S. v. Dep't of Transp., EEOC Appeal No. 01201061130 (Jul. 1, 2016) (\$150,000).

Complainant further distinguishes the cases presented by the Agency by showing that the complainant in those cases presented very limited testimony and no corroboration, whereas Complainant here provided testimony and extensive corroboration from two members of her family.

The record reflects that Complainant suffered both emotional and physical distress as a result of the Agency's actions. Specifically, as discussed above, testimony from Complainant and family members demonstrate that she experienced mood swings, loss of joy, migraines, emotional distress, exacerbation of high blood pressure, sleeplessness, marital discord, and loss of self-esteem. We note that the AJ found that the testimony provided by Complainant and her family was credible and absent evidence in the record to the contrary, we cannot disturb that finding. As such, we conclude that an award of \$50,000 in non-pecuniary compensatory damages appropriately compensates Complainant for the harm caused by the Agency. This award takes into account the duration and severity of the harm suffered and is neither “monstrously excessive” nor the product of passion or prejudice. We also find this amount is consistent with the amount awarded in similar cases. See Nia G. v. Dep't of Justice, EEOC Appeal No. 0120123467 (Apr. 3, 2015) (\$50,000 in non-pecuniary damages for disability discrimination and retaliation where Complainant testified that she suffered stress, shock and humiliation, which manifested itself in absences from work, headaches, rashes, weight fluctuations, depression, anxiety, insomnia, and nightmares); Greg M. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120160345 (Jan. 31, 2018) (complainant awarded \$50,000 where denial of reasonable accommodation caused exacerbation of pre-existing condition; Danita P. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120172149 (July 18, 2018) (an award of \$50,000 in compensatory damages was appropriate where complainant suffered anxiety, sleeplessness, disengagement from family and high blood pressure); Harvey D. v. Dep't of State, EEOC Appeal No. 0120171079 (Aug. 23, 2018) (\$50,000 in compensatory damages appropriate where the complainant became withdrawn and relationship with husband suffered).

Attorney's Fees

Title VII and 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 11-1 (Aug. 5, 2015). 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). However, our review of the attorney's fees award is limited to whether the hours expended was duplicative or unreasonable because the Agency does not dispute the hourly rate.

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 11-15. 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. at 11-9.

While an attorney is not required to record in detail the way each minute of his or her time was expended, the attorney does have the burden of identifying the subject matters on which he or she spent his or her time by submitting sufficiently detailed and contemporaneous time records to ensure that the time spent was accurately recorded. See Spencer v. Dep't of the Treasury, EEOC Appeal No. 07A10035 (May 6, 2003). The attorney requesting the fee award has the burden of proving, by specific evidence, entitlement to the requested fees and costs. Koren v. U.S. Postal Serv., EEOC Request No. 05A20843 (Feb. 18, 2003).

A review of the case the Agency relies on to support its position that supervisory review of an associate's work is not compensable, Hodge v. Department of Transp., EEOC Appeal No. 1113700 (Apr. 23, 1992), reveals little support for the Agency's position. While that decision declined a complainant's request to reconsider the Commission's earlier decision on attorney's fees, it noted that the Commission had, in fact, reversed the Agency's decision to disallow over 11 hours of presumably duplicative work for preparing a closing brief and 57.2 hours for pre-trial preparation. Id. Moreover, EEO MD-110 cites Hodge in opposition to the Agency's position. Indeed, the citation supports Complainant's position:

The number of hours should not include excessive, redundant, or otherwise unnecessary hours. Hensley, 461 U.S. at 434; Bernard v. Dep't. of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998). *The presence of multiple counsel at hearing or deposition may be considered duplicative in certain situations, such as where one or more counsel had little or no participation or where the presence of multiple counsel served to delay or prolong the hearing or deposition.* Hodge v. Dep't. of Transportation, EEOC Request No. 05920057 (Apr. 23, 1992). *The presence of multiple counsel is not necessarily duplicative, however, and is often justifiable.* Time spent on clearly meritless arguments or motions, and time spent on unnecessarily uncooperative or contentious conduct may be deducted. Luciano v. Olsten Corp., 109 F.3d 111 (2d Cir. 1997); Clanton v. Allied Chemical Corp., 416 F. Supp. 39 (E.D. Va. 1976).

EEO MD-110, Chapter 11, Section VI(F)(1)(d) (emphases added). A review of the record and the hearing transcript demonstrate that both of Complainant's attorneys actively participated in the hearing, with both attorneys taking the lead at different times in questioning witnesses, and the hearing appeared to move along at a solid pace. Accordingly, the admonitions present in Hodge simply do not apply here. Moreover, a review of the attorney's fee petition demonstrates that the time expended by Complainant's two attorneys were not duplicative, but rather complementary of each other. A fair reading of the entries reflect that the senior attorney is reviewing and working to develop the junior attorney. Further, a review of the affidavits submitted by each attorney demonstrates that the senior attorney owns his own practice and employs the junior attorney. As such, the senior attorney has an interest in ensuring both that work product bearing the name of his law firm carries the appropriate quality and that the junior attorney is capable of developing such work product.

To this end, the Agency's attempts to defend its decision to send two attorneys to the hearing is not persuasive because it is not exclusive to the Agency. The Agency asserts that its decision to send two attorneys is influenced by a multitude of factors, "which include but are not limited to workload, training opportunities, and experience levels including ability to gain experience." Complainant's attorneys could have easily adopted this argument as well.

