

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHARLES FRENCH and GEORGE LEWIS,
Plaintiffs,

v.

Civil No. 98-17-P-C

BATH IRON WORKS CORPORATION,
Defendant

This matter is before the Court on Plaintiff George Lewis's Motion for Award of Attorney's Fees and Costs ("Motion") (Docket No. 92). Plaintiff brought this action against Bath Iron Works Corporation ("BIW") alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), and the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.* ("MHRA"). Plaintiff alleged that Defendant discriminated against him on the basis of his age when Defendant terminated him in January 1996 as part of a reduction in force. As part of the Complaint, Plaintiff seeks attorney's fees and costs.

On June 24, 1999, the Court received a Stipulation of Dismissal ("Stipulation") (Docket No. 90) signed by attorneys representing both Plaintiff and Defendant, evidencing a settlement between the parties.¹ The Stipulation indicates that the parties agreed to dismiss the case with prejudice, that BIW agreed to "reinstate" Plaintiff, and that Plaintiff "reserves the issue of entitlement to counsel fees and costs for later determination." Stipulation ¶¶ 1-4. In accordance with the Stipulation, Plaintiff has returned to work at BIW, and the issue of attorney's fees and costs is now before the Court.

¹ While the attorney's fees is the lone remaining issue in the suit between Plaintiff Lewis and BIW, litigation between Plaintiff French and BIW has been entirely resolved.

Defendant has offered myriad objections to Plaintiff's Motion. Defendant's Opposition to Plaintiff's Motion for Award of Attorney's Fees and Costs ("Opposition Motion") (Docket No. 94). The Court will address each of Defendant's objections in turn.

DISCUSSION

A. Statutory Authority for the Award of Attorney's Fees

Under the "American Rule," parties in litigation normally bear their own attorney's fees and costs. Deviation from the American Rule typically results from express statutory authority. *See Nowd v. Rubin*, 76 F.3d 25, 27 (1st Cir. 1996). Here, Plaintiff proffers both the ADEA and the MHRA as statutory authority for the award of attorney's fees and costs, contrary to the American Rule.²

The text of the ADEA does not expressly provide for the award of attorney's fees and costs. Instead, the ADEA incorporates by reference various remedial provisions of the Fair Labor Standards Act ("the FLSA"). 29 U.S.C. § 626(b) (1988). In turn, the FLSA provides: "The court in such action shall, in addition to any *judgment* awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendants, and costs of the action." 29 U.S.C. § 216(b) (emphasis added).

In contrast, the MHRA provides simply that "[i]n any civil action under this Act, the court, in its discretion, may allow the prevailing party, other than the commission, reasonable attorneys' fees and costs, and the commission shall be liable for attorneys' fees and costs the same as a private person." 5 M.R.S.A. § 4614. The phrase "prevailing party" is a legal term of art. As the Maine Law Court has pointed out, this statutory language "tracks the language of its federal counterparts, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), and the Attorney's Fee Act of 1976, 42 U.S.C. § 1988." *Maine Human Rights Com'n v. Allen*, 474 A.2d

² Although Plaintiff's Motion does not offer the MHRA as a basis for the award of attorney's fees, Plaintiff does provide the MHRA as grounds for the award in his Reply (Docket No. 97).

853, 857 (Me. 1984). Consequently, the Law Court has held that the federal case law interpreting these federal statutes will be adopted for the purposes of interpreting this remedial provision of the MHRA. *See id.* at 857-58.

Defendant offers two arguments with respect to the application of these various statutes to the case at hand. First, Defendant points to the language of the FLSA, as incorporated in the ADEA, which allows for an award of attorney's fees "in addition to any *judgment* awarded to the plaintiff." 29 U.S.C. § 216(b) (emphasis added). Defendant argues that because Plaintiff has not achieved a "judgment" in this action, but only a settlement, Plaintiff is not entitled to an award of attorney's fees and costs under the express terms of the ADEA. Plaintiff counters that even if a judgment is required under the ADEA, no judgment is required for an award of attorney's fees under the distinct prevailing party standard adopted by the MHRA.

