

LAWYERS OF THE YEAR

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ALLISON A. MACLELLAN

MacLellan Law Firm

To say that 2018 was a banner year for Allison A. MacLellan would not be an overstatement.

Last May, a Suffolk County jury awarded her client, Gessy Toussaint, \$3 million in compensatory damages and \$25 million in punitive damages against employer Brigham and Women's Hospital based on Toussaint's claim of retaliation.

Dorchester solo MacLellan then asked for \$440,000 in statutory fees. While Superior Court Judge Christine M. Roach cut the requested hourly rate (from \$600 an hour to \$550), Roach issued a remarkable order praising MacLellan's efforts in the case, giving her "significant credit for her ability to marshal the evidence, in both affirmative and defensive modes, to persuade the jury to arrive at this result."

MacLellan's 2018 success began with her representation of Nirva Berthold in 2013. Like Toussaint, Berthold was a Haitian-American nurse at Brigham and Women's Hospital. Berthold claimed that she had been turned down for a promotion based on her race. When Toussaint stood up for Berthold in the face of a doctor's verbal abuse, she alleged she was subjected to discrimination and retaliation.

Their cases were joined through discovery and pre-trial motions, but just a few weeks before trial, the court severed Toussaint's claim to go first before jurors, in part because it required a mini medical malpractice case on the nursing standard of care.

After two and a half weeks of trial, the jury spent several days deliberating before returning the \$28 million verdict for Toussaint on her retaliation claim, but siding with the hospital on the discrimination charge.

MacLellan — nervous during the first day of deliberations — began to relax by late in the second day.

"Anything can happen, but it was more likely they were talking about money than debating liability at that point," she says.

Toussaint cried "tears of joy" when the verdict was returned, MacLellan recalls.

"She's 70 years old and trial is a grueling process," she says. "She felt vindicated."

As did MacLellan when Judge Roach issued her order on attorneys' fees, which rejected the hospital's argument that the amount exceeded prevailing rates, and that the total should be docked for work performed on Berthold's behalf and for claims that were unsuccessful or dropped. The order went on to note that the sole practitioner was significantly outnumbered by the defense team.

Though Toussaint's case remains in post-trial motions, the docket in Berthold's case reflects there was an order of dismissal entered after the action was reported settled.

The jury sided with the employer on Toussaint's discrimination claim but found for the plaintiff on retaliation. Were you surprised at the split verdict?

Losing on discrimination and winning on retaliation is not unusual in these cases. For a discrimination claim, you have to prove state of mind and why the person did what they did. Rarely will someone say, "I'm a racist!" So we have to rely on circumstantial evidence and it is a more difficult claim to prove.

Retaliation in this case was not difficult to prove because of the timeline. Gessy was a nurse for more than 20 years and worked at Brigham and Women's for over a decade with no problem. Then, all of a sudden, she started getting papered up, one thing after another.

Was it a risk to ask the jury for such a large verdict?



Photos by Merrill Shea

I had asked the jurors for \$25 million, and I knew it was a lot of money [to ask] for anybody. But I felt that the case was worth it and [the hospital's] treatment of her warranted it. Brigham and Women's makes \$6.3 billion per year. The whole point of punitive damages is to get their attention. If you fine them \$100,000, that is not enough to get their attention; that's just the cost of doing business. I was grateful to the jury for getting everybody's attention — to send a message that this won't be tolerated.

In her award of attorneys' fees, Judge Roach said you faced

a "virtual barrage of opposition." Was this a David and Goliath-type of situation?

It absolutely felt like David and Goliath. When Berthold first came to me, she said she had shopped around for attorneys and was turned down because people refused to go up against such a big organization.

I was absolutely, definitely outnumbered and outgunned, but it just made me double down on my resolve and work harder. If you dig in and have the passion for the case, that comes through to the jury.

What was your reaction to Judge Roach's award of attorneys' fees?

It wasn't so much about the actual amount she awarded — although I'm really grateful for that. What touched me was that she recognized and commended my work. It is rare that you get that kind of recognition for the hard work you put into a case, and for the judge to write an order like that was very gratifying.

Trial is a moving, breathing thing that involves a ton of work, and doing it all on my own was an extreme challenge. I've done trials on my own before, but this was the most intense because of the breadth of information. I also really liked that she recognized that it is the skill and experience of the attorney and what was involved with the case itself, not the physical address or the size of the law firm.

What is the takeaway from this case?

The verdict proves that you shouldn't be intimidated by what seems to be an overwhelming opposition. Believe in what you are doing, believe in yourself, fight through it, and let the chips fall where they may.

— Correy E. Stephenson