



EMPLOYMENT DISCRIMINATION



REPORT

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EEOC Federal Sector Law and 2007 Decisions on Attorneys' Fees and Costs

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General Law of EEOC Attorneys' Fees and Costs Awards

This article focuses on recent decisions of the Equal Employment Opportunity Commission awarding attorneys' fees and costs to federal employees when they prevail in discrimination cases under Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-16, covering race, color, religion, sex, and/or national origin claims, and under the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791, and Title I of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, covering physical and/or mental handicap claims. However, complainants prevailing on claims under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 631, 633a, or the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d), are not entitled to attorneys' fees at the administrative level. Like the courts in non-federal sector cases, EEOC explains its rationale in ruling on appeals of attorneys' fees decisions issued by its administrative judges and the Office of Federal Operations. EEOC generally follows its own case law, except for U.S. Supreme Court decisions, and does not apply the law of the federal court of appeals in the circuit where the case arose.

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Attorneys' fees in the federal sector have their origin in Title VII, which provides for attorneys' fees and costs to a "prevailing party" who has succeeded on any significant legal issue that achieved some of the benefits sought in the complaint. 42 U.S.C. § 2000e-5(k); *Texas State Teachers Ass'n v. Garland I.S.D.*, 489 U.S. 782 (1989). "A finding of discrimination raises a presumption of entitlement to an award of attorney's fees." 29 C.F.R. § 1614.601(e)(i). EEOC has issued regulations implementing the statute for federal employees at 29 C.F.R. § 1614.501(e) *Attorney's fees or costs*; see also "EEOC Management Directive (MD) 110," Ch. 11 — Attorney's Fees and Costs, and the "EEOC Handbook for Administrative Judges," Ch. 9 — Attorney's Fees and Compensatory Damages:

- A. . . . The Commission has relied on a two-part test set forth in *Miller v. Staats*, 706 F.2d 336 (D.C. Cir. 1983), for determining whether a complainant is a prevailing party. *Baldwin v. Department of Health & Human Services*, EEOC Request No. 05910016 (April 12, 1991). To satisfy the first part of the test, the complainant must have substantially received the relief sought. *Id.* To satisfy the second part of the test, there must be a determination that the complainant was a catalyst motivating the agency to provide relief. *Id.* (citing *Miller*, 706 F.2d at 341). A purely technical or *de minimis* success is insufficient to confer "prevailing party" status. *Texas State Teachers Ass'n*.
- B. The touchstone is whether the actual relief on the merits materially alters the legal relationship between the parties by modifying the agency's behavior in a way that directly benefits the complainant. *Farrar v. Hobby*, 506 U.S. 103 (1992); *Bragg v. Department of the Navy*, EEOC Appeal No. 01945699 (March 7, 1996). Even an award of nominal monetary damages may be sufficient to

meet this standard. *Farrar*. Monetary relief is not required; non-monetary relief such as reinstatement or a higher performance rating is sufficient. *Id.*

MD-110 — Ch. 11 at Sec. II. Determination of Prevailing Party Status.

Special Circumstances Narrowly Construed. Attorneys' fees and costs normally are awarded to prevailing complainants unless special circumstances make such awards unjust. 29 C.F.R. § 1614.501(e)(1)(i); *New York Gaslight Club Inc. v. Carey*, 447 U.S. 54 (1983); *Thomas v. State Dep't*, EEOC Appeal No. 01932717 (June 10, 1994). Special circumstances are narrowly construed by EEOC and do not include the following arguments:

1. the complainant did not need an attorney;
2. the complainant's attorney worked for a public interest organization;
3. the complainant's attorney accepted the case pro bono;
4. the complainant's attorney was paid from some private fee agreement;
5. the complainant was able to pay the costs of the case;
6. the agency acted in good faith;
7. the agency took prompt action in remedying the discrimination;
8. the financial burden of any fee would fall to the taxpayers;
9. the agency has limited funds.

See *Blanchard v. Bergeron*, 489 U.S. 87 (1989); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221 (10th Cir. 1997); *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986); *Fields v. City of Tarpon Springs*, 721 F.2d 318 (11th Cir. 1983); *Copeland v. Marshall, supra.*; see also *Wise v. VA*, EEOC Request No. 05920056 (April 1, 1992).

MD-110 — Ch. 11, Sec. III. Presumption of Entitlement.

Complainants who prevail through negotiated settlement agreements that provide for such reimbursement also are entitled to attorneys' fees and costs under the same standards as any other prevailing party. *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980); *EEOC v. Madison Cmty. Unit Sch. Dist. 12*, 818 F.2d 577 (7th Cir. 1987); *Cerny v. Navy*, EEOC Request No. 05930899 (Oct. 19, 1994).