While the Court is not at all convinced that a plaintiff who does not obtain a judgment is entitled to attorney's fees under the ADEA,³ this cause of action was maintained throughout

³ The Court notes that, in another context, the Court of Appeals for the Ninth Circuit has held that Congress's use of the term "judgment" in the ADEA, as opposed to "prevailing party" in the Civil Rights Act, creates a meaningful distinction between the two statutes. *Richardson v. Alaska Airlines, Inc.*, 750 F.2d 763 (9th Cir. 1984). In *Richardson*, the issue was whether the plaintiff was entitled to have a union, which had intervened to object to a proposed consent decree, pay plaintiff's attorney's fees for opposing the union's failed attempt to contest the consent decree. *Id.* at 764. In other words, could a successful plaintiff be awarded attorney's fees from a non employer participant in the litigation? The plaintiff argued that the court should apply the "prevailing party" standard from the Civil Rights Act which allows the recovery of attorney's fees from any defendant, regardless of whether it is an employer. *Id.* at 766-67. The court rejected the argument, concluding that Congress's decision to not use the "prevailing party" language in the ADEA demonstrated Congress's intent to limit the availability of attorney's fees under the ADEA. *Id.* at 767. As evidence of the meaningful distinction between the two remedy provisions, the court noted that while the "prevailing party" standard expressly allows either a successful plaintiff or a successful defendant to recover fees from the other, the remedy provision of the ADEA expressly limits the recovery of attorney's fees to successful plaintiffs only. *Id.* This substantive distinction between the two remedy provisions, the court concluded, precludes the application of the "prevailing party" standard in ADEA cases. *Id.*

Additionally, the Supreme Court's detailed analysis of the legislative history of the ADEA in *Lorrillard v. Pons*, 434 U.S. 575, 98 S. Ct. 866 (1978), reveals that Congress was both careful and deliberate in its drafting of the remedial provisions of the ADEA and affirmatively chose not to adopt the then-existing prevailing party standard.

In contrast, however, the Court discovered two district courts that have squarely

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under both the ADEA and the MHRA. Accordingly, Defendant's statutory argument, with respect to the ADEA, is rendered moot by the plain language of the MHRA, which provides fees and costs to a "prevailing party." In other words, the MHRA, unlike the ADEA, does not expressly require a party to obtain a judgment to be eligible for attorney's fees and costs.

Defendant's second related argument fails under a similar analysis. Defendant posits that even if a settlement is a judgment for the purposes of the ADEA, the prevailing party standard should not be borrowed from the Civil Rights Act and applied to an ADEA claim. Without discussing the merits of this argument, it is sufficient to note again that the MHRA expressly adopts the prevailing party standard, such that the application of the prevailing party standard to this Motion is plainly appropriate.

B. Application of the Prevailing Party Standard

Having concluded that Plaintiff is entitled to an award of attorney's fees and costs if he is able to "prevail" under the prevailing party standard, the obvious next step is to apply the standard to the facts at hand. Defendant argues that whatever Plaintiff has achieved through the settlement of this action, it is not sufficient to qualify Plaintiff as a prevailing party entitled to attorney's fees and costs.⁴ The case law makes clear that the threshold for designation as a

³(...continued)
addressed this question, both concluding that a settlement *is* a judgment for purposes of the ADEA, although neither court apparently considered the analysis in *Richardson*. See *Webb v. Bavoca Guild, Ltd.*, 631 F. Supp. 35, 36 (W.D. Va. 1985); *Bhatia v. Air India*, 1992 WL 232146 (S.D.N.Y. 1992) (relying in part on *Webb*). Neither the parties nor the Court was able to uncover any appellate decisions directly addressing the question of whether a settlement is a judgment for purposes of the ADEA.

⁴ Defendant offers additional arguments with respect to the settlement. Specifically, Defendant argues that a settlement was reached in October 1998 that did not require BIW to pay attorney's fees or, in the alternative, that the settlement is void because the parties failed to reach a meeting of the minds. Even if the Court assumes that there was a valid settlement in October of 1998, there is insufficient evidence to conclude that the issue of attorney's fees was resolved as part of this alleged settlement. As for Defendant's contention that the settlement is void because there was no meeting of the minds, the Court is satisfied that the Stipulation of Dismissal, which expressly states that the issue of attorney's fees remains to be resolved, demonstrates a sufficient meeting of the minds. The Court is satisfied that there is currently a
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prevailing party is not high. Both Plaintiff and Defendant correctly point to *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 109 S. Ct. 1486 (1989), as the definitive case on the prevailing party standard. In *Texas State Teachers*, the Supreme Court held:

If the plaintiff has succeeded on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit, the plaintiff has crossed the threshold to a fee award of some kind. . . . Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.

