



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

[REDACTED]
Velva B.,¹
Complainants,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service,
Agency.

Appeal No. 2020002159

Hearing No. 520-2010-00280X

Agency No. 4B-140-0062-06

DECISION

The Class Agent 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 June 7, 2018, final decision concerning the attorneys' fees and costs related to her equal employment opportunity (EEO) class complaint alleging employment discrimination in 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 MODIFIES the Agency's final decision.

BACKGROUND

From May 5, 2006, through July 1, 2011, the Agency conducted the National Reassessment Program (NRP). The Agency estimated that approximately 15,000 employees received new work assignments as a result of their NRP assessments; 10,000 employees received determinations of total or partial "No Work Available" assessments; and 34,000 employees were separated while the NRP was in effect.

On August 7, 2007, a class action complaint was initiated. An EEOC Administrative Judge (AJ) certified the class on May 30, 2008. The Agency rejected and appealed the AJ's decision to certify the class.

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.

The Commission reversed the Agency's final order and remanded the matter to the Agency to notify potential class members of the Commission's decision and request the appointment of an AJ to hear the certified class complaint. Velva B., et al. v. U.S. Postal Service, EEOC Appeal No. 0720080054 (Jan. 14, 2010).

On June 4, 2015, the AJ issued an initial Report of Finding, without a hearing. On September 21, 2015, the AJ issued a Final Report of Findings and Recommendations. The AJ found that the Agency discriminated against rehabilitation and limited-duty employees based on disability when they were subjected to: (1) withdrawals of their reasonable accommodations; (2) hostile work environments; and (3) disclosures of confidential medical information. On February 8, 2016, the Agency issued a final order rejecting the AJ's findings and appealed the decision. The Commission reversed the Agency's final order rejecting the AJ's findings. Velva B. v. U.S. Postal Serv., EEOC Appeal Nos. 0720160006 & 0720160007 (Sept. 25, 2017).

On October 30, 2017, the Agency filed a request for reconsideration and clarification, which the Commission denied on March 9, 2018. In addition, the Commission ordered the Agency to notify class members of the provisions to file a claim for individual relief, and to process the Class Agent's request for attorneys' fees associated with the class litigation. Velva B. v. U.S. Postal Serv., EEOC Appeal Nos. 0520180094 & 0520180095 (Mar. 9, 2018).

On April 9, 2018, the Class Agent submitted a fee petition for a total of \$17,792,592.03 in attorneys' fees and costs. The Class Agent requested \$17,215,063.60 in attorneys' fees (which included a 40% enhancement to the lodestar) and \$577,528.43 in costs.

The Class Agent was represented by two law firms for the class litigation; one law firm (Firm 1) based in Rochester, New York, and another law firm (Firm 2) based in Washington, D.C. She requested hourly billing rates for the New York City area. The Class Agent stated that the number of hours incurred and the hourly billing rates were reasonable, and that an enhancement of 40% was required for "exceptional success." The Class Agent also stated that the submitted costs were necessary and reasonably incurred during the litigation of this matter.

On June 7, 2018, the Agency issued a final decision awarding \$1,532,937.36 in attorneys' fees and \$229,258.71 in costs. As an initial matter, the Agency found that the fee petition was deficient. For example, the Agency noted that the time entries were vague and block-billed, and contained time for duplicative, clerical, and excessive work. For example, the Agency noted that there were 1,300 charges of approximately 1,200 hours of non-recoverable administrative and clerical tasks. The Agency also stated that there were over 90 timekeepers who billed, but that not everyone was identified by name, and that there was no way to discern their credentials to even determine that they were attorneys.

Regarding the requested hourly rates, the Agency determined that they were unsupported and unreasonable because the Class Agent sought attorney rates for the New York City area, which is not comparable to Rochester, New York. Further, the Agency argued that the requested rates were higher than rates for attorneys at firms of similar location, size, and specialty.

The Agency also noted that fees and costs outside of Phase 1 of the litigation should not be included in this fee petition. The Agency stated that Phase 1 concluded on March 9, 2018, when the Commission issued its order, and that Class Counsels' work concluded with their November 2017 response to the Agency's Motion for Reconsideration.

