IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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JOHN DAUSE,	*	
Plaintiff	*	
v.	*	**CIVIL NO. JKB-11-3136**
BROADWAY SERVICES, INC.,	*	
Defendant	*	

* * * * * * * * * * * *

ORDER

Pending before the Court is Plaintiff's motion for attorney's fees and costs. (ECF No. 9.) Judgment was entered in Plaintiff's favor following his acceptance of an offer of judgment under Federal Rule of Civil Procedure 68. (ECF Nos. 5 & 7.) The offer of judgment, which was made roughly a month and a half after the complaint was filed and before any discovery had occurred, provided for Plaintiff's "reasonable, reimbursable attorneys' fees incurred" to the date of December 20, 2011, in pursuing his claim. (ECF No. 5.) The fees are to be determined by the Court through a fee petition. (*Id.*) Judgment was accordingly entered for Plaintiff in the amount of $40,000, plus fees and costs. (ECF No. 7.) Defendant has opposed Plaintiff's fee petition on the basis that it is grossly excessive in the number of hours claimed and because Plaintiff has not, in Defendant's view, adequately supported his attorneys' claims pertaining to their hourly rates. (ECF No. 10.) Following Plaintiff's reply (ECF No. 11), the matter is now ripe for decision. No hearing is necessary. Local Rule 105.6 (D. Md. 2011). The motion will be granted in part and denied in part.

Plaintiff has asserted that he should receive an award for 135 hours of attorney and support staff time at a cost of $35,101.50 plus reimbursable costs of $1,135.74 for copying, filing

fees, faxing, administration, legal research, postage, and process service for a total award of $36,237.24. (Mot., Ex. A.) On a percentage basis, this requested award is approximately 91% of the judgment awarded to Plaintiff. The Court agrees the requested award is grossly excessive and thus will reduce the number of hours to be used in calculating the award. The hourly rates will also be adjusted.

As the Supreme Court has observed, "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Speaking directly to the issue of number of hours claimed to have been devoted to a case, the Court also said,

> The district court . . . should exclude from this initial fee calculation hours that were not "reasonably expended." Cases may be overstaffed, and the skill and experience of lawyers vary widely. 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. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority."

Id. at 434 (citations omitted). Although the *Hensley* case was concerned with an award of attorneys' fees pursuant to 42 U.S.C. § 1988, the same principles expressed there apply with equal force to the fee petition in the instant case.

Plaintiff has indicated that it has already exercised billing judgment by not claiming 102.9 hours that it could have claimed in the amount of $22,569. (Mot. 9, Ex. A.) Even with that reduction, the number of hours claimed is greatly in excess of what should be reasonably claimed for Plaintiff's case.

This case involved Plaintiff's termination from his job as a security guard on the basis of his monocular vision. Although the complaint contained various theories under the Americans

with Disabilities Act, Maryland state law, and the Baltimore City code, the operative facts were essentially the same regardless of which theory was proposed. (Compl., ECF No. 1.) He has been represented in this case by four attorneys. They are Mr. Ari Wilkenfeld and Mr. Daniel Katz of the Law Office of Gary M. Gilbert and Associates ("GMGA") and Mr. Joseph Espo and Ms. Laura Ginsberg Abelson of the law firm of Brown Goldstein and Levy LLP. Only the GMGA attorneys are moving for the award of attorney's fees. (Mot. 1 n.1.)

