STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 07 PPD 310

In the matter of

Patrick Banyaniye
Complainant

v. DECISION ON MOTION FOR ATTORNEY'S FEES

Mi Sueno, Inc. and Jesus M. Titin
Respondents

INTRODUCTION

On June 26, 2007, Patrick Banyaniye (hereafter referred to as the complainant) filed a charge against Mi Sueno, Inc. and Jesus M. Titin (hereafter referred to as the respondents) with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission). After investigation and a finding of probable cause, a complaint and notice of hearing issued. The complaint alleged that the respondents had denied the complainant access to and/or the services of a public accommodation because of his disability in violation of the Hotels and Public Places Act, Title 11, Chapter 24 of the General Laws of Rhode Island (hereafter referred to as the HPPA), the Civil Rights of People with Disabilities Act, Title 42, Chapter 87 of the General Laws of Rhode Island (hereafter referred to as the PDA) and the Equal Rights of Blind and Deaf Persons to Public Facilities Act, Title 40, Chapter 9.1 of the General Laws of Rhode Island (hereafter referred to as the ERFA).

A hearing was held on the complaint on August 14, 2008 before Commissioner Camille Vella-Wilkinson. All parties were in attendance at the hearing and represented by counsel. On June 4, 2009, the Commission found that the respondents discriminated against the complainant because of his physical disability with respect to access to and the services and facilities of a public accommodation.

The Decision and Order provided that:

> The attorney for the complainant may file with the Commission a Motion and Memorandum for Award of Attorney's Fees no later than forty-five (45) days from the date of this Order. The respondents may file a Memorandum in Opposition no

later than forty-five (45) days after receipt of the complainant's Motion. The parties' attention is directed to Morro v. Rhode Island Department of Corrections, Commission File No. 81 EAG 104-22/02 (Decision on Attorney's Fees 1982) for factors that will be generally considered by the Commission in an award of attorney's fees. If any party would like a hearing on the Motion for Award of Attorney's Fees, the party should request it in the memorandum.

No party requested a hearing on attorney's fees. The complainant filed Plaintiff's Motion for Award of Attorney's Fees (hereafter referred to as the Motion) on July 17, 2009. The parties stipulated that the respondents could have an extension to file their memorandum. The respondents filed an Objection to the Plaintiff's Motion on August 17, 2009. The respondents filed Defendant's Response to Plaintiff's Motion for an Award of Attorney's Fees (hereafter referred to as the respondents' Response) on September 14, 2009. On October 8, 2009, the complainant filed a Memorandum in Response to Respondent's Opposition to the Award of Attorney's Fees. On October 28, 2009, the respondents filed Defendant's Additional Response to Plaintiff's Motion for an Award of Attorney's Fees.

DISCUSSION

I. Introduction

Section 28-5-24(3) provides in relevant part that: "In appropriate circumstances attorney's fees, including expert fees and other litigation expenses, may be granted to the attorney for the plaintiff if he or she prevails." [1]

In establishing its standards for evaluating evidence in discrimination cases, the Commission utilizes the decisions of the Rhode Island Supreme Court, the Commission's prior decisions and decisions of the federal courts interpreting federal civil rights laws. The Rhode Island Supreme Court has utilized federal cases interpreting federal civil rights law as a guideline for interpreting the state anti-discrimination laws. "In construing these provisions, we have previously stated that this Court will look for guidance to decisions of the federal courts construing Title VII of the Civil Rights Act of 1964. *See* Newport Shipyard, Inc., 484 A.2d at 897-98." Center for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998).

[1] R.I.G.L. Section 42-87-5(a) provides that: "the provisions of §§ 28-5-13 and 28-5-16 – 28-5-36, as to the powers, duties and rights of the commission, its members, hearing examiners, the complainant, respondent, … and the court shall apply in any proceedings under this section". Similar language is contained within the HPPA (R.I.G.L. Section 11-24-4) and the ERFA (R.I.G.L. Section 40-9.1-4).

The complainant seeks attorneys' fees of $7,935.00 for work up to December 2, 2008. This sum reflects 52.9 hours of work at a rate of $150 per hour. The respondents object to granting any fees at all. The respondents also object to the hourly rate, the number of hours claimed and the amount requested.