The Agency also noted that the Class Agent was unsuccessful on her disparate impact claim, and that she should not receive fees or costs associated with that claim. The Agency also argued that there was no justification for a 40% enhancement. The Agency obtained two expert witnesses to review the fee petition and, based on their expertise, determined that Class Counsel was entitled to 4,452.36 hours at \$326 per hour for attorneys and 1,629.36 hours at \$50 per hour for document review, for a total of \$1,532,937.36 in attorneys' fees.

The Agency also argued that the fee petition contained excessive, duplicative, and inadequately documented costs. For example, five attorneys billed travel costs for a three-hour meeting in Austin, Texas, which totaled over \$50,000 for first-class airfare, luxury hotels, and a nightclub charge. The Agency noted that one of the attorneys billed for almost no other time over the ten years of the litigation. The Agency also highlighted unexplained charges from an online retailer, movie theater, health club, and credit monitoring services. The Agency asserted that none of the invoices have explanations for their costs, and that the Class Agent requests \$30,000 more than what was supported by receipts. The Agency identified \$229,258.71 in total costs statutorily allowable for deposition transcript and appearance costs, expert costs, "relativity/eDiscovery" costs, and photocopies.

The Class Agent filed the instant appeal and submitted a brief in support asserting that the fee petition supports attorneys' fees of \$17,068,509.15, which includes a 40% enhancement, and \$661,996.85 in costs, through September 18, 2018. The Class Agent argues that the Agency improperly applied a single rate for all attorneys, without regard to level of experience. The Class Agent also states that the hourly rates and number of hours billed are reasonable, and that an enhancement of the lodestar is justified. The Class Agent also asserts that the costs were properly claimed and submitted. Regarding expert witness fees, the Class Agent noted that one expert witness produced a report on the unsuccessful disparate-impact claim, and that those fees were excluded, but that he also provided a separate damages-analysis report, which was included in the costs.

The Agency responded to the Class Agent's appeal, arguing that she submitted a new fee petition for the first time on appeal. The Agency states that the new fee petition contains at least 500 unexplained changes, demonstrating the inherent unreliability of the claimed fees and costs, and that the attempt to cure the deficiencies of the fee petition is improper. The Agency argues that the fee petition demonstrated duplicitous billing practices; revealed an extreme lack of billing judgment; claimed extraordinarily inflated and improper hourly rates; lacked any indicia of accuracy, reliability, or being contemporaneously kept; failed to sufficiently describe the work performed; containing overwhelmingly vague and block billed entries; contained numerous errors; and improperly included a 40% fee enhancement.

For example, the Agency notes that the fee petition contains travel charges when no time was billed to the case, and billing to attend depositions on dates when no depositions occurred. Regarding costs, the Agency asserts that the Class Agent claims a remarkable amount of improper expenses, including lobbying fees, first-class airfare, extravagant dinners, and unexplained trips and extended stays at luxury hotels occurring when no time was billed for the case. The Agency notes that none of the costs claimed were itemized with corresponding documentation, and that there were an inordinate amount of receipts, invoices, and credit card statements with no corresponding identifying information.

ANALYSIS AND FINDINGS

Standard of Review

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

As an initial matter, we note that the Class Agent provided revised attorney affidavits and documents with her appeal. As a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to or during the investigation. See Id. at Chap. 9, § VI.A.3. Here, the Class Agent has not provided any arguments or evidence to show that these new materials were not available prior to the time she submitted the fee petition. Accordingly, the Commission declines to consider the new evidence presented on appeal.

Attorneys’ Fees

An agency is required to award attorney's fees for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 29 C.F.R. § 1614.501(e); Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998). Attorney's fees are computed by determining the lodestar, i.e., the number of hours reasonably expended multiplied by a reasonable hourly rate. 29 C.F.R. § 1614.501(e)(2)(ii)(B); EEO MD-110 at Chap. 11 §VI (citing Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). All hours reasonably spent in processing the complaint are compensable, and the number of hours should not include excessive, redundant, or otherwise unnecessary hours. Id. (citing Hensley, 461 U.S. at 434; and Bernard, EEOC Appeal No. 01966861).

