

**NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS**

VIVIANA ARIAS,

Plaintiff,

v.

BOROUGH OF EAST NEWARK,
ROBERT TOMASKO, JOHN DOES 1-
10, and ABC CORPS. 1-10,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY
DOCKET NO. HUD-L-2155-12

Civil Action

OPINION

DATE OF HEARING: OCTOBER 7, 2014

DATE OF DECISION: OCTOBER 10, 2014

FOREMAN & GRAY, LLC

Attorney for Plaintiff Viviana Arias
(Paul S. Foreman, Esq. and David E. Gray, Esq. appearing)

SWEENEY & SHEEHAN

Attorney for Defendant, Borough of East Newark
(Robyn F. McGrath, Esq. appearing)

HARWOOD LLOYD, LLC

Attorney for Robert Tomasko
(Amanda Taylor, Esq. appearing)

ESPINALES-MALONEY, J.S.C.

This is an application by Plaintiff Viviana Arias for enhanced attorney's fees and costs pursuant to N.J.S.A. 10:5-27.1 against Defendants Borough of East Newark and Robert Tomasko.

FACTUAL BACKGROUND

Plaintiff filed an initial Complaint on April 26, 2012 against the Borough of East Newark Police Department and Robert Tomasko. See Certification of Robyn F. McGrath, Exhibit "A". To list the correct parties, Plaintiff filed a Second Amended Complaint on August 6, 2013, against the

Borough of East Newark and Robert Tomasko. See Certification of Robyn F. McGrath, Exhibit “C”. The Second Amended Complaint contained six counts:

- Count I Law Against Discrimination (LAD) sexual hostile work environment claim against police department
- Count II LAD quid pro quo harassment claim against police department
- Count III Conscientious Employee Protection Act (CEPA) claim against police department
- Count IV Wrongful discharge claim against police department
- Count V CEPA claim against fire department
- Count VI LAD claim against fire department

See Certification of Robyn F. McGrath, Exhibit “C”. Of these six claims, only Count I survived Summary Judgment by June 6, 2014 Order of the Honorable Francis B. Schultz, J.S.C. The quid pro quo harassment claim was dismissed as barred by the statute of limitations. See Honorable Francis B. Schultz, J.S.C. Order of June 6, 2014.

The parties attempted to engage in settlement negotiations. However, Plaintiff’s counsel indicated that they would not accept less than \$1 million to settle the case. See Defendant’s Brief in Opposition to Plaintiff’s Application for Enhanced Attorneys’ Fees and Costs, p. 8 (hereinafter “Defendant’s Opposition”). After Summary Judgment, Plaintiff’s counsel indicated that they would not negotiate at any level below \$500,000. Id. Ultimately, on June 27, 2014, Plaintiff accepted an Offer of Judgment in the amount of \$101,000. Id. at 9. The court entered an Order of Judgment on July 25, 2014. See Honorable Mark K. Costello, P.J.Cv. Order of July 25, 2014.

Following the acceptance of the Offer of Judgment, on June 30, 2014 Plaintiff’s counsel indicated that he would file a motion for a fee petition returnable with the Court on July 25, 2014.

See Certification of Robyn F. McGrath, Exhibit "K". However, Plaintiff's counsel did not file this fee petition until October 8, 2014.

ANALYSIS

Timeliness

Defendant argues that the court should dismiss Plaintiff's fee as untimely. Defendant's Opposition, p 11.

R. 4:42-9(a)(8) authorizes an allowance of attorneys' fees in cases permitted by statute. The Law Against Discrimination (LAD), the single claim in the Plaintiff's Complaint at the time of the Offer of Judgment, contains a fee shifting provision. See N.J.S.A. 10:5-27.1. The statute provides that "[i]n any action or proceeding brought under this act, the prevailing party may be awarded a reasonable attorney's fee as part of the cost." Ibid.

The fee petition is governed by R. 4:42-9, which provides that "[a]n allowance of fees made on the determination of a matter shall be included in the judgment or order stating the determination." R. 4:42-9(d). The Supreme Court interpreted this rule to mean that "an application for the allowance of attorney's fees...has to be presented before the entry of the final judgment or, possibly, at the latest, within ten days thereafter by a motion to alter or amend the judgment." Czura v. Siegel, 296 N.J. Super. 187, 190 (1997). The court finds Czura instructive in this case.