II. The Disability Law Center May Make a Claim for Attorney's Fees

The respondents claim that the complainant should not be awarded attorney's fees because the Rhode Island Disability Law Center "accepted to represent to [*sic*] Complainant to further their own cause and to give a disabled individual free legal advice". Respondents' Response, p. 7. Federal courts have consistently held that agencies that provide representation free of charge to their clients should be awarded attorney's fees under federal fee-shifting statutes. In Brinn v. Tidewater Transp. Dist. Com'n, 242 F.3d 227 (4th Cir. 2001), the Court held that a State agency charged with representing individuals in disability rights cases which did not charge a fee to plaintiffs for its services was properly awarded attorney's fees after reaching a settlement in an Americans with Disabilities Act (ADA) lawsuit. It discussed the matter as follows:

> Tidewater also argues that no attorney's fees may be awarded in this case because the plaintiffs were provided legal representation by a state agency free of charge. But courts have consistently held that entities providing pro bono representation may receive attorney's fees where appropriate, even though they did not expect payment from the client and, in some cases, received public funding. *See, e.g.,* Blum v. Stenson, 465 U.S. 886, 893-95, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (upholding use of prevailing market rates to calculate attorney's fee award to Legal Aid Society in civil rights action); Johnson v. Lafayette Fire Fighters Ass'n Local 472, 51 F.3d 726, 732 (7th Cir.1995) (attorney's fees to private foundation); Alexander S. By and Through Bowers v. Boyd, 929 F.Supp. 925, 928-29 (D.S.C.1995), *aff'd sub nom.* Burnside v. Boyd, 89 F.3d 827 (4th Cir.1996) (attorney's fees to state agency).

Id. at 234-235.

See also Reynolds v. Coomey, 567 F.2d 1166, 1167 (1st Cir. 1978) which held with respect to a Title VII employment discrimination case that: "Attorney's fees are, of course, to be awarded to attorneys employed by a public interest firm or organization on the same basis as to a private practitioner" [Citations omitted].

The Commission will make its determination on awarding attorney's fees in the same manner as it would if the complainant had retained a private attorney.

III. There Are No Special Circumstances That Would Make an Award of Attorney's Fees Unjust

Both federal practice and Commission practice provide that attorney's fees should be granted to complainants who prevail in civil rights cases unless special circumstances would make such an award unjust. *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978) and Morro v. State of Rhode Island/Department of Corrections, Decision on Request For Attorney's Fees, Commission File No. 81 EAG 104-22/02 (1982) (Morro). The respondents argue that special circumstances make the award unjust in that the act found to have been discriminatory resulted from the respondents' attempt to provide public safety while accommodating the complainant. This argument fails for two reasons. One is that the Commission did not find that Mr. Titin offered the complainant the accommodation in question. (See the Commission Decision and Order, Findings of Fact, pp. 2-4. See also the discussion of the "purported" offer of accommodation in the section entitled "The respondents' evidence, even if it were credited, does not justify their unlawful treatment of the complainant", Commission Decision and Order, pp. 12-14.) Second, a defendant's good faith is not a special circumstance that justifies denial of attorney's fees to a prevailing plaintiff in a civil rights case. De Jesus Nazario v. Morris Rodriguez, 554 F.3d 196, 201 (1st Cir. 2009). In this case, the circumstances are appropriate for an award of attorneys' fees.

IV. The Appropriate Amount of Attorneys' Fees

To calculate the lodestar amount for attorney's fees, the number of hours reasonably expended by counsel is multiplied by a reasonable hourly rate. City of Burlington v. Dague, 505 U.S. 557, 559, 112 S. Ct. 2638, 2640 (1992) (Dague).

The respondents argue that the complainant's attorney's fee should be calculated as a percentage of the damages awarded. They argue that the fee should be set at $1,500. Respondents' Response, p. 7. Federal courts have held that the lodestar method is the appropriate method for calculating an attorney's fee in a civil rights case. *See, e.g.* Dague, 505 U.S. at 565-566, 112 S. Ct. at 2643. *See also* Quaratino v. Tiffany & Co., 166 F.3d 422 (2nd Cir. 1999) (attorney's fee should be calculated using the lodestar, the lower court was wrong to calculate the attorney's fee by taking a percentage of the damages awarded).

