IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

GAIL STERLING,	*	
Plaintiff,	*	
vs.	*	Civil Action No. 235718
ATLANTIC AUTOMOTIVE CORP.,	*	
Defendant.	*	

OPINION AND ORDER

This matter comes before the Court on the Plaintiff's Petition for Attorney's Fees, Costs and Expenses, the Supplemental Petition, the Second Supplemental Petition, the Defendant's Opposition, and the Plaintiff's Reply thereto. Following an evidentiary hearing on January 7, 2005, the Court took the matter under advisement to consider the testimony and exhibits presented at the hearing as well as the arguments of counsel. For reasons set forth hereinafter, the Court shall defer entry of a final order on the petition for a period of 15 days from the date of this Order.

FACTS

Because the Plaintiff was only partially successful, a general understanding of the underlying facts and claims is necessary to address the Petition.

On July 17, 2000, the Plaintiff, Gail Sterling (hereinafter: Plaintiff or Sterling) began work for Tischer Subaru as a service advisor. Tischer Subaru was owned by Defendant, Atlantic Automotive Corp. (hereinafter: Defendant or Atlantic). When applying for her job, she concealed her prior history of criminal convictions.

According to the Plaintiff, sometime around May of 2001, Jay Sponsellor, Defendant's Director of Operations, began making inappropriate comments to her of a sexual nature. For example, on one or more occasions he asked her the color of her underwear. On another, he said he would like to lick her from head to toe. On numerous occasions, he asked her to have sex with him. In late August of 2001, she reported his conduct to her immediate supervisor, Greg Yancey. He responded by telling her "everyone here wants to fuck you." Following that conversation, she called Mr. Yancey and told him she was quitting because of Sponsellor's conduct. Mr. Yancey agreed to talk to Sponsellor. A few days later, Mr. Yancey told Ms. Sterling that Mr. Sponsellor had offered to promote her to a service advisor position at Tischer Audi. Because of the way her compensation was determined, the promotion would have meant more money. Ms. Sterling agreed to accept the offer but only if Sponsellor would stop his harassment.

Ms. Sterling subsequently had a conversation with Mr. Todd Van Houten, the General Manager at Tischer, who was Mr. Sponsellor's supervisor. During that conversation, she repeated her allegations about Sponsellor and described Yancey's initial reaction to her complaint. Plaintiff alleges that as a result of reporting this conduct to Van Houten and refusing Sponsellor's sexual advances, she was denied the promotion.

In March 2002, Plaintiff was transferred to one of Defendant's nearby dealerships, Herb Gordon Dodge Subaru. In May of 2002, Scott Riverback, a Dodge service writer, told one of Plaintiff's co-workers that he should avoid any sexual relationship with her because she had a sexually transmitted disease. Ms. Sterling learned of the remarks. She complained to her supervisor about Mr. Riverback's conduct/comments. No action was taken against Mr.

Riverback. Approximately two weeks later, Plaintiff was fired. She was told she was not working out.

As a result of those acts, on August 28, 2002 Plaintiff brought suit against the Defendant alleging:

Count I: Quid Pro Quo/Sexual Harassment;

Count II: Hostile Work Environment/Sexual Harassment;

Count III: Retaliation;

Count IV: Defamation

Except for the defamation claim, all claims were brought under Md. Ann. Code of 1957, Art. 49B and Montgomery County Code, § 27-19. For relief, Ms. Sterling sought compensatory damages, including past lost wages, future lost wages and pain and suffering. As well, she sought punitive damages.

Prior to trial, the Plaintiff voluntarily dismissed Count IV, the claim for defamation. She later amended her complaint to add a new Count IV, a claim for failure to pay wages. On October 20, 2003, the Court dismissed that claim on Defendant's motion. On June 18, 2004, approximately five weeks before trial, as a result of what the Court found to be willful and egregious misconduct by the Plaintiff during the discovery process, the Court dismissed the Plaintiff's claim for punitive damages.

In addition to the above, the Plaintiff abandoned portions of her claim for emotional distress damages. Initially, she identified an expert she intended to call to present medical testimony as to the full nature and extent of her emotional distress. However, during the course of discovery, counsel for the Defendant learned that the Plaintiff had concealed her past history of mental health treatment from her expert. Faced with the Defendant's

discovery, the Plaintiff reluctantly agreed to withdraw the expert and present no medical testimony on that issue. By stipulation, Plaintiff agreed to limit her testimony about her emotional distress to telling the jury she suffered "humiliation, shame, shock, moodiness and upset." In light of the stipulation, the Defendant agreed not to call an expert or otherwise inquire into Plaintiff's medical history.

The trial of this matter commenced on July 26, 2004 and continued through July 30, 2004. The Plaintiff called eight witnesses. The Defendant also called eight witnesses. Three of them had already testified during the Plaintiff's portion of the case. Following the trial, the jury awarded the Plaintiff $195,000 for the emotional distress damages on Count II, her hostile work environment claim. They denied her claim for back pay finding that had her employer been aware of her prior convictions, they would not have hired her. (Shortly before trial, she withdrew her claim for future wages or "front pay.") The jury also found against her on Counts I and III, her retaliation and quid pro quo claims.

Atlantic filed a number of post-trial motions, including a motion for new trial. Among other arguments, they asserted that the amount awarded for the Plaintiff's emotional distress was so excessive, it "shocked the conscience" and should be set aside. They pointed to the fact that the Plaintiff had presented no expert testimony about the extent of her injury. Apart from testifying that she lost some sleep and wanted to quit at one point, her testimony about her distress was limited to telling the jury she suffered "humiliation, shame, shock, moodiness and upset." After conducting a hearing on the motion, the Court found that the amount of damages bore little relation to the evidence of the nature and extent of the Plaintiff's injury and was almost certainly motivated by the jury's desire to punish the Defendant. Since compensatory damages cannot be awarded as punishment, the Court offered the Plaintiff the

opportunity to accept a remittitur to $100,000 in lieu of a new trial on damages. After consulting with her attorney, the Plaintiff accepted the remittitur.

