



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

[REDACTED]
Victor S.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Southern Area),
Agency.

Appeal No. 0120180973

Appeal No. 0120160739

Hearing No. 451-2015-00038X

Agency No. 4G-780-0085-14

DECISION

On January 23, 2018, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 15, 2017 final decision concerning his award of attorney's fees regarding his equal employment opportunity (EEO) 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a full-time Mail Processing Clerk at the Agency's Waco, Texas Processing and Distribution Facility (P&DF).

On February 4, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability and reprisal for prior protected EEO activity (requesting a reasonable accommodation) when:

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.

1. on November 30, 2013, he was placed into a Letter Carrier position outside of his medical restrictions; and
2. on December 11, 2013, he was told that there was no work available and sent home.

At the conclusion of the 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 but subsequently withdrew his request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Complainant appealed the Agency's decision. In EEOC Appeal No. 0120160739 (Oct. 18, 2017), the Commission found that the Agency denied Complainant a reasonable accommodation when it involuntarily reassigned him to a position that he was unable to perform because of his medical restrictions in November 2013. Although the Waco P&DF was closing, the decision held that the Agency had not shown that it would have constituted undue hardship to reassign Complainant to a position that he could perform within his known medical restrictions. In addition, we found that Complainant had established that he was subjected to discrimination based on disability and reprisal when he was sent home and told that there was no work available on December 11, 2013.

Among other things, the Commission ordered that the Agency determine Complainant's entitlement to attorney's fees and costs for the work done by his attorney (Attorney). To that end, the Attorney submitted her fee petition package to the Agency on November 17, 2017. She included her time records indicating that she expended 142.70 hours during her representation of Complainant from December 13, 2013 through November 17, 2017, with the filing of the instant fee petition and Complainant's compensatory damages submission. The Attorney also asserted that her hourly rate is \$650 and provided supporting affidavits from attorneys indicating that the rate is reasonable. As such, the Attorney sought \$ 92,755 in fees.

The Agency issued its final decision regarding Complainant's award of fees and costs. The Agency first determined that the Attorney's hourly rate was not reasonable. The Agency noted that the Attorney was asked to provide a fee agreement with Complainant. However, she failed to do so. Further, the Agency noted that the median hourly rate for attorneys with the Attorney's experience and practice ranged from \$250 to \$300 in a statewide analysis by the Texas Bar Association. The Agency noted that the "Laffey Matrix" is not applicable here because the work conducted by the Attorney was done in San Antonio, Texas, not Washington, D.C. Further, the Attorney noted that she had been previously awarded an hourly rate of \$450 by the Commission. As such, the Agency determined that the reasonable hourly rate for the Attorney was more commensurate with \$450, not the requested \$650.

The Agency then address the hours expended. The Agency reduced the number of hours by 31.45 hours finding that the Attorney's entries for the hours were vague or considered them to be clerical in nature. Many of the entries cited by the Agency were listed as, for example: "Correspondence with client, called client," "Teleconference with client," "Research," "Agency Correspondence with OFO," "MSPB Order."

The Agency then reduced the hours expended for work done prior to the filing of the formal complaint. The Agency noted that 7 hours had been expended prior to the filing of the formal complaint. The Agency allowed 2.5 hours expended prior to the filing of the formal complaint. Finally, the Agency further reduced the Attorney's hours expended by 30% finding that the Attorney's services were excessive.

In sum, the Agency found that the Attorney's reasonable hourly rate should be reduced to \$450 and the hours expended to 72.97 hours. Accordingly, the Agency concluded that Complainant was entitled to \$32,836.50 in fees.

Complainant appealed seeking the full amount of fees submitted in the Attorney's original fee petition. The Attorney noted that another Agency had just issued a final decision on fees and costs finding that her hourly rate was reasonable. The Agency asked that the Commission affirm its decision. As to the Attorney's hourly rate, the Agency noted that the Merit System Protection Board (MSPB) had just issued a decision regarding Complainant's entitlement to fees and costs. The MSPB specifically rejected the Attorney's supporting affidavits and determined that the Attorney's reasonable rate was \$450 per hour.

ANALYSIS AND FINDINGS

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, at Chapter 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").

By federal regulation, the 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. EEOC Regulation 29 C.F.R. § 1614.501(e)(1)(ii). To determine the proper amount of the fee, a lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

Hourly Rate

A reasonable hourly rate is a rate based on “prevailing market rates in the relevant community” for attorneys of similar experience in similar cases. Cooley v. Dep’t. of Veterans Affairs, EEOC Request No. 05960748 (July 30, 1998) (quoting Blum v. Stenson, 465 U.S. 886 (1984)). We note that the Attorney works in San Antonio, Texas, although she claims about 30% of her practice includes representation before adjudicatory bodies in the Washington, D.C. area. The Attorney argues that she had been paid at a rate of \$450 by the Commission for over ten years and cited cases in support of her claim. She also alleges she was recently awarded \$650 per hour by the Department of Veterans Affairs in an employment discrimination case. Finally, she provides supporting affidavits from other attorneys indicating a variety of fee awards in employment discrimination cases in federal district court in Texas that exceeded \$650 per hour.