In Czura, the Defendant moved for an award of attorney's fees under the Frivolous Claims Act after his Motion for Summary Judgment was granted. 296 N.J. Super. at 188-89. The action was dismissed by Order dated April 27, 1995 and the Defendant filed a motion for counsel fees and costs on December 11, 1995. Id. The Court explained that R. 4:42-9(d) required that the fee petition be presented either before the entry of the final judgment or within the time prescribed by

R. 4:42-9. Id. at 190. The Court held that, because the Defendant did not make its fee application within the time prescribed by the rule, the application was denied. Id.

Here, Plaintiff accepted an Offer of Judgment on June 27, 2014 and an Order of Judgment was entered on July 25, 2014. Plaintiff's fee petition was filed 103 days after Plaintiff's acceptance of the Offer of Judgment and 75 days after the court's Order entering judgment in the case. In both scenarios, Plaintiff's motion is untimely. Additionally, on July 24, 2014, Plaintiff indicated that he would be filing his fee petition which to be returnable before the Court on July 25, 2014. See Certification of Robyn F. McGrath, Exhibit "K". However, Plaintiff did not file this motion until October 8, 2014. Accordingly, the court finds that Plaintiff's fee petition is untimely.

On the other hand, there have been exceptions made for extenuating circumstances. See e.g. Sisolak v. Briarwood Sportsman's Club, 2010 N.J. Super. Unpub. LEXIS 2727 at *10 (App.Div. Nov. 10, 2010) ("extenuating circumstances sometimes justify a modest delay in the presentation of a fee application . . ."); see also D.L.D. v. S.D., 2011 N.J. Super. Unpub. LEXIS 698 at *20 (App.Div. Mar. 22, 2011) ("the judge [can] consider whether plaintiff's delay in seeking fees stemmed from inadvertence or excusable neglect under Rule 4:50-1(a), or whether that delay is otherwise equitably excused under any of the other provisions of Rule 4:50-1").

In its Reply Brief, Plaintiff's counsel explained that he "was hospitalized in Morristown Memorial Hospital the week of July 7th. After recuperating, [he] attempted to return to work the last week in July. Unfortunately, [he] was admitted back into the hospital on August 10th through August 16th. Thereafter, due to [his] weakened condition [he] was unable to begin working full-time until the middle of September. [He] filed the instant application on October 8, 2014." Plaintiff's Reply Brief to Defendant's Opposition to Plaintiff's Attorney Fee Application, pp. 3-4 (hereinafter "Plaintiff's Reply").

The court finds that Plaintiff's counsel's hospitalization presents extenuating circumstances justifying the modest delay in the presentation of this fee application. Accordingly, the court will judge the motion on the merits.

Attorney's Fees

As stated above, the LAD provides that "[i]n any action or proceeding brought under this act, the prevailing party may be awarded a reasonable attorney's fee as part of the cost." N.J.S.A. 10:5-27.1. The framework for analyzing Plaintiff's fee petition is set forth in the Supreme Court's opinion in Rendine v. Pantzer, 141 N.J. 292 (1995).

In Rendine, the Court explained that the first step in the analysis of a fee petition is the determination of the lodestar fee, defined as "the number of hours reasonably expended multiplied by a reasonable hourly rate." Id. at 334-35. The Court described this as the "most significant element in the award of a reasonable fee" and cautioned that trial courts "should not accept passively the submissions of counsel to support the lodestar amount", directing them to "evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application." Id. at 335; see also Szczepanski v. Newcomb Medical Ctr., 141 N.J. 346, 366 (holding that "a trial court should carefully and closely examine the lodestar-fee request to verify that the attorney's hours were reasonably expended.").

The evaluation of hours expended includes several components, including a recognition that the focus must be on "the amount of time reasonably expended" rather than merely an acceptance of "the amount of time actually expended." Rendine, 141 N.J. at 335. Moreover, the Court required the attorney seeking the fee award to prepare and provide a request in the form of a certification of services that is sufficiently detailed to enable the court to accurately calculate the lodestar. Id. at 337. In that regard, the Court embraced the concept that "fairly definite information

as to the hours devoted to various general activities . . . and the hours spent by various classes of attorneys" was essential for the court to analyze the fee request and to perform the lodestar calculation. Ibid.

