



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Vaughn C.,¹
Complainant,

v.

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

Appeal No. 0120181371

Hearing No. 420-2012-00106X

Agency No. 811M11013

DECISION

The Equal Employment Opportunity Commission (EEOC or Commission) accepts Complainant's appeal from the Agency's January 30, 2018, final order concerning attorney's 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. The Commission AFFIRMS the attorney's fees award.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Security Specialist, GS-0080-09, at the Agency's Eglin Air Force Base in Florida.

On May 19, 2011, Complainant filed an EEO complaint wherein he claimed that the Agency discriminated against him and subjected him to a hostile work environment on the bases of race (African-American), national origin (African-American), and color (black) when on or about December 15, 2010, a coworker used foul, offensive and explicit language against him, and on March 31, 2011, the same coworker addressed him using derogatory terms.

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

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.

Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The AJ assigned to the case determined sua sponte that the complaint did not warrant a hearing and over Complainant's objections, issued a decision without a hearing on June 13, 2012, finding that no discrimination occurred. The Agency subsequently issued a final order fully implementing the AJ's decision. Complainant subsequently filed an appeal with the Commission.

In Complainant v. Dep't of the Air Force, EEOC Appeal No. 0120123332 (Sept. 10, 2014), the Commission reversed the Agency's final order and found that Complainant was subjected to a hostile work environment based on his race and color, which culminated in his constructive discharge. To remedy this discrimination, our previous decision ordered the Agency to reinstate Complainant to the position he would have been in absent the harassment and constructive discharge. The Agency was also ordered to provide Complainant with back pay with interest and benefits from the date he ceased receiving pay from the Agency until the date he is reinstated or declines the Agency's offer of reinstatement. The Agency was also ordered to pay attorney's fees and costs as well as to adjudicate Complainant's claim for compensatory damages.

The matter was assigned to an EEOC Compliance Officer and docketed as Compliance No. 0620150030 on October 9, 2014, who monitored the Agency's compliance with these orders.

On December 10, 2015, Complainant submitted a petition for enforcement. Complainant contended that the Agency failed to provide him with any back pay. Complainant also argued that once he was reinstated at the Agency, he was incorrectly notified that he had been overpaid by the Agency in the amount of \$14,634.05, and that his pay is being reduced by \$267.37 each pay period in order to repay this debt. Additionally, Complainant maintained that the Agency's awards of compensatory damages and attorney's fees and costs were incorrect and did not adequately compensate him. In Petitioner v. Dep't of the Air Force, EEOC Petition No. 0420160004 (Apr. 15, 2016), we granted the petition and remanded the matter to the Agency to comply with our order. We observed that the record was devoid of evidence to support the alleged back pay and benefit award, and thus we found that the Agency had not complied with our order in EEOC Appeal No. 0120123332. The Agency was ordered to determine the appropriate amount of back pay and other employment benefits due Complainant. Our decision also ordered the Agency to provide the Compliance Officer with documentation and an explanation for the overpayment of \$14,635.05. Our decision indicated that Complainant was entitled to an award of reasonable attorney's fees.

On May 8, 2017, Complainant filed a second Petition for Enforcement. This Petition for Enforcement addressed the enforcement of orders set forth in EEOC Appeal No. 0120123332 and Petition No. 0420160004. Complainant claimed that the Agency failed to provide evidence of the debt he owed and did not provide him with appropriate back pay. Complainant also stated that the Agency failed to provide him with the sick and annual leave due to him. In Petitioner v. Dep't of the Air Force, EEOC Petition No. 0420170022 (Nov. 3, 2017), we granted the petition in part and remanded the matter to the Agency with reference to the potential availability of attorney's fees.

