

6/3/13

STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 11 ESH 080

In the matter of

Melissa B. Korsak
Complainant

v.

DECISION ON THE AFFIDAVIT FOR
ATTORNEYS FEES AND FURTHER
DETERMINATION OF DAMAGES

John Frigault, *alias*
Respondent

INTRODUCTION

On September 9, 2010, Melissa B. Korsak (hereafter referred to as the Complainant) filed a charge with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission). The charge alleged that the named parties, including "Jack Frigot", subjected the Complainant to disparate terms and conditions of employment on the basis of her sex, and retaliated against her for opposing unlawful employment practices, in violation of the Fair Employment Practices Act, Title 28, Chapter 5 of the General Laws of Rhode Island (hereafter referred to as the FEPA). On December 2, 2010, the Complainant withdrew her charge against the parties other than Mr. Frigot. On February 28, 2011, the charge was amended to correct the spelling of "Jack Frigot" to John Frigault. Mr. Frigault (hereafter referred to as the Respondent) was named as the sole respondent in the amended charge. Probable cause to believe the allegations of the amended charge was found, a Complaint and Notice of Hearing issued and a hearing on the Complaint was held before Commissioner John B. Susa.

On January 28, 2013, the Commission issued a Decision and Order. The Commission found that the Respondent incited unlawful employment practices and attempted directly and indirectly to commit unlawful employment practices. The Commission Decision and Order, ordered the following in relevant part:

I. Violations of R.I.G.L. Section 28-5-7 having been found with respect to the Respondent, the Commission hereby orders:

1. ...
2. That the Respondent pay the Complainant \$50,882 as compensatory

damages for the Complainant's loss of wages and partial bonuses in 2010 and 2011 caused by his actions, together with statutory annual interest of 12% from the date the cause of action accrued, January 2010, until paid;

3. That the Respondent pay the Complainant \$25,441, minus interim earnings, tips and unemployment compensation earned in 2012, as compensatory damages for the Complainant's loss of wages and partial bonuses in 2012 caused by his actions, together with statutory annual interest of 12% from the date the cause of action accrued, January 2010, until paid;
4. That the Respondent pay the Complainant \$2,120, minus interim earnings, tips and unemployment compensation earned in January 2013, as compensatory damages for the Complainant's loss of wages and partial bonuses in January 2013 caused by his actions, together with statutory annual interest of 12% from the date the cause of action accrued, January 2010, until paid;
5. That the Respondent pay the Complainant the amount equal to her lost tips and additional bonuses for 2010, 2011, 2012 and January 2013 once the Commission calculates them at a later date;
6. That the Respondent pay the Complainant \$75,000 as compensatory damages for pain and suffering together with statutory annual interest of 12% from the date the cause of action accrued, January 2010, until paid;
- ...
10. That, within 45 days of the date of this Order, the Complainant submit to the Commission and the Respondent documents indicating any unemployment compensation or interim earnings and tips that she received in 2012 and January 2013;
11. That, within 45 days of the date of this Order, the Complainant submit to the Commission and the Respondent that portion of her 2009 tax return which documents tips and bonuses that she received in 2009, other than the bonus reflected in her 2009 W-2 form;
12. That either party may request a hearing on the issue of interim earnings and tips which the Complainant earned in 2012 and January 2013 and on the amount of tips and additional bonuses which the Complainant received in 2009. If neither party requests a hearing, the Commission will calculate the amounts based on the information received.

II. The attorney for the Complainant may file with the Commission a Motion and Memorandum for Award of Attorney's Fees no later than 45 days from the date of this Order. The Respondent may file a Memorandum in Opposition no later than 45 days after receipt of the Complainant's Motion. The parties' attention is directed to Banyaniye v. Mi Sueno, Inc. and Jesus M. Titin, Commission File No. 07 PPD 310 (Decision on Motion for Attorney's Fees 2009) for factors to be generally considered in an award of attorney's fees under the FEPA. Either party may choose a hearing on the issues involved in the determination of an appropriate award of attorney's fees by requesting it in his or her memorandum.

Decision and Order, pp. 14-15.

On March 13, 2013, the Complainant filed an Affidavit for Attorneys Fees. The Respondent did not file an objection and did not request a hearing on the issue of attorney's fees.

The Complainant requested an extension of time to file information related to any unemployment compensation or interim earnings and tips that she received in 2012 and January 2013 and that portion of her 2009 tax return which documented tips and bonuses that she received in 2009, other than the bonus reflected in her 2009 W-2 form. The extension was granted and on March 22, 2013, the Complainant submitted additional information. The Complainant submitted attachments and requested that the attachments not be provided to the Respondent. The Commission determined that the attachments did not provide additional information which would assist in the calculation of damages, returned the documents to the Complainant and did not take them into consideration when making the instant decision. The Respondent did not file an objection and did not request a hearing on the issue of the calculation of the unresolved damages.

