



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

[REDACTED]

Mike G.,¹
Complainant,

v.

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

Appeal No. 2021003869

Hearing No. 532-2018-00104X

Agency No. CHI-17-0645-SSA

DECISION

On June 23, 2021, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 24, 2021 final decision concerning his entitlement to attorney's fees following a violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Customer Service Representative, GS-0962-08, at the Agency's Columbus West E65 Office in Columbus, Ohio.

On July 12, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability (blindness) when:

1. management failed to provide Complainant with a reasonable accommodation when, from May 3, 2017, through September 5, 2017, management terminated his Reader Assistant's (RDA) contract and delayed providing him with a new RDA;

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.

2. from December 22, 2016, through July 24, 2018, Agency management subjected Complainant to a hostile work environment;
3. between July 6, 2017, and July 11, 2017, management disclosed Complainant's medical information in a public folder; and
4. on June 19, 2017, management did not provide Complainant with the necessary training to use Job Access With Speech (JAWS) software he was provided as a reasonable accommodation.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. After conducting discovery, which included several depositions and a request to consolidate the instant complaint with another complaint consisting of seven claims, Complainant withdrew his hearing request. The AJ denied Complainant's request to consolidate and remanded the matter to the Agency for a final decision. Consequently, the Agency issued a final decision (FAD) pursuant to 29 C.F.R. § 1614.110(b).

In the decision, the Agency concluded that Complainant failed to prove Agency management subjected him to discrimination as alleged as to Claims (1), (2), and (4). However, the Agency concluded that Agency management violated the Rehabilitation Act as alleged in Claim (3) and awarded Complainant \$500.00 in compensatory damages. The Agency invited Complainant to submit a petition for attorney's fees.

Complainant sought \$35,687.00 in attorney's fees and \$1,647.29 in costs. Complainant argues the fees were reasonable because Complainant's counsel "engaged in discovery, including defending Complainant's deposition." To justify the hourly rates charged, the petition included affidavits from four of five attorneys who worked on Complainant's case and noted that the fifth left the firm prior to the conclusion of the case.

In its decision on attorney's fees, the Agency accepted the hourly fees for the four attorneys who submitted affidavits. According to the Agency, "we can only calculate rates for the employees whose affidavits have been included."

The Agency noted that Complainant prevailed on only one of four claims, and that the claims were fractionable. In this case, succeeding on the *per se* violation only required Complainant to demonstrate that his medical records were exposed, even if inadvertently. The Agency found that Complainant's fee petition contained multiple entries that did not pertain to Claim (3). Further, the Agency discounted the time and effort Complainant's attorneys needed to devote to Claim (3):

[T]here is very little indication that Counsel's litigation strategy, hours billed, consultation, or legal efforts contributed significantly to the FAD finding because the Agency's FAD finding the *per se* Rehabilitation Act violation was based solely

upon the affidavits and evidence in the ROI, which the Agency produced before Complainant engaged Counsel.

The Agency further discounted work performed by other individuals identified in the fee petition because Complainant did not explain their positions and roles. As to the costs Complainant requested, the Agency noted that Complainant provided supporting receipts, but did not explain whether the costs were related to Complainant's successful claim or to his unsuccessful claims. Thus, the Agency determined that these costs were not reimbursable.

The Agency concluded that, out of the \$35,687 in attorney's fees, \$21,750 was properly supported by verified affidavits. Further, the Agency concluded that Complainant's reimbursable attorney's fees should be divided by 11, to account for all 11 claims Complainant raised in both the instant EEO complaint and the EEO complaint he sought to consolidate at the hearing stage. Since Complainant was successful on only one claim, the Agency awarded Complainant \$1,973.25 in attorney's fees and no costs.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the Agency improperly denied reimbursement for fees associated with paralegal and non-attorney staff time. Complainant explains that he was unable to supply an affidavit for the fifth attorney because that attorney left the firm prior to the Agency's findings. Complainant cites to the attorney's public profile at her new position.

Complainant also argues that the Agency's decision to include his other EEO complaint in its calculations was improper because Complainant only submitted billable charges related to the instant EEO complaint. Complainant also points to prior EEO decisions to argue that reducing his request for attorney's fees by over 90 percent was excessive. In one case, we reduced the requested fees by 25 percent where a complainant prevailed on one of two claims, Wayne C. v. Dep't of Transp., EEOC Appeal No. 0120182783 (Nov. 29, 2019), and in another, we reduced the attorney's fees by five-sixths where the Complainant prevailed on one out of six claims, Complainant v. Dep't of Homeland Sec., EEOC Appeal No. 0720100038 (Mar. 2, 2011). Therefore, Complainant requests that the attorney's fees award be increased to 25 percent of all of his requested fees and that his costs be reimbursed.

In response, the Agency contends that both cases contain the same common set of facts and therefore are indistinguishable from each other. The only reason the cases were not consolidated, according to the Agency, was because the AJ granted summary judgment in the other case, which precluded consolidation for a hearing. Therefore, the Agency argues that it is impossible to determine, from the billing entries provided by Complainant's attorneys, whether the entry is related to one case or the other.