Id. at 791-92, 1493 (internal citations and quotations omitted).

It is undisputed that, as part of the settlement, Plaintiff was reinstated to a position at BIW. The Court is satisfied that such reinstatement qualifies Plaintiff as a prevailing party, as it obviously changed the legal relationship between the parties. Defendant's effort to characterize this remedy as "technical" or "*de minimis*" are unavailing, as is Defendant's suggestion that a plaintiff alleging wrongful discharge must receive a monetary award of some kind in order to be a prevailing party. Therefore, the Court finds that Plaintiff is a prevailing party entitled to an award of attorney's fees and costs under the MHRA.

C. Calculation of the Fee Award

Defendant's remaining arguments address the specifics of Plaintiff's fee petition. In calculating an award of attorney's fees, the Court begins with the "lodestar" analysis. Specifically, the Court calculates the number of hours reasonably expended by the Plaintiff in the course of litigation and multiplies it by a reasonable hourly rate to reach a total. *See Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331, 337 (1st Cir. 1997). Here, Defendant apparently does not take issue with Plaintiff's proposed hourly rate of \$185.⁵

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settlement of this litigation, and that the issue of attorney's fees has not yet been resolved by the parties. Accordingly, the Court rejects Defendant's arguments on this point.

⁵ While Defendant has not expressly agreed with this rate, the Court has not found within Defendant's Opposition Motion any objection to the proposed rate. In the absence of objection,
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Defendant does, however, offer two distinct challenges to a portion of the time Plaintiff spent on the litigation relative to proceedings before the Maine Human Rights Commission (“the Commission”). In order to obtain damages or attorney’s fees in a civil action under the MHRA, a plaintiff must first initiate an action before the Commission. 5 M.R.S.A. § 4622. Accordingly, it is perfectly reasonable for Plaintiff to include in his petition for attorney’s fees the time spent before the Commission. *See New York Gaslight Club, Inc., v. Carey*, 447 U.S. 54, 63, 100 S. Ct. 2024, 2030 (1980) (in prevailing party case, “[t]he conclusion that fees are authorized for work done at the state and local levels is inescapable.”); *Nadeau v. Rainbow Rugs, Inc.*, 675 A.2d 973, 977 (Me. 1996) (allowing an award of fees for time spent before the Commission in a suit under the MHRA). Defendant’s unsupported contention that these fees should be disallowed because Plaintiff did not prevail before the Commission is unpersuasive.

However, Defendant does offer a persuasive ground upon which the Court will reduce the award with respect to Plaintiff’s attorney’s fees relative to proceedings before the Commission. Defendant points out, and Plaintiff does not dispute, that Plaintiff’s attorney was simultaneously representing multiple parties before the Commission. In particular, Plaintiff’s attorney was representing four former BIW employees, including Plaintiff, who had all apparently been laid off at the same time.⁶ Defendant contends that Plaintiff’s time before the Commission should be reduced to reflect the multiple representation. The Court is persuaded that such a reduction is reasonable. Accordingly, the Court will calculate Plaintiff’s time spent before the Commission

⁵(...continued)
the Court finds that Plaintiff’s proposed rate of \$185 per hour, as supported by various affidavits attached to Plaintiff’s Motion, is reasonable.