In this case, Plaintiff's attorney, Paul S. Foreman, Esq., certified that he and his partner, David E. Gray, Esq., expended 1,990.5 hours at a billing rate of \$395.00 in the defense of this case. First, the court determines that the billing rates of \$395.00 for Mr. Foreman and Mr. Gray are reasonable.¹ However, a review of counsel's time entries reveals unreasonable charges for attorney time:

1. Plaintiff's counsel billed 12.5 hours to draft a set of interrogatories.
2. Plaintiff's counsel billed 19.8 hours to review and abstract the transcript of Robert Tomasko's statement of September 28, 2012, a statement that took 2 hours and 47 minutes to take and is 84 pages long.
3. Plaintiff's counsel billed 41.8 hours to prepare for the deposition of Robert Tomasko.
4. Plaintiff's counsel billed 9.1 hours to attend the deposition of Robert Tomasko, which took approximately two and half hours.
5. Plaintiff's counsel billed 29.1 hours to prepare for depositions of Police Chief Kenneth Sheehan and Police Chief Anthony Monteiro.
6. Plaintiff's counsel billed 5.2 hours for the deposition of Police Chief Kenneth Sheehan, which took approximately two and a half hours.

¹ In support of the hourly fee of \$395.00, Plaintiff's counsel supplied the Certifications of Keith McDonald, Esq., Christopher Hager, Esq., and Kevin Barber, Esq. These certifications prove that this rate is commensurate with peers of Plaintiff's bar in light of Mr. Gray's 11 years and Mr. Foreman's 9 years of litigation experience. Accordingly, the court determines that \$395.00 is a reasonable hourly rate for Plaintiff's counsel.

7. Plaintiff's counsel billed 140 hours to oppose Defendant's Motion for Summary Judgment. The final brief was 15 pages long.

See generally Certification of David E. Gray, Exhibit "C".

The expenses outlined above are merely examples taken from the 45 pages of time entries produced and certified by Plaintiff's counsel. These examples are not exhaustive, merely illustrative of the efforts of Plaintiff's counsel to recover fees. The court determines that the above examples, such as 41.8 hours to prepare for a two and half hour deposition and 140 hours to draft a 15 page Summary Judgment brief, are unreasonable. Additionally, Mr. Foreman and Mr. Gray each individually billed hours for all activities they worked on together. See generally Certification of David E. Gray, Exhibit "C". It is unreasonable for two attorneys to charge individually for routine activities, such as drafting interrogatories.

After reviewing Plaintiff's Certifications, the court determines that a reduction of the 1,990.5 hours is appropriate since "the hours expended...exceed those that competent counsel reasonably would have expended." Rendine, 141 N.J. at 336.

In addition to a careful and close examination of the attorneys' hours required by Rendine, the court also recognizes its heightened duty to review the lodestar fee request in light of the disproportionality of the recovery to the fees sought. In Szczepanski, the Supreme Court stated:

The trial court's responsibility to review carefully the lodestar fee request is heightened in cases in which the fee requested is disproportionate to the damages recovered. In such cases, the trial court should evaluate not only the damages prospectively recoverable and actually recovered, but also the interest to be vindicated in the context of the statutory objectives, as well as any circumstances incidental to the litigation that directly or indirectly affected the extent of counsel's efforts. Based on that evaluation, if the Court determines that the hours expended exceed those that competent counsel reasonably would have expended to achieve a comparable result, a trial court may exercise its discretion to exclude excessive hours from the lodestar calculation.

141 N.J. 346, 366-67 (quoting Rendine, 141 N.J. at 336)(internal citations omitted).

In this case, Plaintiff's counsel seeks fees more than 12 times the recovery of their client – \$1.2 million in attorney fees compared to a \$101,000 settlement. Throughout the litigation, Plaintiff's counsel refused to negotiate a settlement below \$1 million. The court recognizes that the final settlement of \$101,000 is considerably less than the prospective recoverable amount of \$1 million.

