



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

[REDACTED]
Mary C.,¹
Complainant,

v.

Kirstjen M. Nielsen,
Secretary,
Department of Homeland Security
(Federal Emergency Management Agency),
Agency.

Appeal No. 0120172173

Hearing No. 480-2012-00791X

Agency No. HS-10-FEMA-00153

DECISION

The Equal Employment Opportunity Commission (EEOC or Commission) accepts Complainant's appeal from the Agency's decision concerning attorneys' fees for a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Human Resources (HR) Unit Manager at the Agency's Pasadena Joint Field Office in California.

In June 2010, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and in reprisal for prior protected EEO activity when:

1. On April 6, 2010, her supervisor exposed her to a full-frontal nudity color photo of himself on her work computer; and
2. Her second-level supervisor refused to issue her a performance evaluation and otherwise created a hostile work environment.

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.

Following an investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ). The AJ held a hearing and issued a decision finding that Complainant had been subjected to discrimination and awarding damages and attorney's fees. The Agency subsequently issued a final order rejecting the AJ's decision and the relief ordered. Consecutively, the Agency filed an appeal with the Commission.

In our appellate decision, we reversed the Agency's final order and affirmed the AJ's finding of sexual harassment and reprisal. We ordered the Agency to, among other things, pay Complainant \$50,000.00 in non-pecuniary compensatory damages and \$40,950.00 in attorney's fees.

According to Complainant, the attorney who represented her during the hearing and filed her appeal retired from the practice of law in or about April 2015. Complainant received the Commission's decision on or about February 5, 2017. Subsequently, Complainant contacted and hired the attorneys who now represent her. The Agency asserts that it paid Complainant \$90,950.00 on March 21, 2017.

Following the Commission's order, Complainant filed a petition for attorney's fees with the Agency. Complainant provides a copy of the undated petition for attorney's fees that she submitted to the Agency.² The petition seeks fees for work done by Complainant's new attorneys following her receipt of the Commission's order. The earliest activity on itemized billing statement attached thereto is dated February 13, 2017. The petition sought, in addition to \$90,950.00 already ordered, \$6,549.10 in attorney's fees and \$46.60 in costs.

In a decision dated May 10, 2017, the Agency denied Complainant's petition for additional attorney's fees. The Agency first noted that Complainant's attorneys were not retained until after the Commission issued its decision and therefore could not have engaged in any effort in support of Complainant's appeal. The Agency further explained that it complied with the Commission's decision within weeks of receiving the decision, and with 73 days remaining in the Commission's 120-day deadline. Thus, there was no need to compel the Agency to comply with the Commission's decision and attorney's fees were not warranted to that end. Additionally, the Agency concluded that Complainant did not provide any documentation to substantiate her entitlement to additional fees and costs.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Commission's order permitted her to request additional attorney's fees. Complainant also argues that the fees she requested were very reasonable and constituted far less than if her prior attorney had continued with her case. Additionally,

² Although the petition itself is undated, the itemized billing statement attached thereto is dated March 2, 2017, and the affidavits attached thereto are dated March 3, 2017.

Complainant contends that attorney representation was necessary because the Agency was not responding to her inquiries, and only began doing so after she obtained representation.

In opposition, the Agency reiterates the arguments made in its final decision and rejects the implication that it was not complying with the Commission's decision. The Agency provides documentation that demonstrates it began the process of complying with the Commission's decision within one day of receiving the decision.

ANALYSIS AND FINDINGS

Title VII and the Commission's regulations authorize the award of reasonable attorney's fees and costs to a prevailing Complainant. 29 C.F.R. § 1614.501(e); see also EEO Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 11-1 (Aug. 5, 2015). Fee awards are typically calculated by multiplying the number of hours reasonably expended times a reasonable hourly rate, an amount also known as a lodestar. See 29 C.F.R. § 1614.501(e)(ii)(B); Blum v. Stenson, 465 U.S. 886, 899 (1984); Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

All hours reasonably spent in processing the complaint are compensable, but the number of hours should not include excessive, redundant or otherwise unnecessary hours. EEO MD-110, at 11-15. A reasonable hourly rate is based on prevailing market rates in the relevant community for attorneys of similar experience in similar cases. Id. at 11-6. An application for attorney's fees must include a verified statement of attorney's fees accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. Id. at 11-9.

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

In determining whether Complainant's efforts to obtain relief she was entitled to warrant attorney's fees, we must determine whether those efforts were necessary. Bermudez v. U.S. Postal Serv., EEOC Request No. 05920122. To that end, "[w]hen efforts outside the EEO administrative process to secure compliance with a Commission back pay order were a catalyst in getting compliance, attorney fees and costs are appropriate." McCann v. Dep't of the Air Force, EEOC Petition No. 04990041 (Oct. 20, 2000), citing Bermudez.

Here, Complainant has not demonstrated that her attorneys' efforts were necessary in securing compliance with the Commission's order. The Agency demonstrated that it immediately began efforts to compensate Complainant and otherwise comply with the Commission's order well within the timeframes imposed by the Commission.

Complainant is correct in that the Commission's order granted Complainant an entitlement to attorney's fees expended on her successful appeal. However, Complainant's argument is not well taken. Here, Complainant's attorneys, by Complainant's own admission, were not retained until after the Commission issued its appellate decision and after the Agency began complying with the Commission's decision. Complainant has not demonstrated that the fees she now seeks were for services rendered in furtherance of her appeal. Accordingly, we are not persuaded that Complainant should be awarded fees in addition to those already awarded.

Further, attorney's fees for the instant appeal are not in order. Attorney's fees may not be recovered for work on unsuccessful claims. Hensley, 461 U.S. at 434-35.

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 decision not to award further attorney's fees.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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).

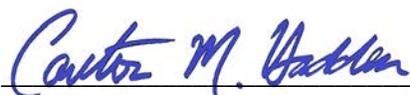
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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. 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

February 28, 2019

Date