Even though Mr. Wilkenfeld and Mr. Katz were the only two GMGA attorneys of record, the fee petition has claimed hours for them and their colleague, Mr. Benjamin Wick, as well as for a paralegal and a law clerk. Although no hours are claimed for Mr. Gilbert, he is noted in the records as having worked 3.7 hours on the case. Plaintiff is claiming 41.2 hours for Mr. Wilkenfeld (with 7.9 hours not charged), 14.7 hours for Mr. Katz (with 21 hours not charged), 27 hours for Mr. Wick (with 10.7 hours not charged), 13.1 hours for the paralegal (with 26.7 hours not charged), and 39 hours for the law clerk (with 32.9 hours not charged). (Mot., Ex. A.) A close review of the day-to-day billing records shows numerous conferences either in person, by telephone, or through email among the attorneys, resulting in excessive hours being recorded for the case. This was a one-lawyer case on the low end of the spectrum of complexity, but it was overstaffed so that an unreasonable number of hours have now been claimed as reimbursable by Plaintiff. This is particularly so given the years of experience each of the lawyers has had in litigating employment discrimination cases. Furthermore, this case was nipped in the bud early in the litigation, so the only filings by Plaintiff were the complaint, a notice of acceptance of the offer of judgment, and the pending motion for attorney's fees. No formal discovery was conducted.

The Court can discern no benefit to the Plaintiff, or to the judicial process, for so many lawyers to have been involved in this relatively simple case, and it would be unfair to require

Defendant to foot the bill for overstaffing by Plaintiff's counsel. Accordingly, out of the total attorney hours claimed by Plaintiff, the Court will allow 36 hours collective attorney time. *See Trimper v. City of Norfolk*, 58 F.3d 68, 76-77 (4th Cir. 1995) ("Properly reducing allowable hours because of overstaffing of attorneys is not an abuse of discretion"). *See also Schlacher v. Law Offices of Phillip J. Rotche & Associates, P.C.*, 574 F.3d 852, 858 (7th Cir. 2009) ("overstaffing cases inefficiently is common, and district courts are therefore encouraged to scrutinize fee petitions for duplicative billing when multiple lawyers seek fees"). Such a number adequately addresses the need for initial and follow-up client consultation, editing of the complaint drafted by the law clerk, drafting of the notice of the offer of acceptance, and drafting the fee petition. In addition, the Court will allow 10 hours for the paralegal for administrative and research tasks and 12 hours for the law clerk for drafting and research duties. This brings the total number of hours reasonably expended on this case to 58, which is probably more generous than necessary.

In allocating the collective attorney time among these three attorneys, the Court refers to the billing records to get a sense of how the attorneys divided the work among themselves, putting aside for the moment the issue of duplication. Starting with the total hours claimed, the records show total attorney hours claimed was 82.9 hours. Proportionally, Mr. Wilkenfeld contributed roughly half of those hours, Mr. Katz contributed approximately 18% of those hours, and Mr. Wick contributed the remaining amount, or roughly 32% of the hours. Applying those same proportions to the allowed hours, Mr. Wilkenfeld is credited with 18 hours, Mr. Katz is credited with 6.5 hours, and Mr. Wick is credited with 11.5 hours.

Next, the Court considers the rate at which these hours should be billed and turns for guidance to the Court's Local Rules, Appendix B: Rules and Guidelines for Determining Attorneys' Fees in Certain Cases (D. Md. 2011), which the Court accepts as presumptively

reasonable to apply to this case. The year 2011 is used for determining the years of experience of the lawyers given that the compensable legal work occurred in 2011. Thus, Mr. Wilkenfeld is credited with 13 years at the bar, Mr. Katz is credited with 17 years at the bar, and Mr. Wick is credited with 5 years at the bar. (*See* Mot., Ex. B, C, D.) For Mr. Wilkenfeld, the recommended range of hourly rates is $225 to $300. For Mr. Katz, the recommended range of hourly rates is $275 to $400. For Mr. Wick, the recommended range of hourly rates is $165 to $250. Mr. Wilkenfeld logically should receive a rate near the top of his range because it is designed to compensate attorneys with 9 to 14 years of experience; thus, the reasonable hourly rate for Mr. Wilkenfeld will be $290. Mr. Katz is in a range with the very top rate being $400; however, he is at the lower end of that range in terms of his experience. Thus, a rate of $325 is a reasonable rate for Mr. Katz. Mr. Wick is at the low end of his range, and it is reasonable that he would be reimbursed at an hourly rate of $165. The paralegal and law clerk are in the same range, which is $95 to $115. No information is provided to the Court on these individuals' experience, so the Court selects a midpoint on the range as being appropriately applied to this case; accordingly, the paralegal and law clerk will be reimbursed at the hourly rate of $105.