Following the trial, Plaintiff, through her attorneys, also filed a petition for fees and costs. The Court allowed both parties to designate experts and take additional discovery on the issue of the reasonableness of the fees. The Plaintiff designated Lawrence Kaye, Esquire as its expert and the Defendant designated Thomas Murphy, Esquire.

In order to assist the Court in its review, the Court directed the Plaintiff to prepare a compilation exhibit showing for all hours billed: the work done, the person doing the work, the rate charged, and the hours claimed. Upon receipt of the exhibit, the Defendant was directed to identify each item to which they had an objection and the reason for the objection. If the objection was based upon excessive time or rate, they were to set out on the line for that item the rate or time they agreed was reasonable.

The compilation exhibit was introduced at the hearing on January 7th designated Defendant's 1, Defendant's 2 Amended, and Defendant's 2 A (hereinafter collectively: Defendant's 1 and 2). Defendant's 1 listed all charges through the conclusion of the trial. Defendant's 2 Amended covered the period of post-trial proceedings up through December 13, 2004. Defendant's 2A brought those figures current to the date of the hearing on January 7, 2005. Defendant's 1 and 2 combined included 2,927 separate entries, each has been reviewed by the Court.[1]

[1] In computing the total amount of fees the Court finds to be reasonable, under the initial lodestar calculation, the Court made extensive use of Defendant's 1 and 2. Almost without exception, if the Defendant agreed the charge was reasonable as indicated on the exhibit, the Court included it in its initial computation. Concerning those that were contested, if the Court adopted Mr. Murphy's position, the item was deleted, or otherwise modified. If the Court rejected the item for reasons other than those given by Mr. Murphy, the Court noted its reason on the exhibit using the same codes as Mr. Murphy. If no code is shown on a deleted line, the Court deleted it for the reason assigned by Mr. Murphy. If the Court rejected Mr. Murphy's objection, the item was included in whole or part. For purposes of appellate review, Defendant's 1 and 2 with the Court's alterations has been filed

The Court conducted a daylong hearing on the Petition. The Plaintiff presented the testimony of its expert, Lawrence Kaye, Esq. The Defendant presented the testimony of Frank Laws, Esq., trial counsel for the Defendant, and its expert, Thomas Murphy, Esq. While there was general agreement between the experts that the Plaintiff was entitled to recover reasonable attorney's fees, there was wide disagreement as to the value of those services. The Plaintiff sought $560,408.10 in attorney's fees and $46,080.71 in costs, a total of $606,488.81. The Defendant did not contest the claim for costs,[2] but maintained that $211,998.50 were the reasonable fees. Alternatively, if the Court found that charges for "legal assistants" were compensable as a matter of law, $227,884.60 were the reasonable attorney's fees. The disagreements centered primarily around the reasonableness of the work claimed. The hourly rate for the attorneys, with one exception, was not contested.[3]

ANALYSIS

The parties are in general agreement as to the methodology that the Court must employ in determining an appropriate award of fees. In *Friolo v. Frankel*, 373 Md. 501 (2003), the Court of Appeals discussed the issue at length. They held that the "lodestar" approach with its adjustments is to be used by the courts in fee shifting cases. Thereafter, they described the process in great detail.

Initially, the *Friolo* court observed that the award of such fees is discretionary. The Annotated Code of Maryland 1957, Article 49B, § 42(c) provides: "In a civil action under

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contemporaneously with this opinion and order. The deleted items are represented by blank lines opposite the item number. The altered items appear in bold print. The exhibit will be designated Court's 1.

[2] Although the Defendant did not contest to the costs, upon review by the Court, the figure requested was reduced due to duplicity in the billing statements. See Court Exhibit 3.

[3] Generally, the attorney time was billed at a rate of $250/hour, except time for Courtney Abbott and Kenneth Fails (time charged by Mr. Fails is contested by Defendant as explained later), which was billed at $175/hour.

this section, the court in its discretion, may allow the prevailing party reasonable attorney's fees, expert witness fees and costs." Montgomery County Code, § 27-9(a) has similar language. "A person who substantially prevails in a civil action may recover costs and reasonable attorney's fees." Although discretionary, the *Friolo* court makes clear that where, as here, the statute is a remedial one, discretion should be "exercised liberally in favor of awarding fees …." *Friolo*, at 515. Similarly, the Supreme Court opined in *Hensley v. Eckerhardt*, 461 U.S. 424 (1983), cited at length in *Friolo*, that in civil rights cases "a prevailing plaintiff 'should ordinarily recover attorney's fees unless special circumstances exist which would render such an award unjust.' " Hensley, at 429.

The lodestar analysis involves a two-step process, making an initial calculation of reasonable attorney fees and then determining if an adjustment to those fees is warranted. The starting point for calculating the reasonable attorney's fee is determining the product of "… the number of hours reasonably expended on litigation multiplied by a reasonable hourly rate. That calculation … provide(s) an objective basis on which to make an 'initial estimate' of the value of the lawyer's services." *Friolo*, at 523-24. "Excessive, redundant [and] … unnecessary" hours must be excluded. *Id*.

Apart from excluding such hours, in making the initial calculation, the Court must consider whether the Plaintiff succeeded on all or only some of their claims. A plaintiff need not succeed on all claims to be entitled to recover reasonable attorney's fees. It is sufficient "… if the plaintiff succeeds on any significant issue that achieves some of the benefit sought in bringing the action." *Id*. However, in cases where the plaintiff is only partially successful, the court must undertake additional steps. First, the court must determine if the unsuccessful claims are related to the claims on which the plaintiff succeeded. If they are unrelated, then

the work done on those claims may not be compensated. The test for determining relatedness is whether the claims involve "a common core of facts or related legal theories. In those situations, counsel's time will usually be devoted to the overall litigation, making it difficult to decide the hours expended on a claim-by-claim basis, and the claims should therefore be regarded as related." *Hensley*, at 435.