Where a settlement agreement is silent as to attorneys' fees and costs, it may be construed as a waiver. *Wakefield v. Matthews*, 852 F.2d 482 (9th Cir. 1988); *Elmore v. Shuler*, 787 F.2d 601 (D.C. Cir. 1986). However, if the parties are unable to agree on the amount of attorneys' fees and costs but provide for such reimbursement in a settlement agreement, EEOC will become the final arbiter if the complainant disputes the agency's award. 29 C.F.R. § 1614.501(e)(2)(ii)(A). If a complainant rejects an offer of resolution made pursuant to 29 C.F.R. § 1614.109(c) and does not ultimately obtain more relief than the agency had offered, attorneys' fees will be limited. Also, attorneys' fees may not be awarded for work performed in the informal stage of a complaint unless the administrative judge issues a decision finding discrimination, the agency issues a final or

der refusing to implement the decision, and EEOC upholds the AJ's decision on appeal although attorneys' fees and costs are negotiable in reaching settlement. Regardless, attorneys' fees may be recovered for a reasonable period of time in deciding whether to represent the complainant. 29 C.F.R. § 1614.501(e)(1)(iv).

An attorney who represents himself or herself is not entitled to an award of attorneys' fees and costs. *Kay v. Ehrler*, 499 U.S. 432 (1991). Non-attorneys likewise are not entitled to an award of fees and costs. Federal employees, including attorneys, also are not entitled to an award of fees. Only the complainant has standing to petition for an award of fees and costs; counsel (current or former) does not have an independent right to petition for an award of fees, either as a direct claimant or as an intervenor. See *Scott v. DOE*, EEOC Appeal No. 0720070018 (April 24, 2007). The award constitutes the complainant's entitlement to payment from the agency. Actual adjustment of payments between counsel and the complainant is a private contractual matter outside the scope of EEOC's authority. See *id.*

EEOC Uses 'Lodestar' Formula. The same general criteria for the computation of attorneys' fees apply in the federal sector as in the private and state and local government sectors. EEOC uses the "lodestar" formula—"the number of hours reasonably expended multiplied by a reasonable hourly rate"—for calculating the amount of attorneys' fees. MD-110 — Ch. 11, Sec. VI A, citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); see 29 C.F.R. § 1614.501(e)(2)(ii)(B). "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. Department of Veterans Affairs*, EEOC Request No. 05960748 (July 30, 1998) (quoting *Blum v. Stenson*, 465 U.S. 886 (1984))." MD-110 — Ch. 11, Sec. VI A 5.

The lodestar may be adjusted under limited circumstances, "taking into account the degree of success, the quality of representation, and the long delay caused by the agency." *Id.* at Sec. VI B; 29 C.F.R. § 1614.501(e)(iv)(2)(ii)(B). However, EEOC has allowed attorneys to use their current billable rates for all work done to compensate for long delays in receiving reimbursement of fees. *Mareno v. VA*, EEOC Appeal No. 01943104 (Feb. 14, 1996). Some attorneys charge a higher rate for time spent at a hearing, which may be recoverable if trial work commands a higher rate under prevailing community standards. If more than one attorney or paraprofessional has worked on a case, the rate for each should be separately determined. "A prevailing plaintiff is entitled to compensation for the work of law clerks, paralegals, and law students under supervision of members of the Bar, at market rates, 1614.501(e)(1)(iii), but not for clerical services. *Missouri v. Jenkins*, 491 U.S. 274 (1989)." MD-110 — Ch. 11, Sec. V C.

In the District of Columbia, reasonable attorneys' fees in both the private and federal sectors commonly are calculated based on market rates using the *Laffey* matrix. *Laffey v. Northwest Airlines*, 572 F. Supp. 354, 32 FEP Cases 750 (D.D.C. 1983), *aff'd in relevant part*, 746 F.2d 4 (1985), 35 FEP Cases 1609 (D.C. Cir. 1984). In *Laffey, supra*, the U.S. Court of Appeals for the District of Columbia Circuit strongly endorsed tying the "reasonable hourly rate" to the firm's own billing rates. However, *Save Our Cumberland Mountains Inc. v.*

Hodel, 857 F.2d 1516 (D.C. Cir. 1988) (*en banc*), overruled *Laffey* and approved the recovery of attorneys' fees at the prevailing market rate, without regard for the actual rate charged to the client, for attorneys who offer reduced rates to clients in Title VII cases. EEOC has specifically approved the use of the *Laffey* matrix although there is at least one other formula that it has accepted. *Morales v. USIA*, EEOC Appeal No. 01956779 (Dec. 3, 1997) (*Laffey* matrix provides permissible basis for determining prevailing market rate for attorneys' fees); *Lal v. SEC*, EEOC Appeal No. 01974652 (Feb. 2, 2000) (attorneys' fees awarded at prevailing market rate notwithstanding reduced rate retainer agreement); but see *Monroig v. U.S. Comm'n on Civil Rights*, EEOC Request No. 05A0762 (April 9, 2003) (upholding alternate calculation of attorneys' fees at market rates).