The LAD instilled the attorney fees provision in order to encourage attorneys to take high risk cases. However here, Plaintiff's counsel spent two years on claims that were barred by the statute of limitations and other legal defenses, such as the claims by volunteer firefighters are unrecoverable as employment-based claims under New Jersey law. See Honorable Francis B. Schultz, J.S.C. Order of June 6, 2014. While commendable for taking on his high risk case, the court cannot ignore the fact that a majority of the charges were dismissed for procedural and statutory deficiencies. Under the heightened review required by Szczepanski, Plaintiff's fee petition must be dramatically reduced.

Additionally, the Supreme Court instructed that the “trial court should reduce the lodestar fee if the level of success achieved in the litigation is limited as compared to the relief sought.” 141 N.J. at 336.

If . . . a Plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the Plaintiff's claims were interrelated, non-frivolous, and raised in good faith.

Rendine, 141 N.J. at 336; see also Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 23 (2004) (“a trial court should decrease the lodestar if the prevailing party achieved limited success in relation to the relief he had sought”).

In this case, Plaintiff achieved limited success in comparison to the relief sought. Evaluating the level of success in terms of the claims advanced by Plaintiff, five of six claims were dismissed on Summary Judgment, including Plaintiff's claims for quid pro quo sexual harassment, CEPA violations, wrongful discharge, pregnancy discrimination and hostile work environment in the fire department. Only Plaintiff's claim of hostile work environment in the police department survived. Most notably, Plaintiff's claim for quid pro quo sexual harassment, the focal point of her case, was dismissed as time-barred. In terms of financial success, Plaintiff's acceptance of the Offer of Judgment in the amount of \$101,000 represents a limited recovery based on her initial demand of \$1,000,000 and her post-summary judgment demand of \$500,000. Plaintiff achieved limited success and, as such, her lodestar should be reduced.

After carefully and closely examining Plaintiff's Certifications to verify that the attorney's hours were reasonably expended and in light of the disproportionality of the requested fees and ultimate judgment amount, the court determines that a reasonable amount of hours spent in this case is 200 hours. 200 hours multiplied by the reasonable charge rate of \$395.00 comes to a total amount of \$79,000.

The court determines that Plaintiff is entitled to \$79,000 in attorney's fees.

Enhancement

Plaintiff requests that her fee awards under the LAD should be enhanced to compensate for the high risk of non-payment. See Legal Brief in Support of Plaintiff Viviana Arias' Application for Enhanced Attorney's Fees and Costs, p 13 (hereinafter "Plaintiff's Brief). The Supreme Court held that trial courts "should consider whether to increase [the lodestar] fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome." Rendine at 337.

The Court indicated that the trial court should consider “the extent to which the attorney has been able to mitigate the basic risks on non-payment...” Id. at 340. The Court noted that, “[e]ven in cases in which an attorney has negotiated a contingent-fee payment, the risk of non-payment might remain substantial because of the specific problems of proof and the hazards inherent in all litigation.” Ibid. However, “[n]owhere does the [Rendine] Court say that a fee enhancement multiplier must be awarded in every case.” Gallo v. Salesian Society, Inc., 290 N.J. Super. 616, 660 (App. Div. 1996). Fee enhancements are not mandated in every LAD contingency case. Saffos v. Avaya Inc., 419 N.J. Super. 244, 277.

Further, in Furey v. County of Ocean, the Appellate Division considered it vital that the trial judge consider the underlying policies as to damages. 287 N.J. Super. 42, 46 (App.Div.1996). Here, the court recognizes that Defendant is a governmental entity, and the additional cost of attorney fees is ultimately borne by the taxpaying public. The court must balance the statutory purposes of the LAD to compensate the attorney, while neither encouraging or discouraging attorneys from undertaking meritorious causes of actions against governmental entities. Furey, 287, N.J. Super at 46; see also Failla v. City of Passaic, 146 F.3d 149, 161 (3d Cir. N.J.1998) (affirming a fee enhancement against a City found liable for unlawful discrimination).