⁶ Defendant alleges that Plaintiff’s attorney was representing five former BIW employees, including Plaintiff, before the Commission. The Court is satisfied, based on Plaintiff’s assertion in his Reply Memorandum, that Plaintiff’s attorney was representing only four parties with a common nucleus of fact – specifically, they worked at the same department and were laid off at the same time. Plaintiff’s attorney did represent a fifth BIW employee from the same department, but apparently this fifth employee was laid off at a different time.

as follows: All time spent exclusively on Plaintiff's claim plus one-fourth of all other time before the Commission.⁷

According to the documents provided by Plaintiff, between July 10, 1996, when the billing begins, and December 24, 1997, when the Commission provided Plaintiff with notice of his right to sue, Plaintiff's attorney expended 27.7 hours on the case. Second Affidavit of Jeffrey Neil Young, Exhibit B (Docket No. 93) ("Exhibit B"). Of that time, the Court concludes that only 0.7 hours were related solely to Plaintiff's claim. Exhibit B at 1-2. For that time, Plaintiff is entitled to an award of \$112.⁸ For the remaining time, Plaintiff is awarded one-fourth of \$4,290.50, or \$1,072.63.⁹ In total, Plaintiff is entitled to an award of \$1,184.63 for attorney's fees representing work before the Commission.

Because the Court has separated out the fees with respect to the work before the Commission, the Court must now recalculate the award for the remaining time.¹⁰ From December 24, 1997 to May 28, 1999, Plaintiff's attorney apparently expended 108.3 hours on this case. Exhibit B at 3-9. Because Exhibit B includes time attributable to both Plaintiffs as well as time attributable to Plaintiff Lewis alone, Plaintiff has proposed, and the Court adopts as

⁷ The Court notes that this approach is entirely consistent with the approach employed by Plaintiff in calculating the time spent before this Court, at which time Plaintiff's attorney was representing two Plaintiffs.

⁸ This figure does not reflect a simple multiplication of 0.7 times \$185. According to Exhibit B, 0.2 hours of work was apparently done by Mr. Young, while 0.5 hours of work was done by someone referred to in the billing by the initials PNM. Exhibit B at 2. While Mr. Young's rate is \$185 per hour, PNM's time is billed at \$150 per hour. Exhibit B at 10. The separate calculations total \$112.

⁹ Again, the Court must make a detailed calculation. Of the remaining 27 hours, Mr. Young accounted for 7.7 hours, PNM accounted for 18.9 hours, JJM accounted for 0.1 hours and NCP accounted for 0.3 hours. Exhibit B at 1-2. Mr. Young's hours are multiplied by \$185 for a total of \$1,424.50. PNM's hours are multiplied by \$150 for a total of \$2,835. JJM's time is multiplied by \$145 for a total of \$14.50. NCP's time is multiplied by \$55 for a total of \$16.50. The combined total is \$4,290.50.

¹⁰ This is necessary because Exhibit B does not separate the billing between time spent before the Commission and time spent before this Court.

reasonable, a formula whereby Plaintiff is entitled to an award for all time expended solely with respect to Plaintiff Lewis and for one-half of the time expended in relation to both Plaintiff Lewis and Plaintiff French.¹¹ Applying this formula, the Court determines that of the 108.3 hours at issue, 39.7 hours were expended solely in pursuit of Plaintiff Lewis' claim. For that time, Plaintiff is entitled to an award of \$6,783.¹² The remaining 68.6 hours were expended for the benefit of both Plaintiffs. For that time, Plaintiff Lewis is entitled to one-half of \$12,691, or \$6,345.50.¹³ Combining these two amounts, the total is \$13,128.50.

Accompanying Plaintiff's Reply (Docket No. 97) is the Third Affidavit of Jeffrey Neil Young ("Third Affidavit") (Docket No. 98). In this affidavit, Plaintiff's attorney sets forth two other sets of fees charged to Plaintiff. First, the Third Affidavit includes \$2,696 in fees related to work solely on behalf on Plaintiff Lewis, which had been mistakenly omitted from Exhibit B. Because these fees relate solely to Plaintiff Lewis' case, the full amount of these previously omitted fees will be awarded to Plaintiff.

Additionally, the Third Affidavit states that Plaintiff has incurred \$5,820.50 for time spent by Plaintiff's attorney in preparing the fee petition currently under consideration, including the original brief, reply brief, and accompanying affidavits. The Court notes that this bill represents nearly forty hours of attorney's work. The Court determines that this is an excessive and unreasonable amount given the legal issues at hand. Therefore, the Court will reduce this

¹¹ As already noted, the Court has borrowed this approach in determining the proper award for work before the Commission as well. The only difference is the number of clients being represented, which is reflected in the divisor employed.