EEOC also has permitted the calculation of attorneys' fees using the *Laffey* matrix outside of Washington where out-of-town counsel was not readily available. Under EEOC precedent, if "a party does not find counsel readily available in that locality with whatever degree of skill may reasonably be required, it is reasonable that the party go elsewhere to find an attorney . . ." *Hatfield v. Navy*, EEOC Appeal No. 01892909 (Dec. 12, 1989). Furthermore, the burden is on the agency to demonstrate that the complainant's selection of out-of-town counsel was unreasonable. *Williams v. VA*, EEOC Appeal No. 01984753 (July 6, 2001).

The calculation of attorneys' fees in the federal sector is more complicated because of the limitation on fees incurred during the informal EEO process, which must be exhausted before filing a formal complaint with the agency. As explained *supra*, attorneys' fees for services rendered during the pre-complaint process are limited to a reasonable period of time for services performed in reaching a determination to represent the complainant, unless the agency unsuccessfully appeals a favorable decision to EEOC. 29 C.F.R. § 1614.501(e)(1)(iv). The amount of fees not reimbursed can be fairly significant if the employee engaged in an unsuccessful mediation, as alternative dispute resolution is an option. 29 C.F.R. § 1614.105(b)(2). Attorneys' fees are awardable for work performed in the appeals stage if the complainant prevails, but the fees may be reduced if the employee does not prevail on all claims, normally with a maximum reduction of 75 percent. MD-110 — Sec. VII B 5; *Opfer v. DOC*, EEOC Appeal No. 01A44558 (Dec. 29, 2005). By case law, EEOC reduces by 50 percent attorneys' fees spent on travel where no work was performed. *Black v. Army*, EEOC Request No. 05960390 (Dec. 9, 1998); *Logan v. Army*, EEOC Appeal No. 01950602 (June 20, 1997).

EEOC has resumed issuing attorneys' fees and costs as a sanction where an agency does not honor an AJ's order, *e.g.*, in failing to respond fully to discovery requests or in failing to complete an EEO report of investigation. The purpose of the sanctions is to prevent misconduct in the future. *Waller v. DOT*, EEOC Appeal No. 0720030069 (May 25, 2007), rejecting a Justice Department memorandum to the contrary, held that EEOC has "the authority to issue sanctions in the administrative hearing process because it has been granted, through statute, the power to issue such rules and regulations that it deems necessary to enforce the prohibition on employment discrimination," citing *Metheny v. DOJ*, EEOC Request No. 05A30373 (April 21, 2005). EEOC also held that it has specifically deemed monetary sanc-

tions, to include attorneys' fees and costs, "necessary and appropriate to carry out its responsibilities." See 42 U.S.C. § 2000e-16(c); MD-110 — Ch. 11, Sec. VIII C, citing 29 C.F.R. § 1614.109(f)(3)(v). Sanctions may be awarded even when the complainant does not prevail on the merits, *e.g.*, for efforts to secure discovery compliance. *Stull v. DOJ*, EEOC Appeal No. 01942827 (June 14, 1995); MD-110 — Ch. 11, Sec. VIII C.

Awards Similar to Private Sector. EEOC awards costs and fees to a prevailing complainant similar to the private sector, including those authorized by 28 U.S.C. § 1920; see 29 C.F.R. § 1614.501(e)(2)(ii)(C). These costs include:

. . . witness fees; transcript costs; and printing and copying costs. In addition, reasonable out-of-pocket expenses may include all cost incurred by the attorney that are normally charged to a fee-paying client in the normal course of providing representation. *Hafiz v. Department of Defense*, EEOC Petition No. 04960021 (July 11, 1997). These costs may include such items as mileage, postage, telephone calls, and photocopying.

MD-110 — Ch. 11, Sec. V A. A prevailing complainant also is entitled to recover fees for experts as part of recoverable attorneys' fees. 42 U.S.C. § 1988. The fees include per diem expenses and any other expenses incurred. While recovery generally is limited to testifying experts, fees may be awarded for non-testifying experts if such services were reasonably necessary for the case. MD-110 — Ch. 11, Sec. V B. Reasonable costs incurred directly by a prevailing complainant who is unrepresented or represented by a non-lawyer may be recovered, but the complainant must provide proper documentation such as bills or receipts. *Id.* at Sec. V D. Complainants represented by attorneys also may recover such costs under pecuniary damages. "Witness fees shall be awarded in accordance with 28 U.S.C. 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness. 1614.501(e)(2)(iii)." *Id.* at Sec. V E.