The Commission, in the past, has looked at a number of factors to determine whether to increase or decrease the lodestar. Morro. Those factors include the novelty and difficulty of the questions involved, the skill needed to perform the legal services, preclusion of other employment by the attorney, the customary fee in the community, time limitations imposed, the monetary and other results obtained, the experience, reputation and ability of the lawyer, the undesirability of the case, the nature and length of the attorney's professional relationship to the client and awards in similar cases. The federal courts over the years have been shifting the consideration of these factors to calculation of an appropriate lodestar amount instead of using them to decide whether to grant an increase in the lodestar amount. Courts have been holding that in most cases the lodestar amount is the proper amount to be awarded. Blum v. Stenson, 465 U.S. 886, 897, 898-899, 104 S. Ct. 1541, 1548, 1549 (1984) (the attorney's fees to be awarded in the federal Section 1988 suit should not be

adjusted upward; the lodestar is presumed to be the reasonable fee to be awarded; the results obtained and the complexity and novelty of a case should be factors considered in calculating the lodestar not as a factor to justify increasing the fee; the special skill of the attorney justifies an increase in the lodestar only in rare cases); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 564 – 565, 106 S. Ct. 3088, 3098 (1986) (holding that a fee under the Clean Air Act could not be enhanced for superior quality of the work of plaintiff's attorney; the lodestar is presumed to be the correct amount; upward modification of the lodestar occurs in only unusual cases); Dague, 505 U.S. at 562, 567, 112 S. Ct. at 2641, 2643-2644 (1992) (it is impermissible to increase an attorney's fee under the Clean Water Act on the basis that it was brought on a contingent-fee basis; there is a strong presumption that the lodestar is the correct fee to be awarded; case law interpreting a reasonable attorney's fee under federal fee-shifting statutes should be uniformly applied to all the statutes). Indeed, the Commission has been following these precedents *de facto*; it has not awarded an increase in the lodestar amount in the past ten years, except for one case in which the lodestar was adjusted to reflect the delay in payment. The Commission will examine the above-cited factors in determining the lodestar.[2]

A. The reasonable number of hours expended by complainant's counsel

The Commission first examines the number of hours claimed by the complainant.[3] The complainant's attorney asks that she receive a fee for 52.9 hours of work.

The respondents object to the number of hours claimed on several different grounds. The respondents argue that the time claimed is excessive and unreasonable, that the complainant should not ask to be reimbursed for time spent before an agreement was reached with the complainant, and that the complainant spent too many hours on certain tasks including time spent on a memorandum and six hours spent on a sur-reply memorandum.

The respondents submit that the complainant cannot be awarded fees for hours spent prior to an attorney fee agreement, stating that the "rules of professional responsibility require every attorney [*sic*] have entered into an attorney client agreement which is reduced to a writing prior to representing the client in order to justify payment of his/her attorney's fees". Respondents' Response, p. 2. The respondents do not cite case law or the particular rule in question. Rules of Professional Conduct, Art. V, Rule 1.5(b) provides in relevant part that: "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation …" The Commentary to the Rule states in Section 2 that: "The obligation to provide written fee information does not apply to lawyers representing clients who are not paying fees to the lawyer or where the lawyer is paid by a third party." Given that the Commentary states that written fee information is not required when the client is not charged a fee, and given that an agreement on representation was reached within a reasonable length of time, the

[2] There may be cases in which the lodestar should be increased, but the circumstances of this case do not warrant that.

[3] After an objection of the respondents to one entry, the complainant has decreased the claimed number of hours by three.

Commission does not find support for the respondents' argument on this point.

The respondents challenge the number of hours (3.15) spent prior to the meeting on a representation agreement, arguing that the goal of the pre-agreement investigation was to determine if the case met the standards set by the Disability Law Center for taking the case. The complainant's attorney represents that some of the pre-representation investigation was needed to determine if the complainant's case met the agency's standards. The investigation would also be useful in gathering evidence and determining strategy. The Commission will therefore award attorney's fees for most of the time involved but will reduce the hours claimed by 0.5 hours to reflect that a portion of the time was spent solely on evaluating whether agency standards for representation were met, a matter that was not relevant to the presentation of the complainant's case.

The respondents challenge the entry stating that 1.5 hours were spent on "Meeting with client re: representation agreement". The respondents argue that this time is excessive. The Commission does not find this time excessive for explaining the agreement.

