



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Blake H.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2022001533

Agency No. HS-CBP-26602-2016

DECISION

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 December 22, 2021 final decision pertaining to an award of attorney's fees.

BACKGROUND

Complainant applied to become a Border Patrol Agent with the Agency's Customs and Border Patrol.

On August 7, 2016, Complainant filed a formal complaint of discrimination. Complainant alleged that he was discriminated against based on disability when:

1. on June 2, 2016, his tentative offer of employment for the position of Border Patrol Agent, was rescinded.²

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an EEOC Administrative Judge (AJ).

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 Complainant subsequently withdrew this claim when his complaint was later amended.

Complainant requested a hearing. The AJ amended the formal complaint to include the following claims:

2. The Agency violated the Rehabilitation Act when it subjected Complainant to disability-related medical inquiries and/or medical examinations after Complainant received an unfavorable polygraph result, disqualifying him from further consideration for the position.
3. The Agency discriminated against Complainant during the hiring process in violation of the Genetic Information Non-Discrimination Act (GINA) when the Agency acquired and used his genetic information.

On May 15, 2019, the AJ issued a decision in the Agency's favor on claim (2), and in Complainant's favor on claim (3).

On December 11, 2019, the AJ issued a decision on attorneys' fees. Complainant requested \$67,115.00 in fees and \$356.30 in costs. The AJ awarded \$42,535.49 in fees and \$356.30 in costs for a total of \$42,891.79. The AJ reduced the requested hourly rates for the three attorneys, two paralegals, and law student. The AJ's decision also applied across-the-board reductions for duplicative entries and unsuccessful claims.

The Agency issued a final order adopting the AJ's decision. Complainant filed an appeal docketed as EEOC Appeal No. 2020002429.

In EEOC Appeal No. 2020002429 (Sept. 8, 2021), we determined that the appeal comprised the following five issues: 1) whether the AJ erred by finding no discrimination regarding claim (2); 2) whether the AJ erred in not ordering the entire department to be trained on GINA requirements; 3) whether the AJ erred when he did not order the Agency to review/modify policies to comply with GINA; 4) whether the AJ erred when he reduced the hourly rate for Complainant's counsel; and 5) whether the AJ erred in reducing the time expended regarding requested attorneys' fees.

Regarding attorneys' fees, we found that the AJ erred by reducing the hourly rate for Complainant's representatives. We modified the hourly rate to that requested by Complainant's attorneys. Specifically, the following determinations were made: Attorney # 1 (A1) \$450/hour; Attorney # 2 (A2) \$330/hour, paralegal #1 (PL1) \$165/hour, paralegal # 2 (PL2) \$125/hour, and a law student (\$125). OFO reasoned "in the Retainer Agreement, Complainant acknowledged that the services he was being provided were at a reduced rate, and that the law firm "[r]eserved the right to seek recovery at its current rate in accordance with the DOJ Laffey Matrix or other relevant index for fees as part of a settlement or an award of fees in this matter. The Retainer Agreement set forth both the reduced rate and the current rate.

The Commission has held that attorneys who demonstrate that they charge reduced rates to federal employees in discrimination cases, based on public interest motives, are entitled to compensation at the higher prevailing market rate, notwithstanding a retainer agreement.” We further set forth that the retainer agreement itself supported the higher rate. EEOC Appeal No. 2022002429 (Sept. 8, 2021).

We concurred with the AJ’s decision on the other issues. Moreover, we awarded reasonable attorneys’ fees associated with the processing of EEOC Appeal No. 2020002429. Id.

Complainant submitted an October 8, 2021 fee petition regarding the work his representatives performed associated with the appeal and requested the following fees totaling \$7,672.00:

Professional	Hourly Rate	Hours Expended	Total Sought
A1	\$535.00	.5	\$267.50
A2	\$425.00	15.3	\$6,502.50
PL1	\$175.00	2.8	\$490
PL2	\$155	.6	\$93
PL3	\$145	1.9	\$275.50
PL4	\$145	.3	\$43.50

Complainant also requested \$56.15 in costs (for a total of \$7,728.15).