The next question which the Court must address in partial success cases is "whether the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for a fee award." *Id*., at 434. The *Friolo* court citing *Hensley* states that where the court determines that the plaintiff achieved "excellent results," the attorney should receive a "fully compensatory fee." *Friolo* at 524-25. Such an award would encompass all hours without reduction because the plaintiff failed to succeed on one or more claims. If the plaintiff has achieved an "exceptional success," an increased adjustment of the fee might be warranted. Alternatively, if the plaintiff has achieved only "limited success," then a reduction might be warranted even if the claims were "interrelated, non-frivolous and made in good faith." *Id*. The Court of Appeals further observed that " 'there is no precise rule or formula for making these determinations' – that the trial court may, in its discretion, eliminate specific hours or simply reduce the award to account for the limited success." *Id*.

Once the Court has completed the initial calculation, it proceeds to the second step of the lodestar analysis. There the Court must consider whether that calculation should be adjusted upward or downward by a consideration of other factors such as those set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). An edited version of those factors is found in footnote 2 of the Court of Appeals opinion in *Friolo*:

> 1. The time and labor required (the judge should weigh the hours claimed against his or her own knowledge,

experience and expertise and, if more than one attorney is involved, scrutinize the possibility of duplication);
2. The novelty and difficulty of the question (cases of first impression generally require more time and effort);
3. The skill required to perform the legal service properly;
4. The preclusion of other employment by the attorney due to acceptance of the case;
5. The customary fee for similar work in the community;
6. Whether the fee is fixed or contingent (fee agreed to by client is helpful in demonstrating attorney's fee expectations, litigant should not be awarded fee greater than that he is contractually bound to pay);
7. Time limitations imposed by the client or circumstances (whether this was priority work);
8. The amount involved and the results obtained (Court should consider amount of damages awarded, but also whether decision corrects across the board discrimination affecting large class of employees);
9. Experience, reputation and ability of the attorneys;
10. Undesirability of the case (effect on the lawyer in the community for having agreed to take an unpopular case);
11. Nature and length of professional relationship with the client; and
12. Awards in similar cases.

These factors are almost identical to those found in Rule 1.5 of the Maryland Rules of Professional Conduct which mandates that a lawyer's fee must always be reasonable. Therefore, many of the *Johnson* factors are necessarily "subsumed in the initial lodestar calculation." *Friolo*, at 524. Where the Court finds a fee adjustment is warranted, it must make specific findings and articulate the reason for its decision to allow for meaningful review of that decision. *Flaa v. Manor Country Club*, 158 Md. App. 483 (2004).

Because the measure of reasonableness is relative, it is important for the Court to keep in mind the legislative intent behind these fee shifting statutes. *Friolo* addresses this issue and makes clear that a fee which may be reasonable under a private fee arrangement may nevertheless be unreasonable under a fee shifting statute. Citing *Pennsylvania v. Del. Valley*

Citizen Council, 478 U.S. 546 (1986), the *Friolo* court states: "fee shifting statutes 'were not … intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client.' Rather … 'the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws' and if plaintiffs are able to engage a lawyer 'based on the statutory assurance that he will be paid a reasonable fee,' the purpose behind the fee shifting statute has been satisfied." *Friolo,* at 526.

A similar sentiment is expressed in *Johnson v. Georgia Highway Express, Inc.* also cited in *Friolo*. *Johnson* was a class action lawsuit that involved a claim for money damages and injunctive relief on behalf of the plaintiff and other members of the class for acts of alleged employment discrimination in violation of Title 7 of the Civil Rights Act of 1964. After setting out the twelve factors listed previously herein, the court stated:

> "To put these guidelines into perspective and as a caveat to their application, courts must remember that they do not have a mandate under § 706(k) to make the prevailing counsel rich. Concomitantly, the Section should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general. The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of the Title 7 litigation. Adequate compensation is necessary, however, to enable an attorney to serve his client effectively and to preserve the integrity and independence of the profession. The guidelines herein are merely an attempt to assist in this balancing process."
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> *Johnson*, at 719-20.

Finally, as is true in all other aspects of the case,

> "… the fee applicant bears the burden of establishing entitlement to an award and documenting the

> appropriate hours expended and hourly rates. The applicant should exercise 'billing judgment with respect to hours worked, …, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.' [FN 12].
>
> FN12 … Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures. …"
>
> *Hensley*, at 437.

Having set forth the framework for its analysis, the Court will now turn to a consideration of the Plaintiff's petition for attorney's fees. Consistent with the above discussion, the Court will first make the initial lodestar calculation. Thereafter, the Court will determine if adjustments to that calculation are warranted.

1. The initial lodestar calculation (reasonable hours x reasonable rate).

The dichotomy between reasonableness in the marketplace and reasonableness under a fee shifting statute has particular relevance in this case. The Plaintiff's expert, Lawrence Kaye, testified that even if the tasks claimed here represented a very high level of effort or very unusual work, they should nevertheless be deemed reasonable and compensable so long as the effort provided something of value to the case.

In Mr. Kaye's opinion, all but one or two of the entries in Defendant's 1 and 2 represented reasonable work. He believes the evaluation must be guided by the recognition of counsel's obligation to zealously represent a client. If the client can afford it and the work has some benefit, it is per se reasonable. By way of example, he pointed to the Plaintiff's use of "focus groups," even for motions hearings. While he acknowledged that because of their

expense it was unusual to use such groups, particularly for motions, he felt they provided valuable information. Therefore, although unusual, they were reasonable. While such a test might be valid for assessing reasonableness under a private fee arrangement, it cannot be reconciled with the holdings of *Friolo* and *Johnson*.