The respondents challenge nine entries, stating that they are vague and cannot be reasonably justified. The complainant has dropped the request for fees for one of the challenged entries. The remaining entries in question appear relevant. The respondents raise several particular objections. The respondents challenge the 8/6/08 entry of 2 hours to research evidentiary questions. They note: "none raised at trial". Respondents' Response, p. 4. It is reasonable for a counsel to research evidentiary questions before trial so that she can determine what evidence could be presented and be prepared for the other parties' potential objections. The respondents challenge the entry for 0.5 hours to edit direct examination questions on 8/6/08, commenting: "has not met with client yet". Respondents' Response, p. 4. The Commission does not understand this objection because there are nine previous entries that indicate contact with the complainant. Although some of the previous listed contacts are listed as relating to specific activities, some are more general such as 3/25/08 – "Call to client – initial call" and 4/17/08 – "Client meeting". Motion, Ex. A, p. 1. The respondents challenge the complainant's entries relating to preparing cross-examination questions before trial, calling them "speculative". Respondents' Response, p. 4. While a counsel generally cannot be certain of cross-examination questions until a witness testifies, the Commission sees the utility of preparing cross-examination questions based on anticipated testimony and the counsel's strategy. The entries in question are sufficient to describe relevant and reasonable work on behalf of the complainant's case.

Respondents challenge the time expended by complainant's counsel on memoranda. The respondents state that they did not agree to a written rather than an oral closing argument, but that their attorney: "extended the professional courtesy since the Commission seemed inclined to grant her request". The respondents particularly dispute the hours spent on preparing the memorandum (16 hours) when the trial itself lasted only three hours. The respondents also object to the complainant's attorney conducting legal research after the hearing. The Commission finds written memoranda to be helpful. While the factual issues in this case were not elaborate, the legal issues were complicated. The complaint alleged violations of three different statutes. There is minimal state court or Commission case law in this area and disability discrimination law is a complex area. Research after the evidence has been submitted is proper to provide comparable precedents. The

Commission does not find the time spent on research or writing to be excessive.

The respondents contend that the complainant's attorney should not have spent six hours on a sur-reply Memorandum when it was only six and one half pages long, three and one-half of which are substantive argument. The complainant argues that a large amount of time needed to be spent in perusing the transcripts as the complainant disagreed with many of the respondents' statements of the facts and the respondents did not often cite specific pages in the transcript. The Commission does not find the time spent on the sur-reply Memorandum to be excessive.

The respondents contend that the time spent by complainant's counsel on the motion for a default judgment should not be subject to reimbursement for fees because the complainant did not prevail on that issue. While the Commission did not grant a default judgment to the complainant, the complainant's motion for a default judgment resulted in the Commission limiting the respondents to factual arguments, a benefit for the complainant. The Commission finds that time spent on that issue advanced the complainant's case and will award attorney's fees for that time.

The respondents also contend that certain post-hearing entries were vague and not reasonable. The entries in question are clear to the Commission and clearly relate to reasonable representation. For example, after the hearing, the respondents submitted a proposed Order seeking authorization to file an Answer after the close of the hearing and one of the entries the respondents now challenge relates to drafting an Objection to that Order.

The Commission finds that, having reduced the hours submitted by 0.5 hours (see discussion above), the remaining hours submitted were not excessive or unreasonable. The Commission will award fees for 52.4 hours of the attorney's work.

B. The reasonable hourly fee

The complainant seeks a rate of $150 per hour. As discussed above, the Commission will look at the factors of the undesirability of the case, the nature and length of the attorney's professional relationship to the client, preclusion of other employment by the attorney, time limitations imposed, the monetary and other results obtained, the novelty and difficulty of the questions involved, the skill needed to perform the legal services, the experience, reputation and ability of the lawyer, the customary fee in the community, and awards in similar cases in evaluating that rate.[4]

In this case, a number of factors are not significant. The case was not undesirable, the professional

[4] The respondents take issue with the complainant's failure to address the issue of whether the agreement between the complainant and his attorney was contingent or fee-based. Since the complainant's attorney did not charge the complainant a fee and since the Commission has recently held that the contingency of the fee arrangement will rarely, if ever, be a factor for consideration in determining an appropriate attorney's fee (Ezersky v. Rite-Way Forms, Inc., Decision and Order on Attorney's Fees and Damages, p. 6, Commission File No. 02 EPD 301 (2009)), the Commission will not consider this factor in its determination.

relationship of the attorney and the complainant was not unusual and the case would have only a minimal impact on the attorney's ability to take other cases. The time limitations imposed were not unusual.