After careful review of the evidence, we find that the Attorney has provided no evidence that she has ever billed or collected \$650 from her fee-paying clients, or been awarded more than \$450 by this Commission. While she claims the Department of Veterans Affairs has *agreed* to pay that hourly rate in an employment discrimination case adjudicated in an unspecified location, we do not find this dispositive of the issue. Similarly, we are also unpersuaded by the Attorney’s citation of cases in federal court where other Texas area attorneys have received higher rates. On the other hand, we note that the Agency, in response to the appeal, provided a copy of the MSPB decision (Francis v. USPS, MSPB Docket No. DA-0752-17-0330-A-1) rejecting the Attorney’s request for \$650 per hour and finding that the Attorney’s hourly rate of \$450 was more reasonable for legal work done around the same time as this case.

Like the MSPB, we do not find that the evidence supports the Attorney’s claim for \$650 per hour for work in the administrative EEO complaint process in Texas. However, we do recognize that the Attorney has been awarded \$450 for ten years and some increase over time is needed factor in her significant experience in this area of law. Therefore, we conclude that \$500 per hour reasonably recognizes both the Attorney’s years of experience as well as the prevailing rates in her geographic area.

Hours Expended

There is a strong presumption that the number of hours reasonably expended multiplied by a reasonable hourly rate, the lodestar, represents a reasonable fee, but this amount may be reduced or increased in consideration of the degree of success, quality of representation, and long delay caused by the agency. 29 C.F.R. § 1614.501(e)(2)(ii)(B). The circumstances under which the lodestar may be adjusted are extremely limited and are set forth in Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 11-9 (Aug. 5, 2015). A fee award may be reduced: in cases of limited success; where the quality of representation was poor; the attorney’s conduct resulted in undue delay or obstruction of the process; or where settlement likely could have been reached much earlier, but for the attorney’s conduct. Id. The party seeking to adjust the lodestar, either up or down, has the burden of justifying the deviation. Id. at p. 11-13.

All hours reasonably spent in processing the complaint are compensable, but the number of hours should not include excessive, redundant or otherwise unnecessary hours. Id. A reasonable hourly rate is based on prevailing market rates in the relevant community for attorneys of similar experience in similar cases. MD-110 at 11-14. 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. MD-110 at 11-17. While the attorney is not required to record in great detail the manner in which each minute of his time was expended, the attorney does have the burden of identifying the subject matters on which he spent his time by submitting sufficiently detailed and contemporaneous time records to ensure that the time spent was accurately recorded. See Spencer v. Dept 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).

Fees and Costs for Pre-complaint

EEOC Regulation 29 C.F.R. § 1614.501(e)(1)(iv) provides, in pertinent part, that agencies are not required to pay attorney's fees on services performed during the pre-complaint process. An attorney may reasonably expend up to two hours to determine whether to represent a complainant. Nenita S. v. Dept. of Veterans Affairs, EEOC Appeal No. 0120151925 (May 23, 2017). The record indicated that the Attorney claimed a total of 9.5 hours prior to the filing of the formal complaint. As such, we agree that the hours expended should be reduced. However, we find that the hours expended should be reduced by 7.5 hours pursuant to our precedent.

Reduction in Fees

The Agency reduced the expended hours by 31.45 hours for vagueness and what appeared to be clerical in nature. A review of the entries excluded by the Agency, we find that some of the hours were not vague such as "Correspondence with OFO," "Acceptance for Investigation," "Received affidavit package," "Affidavit mailed to Investigator," "Received ROI" and the like. As such, we find that only 22.1 hours should be excluded as vague.

Finally, the Agency reduced the Attorney's hours expended by an additional 30% for excessive hours. However, we find that the Agency's across-the-board reduction following the Agency's other reductions is unwarranted. Accordingly, we decline to implement the Agency's across-the-board 30% reduction.

Therefore, we find that the hours expended should be:

Attorney's requested hours	142.70 hours
Pre-complaint reduction	- 7.50 hours
Reduction for vagueness	- 22.10 hours
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Total Hours Expended:	113.10 hours

As such, we conclude that the Attorney expended 113.10 hours at a reasonable hourly rate of \$500. Accordingly, we find that Complainant is entitled to \$56,550 in attorney's fees.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final decision and REMAND the matter in accordance with the ORDER below.

ORDER

Within thirty (30) calendar days of the date this decision is issued, to the extent the Agency has not done so already, the Agency is ordered to pay Complainant \$56,550 in attorney's fees.

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 Complainant, including evidence that the corrective action has been implemented.

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 (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

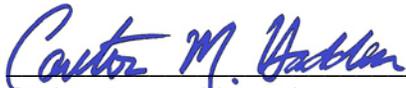
appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision.

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 Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

April 16, 2019

Date