Mr. Murphy clearly had a much more restrictive view of what was reasonable. He generally described it with reference to a passage from *Hensley v. Eckerhardt*, 461 U.S. 424, 434 (1983).

> "Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. . . . 'Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.' "

While even that test might be applied too liberally given the private fee arrangement/fee shifting statute distinction discussed in *Friolo*, as is apparent from a review of Defendant's 1 and 2, Mr. Murphy applied the test with a critical eye.

a. intra-office meetings.

Mr. Murphy felt the hours reflected in Defendant's 1 and 2 were clearly excessive, particularly for a trial of this length. In his opinion, there were numerous instances where attorneys billed for intra-office meetings of dubious value. The number of attorneys and legal assistants who "touched" the case was very high. He felt this was a very inefficient use of attorney time. Accordingly, he eliminated many of the hours as unnecessary. He seemed particularly critical of the sometimes weekly Employment Law Group (ELG) meetings.

In Mr. Kaye's opinion, these meetings were valuable. They permitted Mr. Oswald as lead counsel to keep abreast of developments in the case and delegate tasks to legal assistants or other attorneys who were then able to perform necessary work with little supervision at less expense to the client. Absent such meetings, the legal assistants and other attorneys would have required a higher degree of supervision by Mr. Oswald.

The Court has reviewed Defendant's 1 and 2 in detail and found few instances where more than one party at an intra-office meeting billed his time. Rarely did the meetings occur more than weekly. In the early stages of the case, they occurred less frequently. Normally, the time billed for those meetings was 30 minutes or less. From a review of the exhibits and the testimony, the Court concludes that the meetings were in the majority of instances reasonable. There were some instances where they appeared to occur with a frequency that seemed unnecessary given the stage of litigation. In those instances, the Court disallowed the charge. (See Court's Ex. 1).

b. multiple attorneys for motions/trial.

Mr. Murphy also testified that, from his review, it appeared that Plaintiff's counsel frequently assigned multiple attorneys to attend a hearing or deposition. At trial, they had three attorneys present for the Plaintiff: Mr. Oswald, Mr. Carter and Ms. Abbott. In most instances, he felt this multiple representation was unreasonable and unnecessary.

Mr. Kaye noted that there were few, if any, instances where more than one attorney attended a deposition. Occasionally, Ms. Abbott, who graduated law school during the lifespan of the case, attended with another attorney. However, as he recalled, on those occasions her time was billed as a legal assistant, not an attorney. In the instances where

more than one attorney attended a motion, it was because multiple significant motions were being heard at the same time and different attorneys were arguing different motions. As for trial, he thought it was appropriate given the volume of material and the complexity of the case to have both Mr. Carter and Mr. Oswald at trial. He noted that the third attorney, Courtney Abbott, was present because the paralegal who otherwise would have attended had just gone on maternity leave. Ms. Abbott was very familiar with the case and it made sense for her to attend as opposed to trying to bring in a new legal assistant who knew little about the case. He also noted that Ms. Abbott conducted the examination of one or more witnesses.

Upon its review, the Court found few instances where two attorneys charged for attending a deposition or motion. In most instances, the motion or deposition was of such import that the Court felt that the presence of a second attorney was reasonable. At trial, the Court also feels that the presence of both Mr. Oswald and Mr. Carter was reasonable. However, in the Court's view, while Ms. Abbott's presence at trial no doubt was of value to Mr. Oswald and Mr. Carter, her presence was more a luxury than a necessity. Accordingly, that expense should not fairly or reasonably be borne by to the Defendant as attorney time. However, in the Court's view, her time may properly be billed as that of a legal assistant, to the extent such time is compensable as discussed below, except to the extent deemed excessive by the Court. In arriving at its conclusion, the Court notes that the Defendant appeared at trial and frequently at motions with two attorneys. While not dispositive, in the Court's view, this provides some evidence of reasonableness and necessity.

c. legal assistants.

(1) compensability generally.

A preliminary issue involving "legal assistants" is whether Article 49B, § 42 of the Maryland Annotated Code authorizes reimbursement of fees for non-attorneys. The Defendant, citing *Friolo v. Frankel*, 373 Md. 501 (2003), argues that a "legal assistant's" time is not compensable: "Because the statutes allow only reasonable 'counsel fees,' the court must exclude any fees of non lawyers. Charges for paralegals and legal interns are subsumed within attorney's fees." *Id*., at 530.

Mr. Kaye argues that *Friolo* is a wage claim case and the statute construed therein is more restrictive than the instant one. He points to the practice of the federal courts in Title 7 cases, after which Article 49B is modeled, as well as the practice of the Montgomery County Human Rights Commission. According to him, such fees are routinely awarded by the federal courts and the Commission. He suggests such a broad view is necessary if a statute is going to serve the purpose of encouraging attorneys to take meritorious cases.

Mr. Murphy raised the question but offered no expert opinion on whether legal assistants were covered. In his view, it is a question of law for the Court to determine. While the court finds Mr. Kaye's testimony and logic compelling, the Court believes that *Friolo* controls the decision in this case. Therefore, legal assistant time may not be compensated.[4]

(2) rate.

Mr. Kaye testified that the rate charged for "legal assistants," $115 per hour, was appropriate. In arriving at that conclusion, he noted that Plaintiff's counsel was based in the District of Columbia. Rates there tend to be higher than they are in Montgomery County.

[4] In light of Mr. Kaye's testimony about the practice of other courts and the Commission and anticipating that an appellate court may distinguish *Friolo* for reasons not to this Court apparent, the Court will in the alternative proceed to analyze these charges under the lodestar analysis.

Given the dearth of employment lawyers practicing in Montgomery County, he believed it was entirely reasonable for Plaintiff to hire someone from the District of Columbia.

