SUBJECT MATTER INDEX ENTRY

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X Board Ruling after Administrative Hearing (R)
__ Commission Order (CO)
__ Hearing Officer Order (HO)

Note: This has been updated on 3/14 to add the PLA denial date to the cite and further edit the entries. SJB

Case Citation *Alexander v. 1212 Restaurant Group et al.*, CCHR No. 00-E-110 (Apr. 15, 2009), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist, Aug. 25, 2011), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012)).

MAIN CATEGORY ATTORNEY'S FEES
SUBCATEGORY 1 Unsuccessful Claims/Theories
SUBCATEGORY 2

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Apr. 15, 2009), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist, Aug. 25, 2011)), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Attorney fee award reduced 15 per cent from amount sought to adjust for unsuccessful discharge claim accompanying successful workplace harassment claim, citing *Barnes v. Page* and noting that much of the testimony would have been presented for the harassment claim and that rough approximations are inevitable in this situation. R

MAIN CATEGORY Attorney's Fees
SUBCATEGORY 1 Reasonable Fees
SUBCATEGORY 2

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Apr. 15, 2009), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist, Aug. 25, 2011)), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Attorney fees of $83,781.31 and costs of $691.75 awarded for successful workplace harassment claim after 15 per cent reduction of amount claimed to adjust for unsuccessful discharge claim. R

MAIN CATEGORY Attorney's Fees
SUBCATEGORY 1 Reasonable Rate
SUBCATEGORY 2

Alexander v. 1212 Restaurant Group et al., CCHR No. 00-E-110 (Apr. 15, 2009), aff'd Cir. Ct. Cook Co. No. 09-CH 16337 (Feb. 19, 2010), aff'd Ill. App. Ct. No 1-20-0797 (1st Dist, Aug. 25, 2011)), PLA denied Ill. S.Ct. No 113274 (Jan. 25, 2012). Hourly rates progressing from $290 in 2003 to $350 in 2008 approved for attorney who had practiced law since 1987, plus rates of $100 in 2005 and $200 in 2006 for a paralegal, based on attorney's affidavit as to his reasonable and customary rates, CHR's knowledge of rates charged by experience employment lawyers in Chicago area, and lack of evidence from Respondents to support contention the rates were not reasonable and customary. R

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City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, 3rd Floor, Chicago, IL 60654
312/744-4111 (Voice), 312/744-1081 (Fax), 312/744-1088 (TDD)

IN THE MATTER OF:

Demetri G. Alexander
Complainant,
v.
1212 Restaurant Group, LLC, d/b/a The State Room, Scott Schwab, and Russell Scalise
Respondent.

Case No.: 00-E-110

Date Mailed: April 24, 2009

TO:

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FINAL ORDER ON ATTORNEY FEES AND COSTS

YOU ARE HEREBY NOTIFIED that, on April 15, 2009, the Chicago Commission on Human Relations issued a Final Ruling on Attorney Fees and Costs in favor of Complainant in the above-captioned matter. The Commission orders Respondent to pay supplemental attorney fees in the total amount of $83,781.31 and supplemental costs in the total amount of $691.75, for a total award of $84,473.06. The findings and specific terms of the ruling are enclosed.

Pursuant to Commission Regulations 100(15) and 250.150, a party may obtain review of this order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law at this time. Compliance with this Final Order and the Final Order on Liability and Relief entered on October 30, 2008, shall occur no later than 28 days from the date of mailing of this order.[1] Reg. 250.210

CHICAGO COMMISSION ON HUMAN RELATIONS
Dana V. Starks, Chair and Commissioner

[1] **COMPLIANCE INFORMATION:** Parties must comply with a final order after administrative hearing no later than 28 days from the date of mailing of the later of a Board of Commissioners' final order on liability or any final order on attorney fees and costs, unless another date is specified. CCHR Reg. 250.210. Enforcement procedures for failure to comply are stated in Reg. 250.220.

Payments of attorney fees and costs are to be made to Complainant's attorney of record.

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Respondents.