The respondents argue that they made an offer to the complainant to settle the case for $5,000 and that the compensatory damages awarded to the complainant were $5,000 and therefore the requested attorney's fee is excessive. (The complainant's original request for attorney's fees was for $8,383. The complainant now requests $7,935.00.) The complainant does not agree that a settlement offer of $5,000 was made to him. Whatever settlement offer was or was not made, a respondent may argue that the results obtained by the complainant should be taken into account when determining a proper attorney's fee. In the instant case, the Commission ordered the respondents to pay the complainant $5,000 in compensatory damages for pain and suffering plus 12% statutory interest. The Commission also ordered that the respondents: cease and desist from unlawful practices; train all staff of Mi Sueno on the provisions of state and federal law prohibiting discrimination in a public accommodation; and create a written policy to be posted at Mi Sueno and distributed to staff that explains the provisions of the laws in question and creates a complaint procedure. This relief will provide protection to future customers of the respondents and advance the state goal of the elimination of discrimination. The complainant in his memorandum did not request a particular amount of money. Thus the complainant received a comprehensive remedy and the hourly rate should not be decreased because of this factor.

Both parties concede that the issues involved were novel. As noted above, the complaint involved three statutes and allegations on which there is very little state or Commission case precedent. The factual issues were not complicated. Because of the complexity of the legal issues, a fair amount of skill and prior experience with ADA cases were critical to an effective presentation of the case. The complainant's attorney was admitted to practice in Massachusetts in 2004 and in Rhode Island in 2005. Thus, she had around three years of experience practicing in Rhode Island as of the date of the hearing. While that length of time in practice is not lengthy, she has been concentrating in cases involving disability issues for at least four years.[5] Her experience in disability issues was evident in her memoranda and she presented the case in an effective way.

The Commission has awarded hourly fees to attorneys ranging from $35 per hour to $290 per hour. In O'Rourke v. City of Providence, 77 F.Supp.2d 258 (D. R.I. 1999), *aff'd in part and rev'd in part on other grounds*, 235 F.3d 713 (1st Cir. 2001), the District Court granted one of the attorneys in the case attorney's fees at a rate of $200 per hour. The court, in that 1999 decision, further cited with approval the magistrate's conclusion that the appropriate attorney's fee range for civil rights litigation in Rhode Island is $125 - $200 per hour. In 2003, attorneys who submitted a supplemental motion for attorney's fees in a Title IX discrimination case were awarded fees at rates ranging from $175 per hour to $305 per hour. Cohen v. Brown University, 2003 WL 21511123 (D. N.H. 2003). In Shoucair v. Brown University, 2004 WL 2075159 (R.I. Super. 2004), an employment discrimination case, the Court found $275 per hour to be a reasonable hourly rate to

[5] The complainant's attorney commenced her employment with the Rhode Island Disability Law Center four years before the date of the hearing and also worked on disability issues in Massachusetts prior to her work in Rhode Island.

award an attorney with extensive experience in labor and employment litigation.

Taking all of the above factors into account, the Commission finds that $150 per hour is a reasonable rate for the work of the complainant's attorney. Therefore, the lodestar amount consists of the following: (52.4 hours x $150) or $7,860 and the Commission will award that amount.

ORDER

I. Violations of R.I.G.L. Sections 11-24-2, 42-87-2 and 40-9.1-1 having been found, in addition to the relief ordered in the Decision and Order dated June 4, 2009, the Commission hereby orders the respondents:

1. Within thirty (30) days of the date of this Order, to pay complainant's attorney's fees of $7,860 plus 12% interest per annum for work performed up to December 2, 2008. The interest should be calculated starting from the date the cause of action accrued, April 7, 2007, and ending when the amount is paid;

2. To submit to the Commission a copy of a cancelled check indicating compliance with Paragraph 1 above within forty-five (45) days of the date of this Order.

Entered this [8th] day of [December], 2009

_____/S/_____

Camille Vella-Wilkinson
Hearing Officer

I have read the record and concur in the judgment.

_____/S/_____ _____/S/_____

Rochelle B. Lee
Commissioner

Alton W. Wiley, Jr.
Commissioner