On December 21, 2021, the Agency issued a final decision regarding attorney’s fees and costs pertaining to the processing of the appeal in EEOC Appeal No. 2020002429. In its final decision, the Agency determined that the hourly rates for A1, A2, PL1, and PL2 should be reduced. The Agency reasoned that, “Complainant seeks fees pursuant to an hourly fee schedule that his attorney representatives of record implemented on May 1, 2021...we observe that more than 70 percent of the work expended occurred prior to May 1, 2022...[T]he requested hourly rates presented in Complainant’s October 2021 fee petition...do not comport with, and indeed captures significant percentage increases over the reasonable rates the Commission established in this case just four weeks prior to Complainant’s submission of [the instant fee petition].” Thus, the Agency awarded the same hourly rates for A1, A2, PL1, and PL2 that OFO awarded in EEOC Appeal No. 2020002429 (A1-\$450/hour, A2 -\$330/hour, PL1-\$165/hour, and PL2-\$125.00/hour). The Agency also excluded from its fee award the work expended by PL3 and PL4 reasoning that there are no resumes or other documentation that would support the hourly request for these individuals. The Agency reasoned that the attorneys’ fees with the adjusted rates would total \$5,811.00.

Regarding time expended, the Agency, in its final decision, excluded certain clerical tasks and adjusted the fee to 18.1 billable hours for \$5,633.00. Finally, the Agency determined that a 75% reduction of the \$5,633.00 was proper because Complainant was only successful on one of five issues on appeal. Based on the foregoing, the Agency awarded \$1408.25 in attorneys’ fees and \$56.15 in costs.

The instant appeal followed. Complainant's attorney asserts that the Agency improperly reduced the hourly rate for her legal representatives because the requested hourly rates are the firm's billing rates, and are reasonable. Complainant's attorney asserts the hourly rate should be the one in effect at the time of the fee petition, rather than at the time the work is performed. Complainant's counsel states that the Agency erred in applying a 75% across-the board reduction for unsuccessful claims. Specifically, Complainant's counsel states that time spent directly working on unsuccessful claims were listed as "No Charge" in the fee petition. In addition, Complainant's attorney states that "most of the time expended by [Complainant's] counsel was incurred as a result of the proceeding with the appellate process and is not fractionable by independent claims on appeal."

In response, the Agency requests that we affirm its final decision and reiterates its reasoning set forth in its final decision.

ANALYSIS AND FINDINGS

The Agency is required to award attorney's fees and costs for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 29 C.F.R. § 1614.501(e)(1)(ii). To determine the proper amount of the fee, the lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. Hensley v. Eckerhan, 461 U.S. 424 (1983); 29 C.F.R. §1614.501(e).

Reasonably Hourly Rates

We find the Agency erred in reducing the requested hourly rates set forth in Complainant's fee petition. The record contains a Retainer Agreement dated February 2018 between Complainant and the law firm representing him. Complainant, in the Retainer Agreement, acknowledged that services were being provided at a reduced rate, and that the law firm "reserved the right to seek recovery at its current rate in accordance with the DOJ Laffey Matrix or other relevant index for fees as part of a settlement or award of fees in this matter." The Retainer agreement set forth both the reduced rate and the current rate. The Commission has held that attorneys who demonstrate that they charge reduced rates to federal employees in discrimination cases, based on public interest motives, are entitled to compensation at the higher prevailing market rate.³ Rick G. v. Dep't of Homeland Sec., EEOC Appeal No. 0720180009 (April 26, 2019). In its final decision, the Agency found that most of the work in the fee petition occurred prior to May 1, 2022.

³ In this matter, the Retainer Agreement itself supports the higher rate.

However, the Commission has previously found, consistent with federal case law, that delay in payment is properly measured by compensating a complainant's attorneys at the current, rather than historical, hourly rates. See Missouri v. Jenkins, 491 U.S. 274, 283-284 (1989); Rowland v. Dep't of Agriculture, EEOC Appeal No. 0120113022 (Feb. 8, 2012). Our award of the current hourly rate at the time of the fee petition is also consistent with our determination of the reasonable hourly rate in the prior appeal, EEOC Appeal No. 2020002429 (Sept. 8, 2021).