Reasonable Hourly Rates

The Class Agent argues that, because she litigated the class action before an EEOC AJ in New York City, the prevailing market rate is New York City. However, the Supreme Court has held that a reasonable hourly rate is to be determined by the “prevailing market rates in the relevant community” for similar services by lawyers of reasonably comparable skill, experience, and reputation. Blum v. Stenson, 465 U.S. 886 (1984). The burden is on the fee applicant to produce satisfactory evidence that the rate requested is comparable to those prevailing in the relevant community. Id., at 895, n. 11.

The Commission has held that attorney’s fees are to be calculated using the rate charged by the attorney at the time the fee is calculated, not the attorney’s historical rate(s). See Ricky G. v. Dep’t of Homeland Security, EEOC Appeal No. 0720180009 (Apr. 26, 2019); Complainant v. Dep’t of Def., EEOC Appeal No. 0720120002 (Sept. 19, 2014); Huyck v. Dep’t of Defense, EEOC Appeal No. 01952015 (Oct. 31, 1997). As such, we will use the appropriate prevailing rates for April 2018.

Firm 1

For the purpose of determining the prevailing market rate, the relevant legal community is the area where the Agency’s facility and the complainant are located. See McTier v. Dep’t of the Navy, EEOC Appeal No. 07A30016 (Mar. 2, 2004); Cook v. U.S. Postal Serv., EEOC Appeal No. 01A03897 (Mar. 13, 2001); Black v. Dep’t of the Army, EEOC Appeal No. 01921158 (Jan. 14, 1993). In this case, it is undisputed that the Class Agent lived and worked in Rochester, New York, and that Firm 1 is located in Rochester, New York, with no other office locations. As such, we find that the relevant legal community for Firm 1 is Rochester, New York.

The Commission has previously held that the most reliable evidence for establishing reasonable hourly rates for private attorneys is the hourly rate customarily charged by those attorneys for fee-paying clients. See Cooley v. Dep’t of Veterans Affairs, EEOC Request No. 05960748 (July 30, 1998); Chris v. Central Intelligence Agency, EEOC Appeal No. 01956844 (July 19, 1996). We note that the fee petition did not contain a copy of the fee agreement between the Class Agent and Class Counsel.

The Class Agent provided four attorney affidavits, all stating that the provided attorney rates were customary rates for complex federal litigation in the New York City area. However, the Class Agent did not provide any evidence regarding the reasonable hourly rates for comparable attorneys in the Rochester area. The Agency procured an expert witness to provide reasonable hourly rates for attorneys in the Rochester area. We note that the Class Agent did not dispute these Rochester rates.

We therefore will utilize the Agency's expert witness' 2018 rates for the attorneys in Firm 1:

Attorney	Years of Experience ²	Hourly Rate
NT	24	\$417
PS	23	\$417
ML	18	\$394
SB	7	\$314
JC1	6	\$314
JC2	13	\$362
SC	17	\$394
CD	3	\$248
JF1	2	\$248
JF2	3	\$248
PG	8	\$326
EH	9	\$326
JL	8	\$326
GT	19	\$394
Paralegals/Law Clerks		\$149

Firm 1 also included hours for "Other Attorneys." However, we find that the Class Agent did not provide sufficient information about these attorneys to establish entitlement to fees for their services. Thus, we decline to award attorneys' fees for these unidentified attorneys.

