NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 2014-2253-B

GESSY TOUSSAINT,
Plaintiff

v.

BRIGHAM AND WOMEN'S HOSPITAL, and
MARY ANN KENYON,
Defendants

Notice sent
8/21/2018
A. A. M.
M. LAW F.
J. S.
S.,E. A. & L.
J. D. L.
R. J. W.
Z. W. B.
L. G.
P. & A.
E. A. H.
J. S. R.
(sc)

MEMORANDUM AND ORDER ON PLAINTIFF'S PETITION FOR ATTORNEY'S FEES AND COSTS

Following nearly four years of litigation and fourteen days of trial,[1] Plaintiff Gessy Toussaint obtained a jury verdict in her favor on one of the claims pleaded in her complaint. On May 23, 2018, after seventeen hours of deliberations, the jury returned a verdict for Toussaint against both Brigham and Women's Hospital and nurse manager Mary Ann Kenyon on the claim of unlawful retaliation pursuant to Mass. G.L. c. 151B. The jury found in favor of the Defendants on Toussaint's claim for race discrimination. The jury awarded Toussaint: $176,000 in back pay damages; $287,000 in front pay damages; $2.75M in emotional distress damages; and $25M in punitive damages, for a total award of $28,213,000.00.

Final judgment awaits a ruling on statutory attorneys' fees. As of July 11, 2018, issue was joined by the parties' pleadings.[2] Following thorough review of the voluminous file and all relevant pleadings, and based on my extensive familiarity with the record as trial judge, the Petition is **ALLOWED**, in the amounts and for the reasons stated below. I decline in my

[1] The jury heard eighteen witnesses and received in excess of one hundred fifty trial exhibits.

[2] The Superior Court Rule 9A packet was filed on July 6, 2018. On July 11, 2018, Defendants sought leave to file a Surreply, which I have considered for purposes of these rulings.

discretion to grant the hearing sought by the Defendants, as I find that the written pleadings constitute more than sufficient basis for ruling on fees, and oral argument by the parties will add nothing material to the required analysis.

The Petition and the Opposition

The Petition seeks attorneys' fees in the amount of $437,520.00, and costs in the amount of $14,570,85, for work performed during the period November, 2013 through May, 2018. The calculation is based on an hourly rate of $600 per hour, for 729.2 hours of work. Paper 108.

Defendants oppose the Petition on three primary grounds: They argue the hourly rate is unjustified and unsupported by rates for comparable lawyers in the Boston legal community; they argue the hours should be further reduced for work performed on behalf of the (as yet, untried) co-plaintiff, Nirva Berthold;[3] and they argue for a "25% global reduction" in fees for unsuccessful or untried claims. Paper 109.

Having examined all of the records independently for the reasonableness of the requested fees, I rule as follows. Haddad v. Wal-Mart Stores, Inc. (No. 2), 455 Mass. 1024, 1025 (2010) (rescript); Twin Fires Investment, LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 429-432 (2005); Berman v. Linnane, 434 Mass. 301, 302-303 (2001)(factors to be considered; no one factor determinative; factor-by-factor analysis not required); Fontaine v. Ebtec Corp., 415 Mass. 309, 324-326 (1993)(endorsing the lodestar method for Chapter 151B cases); Linthicum v. Archambault, 379 Mass. 381, 388-389 (1979).

[3] The Complaint was originally filed on behalf of both Berthold and Toussaint. Early in the life of this litigation, a prior session judge denied Defendants' motion to sever the two Plaintiffs. Paper 7 (Ruling 1/30/2015)(Curran, J.). During pre-trial litigation, I allowed Defendants' Motion to Sever the Plaintiffs for trial. Paper 52 (Ruling 4/10/2018)(Roach, J.) The Berthold case has not yet gone to trial, due to the parties' joint request to pursue scheduled mediation.

Hourly Rate

Defendants challenge the reasonableness and appropriateness of the hourly rate of $600 on two grounds. First, they argue that Attorney MacLellan charged and petitioned for a significantly lower hourly rate in a prior discrimination case in Superior Court. It is undisputed that in March, 2016, in the case captioned Avila v. Levy Restaurants, Inc., Civil Action No . 2013-112, Attorney MacLellan petitioned the court for an hourly rate of $350. The timeframe involved in that case was September, 2013 through March, 2016, a period which obviously overlaps in part with MacLellan's work here. Defendants argue MacLellan's "representations regarding her hourly rate in the Avila case are inconsistent with and do not support her request for a significantly increased hourly rate in this litigation." Opposition (Paper 109), at page 5. They request that her rate for this case be reduced to the Avila rate, at least through the Avila end date of March, 2016. Id.