Compiling the above information in tabular form yields the following result:

Biller	**Hours allowed**	**x**	**Hourly rate**	**=**	**Lodestar figure**
Wilkenfeld	18	x	$ 290	=	$ 5,220.00
Katz	6.5	x	$ 325	=	2,112.50
Wick	11.5	x	$ 165	=	1,897.50
Paralegal	10	x	$ 105	=	1,050.00
Law clerk	12	x	$ 105	=	1,260.00
TOTAL	**58**				**$ 11,540.00**

Thus, the lodestar figure is $11,540. Having arrived at the lodestar figure, the Court now must determine if it should be adjusted according to the well-established twelve factors of *Johnson v. Georgia Hwy. Express*, 488 F.2d 714 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989):

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

See Robinson v. Equifax Info. Servs., 560 F.3d 235, 243-44 (4th Cir. 2009).

The Court has previously incorporated into its analysis factors one, two, five, seven, eight, nine, and twelve. As to the second factor, Plaintiff asserts it was necessary "to research numerous legal issues, including the different applicable statutes as [to] the relief available." However, beyond the issue of monocular vision as a disability, the Court is provided no further information as to the specific issues for which research was needed. In the supplemental information included in Plaintiff's reply, Plaintiff indicates research was performed as to the following:

- Damages in 4th Circuit and others, including back pay, compensatory damages, and punitive damages
- Collateral source issues, front pay issues, compensatory damage amounts awarded based on facts of case, punitive damages elements, back pay determinations depending on subsequent disability from different employer
- Damages, including effect of subsequent disability on back pay, effect of ability to work on back pay, front pay research on similar cases, when reinstatement is not possible or appropriate, similar cases with compensatory damages
- Disparate impact claim, qualification standards, "regard as" prong of ADA discrimination, per se ADA violations

- Maryland anti-discrimination law; Baltimore city ordinances; Baltimore county ordinances
- Case law in 4th Circuit and/or Maryland regarding a party's obligation to retain documents which are relevant to litigation

(Reply 3-4, ECF No. 11.)

Plaintiff's counsel has failed to explain how these are specific to Plaintiff's case as opposed to being research generally applicable to discrimination cases. Presumably, nearly every, if not every, discrimination case has damages issues like the kind detailed above, and most if not all cases are likely to be affected by a party's obligation to retain documents that are relevant to litigation. As for applicable statutes and ordinances, a local lawyer with experience in employment discrimination law should be reasonably familiar with local as well as federal governing laws in that area. The Court has already allowed time for research that would be addressed to Plaintiff's specific case.

Regarding the third factor, the case required no unusually high level of skill but only that to be expected from an attorney who customarily practices in the area of employment discrimination litigation. This factor is adequately reflected in the analysis of applicable hourly rates.

As to the fourth factor, although it is generally true that an hour of time devoted to one case cannot be simultaneously devoted to a different case, the Court notes that the hours reasonably expended on Plaintiff's behalf were expended by three lawyers over a period of nine months and did not preclude other employment during that nine-month period, out of which only a small amount of time was devoted to Plaintiff's case. Even considering the total hours claimed, they still did not account for a majority of the three lawyers' time during that nine months.

On the sixth factor, whether the fee was fixed or contingent, counsel's arrangement with Plaintiff was on a contingent basis but provided no percentage basis for a contingent fee. Instead, the agreement was for Plaintiff to cooperate with counsel in obtaining a resolution of his case that provided for attorney's "fees being calculated at full Laffey rates." (Mot., Ex. 3, ¶ 3 (referring to the hourly rates set by the United States Attorney's Office for the District of Columbia).) However, Plaintiff acting on the advice of counsel accepted an offer of judgment that provided for "reasonable, reimbursable attorneys' fees incurred to date as determined by the court through a fee petition" (Pl.'s Acceptance of Offer of Judgment), not for attorney's fees calculated "at full Laffey rates." In reality, then, the only contingency that governs the amount of fees to be paid to Plaintiff's counsel in this case is what amount is to be awarded by the Court.

