

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION)
AGAINST DISCRIMINATION and)
ANDY NOM)
Complainants)
)
v.)
)
ACTON AUTO BODY, SONIA TRINH,)
JOSE MOURATO)
Respondents)
)

DOCKET NO. 18-WEM-02229

**DECISION ON COMPLAINANT NOM’S PETITION
FOR THE AWARD OF ATTORNEYS’ FEES AND COSTS**

I. INTRODUCTION

On October 23, 2024, I issued a Decision of the Hearing Officer in the above-captioned matter finding Respondent Acton Auto Body (“AAB”) liable for suspending and transferring Complainant Andy Nom (“Mr. Nom”) in retaliation for his internal complaint of race/national origin harassment. I dismissed all claims against Respondents Jose Mourato (“Mr. Mourato”) and Sonia Trinh (“Ms. Trinh”) and ordered AAB to pay emotional distress damages in the amount of \$7,500, to pay consequential damages in the amount of \$478.20, and to pay for and undergo training on retaliation.

On November 7, 2024, Mr. Nom submitted a petition for attorneys’ fees and costs seeking \$83,134.00 in attorneys’ fees and \$2,405.55 in costs (“Petition”). The Petition included the Affidavit of Matthew J. Fogelman, Esq. (“Affidavit”). The Affidavit attached billing records which show that Fogelman Law LLC (“Fogelman Law”) represented Mr. Nom from October 2017, through the Commission’s investigation, conciliation conference, certification conference, the public hearing and the filing of a post-hearing brief. Affidavit, Exhibit 1. Fogelman Law

conducted discovery including requesting and responding to interrogatories and requests for production of documents, defending Mr. Nom's deposition and conducting the depositions of Ms. Trinh and Mr. Mourato. Id. Attorneys Matthew Fogelman, Adam Rooks, Zinnia Khan and Daniel Lederman of Fogelman Law provided legal services for Mr. Nom in this matter. Mr. Nom seeks reimbursement for the following hours of legal services: Attorney Fogelman (39.61); Attorney Rooks (106.50); Attorneys Khan and Lederman, collectively (11.50).

Attorney Fogelman asserts that his "regular and customary hourly rate" is "a minimum of \$650.00" which "is commensurate with the reasonable hourly rate for attorneys with [his] education, credentials and experience, and reasonable in light of the prevailing billing rates in the greater Boston area." Affidavit, p. 2. Attorney Fogelman graduated from law school in 2002 and has extensive legal experience, including trial work. He has received several accolades, tried numerous cases and founded Fogelman Law. Affidavit, pp. 1-3. Based on the signature line of Mr. Nom's Post-Hearing Brief, and the Massachusetts Board of Bar Overseers website ("BBO website") which identifies Attorney Fogelman's work address as Newton Center, I infer that Fogelman Law is located in Newton, Massachusetts.

Attorney Fogelman argues that Attorney Rooks' "regular and customary hourly rate is \$500." Affidavit, pp. 2-3. Attorney Rooks graduated from law school in 2014, has received several accolades and according to Attorney Fogelman, is "an accomplished litigator with a stellar track-record." Affidavit, pp. 2-3.

AAB opposes the Petition on several grounds. It argues that Mr. Nom did not prevail in this case and therefore, the fees requested should not be awarded at all, and if not, reduced substantially.

In addition, AAB argues that the fees requested should be reduced substantially on the grounds that: (1) the attorneys' fees and costs amount to more than 10 times the damages awarded, and are therefore, unreasonable; (2) counsel for Mr. Nom expended substantial time and effort on several unsuccessful claims; (3) there are charges in the billing records that are excessive or unreasonable; (4) the hourly rates applied from 2017 to present should be reduced because they "presumably" increased over time; (5) the fees should be reduced because of a belief that Mr. Nom was receiving legal assistance in this case on a contingency fee basis; and (6) time expended by Attorney Fogelman at hearing should be subtracted from the fees requested because his work at hearing was unnecessary and excessive. Opposition to Complainant's Petition for Attorneys' Fees and Costs ("Opposition"), pp. 3-6.