In response MacLellan argues that she simply undervalued her time in Avila, later learned of higher prevailing rates approved by courts in similar cases, and has since corrected that undervaluation. On this point, MacLellan has the better argument. Though replete with legal authority, the Opposition conspicuously fails to support this portion of the defendants' challenge with precedent binding on this court. Contrary to the reported analysis of certain federal judges in Massachusetts, I fail to see why counsel's choice of fee in prior litigation, for a different client, should control as a ceiling on the court's determination of reasonableness here, and I decline to consider the $350 hourly rate in that manner.

Of far more importance as a matter of law is an assessment of the objective reasonableness of the $600 hourly rate, based on the time-honored state law factors. In this respect I agree with the Defendants that one factor is counsel's expertise and experience in the

particular type of litigation at issue. Defendants suggest that MacLellan's experience is limited because she has only been trying civil discrimination cases for less than a decade. Opposition, at page 7. Selected federal case law again notwithstanding, I am not persuaded that should be a weighty factor in the rate itself. While specific experience may impact the hours required to accomplish certain tasks, I have seen no evidence in the preparation or trial of this matter that MacLellan's other areas of practice detracted from her performance in this case, or factored as a limitation on or diminishment of her expertise in the area of employment discrimination. To the contrary, MacLellan's experience trying criminal cases likely enhanced her performance here.

That said, for whatever market reasons, employment trial lawyers in the Boston region charge somewhat less per hour than do their business litigation peers. I agree that the data presented by both sides in this case demonstrate $600 per hour is at the high end of prevailing rates within the employment bar, for counsel of MacLellan's years of varied experience under similar circumstances. **Based on the information available to me, I find a reasonable hourly rate to be awarded in this case to be <u>$550</u> per hour**. <u>Haddad</u>, 455 Mass. at 1025-1026 (an increase in hourly rates is to be expected over the years).

<u>Challenged Fee Allocations</u>

The Opposition is of course correct that the Petition is obliged to use best efforts to segregate work performed for a particular client on those particular claims compensable under the statute. Opposition at pages 11-16. And Plaintiff bears the burden of demonstrating that all aspects of the Petition are reasonable. <u>Twin Fires</u>, 445 Mass. at 428 (plaintiff's obligation to submit sufficient documentation to evaluate hours spent and nature of work). Defendants concede MacLellan "has made some attempt to equitably allocate time spent on tasks that relate to both Toussaint's and [her co-Plaintiff] Berthold's claims." Nonetheless, they then devote the

remainder of the Opposition to contesting "some of Toussaint's proposed allocations." Id. at page 12. Plaintiff has the better of the law and the facts on these questions.

Allocation Between the Two Plaintiffs

The Petition splits in half fees which were undertaken jointly on behalf of both Plaintiffs prior to the cases being severed for trial. The Petition also omits fees for the extensive summary judgment litigation which took place, "because [many of] those claims were not presented at trial." Memorandum in Support of Petition, at page 5. Defendants now claim that certain charges related to Plaintiff Berthold (for example, the time expended on her deposition) need be further parsed. I cannot agree.

First, Plaintiffs' theory of the case from the very outset was that the two claims were interrelated in time, place, and manner, because they claimed Toussaint (a Haitian-American nurse) was discriminated against and/or retaliated against for supporting Berthold (also a Haitian-American nurse) in her (first raised, and first filed) race-related dispute with the Defendants. Notably, individual Defendant Kenyon was involved as a nurse manager in both matters. The fact that the two sets of employment disputes overlapped, and involved many of the same managers and other witnesses, likely influenced the first session judge's ruling to join the cases. MacClellan appropriately investigated and discovered the cases as so joined. It is never clear from the outset of such discovery what each witness's capacity might or might not be to offer information that could lead to the discovery of admissible evidence on a variety of claims.

Responding to defendants' specific examples, witnesses Berthold, Nicholas, Rumble and Sullivan-Day each could reasonably have been expected to possess knowledge about the working relationships, performance, and investigations surrounding each Plaintiff, and and/or involving the multiple Hospital supervisors and other witnesses. I am aware of no fees precedent which

authorizes adversaries or courts to employ a standard of omniscient hindsight to work involving witnesses ultimately not called for trial, if the work performed was reasonable at the time. Obviously, neither side knew how a different session judge or trial judge would rule on a second motion to sever the Plaintiffs for trial -- a second motion which was brought in this instance at the eleventh hour, and which Defendants could have brought at any earlier time in the litigation if they so chose. **For these reasons, I decline to reduce the fees any further on alleged Berthold-related work.**

Allocation Among Toussaint's Claims

Massachusetts fee jurisprudence has long recognized the possibility – albeit not the strict requirement – to reduce or allocate fees by claim, where that may be accomplished fairly, sensibly, and feasibly. DeRoche v. Massachusetts Commission Against Discrimination, 447 Mass. 1, 18-19 (2006)(plaintiff entitled to compensation only for those attorney's fees and costs incurred for issues on which he prevailed); Killeen v. Westban Hotel Venture, L.P., 69 Mass. App. Ct. 784, 792-793 (2007)(court may find unsuccessful claims are sufficiently interconnected with claims on which the plaintiff prevails). Defendants rightly point out that: Toussaint originally stated race, age, and retaliation claims against the Hospital and three individuals; ultimately two claims were tried against two defendants; certain claims were voluntarily dismissed; and certain claims did not survive extensive summary judgment proceedings.