The court recognizes that this case involved interests in overcoming sexual discrimination in the East Newark Police Department. Plaintiff alleged that Defendant Robert Tomasko, among the highest ranking official at the East Newark Police Department, sexually harassed her and created a hostile sexual work environment. In Rendine, the Supreme Court concluded that a liberal construction of the LAD to include contingency fee enhancement in appropriate cases promoted the goal of ending discrimination. 276 N.J. Super at 458-59 (“N.J.S.A. 10:5-3 sets forth a legislative finding and declaration that discrimination, including discrimination on the basis of sex,

threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free Democratic State, and [t]he Legislature intends . . . that this act shall be liberally construed” (internal quotations omitted)). Attorneys' fees are one remedy recognized as "a special form of relief designed to encourage those who seek to vindicate the individual as well as societal interests of overcoming discrimination in the exercise of civil rights." Shaner v. Horizon Bancorp, 116 N.J. 433, 430 (1989).

However, in this case, the risks were high because most of Plaintiff's claims were statutorily or procedurally barred, not because of the public policy considerations involved. See Honorable Francis B. Schultz, J.S.C. Order of June 6, 2014. Plaintiff's counsel took on a risk, not on the merits of the case, but by taking the case at such a late time after the claim arose. The court does not award a fee enhancement as a protection against procedural and statutory constraints. Significantly, Plaintiff's counsel mitigated this high risk in their Fee Agreement with Plaintiff.

Plaintiff's Fee Agreement provides that:

If the law firm recovers money for you in excess of the costs and expenses . . . you will pay the law firm a legal fee. The legal fee will be based on a percentage of the net recovery. The firm will prosecute your employment case on a contingency fee basis. The firm will recover forty percent (40%) of any net settlement or verdict, or 1½ times our attorneys' fees, whichever is greater.

See Certification of David E. Gray, Exhibit "B". Plaintiff's counsel mitigated its risk by requiring a contingency fee of 40% or 1½ times attorneys' fees. Plaintiff's counsel "provided for their own 'fee enhancement' by obtaining Plaintiff's agreement to a contingency fee" of the greater of 40% of any recovery obtained by Plaintiff or 1½ times attorneys' fees. Saffos, 419 N.J. Super. at 278. Based on this Fee Agreement, Plaintiff's counsel was not at serious risk of non-recovery warranting a fee enhancement. This is particularly evident by the fact that Plaintiff's Counsel is

entitled to at least \$40,400 of the settlement amount, which is greater than its submitted costs of \$36,563.90. Thus, Plaintiff's request for an enhancement of the lodestar is denied.

Costs

Plaintiff certified it spent \$36,563.90 in litigation costs. See Certification of David E. Gray, Exhibit "C". Of that sum, \$22,083.75 was paid to North Star Litigation Services (North Star). North Star assisted Plaintiff's counsel in preparing for trial and depositions of the parties. During Oral Argument, Defense counsel argued that it is not customary to hire outside consultants to prepare deposition witnesses. In response, Plaintiff's counsel failed to provide evidence to the contrary. The court determines that this cost is unreasonable. Accordingly, the court reduces Plaintiff's reasonable costs by \$22,083.75.

Defendant also disputes Plaintiff's \$8,000 expert fee for Dr. Ann Burgess. See Defendant's Brief, p. 34. Defendant argues that "the services of Ann Burgess were devoted entirely to the quid pro quo sexual harassment/rape trauma aspect of Plaintiff's claim which was dismissed on summary judgment. As such, these expenses are not properly recoverable against Defendants." Id. However, Plaintiff reasonably hired an expert in support of its claims, even if they were ultimately statutorily dismissed. Accordingly, the court determines that Dr. Burgess's expert fee is a reasonable cost. Plaintiff's remaining costs are reasonable postage, courier, and deposition fees.

After carefully and closely examining the remaining requested costs, the court determines that Plaintiff is entitled to \$14,480.15 in reasonable litigation costs.

CONCLUSION

For the foregoing reasons, Plaintiff Arias' motion for attorney fees and costs pursuant to N.J.S.A. 10:5-27.1 is **GRANTED**. Plaintiff is entitled to reasonable attorney's fees of \$79,000 and costs of \$14,480.15 for a total amount of \$93,480.15.

Plaintiff Arias' motion for a fee enhancement is DENIED.

SO ORDERED.



Kimberly Espinales-Maloney, J.S.C.