After reviewing the Petition and Opposition, on December 19, 2024, I ordered the parties to file a supplemental statement providing: "specific information about the average hourly rate for attorneys with similar years of experience who conduct similar work at the times the services in this case were provided and who work in the same or similar community."

In response to the December 19, 2024 order, Attorney Fogelman filed a 2022 Wolters Kluwer Real Rate Report ("2022 WK Report") and three affidavits from experienced litigators in areas including employment discrimination. Affidavit of David Conforto ("Conforto Affidavit"); Affidavit of Rebecca Pontikes ("Pontikes Affidavit"); Affidavit of David Belfort ("Belfort Affidavit"). These three affidavits from experienced employment attorneys attest to Attorney Fogelman's excellent legal judgment, past trial successes and awards and exceptional legal skills.

The Pontikes Affidavit states that: (a) she has been practicing law for 27 years specializing in representing plaintiffs in employment matters and litigation in Massachusetts; (b) her "normal hourly rate is \$600"; and (c) hourly rates charged by attorneys in Boston are \$350-\$750. The

Pontikes Affidavit also attests that: (a) Attorney Fogelman has been practicing law for 21 years; and (b) based on her familiarity with Attorney Fogelman's work and trial performance, she believes that the "hourly rate he has requested, \$650 per hour, is fair and reasonable given the rates charged by other practicing attorneys in the Boston area with similar experience, the nature of this case, the amount of damages involved, and the results obtained, and that the lesser rates he is seeking for other attorneys in his firm also seem fair and reasonable." Pontikes Affidavit, pp. 3-4.

The Conforto Affidavit states that: (a) Attorney Rooks has a strong reputation in the legal community; (b) it is Conforto's understanding that Attorney Rooks has 10 years of legal experience and that he worked as an associate with the Fogelman Law for the past 6 years; (c) based on Attorney Fogelman's and Attorney Rooks' years of experience, a court case in which Attorney Fogelman and Attorney Rooks were awarded \$650/hour and \$500/hour in fees, and other cases with attorneys' fee awards, Attorney Conforto believes that the requested hourly rates for Attorneys Fogelman (\$650) and Rooks (\$500) are reasonable.

Both the Pontikes and Conforto Affidavit reference cases in which plaintiffs' attorneys with equivalent experience were awarded \$600/hour or more.¹ The Pontikes, Conforto and Belfort affidavits do not state the prevailing market rates for attorneys whose firm is located in Newton, nor do they attest to any specific knowledge of the prevailing market rate for attorneys with similar years of experience performing similar work in a similar time period in Newton, Massachusetts.²

¹ The Belfort Affidavit provides similar support for the petition for fees.

² According to the BBO website, Attorneys Pontikes, Conforto and Belfort firms work at firms located in Boston, Massachusetts.

In response to the December 19, 2024 order, AAB filed a supplemental opposition asserting that the Commission should apply an hourly rate of \$275 for Attorney Fogelman (“Supplemental Opposition”). AAB stated that: (a) legal websites report that the general range of fees for litigation counsel in the Boston area is from \$244 to \$757 per hour and that employment/labor lawyers receive an average hourly rate of \$327; (b) the 2022 WK Report states that “the median hourly rate for litigation partners in the Boston area with firms of fewer than 50 attorneys is \$345, and for partners practicing discrimination, retaliation and harassment litigation is \$365.” AAB argued that the hourly rate to be awarded in this case should be on the lower end of these cited fees because: (a) Attorney Fogelman does not practice in Boston; (b) Fogelman Law employs only 6 attorneys³; (c) Mr. Nom lives in a community with lower incomes and would not have been able to afford Attorneys Fogelman or Rooks at hourly rates of \$650 and \$500; (d) AAB’s counsel charges his clients \$250-\$300 per hour and due to both sides’ comparable skills and experience, the hourly rate for Mr. Nom’s attorneys should also be \$250-\$300; and (e) the issues in this matter were not complex. Supplemental Opposition, pp. 1-4.