Nonetheless, defendants' arguments about what sorts of work need not be compensated, and why, are misplaced. For example, discovery disputes about demographic data are standard in employment practice cases. To suggest, again, that the material ultimately was not used at trial is a non-starter. The defense of this case was aggressive and multi-faceted from the very beginning, as I fully expect it will be through to the end, whenever that may be. It was entirely

reasonable for this plaintiff strategically to anticipate and to explore demographic evidence, in connection with both the discrimination and the retaliation claims. Twin Fires, 445 Mass. at 430-431 (not unreasonable for counsel to pursue particular claim or strategy based on what counsel knew at the time). For example, allegedly disparate treatment of similarly-situated, complaining employees may well be a component of a retaliation claim.

Second, I cannot agree with defendants' assumption that "the facts upon which the jury relied to find for Toussaint on her retaliation claim [necessarily] were fundamentally different than those considered in connection with her race discrimination claim." Opposition at page 15. The jury was assessing the state of mind of the key individual supervisory Defendant (Kenyon), and the same group of supporting players (e.g., the Hospital's Human Resources Department), on both claims. The jury was considering the same series of events, over the same period of time. That the jurors were able to follow the law with respect to the different elements of the two claims, to discern distinctions within the testimony and exhibits presented to them, and to arrive at different verdicts accordingly, speaks to their attention to detail and their integrity; but it says little about a trial judge's capacity or authority fairly to deconstruct that interwoven fact pattern for purposes of fee allocation.[4] Twin Fires, 445 Mass. at 431 (trial judge must exercise judgment on this issue in light of firsthand knowledge of the details and complexity of the case).

For these reasons I decline to "apply a global reduction to Toussaint's claimed fees and costs by 25% to account for the claims and defendants dismissed from this action directly prior to summary judgment briefing, the claims upon which the Defendants won summary

[4] The Opposition footnotes the argument that "as a matter of law" [Toussaint] could not have engaged in protected activity" before filing her MCAD claim. Id., at page 15, n. 13. As discussed many times pre and during trial, I do not agree with that proposition under the circumstances presented in this case, and I do not find the authority cited by the Defendants controlling or persuasive.

judgment, and the rejection of Toussaint's race discrimination claim at trial." Opposition, at page 16 (emphasis in original).

Result Achieved

Final judgment has not yet issued. But the parties have, not surprisingly, alerted the court to expect substantial post-trial motion practice. Accordingly what I say here in the context of the Petition in no way pre-judges motions on the merits which I have not yet seen, and which will be afforded full, fair and open-minded review at the appropriate time. In the limited context of the Petition and the Opposition currently before me, however, the court cannot ignore the message sent by the jury verdict in this case.

With the obvious exception of the "no" vote on the question of the underlying race discrimination claim, it is difficult to imagine a more resounding victory for Ms. Toussaint. As discussed with the parties in multiple contexts pre-trial, much rode on the demeanor and credibility of the many witnesses. This is of course true in all cases where state of mind and motivation of the decision makers are the controlling elements of law. Nonetheless, trial counsel McClellan deserves significant credit for her ability to marshal the evidence, in both affirmative and defensive modes, to persuade the jury to arrive at this result. While the law is relatively straightforward, the facts of this case were not.

It also must be noted that McClellan accomplished her difficult task while significantly out-numbered. Two lawyers (from the same law firm) appeared at counsel table and actively participated in all trial matters on behalf of both Defendants. A third attorney joined for pre-trial work and very ably argued motions which demonstrated her significant involvement in the case's rather extensive in limine litigation.[5] An adjuster was present in the courtroom each day, and

[5] The third attorney re-appears in the fee petition briefing.

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numerous other administrative staff moved in and out of the courtroom assisting the defense. McClellan carried on each day, under a virtual barrage of opposition, alone.

This observation is not a criticism of the Defendants; each side was entitled to trial counsel and trial strategy of choice. It is simply to find that the difficulties presented by the pre-trial litigation and trial of this case went well beyond the familiar Chapter 151B allegations themselves, to the relationship between the experiences of the two Plaintiffs, and to the strategies employed by the defense. While I agree with the Opposition that "the magnitude of an attorney's success in a single action" does not necessarily justify a rate increase (Opposition at page 10), under all of the circumstances in this case, only the limited hourly rate decrease from the Petition amount is justified.

Conclusion

The Petition is ALLOWED, at an hourly rate of $550, for 729.2 hours, for a fee of $401,060.00.

The Petition is ALLOWED, for costs in the amount of $14,570.85.[6]

SO ORDERED.

Dated: August 20, 2018

Christine M. Roach

[6] Defendants have not opposed the costs requested.