As for the seventh factor, Plaintiff contends the case had to be prepared and filed within a relatively short amount of time following receipt of the right-to-sue letter. The hours and rates awarded adequately reflect this factor.

On the eighth factor, the amount involved was determined to be $40,000 pursuant to Plaintiff's acceptance of the offer of judgment. No dollar figure was included in the complaint, so it is not possible to assess whether this met Plaintiff's and counsel's expectations. But even recognizing that the result is a good one for Plaintiff does not require an adjustment in the rates awarded. As the Fourth Circuit has emphasized, "a prevailing attorney is *not* entitled to an upward adjustment of the lodestar fee simply because he did a good job." *Trimper*, 58 F.3d at 74-75 (citing *Daly v. Hill*, 790 F.2d 1071, 1082 (4th Cir. 1986)). Further the Court has said,

> [T]o show entitlement to an upward adjustment, the attorney must demonstrate that the adjustment is needed to accomplish "full and fair compensation"; . . . however, . . . where the *Johnson* factors are properly considered in the process of calculating the lodestar fee, the efforts of the attorneys which led to the excellent results—such as time, effort, and skill—will already have been considered. Thus, then to increase the lodestar fee for the excellence of the results would result in impermissible "double counting."

Trimper, 58 F.2d at 75. No adjustment is needed in Plaintiff's case to accomplish "full and fair compensation" of his counsel.

The ninth factor, the experience, reputation, and ability of counsel that were detailed in their respective affidavits, has already been considered and accounted for in selecting the hourly rates to be awarded. On the tenth factor, pertaining to the undesirability of the case, Plaintiff's counsel concede they did not find his case undesirable, although they contend that his case represented significant business risk for them since it was undertaken on a contingency basis. (Mot. 7.) But Plaintiff's counsel do not indicate that Plaintiff's case should be valued any differently from the rest of their cases. The Court is unpersuaded Plaintiff's case should be regarded as an undesirable case. Therefore, no adjustment is needed to account for the tenth factor.

Regarding the eleventh factor, the nature and length of the professional relationship with the client, GMGA began representing Plaintiff at an unspecified point during the administrative proceeding and continues to do so in this Court. GMGA had not represented Plaintiff previously. No reason can be found to make any adjustment for the eleventh factor.

As to the twelfth factor, awards in similar cases, Plaintiff's counsel indicate in their affidavits they have received "attorneys' fees at the customary, market rates." (Mot. 8.) The affidavits indicate Mr. Wilkenfeld and Mr. Wick have received some payments of attorney's fees pursuant to the Laffey matrix, but they do not indicate those awards occurred in the District of Maryland. They request to be awarded fees under the Court's Guidelines. Mr. Katz indicates he has received fees pursuant to fee-shifting statutes and pursuant to this Court's Guidelines. These affidavits reinforce the reasonableness of the hourly rates allowed by the Court in this case based on the Guidelines.

The costs generally do not appear unreasonable, save for the legal research fees of $499.98.[1] As has been earlier noted, counsel has failed to explain how the research attributable to Plaintiff's case was, in fact, specific to his case. The Court accepts that some legal research was necessary but concludes the amount awarded for this category of expenses should be reduced to $200.

In summary, total attorney's fees awarded amount to $11,540. Plaintiff is entitled to submit a bill of costs to the clerk that reflects a total online legal research cost of $200 in addition to the other allowed costs.

SO ORDERED.

DATED this 3rd day of April, 2012.

BY THE COURT:

/s/
James K. Bredar
United States District Judge

[1] Plaintiff originally sought $544.24 for this category of expense, but conceded a lack of documentation for $44.26.