Case No.: 00-E-110

Date of Ruling: April 15, 2009

FINAL RULING ON ATTORNEY FEES AND COSTS

I. Introduction

On November 24, 2008, Complainant filed a Petition for Attorneys' Fees and Costs pursuant to Reg. 240.639(b) of the 2001 Rules and Regulations Governing the Chicago Human Rights Ordinance.[1] On October 30, 2008, the Commission had entered a Final Order on Liability and Relief finding in favor of Complainant and awarding him $35,000 in compensatory damages and $140,000 in punitive damages against all Respondents jointly and severally. Additionally, the Respondents were fined the maximum fine of $500 and Complainant was awarded his attorneys' fees and costs against Respondents, jointly and severally.

Complainant is seeking attorney fees of $98,596.25 and costs of $691.75.[2] Respondents filed a Response to the Petition on December 8, 2008, arguing that some of the fees are being sought for unsuccessful claims and that the fee petition is not adequately documented. Respondent is seeking a 75% reduction in the claimed fees and costs.

On January 22, 2009, the hearing officer issued his First Recommended Decision on Attorneys' Fees and Costs. On February 25, 2009, Respondents filed Objections to the First Recommended Decision. Complainant moved for leave to respond to the Objections *instanter*, which the hearing officer granted in his Final Recommended Decision, issued on March 6, 2009.[3] Both the Objections and Complainant's response to them have been considered.

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1 This ruling is governed by Reg. 240.630(b) of the 2001 Regulations because the administrative hearing had been completed as of July 1, 2008. See the "Application of 2008 Regulations" statement governing the amended Regulations which became effective July 1, 2008.

2 Complainant is seeking fees only for time spent by his counsel when his was represented by the law firm of Strauss & Malk LLP, from March 2003 to the present.

3 Also, on April 7, 2009, Respondents filed and served a "Motion to Change Name of Attorney of Record" stating that Attorney Thomas P. Cronin no longer works for the law firm of Schiff and Hulbert but that Schiff and Hulbert continues to represent Respondents. The Commission has treated this filing as notice of a change of contact information which does constitute a withdrawal or new appearance of counsel and does not require a ruling.

II. Lodestar Method of Calculating Fees

The Commission follows the lodestar method of calculating reasonable attorney's fees. That is, the Commission determines the number of hours that were reasonably expended on the case and multiplies that number by the customary hourly rate for attorneys with the level of experience of the complainant's attorney. *Barnes v. Page*, CCHR No. 92-E-1 (Jan. 20, 1994); *Nash/Demby v. Sallas Realty*, CCHR No. 92-H-128 (Dec. 6, 2000).

III. The Appropriate Hourly Rate

In determining an attorney's appropriate hourly rate for fee award purposes, the Commission in *Sellers v. Outland*, CCHR No. 02-H-73 (Mar. 17, 2004), *aff'd in part and vacated in part (on other grounds)*, Ill.App.Ct. No. 1-04-3599 (1st Dist., Sept. 15, 2008), adopted the reasoning of the Seventh Circuit set forth in *Small v. Richard Wolf Medical Instruments Corp.*, 264 F.3d 702,707 (7th Cir. 2001):

> The fee applicant bears the burden of proving the market rate. The attorney's actual billing rate for comparable work is considered to be the presumptive market rate. If, however, the court cannot determine the attorney's true billing rate--such as when the attorney maintains a contingent fee or public interest practice--the applicant can meet his or her burden by submitting affidavits from similarly experienced attorneys attesting to the rates they charge paying clients for similar work, or by submitting evidence of fee awards that the applicant has received in similar cases. Once the fee applicant has met his or her burden, the burden shifts to the defendants to demonstrate why a lower rate should be awarded.

As was stated in *Richardson v. Chicago Area Council of Boy Scouts*, CCHR No. 92-E-80 (Nov. 20, 2996) *reversed on other grounds*, 322 Ill.App.3d 17 (1st Dist. 2001), *dismissed on remand*, CCHR No. 92-E-80 (Feb. 20, 2002), "Once an attorney provides evidence of his/her billing rate, the burden is on the respondent to present evidence establishing a good reason why a lower rate is essential. A respondent's failure to do so is essentially a concession that the attorney's billing rate is reasonable and should be awarded."