I have considered and analyzed all arguments raised by the parties in their initial and supplemental filings relative to the Petition including any arguments that are not explicitly addressed and analyzed below.

II. LEGAL STANDARD

M.G.L. c. 151B, § 5 allows a complainant who prevails after a public hearing before the Commission to recover reasonable attorneys’ fees and costs. The “purpose of G.L. c. 151B, which is to discourage unlawful discrimination, as well as the requirement that the statute be broadly construed, see G.L. c. 151B, § 9, indicate an expressed legislative intent to encourage

³ Mr. Nom has not contradicted AAB’s assertion regarding the size of Fogelman Law. I infer that Fogelman Law was a small law firm.

competent counsel to seek [] relief for discrimination claims.” Haddad v. Wal-Mart Stores, Inc. (No. 2), 455 Mass. 1024, 1025 (2010) (Haddad); MCAD and Sun v. Univ. of Massachusetts, 36 MDLR 85, 88 (2014) (recognizing the strong public interest in allowing claims to proceed with competent counsel to vindicate the public interest to discourage unlawful discrimination).

The Commission has adopted the “lodestar” methodology for fee computation. See, e.g., MCAD and Reed v. Pipefitters Association of Boston, Local 537, 44 MDLR 22 (2022). The Commission has explained the lodestar methodology as follows:

The determination of whether a fee sought is reasonable is subject to the Commission's discretion and includes such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. Baker v. Winchester Sch. Comm., 14 MDLR 1097 (1992). The Commission has adopted the lodestar methodology for fee computation. Id. 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. Id. at 23.

III. CALCULATION OF LODESTAR

A. REASONABLE HOURLY RATE

The party seeking attorneys’ fees bears the burden of establishing the reasonableness of the requested rate. Blum v. Stetson, 465 U.S. 886, 895, n. 11 (1984); MCAD and Babu v. Aspen Dental Management, Inc., 42 MDLR 99, 103 (2020). To satisfy this burden, the requesting party, through affidavits and other satisfactory evidence, must: (1) establish the experience and skill of her attorneys; and (2) demonstrate the prevailing market rate in the community for similarly situated attorneys. Carrion v. Hashem, 2012 WL 2335297, *2 (Mass. Super. Ct. 2012) (Connolly, J.), citing Marotta v. Suffolk County, 726 F. Supp. 2d 1, 4 (D. Mass. 2010).

Thus, petitions for fees must include information about the attorneys’ experience – both as to the number of years they have been practicing and the type of work they have done in the past –

as well as specific information about the average rate in the community for similar work by attorneys with similar years of experience. Haddad, 455 Mass. at 1025-1026 (determination of reasonable hourly rate begins with average rates in the attorney's community for similar work done by attorneys of the same years of experience); Tuli v. Brigham & Women's Hosp., Inc., 2009 WL 10693567 (D. Mass. 2009) (reasonable rate measured by comparing counsel's regular rates with those of the marketplace); MCAD and Coats v. Massachusetts State Police, 46 MDLR 1 (2024) (citations omitted). A fee petition should include materials that corroborate the fees requested, such as model fee charts, matrices, reports, and affidavits from attorneys with knowledge of rates charged by attorneys in the community with similar years of experience performing similar work. See, e.g. Haddad, 455 Mass. at 1026 (affidavits from experienced practitioners in the field set forth comparable hourly billing rates).

I reject AAB's argument that the requested hourly rates should be discounted because they may have increased over time during the course of this case and instead, exercise my discretion to apply a single rate – that of the time of the filing of the Petition (November 7, 2024). MCAD & Joseph v. Massachusetts Dep't of Children & Families, 2024 WL 940057, *4 (2024) (MCAD).

