

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

Massachusetts Commission Against Discrimination,
Joshua Fortin and Nicole Evangelista,
Complainants

v.

DOCKET NO. 17 WPR 00664

Marty Green Properties, LLC,
Martin Green, and Hang Ngo a/k/a Ngo Hang
Respondents

RULING ON AMENDED PETITION FOR ATTORNEY’S FEES

Nicole Evangelista (“Evangelista”) and Joshua Fortin (“Fortin”) filed a complaint of housing discrimination with the Commission against: (a) the property owner, Hang Ngo a/k/a Ngo Hang (“Ngo”); (b) the property management company, Marty Green Properties, LLC (“MGP”); and (c) the property manager of the subject property, Martin Green (“Green”). I presided over the public hearing on June 22-24, 2022 and July 13, 2022. Complainants prevailed on most of their claims. Commission Counsel Peter Mimmo (“Mimmo”) and Commission Counsel Elizabeth Caiazzzi (“Caiazzzi”) presented the case on behalf of the Complainants. In summary, in a decision dated December 19, 2022, I determined the following:

1. Fortin had standing to bring a claim of denial of reasonable accommodation under Sections 4(6) and 4(7A)(2) of G.L. c. 151B. Ngo and MGP were liable to Fortin pursuant to those sections for Green’s failure to provide a reasonable accommodation and for Green’s failure to engage in an interactive dialogue process.
2. In a matter of first impression, Evangelista (although not disabled) had standing to bring a claim of denial of reasonable accommodation under Sections 4(6) and 4(7A)(2) of G.L. c. 151B based on her association with Fortin who was disabled. Ngo and MGP were liable to Evangelista pursuant to those sections for Green’s failure to provide a reasonable accommodation and for Green’s failure to engage in an interactive dialogue process.
3. Ngo and MGP were liable for Green’s retaliatory action against Fortin and Evangelista pursuant to Section 4 of G.L. c. 151B.
4. Green was individually liable to Evangelista and Fortin pursuant to Section 4(4A) of G.L. c. 151B.

5. Fortin's and Evangelista's disparate treatment claims under Section 4(6) of G.L. c. 151B were dismissed for inability to prove pretext, and thus discriminatory animus.

I found each Respondent jointly and severally liable to pay Fortin \$ 10,000 (plus interest) in damages for emotional distress. I found each Respondent jointly and severally liable to pay Evangelista \$ 20,000 (plus interest) in damages for emotional distress. I further imposed a civil penalty of \$ 7,500 against Green; a civil penalty of \$ 5,000 against Ngo; and a civil penalty of \$ 5,000 against MGP; and ordered training requirements.

On January 3, 2023, Commission Counsel filed an emergency motion for a brief extension of the period in which to file a petition for attorney's fees ("Motion"). Later on January 3, 2023, Commission Counsel filed a petition for attorney's fees ("Original Petition"). The next day, January 4, 2023, Commission Counsel filed an amended petition for attorney's fees ("Amended Petition").¹ To the extent a ruling on the Motion is necessary, I allow the Motion in the interest of justice and in light of no resulting prejudice to Respondents. Respondents do not challenge the timeliness of the Original Petition or the Amended Petition.

The Original Petition addressed certain services performed by Mimmo and was supported by an affidavit of Mimmo. The Original Petition addressed the following: (a) 6.75 hours of work performed in 2019 by Mimmo regarding three depositions at a billing rate of \$ 281/hour; and (b) 23 hours of work performed in 2022 by Mimmo regarding a deposition and three days of public hearing at a billing rate of \$322/hour. The Petition sought \$ 9,302.75 in attorney's fees.

The Amended Petition addressed services performed by Mimmo and Caiazzzi. The Amended Petition was supported by contemporaneous time records detailing the time spent on this case by Mimmo and Caiazzzi and by an affidavit from each. The Amended Petition addressed the following: (a) 16.5 hours of services performed in 2019 by Mimmo at a billing rate of \$ 281/hour; (b) 59.6 hours of services performed in 2022 by Mimmo at a billing rate of \$ 322/hour; and (c) 43.67 hours of services performed in 2022 by Caiazzzi at a billing rate of \$420/hour.² The Amended Petition sought \$ 42,168.03 in attorney's fees.

¹Although the title of the Amended Petition references costs, the submission does not seek compensation for any costs and such reference is treated as an editing error.

²For one entry (Item 476 - a task of .17 hours), Caiazzzi entered a billing rate of \$ 380/hour – not \$ 420/hour. This is presumed to be inadvertent, and is *de minimus* in any event.

