



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

[REDACTED]
Zachery V.,¹
Petitioner,

v.

Frank Kendall,
Secretary,
Department of the Air Force,
Agency.

Petition No. 2022004037

Petition No. 2020000605

Request No. 0520180139

Appeal No. 0120170231

Hearing No. 450-3030-00072X

Agency No. AFB5A0J16002

DECISION ON A PETITION FOR ENFORCEMENT

On July 21, 2022, the Equal Employment Opportunity Commission (EEOC or Commission) docketed a petition for enforcement to examine the enforcement of an Order set forth in Zachery V. v. Dep't of the Air Force, EEOC Petition No. 2020000605 (Feb. 25, 2021). The Commission accepts this petition for enforcement pursuant to 29 C.F.R. § 1614.503. For the reasons discussed below, the Commission GRANTS the petition for enforcement.

BACKGROUND

At the time of events giving rise to this complaint, Petitioner worked as an Information Specialist at the Agency's 17th Training Wing facility in Goodfellow Air Force Base, Texas. Petitioner filed a formal EEO complaint in which he alleged that the Agency discriminated against him on the bases of race (Caucasian), sex (male), religion (Jewish), and disability (personality disorder) in

¹ This case has been randomly assigned a pseudonym which will replace Petitioner's name when the decision is published to non-parties and the Commission's website.

violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

The Agency dismissed the complaint for untimely filing, but in Zachery V. v. Dep't of the Air Force, EEOC Appeal No. 0120170231 (Oct. 31, 2017), req. for recon. den. EEOC Request No. 0520180139 (May 25, 2018), the Commission remanded the complaint for processing. On October 31, 2019, Petitioner filed a petition for enforcement stating that the Agency failed to accept his claims or complete its investigation. In Zachery V. v. Dep't of the Air Force, EEOC Petition No. 2020000605, supra, the Commission remanded the matter due to the Agency's failure to timely comply with its order in Request No. 0520180139. In clause (3) of the order in Petition No. 2020000605, the Commission ordered the Agency to pay attorney's fees and costs as a sanction for effectively forcing Petitioner to incur more legal expenses unnecessarily.

The matter was assigned to a Compliance Officer and docketed as Compliance No. 2021002302 on March 5, 2021. On November 23, 2021, the Agency provided documentation indicating that the attorney's fee payment in the amount of \$8,273.80 was being processed. The compliance action was closed on December 9, 2021.

On July 1, 2022, Petitioner filed the instant petition for enforcement, in which he reported that the payment for attorney's fees still had not been received by Petitioner's Counsel. Counsel requested the following relief:

- Payment of fees in the initial amount of \$8,273.80, to which the Agency had already agreed.
- Interest on the initial amount that accrued as a result of the delay in payment.
- Additional fees incurred for pursuing remittance of the initial amount through the second petition for enforcement as a sanction.

ANALYSIS AND FINDINGS

Section 717(d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(d), as amended by section 114(2) of the Civil Rights Act of 1991, Pub. L. 102-166 (Nov. 21, 1991), provides that "the same interest to compensate for delay in payment shall be available [to federal employees] as in cases involving nonpublic parties." By enacting the 1991 amendments, the Congress expressly waived the federal government's sovereign immunity from interest for delay in the payment of all monetary awards to victims of employment discrimination in the federal government to the same extent that any non-federal entity would be subject to. Charles E. v. Dep't of Justice, EEOC Appeal No. 07 20180006 (July 19, 1918). Accordingly, Petitioner is entitled to any interest that accrued because of the Agency's delay in awarding backpay, compensatory damages, and attorneys' fees that resulted in a loss of value of those obligations. Madelaine G. v. Dep't of State, EEOC Appeal No. 2020000241 & Petition No. 2019005970 (Sept. 2, 2020).

The Back Pay Act regulation at 5 C.F.R. § 550.806(d), provides that the rate or rates used to compute the interest on a back pay award under 5 U.S.C.A. § 5596 shall be the annual percentage rate or rates established by the Secretary of the Treasury as the Overpayment Rate² under Internal Revenue Service Regulation 26 U.S.C. § 6621(a), for the period or periods of time for which interest is payable. Moreover, 5 C.F.R. § 550.806(e) provides that the interest rate shall be compounded daily. Yovan v. Dep't of Homeland Sec., EEOC Appeal No. 0120083601 (Oct. 20, 2010).

If payments were made within a reasonable time, however, the Commission will not award interest. Homer B. v. Dep't of the Army, EEOC Appeal No. 0120161342 (May 24, 2018) citing Complainant v. U.S. Postal Serv., EEOC Request No. 0520140042 (Mar. 28, 2014) (substantial compliance found and therefore no interest awarded); April v. Dep't of Agric., EEOC Appeal No. 01963775 (June 5, 1997)(two-year delay in payment of back pay found unreasonable and interest awarded); Malladi v. Dep't of Veterans Affairs, EEOC Appeal No. 01961100 (Dec. 18, 1996) (seven-month delay in payment of predetermined amount of attorney's fees not unreasonable); Brown v. Dep't of Defense, EEOC Appeal No. 01985765 (Dec. 1, 1999) (ten-month delay unreasonable and interest awarded).

An Agency that receives a petition for attorney's fees is required to issue a decision determining the amount of those fees within 60 days of receiving the fee petition. See 29 C.F.R. § 1614.501(e)(2)(ii) (A). On March 29, 2021, Petitioner's Counsel submitted a petition for attorney's fees in the amount of \$8,273.80, which the Agency agreed to pay in full. Petition for Enforcement, Exhibit (5). The Agency was therefore obligated to issue its decision awarding those fees by May 28, 2021, 60 days later. According to records provided by the Agency, payment in the amount of \$8,273.80 was paid by check to Petitioner's Counsel on September 29, 2022. Agency's Supplemental Response to Petition for Enforcement, Ex. 1. The transaction was assigned the number 3543004. The delay in payment from May 28, 2021 to September 29, 2022 extended for 16 months and was unreasonable according to our precedent cited above. In utilizing the Treasury Department's overpayment calculator, we find that the total amount owed to Counsel was \$8,562.28. Since the principal of \$8,273.80 was already paid, the Agency owes Counsel \$288.48 in interest. Accordingly, we will enter an order directing the Agency to award Counsel this amount. Additionally, since Petitioner is a prevailing party, his Counsel is entitled to seek any reasonable additional attorney's fees and costs associated with the filing of the instant petition for enforcement. See e.g., Mercedes A. v. Dep't of Justice, EEOC Appeal No. 2021000657 (Oct. 4, 2022) citing Hensley v. Eckerhart, 461 U.S. 427, 433 (1983) (prevailing party is one who succeeds on any significant issue and achieves some of the benefit sought in bringing the action).

² The Internal Revenue Service overpayment calculator can be found at <https://www.irs calculators.com/overpayment-interest-calculator>.

ORDER (C0618)

To the extent it has not already done so, the Agency shall, within thirty (30) days of the date this decision is issued, pay Petitioner \$288.48 in interest for the late payment of attorney's fees incurred in connection with the processing of the previous petition for enforcement per our decision in Petition No. 2020000605. The Agency shall also award attorney's fees and costs associated with the processing of the instant petition for enforcement in accordance with our order below.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Petitioner, including evidence that the corrective action has been implemented.

ATTORNEY'S FEES (H1019)

If Petitioner 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 Petitioner and his/her representative.

If the Agency does not comply with the Commission's order, the Petitioner may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Petitioner 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 Petitioner 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 Petitioner 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.

PETITIONER'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 received 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 Petitioner's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

December 12, 2022
Date