When making a fee application, the complainant's attorney must submit a verified statement of fees, including expert witness fees and costs, as appropriate, to the agency or the AJ within 30 days of receipt of the decision. *Id.* at Sec. VII A; 29 C.F.R. § 1614.501(e)(2)(1). According to EEOC:

A statement of attorneys' fees and costs must be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. A verified statement of fees and costs shall include the following:

1. a list of services rendered itemized by date, number of hours, detailed summary of the task, rate, and attorney's name;
2. documentary evidence of reasonableness of hours, such as contemporaneous time records, billing records, or a reasonably accurate substantial reconstruction of time records;
3. documentary evidence of reasonableness of rate, such as an affidavit stating that the requested rate is the attorney's normal billing rate, a detailed affidavit of another attorney in the community familiar with prevailing community rates for attorneys of comparable experience and expertise, a re-

sume, a list of cases handled, or a list of comparably cases where a similar rate was accepted; and

4. documentation of costs.

National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982). A fee award may be reduced for failure to provide adequate documentation. If seeking an adjustment to the lodestar figure, the fees application shall clearly identify the specific circumstances of the case that support the requested adjustment. *Id.*

Id. at Sec. VII A.

The agency then has 30 days from receipt to respond to the statement of fees and costs. If it contests the fee request, it “must also provide equally detailed documentation in support of its arguments. *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982).” *Id.* at Sec. VII B. While discovery concerning attorneys’ fees and costs may be possible if approved by an AJ, it is discouraged and rarely used. *Id.* at Sec. VII C. The AJ or agency is required to issue a decision within 60 days and “should provide a written explanation of any award of fees and costs, including, as appropriate, findings of fact, analysis, and legal conclusions. 1614.501(e)(2)(ii)(A).” The decision also must include a notice of right to appeal to EEOC. *Id.* at Sec. VII D.

EEOC strongly encourages parties to settle fee and costs issues, and an “administrative judge will not review a fee settlement agreement for fairness or reasonableness, except in class cases.” *Id.* at Sec. VII E. There also is a possibility of an interim fee award pendente lite where a complainant has prevailed on an important allegation of discrimination during the processing of the case over a long period of time. *Id.* at Sec. VIII A. However, this is very rare in the EEOC administrative process. If a complainant, but not the agency, is not satisfied with the outcome during the administrative phase of the case, he or she can file a complaint in the appropriate federal district court and request a trial de novo. Regardless, the case law has not allowed a plaintiff to contest only an award of attorneys’ fees and/or damages without subjecting the entire case to a trial de novo. *See, e.g., Laber v. Harvey*, 438 F.3d 404, 413-14, 424-25, 97 FEP Cases 846 (4th Cir. 2006) (44 GERR 258, 3/7/06); *Chris v. Tenet*, 221 F.3d 648, 655 (4th Cir. 2000).

2007 EEOC Decisions on Attorneys’ Fees and Costs

The following is a digest of the reported decisions of EEOC’s Office of Federal Operations issued in calendar year 2007 of particular import with respect to EEOC’s award of attorneys’ fees and costs to federal sector complainants.

1. Statutes Authorizing Fees

- Under the Civil Rights Act of 1991, a finding of a “mixed motive” entitles a complainant to prevailing party status such as to raise entitlement to attorneys’ fees. *Reddy v. USAID*, EEOC Appeal No. 0720060022 (Aug. 31, 2007).

2. Prevailing Party Status

- Achieving agency compliance with a breached settlement agreement constitutes “obtaining re-

lief” such as to entitle the complainant to an award of attorneys’ fees. *Roberts v. DOI*, EEOC Appeal No. 0120072387 (Aug. 28, 2007).