In arriving at a reasonable hourly rate, I have considered all the filings but rely primarily on the 2022 WK Report and the Pontikes Affidavit. In evaluating the average rates in the community for similar work done by attorneys of the same years of experience, the most pertinent data in the 2022 WK Report is that which focuses on the hourly rates of attorneys who practice employment law in Boston.⁴ While these rates are not the same as the fees that would be

⁴ Nationwide data in the 2022 WK Report regarding the hourly rates of practitioners is not useful because attorneys' rates nationwide vary so widely. In addition, I do not view the median as the proper reference point, but instead, rely in part on the mean (average) for 2022. Compare MCAD and Joseph v. Massachusetts Dep't of Children and Families, 2024 WL 940057 (MCAD) (averaging the median hourly rate for several data points in the 2022 WK Report including national data points).

charged by similarly experienced attorneys in Newton, Massachusetts (as discussed below), this data provides the most relevant starting point. The 2022 WK Report states that the mean hourly rate for Boston attorneys who are partners and who practice in employment and labor law is \$587/hour. 2022 WK Report, p. 116.⁵ In addition, I have considered the \$600 hourly rate of Attorney Pontikes, who has 6 more years of experience than Attorney Fogelman, practicing employment law in Boston. Based on the information available to me, I have concluded that \$587/hour was the prevailing market rate in 2022 for a Boston attorney with the same or similar years of experience and practice area as Attorney Fogelman.

For several reasons, including: (a) the fact that Fogelman Law is located in Newton, which would command a lower hourly rate for its attorneys than Boston; (b) the small size of the law firm; and (c) the lack of complexity of this case,⁶ I am discounting this hourly rate by 10%: $.9 \times \$587 = \528.30 . As for inflation, the 2022 WK Report was “based on data collected thru Q2 2022” (i.e. through June 30, 2022) - approximately 2.3589 years before the filing of the Petition (November 7, 2024). The record does not include the rate of inflation for this period. The Bureau of Labor Statistics CPI Inflation Calculator supports the application of a 6% total inflation rate, stating that \$1 in July 2022 would be roughly equal to \$1.06 in November 2024.⁷ Applying a 6%

⁵ This data point does not take into consideration the number of years that Attorney Fogelman has practiced law. However, at 21 years, Attorney Fogelman is at an approximate mid-point in his career, supporting the use of this mean hourly rate. See 2022 WK Report, p. 29.

⁶ See Rudy v. City of Lowell, 883 F. Supp. 2d 324, 327 (D. Mass. 2012); see also 2022 WK Report, p. 5 (“lawyers in urban and major metropolitan areas tend to charge more when compared with lawyers in rural areas or small towns”; “cost of representation will be higher if the case is particularly complex”; “rates can increase if the firm is large”)

⁷ https://www.bls.gov/data/inflation_calculator.htm

total inflation rate, I conclude that \$560.00 is a reasonable hourly rate for Attorney Fogelman (\$528.30 X 1.06 = \$560.00).

As for Attorney Rooks' reasonable hourly rate, the 2022 WK Report states that the mean hourly rate for associates practicing in employment and labor law in Boston is \$430. WK Report, p. 116. I apply a 10% discount to represent the fact that he practices out of Newton in a small law firm (resulting in \$387) and adjust for inflation at a total rate of 6% (resulting in \$410.22).⁸

The reasonable hourly rates for Attorneys Fogelman and Rooks are \$560 and \$410.22, respectively.⁹

B. HOURS REASONABLY EXPENDED TO LITIGATE

In determining the number of hours reasonably expended, the following principles apply:

Only those hours that are reasonably expended are subject to compensation under M.G.L. c. 151B. In determining whether hours are compensable, the Commission will consider contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved. (citation omitted) Compensation is not awarded for work that appears to be duplicative, unproductive, excessive, or otherwise unnecessary to the prosecution of the claim. Hours that are insufficiently documented may also be subtracted from the total. Grendel's Den v. Larkin, 749 F.2d 945, 952 (1st Cir.1984); Brown v. City of Salem, 14 MDLR 1365 (1992). The party seeking fees has a duty to submit detailed and contemporaneous time records to document the hours spent on the case. Denton v. Boilermakers Local 29, 673 F. Supp. 37, 53 (D. Mass. 1987); Baker v. Winchester Sch. Comm., 14 MDLR 1097 (1992).