Respondents argue that Complainant has not shown that his attorney or paralegal rates are reasonable and customary in the community where the work was performed. They claim that the billing records submitted do not reflect the rate charged for each hour of work nor do they identify one of the individuals, "JJK," who billed time on September 20, 2005. Finally, Respondent argues that Complainant failed to attach actual bills, the fee agreement, or paid bills and thus cannot show that his attorneys' rates are reasonable.

Attorney Brad S. Grayson submitted his affidavit averring that at all relevant times he has been a partner and senior litigation attorney at Strauss & Malk, LLP, having practiced law in Illinois since 1987. Mr. Grayson avers that his usual and customer billing rate in 2003 was $280 per hour, increasing to $290 in 2004, $310 in 2005, $320 in 2006, $335 in 2007, and $350 in 2008. Mr. Grayson further asserts that Strauss & Malk has billed $100 per hour for a paralegal, Susan Goldberg, for time spent in 2005 and $110 for time spent in 2006. According to Mr. Grayson's affidavit, attorney time associated with a related Circuit Court case involving the same parties has been paid and is not being sought in this Petition.

Complainant has not submitted any supporting affidavits other than his own regarding the reasonableness of his hourly rates. Nor has he presented any survey, or other billing data, or any of his actual bills, either paid or unpaid, establishing his customary rates. The Time and Billing Statement attached to Complainant's Petition does not indicate what hourly rate was being charged for each task, although it appears from the calculations, which the hearing officer attempted to duplicate, that historical rates are being sought. [4]

Commission Regulation 240.630(a) (2001) requires that a prevailing Complainant submit a "statement of fees and/or costs he or she incurred during the state court proceedings, supported by argument and affidavits." The supporting documentation must include, among other things, the number of hours sought, itemized according to the work that was performed and the individual who performed the work and the hourly rate customarily charged by each individual. Although it is a best practice for counsel to submit affidavits of other counsel attesting to the reasonableness of counsel's hourly rate, this Commission has not required such additional affidavits to be submitted. See, e.g., *Nuspl v. Marchetti*, CCHR Case No. 98-E-207 (Mar. 19, 2003).

Although Respondents argue that Mr. Grayson's hourly rate has not been shown to be reasonable and customary, they have likewise submitted no affidavits or other evidentiary matter rebutting Mr. Grayson's affidavit. Respondents, in their Objections, argue that a Complainant must submit documentation of rates prevalent in the practice of law in the same locale with comparable experience and expertise - even where Respondents have presented no evidence rebutting the reasonableness of the claimed rates.

Complainant met his initial burden by averring as to the rates he customarily charged for his legal services during the applicable time period. Respondents have not adequately raised a factual issue regarding the reasonableness of those rates. In the absence of any contrary evidence, by way of affidavit or otherwise, and consistent with the hearing officer's and Commission's knowledge of comparable rates charged by experienced employment lawyers in the Chicago area, the Commission finds the hourly rates charged by Mr. Grayson and by his paralegal, Ms. Goldberg, to be reasonable. The mysterious entry for JJK is unsupported by any affidavit; however it does not appear that any time was billed by JKK on that date.

IV. Percentage Reduction for Unsuccessful Claims

Respondents seek a twenty-five per cent (25%) reduction in fees for each of three reasons. First, Respondents claim that Complainant's failure to prevail on a claim of race discrimination merits a reduction. Secondly, they claim that Complainant's failure to prevail on a claim of disability discrimination merits a reduction. Finally, they claim that Complainant's failure to prove that he was terminated because of his perceived sexual preference merits a reduction. One of these arguments has merit.

In *Huezo v. St. James*, CCHR No. 90-E-44 (Oct. 9, 1991), the Commission held that "[a] Complainant is entitled to attorneys' fees for both the claims on which she prevailed, and those that share a common core of fact. The interrelated nature of the lawsuit means that even if some time may have been spent on an unsuccessful claim, the claimant may recover fees if development of that legal theory was necessary to the claims on which she did prevail. As explained in *Bohen v. City of*

4 Federal judges generally have discretion to award fees based on an attorney's historical rate plus interest or based on current rates, to compensate for delay in payment. *Smith v. Village of Maywood*, 17 F.3d 219 (7th Cir. 1994).