- A successful challenge to insufficient agency proposed remedial actions entitles complainant to prevailing party status. *Burton v. OPM*, EEOC Appeal No. 0120055743 (March 29, 2007).
 - A party who was successful on original appeal, but failed to expand originally awarded relief on request for reconsideration, is not considered a prevailing party with respect to the request for reconsideration-associated fees. *Wilson v. USPS*, EEOC Appeal No. 0120051771 (May 25, 2007).
 - Obtaining an enhanced calculation of back pay and ensuring continued processing of the complaint do not constitute “additional relief” such as to justify a supplemental award of fees. *Lim v. USPS*, EEOC Appeal No. 0120061399 (June 6, 2007).
 - Obtaining an EEOC order directing implementation of an incompletely implemented agency final order concerning discrimination potentially entitles employee to an award of attorneys’ fees. *Loomis v. DHS*, EEOC Appeal No. 0120071945 (June 12, 2007).
 - Obtaining attorneys’ fees and compensatory damages withheld by agency when it refused to fully implement AJ’s decision constitutes obtaining relief such as to justify a supplemental award of fees. *Mohr v. VA*, EEOC Appeal No. 0720050057 (Feb. 23, 2007).
 - Complainant is entitled to fees associated with a petition to enforce where the filing of the petition to enforce was necessary to force the agency to issue a tardy decision on attorneys’ fees. *Moore v. DOJ*, EEOC Petition No. 0420070012 (July 31, 2007).
 - Obtaining improved remedies on appeal is sufficient to justify prevailing party status. *Moore v. DOJ*, EEOC Appeal No. 0120072439 (July 31, 2007).
 - Award of training and other remedial relief is sufficient to confer prevailing party status. *Reddy v. USAID*, EEOC Appeal No. 0720060022 (Aug. 31, 2007).
 - A complainant obtaining agency enforcement of breached settlement agreement is considered a prevailing party entitled to attorneys’ fees. *Romike v. Army*, EEOC Appeal No. 0120073772 (Nov. 16, 2007).
 - Increase of non-pecuniary damages award on appeal is sufficient to justify prevailing party status. *Pearman v. Navy*, EEOC Appeal No. 0120054343 (Nov. 20, 2007).
 - Prevailing party status does not occur where EEOC vacated an agency decision annulling a settlement agreement where complainant did not receive any benefit from the decision as the agency was already in material compliance with that agreement. *Ellis v. USPS*, EEOC Appeal No. 0120063065 (Dec. 5, 2007).
- ### 3. Categories of Persons/Activities Compensable
- Where the complainant changed counsel in the midst of administrative proceedings, limited fees attributable to the efforts of second counsel in recovering the case file from first counsel are com-

pensable. *Brinkley v. USPS*, EEOC Appeal No. 0120055354 (March 30, 2007).

- Attorney who was a member in good standing of the Mississippi Bar Association is entitled to compensation, even though he was in inactive status with the bar during representation. *Wynn v. Treasury Dep't*, EEOC Appeal No. 0120063627 (Feb. 8, 2007).

4. Categories of Persons/Activities Not Compensable

- For an agency to be liable for fees, the complainant first must provide the agency with reasonable notice of the representation. The agency is then only liable for those services that occur subsequent to this notification of representation. *Bauer v. NSA*, EEOC Request No. 0520070367 (June 27, 2007); *Johnson v. USPS*, EEOC Appeal No. 0120054278 (March 20, 2007).
- Truly clerical tasks are not compensable. *Johnson v. USPS*, EEOC Appeal No. 0120054278 (March 20, 2007).
- Travel time where no other work is being performed is only 50 percent compensable, but paralegal travel time also is 50 percent compensable. *Watson v. USPS*, EEOC Appeal No. 0720050085 (June 21, 2007); *Johnson v. USPS*, EEOC Appeal No. 0120054278 (March 20, 2007).
- When complainant is not represented by an attorney, no fee award can be made for the services of a non-attorney representative even if the non-attorney representative occasionally consulted with an attorney during the representation. *Nunez-Mattocks v. DOE*, EEOC Appeal No. 0120062430 (June 1, 2007).
- Attorney consultation fee is not compensable where attorney did not represent complainant directly in proceedings. *Nunez-Mattocks v. DOE*, EEOC Appeal No. 0120062430 (June 1, 2007).

5. Lodestar—General

- EEOC awarded fees based upon a partial flat fee arrangement where the complainant's attorney charged the complainant a flat fee for representation through the investigatory process, then switched to hourly fees during the hearing process. See *Thorogood v. Navy*, EEOC Appeal No. 0720070072 (Nov. 13, 2007).

6. Hours Reasonably Expended

- Counsel claimed an unreasonable number of hours for the work specified (e.g., 95.65 hours for "preparation of opening and reply appeal briefs" and 67.1 hours for preparing motions regarding attorneys' fees and motions to strike), prompting EEOC to deduct time. *Davis v. USPS*, EEOC Appeal No. 0120053186 (April 24, 2007).
- For fee award for successful prior appeal to the Office of Federal Operations, time expended prior to the agency's filing of its appeal is not reasonably expended, but time spent analyzing the AJ's decision and in deliberating on a possible cross-appeal is reasonable. *Coffey v. USPS*, EEOC Appeal No. 0120052508 (Oct. 31, 2007).

