



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

[REDACTED]
Tiffanie M.,¹
Complainant,

v.

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

Appeal No. 0120182054
Hearing No. 440-2013-0096X
Agency No. 4J606015212

DECISION

On May 23, 2018, 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 April 20, 2018, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

The issues presented on appeal are:

1. Whether substantial evidence in the record supports the EEOC Administrative Judge's (AJ's) finding that Complainant failed to establish that she was subjected to discrimination on the basis of race, color, sex, disability, and reprisal when on September 21, 2012, she was verbally assaulted by her manager and her manager placed her hand in Complainant's face; and

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. With respect to the issues where discrimination was found, did the AJ err by using Complainant's counsel's customary hourly rate for the Grand Rapids, Michigan area instead of the higher hourly rate of the relevant market rate in which the discrimination arose.

BACKGROUND

The record reflects that at the time of events giving rise to this complaint, Complainant worked as a Customer Service Supervisor at the Agency's Jefferson Park Annex in Chicago, Illinois. The AJ's decision clearly articulated the facts of record, and the instant decision incorporates them by reference. On November 8, 2012, Complainant filed an EEO complaint alleging that the Agency subjected her to discriminatory harassment on the bases of race (African-American), sex (female), color (Black), disability, and reprisal for prior protected EEO activity when:

1. On July 25, 2012, she was charged 8 hours of sick leave without notification;
2. In August 2012, she was removed from a training class;
3. On August 10, 2012, her schedule was changed from a 4:00 am start to a 6:30 am start time;
4. On August 31, 2012, her manager raised her voice at Complainant and made the statement "you need to transfer out";
5. On September 21, 2012, she was verbally assaulted by a manager, including the manager placing her hand in Complainant's face;
6. On October 17, 2012, her manager yelled at Complainant about moving her car in the parking lot;
7. On October 18, 2012, her manager yelled at Complainant about not getting enough mail moved;
8. On October 20, 2012, she was issued a 5-day letter and moved out of her bid job assignment;
9. On unspecified dates, management improperly disclosed Complainant's medical information and failed to properly maintain those records.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge. A hearing was held on the merits of the complaint on November 8 - 9, 2016, and a hearing on damages was held May 18, 2017. A final AJ decision was issued March 18, 2018. The Agency subsequently issued a final action adopting the AJ's decision on April 20, 2018.

Complainant prevailed on three of her claims. Specifically, the AJ found: (1) Complainant was discriminated against on the basis of disability when, in August 2012, she was removed from her 3999 Route Inspection Training; (2) Complainant was discriminated against on the basis of retaliation on October 20, 2012, when the Agency reassigned her; and (3) the Agency violated the Rehabilitation Act when, in mid-October 2012 and specifically on October 18, 2012, it improperly released her medical information. The AJ awarded a total of \$17,000 in compensatory damages and ordered the Agency to consider taking appropriate disciplinary action against the responsible

management officials, and to provide EEO training on the requirements of Title VII. As indicated above, the Agency subsequently issued a final order adopting the AJ's finding. The instant appeal by Complainant followed.

CONTENTIONS ON APPEAL

On appeal, Complainant requests that the AJ's decision on reasonable hourly rates be reversed and the claimed fee rates be awarded. Complainant contends the AJ erred in awarding the fee based on the normal Grand Rapids, Michigan rates, instead of the claimed Chicago market rates, or the relevant community where the instant matter. Additionally, Complainant contends that her allegations were not fractionable claims, and therefore no pro rata reduction should have been made to the fee award. Complainant request that an adjustment be made to the fee award if it is determined that she was discriminated against as articulated in allegation 5.

In response, the Agency requests that the Commission deny Complainant's appeal, and affirm the AJ's decisions on the merits and damages. The Agency contends that Complainant was unable to establish that any Agency official acted with any discriminatory animus with respect to allegation 5. Additionally, the Agency argues that Complainant failed to establish a proximate cause for any additional claimed damages as it relates to the October 2012 reassignment or the September 2012 incident.

STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

ANALYSIS AND FINDINGS

Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VI.C (Aug. 5, 2015) provides that on appeal to the Commission, the burden is squarely on the party challenging the AJ's decision to demonstrate that the AJ's factual determinations are not supported by substantial evidence. See id. In this case, this means that Complainant has the burden of pointing out where and why the AJ's findings are not supported by substantial evidence. Cf. id. (pointing out that "[t]he appeals statements of the parties, both supporting and opposing the [AJ's] decision, are vital in focusing the inquiry on appeal so that it can be determined whether the [AJ's] factual determinations are supported by substantial evidence").