Firm 2

The Class Agent requested the same New York City hourly rates for the attorneys in Firm 2, even though Firm 2 is located in Washington, D.C., and Austin, Texas. To determine the appropriate prevailing market rate for an attorney in the Washington D.C. area, the Commission generally uses the Laffey Matrix. See Complainant v. Dep't of Housing and Urban Development, EEOC Appeal No. 0120113288 (Mar. 14, 2014); Henry S. v. Dep't of Defense, EEOC Appeal No. 0720170020 (Mar. 28, 2018) (affirming Administrative Judge's decision declining to deviate from Commission's established precedent using Laffey Matrix). As such, we will use the June 1, 2017, to May 31, 2018, Laffey rates for Firm 2's attorneys based in Washington, D.C.³

Regarding Firm 2's Austin, Texas office, the Class Agent did not provide any evidence regarding the reasonable hourly rates for comparable attorneys in Austin. The best evidence contained in the fee petition is the Agency's expert witness' rates for South-Atlantic Firms. In addition, the Class Agent did not specify the location of each Firm 2 attorney.

² The "years of experience" is calculated from the year an attorney graduated law school through the latest year the attorney worked on the class complaint.

³ We note that the Class Agent did not explain the need to retain a law firm based on Washington, D.C. However, the Agency did not challenge this need.

As such, we will rely on information provided in the fee petition to determine the applicable rate for each Firm 2 attorney:

Attorney	Location	Years of Experience	Hourly Rate
MK	Washington, D.C.	37	\$864
JP	Washington, D.C.	38	\$864
DW	Austin, TX	32	\$426
CH	Washington, D.C.	21	\$864
JW	Washington, D.C.	16	\$717
JN	Washington, D.C.	7	\$440
RS	Washington, D.C.	6	\$440
AG	Washington, D.C.	6	\$440
AC	Austin, TX	2	\$206
MP	Washington, D.C.	3	\$359
DC	Washington, D.C.	3	\$359
Paralegals/Law Clerks	Washington, D.C.		\$196

For Firms 1 and 2, we also note that the Commission recognizes that travel time should be compensated at 50% of the hourly rate. See Sang G. v. Dep't of Homeland Security, EEOC Appeal No. 0120151360 (July 28, 2017); Black v. Dep't of the Army, EEOC Appeal No. 01943642 (Feb. 27, 1996); Hooper v. Defense Logistics Agency, EEOC Appeal No. 01873384 (May 06, 1988). Accordingly, we will use 50% of the above rates for the claimed travel time.

Reasonable Number of Hours

While the Class Agent is only entitled to an award for time reasonably expended, it does not always follow that the amount of time actually expended is the amount of time *reasonably* expended. See Elvin v. Dep't of Labor, EEOC Request No. 01943425 (Aug. 31, 1995). Rather, “billing judgment” is an important component in fee setting, and hours that would not be properly billed to a private client are also not properly billed to an agency pursuant to a successful EEO claim. Id. Counsel for the prevailing party should make a “good faith effort to exclude from a fee requested hours that are excessive, redundant or otherwise unnecessary.” Bernard, supra, EEOC Appeal No. 01966861.

Class Agent requests the following number of hours:

Firm 1

Attorney	Hours
NT	615.1
NT (Travel)	45.9
PS	60.5
PS (Travel)	43.0
ML	1044.2
ML (Travel)	29.0
SB	1055.1

JC1	1117.7
JC2	1610.9
SC	529.0
CD	6.4
JF1	388.8
JF2	593.2
PG	65.3
EH	4.0
JL	451.9
GT	169.7
Paralegals/Law Clerks	6,301.9

Firm 2

Attorney	Hours
MK	1,472.6
MK Travel	19.5
JP	188.1
DW	1,442.7
DW Travel	98.7
CH	87.7
JW	5,041.3
JW Travel	89.7
JN	39.1
RS	18.5
AG	243.0
AG Travel	58.2
AC	37.7
MP	16.4
DC	5.6
Paralegals/Law Clerks	167.0

For a fee petition, an attorney has “the burden of identifying the subject matters in which he spent his time, which can be documented by submitting sufficiently detailed contemporaneous time records to ensure that the time spent was accurately recorded.” Id. In addition, attorneys should make a “good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary.” Id. (citing Hensley, 461 U.S. at 434). Further, the Commission has found that “it is unnecessary to perform a detailed analysis to [determine] precisely the number of hours or types of work for which no compensation is allowed; rather, it is appropriate to reduce the hours claimed by an across-the-board reduction.” Finch v. Postmaster General, 05880051 (1988) (citing Brown v. Gillette Co., 34 FEP Cases 1828, 1833 (D. Mass. 1982); Copeland v. Marshall, 641 F.2d 880, 903 (D.C. Cir. 1980); Bradford v. Blum, 507 F. Supp. 526, 534 (S.D.N.Y. 1981)).