7. Reasonable Hourly Rates

- Williamsburg, Va.-based attorney participating in a proceeding in Richmond, Va., was entitled to \$200/hour for attorney time and \$11/hour for paralegal time. *Johnson v. USPS*, EEOC Appeal No. 0120054278 (March 20, 2007).
- Relying on *Laffey* matrix, attorney with 10-plus years of experience was entitled to \$345/hour rate. *Burton v. OPM*, EEOC Appeal No. 0120055743 (March 29, 2007).
- \$350/hour rate was approved for counsel of unspecified origin. *Jarvis v. NASA*, EEOC Appeal No. 0720060082 (April 3, 2007).
- Mississippi attorney was entitled to \$125/hour rate. *Wynn v. Treasury Dep't*, EEOC Appeal No. 0120063627 (Feb. 8, 2007).
- Atlanta prevailing market rate was identified at \$250/hour. *Wynn v. Treasury Dep't*, EEOC Appeal No. 0120063627 (Feb. 8, 2007).
- \$305/hour rate was approved for counsel of unspecified origin. *Davis v. USPS*, EEOC Appeal No. 0120053186 (April 24, 2007).
- \$350/hour attorney rate and \$90/hour legal assistant rate were approved for counsel of unspecified origin. *Mullen v. USPS*, EEOC Appeal No. 01A53977 (Dec. 19, 2005), *aff'd* EEOC Request No. 0520060411 (May 3, 2007).
- Chicago attorneys were entitled to \$330/hour and \$300/hour rates, and paralegal entitled to \$90/hour rate. *Drummond-Irving v. DHS*, EEOC Appeal No. 0720060051 (May 17, 2007).
- EEOC permitted an AJ to make a determination of hourly rates based on his survey of his own prior cases and attorneys' fee claims made therein by other complainants' counsel. *Drummond-Irving v. DHS*, EEOC Appeal No. 0720060051 (May 17, 2007).
- \$300/hour attorneys' rate was approved for counsel of unspecified origin. *Bergren v. DOT*, EEOC Appeal No. 0720060007 (June 12, 2007).
- Attorney practicing in Ventura, Calif., and Long Beach, Calif., is entitled to \$300/hour rate, and legal assistant entitled to \$150/hour rate in that the assistant already possessed a J.D. degree and was an applicant to the bar. *Page-Sanchez v. USPS*, EEOC Appeal No. 0720050080 (June 12, 2007).
- Philadelphia attorney's \$350/hour rate for 2004 and \$325/hour rate for 2003 were approved. *Mohr v. VA*, EEOC Appeal No. 0720050057 (Feb. 23, 2007).
- \$360/hour rate was approved for counsel of unspecified origin. *Moore v. USPS*, EEOC Appeal No. 0720050084 (March 6, 2007).
- \$225/hour rate and \$165/hour rate were approved for counsel of unspecified origin. *McGray v. Peace Corps*, EEOC Appeal No. 0720060027 (March 7, 2007), *aff'd* EEOC Request No. 0520070500 (Sept. 21, 2007).
- Columbia, S.C., attorneys were found entitled to \$300/hour rate for lead counsel, \$275/hour rate for secondary counsel, and \$85/hour rate for law clerks. *Lindsay v. VA*, EEOC Appeal No. 0720070016 (July 26, 2007), *aff'd* EEOC Request No. 0520070874 (Sept. 26, 2007).

- The burden is on the agency to challenge the unreasonableness of retaining out-of-town attorneys on the basis that lower-priced local counsel was available. *Moore v. DOJ*, EEOC Appeal No. 0120072439 (July 31, 2007).
- Complainant was entitled to recover attorneys' fees at home rate for Washington, D.C.-area rate rather than for lower rate prevalent in West Texas locale where the case arose, when no employment law practitioners were available locally. *Moore v. DOJ*, EEOC Appeal No. 0120072439 (July 31, 2007).
- Partner rates of \$300/hour and \$250/hour, junior associate rates of \$175/hour, and paralegal rates of \$75/hour and \$90/hour were reasonable for attorneys of unspecified origin. *Olison v. VA*, EEOC Appeal No. 0120072707 (Sept. 17, 2007).
- \$300/hour and \$350/hour rates were reasonable for attorneys of unspecified origin. *Coffey v. USPS*, EEOC Appeal No. 0120052508 (Oct. 31, 2007).
- \$200/hour rate was reasonable for counsel of unspecified origin. *San Diego v. VA*, EEOC Appeal No. 0720060014 (Nov. 15, 2007).
- \$250/hour rate was reasonable for counsel of unspecified origin. *Pearman v. Navy*, EEOC Appeal No. 0120054343 (Nov. 20, 2007).

8. Hourly Rate Adjustment

- Commission declined to double fees; complainant's request was made on the basis of skill of the attorneys and for other rationale not stated in the opinion. *Page-Sanchez v. USPS*, EEOC Appeal No. 0720050080 (June 12, 2007).
- In sexual harassment case, AJ decision reducing fees by 50 percent for having lead attorney assisted by one co-counsel at hearing was overturned. EEOC instructed, "Proof of sexual harassment involves matters of subjective perception that are frequently difficult to prove. The same is true of claims of non-pecuniary, compensatory damages." *Page-Sanchez v. USPS*, EEOC Appeal No. 0720050080 (June 12, 2007).