We also do not concur with the Agency's decision to exclude work performed by PL3 and PL4 from the fee award because the record does not contain documentation regarding their experience. The Commission has found that the definition of who is a paralegal is broad-based and not restricted to those who attend legal courses or who complete a formal program. Rather, it is the work performed that determines whether an individual can be regarded as a paralegal. See Finch v. U.S. Postal Serv., EEOC Appeal No. 01872869 (Sept. 29, 1987).

The record contains an affidavit from A1, the founder and partner of the law firm representing Complainant based in Denver, Colorado. A1 states that he has been a member of the Colorado Bar since 2008 and has worked on more than one thousand cases involving federal employment disputes. A1 asserts that he sets the hourly rates for attorneys and support staff based on various factors such as years of experience, rates charged by practitioners within the Denver community who have a comparable practice, and recent decisions issued by administrative forums and state and federal courts. A1 asserts that effective May 1, 2021, the rates were the following: A1-\$535/hour, A2-\$425/hour, PL1-\$175/hour, PL2-\$155/hour. The record also contains copies of decisions from other federal agencies indicating that the requested hourly rates have been previously awarded.

The record also contains an affidavit from A2 that she has been admitted to the Colorado Bar since 2013 and is a partner at A1's law firm and has worked on almost one thousand cases involving federal employment disputes.

Based on the foregoing, we MODIFY the Agency's final decision to reflect the hourly rates requested in the October 8, 2021 fee petition.

Exclusion of Specific Hours Expended

The Agency excludes several specific entries for work performed by paralegals, reasoning that the work is purely clerical in nature. Reasonable attorney's fees may include the work of paralegals as well as that of attorneys. Missouri v. Jenkins, 491 U.S. 274, 285 (1989). However, purely clerical or secretarial tasks should not be billed at a paralegal or attorney rate regardless of who performs them. Id. at 288 n. 10; Complainant v. Dep't of the Navy, EEOC Appeal No. 0120111028 (May 15, 2014). We concur with the Agency that the following hours should be excluded from the fee award because they are purely clerical: PL2 mailing in the brief in support of the appeal on March 11, 2020 (\$155 x.5=\$77.50). We do not exclude from the fee award the other hours contested by the Agency, in its final decision, for being purely clerical. Based on our review of these entries in the fee petition, we do not find these entries reflect purely clerical work.

We also concur with the Agency in excluding from the fee award work performed by A2 on December 16, 2019 which appears to be related to a different matter because the entry in the fee petition references a Supervisory Administrative Judge which was not involved in this matter (\$425 x.1=42.50). Thus, after excluding the above referenced hours the adjusted total for attorneys' fees is \$7,672-\$120=\$7,552.00.

Across-the-Board Reduction

Complainant's contests the Agency's 75% across-the-board reduction for work performed on unsuccessful claims. We acknowledge Complainant's assertion that some work was not fractionable and related to the appeals process in general. We also acknowledge that the Agency did not charge for some work performed on unsuccessful claims. There are, however, other entries in the fee petition which do not clearly exclude the time spent on unsuccessful claims. For example, the work performed by a paralegal on March 11, 2020 for reviewing and revising Complainant's Brief (the entry does not specifically indicate that this work was performed on the successful claim) and March 9, 2020 worked performed by A2 in drafting an outline of the brief (this entry in the petition does not clearly indicate that this was solely for work on the successful claim). Thus, while we find the Agency's 75% across-the-board reduction to be excessive in this matter, we do find some reduction to be appropriate. Based on specific circumstances of this matter, we find an across-the-board reduction of 25% to be proper. Thus, the award for attorney's fees is \$5,664.00 (\$7,552.00 X .75).

The Agency's final decision did not contest the requested \$56.15 in costs. Thus, the total award for attorneys' fees and costs is \$5,720.15.

Accordingly, the Agency's final decision is MODIFIED as set forth above. This matter is REMANDED to the Agency for compliance with the ORDER below.

ORDER

The Agency, to the extent it has not already done so, shall take the following actions:

1. Within 60 days from the date this decision is issued, the Agency shall pay Complainant \$5,720.15 in attorneys' fees and costs.

The Agency must submit a report of compliance as set forth in the section below entitled "Implementation of the Commission's Decision."

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 (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

August 10, 2023

Date