

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

Massachusetts Commission
Against Discrimination and
Yerica Santiago,
Complainants

v.

DOCKET NO. 17-SEM-02059

Caregivers of Massachusetts, Inc.,
Respondent

ORDER AND FINAL DECISION ON ATTORNEYS' FEES AND COSTS

I. Procedural Background

On January 11, 2023, I issued an Amended Decision in favor of Complainant Yerica Santiago ("Santiago"). On January 31, 2023, counsel for Santiago filed a Petition for Fees and Costs ("Petition"), with a copy to George Kahi ("Kahi"), the representative of Respondent Caregivers of Massachusetts, Inc. ("Caregivers"). The Petition requests fees and costs in the amount of \$101,147.56, reflecting 164.20 hours of work performed by Attorney Chelsea K. Choi¹ at a rate of \$250 in 2020-2021 and \$325/hour in 2022-2023 and 115.2 hours of work performed by Attorney Jeffrey S. Morneau at a rate ranging from \$350 to \$450.² The Commission has not received a response or opposition to the Petition from Kahi or Caregivers. 804 CMR 1.12 (19) (2020) (a respondent may file a written opposition within 15 days of a petition for an award of reasonable attorneys' fees and costs).

II. Hampden Superior Court Action

At the outset, I must determine whether the attorneys' fees and costs sought by counsel for Santiago and related solely to a civil action brought by Santiago in Hampden Superior Court should be awarded in this Commission action. On November 28, 2018, Santiago filed a superior court action against Caregivers of Massachusetts, LLC, George Kahi and Willie Kangela, Docket No. 1879CV00883 ("superior court action"). Petition, p. 2. Santiago argues that the superior court action "arose from the same employment relationship that the MCAD Charge arises from" and seeks attorneys' fees incurred in both the superior court action and the Commission action. Petition, p. 2. On October 29, 2020, the Hampden Superior Court entered judgment in favor of

¹ This includes time spent by Attorneys Lan Kantany and Andrea Harrington.

² In addition, the Petition seeks reimbursement for 1 hour of work by Attorney John D. Connor; 6.2 hours by Rebecca Willoughby and 14.0 hours of work by Eilis Hellyar at a rate of \$100/hour and costs of \$32.56.

Santiago in the amount of \$70,440.00 plus attorneys' fees in the amount of \$20,215.00 and costs of \$969.18. Santiago has represented that this default judgment is unpaid.

The Commission should use care to award fees incurred in a case other than the case before the Commission,³ but as recently illustrated by the First Circuit Court of Appeals in a Title VII case, where the work done in another matter is "useful and ordinarily necessary legal work" to advance or protect the complainant's interest in the subject action, attorneys' fees and costs may be awarded. Pérez-Sosa v. Garland, 22 F.4th 312, 324 (1st Cir. 2022) (courts should treat all useful and ordinarily necessary legal work as performed "for the litigation" even if the work was done outside the four corners of the particular case). To be compensable, the time expended in another matter must be devoted to work that is useful and of a type that is ordinarily considered necessary to secure the final result in the matter at hand. Pérez-Sosa v. Garland, 22 F.4th at 323-324. Attorneys' fees should include services which, at the time rendered, would have been undertaken by a reasonably prudent lawyer to advance or protect her client's interest in the case at bar. Id. at 325, citing Armstrong v. Davis, 318 F.3d 965, 971 (9th Cir. 2003).

The superior court action was comprised of three counts: failure to pay wages; failure to pay overtime and breach of contract. Petition, p. 2. These causes of action are not within the Commission's jurisdiction nor could they have been brought pursuant to M.G.L. c. 151B. The superior court action was designed to vindicate Ms. Santiago's right to overtime and wages; the Commission action was designed to vindicate Ms. Santiago's right to work free of discrimination and harassment pursuant to M.G.L. c. 151B. Other than a statement that the superior court action "arose from the same employment relationship that the MCAD Charge arises from", there is no assertion in the Petition that the litigation undertaken in the superior court action related to or more importantly, advanced or protected Santiago's interests in the Commission proceeding. No discovery taken or witness interviews from the superior court action were introduced or relied upon in the Commission proceeding. For these reasons, I conclude that those attorneys' fees and costs incurred in the advancement of the superior court action were not "useful or of a type ordinarily necessary" to advance or protect Santiago's interests in the Commission case, and are not compensable.⁴

A careful review of the billing records submitted by counsel for Santiago reveals that the attorneys' fees and costs after the date that the Hampden Superior Court entered its default judgment on October 29, 2020, amount to \$45,393.56.⁵ I have added to this figure those entries

³See Smith v. City of Boston, 496 F. Supp. 3d 590, 594 (D. Mass. 2020), citing Binta B. v. Gordon, 740 F.3d 608, 631 (6th Cir. 2013) ("[t]his Court shares the Sixth Circuit's concern about the 'idea of ever permitting plaintiffs' counsel to receive fees for work performed in a completely separate case. Doing so could lead to all sorts of oddities, as illustrated by this case where counsel would be permitted to recover fees for thousands of hours of time spent litigating a case they lost.'" (Title VII case)

⁴ In addition, the attorneys' fees incurred in the superior court action were awarded to Ms. Santiago through a default judgment entered on October 29, 2020. Petition, p. 3. An award by the Commission for the time expended by counsel in the superior court action would result in "double dipping" and is strictly precluded.