While the Agency criticizes the AJ for failing to cite to multiple cases to support his position that "use of more than one attorney does not inherently generate duplicative billing," the Agency ignores that EEO MD-110 contains substantively the same language. The Agency protests that it is not arguing that the attorneys engaged in duplicative costs but rather "duplicate fee billing." We fail to see the distinction.

We turn to the Agency's argument that the billing entries were excessive. We disagree and note that Complainant's citation to Emiko S. in support of her argument that 33 hours of attorney time dedicated to a summary judgment brief appears on point. In that matter, the complainant prevailed on the sole issue of whether the agency refused to provide the complainant with a reasonable accommodation and withdrew its tentative offer of a position to the complainant, and the complainant's request for 40 hours of attorney's fees to draft a summary judgment brief was approved. Here, Complainant does not request as much time, but a review of the fee petition along with the relevant documents demonstrate that it was 33 hours of time well spent.

We also address the Agency's arguments that the case was not sufficiently complex to warrant the fees requested by Complainant's attorneys. Notably, we agree with the Agency's argument that this was not a novel Rehabilitation Act case. However, despite the straightforward nature of the case, the Agency pressed forward. The Agency sought a motion for summary judgment in its favor, which required Complainant to expend 33 hours to parry. The Agency then pressed forward with a hearing, which required Complainant's time to prepare. Moreover, whether a case presents straightforward or ordinary issues is not normally relevant to the question of whether the hours expended in prosecution is warranted. Time simply needs to be expended to litigate, and the question before us is whether Complainant's fee petition seeks to recover attorney's fees for time that was reasonably expended. Given the posture of this case and Complainant's successful efforts, we cannot say that the time billed by Complainant's attorneys is unreasonable and Complainant does not seek to recover for time spent on unsuccessful motions or issues. She had one issue and she prevailed on that issue.

In its response, the Agency takes the billing entries out of context. For example, the Agency asserts that, on April 22, 2021, the senior attorney's entry read: "Discuss agency's settlement response and offer" and that the junior attorney's entry on the same day read: "discuss agency 4/22 settlement offer w/ [senior attorney.]" A quick reading of the fee petition demonstrates that the actual entry for the senior attorney read: "prep for trial; research re disability act requirements, 'reasonable accommodation' prima facie case (3.5) review summary judgment briefing and ROI re Defendant's arguments (2); discuss agency's settlement response and offer (1)" and the junior attorney's entry reads as follows: "discuss agency 4/22 settlement offer w/ [senior attorney] (1);

call w/ client re: agency offer and witness logistics including discussion about [witness] participation (.75); provide agency w/ client response to offer (.25); prep for trial (4).”

Nowhere in its response or on appeal does the Agency suggest that the entries for either attorney is more detailed than as quoted or that it was leaving out those such details from its argument. A fair reading of the full context of the fee petition demonstrates that the junior attorney assumed far more of the work – expending in excess of 150 hours – developing the case for Complainant. The senior attorney remained actively present, exercising appropriate supervision and oversight of the junior attorney to ensure that the case developed as necessary, spending more than 60 hours on the case. We believe the Agency would do well to take all care as is necessary to ensure that it is accurately framing and representing documents as they have been filed in the case.

Accordingly, the AJ did not abuse his discretion in awarding Complainant \$50,000.00 in compensatory damages and \$77,800.00 in attorney’s fees. Further, because Complainant has succeeded on appeal, she is entitled to further attorney’s fees as provided below. EEO MD-110, at Ch. 11 § VI(F)(1)(c).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency’s final order finding discrimination and REVERSE the Agency’s final order rejecting the relief ordered. We REMAND the matter so that the Agency may comply with the ORDER below.

ORDER

The Agency is ORDERED to take the following actions, as slightly modified:

1. Within 60 days from the date this decision is issued, the Agency shall modify Complainant's official personnel folder to ensure that it reflects that Complainant worked until the end of her Schedule A Appointment, March 31, 2018.
2. Within 60 calendar days from the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501 and 5 C.F.R. § 550.805, for the period between October 26, 2017, through March 31, 2018. In calculating the number of hours Complainant would have worked, the Agency is directed to determine, for each full pay period during the Back Pay Period, which of the FOC-East employees employed through a Schedule A temporary appointment worked the most hours during the pay period, and pay Complainant for the number of hours that employee worked at the rate Complainant would have been paid had she worked that pay period. For each day within the Back Pay Period that falls within a pay period that also includes days outside of the Back Pay Period, the Agency shall determine which of the FOC-East employees employed through a schedule A temporary appointment worked the most hours, and pay Complainant for the number of hours that employee worked at the rate Complainant would have been paid had she worked that number of hours on the applicable day. The Agency shall deduct any pay Complainant previously received for work performed on those days. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within 60 calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
4. Within 60 days from the date this decision is issued, the Agency shall pay Complainant \$50,000.00 in non-pecuniary compensatory damages.
5. Within 60 days from the date this decision is issued, the Agency shall pay Complainant \$77,800.00 in attorney's fees.

6. Within 90 days from that date this decision is issued, the Agency shall provide eight hours of training to the management officials identified in this decision as S1 and S2. The training should focus on an employer's obligation to provide reasonable accommodations to individuals with disabilities and the prevention of disability-based and retaliation-based discrimination.
7. The Agency shall consider taking appropriate disciplinary action against S1 and S2. The Agency shall report its decision to the Compliance Officer referenced herein. 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 the identified management officials have left the Agency's employment, the Agency shall furnish documentation of the departure date(s).

POSTING ORDER

The Agency is ordered to post at all facilities where FOE-East employees work copies of the attached notice. Copies of the notice, 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/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 (Q0610)

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 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

March 9, 2022
Date