Here, we find that an across-the-board reduction of the hours is appropriate for a number of reasons. For example, many of the descriptions of hours billed were inadequately described as “research,” “attend meeting,” “conference/discussion,” or “telephone calls.” The descriptions did not provide any specific elaboration, such as “research of issue x” or “telephone call with person y regarding issue x.”

In addition, 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. “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). In this case, the Class Agent did not prevail on her disparate impact claim, and she does not dispute the need to exclude attorneys’ fees related to this unsuccessful claim. The Class Agent asserted that these hours were not included in the fee petition. However, we note that it is not clear that these hours were excluded based on the vague language used in the billing, as noted above.

Further, we note that the Commission has held that clerical work is generally viewed as part of the attorney's overhead, and as such, these expenses are not reimbursable. See Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120150407 (July 20, 2017); Cole v. U.S. Postal Serv., EEOC Request No. 05910450 (Aug. 5, 1991). The fee petition contains many entries of clerical work; for example, time billed for filing, scanning, making copies, and creating labels.

Based on the vague descriptions of the billing entries, the unsuccessful disparate impact claim, and the inclusion of time for clerical work, we find that a 50% across-the-board reduction in the hours claimed is appropriate. See Zoila P. v. Dep’t of Justice, EEOC Appeal No. 0720130036 (Nov. 24, 2015); Brown v. Dep’t of Justice, EEOC Appeal No. 0120072877 (Feb. 25, 2009). Accordingly, we will reduce the claimed hours by 50%:

Firm 1:

Attorney	Hours	50% of Hours
NT	615.1	307.55
NT (Travel)	45.9	22.95
PS	60.5	30.25
PS (Travel)	43.0	21.5
ML	1044.2	522.1
ML (Travel)	29.0	14.5
SB	1055.1	527.55
JC1	1117.7	558.85
JC2	1610.9	805.45

SC	529.0	264.5
CD	6.4	3.2
JF1	388.8	194.4
JF2	593.2	296.6
PG	65.3	32.65
EH	4.0	2.0
JL	451.9	225.95
GT	169.7	84.85
Paralegals/Law Clerks	6,301.9	3,150.95

Firm 2:

Attorney	Hours	50% of Hours
MK	1,472.6	736.3
MK Travel	19.5	9.75
JP	188.1	94.05
DW	1,442.7	721.35
DW Travel	98.7	49.35
CH	87.7	43.85
JW	5,041.3	2,520.65
JW Travel	89.7	44.85
JN	39.1	19.55
RS	18.5	9.25
AG	243	121.5
AG Travel	58.2	29.1
AC	37.7	18.85
MP	16.4	8.2
DC	5.6	2.8
Paralegals/Law Clerks	167.0	83.5

When applying the appropriate hourly rates to 50% of the requested hours, we have determined the following as the attorneys' fees for this case:

Firm 1:

Attorney	Hourly Rate	50% of Hours	Total
NT	\$417	307.55	\$128,248.35
NT (Travel)	\$208.50	22.95	\$4,785.08
PS	\$417	30.25	\$12,614.25
PS (Travel)	\$208.50	21.5	\$4,482.75
ML	\$394	522.1	\$205,707.40
ML (Travel)	\$197.00	14.5	\$2,856.50
SB	\$314	527.55	\$165,650.70

JC1	\$314	558.85	\$175,478.90
JC2	\$362	805.45	\$291,572.90
SC	\$394	264.5	\$104,213.00
CD	\$248	3.2	\$793.60
JF1	\$248	194.4	\$48,211.20
JF2	\$248	296.6	\$73,556.80
PG	\$326	32.65	\$10,643.90
EH	\$326	2.0	\$652.00
JL	\$326	225.95	\$73,659.70
GT	\$394	84.85	\$33,430.90
Paralegals/Law Clerks	\$149	3,150.95	\$469,491.55
TOTAL			\$1,806,049.48