9. Reduction for Lack of Success on All Claims

- 25 percent reduction was applied to hearing preparation time of trial co-counsel where time entries for co-counsel were potentially duplicative of other time entries of lead counsel, and the text of the time entries did not clearly delineate which tasks were performed by lead counsel and which tasks were performed by co-counsel. *Jarvis v. NASA*, EEOC Appeal No. 0720060082 (April 3, 2007).
- 50 percent reduction was applied where complaint consisted of three separate nonselection claims, where no violation was found as to two of the nonselections, where the third claim was only found to be retaliatory and not discriminatory on any of the cited bases, and where the three nonselections were factually distinguishable. *Holt v. USPS*, EEOC Appeal No. 0720060034 (Jan. 31, 2007).
- Two-thirds reduction was applied for fees related to an appeal, where the appeal related to three separate remedy items, and where complainant only prevailed on appeal as to one of the three remedy items subject to appeal. *Norte v. DOE*, EEOC Appeal No. 0120055353 (April 17, 2007).
- 50 percent reduction was applied to fees related to appeal on compensatory damages and prior attor-

neys' fees, where appeal only succeeded in increasing compensatory damages award by \$15,000 compared to \$285,000 sought and only succeeded in award of \$16,735 in fees when over \$100,000 sought. *Davis v. USPS*, EEOC Appeal No. 0120053186 (April 24, 2007).

- 67 percent reduction was applied to fee award where complainant was only partially successful and claims were not sufficiently intertwined legally or factually. *Mullen v. USPS*, EEOC Appeal No. 01A53977 (Dec. 19, 2005), *aff'd* EEOC Request No. 0520060411 (May 3, 2007).
- 30 percent reduction was applied when not successful on two of four claims, where claims were not fractionable. *Drummond-Irving v. DHS*, EEOC Appeal No. 0720060051 (May 17, 2007).
- Use of two attorneys does not per se justify a fee reduction. *See Drummond-Irving v. DHS*, EEOC Appeal No. 0720060051 (May 17, 2007).
- Reduction found not appropriate where complainant proved hostile work environment on the basis of sex discrimination but not on the basis of reprisal because the claims were not distinct or fractionable. *Page-Sanchez v. USPS*, EEOC Appeal No. 0720050080 (June 12, 2007).
- 25 percent reduction was applied when employee was unsuccessful on two of five claims asserted, where unsuccessful claims were factually segregable from the successful claims. *See Ansari v. Treasury Dep't*, EEOC Appeal Nos. 0720070054, 01220070328 (June 15, 2007).
- 20 percent reduction was applied where employee was successful on only one of seven claims, but claims arose from a common core of facts and overlapping legal theories, issues and discovery. *Davis v. DHS*, EEOC Appeal No. 0720060003 (June 18, 2008).
- 20 percent reduction was applied where two of three claims unsuccessful. *Mohr v. VA*, EEOC Appeal No. 0720050057 (Feb. 23, 2007).
- Reduction was found not appropriate where issues on appeal pertained to remedies issued for same core discriminatory acts, as the facts were not fractionable. *Moore v. DOJ*, EEOC Appeal No. 0120072439 (July 31, 2007).
- Maximum reduction of 75 percent under MD-110 was permitted where complainant only received training and other remedial relief, having only succeeded on two of eight claims; AJ's 80 percent reduction accordingly was reduced to the MD-110 75 percent maximum. *Reddy v. USAID*, EEOC Appeal No. 0720060022 (Aug. 31, 2007).
- Where claims are non-fractionable and related, a percentile fee reduction is unwarranted. *Logan v. DOI*, EEOC Appeal No. 0720060093 (Sept. 10, 2007).
- 50 percent reduction was applied where complainant was only successful in defeating agency's appeal, but had failed on cross-appeal or request for reconsideration. *Olison v. VA*, EEOC Appeal No. 0120072707 (Sept. 17, 2007).

10. Fees as Sanctions

- EEOC refused to follow the opinion of the Justice Department ("Re: The Equal Employment Opportunity Commission's Authority to Impost Attorney's Fees Against Federal Agency for Failure to Comply with Order Issued by EEOC Administra-

tive Judges,” issued Jan. 6, 2003) that had argued that EEOC did not have authority to issue monetary sanctions against federal agencies under the doctrine of sovereign immunity. Instead, relying on the prohibition of employment discrimination in federal agencies as a statutory waiver of sovereign immunity, and citing EEOC’s enabling regulations and long-standing case law, EEOC found that its AJs were authorized to impose monetary sanctions against federal agencies in appropriate circumstances. *Waller v. DOT*, EEOC Appeal No. 0720030069 (May 25, 2007).

- Issuance of default judgment, including award of attorneys’ fees and costs, was found appropriate for agency failure to timely investigate a complaint of discrimination. *Lomax v. VA*, EEOC Appeal No. 0720070039 (Oct. 2, 2007); *Royal v. VA*, EEOC Appeal No. 0720070045 (Sept. 10, 2007).