On January 18, 2023, Respondents' Counsel filed an opposition to the request for attorney's fees. His principal argument was the following. The Original Petition and Amended Petition substantially differ in the number of hours of work performed with no basis to explain the difference. His opposition states it is "unreasonable for the initial fee petition to jump from the initial number to over four times the amount under the amended fee petition, especially when both numbers were signed under pains and penalties of perjury" and argues that the total fee allowed should be limited to that requested in the Original Petition. Respondents' Counsel secondary argument is that on the first day of the public hearing, "Caiazzzi merely observed" so her time for attending that day of hearing (6.5 hours) should not be compensable.

Section 3(15) of G.L. c. 151B authorizes an award of reasonable attorney's fees when, as here, Commission Counsel presents a charge at a public hearing on behalf of a prevailing Complainant(s). The Commission has adopted the "lodestar" methodology for attorney's fee computation. Sch. Comm. of Norton v. Massachusetts Commission Against Discrimination, 63 Mass. App. Ct. 839, 850 (2005), review denied, 445 Mass. 1103 (2005) ("MCAD was well within its discretion to apply the lodestar method.") "By this method, the Commission will first calculate the number of hours reasonably expended to litigate the claim and multiply that number by an hourly rate it deems reasonable. The Commission then examines the resulting figure, known as the 'lodestar,' and adjusts it either upward or downward or determines that no adjustment is warranted depending on various factors, including complexity of the matter. Baker v. Winchester School Committee, 14 MDLR 1097 (1992)." Chase, Easton, and Massachusetts Commission Against Discrimination v. Crescent Yacht Club and McCarthy, 42 MDLR 8, 10 (2020) Because only hours of work reasonably expended are compensable, work that is duplicative, unproductive, excessive, or otherwise unnecessary to the prosecution of the claim is not compensable.

I first address whether the attorney's fee award should be reduced to the amount sought in the Original Petition (\$9,302.75) as argued by Respondents' Counsel. The hours of services performed and the total fee requested substantially differ between the Original Petition and the Amended Petition. But it is obvious from the contemporaneous time records that the true work performed by Commission Counsel is reflected in the Amended Petition and not the Original Petition. The Original Petition only addressed a portion of the work performed by Mimmo. In contrast, the Amended Petition addresses the universe of work performed by Mimmo and by Caiazzzi.³ In light of the supporting documents in the Amended

³The filing of an Amended Petition was expected. The filing of the Original Petition referred to that document as an "initial" petition and stated that "Complainants intend to amend the Petition." Thus it was clear from the outset that Commission Counsel would be amending the Original Petition to include additional hours worked on the matter.

Petition, I conclude that it would be error to limit the fee award to that requested in the Original Petition, and I decline to take such action.

I next address the argument by Respondents' Counsel that the time spent by Caiazzzi attending the first day of the public hearing (6.5 hours) should not be compensable because Caiazzzi merely observed that day without conducting any examination.⁴ Caiazzzi was an active "second chair" during the public hearing. Mimmo presented the opening statement and examined Fortin, Evangelista and the expert witness. Caiazzzi examined Green, Evangelista's mother and two minor witnesses. Review of Commission precedent reflects that a valid method for resolving issues regarding petition fees and limited participation by a "second chair" is a partial reduction of the applicable hours of the "second chair."⁵ In light of precedent and the circumstances of this case, I find it reasonable to reduce by a third Caiazzzi's hours for the first day of the public hearing. This reduces the hours on that day from 6.5 to 4.3 hours (rounded) which equates to a reduction of 2.2 hours. Aside from this issue, after reviewing Caiazzzi's and Mimmo's contemporaneous time records, I find that all of the items for which compensation is sought are for work reasonably necessary to the successful prosecution of this case and were not excessive or duplicative.⁶

I next address whether the billing rates of Mimmo and the billing rate of Caiazzzi are reasonable. In support of their respective rates, they rely upon an attorney fee scale of the Massachusetts Law Reform Institute ("MLRI"). In 2019, Mimmo had been practicing law for 14 years. The MLRI scale for attorneys with 14 years of experience supports an hourly rate of \$ 281-310. Mimmo's billing rate for work performed in 2019 is at the lowest end of this scale. In 2022, Mimmo had been practicing law for 17

⁴Caiazzzi observed but did not conduct an examination on the fourth day of the public hearing. Respondents' Counsel presumably does not make the same argument relative to that day because the Amended Petition does not seek compensation for services performed on the fourth day of the public hearing by either Commission Counsel.