Firm 2:

Attorney	Hourly Rate	50% of Hours	Total
MK	\$864	736.3	\$636,163.20
MK Travel	\$432	9.75	\$4,212.00
JP	\$864	94.05	\$81,259.20
DW	\$426	721.35	\$307,295.10
DW Travel	\$213	49.35	\$10,511.55
CH	\$864	43.85	\$37,886.40
JW	\$717	2520.65	\$1,807,306.05
JW Travel	\$358.50	44.85	\$16,078.73
JN	\$440	19.55	\$8,602.00
RS	\$440	9.25	\$4,070.00
AG	\$440	121.5	\$53,460.00
AG Travel	\$220	29.1	\$6,402.00
AC	\$206	18.85	\$3,883.10
MP	\$359	8.2	\$2,943.80
DC	\$359	2.8	\$1,005.20
Paralegals/Law Clerks	\$196	83.5	\$16,366.00
TOTAL			\$2,997,444.33

Accordingly, we award \$1,806,049.48 for Firm 1 and \$2,997,444.33 for Firm 2, for a total of \$4,803,493.81 in attorneys' fees.

Enhancement

Regarding Fee enhancement, the Commission follows the guidance of the Supreme Court:

[In Perdue v. Kenny A., 559 U.S. 542, 552-54 (2010),] the Supreme Court noted that its prior decisions have established the following important rules regarding fee enhancements: (1) there is a “strong” presumption that the lodestar method yields a sufficient fee, but an enhancement may be awarded in “rare” and “exceptional” circumstances; (2) the novelty of a case, the complexity of a case, and the quality of an attorney's performance generally may not be used as grounds for an enhancement because those factors are subsumed in the lodestar calculation; (3) the burden of proving that an enhancement is necessary must be borne by the fee applicant; and (4) a fee applicant seeking an enhancement must produce “specific evidence” that supports the award. Moreover, the Court held that superior results stemming from superior attorney performance can justify an enhancement in “rare” and “exceptional” circumstances, but it requires specific evidence that the lodestar fee would not have been “adequate to attract competent counsel.”

Belia S. v. Dep’t of Justice, EEOC Request No. 0520130561 (Aug. 12, 2014).

In Belia S., the Administrative Judge awarded a 20% enhancement to the lodestar based on the complexity of the class-related litigation and exceptional success achieved by class counsel. However, the Commission reversed the enhancement, finding that the complexity of a case generally may not be used as grounds for an enhancement; and that the class agent did not produce “specific evidence” that the lodestar fee would not have been “adequate to attract competent counsel,” nor sufficiently demonstrate the existence of “rare” and “exceptional” circumstances to justify the fee enhancement.

Here, the Class Agent requested a 40% enhancement of the lodestar, asserting an “exceptional quality of representation.” However, Class Agent failed to produce “specific evidence” that the lodestar fee would not have been adequate to attract competent counsel nor sufficiently demonstrate the existence of “rare” and “exceptional” circumstances to justify the fee enhancement. Rather, she simply asserted that Class Counsel provided an “exceptional quality of representation.” See Belia S. As such, we decline to award an enhancement to the lodestar for attorneys’ fees.

Costs

The Commission has held that reasonable costs incurred by a prevailing party in the course of litigation of an EEO complaint are compensable. See EEOC MD-110, Chap. 11 § V(A); Hafiz v. Dep’t of Defense, EEOC Petition No. 04960021 (July 11, 1997). Costs may include such items as mileage, postage, telephone calls, photocopying, and any other reasonable expenses incurred in connection with litigating the EEO complaint. See Williams v. Dep’t of Veterans Affairs, EEOC

Petition No. 04A40047 (June 30, 2005). It is a complainant's burden to prove that such costs were incurred by providing documentation, such as bills for copying, or receipts for mailings. Id. Further, it is a complainant's burden to prove that such costs were reasonable. See Adam F. v. International Boundary and Water Comm'n., EEOC Appeal No. 0120142479 (Jul. 8, 2016); Clay v. Dep't. of the Army, EEOC Petition No. 04950006 (Dec. 14, 1995); Davis v. Dep't. of the Treasury, EEOC Request No. 05901213 (March 1, 1991); Canady v. Dep't. of the Army, EEOC Request No. 05890226 (Dec. 27, 1989).