⁵ There were duplicate entries on July 21, 2022 and July 29, 2022, which were not included in this calculation. Pérez-Sosa v. Garland, 22 F.4th at 322 (district judge "need not, and indeed should not,

prior to the October 29, 2020 default judgment, which clearly describe services provided in the advancement of the Commission proceeding. These fees and costs amount to \$10,240 for a total of \$ 55,633.56.

Further evaluation is necessary to determine whether these fees are reasonable, and appropriately awarded in this matter.

III. Reasonable Attorneys' Fees and Costs

M.G.L. c. 151B, § 5 allows prevailing complainants to recover reasonable attorneys' fees. The determination of whether fees sought are 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. O'Leary v. Brockton Fire Dep't, 43 MDLR 15 (2021), citing Baker v. Winchester School Committee, 14 MDLR 1097 (1992). The Commission has adopted the lodestar methodology for fee computation. Id. By this method, the Commission calculates the number of hours reasonably expended to litigate the claim and multiplies 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.

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. Id. Compensation is not awarded for work that appears to be duplicative, unproductive, excessive, or otherwise unnecessary to the prosecution of the claim. The party seeking fees has a duty to submit detailed and contemporaneous time records to document the hours spent on the case. Osorio & MCAD v. Standhard Physical Therapy et. al, 45 MDLR 1 (2023).

I have reviewed the affidavits and accompanying time records and determined that the hourly rates are consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases and determined that the number of hours of services performed for this action were reasonably expended. In addition, the costs are reasonable. However, when multiple claims are alleged, and the complainant does not prevail on all her claims, the Commission may exercise its discretion to reduce the fees requested by some amount reasonably associated with the pursuit of complainant's unsuccessful claim. See Marathas v. Holiday Inn, 22 MDLR 391 (2000). Where a complainant's successful and unsuccessful claims are inextricably intertwined and based on a common nucleus of facts, a reduction may not be required. See Cheeks v. Massachusetts Correction Officers Federated Union, 27 MDLR 30 (2005). Santiago was unsuccessful on the following claims: sexual harassment, a claim of a violation of the Massachusetts Parental Leave Act (MPLA), and sex/pregnancy discrimination. She was successful on her retaliatory transfer claim and her disability discrimination claim.

become green-eyeshade accountants" and "may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time).

The claims of an MPLA violation and sex/pregnancy discrimination were based on the same common nucleus of facts necessary to prove the disability discrimination claim. All three claims arose out of Caregivers' termination of Santiago's employment. Toussaint v. Brigham & Women's Hospital, 35 Mass. L. Rptr. 179 (Superior Court, August 21, 2018) (declining to reduce award where the claims involved "the same series of events, over the same period of time"). As such, I decline to reduce attorneys' fees on the basis that the MPLA and sex/pregnancy discrimination claims were unsuccessful.

As for the unsuccessful hostile work environment sexual harassment claim, there was some evidence supporting that claim which was relevant and necessary to support the retaliatory transfer claim. Santiago's reasonable belief that she was subjected to sexual harassment and evidence about the individuals to whom she reported it was information relevant to and necessary to prove the claim that her subsequent transfer was retaliatory. Kelley v. Commonwealth of Massachusetts Dep't of Conservation & Recreation, 2014 WL 2504520 (Superior Court, March 21, 2014) (hostile work environment claim related to retaliatory transfer claim); Carrion v. Hashem, 2012 WL 2335297 (Superior Court, May 24, 2012) (retaliation claim related to underlying pregnancy discrimination claim). While Santiago's successful claim of retaliatory transfer was related to her claim of sexual harassment, they were not so closely interconnected as to merit full compensation for the litigation of the sexual harassment claim. Much of the public hearing was devoted to the presentation of evidence of untimely acts alleged to constitute sexual harassment. As such, I exercise my discretion to reduce the \$55,633.56 in attorneys' fees and costs by 20%, and award the sum of \$44,506.85.

IV. Order

Caregivers of Massachusetts, Inc. is hereby ordered to pay Santiago the sum of \$44,506.85 in attorneys' fees and costs with interest thereon at the rate of 12% per annum from the date of the filing of Santiago's Petition for Attorneys' Fees and Costs, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This Order and Final Decision on Attorneys' Fees and Costs ("Final Decision on Attorneys' Fees") 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. 804 CMR 1.12 (19) (2020). **Any party aggrieved by this Final Decision on Attorneys' Fees may appeal to the Full Commission. To do so, a party must file a "Notice of Appeal of Final Decision on Attorneys' Fees" with the Clerk of the Commission within ten (10) days of receipt of this Final Decision on Attorneys' Fees, and submit a "Petition for Review of the Final Decision on Attorneys' Fees" within 30 days of receipt of this Final Decision on Attorneys' Fees. 804 CMR 1.23 (2020).**

So ordered this 2nd day of March, 2023.

Simone Liebman

Simone R. Liebman
Hearing Officer