In its final order dated January 30, 2018, the Agency addressed the issue of attorney's fees for the Second Petition for Enforcement. The Agency noted that Complainant's attorney submitted a bill for 63.8 hours of work at a rate of \$425.00 an hour for a total of \$27,115.00. The Agency stated that its previous decision on December 8, 2014, determined the appropriate hourly lodestar rate to be \$300.00 per hour, but that it elected to pay \$335.00 per hour. According to the Agency, Complainant's attorney submitted her fee agreement with the Second Petition for Enforcement, but Complainant's representative did not submit any evidence concerning the rate at which she customarily bills fee-paying clients. The fee agreement provided for charges of \$425.00 per hour for legal services. The Agency noted that it contacted three law firms in Jonesboro, Georgia, who practice labor and employment law to ascertain prevailing market rates in Complainant's attorney's community. The Agency stated that the attorneys had rates that ranged from \$250.00 to \$350.00 per hour. The Agency asserted that \$425.00 per hour was not reasonable as Complainant's attorney has not provided evidence that she routinely practices, or was a specialist, in the employment law field. The Agency stated that it would compensate her at a rate of \$350.00 per hour.

With respect to the itemized bill submitted by the attorney for a total of 63.8 hours of legal services, the Agency observed that 6.1 hours billed involved clerical work such as scanning, copying and preparing general correspondence, and is not reimbursable. The Agency noted that Complainant filed the Second Petition for Enforcement in March 2017, and Complainant's attorney billed 25.9 hours for that work. The Agency stated that it responded to the Petition and Complainant's attorney charged 5.7 hours for researching the decisions in the Agency's response. According to the Agency, Complainant's attorney subsequently filed an addendum to her Second Petition for Enforcement wherein she billed an additional 12.8 hours. The Agency stated it filed a response to the addendum and Complainant's attorney again billed 5.7 hours for reviewing the case law and decisions cited in the Agency's supplemental response.

The Agency noted that the Commission did not reference the amended filings of either party in its November 3, 2017 decision. The Agency reasoned that the record does not support that Complainant's additional filings contributed to the limited success he achieved. The Agency determined that the additional filings were redundant, excessive and constituted unnecessary hours that should not be reimbursed. The Agency further reduced the remaining balance by 12.8 hours.

Additionally, the Agency determined that Complainant's fee request included redundant and duplicative billing for legal research. The Agency stated that in both its May 31, 2017 response and its August 3, 2017 supplemental response it cited to the same case law and decisions. The Agency argues that Complainant's attorney spent 5.7 hours researching those cases from the original response and therefore 5.7 hours should be deducted for the legal research billed for researching the same cases in the supplemental response. The Agency issued attorney's fees at a rate of \$350.00 per hour for 39.2 hours of work for a total of \$13,720.00.

CONTENTIONS ON APPEAL

On appeal, Complainant's attorney contends that the Agency received an itemized and verified statement for attorney's fees no later than December 4, 2017, but it was not until more than 30 days later on January 11, 2018, that it requested a copy of the fee agreement between Complainant and his attorney. Complainant's attorney argues that the Agency was mandated to respond to the request for attorney's fees within 30 days, and that it refused to comply with the Commission's orders. Complainant's attorney claims that the Agency has acted in bad faith and that sanctions are appropriate. Complainant's attorney maintains that the Memorandum of Engagement between her and Complainant dispels the notion that any of her work was clerical as there was no provision for such work in the agreement.

Complainant's attorney challenges the Agency's disallowance of 12.8 hours for her addendum. Complainant's attorney points out that the Agency responded to the addendum. With respect to the 5.7 hours that were disallowed based on being duplicative, Complainant's attorney maintains this was unwarranted as she was obligated to research the original and additional pleadings submitted by the Agency. Complainant's attorney requests an increase in the lodestar as a sanction against the Agency in light of the delay in payment. Complainant's attorney requests \$27,115.00 in attorney's fees for 63.8 hours of legal services at a rate of \$425.00 per hour.

Complainant's representative also requests sanctions in the form of an increased lodestar as to the attorney's fee award of \$11,792 issued with respect to the work done on the first Petition for Enforcement. Complainant's representative submitted an itemized bill for attorney's fees in the amount of \$14,960.00 for 35.2 hours of work at an hourly rate of \$425.00. Complainant's attorney states that the Agency paid \$10,887.50 based on a billable hourly rate of \$335.00 for 35.2 hours. According to Complainant's attorney, this payment was due not later than 30 days from January 31, 2018 but was not received until April 2, 2018.²

In response, the Agency asserts that its decision regarding attorney's fees was issued in accordance with the Commission's orders and regulations. The Agency notes that it was required to issue a decision determining the amount of attorney's fees within 60 days of receipt of the statement and affidavit from the complainant's attorney.

