



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

[REDACTED]
Mario G.,¹
Complainant,

v.

Dr. Heather A. Wilson,
Secretary,
Department of the Air Force,
Agency.

Appeal No. 0120180942

Hearing No. 451-2013-00078X, 451-2013-00079X

Agency Nos. 9P0J11027, 9P0J11033

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 19, 2017 final decision concerning the Agency's award of attorney's fees.

BACKGROUND

During the period at issue, Complainant worked for the Agency as an Aircraft Sheet Metal Mechanic at Randolph Air Force Base in Texas.

On July 19, 2011 and November 18, 2011, Complainant filed formal EEO complaints alleging that the Agency discriminated against him based on national origin (Hispanic), disability, and in reprisal for prior protected EEO activity when:

1. From May 2010 to June 2011, (the Supervisory General Engineer/Trainer Development Director (S3)) directed that he could not use his personal cell phone on duty time, even though other employees were allowed to do so;

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. On September 15, 2011 (Complainant's first-level supervisor (S1)) harassed and threatened him by pointing his finger and pushing him in the chest because Complainant did not complete a computer-based test fast enough and S3 did nothing;
3. On September 21, 2011, S3 threatened to suspend him for 30 days without pay for abuse of a government vehicle when he was a passenger on September 20, 2011;
4. From September 19 to October 5, 2011, S2 and Complainant's first level supervisor (S1) refused to provide him the necessary equipment and a facility key needed to complete the C-17 project;
5. On October 7, 2011, S1 ordered him to continue working alone on a C-17 project when the work was a two-person job;
6. On October 7, 2011, he became aware that S1 placed an employee on light duty, when S1 and S2 had denied his same request after his surgery in June 2011;
7. On October 12, 2011, S1 gave him a negative midterm feedback that addressed ejection seat refurbishment issues that happened years ago;
8. On January 4, 2012, S2 harassed and reprimed against him when he was on the phone and computer trying to obtain information for his medical treatment and to schedule doctor's appointments regarding his worker's compensation claims;
9. On March 1, 2012, S2, who Complainant did not know was the new second-level supervisor, yelled at him in front of other employees when Complainant's common access card and password were being coded into a new system, like all the other individuals;
10. On March 1, 2012, S2 singled him out and said that he could not leave his work area or do anything without S2's permission;
11. On April 4 and 5, 2012, S2 left an email from Civilian Personnel asking about his medical condition sitting on his desk for all employees to review and co-workers told him they could read the document.
12. From November 11, 2011 to May 23, 2012, the Colonel failed to reassign him to a position in 902 Mission Support Group;
13. In April 2012, S2 refused to give him a building key that S1 swore under oath in March 2012, would be provided to him;

14. On May 1, 2012, S2 yelled at him in front of other employees for using the updated equipment necessary to complete an assigned task, said not to train him to give him current skills like other machine shop employees and changed the task to force him to complete the project on an outdated machine; and
15. On May 12, 2012, S3 failed to give him credit for a 5-month long welding project as promised.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on June 12, 2013, and issued a decision on July 23, 2014 finding no discrimination. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Complainant filed an appeal with the Commission's Office of Federal Operations (OFO).

In EEOC Appeal No. 0120150193 (Oct. 19, 2017), the Commission found that Complainant failed to establish that he was subjected to a hostile work environment. However, OFO found with respect to claim (11), that the Agency's disclosure of information about Complainant's medical condition constituted a violation of the Rehabilitation Act. OFO set forth the following: "[w]e do not find any persuasive evidence that the Agency's disclosure was based on reprisal for Complainant's prior protected EEO activity or his national origin." *Id.* OFO ordered the Agency to provide EEO training to S2 on the Agency's obligation under the Rehabilitation Act to keep medical information confidential; consider taking disciplinary action against S2, conduct a supplement investigation pertaining to Complainant's entitlement to compensatory damages, and pay reasonable attorney's fees. *Id.*

The Agency issued a final decision on December 19, 2017 regarding attorney's fees. Complainant sought \$13,800 in attorney's fees (46 hours at \$300/hour). The Agency in its final decision found the hourly rate of \$300 to be reasonable. The Agency did not contest three hours for the initial consultation and assistance in the investigative phase. The Agency found that "[t]he remaining 43 hours claimed should be significantly reduced to reflect the fact they were expended in pursuit of failed claims. A reasonable amount of the outstanding number of hours claimed is ten percent or 4.3 hours. Rounding up to five hours makes a total of 8 compensable hours at a rate of \$300 per hour...for a total of \$2,400." In reaching this determination, the Agency stated "[i]t is a stretch to say Complainant had even one successful claim since he alleged a pattern of discrimination and harassment and none was found. The one success Complainant had is clearly separate and distinct from all of his fruitless allegations since it was an isolated event and was not found to have been intentionally discriminatory. As such, a significant reduction in fees is in order."

Complainant appealed the Agency's final decision on attorney's fees. Complainant seeks fees for 39 hours of work for a total of \$11,700.

In response, the Agency requests we affirm its final decision. The Agency states that Complainant's success was de minimis on a technical violation of the Rehabilitation Act and that he was not successful on the hostile work environment portion of his claim.

ANALYSIS AND FINDINGS

Attorney's fees may not be recovered for work on unsuccessful claims. Hensley v. Eckerhart, 461 U.S. 435-35 (1983). 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. In cases where a claim for relief involves "a common core of facts or will be based on related theories," however, a fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Id. at 435.

The Agency does not contest the \$300 hourly rate or the first three hours in attorney's fees for the initial consultation and assistance in the investigative phase. The remaining 43 hours are in dispute (\$12,900). The Agency applied a 90% reduction to the remaining hours in dispute and awarded 5 hours (4.3 hours rounded up to five) for a total of 8 hours (including the initial 3 hours awarded as set forth above).

In this matter, we find the hostile work environment claim upon which Complainant did not prevail to be fractionable from the disclosure of medical information claim. Complainant was not successful on the majority of his claim. The per se violation of the Rehabilitation Act involved one management official and an isolated incident. Thus, we concur with the Agency that a significant reduction in attorney's fees is appropriate. However, we believe that a reduction of 75 percent (rather than a 90 percent reduction) on the remaining amount (\$12,900) of attorney's fees to be reasonable. A 75 percent reduction of \$12,900 is \$9,675. Thus, Complainant would be entitled to \$3,225.00 for the hours in dispute plus the \$900 for the initial three hours not in dispute for a total of \$4,125.00.

Accordingly, we MODIFY the Agency's final decision pertaining to attorney's fees, as reflected in the ORDER below.

ORDER

To the extent, it has not already done so, the Agency is directed within sixty (60) calendar days from the date this decision is issued to pay Complainant \$4,125.00 in attorney's fees.

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), 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 the date this decision was issued. 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 (K0618)

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.

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 (T0610)

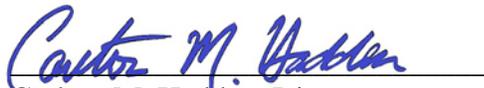
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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

June 11, 2019

Date