

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

August 26, 2014

JOHN A. BREDA,)	
Complainant,)	
)	8 U.S.C. § 1324b Proceeding
v.)	OCAHO Case No. 12D0077
)	
KINDRED BRAINTREE HOSPITAL, LLC,)	
Respondent.)	
_____)	

ORDER GRANTING MOTION FOR ATTORNEY’S FEES

I. PROCEDURAL HISTORY

A final decision and order was entered on October 10, 2013 finding that Kindred Braintree Hospital, LLC (Kindred, KBH, or the hospital) retaliated against Dr. John A. Breda in violation of § 1324b(a)(5) because Breda previously filed a charge of discrimination with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). *See Breda v. Kindred Braintree Hospital, LLC*, 10 OCAHO no. 1202 (2013).¹ That order set out a schedule for the parties to file their submissions respecting the issue of attorney’s fees. Breda filed a motion for attorney’s fees, and Kindred filed a response in opposition. Breda then filed a request for leave to amend his motion and affidavit, followed by a motion to supplement his amended motion, and a reply to respondent’s opposition. The filings are complete and the issue

¹ Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm# PubDecOrders>.

is ripe for resolution.

II. THE STANDARD FOR AWARDING ATTORNEY’S FEES IN THIS FORUM

The statute governing this case provides that an award of reasonable attorney’s fees may be made “if the losing party’s argument is without reasonable foundation in law and fact.” 8 U.S.C. § 1324b(h) (2012). While the text of the statute does not draw a distinction between awards to a successful complainant and awards to a successful respondent, OCAHO practice follows the dual standard set out in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) for attorney’s fees in cases arising under Title VII. See, e.g., *Trivedi v. Northrup Corp.*, 4 OCAHO no. 600, 103, 124-25 (1994). A prevailing plaintiff under that standard is ordinarily presumed to be entitled to an award of attorney’s fees to “make it easier for a plaintiff of limited means to bring a meritorious suit.” *Christiansburg Garment*, 434 U.S. at 420 (quoting remarks of Senator Humphrey, 110 Cong. Rec. 12724 (1964)). Awards to prevailing defendants, in contrast, are made only when the plaintiff is actually found to be without reasonable foundation in law or fact. *Id.* at 420 – 421.

OCAHO Rules² provide that an application for attorney’s fees must be accompanied by an itemized statement from the attorney or representative stating the actual time expended and the rate at which fees and other expenses were computed. 28 C.F.R. § 68.52(d)(6). Our case law follows the lodestar method of calculating fees as set out in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The starting point is to find the number of hours reasonably expended and multiply that figure by a reasonable hourly rate. The fee applicant bears the burden of producing satisfactory evidence supporting the hours worked and the rate claimed. *Id.*; see also *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984); cf. *Coutin v. Young & Rubicam P.R., Inc.*, 124 F.3d 331, 337 (1st Cir. 1997) (noting lodestar is the “strongly preferred method”).

III. THE POSITIONS OF THE PARTIES

Breda’s motion as amended and supplemented says he seeks \$2262.19 in attorney’s fees (including \$51.19 in shipping charges billed by his attorney), and \$211.46 in other expenses. His amended affidavit indicates that he had paid his attorney \$1921.19 through December 2013 (including \$51.19 in shipping costs), and incurred additional attorney’s fees of \$442 in January 2014, together with additional mailing costs of \$5.60. It appears that Breda added his attorney’s fees wrong, inasmuch as \$1921.19 plus \$442 is \$2363.19, not \$2262.19.

Breda’s amended motion is accompanied by John Breda’s amended affidavit and exhibits

² 28 C.F.R. Pt. 68 (2013).

consisting of A) invoices from The New Law Center, LLC dated May 9, 2012, June 2, 2012, and July 1, 2012 (3 pp.); B) Bank of America checking subtractions; C) Bank of America checking subtractions; D) Bank of America checking subtractions; E) Fed-Ex receipts; F) a comparison of

firm billing rates by practice, city, and size (3 pp.); G) Docket Entry dated October 1, 2013 and Judgment dated September 27th, 2013 in the Superior Court for the Commonwealth of Massachusetts (2 pp.); H) a letter from OSC dated September 8, 2011; and I) USPS receipts.

Also accompanying the motion is Douglas C. Reynolds' affidavit dated November 5, 2013, together with exhibits consisting of A) invoices from The New Law Center (3 pp.); B) a resume and professional profile of the affiant's background and experience (3 pp.); C) a Lawyer's Journal survey of the Massachusetts Bar (7 pp.); and D) United States Consumer Law Attorney Fee Survey Report (67 pp.). Accompanying Breda's subsequent filings were exhibits consisting of J) an invoice from The New Law Center dated January 2, 2014 (2 pp.); and K) a USPS receipt.

KBH's response to the motion argues that Breda is not entitled to a fee award at all because he cannot meet the statutory standard for an award of fees. First, KBH argues that Breda was not the prevailing party on his "primary damage claim." Second, Kindred denies that its position was without reasonable foundation in law and fact, and says that Breda has mischaracterized the nature of its counterclaim in the Massachusetts action, which was not retaliatory. Kindred also argues that Breda's itemization of shipping costs is inconsistent with an affidavit Breda filed with the Massachusetts court, and that, in any event, this forum lacks the authority to award Breda his costs. KBH says in addition that Breda's use of FedEx instead of ordinary mail was not reasonable, and that the receipts and bank statements Breda submitted do not contain adequate detail.