I. ASSESSMENT OF DAMAGES

The Decision and Order ordered that the Respondent pay the Complainant compensatory damages for pain and suffering (\$75,000) and damages for loss of wages and partial bonuses in 2010 and 2011 (\$50,882). The Commission sought additional information from the Complainant with respect to Paragraphs 3, 4 and 5 of the Order.

Paragraph 3 of the Order ordered as follows:

3. That the Respondent pay the Complainant \$25,441, minus interim earnings, tips and unemployment compensation earned in 2012, as compensatory damages for the Complainant's loss of wages and partial bonuses in 2012 caused by his actions, together with statutory annual interest of 12% from the date the cause of action accrued, January 2010, until paid.

The Complainant now asserts that she had no interim earnings, tips or receipt of unemployment compensation in 2012.¹ The Commission finds this assertion to be credible. Therefore the amount awarded in Paragraph 3 is \$25,441 plus statutory annual interest.

Paragraph 4 of the Order ordered as follows:

4. That the Respondent pay the Complainant \$2,120, minus interim earnings, tips and unemployment compensation earned in January 2013, as compensatory damages for the Complainant's loss of wages and partial bonuses in January 2013 caused by his actions, together with statutory annual interest of 12% from the date the cause of action accrued, January 2010, until paid.

The Complainant now asserts that she had no interim earnings, tips or receipt of unemployment compensation in January 2013. The Commission finds this assertion to be credible. Therefore the amount awarded in Paragraph 4 is \$2,120 plus statutory annual interest.

The Commission found that the Complainant established that she earned \$23,419 in salary and a holiday bonus in 2009. She also established that she earned at least \$2,022 in additional bonuses. The Commission has awarded damages for the loss of these amounts for 2010 through January 2013. At the hearing, the Complainant had also testified to additional bonuses and tips which she earned in 2009. The Complainant's testimony was not clear as to the amounts involved, therefore, the Commission ordered the Complainant to provide that portion of her 2009 income tax return which reflected the tips and additional bonuses which she received in 2009. Now that the Complainant has been unable to demonstrate that her 2009 tax return reflects tips and additional bonuses, the Commission declines to award them. The evidence is insufficient to demonstrate their receipt.

Paragraph 5 of the Order provided as follows:

5. That the Respondent pay the Complainant the amount equal to her lost tips and additional bonuses for 2010, 2011, 2012 and January 2013 once the Commission calculates them at a later date;

Now that the Commission has found that there is insufficient evidence to award damages for loss of tips and additional bonuses, nothing is awarded under Paragraph 5.

¹ The Respondent did not object to the information provided by the Complainant and he did not elect a hearing on the issue of the further determination of damages.

II. ASSESSMENT OF ATTORNEY FEES

A. Introduction

Section 28-5-24(a)(3) of the FEPA 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."

In establishing its standards for determination of issues, 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).

The Complainant seeks attorneys' fees of \$13,652.50 for work up to March 13, 2013. This sum reflects 13.15 hours of work at a rate of \$250 per hour for the work of attorney Chip Muller plus 69.1 hours at a rate of \$150 per hour for third-year law student John Regan. As noted above, the Respondent did not file an objection.

B. 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); *Banyaniye v. Mi Sueno, Inc. and Jesus M. Titin*, Commission File No. 07 PPD 310 (Decision on Motion for Attorney's Fees 2009) (*Banyaniye*) and *Morro v. State of Rhode Island/Department of Corrections*, Decision on Request For Attorney's Fees, Commission File No. 81 EAG 104 (1982) (*Morro*). In this case, the circumstances are appropriate for an award of attorneys' fees.

C. 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*).

To determine a reasonable hourly rate, the Commission looks at a number of factors. Those factors include the novelty and/or 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 with the client and awards in similar cases. Banyaniye. See also Blum v. Stenson, 465 U.S. 886, 897, 898-899, 104 S. Ct. 1541, 1548, 1549 (1984) (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) (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 (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). The Commission will examine the above-cited factors in determining the lodestar.²

1. The number of hours reasonably expended by Complainant's counsel

The Commission first examines the number of hours claimed by the Complainant's attorney. The Complainant's attorney asks that he receive a fee for 13.15 hours of work by him and 69.1 hours of work by third-year law student, John Regan, through March 13, 2013. The Commission finds that the hours submitted were reasonable.

2. The requested hourly fee

The Complainant seeks a rate of \$250 for attorney Chip Muller. 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.³

This case was not undesirable. The professional relationship of the attorney and the Complainant was not unusual. The amount of time needed was not unusual and would have minimal impact on the attorney's ability to take other cases. The time limitations imposed

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

³ The Commission has held that the contingency of the fee 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)), and the Commission will not consider this factor in its determination.

were not unusual.