In determining the appropriateness of the rate, he looked at what law firms in the District of Columbia billed for legal assistants. His investigation revealed that the rate for legal assistants with zero to two years experience was an average of $120 per hour. He did not feel that the rate was dependent upon the assistant having a paralegal certificate. He believed that the legal assistants used here who were second and/or third year law students or had other advanced degrees qualified for that rate.

Mr. Murphy had a much more restrictive view of who qualified as a "legal assistant". In his view, the term should generally be used only for someone who has a paralegal degree. Legal assistants with such a degree, he felt should be billed at the rate of $90 to $100 per hour. Without such a degree, the assistants should be billed as "law clerks" at a rate of $75 to $80. Because there was no evidence that any of these "legal assistants" had paralegal degrees, the charge of $115 was too high.

In support of this position, Defendant directed the Court's attention to the Rule of the United States District Court for the District of Maryland Appendix B. Rules and Guidelines for Determining Lodestar Attorneys' Fees in Civil Rights and Discrimination Cases. The guideline rate for paralegals and law clerks established therein is $90. While not controlling pursuant to *Friolo,* the defense suggests this is relevant evidence of what is a reasonable fee.

Upon a consideration of the evidence, in particular Mr. Kaye's testimony, the Court finds the charge of $115 for legal assistant time is reasonable. The Court also notes with reference to Defendants 1 and 2, in those instances where Mr. Murphy did not dispute the

reasonableness of the legal assistants' hours, he allowed the charge based upon a rate of $115 per hour.

(3) tasks.

Mr. Murphy reserved most of his criticism of the legal assistants for the tasks they were assigned. He felt it was particularly significant that his investigation revealed Plaintiff's counsel had no secretarial staff. He believed that this fact represented an effort on their part to try and increase profits by seeking fees for routine tasks that historically are part of an attorney's overhead and non-compensable. This overhead is already built into the attorney's hourly rate. He noted that many tasks performed by the legal assistants were clerical and required no legal training. By way of example, he pointed to charges for copying, organizing files and filing pleadings. He also felt it was inappropriate to use "legal assistants" for such tasks as serving summonses or other pleadings. Typically, counsel employ third parties to do those tasks for a relatively minor flat fee. He noted that on occasion in this case the legal assistants charged $500 or more to serve summonses which probably could have been served for $50 or less.

Mr. Kaye was untroubled by the fact that Plaintiff had no secretarial staff. He testified that firms in the District of Columbia were increasingly using legal assistants to do tasks formerly done by secretaries. The practice was, no doubt, in part an effort to pass that expense onto the clients. He also suggested the practice allowed for a higher level of review which appealed to some malpractice carriers. He acknowledged that clerical jobs were at the low end of what legal assistants do, but nevertheless found that an appropriate use of them.

He disputed whether some of the tasks about which Mr. Murphy complained were in fact "clerical," for example, entering documents into the firm's "Casemap system." Mr.

Murphy felt this was a clerical task. Mr. Kaye pointed out that this was a computer software program that required an understanding of the legal issues involved in the case. Only someone with legal knowledge could properly enter documents into the system.

While the Court agrees that Mr. Murphy's view of clerical tasks here is over broad, the Court shares his view that tasks not requiring legal training should not be billed to a client because a "legal assistant" performs them. The Court has conducted an independent review of the charges and disallowed those which in its view did not require legal training or experience. (See Court's Ex. 1).

d. Kenneth Fails.

A separate but related issue involves the question of how, if at all, Kenneth Fails' time should be compensated. Mr. Fails was an attorney admitted to practice in Virginia and Pennsylvania, but not Maryland. On March 22, 2002, soon after counsel began their representation of Mrs. Sterling, the Virginia State Disciplinary Board revoked Mr. Fails' license to practice law in Virginia. On January 10, 2003, the Supreme Court of Virginia affirmed the Board's decision. Nevertheless, he retained his license to practice in Pennsylvania. Near the end of the litigation, Pennsylvania disbarred him in light of Virginia's earlier action. Up until the time Pennsylvania acted, the Plaintiff billed Mr. Fails' time at an attorney rate of $175 per hour. After Pennsylvania acted, they billed his time as a legal assistant at $115 per hour.

In Mr. Murphy's view, because Mr. Fails could not have been admitted in Maryland *pro hac vice* once Virginia had disbarred him, his time should not have been billed as attorney time. To the extent that any of his time is billable, it should have been billed as legal assistant

time. Mr. Kaye takes the opposite view. He feels that it is entirely appropriate to bill Mr. Fails' time as attorney time up until the time Pennsylvania acted. Until then, as Mr. Kaye sees it, Mr. Fails was still an attorney.

The Court adopts Mr. Murphy's view. Once Mr. Fails was disbarred in Virginia, to the extent any of his services were reasonable, they should not have been billed as attorney time. If billable, they should have been as "legal assistant" time.

e. maximum hours per day.

Mr. Murphy was also of the view that there is a limit to the number of hours that an attorney can reasonably charge to a client in a given day. He noted that there were a number of instances where Mr. Oswald and/or Mr. Carter billed for more than 18 hours in one day. (See Defendant's 1 and 2, July 26 – 30th.) In Mr. Kaye's view, there is no such limit. While the Court recognizes that the hours in question were billed during the trial and that trial days can be long and grueling, the Court nevertheless believes that it is unreasonable to bill for 18 plus hours routinely while in trial. While there might be some exceptional circumstances which would justify billing that number of hours in a given day, the Court finds the Plaintiff has not met their burden to demonstrate such a circumstance here.

During trial, the Court generally convened at around 9:30 a.m. and most often recessed by 5:00 p.m. While the Court recognizes that there was work to be done before and after the trial, that fact alone does not justify a charge for 18 plus hours. The Court also notes that on a number of those dates Plaintiff's counsel sought reimbursement for time spent by yet another attorney, Nicholas Woodfield. While in most instances the Court disallowed those charges, in at least two instances, the Court approved them in part.

f. vague entries.