² In Complainant v. Dep't of the Air Force, EEOC Appeal No. 0120162729 (Jan. 31, 2018), we found that the Agency owed Complainant \$904.50 in attorney's fees. The Agency had previously issued Complainant \$10,887.50 in attorney's fees for the work done on the first Petition for Enforcement. Complainant filed an appeal with the Commission and we observed that the Agency had erroneously stated the award of attorney's fees was based on 32.5 hours of work rather than 35.2 hours. Thus, we added \$904.50 to the Agency's attorney's fees award and agreed with the Agency's determination of \$335.00 per hour for Complainant's attorney. We stated that the attorney did not provide any documentation or evidence to support her claim for a rate of \$425.00 per hour.

The Agency states that it received Complainant's representative's request for fees on December 8, 2017, and that it issued its decision within 60 days on January 30, 2018. The Agency argues it was under no obligation to respond to Complainant's representative within 30 days of receipt of the itemized statement and affidavit.

The Agency asserts that Complainant's representative did not produce any evidence concerning the reasonableness of her hourly rate being requested such as an affidavit that the rate requested is the attorney's normal billing rate or documentation from other attorneys in the community. The Agency rejects Complainant's attorney's position that the fee agreement should take precedence. The Agency maintains that the prevailing market rate supports its position that a billing rate of \$335.00 is reasonable and appropriate. Further, the Agency argues that the 6.1 hours of purely clerical work was a justified deduction.

The Agency asserts that the deductions were appropriate for excessive motions and research. The Agency argues that the amended filings failed to contribute to the Commission's decision and that there should only be compensation that contributed to Complainant's success. The Agency maintains that the second legal research charge of 5.7 hours is clearly redundant, duplicative and excessive. Additionally, the Agency stated that a 50 percent across-the-board reduction was appropriate given the marginal level of success achieved by Complainant's representative. According to the Agency, the only claim on which Complainant was successful in his Second Petition for Enforcement concerned his entitlement to sick and annual leave, and the Agency states that claim was successful for less than the amount requested by Complainant. The Agency notes that Complainant's attorney did not identify in her itemized billing statement the hours associated with each claim.

Finally, the Agency asserts that its compliance with respect to the Commission's Order in EEOC Appeal No. 0120162729, and its reissuance of a prior fee payment is not relevant to whether or not the instant attorney's fees determination in the final order is appropriate. The Agency argues that its compliance efforts are not properly before the Commission for review. Assuming *arguendo* it is properly before the Commission, the Agency asserts that Complainant's requested relief is unwarranted. The Agency states that in EEOC Appeal No. 0120162729, on January 31, 2018, the Commission ordered it to pay Complainant's representative \$904.50 due to a typographical error that had omitted that amount from its final order award. The Agency states that it had already paid Complainant's attorney \$10,887.50 and that the Commission affirmed its final order except for the portion involving the typographical error. The Agency notes that it forwarded payment of the \$904.50 on March 7, 2018, and that it also reissued the payment of \$10,887.50 on March 30, 2018, after Complainant's representative informed it that she had failed to tender the previous payment, and that the check was void due to the passage of time. With respect to whether Complainant is entitled to any relief, the Agency asserts that it should be for no more than interest for the five days it was past due on the payment of \$904.50.

ANALYSIS AND FINDINGS

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. 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).

There is a strong presumption that 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), 11-13. (Aug. 5, 2015). All hours reasonably spent in processing the complaint are compensable, and the number of hours should not include excessive, redundant or otherwise unnecessary hours. MD-110 at 11-5 (citing Hensley, 461 U.S. at 434; and Bernard, EEOC Appeal No. 01966861). 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 11-6 (citing Cooley v. Dep't of Veterans Affairs, EEOC Request No. 05960748 (July 30, 1998)).