The hospital's response was accompanied by exhibits consisting of 1) an affidavit Breda filed in C.A. No. 10-5005-A in the Superior Court for the Commonwealth of Massachusetts (4 pp.); 2) a portion of the transcript in SUCV 2010 – 05005 in the Superior Court for the Commonwealth of Massachusetts (4 pp.); and 3) page 1 of Kindred's motion for summary decision in OCAHO Case No. 12B00077.

IV. DISCUSSION

Breda was clearly the prevailing party in his OCAHO retaliation case; that he did not prevail in some other case is of no consequence. Kindred's assertion that its counterclaim against Breda in the Massachusetts court was not retaliatory simply reflects the hospital's disagreement with the findings made in the final decision and order on the merits in the instant matter. That decision

specifically found that Kindred filed the counterclaim in the Massachusetts contract action in retaliation for Breda's having filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). The decision explained not only that Kindred's counterclaim was retaliatory on its face, but also that it lacked any basis in law or fact. Notwithstanding the hospital's representation that its claims were "compulsory counterclaims," the Massachusetts court itself said that Kindred's pleading was not a valid counterclaim, and "not a cause of action."

The Supreme Court cautioned in *Hensley* that a fee dispute is not intended to "result in a second major litigation," 461 U.S. at 437, and there is no reason that should happen in this case. After examining the exhibits, I find that the billing rate of \$340 an hour for Douglas C. Reynolds, a member of the Massachusetts bar since 1973, is an eminently reasonable rate for an attorney of similar experience in the Boston/Cambridge metropolitan area. Indeed, that rate is below both the average rate and the median rate for consumer attorneys in the Atlantic region in 2010-2011 as shown in Reynolds' exhibit D.

The number of hours Reynolds expended, moreover, is exceedingly modest for a case of this nature. Fewer than seven attorney-hours in total were billed. The invoices reflect that some of the services were provided without charge. The major portion of Reynolds' time in 2012 was devoted to telephone conferences with OSC and with the client, the preparation of Breda's OCAHO complaint and the attachments thereto, and one in-person meeting with Breda. The additional charges in January 2014 were for preparing the fee request itself, and the affidavits and exhibits to accompany it. Correcting Breda's addition and subtracting the \$51.19 his attorney paid in shipping costs, the sum total of attorney's fees Breda actually incurred for this matter was \$2312. Breda is entitled to recover these fees, together with interest for any period in which the fees remain unpaid after the expiration of thirty days.

While a number of OCAHO cases have also awarded a prevailing party the costs and incidental expenses of litigation as a matter of course without discussion, *see, e.g., Hamilton v. The Recorder*, 7 OCAHO no. 978, 925, 935 (1997); *Austin v. Jitney Jungle Stores of America, Inc.*, 7 OCAHO no. 969, 763, 772 (1997); *Lareau v. US Airways, Inc.*, 7 OCAHO no. 963, 619, 630-31 (1997), that practice has been called into serious question in cases such as *United States v. Great Earth Companies, Inc.*, 9 OCAHO no. 1070, 7 (2001); *United States v. Zabala Vineyards*, 6 OCAHO no. 844, 205, 207 (1996); and *Touissant v. Tekwood Assocs., Inc.*, 6 OCAHO no. 892, 784, 808 (1996).

Unlike the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (b)(1)(A), which provides for the award of fees *and other expenses*, and unlike Rule 54(d) of the Federal Rules of Civil Procedure, which provides for an award of costs as well as fees, neither 8 U.S.C. § 1324b nor 28 C.F.R. § 68.52(d)(6) makes any mention of the costs or incidental expenses of litigation. The provisions

governing awards to prevailing parties for proceedings in this forum are instead addressed solely to attorney's fees. KBH is correct in asserting that no authority has been cited for an award of costs in this matter. Any discrepancy or lack of detail in Breda's delivery receipts, as well as any criticism of the mode of delivery Breda chose, is accordingly moot. Absent any statutory or regulatory authority for an award of costs, each party must be responsible for its own incidental expenses.

ORDER

Kindred Braintree Hospital, LLC, shall pay Dr. John A. Breda the sum of \$2312 in attorney's fees within thirty days of the date of this order. For any period in which the amount remains unpaid after thirty days, interest will accrue at the adjusted federal rate established by the Internal Revenue Service for underpayment of taxes as set forth in § 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2) (1998).

SO ORDERED.

Dated and entered this 26th day of August, 2014.

Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Civil Procedure.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
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August 28, 2014

JOHN A. BREDA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324d Proceeding
)	OCAHO Case No. 12D00077
)	
KINDRED BRAINTREE HOSPITAL, LLC,)	
Respondent.)	
_____)	

ERRATUM

In the Order Granting Motion for Attorney’s Fees issued on August 26, 2014:

The case caption on page one reading, “OCAHO Case No. 12D0077,” is hereby corrected to read “OCAHO Case No. 12D00077.”

SO ORDERED.

Dated and entered this 28th day of August, 2014.

Ellen K. Thomas
Administrative Law Judge