The Defendant asserts that because the Plaintiff has the burden of proof to demonstrate the reasonableness of fees, the work done must be described with particularity. They argue that many of the entries in Defendant's 1 and 2 are so vague that the reasonableness of the work cannot be determined. Therefore, the Plaintiff cannot meet its burden of establishing the reasonableness of the fees. A related complaint is that counsel lumped multiple tasks together as a single item "block billing." This makes it impossible to determine how much of the time was spent on a particular task. Therefore, it cannot be determined whether the time spent on a specific task was reasonable.

Mr. Kaye responds that the charges evidenced by the composite exhibit are sufficient under *Hensley* to enable the Court to determine which claim they relate to and whether they are reasonable. (See *Hensley*, 461 U.S. 424, 437.) He suggests that it is incumbent upon the Defendant to ask for additional information if they have questions about a particular charge. He submits that supporting documents for each of the charges could be produced which would enable Plaintiff's counsel, as necessary, to give a more detailed description of the work that was done and how much time was devoted to a particular task. Despite ample opportunity to take discovery on the reasonableness of the fees, the Defendant made no specific requests for more detailed information. In his view, the level of detail required by Mr. Murphy does not need to be set forth in the bill absent some specific request.

The Court having reviewed the approximate 3,000 entries finds that the overwhelming majority of them provide sufficient detail. The Court further notes that the Defendant was given the opportunity to conduct discovery of Plaintiff's counsel with respect to any and all of

these charges. The Court finds that it was reasonable in almost all instances to list multiple tasks together as a single charge. Generally, the tasks on their face appeared substantially related. Additionally, in some instances, the additional tasks were so minor as to almost certainly represent only a small fraction of the time being charged. Accordingly, the Court finds that, in general, the Plaintiff has provided sufficient information to meet their burden under *Hensley*.

g. unnecessary motions.

Defendant argues that many of the Plaintiff's motions were unnecessary. Therefore, the time spent on them should not be compensable. Mr. Laws testified that there was no need to file a motion to amend the Complaint as Plaintiff had done. By rule, they had a right to amend. Also, a motion for special assignment was unnecessary. Under Montgomery County's Differentiated Case Management system, all cases such as this, estimated to take four or more days to try, are specially assigned. Further, there were multiple motions to compel discovery or alternatively for protective orders that were unnecessary because Defendants were never consulted about relief sought. Had they been consulted, they would have consented. Finally, many motions were caused by Plaintiff's misconduct during discovery. Plaintiff should not be compensated for time spent on those. Mr. Murphy shared Mr. Laws' opinion in large part, as is evident from his testimony and the charges he disallowed on Defendant's 1 and 2.

Mr. Kaye did not address each motion specifically. He did look at the outcome of most. It appeared to him Plaintiff won about as many as she lost. He does not believe success

is a proper test for reasonableness. With very limited exception, he opined that all the work was reasonable. Reasonableness is not to be judged in hindsight.

The Court agrees that some motions were unnecessary as a matter of law, to amend and for specific assignment. Those should not be compensated. Concerning the motions to compel, neither side appeared too willing to cooperate with the other. Therefore, the Court allowed most of the motions related to discovery issues. Concerning those caused by Plaintiff's discovery violations, most were initiated by Defendant and Plaintiff responded. The responses were necessary. Plaintiff has already been sanctioned for her misconduct. The Court struck her punitive damages claim. The Court does not believe it should disallow attorney's fees as a further sanction. Although the Court allowed fees for most of the motions, where the Court viewed the time spent on them as excessive, it reduced the time accordingly. (See Court's Exhibit 1).

h. mediation efforts.

Defendant's counsel alleges that Plaintiff's counsel unnecessarily prolonged the litigation in an effort to increase his legal fees. Specifically, Plaintiff's counsel refused to participate in settlement discussions in good faith. As evidence, the defense presented the testimony of trial counsel, Mr. Laws. According to him, from the outset Plaintiff's counsel was making unreasonable demands for attorney's fees as part of any possible settlement in the case. In Mr. Laws' view, it was the unreasonable demands for fees that made it impossible to have any meaningful settlement discussions.

The Plaintiff responded by way of affidavit from Mr. David Martin, Esquire.[5] They argue it was appropriate to make Defendant aware that as part of any settlement they would seek reasonable attorney's fees. More importantly, they point out that despite repeated requests the only settlement offer the Defendant ever made came late in the case and was for $2,500. From this evidence, the Court concludes that it was not the Plaintiff's actions alone that made settlement impossible. If there is blame to be assigned for unnecessarily prolonging the litigation, it would appear to be equally shared by the parties. More likely, however, the facts here are such that settlement was an unlikely outcome from the beginning.

i. federal court fees.

During the course of the litigation, the Defendant sought to remove the case to federal court. Following removal, the Plaintiff filed a motion for remand. Based upon the arguments presented by counsel for the Plaintiff, the federal court remanded the case to the Montgomery County Circuit Court for trial. Following the grant of the motion for remand, Plaintiff's counsel sought and was awarded attorney's fees by the federal court. The federal court awarded Plaintiff $500 for its efforts in connection with the motion. The Plaintiff filed a motion for reconsideration seeking an increase in the amount of fees, which motion was denied. The Plaintiff now seeks to recover additional fees in this Court for the same activities. The Defendant argues that only the federal court has the authority to award such fees relating to the removal issue.

Mr. Kaye testified that in his view the time was compensable under Article 49B. He noted that the Defendant removed the case and the Plaintiff was forced to respond. While the

[5] Plaintiff's Reply to Defendant's Opposition to Plaintiff's Petition For Award of Attorney's Fees, Costs and Expenses. Ex. 1, Aff. of David Martin, Esquire.

federal court can award fees to a party for their efforts to have the matter remanded to state court, the purpose of the award, unlike Article 49B, is not to encourage attorneys to take cases where the plaintiffs have meritorious claims. Therefore, an award of additional fees under Article 49B is proper. In his experience, such fees are routinely awarded by other courts construing this statute.