Allegation 5 & Additional Attorney's Fees

Upon review, we find the record contains substantial evidence to support the AJ's finding of no discrimination with respect to Complainant's allegation that she was verbally assaulted and subjected to discriminatory harassment by a manager. Like the AJ, we find that Complainant failed to establish that she was subjected to discrimination or retaliation with respect to this incident. The record reflects that Complainant was accused of improperly denying another employee's overtime while acting as a manager. Complainant accused another manager of being responsible for making the final decision regarding overtime, and a disagreement ensued as to who was responsible. Complainant was never touched by the manager, and none of the circumstances surrounding the incident indicate discriminatory animus or intent was involved. Likewise, we find that Complainant has not established on appeal that any action taken involved discriminatory animus.

We also find support for the AJ's determination that Complainant's testimony about the incident that occurred that day was not credible,² and that Complainant did not present specific, substantive evidence to prove she was subjected to disparate treatment based on any protected category. While the incidents complained of in allegation 5 are unprofessional, they do not meet the criteria of discriminatory personnel actions. Consequently, Complainant is not entitled to any increase in the compensatory damages award based on our determination that she cannot establish that she was subjected to discrimination with respect to allegation 5.

Attorney's Fees

An 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); Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (Jul. 17, 1998). Attorney's fees are computed by determining the lodestar, i.e., the number of hours reasonably expended multiplied by a reasonable hourly rate. 29 C.F.R. § 1614.501(e)(2)(ii)(B); EEO Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) at 11-5 (citing Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). All hours reasonably spent in processing the complaint are compensable, and the number of hours should not include excessive, redundant or otherwise unnecessary hours. EEO 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. EEO MD-110 at 11-6 (citing Cooley v. Dep't of Veterans Affairs, EEOC Request No. 05960748 (Jul. 30, 1998)).

The reasonable hourly rate is generally determined by the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skill, experience and reputation. Blum v. Stenson, 465 U.S. 886 (1984). The AJ determined that Complainant should be

² An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chap. 9, at § VI.B. (Aug. 5, 2015).

awarded counsel's customary hourly rate used in his Grand Rapids, Michigan law firm.³ Although the parties concede that Complainant worked in the Jefferson Park Carrier Annex of the Chicago Post Office, and that the case was heard in the Chicago District Office, we find nothing in the record to warrant reversing the AJ's decision to use counsel's customary hourly rate as the reasonable hourly rate in the instant matter. The Commission has held that complainants can go elsewhere to find an attorney to handle their specific case, even when it results in payment of a higher hourly rate than the prevailing market rate where the matter arose, but this is not the situation here. See Southerland v. U.S. Postal Serv., EEOC Appeal No. 01A05403 (Oct. 16, 2002). In the instant matter, Complainant chose to hire an attorney with lower hourly rates from outside of the market where allegations arose. Nothing in the record supports an assertion that Complainant's counsel performed his duties any differently than he would have if the case arose, or was litigated in, Grand Rapids.

While Complainant contends that the AJ failed to justify the decision to pay counsel's customary rates, we note that the burden rests with Complainant to establish that a higher rate was justified. Aside from citing a single case in which a higher hourly rate matching the forum's jurisdiction was awarded and establishing that a higher hourly rate was customary in Chicago than in Grand Rapids, Complainant offers no evidence that the AJ erred or that a higher hourly rate was warranted. Accordingly, we find no persuasive evidence, or precedent, to support the reversal of the AJ's decision on fees in the instant matter.

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 final order implementing the AJ's decision. We find substantial evidence in the record to support the finding that Complainant failed to establish that she was subjected to discrimination on the basis of race, color, sex, disability, and reprisal when on September 21, 2012, she was verbally assaulted by her manager and her manager placed her hand in Complainant's face, as well as, to support the AJ's decision to use Complainant's counsel's customary hourly rate in the fee award calculation.

ORDER

The Agency is ordered to take the following remedial action within one hundred and twenty (120) days of the date this decision is issued:

To the extent it has not already done so, the Agency shall pay Complainant \$61,462.84 in attorney's fees and costs.

³ Complainant's counsel had a customary hourly rate of \$375 per hour, and \$275 per hour for the junior attorney on the case. Counsel was claiming that hourly compensation should have been at the prevailing market rate for the Chicago area at \$475 and \$300 per hour respectively.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled “Implementation of the Commission’s Decision.” The report shall include supporting documentation verifying the corrective action has been implemented as ordered.⁴

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

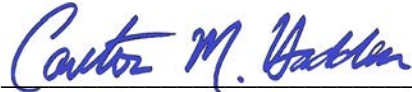
⁴ The other aspects of the Agency’s final Order are not in dispute.

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

December 18, 2019

Date