11. Varieties of Costs Awarded

- Costs for procuring hearing transcript are compensable. *Brinkley v. USPS*, EEOC Appeal No. 0120055354 (March 30, 2007).
- Costs for court reporting, transcripts, printing, travel expenses, and mileage are compensable. *Jarvis v. NASA*, EEOC Appeal No. 0720060082 (April 3, 2007).
- Mailing costs are compensable even without attorney participation in the case. *Nunez-Mattocks v. DOE*, EEOC Appeal No. 0120062430 (June 1, 2007).
- Costs for computer research fees, FedEx delivery costs, MSPB hearing transcripts, and deposition transcripts are compensable. *Davis v. DHS*, EEOC Appeal No. 0720060003 (June 18, 2007).
- Costs for expert witness fees to orthopedist and psychiatrist, deposition, and copying costs are compensable. *Moore v. USPS*, EEOC Appeal No. 0720050084 (March 6, 2007).

12. Documentation Required for Fees/Costs Petition

- Time for telephone call was noncompensable as impermissibly vague where the time entries failed to identify the person spoken to. *Johnson v. USPS*, EEOC Appeal No. 0120054278 (March 20, 2007).
- Failure to provide verified statement of costs with fee petition bars costs recovery. *Johnson v. USPS*, EEOC Appeal No. 0120054278 (March 20, 2007).
- Verified statement of fees and costs need not be separate document; verified statement of damages incorporating documentation of attorneys’ fees was sufficient. *Johnson v. USPS*, EEOC Appeal No. 0120054278 (March 20, 2007).
- EEOC permits costs petition to omit receipts for postage, shipping, internal photocopies, and on-line subscription legal research, but the fee petition must contain a list of services rendered itemized by date, detailed summary of the task, rate, and if practicable the name of the individual performing the task. *Davis v. USPS*, EEOC Appeal No. 0120053186 (April 24, 2007).
- EEOC requires for long-distance telephone calls and faxes that counsel at least be able to produce their monthly bill when filing costs petition. *Davis*

v. USPS, EEOC Appeal No. 0120053186 (April 24, 2007).

- Costs petition was found fatally deficient where the breakdown of costs was by category alone and did not include itemization of costs by date, by rate, and without statements as to the substance of the tasks. *Davis v. USPS*, EEOC Appeal No. 0120053186 (April 24, 2007).
- A fee petition requires specific evidence of prevailing community rate for attorneys’ fees; general affidavits are not sufficient. *Drummond-Irving v. DHS*, EEOC Appeal No. 0720060051 (May 17, 2007).
- Portion of costs petition without proper receipts as documentation was excluded from costs recovery. *Drummond-Irving v. DHS*, EEOC Appeal No. 0720060051 (May 17, 2007).
- Affidavit of non-attorney representative from earlier proceedings as to lack of local employment law counsel and lack of advertisements for labor attorneys in local phone book was found to constitute evidence of lack of local counsel sufficient to justify hiring of out-of-town counsel at higher rates. *Moore v. DOJ*, EEOC Appeal No. 0120072439 (July 31, 2007).

13. Time Limits for Fee Petition

- Laches was found to apply to instance where counsel (a) failed to resubmit the fee petition to the agency in a format consistent with MD-110 — Ch. 11’s requirements and (b) delayed 10 months in filing an appeal to the Office of Federal Operations of the AJ’s denial of fees. *Green v. USPS*, EEOC Appeal No. 0120055275 (April 12, 2007), *aff’d* EEOC Request No. 0520070533 (June 26, 2007).
- Complainant was only required to file a fee petition with the agency once EEOC’s decision became final. Where the agency files a request for reconsideration, the filing deadline only occurs once EEOC’s decision on reconsideration becomes final. *Pearman v. Navy*, EEOC Appeal No. 0120054343 (Nov. 20, 2007).
- Attorneys’ fees were denied where the fee petition was untimely filed. *Vraniak v. USPS*, EEOC Appeal No. 0120060906 (Nov. 26, 2007).

14. Documentation Required for Fee Opposition

- The burden is on the agency to rebut the fee petition proffered by the complainant. *e.g.*, *Wittren v. Army*, EEOC Appeal No. 0120073308 (Dec. 11, 2007); *Henry v. VA*, EEOC Appeal No. 0720060016 (Nov. 15, 2007).
- An agency’s failure to provide specific reasons for each charge it disputes is found to be insufficient to challenge the charges referenced. *Brinkley v. USPS*, EEOC Appeal No. 0120055354 (March 30, 2007).
- The affidavit of single attorney practicing 43 miles from town where claims arose, without evidence that complainant should have readily located that attorney in a diligent search for local counsel, was insufficient to oppose higher out-of-town hourly rate. *Moore v. DOJ*, EEOC Appeal No. 0120072439 (July 31, 2007).