In the Court's opinion, the federal court is in the best position to judge the reasonableness of the fees associated with proceedings before their court. In this case, they determined an award based upon the Plaintiff's petition. Notwithstanding a motion to reconsider, they declined to alter the amount of that award. Under the circumstances, this Court will not award additional fees for work done in connection with that matter.

j. related claims.

The computation of reasonable hours in this case is complicated by the fact that the Plaintiff succeeded only in part. Of the five claims brought by the Plaintiff, defamation, hostile work environment, quid pro quo, retaliation, and failure to pay wages, she succeeded only on one, her claim for hostile work environment. Further, although successful on that claim, she was unsuccessful on her claim for back pay, front pay and punitive damages.

As previously discussed, the Court in *Hensley* held that where the unsuccessful claims are unrelated to the core set of facts underlying the successful claims, the time spent on those claims is normally not compensable. Alternatively, if the facts are so interrelated as to contribute to the Plaintiff's ultimate success, they are compensable. The Court further stated that where the Plaintiff has achieved "excellent results," the attorney's time should be fully compensated even though he or she was not successful on all of the claims.

Mr. Kaye testified that the quid pro quo, retaliation and hostile work environment claims were simply alternate theories of recovery based upon a common set of core facts. Accordingly, all time spent on those claims is compensable. He also opined that the defamation claim was based on the same set of core facts. Alternatively, if the claims are unrelated, the Plaintiff achieved an "excellent result", which even Mr. Murphy conceded. Therefore, except for the wage claim, which Mr. Kaye concedes is unrelated, Plaintiff's counsel should be fully compensated for their time. The wage claim charges Plaintiff voluntarily withdrew.

In Mr. Murphy's view, the unsuccessful claims were unrelated. Therefore, the time spent on those should be excluded. He believed that this is particularly true for the defamation and wage claims. The Court, however, having presided over the trial and well familiar with the evidence presented, finds that except for the wage claim, the claims are so interrelated that they should be treated as one for purposes of determining an award of reasonable attorney's fees.

k. the calculation.

After considering the above arguments, the Court, upon a review of Defendant's Exhibits 1 and 2, finds that Plaintiff's counsel reasonably devoted 1253.43 hours in the prosecution of the Plaintiff's claims. Assuming "legal assistant" time were compensable, the Court finds 537.03 hours of legal assistant time were reasonably devoted to the case. Therefore, the initial calculation of reasonable attorney's fees is $304,063.00. (See Court Exhibit 2). Reasonable fees for legal assistants would add $61,758.45 (537.03 hours x $115). (See Court Exhibit 2).

The Court shall now consider whether an upward or downward departure is appropriate upon a consideration of the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) as later adopted by the Supreme Court in *Hensley vs. Eckerhardt*, 461 U.S. 424 (1984).

2. The adjustments/Hensley/Johnson factors.

The Court of Appeals in *Friolo* citing *Hensley* noted that "…many of [the *Johnson*] factors are subsumed within the initial lodestar calculation." (*Friolo*, at 524). To the extent subsumed in the Court's initial calculation, the Court will not again address those factors. The Court shall further limit its discussion of the remaining factors to those which the parties suggest or the Court believes require an upward or downward adjustment of the calculation. Absent either circumstance, the Court does not believe it is necessary or productive to discuss any particular factor set out in *Johnson*.

a. The novelty and difficulty of the questions involved in the case.

Cases of this nature of necessity raise some difficult and unsettled questions of law, particularly the interplay between the body of case law developed at the state and federal levels. However, these are not novel issues. No doubt both counsel have had to confront them repeatedly since they have extensive experience in this area. Because there is nothing novel or unusually difficult about the instant case, the Defendant argues there should be a downward departure from the initial fee computation.

The Plaintiff takes an opposite approach. He submits that since the case did not present any novel or unusually difficult issues, no upward adjustment is warranted. However,

cases of this nature are inherently difficult to prosecute, so a downward departure is unwarranted.

The Court is persuaded that Plaintiff is correct. A downward departure is not warranted. While the legal and factual issues presented were not novel, they were sufficiently complex that a downward departure in this case is unwarranted. Plaintiff's alternate suggestion that "the unique nature and complexity of this case is that it was an all out war between counsel"[6] is without merit. Regrettably, such "wars" are far from "unique."

b. Whether the fee is fixed or contingent.

The paraphrased explanation for this factor as it appears in footnote 2 of *Friolo* is "fee agreed to by client is helpful in demonstrating attorney's fees expectations, **litigant should not be awarded fee greater than he is contractually bound to pay**." *Friolo,* 373 Md. 501, 522, n2. (emphasis added).

Since the *Friolo* court is simply paraphrasing the *Johnson* court, it is instructive to look at the complete explanation of the relevance of this factor as set forth in *Johnson:*

> (6) *Whether the fee is fixed or contingent*. The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case. But as pointed out in *Clark v. American Marine, supra,*
>
> > **[t]he statute does not prescribe the payment of fees to the lawyers. It allows the award to be made to the prevailing party.** Whether or not he agreed to pay a fee and in what amount is not decisive. Conceivably, a litigant might agree to pay his counsel a fixed dollar fee. This might be even more than the fee eventually allowed by the court. Or he might agree to pay his lawyer a percentage contingent fee that would be greater

[6] Plaintiff's Reply to Defendant's Opposition, Page 13, Section XI.