In the original fee petition, the Class Agent requested a total of \$577,528.43 for costs but provided only a limited breakdown of such costs. In addition, the Class Agent provided unorganized copies of invoices, receipts, and credit card statements. On appeal, the Class Agent provided the following breakdown for costs:

Expert Fees	\$171,959.50
Deposition Transcripts	\$47,559.21
Document Hosting/eDiscovery	\$319,195.44
Travel	\$73,877.36 ⁴
Postage	\$15,461.18
In-House Copies	\$16,717.16
External Copies	\$1,122.23
Legal Research	\$11,329.80
Website	\$1,638.28
Survey	\$2,313.45

Expert Witness Fees and Deposition Costs

A prevailing complainant is entitled to recovery of expert witness fees. See 29 C.F.R. §1614.501(e). Here, the Class Agent stated that she obtained industrial psychologists, a vocational rehabilitation expert, and an economist as expert witnesses. However, the Class Agent did not provide a breakdown or explanation of the \$171,959.50 request for expert witnesses.

While we note that the fee petition contains invoices from various companies, we find that there is insufficient justification for reimbursement for all of these invoices. For example, there are invoices totaling \$19,936.30 from a company that provided services related to congressional matters and a charge of \$675 to “monitor amendments to Senate budget resolution.” In addition, there are unexplained invoices from an unnamed company for “professional services” totaling \$33,257.50 and invoices for “ongoing and creative programming” totaling \$760. We find that the Class Agent has not shown that these charges were related to the litigation of the class action, and they will not be included in the costs for expert witnesses.

⁴ On appeal, the Class Agent reduced the total requested for travel costs from \$109,071.19.

The fee petition contains invoices from industrial psychologists totaling \$97,610. However, we note that the invoices contain charges for clerical work. We will exclude those charges totaling \$4,935, for a remaining total of \$92,675 for the industrial psychologists.

The fee petition also contains invoices from expert witnesses for work related to the depositions. The Class Agent has noted that the Agency already paid some of these costs. As such, the remaining costs for these expert witnesses is \$4,650. In addition, there are invoices from expert witnesses for \$14,725; \$1,050; and \$44,825.00.⁵ In total, we find that the fee petition supports \$157,925 for the cost of expert witnesses (\$92,675 + \$4,650 + \$14,725 + \$1,050 + \$44,825).

The Class Agent also requested \$47,559.21 for the cost of deposition transcripts. However, a review of the supporting documents in the fee petition shows that the costs related to depositions is \$41,507.93.

Document Hosting/eDiscovery, Website, and Survey Tool

The Class Agent states that the Agency produced a “gigantic universe” of documents, and that Class Counsel needed to store and maintain access to millions of electronic documents. The Class Agent also states that Class Counsel utilized a website and survey tool to facilitate communications with the class members. We find that these were reasonable costs associated with the litigation.

The supporting receipts show that the law firms have already paid \$168,144.48 to the document-hosting company. However, we note that the document-hosting company deferred payments totaling \$122,549.73, which should also be provided. The document-hosting company’s invoices reveal an 8% sales tax, which should be calculated and included on the unpaid portion, for a total of \$132,353.71. As such a total of \$300,498.19 is appropriate for costs related to document hosting/eDiscovery.

The Class Agent requests \$1,638.28 for costs related to a website. However, the supporting documentation supports only \$268.17 for charges from the website company. In addition, the Class Agent requests \$2,313.45 for survey costs, which is supported by the submitted documentation.