¹² Again this figure does not reflect a simple multiplication of 39.7 times \$185. According to Exhibit B, 0.2 hours of work was apparently done by NCP. Exhibit B at 3. Additionally, 6.3 hours were expended by someone referred to in the billing by the initials SJS. Exhibit B at 5. Mr. Young apparently expended the remaining 33.2 hours. Again Mr. Young's rate is \$185 per hour, NCP's time is billed at \$55 per hour, and SJS's time is billed at a rate of \$100 per hour. Exhibit B at 10. Accordingly, the separate calculations total \$6,783.

¹³ Because all 68.6 hours are attributable to Mr. Young in this instance, the calculation is quite simple. Multiplying 68.6 by Mr. Young's rate of \$185 per hour, the product is \$12,691.

amount by one-half. Accordingly, Plaintiff is entitled to an award of one-half of \$5,820.50, or \$2,910.25.

The final fee calculation, including the time incurred before the Commission (\$1,184.63), the time expended before this Court (\$13,128.50), the previously omitted time (\$2,696), and the award related to the preparation of this fee motion (\$2,910.25) totals \$19,919.38. Plaintiff is entitled to an award of \$19,919.38 for attorney's fees in this case.

D. Calculation of Costs

Defendant offers several specific objections to Plaintiff's calculation of costs. First, Defendant challenges as unreasonable the amounts expended with respect to an expert, Richard Goldstein, Ph.D.¹⁴ Plaintiff has limited his request for costs related to Dr. Goldstein to those incurred prior to October 28, 1998. Additionally, Plaintiff is seeking only one-half of these costs because this expert was used in relation to both Plaintiffs in this case. The Court is satisfied that Plaintiff is entitled to the requested award of costs relative to Dr. Goldstein's services.

Defendant next challenges the inclusion of fax and postal charges in Plaintiff's calculation because they are "overhead" costs not recoverable. While it is true that an award of costs typically does not include true overhead costs, such as rent and administrative staff, out-of-pocket costs that are directly attributable to the litigation, such as postal costs, telephone, or fax costs, are not true overhead costs. Having said that, the Court is persuaded by Defendant's argument that certain of Plaintiff's fax charges are unreasonable. Specifically, Defendant challenges \$169 in fax charges from Plaintiff's attorney in Topsham to Defendant's attorney in Bath, a local call. The Court is persuaded that these charges are unreasonable and the Court will disallow these charges.

¹⁴ Defendant initially challenges the ability of Plaintiff to recover expert costs at all under the ADEA. Because the Court has determined that Plaintiff is entitled to an award of attorney's fees and costs under the MHRA, Defendant's argument with respect to the ADEA is moot. Defendant concedes that Title VII, and by implication the MHRA, expressly allows for the reimbursement of expert fees as part of a plaintiff's costs.

Of the costs set forth in Exhibit B, \$192.20 is attributable to costs incurred solely on behalf of Plaintiff Lewis. From the remaining \$6,713.42 in costs set forth in Exhibit B, the Court subtracts \$169 in unreasonable fax charges leaving \$6544.42. Plaintiff is entitled to one half of that amount, or \$3,272.21. Additionally, the Third Affidavit sets forth \$19 in previously omitted costs and \$13.75 in costs relative to the preparation of Plaintiff's fee motion. Both of these costs will be allowed.

Combining the costs attributable only to Plaintiff Lewis (\$192.20), with the shared costs (\$3,272.21), and the omitted costs (\$19), as well as the costs related to the fee motion (\$13.75), the total is \$3,497.16. Plaintiff is entitled to an award of costs of \$3,497.16.

Conclusion

Finally, combining the fee award of \$19,919.38, with the cost award of \$3,497.16, the total award is \$23,416.54. Accordingly, it is ORDERED that Plaintiff's Motion for Award of Attorney's Fees and Costs be, and it is hereby, GRANTED in the amount of Twenty-Three Thousand Four Hundred Sixteen Dollars and Fifty-Four Cents (\$23,416.54).

GENE CARTER
District Judge

Dated at Portland, Maine this 29th day of November, 1999.