> than the fee the court might ultimately set. Such arrangements should not determine the court's decision. The criterion for the court is not what the parties agreed but what is reasonable.
>
> 320 F.Supp. at 711. **In no event**, however, **should the litigant be awarded a fee greater than he is contractually bound to pay**, if indeed the attorneys have contracted as to amount.
>
> *Johnson*, 488 F.2d at 718 (emphasis added).

Mindful that it is the **litigant** who is seeking the award, and that therefore the award should in no event exceed the fees she is legally obligated to pay, the Court sought to review the fee agreement entered into here. Although, there were numerous references to the arrangement as a contingency fee, the agreement was not part of the record. Upon discovering this, with notice to the Defendant, the Court *sua sponte* contacted Plaintiff's counsel and asked for a copy of the agreement. On February 3, 2005, Plaintiff's counsel provided the agreement (subject to a protective order) to opposing counsel and the Court.[7]

If the agreement here was solely a contingent fee arrangement, it would significantly limit the fees Ms. Sterling was obligated to pay her attorney. By way of example, if Ms. Sterling's only obligation under the agreement was to pay her attorneys 40 percent of her recovery, $100,000, her maximum liability for fees would be $40,000 (40% x $100,000). Therefore, under *Friolo*, even though the **initial** lodestar calculation of reasonable attorney's fees was $304,063.00, the Court's award would be limited to $40,000. If the Court awarded additional fees, the litigant could potentially realize a windfall because she would be under no legal obligation to pay them to the attorney. Presumably, in cases like this, most agreements for this reason provide for an alternate method of determining the fee a litigant would be obliged to pay if the court awards fees.

[7] Agreement is filed herein under seal at Court's 4.

The fee agreement entered between counsel and Ms. Sterling is such an agreement. The Court sets forth below only those portions of the agreement relevant to a discussion of this factor:

> 2. Determination of Fees for Services.
>
> (A) I will represent you on a contingency fee basis, in which you agree to pay me a fee – not covering costs – of … 40% of the gross amount recovered after trial has begun, 45% if any judgment is appealed …
>
> (B) Should the Court award attorney's fees in this case, you agree to pay me the higher of either the percentage as set forth in Paragraph 2 (A) herein, or $250 per hour for my time and $115 per hour for legal assistant time -- excluding costs.[8]

Significantly, the fees that the client becomes obligated to pay under 2 (B) are <u>not limited</u> to the fees awarded by the Court. That fact creates an enormous problem in this case.

If the Court denies the fee petition, and awards costs only, Plaintiff is only obliged to pay counsel $40,000 under Paragraph 2 (A). This would leave her with $60,000 of the $100,000 judgment. If on the other hand the Court awards fees in the amount of the initial calculations, $304,063.00, under the agreement Plaintiff will owe the firm $256,345.10, the difference between that award and the amount billed.[9] Even if she assigns her entire judgment to the firm, she will still owe them $156,345.10. Accordingly, it is directly contrary to Ms. Sterling's best interests to pursue this petition for attorney's fees. Counsel has a direct and open conflict with his client.

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[8] Presumably the reference to "my time" in paragraph 2 (B) includes all attorneys in the firm, not just Mr. Oswald. Mr. Oswald signed the agreement on behalf of his firm.

[9] The firm maintains it is owed $560,408.10 in fees for the work done in this case. Mr. Kaye has testified those fees are reasonable. The Court has opined they may be reasonable under a private fee arrangement analysis, even though not reasonable under a fee shifting statute analysis. Using these numbers, if the Court were to award the fees determined reasonable under the initial lodestar analysis, the Plaintiff would end up owing Mr. Oswald's firm $256,345.10. ($560,408.10 - $304,063.00 = $256,345.10)

Unless the conflict is remedied, the Court should and must decline to award attorney's fees. Counsel will still recover $40,000 under the fee agreement. While that is far less than the initial lodestar calculation of reasonable fees, to do otherwise would reward counsel at enormous expense to his client. Such a result must be avoided. The Court, however, hesitates to take such drastic action. Therefore, if Plaintiff's counsel remedies the direct conflict by waiving any claim against Plaintiff for monies (fees and/or costs) over and above those that might be awarded by the Court, then the Court shall award reasonable attorney's fees as computed herein. If counsel desires to do so, he shall file with the Court within 15 days of the date of this Opinion and Order a waiver to that effect signed by counsel and acknowledged by the Plaintiff. If counsel chooses not to do so, or if the Court shall not receive the waiver within 15 days of this Order, then it shall decline to award any attorney's fees and award costs only.

The Court does not believe its decision in this case undermines the goal of the fee shifting statutes to ensure competent counsel remain willing to take such cases. Such counsel will continue to have the assurance that "reasonable fees" will be available for successful litigants so long as counsel agrees to accept such "reasonable fees" as full payment (or in the alternative, a contingency, whichever is higher).

CONCLUSION

For reasons set forth hereinabove, under the initial lodestar analysis, the Court determines that the amount of reasonable attorney's fees in this case is $304,063.00. If "legal assistant" fees were compensable, then for the reasons set out earlier, the Court would hold

the initial calculation of reasonable attorney's fees is $365,878.95 ($304,063.00 + $61,815.95 = $365,878.95).

Upon a consideration of the relevant factors, to the extent they were not subsumed in the initial calculation, except for the fee arrangement between Plaintiff and counsel, the Court would adjust the fees neither upward nor downward. However, the pursuit of Court awarded attorney's fees herein places Plaintiff's counsel in a direct and open conflict with his client. Under the present fee arrangement, an award of reasonable attorney fees (for counsel) would be at enormous expense to the litigant, the party who suffered the original injury. This the Court will not permit. Unless the conflict is remedied, the Court shall award no fees. If within 15 days counsel waives a claim to any monies from the client as discussed herein, the Court shall award fees of $304,063 and costs in the amount of $46,437.

IT IS SO ORDERED this _____ day of February, 2005.

_____
MICHAEL D. MASON, JUDGE
Circuit Court for Montgomery County, MD.