Reed, 44 MDLR at 23.

⁸ Based on the standard for determining a reasonable hourly rate, i.e. prevailing market rate in the community for attorneys with similar years of experience performing similar work in a similar period, I reject AAB's arguments that rely on principles contrary to this established standard, specifically: (1) the case may have been taken on a contingency fee basis and therefore, "a reasonable fee must not exceed the amount which Complainant actually must pay" (Opposition, p. 4); (2) because Mr. Nom lives in a neighborhood with a lower median income, the fee rate should be adjusted downward (Supplemental Opposition, pp. 2-3); and (3) the fee rate awarded to Mr. Nom's counsel should equal the fee rate of AAB's counsel who practices in Salem, Massachusetts, charges \$250-300 and contends that his skills and experience are comparable to those of Attorneys Fogelman and Rooks. (Id., p. 3).

⁹ I view the requested hourly rate of \$350 reasonable for the services of Attorneys Khan and Lederman.

AAB argues that the Commission should either not award attorneys' fees at all or should substantially reduce them because Mr. Nom did not prevail at hearing. AAB also argues that the fees should be substantially reduced on the grounds that: (a) the public hearing should have been handled by one, not two, attorneys; and (b) Mr. Nom's counsel expended substantial time on the unsuccessful claims of individual liability, national origin/race harassment and retaliatory termination.

AAB's first and second arguments are easily dispatched. First, Mr. Nom prevailed at hearing. Mr. Nom was awarded monetary damages and AAB was ordered to train its owners, managers and employees regarding retaliation in the workplace.¹⁰ Second, Attorneys Fogelman and Rooks were integral in prosecuting the case on behalf of Mr. Nom. Both attorneys were actively engaged in the hearing, questioning witnesses and handling objections and other evidentiary issues. The hours they spent during the hearing were neither duplicative nor excessive. Neal v. City of Boston, 2022 WL 303492 at *7 (Mass. Super. Jan. 18, 2022) (declining to reduce second attorney's work based on observations of trial performance reflecting each of the trial lawyers as "integral to plaintiff's prosecution of the case"); MCAD & Sun v. Univ. of Mass., 36 MDLR 85, 88 (2014).

As for the third argument, a fee award is generally limited to successful claims unless it can be shown that the unsuccessful and successful claims were interconnected by a common core of facts or related legal theories. Killeen v. Westban Hotel Venture, LP, 69 Mass. App. Ct. 784, 792-93 (2007) (no award should be made for attorneys' fees related to unsuccessful claims unless successful and unsuccessful claims are sufficiently interconnected); Haufler v. Zotos,

¹⁰ McNelley v. 7-Eleven, Inc., 2024 WL 4872394 (D. Mass. 2024), citing Farrar v. Hobby, 506 U.S. 103, 111-112 (1992) (plaintiff prevails when actual relief on merits of claim materially alters legal relationship between parties by modifying defendant's behavior in a way that directly benefits plaintiff).

2008 WL 425639 (Mass. App. Ct. Feb. 15, 2008); MCAD & O’Leary v. Brockton Fire Dep’t and Deputy Chief Brian Nardelli, 43 MDLR 15, 17-18 (2021).

With regard to the claims against Ms. Trinh and Mr. Mourato, there was a common nucleus of facts between Mr. Nom’s successful retaliatory suspension and transfer claim and Ms. Trinh and Mr. Mourato’s potential individual liability for the suspension and transfer. Sch. Comm. of Norton v. Massachusetts Comm’n Against Discrimination, 63 Mass. App. Ct. 839, 854 (2005) (claims against individuals based on a common core of factual investigation and related legal theories). The facts which proved AAB’s liability for retaliatory suspension and transfer comprised a common nucleus with those that would be needed to establish individual liability, and as such, the dismissal of the individual liability claims does not warrant a reduction in hours. In contrast, the race/national origin harassment claim (dismissed as untimely) and retaliatory termination claim (dismissed due to factual determination that Mr. Nom was not terminated), did not share a common nucleus of facts with the successful retaliatory suspension and transfer claim. I have reduced all attorneys’ hours by 25% to reflect Mr. Nom’s lack of success with respect to his claims of race/national origin harassment and retaliatory termination.