⁵Baker and Massachusetts Commission Against Discrimination v. Plymouth County Sheriff's Department, 35 MDLR 141, 143 (2013) ("However since Attorney Howards was second chair on the case, her participation in the hearing was limited. Respondent notes that Attorney Howards conducted only the opening and limited portions of Complainant's direct exam and that all other witnesses in this five day hearing were examined by Attorney Sankey.... [W]e conclude that Attorney Howard's billing is excessive given her limited role in the hearing. Given these circumstances we find it reasonable to reduce the number of compensable hours by Attorney Howards for the preparation and conduct of the hearing, by one-third...."); Carta and Massachusetts Commission Against Discrimination v. Wingate Healthcare, Inc., 42 MDLR 79, 84 (2020) ("We will allow part of the fee for 16.6 hours for Attorney La France to attend the hearing on 11/3/15 and 11/4/15, but reduce it by half to 8.3 hours since Attorney LaFrance was 2nd chair and did not participate, while acknowledging that he performed much of the preparation for the litigation.")

⁶In reviewing Caiazzzi's time records, I noticed that one item does not sufficiently support the claimed amount of time. Item 521 is for 3 hours but the documentation only support a claim for 2.6 hours. Accordingly, .4 hours of Caiazzzi's time will be excluded from the award.

years. The MLRI scale for attorneys with 17 years of experience supports an hourly rate of \$ 322-345. Mimmo's billing rate for work performed in 2022 is at the lowest end of this scale. I find Mimmo's billing rates in this case to be reasonable and note that the opposition does not challenge the reasonableness of his billing rates. In 2022, Caiazzzi had 27 years of litigation experience. The MLRI scale for attorneys with 27 years of experience supports an hourly rate of \$ 435. Caiazzzi's billing rate for work performed in 2022 is lower than that rate. I find Caiazzzi's billing rate in this case to be reasonable and note that the opposition does not challenge the reasonableness of her billing rate.

Multiplying the number of reasonably expended hours of work performed by the reasonable billing rates results in a lodestar of **\$ 41,077.10**.⁷ This number is calculated as follows: (a) Mimmo's fees for 2019 of \$ 4,636.5 (16.5 hours x \$ 281/hour) plus (b) Mimmo's fees for 2022 of \$ 19,191.2 (59.6 hours x \$ 322/hour) plus (c) Caiazzzi's adjusted fees for 2022 of \$ 17,249.4 (41.07 hours x \$ 420/hour).

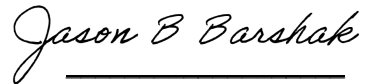
While this case involved an issue of first impression decided in favor of Evangelista, a factor that might merit an upward adjustment of the lodestar, adjusting the lodestar is discretionary, and I have determined that doing so is not merited in this case.

Finally, I address whether to reduce the **\$ 41,077.10** because Evangelista and Fortin did not prevail on their disparate treatment claims. "When a complainant does not prevail on all claims charged the 'Commission may exercise its discretion to reduce the overall fees requested by some amount that may reasonably be said to have been expended in pursuit of Complainant's unsuccessful claim. In making such a determination, [I] may examine the 'degree of interconnectedness' between the [successful and unsuccessful] claims. Blue v. Aramark Corp., 27 MDLR 73 (2005)." Drigo and Massachusetts Commission Against Discrimination v. City of Boston, 42 MDLR 25, 27 (2020) I find that the disparate treatment claims and the denial of reasonable accommodation/failure to engage in interactive dialogue claims were inextricably intertwined and based on a common nucleus of facts and decline to reduce the attorney's fee award due to the lack of success on significantly inter-related claims. Id. Nor does Respondents' Counsel argue that the fee award should be reduced because the disparate treatment claims were dismissed.

⁷Respondents' Counsel argues that there are "small minute mistakes" of math in the time records. I agree. I found *de minimus* errors in the "slip values" in the time records of Mimmo (Items 6, 10, 14, 15) and Caiazzzi (Items 463, 470, 476, 512, 514, 516, 517, 520, 530). I performed my own mathematical calculations.

In sum, I conclude that Respondents are *jointly and severally* liable for Commission Counsels' attorney's fees in the amount of \$ **41,077.10**.

So ordered this 1st day of February 2023.

A handwritten signature in cursive script that reads "Jason B Barshak".

Jason Barshak
Senior Hearing Officer