The Commission has ruled that, when reviewing the fee petitions which contain many excessive, redundant, unnecessary, or inadequately documented expenditures of time, in lieu of engaging in a line-by-line analysis of each charge claimed, the Commission may calculate the number of hours compensable by applying an across-the-board reduction to the number of hours requested. See Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998). 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. EEO MD-110, 11-7. The party seeking to adjust the lodestar, either up or down, has the burden of justifying the deviation. Id. at p. 11-8

Initially, we observe that Complainant's representative is in part on appeal presenting arguments that pertain to the attorney's fees matter that was addressed in our decision in EEOC Appeal No. 0120162729. That matter is not at issue in the instant appeal and we will only address the issues that are involved in the instant appeal.

Complainant's attorney also claims that the Agency received an itemized and verified statement for attorney's fees no later than December 4, 2017, but it was not until more than thirty days later on January 11, 2018, that it requested a copy of the fee agreement between her and Complainant. Complainant's attorney argues that the Agency improperly failed to respond to the attorney's fees statement within 30 days and failed to issue a decision within 30 days of the amount of such fees.

EEOC Regulations provide that an agency shall issue a decision regarding the amount of attorney's fees or costs due within 60 days of receipt of the statement and affidavit in support of a request for fees or costs. 29 C.F.R. § 1614.501(e)(2)(i)(A). The record reflects that the Agency had until at least February 2, 2018, to issue a final order concerning attorney's fees. The Agency issued its final order in a timely manner within the 60-day period on January 30, 2018. Accordingly, we find no basis to issue sanctions in the instant matter.

Complainant's attorney is challenging the number of work hours and the billable hourly rate that the Agency utilized in determining its award of attorney's fees. With regard to the billable rate, Complainant's representative seeks \$425.00 per hour. The Agency awarded in its final order \$350.00 per hour. Upon review of the record, we discern no persuasive evidence from Complainant's representative supporting her position that she should be awarded attorney's fees at the rate of \$425.00 per hour. Although the fee agreement between Complainant and his representative provides for the payment of \$425.00 per hour, the record evidence supports the Agency's determination that the prevailing market rate in the attorney's legal community of \$350.00 per hour was reasonable and appropriate.

Included in the representative's itemized statement is 6.1 hours of work that entailed copying, scanning, mailing and the preparation of cover letters. The Agency deemed these tasks clerical and not reimbursable. We note that Complainant's attorney states she has no staff and she performed the relevant tasks. However, we find that Complainant's attorney cannot claim fees for performing clerical work. Complainant's representative does not need to pay wages and benefits to employ individuals to perform such work. We have held that clerical work is generally viewed as part of the attorney's overhead and as such these expenses are not reimbursable. Cole v. U.S. States Postal Serv., EEOC Request No. 05910450 (Aug. 5, 1991); see also Weaver v. U.S. Postal Serv., EEOC Appeal No. 0120130748 (May 1, 2013).

The itemized statement also referenced 12.8 hours of work performed on an addendum to the Second Petition for Enforcement. The Agency observed that the Commission did not reference or acknowledge the amended filings of either party in its November 3, 2017 decision. The Agency reasoned that Complainant's addendum did not contribute to the limited success he achieved. Complainant argues that the Agency response to the addendum is evidence that it was something it believed the Commission would consider. We agree with the Agency that the addendum filed to the Second Petition for Enforcement was not a factor in the Commission's decision. Therefore, we find that the Agency properly deducted from its award the 12.8 hours of work done on the addendum.

With respect to the 5.7 hours of legal research that the Agency deemed duplicative, we observe that the Agency pointed out it did not use any new case law in its supplemental response and Complainant's representative spent 5.7 hours researching the same cases on May 31, 2017. We discern that Complainant's representative has offered no persuasive explanation as to why this work was necessary and not redundant. Thus, we find that the Agency appropriately deducted 5.7 hours.

Accordingly, we find that the Agency properly awarded attorney's fees in the amount of \$13,720.00 for 39.2 hours of work performed at an hourly rate of \$350.00.

CONCLUSION

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity Commission to affirm the Agency's final decision awarding \$13,720.00 in attorney's fees and costs to Complainant.

ORDER

To the extent it has not already done so, within 60 days of the date this decision is issued, the Agency shall pay Complainant the amount of \$13,720.00 representing attorney's fees and costs.

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 that the action has been implemented.

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 CFR § 1614.503(f) for enforcement by that agency.

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

September 4, 2019

Date