East Chicago, 666 F.Supp. 154, 156 (N.D. Ind. 1987), citing *Lenard v. Argento*, 808 F.2d 1242, 1245-46 (7th Cir. 1987), counsel may pursue multiple legal theories in support of a single claim for relief without needing to win on each legal theory; but when a party pursues separate claims for relief, each must be assessed separately.

As noted in the Final Order on Liability and Relief, Complainant introduced no evidence and abandoned any claims that his termination or harassment was based on his opposition to race discrimination. No time was spent by counsel during the hearing developing that theory. Respondents object that substantial time was spent at the hearing attempting to prove the race discrimination claim. That does not appear to be the case. In fact, it was Respondents who introduced the issue of race, in an attempt to tarnish Complainant's reputation and credibility. There is no basis to reduce the fee award because of the abandoned race discrimination claim.

With regard to the claim that Complainant was harassed because of his toe injury, the evidence that was introduced regarding Complainant's medical condition was argued by both sides to be relevant to explain the his absences from work. This was an issue which shared a common core of operative facts with the issue of whether Alexander was terminated from his employment for performance reasons or because of his perceived sexual orientation. Additionally, the issue of disability discrimination was not even before the Commission. The testimony of Dr. Kelikian and of Dr. Rennecker related not to any claims of disability discrimination but to Complainant's theory of why he had missed work as well as Complainant's theory of damages. The Commission discerns no basis to reduce Complainant's fees related to introduction of this evidence.

The issue of Complainant's termination from employment involves a distinct *claim* rather than a theory of liability. There was considerable testimony and briefing related to whether the termination of Complainant's employment was motivated by his perceived sexual orientation. This case is similar to the situation in *Barnes v. Page*, CCHR No. 92-E-1 (Sept. 23, 1993), where the complainant prevailed on her claim that she was forced to endure a sexually hostile environment but did not prevail on her claim that she had been unlawfully terminated. The Commission reduced her attorney fee award by fifteen per cent (15%) to adjust for the unsuccessful claim.

Much of the testimony presented by the parties relevant to the termination claim in this case would have been presented with regard to the hostile environment claim. As the court noted in *Bohen*, rough approximations are inevitable in determining how much time was required on an successful claim. 666 F.Supp at 156. See also *Zabkowicz v. West Bend Co.*, 789 F.2d 540, 551 (7th Cir. 1986), holding that time spent on unsuccessful related claims is compensable. As in *Barnes*, the Commission agrees with the hearing officer's recommendation that a reduction of fifteen per cent (15%) is appropriate to account for the unsuccessful claim.

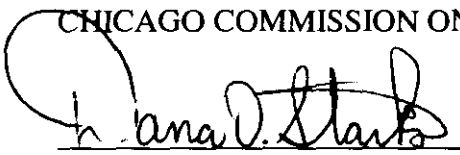
V. The Earlier Settlement

Respondents make reference to an earlier settlement and assert that the Complainant and his attorney have already been compensated for time spent on discovery which was used to support this Commission proceeding. Complainant stated in his Petition that time spent on the related case was not included in the Petition. Respondents have presented no evidence to support their argument, nor have they pointed to any specific time and billing entries for which Complainant or his counsel have already been compensated. Therefore, there is no basis to conclude that any further reduction is warranted.

VI. Conclusion

The Complainant has sought and adequately documented 317 hours of attorney time at his customary and reasonable hourly rates, totaling $98,596.25.[5] Applying a 15% reduction to account for the unsuccessful claim, the Commission awards Complainant $83,781.31 in attorney fees. As no objections were raised to the request for costs, the Commission further awards Complainant $691.75 as costs.

CHICAGO COMMISSION ON HUMAN RELATIONS



By: Dana V. Starks, Chair and Commissioner
Entered: April 15, 2009

5 The hearing officer recalculated Complainant's Fee Petition using the hours listed and the historical rates that Complainant is seeking for each time period. His calculation resulted in a total of $101,053.75 in total fees related to 317.25 hours of work, rather than the $98,596.25 sought by Complainant. However, the failure of Complainant to include the applicable hourly rate on his billing sheet for each period of time justifies the sanction of holding him to his requested amount.