Travel

On appeal, the Class Agent lowered the requested amount for travel costs to \$73,877.36 due to “an abundance of caution.” However, we find that the Class Agent has not met her burden to adequately explain the reasonableness of all the charges. We note that there is no organization to the receipts and credit card statements, which include charges that are unexplained.

⁵ In her appeal brief, the Class Agent stated that this expert witness prepared a report on her unsuccessful disparate impact claim. However, the Class Agent asserted that she did not include those charges; only charges related to the damages analysis.

For example, the Class Agent requested reimbursement for charges at an online retailer, an electronics store, and a racetrack, with no explanation. While we note that these charges may be legitimate, we find that the Class Agent has not met her burden to provide any explanation of the charges.

We also find that the Class Agent has not shown that some of the charges are reasonable. For example, the fee petition contains a charge for \$3,264.79 for a five-night hotel stay for September 2 - 7, 2015. However, we note that no attorney billed for any hours for this case on September 5 - 7, 2015. In addition, we find that the record contains numerous restaurant charges totaling hundreds of dollars, without any explanation. As such, we do not find that it is reasonable to have the Agency pay for all of the Class Agent's requested travel costs.

Overall, we find that the Class Agent has not provided enough information to fully support the reasonableness of all requested travel costs. Accordingly, we will take an across-the-board reduction of 50% of the request for \$73,877.36, and award \$36,938.68 in travel costs. See Bernard, supra, EEOC Appeal No. 01966861 (applying an across-the-board reduction of costs by 50% where insufficient information provided by complainant to determine reasonableness of costs requested).

Postage, Copies, and Telephone

The Class Agent requests \$15,461.18 for postage. Upon review of the supporting receipts and invoices submitted with the fee petition, we find that the documentation supports a total of only \$1,148.17 in postage costs from charges at Stamps.com, FedEx, and the U.S. Postal Service.

The Class Agent requests \$16,717.16 for copies that were done in-house, and \$1,122.23 for copies provided by an external vendor. We find that the supporting documents support a cost of only \$1,733.15 for in-house copies and \$532.05 for external copies. We recognize that receipts for costs such as internal photocopies may not always be available when a law firm uses billing meters and timers. In those situations, we require the fee applicant to submit a verified statement of costs, which should include a list of services rendered itemized by date; a detailed summary of the task; the rate; and, where practicable, the identity of the person performing the task. See Davis v. U. S. Postal Serv., EEOC Appeal No. 0120053186 (April 24, 2007). Here, the Class Agent did not provide an adequate verified statement of costs to support a reimbursement of \$16,717.16 for in-house copies. In addition, the fee petition shows a cost of \$85.14 for telephone services, which should be included in the reimbursement for costs.

Legal Research

We note that previous Commission decisions have affirmed a reduction or exclusion of a request for costs associated with online legal research. See Bell v. Dep't of the Navy, EEOC Appeal No. 0720080024 (June 25, 2008); Foti v. U.S. Postal Serv., EEOC Appeal No. 07A30091 (Oct. 5, 2004). As such, we decline to include the Class Agent's requested costs for legal research.

In summary, we find the following costs have been supported by documentation in Class Agent's fee petition:

Expert Fees	\$157,925.00
Deposition Transcripts	\$41,507.93
Document Hosting/eDiscovery	\$300,498.19
Travel	\$36,938.68
Postage	\$1,148.17
In-House Copies	\$1,733.15
External Copies	\$532.05
Phone	\$85.14
Website	\$268.17
Survey	\$2,313.45
Total	\$542,949.93

CONCLUSION

We MODIFY the Agency's final decision and ORDER the Agency to take further action in accordance with the Order herein.

ORDER

To the extent that it has not already done so, the Agency is ordered to pay the Class Agent \$4,803,493.81 in attorneys' fees and \$542,949.93 in costs, within 60 days of the date this decision is issued.

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)

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

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

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

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

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

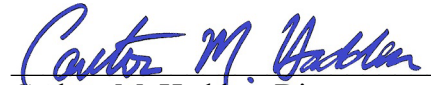
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

November 8, 2022
Date