The Agency further disputes Complainant's contention that he did not include billing entries for the other case, pointing to entries in June and August 2018.

These entries refer to “completing Agency form for EEO formal complaint (SSA-679 06-2011)” and “bases for Client’s new EEO complaint.” In August and September 2018, the fee petition contained entries that referred to time billed for working with an EEO investigator to complete EEO interrogatories. The Agency contends these interrogatories correspond to the other complaint because Complainant did not have an attorney during the investigation in the instant complaint.

The Agency also criticizes Complainant’s argument for not providing an affidavit for the fifth attorney by pointing to another of the attorneys’ affidavits. In that one, the attorney left the firm three months before signing her affidavit. As to time billed by paralegals and staff, the Agency maintains its position that Complainant did not support that time with affidavits or any other evidence. Further, the staff were not identified by name, nor were their positions given.

ANALYSIS AND FINDINGS

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, at Chapter 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”).

The Commission’s regulations require federal agencies to award attorney’s fees and costs for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 29 C.F.R. § 1614.501(e)(1)(ii). Attorney’s fees are calculated by determining the lodestar, which consists of the number of hours reasonably expended multiplied by a reasonable hourly rate. All hours reasonably spent to process the complaint are compensable; however, the number of hours should not include excessive, redundant, or otherwise expenditures of time. Attorney’s fees are also not recoverable for work on unsuccessful claims. Blum v. Stenson, 465 U.S. 886 (1984); and Hensley v. Eckerhart, 461 U.S. 424 (1983).

We note that the Commission has held that one method of addressing the appropriate amount of attorney’s fees when a complainant is not completely successful is to take a percentage across-the-board reduction of compensable time billed. Blinick v. Dep’t of Hous. and Urban Dev., EEOC Appeal No. 07A20079 (Feb. 3, 2004). Even if a complainant did not prevail on every aspect of his or her complaint, that does not, in itself, justify a reduction in the hours expended where the successful and unsuccessful claims are closely intertwined. Id. “Claims are fractionable or unrelated when they involve distinctly different claims for relief that are based on different facts and legal theories.” Id.

Here, the parties do not dispute that Complainant's attorney's fees petition is subject to reduction; the dispute centers on the amount of reduction. Complainant argues that he is entitled to 25 percent of all the attorney's fees he requested, including the fees claimed by retained counsel on behalf of the attorney who left the firm and did not provide an affidavit. The Agency maintains that \$1,973.25 is an appropriate award.

We disagree with the methods that the Agency used in arriving at its award. The Agency correctly notes that Complainant's fee petition alludes to elements of Complainant's second complaint and that warrants a reduction in fees. However, the Agency uses a separate seven-claim complaint to warrant reducing attorney's fees where Complainant prevailed on one-fourth of a complaint.

At the same time, we think it is more pertinent that the claim on which Complainant prevailed did not depend on any action by his attorneys after requesting a hearing. We have awarded attorney's fees in cases where a complainant withdraws a hearing request and then prevails. See Harmony E. v. U.S. Postal Serv., EEOC Appeal No. 0120160122 (Jan. 24, 2017) (finding compensable the hours that complainant expended to gather information needed to decide whether to continue the hearing process, as the claimed hours were not unnecessarily expended). However, to do so, Complainant bears the burden of demonstrating that work performed during the hearing stage contributed to the Agency's ultimate finding of discrimination. See Roxane C. v. Dep't of Energy, EEOC Appeal No. 2019004254 (July 26, 2021). In Roxanne C., we agreed that Complainant was entitled to some attorney's fees for work done during the hearing process because she showed that the evidence was used to support her complaint.

Here, Complainant argues that he is entitled to attorney's fees for work performed after requesting a hearing because discovery took place and depositions were taken and defended. However, Complainant does not demonstrate that any of the information gleaned during discovery or any of the rulings made by the AJ supported the Agency's finding of discrimination on Claim (3). Indeed, the Agency's finding on Claim (3) was wholly supported by information gleaned through the report of investigation. The Agency released the report of investigation to Complainant on February 28, 2018. Complainant first designated a non-attorney representative on March 13, 2018, before retaining current counsel on May 15, 2018. Moreover, Complainant's request to withdraw his hearing request articulated no reason. On these facts, it is not clear based on the record what actions Complainant's attorneys took that led to the Agency's finding in his favor. Accordingly, the record contains insufficient evidence to allow the Commission to increase Complainant's attorney's fees award.

With regard to costs, we note that Complainant's counsel requested \$1,647.29 in costs for medical records and transcripts. We agree with the Agency's determination that Complainant failed to demonstrate how these incurred costs were in any way related to the claim upon which Complainant prevailed. Thus, we find that Complainant has not established his entitlement to said costs.

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 decision on attorney's fees and costs. We REMAND the matter for further action in accordance with this decision and the ORDER below.

ORDER

To the extent that it has not already done so, within 60 days of the date of this decision is issued, the Agency shall pay Complainant \$1,973.25 in attorney's fees.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

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

October 27, 2022

Date