As a result, the reasonable number of hours are calculated as follows:

	Attorney Fogelman	Attorney Rooks	Other counsel
Hours requested	39.61	106.50	11.50
Hours deemed compensable	29.71 39.61*.75 = 29.71	79.88 106.50 (*.75) = 79.875	8.63 11.5 (*.75) = 8.625

The reasonable attorneys’ fees are calculated as follows:

	Attorney Fogelman	Attorney Rooks	Other counsel
Reasonable rate x reasonable number of hours	\$560.00 x 29.71 = \$ 16,637.60	\$410.22 x 79.88 = \$ 32,768.37	\$350 X 8.63 = \$ 3,020.50

The attorneys’ fees that comprise the lodestar are **\$ 52,426.47.**

C. ADJUSTMENT OF LODESTAR

I have considered AAB's argument that the lodestar be reduced because the fees requested are 10 times the amount of monetary damages awarded. The lodestar may be adjusted upward or downward based on the results obtained. The "results obtained" include the success claim by claim, the relief actually achieved and the societal importance of the right which has been vindicated. Diaz v. Jiten Hotel Mgmt., Inc., 741 F.3d 170, 178-80 (1st Cir. 2013).¹¹ Given the societal importance of the rights which have been vindicated by this case, and the above 25% reduction of the number of hours reasonably expended due to lack of success on certain claims, the lodestar amount is not "wholly disproportionate to the interests at stake" and I decline to downwardly adjust it. Twin Fires, Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 430 (2005) (judge's award of \$1 million in attorneys' fees and costs was appropriate where the damages awarded did not exceed \$118,950), quoting Linthicum v. Archambault, 379 Mass. 381, 388-389 (1979).

IV. ORDER

Pursuant to M.G.L. c. 151B, § 5, Respondent Acton Auto Body is ordered to pay a total of **\$52,426.47** in attorneys' fees and **\$2,405.55** in costs¹² with post-judgment interest accruing at a rate of 12% per annum for the period commencing on the date of this decision and ending on payment of the awarded fees and costs.¹³

¹¹ The success or lack of success of each claim has been analyzed in arriving at the lodestar amount. Had the claim of retaliatory termination been successful, it would have likely resulted in consequential damages including back pay.

¹² AAB did not oppose the costs requested. After review, I find the requested amount for costs is reasonable.

¹³ Given that the Petition did not include sufficient information, resulting in my issuance of an order for a supplemental filing, I decline to award any attorneys' fees for time expended submitting the supplemental statement.

V. **NOTICE OF APPEAL**

Pursuant to 804 CMR 1.12(19) (2020), a Hearing Officer decision on a request for award of attorneys' fees and costs is a final decision appealable to the Full Commission pursuant to 804 CMR 1.23(1)(a) (2020), regardless of whether a party has appealed the underlying hearing decision to the Full Commission. Any party aggrieved by this decision on the petition for fees and costs may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal within 10 days of receipt of this decision and file a Petition for Review within 30 days of receipt of this decision. 804 CMR 1.23 (2020). If a party files a Petition for Review, the other parties have the right to file a Notice of Intervention within 10 days of receipt of the Petition for Review and shall file a brief in reply to the Petition for Review within 30 days of receipt of the Petition for Review. 804 CMR 1.23 (2020) All filings referenced in this paragraph shall be made with the Clerk of the Commission with a copy served on the other parties.

So Ordered this 10th day of February, 2025.

Simone Liebman

Simone R. Liebman
Hearing Officer