The Commission ordered the Respondents to pay the Complainant \$50,882 to compensate for her lost salary and bonuses in 2010 and 2011, \$75,000 in damages for pain and suffering as well as the amounts finalized in the instant decision. In addition, the Commission has awarded statutory annual interest of 12%. The Commission also ordered that the Respondent undergo training on the provisions of state and federal anti-discrimination laws. Thus the Complainant received a significant remedy and the requested hourly rate should not be decreased because of this factor.

Harassment is not a novel issue in employment discrimination law. A reasonable level of skill was needed to present the case.

The Complainant's attorney is the owner of Muller Law, LLC. He did not provide information on the extent of his experience. Mr. Muller is an able attorney who 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 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 award an attorney with extensive experience in labor and employment litigation. In a case involving the constitutionality of a Rhode Island law relating to how an organization qualifies as a political party, the U.S. District Court judge ruled that fees at the rate of \$250 for partner work and \$150 for associate work were reasonable hourly rates for Rhode Island lawyers. Block v. Mollis, 2009 WL 2208107, 3 (D.R.I. 2009). In Spruill v. Alexander, 2011 WL 2413837 (D.R.I. 2011) *adopted by* Spruill v. Alexander, 2011 WL 2363520 (D.R.I. 2011), the Court awarded attorney's fees in a case that successfully challenged a Rhode Island agency's procedures as inconsistent with federal law. The Court awarded a local civil rights attorney, with 34 years of experience concentrating in civil rights and constitutional issues, an hourly rate of \$250 per hour rather than the \$290 hourly rate which she sought.⁴

John Regan was, at the time of the proceedings, a third-year law student. As he was not an attorney at the time, the Commission will award fees assessing his work as a paralegal. The Commission has awarded fees for paralegal work at rates varying from \$66 to \$100 per hour. In Cohen v. Brown University, paralegals were awarded hourly fees ranging from \$60 to \$75 per hour. In Shoucair v. Brown University, the Court found \$80 per hour to be a reasonable hourly rate to award for paralegal work. In Walden v. City of Providence, 2008 WL 4613074 (D.R.I. 2008) *vacated on other grounds sub nom.* Walden v. City of Providence, R.I., 596 F.3d 38 (1st Cir. 2010), a case alleging violations of the U.S. Constitution, the Court found that \$90 per hour for paralegal work was within market range.

⁴ In part, the rate was discounted based on the less complex work that she did as local counsel.

3. The lodestar

Taking all of the above factors into account, the Commission finds that \$250 per hour is a reasonable hourly rate for the work by the Complainant's attorney. The Complainant's attorney, who is the founder of his law firm, successfully represented the Complainant in a harassment case with no complex legal or factual issues and obtained a significant remedy for her. The Commission finds that the rate of \$250 per hour is reasonable. Therefore, the lodestar amount for Mr. Muller is \$3,287.50 (13.15 hours x \$250 per hour).

The work done by Mr. Regan was of high quality. The affidavit provides that he met with witnesses, prepared questions for them and worked on the post-hearing memorandum. The witnesses were well-prepared, the questioning was logical and clear, and the post-hearing memorandum was well-written. The Commission finds that awarding a rate at the high end of the rates for paralegal work, \$100 per hour, is justified by the quality of his work. Therefore, the lodestar amount for the paralegal work is \$6,910.00 (69.1 hours x \$100 per hour).

The amount of attorney's fees awarded is \$10,197.50, the combination of the lodestar amounts for the work of Mr. Muller and Mr. Regan.

ORDER

The Respondent is under previous order to pay the Complainant \$125,882 plus statutory interest. The Order required the Respondent to pay the Complainant these amounts by April 15, 2013.

- 1) The Respondent has thirty days from the date of this Order to pay the Complainant, in addition, \$27,561 plus statutory interest of 12% from the date the cause of action accrued, January 2010, representing compensation for lost wages and partial bonuses in 2012 and January 2013.
- 2) The Respondent is further ordered to pay the Complainant's attorney \$10,197.50 in attorney's fees plus 12% annual interest on the amount of attorney's fees starting as of the date of this Decision and continuing until the attorney's fees are paid.
- 3) The Respondent must submit to the Commission proof of payment in accordance with this Order within thirty days of the date of this Order.

Entered this 3rd day of June, 2013.

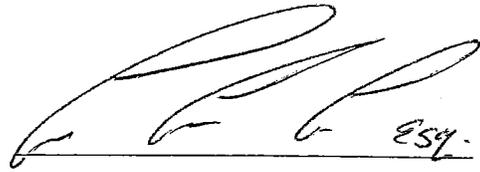


John B. Susa
Hearing Officer



Rochelle Bates Lee

Rochelle Bates Lee
Commissioner



Alberto Aponte Cardona, Esq.

Alberto Aponte Cardona, Esq.
Commissioner