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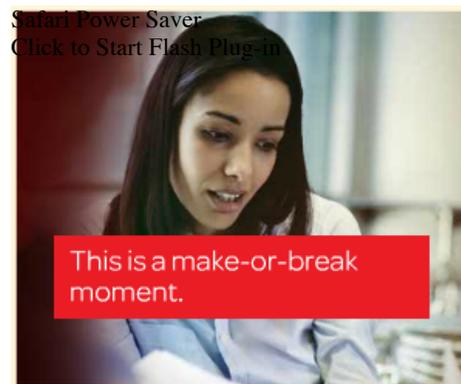
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Without question, one of the topics civil rights lawyers like to discuss (and argue over) most is the issue of attorney fees. After all, getting paid for the work we do is typically the icing on the cake to celebrate a victory for our clients. As the U.S. Supreme Court articulated in one of the earliest cases construing Title VII, *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), plaintiffs who bring actions for violation of the public accommodations provisions are "vindicated a policy that Congress considered of the highest priority" by acting as "private attorneys general." Eventually, Congress codified the private attorneys general principle into law with the enactment of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

In a recently litigated case, U.S. District Judge Robert B. Kugler of the District of New Jersey was confronted with an attorney fee petition in a case under the Americans with Disabilities Act (ADA) and offered insight into the criteria for awarding fees, including how the requested hourly rate should be evaluated. The case is *Lasky v. Moorestown Township*, D.N.J., Civ. A. 09-05624 (Mar. 22, 2013). The facts of the case, as recited by the court, indicate that plaintiff Gregory Lasky instituted an action against Moorestown Township, N.J., in state court alleging that the township failed to provide proper access to its public library, town hall, sidewalks and streets to Lasky, who is a paraplegic. The matter was removed to federal

court and, according to the court, after months of litigation and on the eve of trial, the parties reached a



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settlement. The settlement was memorialized with a consent order signed by the court. The court addressed the background of the case and calculated the award for attorney fees and costs in a March 22 opinion.

As a result of Lasky's successful claims under the ADA, the statute indicates that the court may, within its discretion, allow a "prevailing party" in an ADA enforcement action to recover a reasonable attorney fee, including litigation expenses and costs. Since there was no dispute that Lasky was a "prevailing party" within the meaning of the statute, the court instructed Lasky to submit his motion for an award of counsel fees and costs.

In his motion, the plaintiff requested \$380,468 in attorney fees and costs based on his counsel's work in the matter. Specifically, plaintiffs counsel proposed that the court accept \$450 as the reasonable hourly rate and award payment for 554 hours of work, resulting in a lodestar amount of \$249,300. Lasky also sought other litigation-related costs, as well as a 50 percent enhancement of the lodestar based on the defendant's alleged "fraud on the court," and asked for the court to impose sanctions.

In response, the defendant challenged Lasky's requested hourly rate and contested specific entries in plaintiffs counsel's hourly log. The defendant also sought a 75 percent reduction of the lodestar based on Lasky's "limited success" and to account for the state law claim that Lasky voluntarily dismissed before the parties settled.

With respect to the number of hours billed, the only issue the court needed to consider was whether the number of hours spent preparing the fee petition were reasonable. Citing the fact that plaintiffs counsel had "tried countless ADA-related cases and has likely made similar motions whenever his client was the prevailing party," the court deemed counsel's request for 80 hours "excessive" and reduced the total by 50 hours. There was no dispute with respect to the other 400-plus hours billed by plaintiffs counsel leading up to the settlement on the eve of trial.

On the issues of Lasky's request for a 50 percent enhancement of the lodestar, as well as the defendant's request for a 75 percent reduction, the court rejected both arguments. First, on the enhancement, the court held that Lasky had not established that his case represented an "exceptional circumstance in which upward departure from the lodestar would be justified." Similarly, Kugler rejected Lasky's argument that the defendant committed a "fraud on the court" merely because the defendant was criticized on the record by the magistrate judge for lack of candor to the court.

Second, the court refused to reduce the lodestar based on what the defendant deemed "limited success" by Lasky. In so holding, the court declared: "The fact that plaintiff did not receive every line item requested in the litigation is endemic to the bargaining process in which parties engage while negotiating a settlement agreement. In the complaint, plaintiff sought equitable relief, damages, attorney fees and costs for defendant's alleged noncompliance with the ADA. In the settlement agreement, plaintiff received equitable relief, attorney fees and costs for defendant's alleged noncompliance with the ADA." The court also declined to reduce the lodestar based on the voluntary dismissal of Lasky's identical state law claim under the New Jersey Law Against Discrimination.

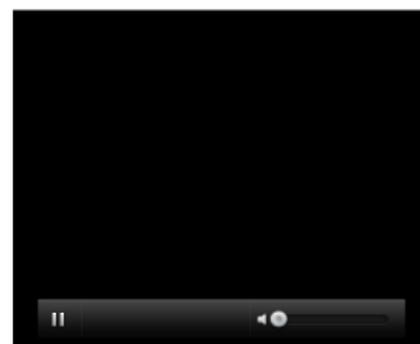
Finally, the court held an evidentiary hearing for the purpose of determining the appropriate hourly rate. As a result of that hearing, the court issued another opinion April 29 and awarded plaintiffs counsel the hourly rate of \$400, which was \$50 less than the requested rate of \$450. In support of the requested rate, plaintiffs counsel argued that he practices almost exclusively under the ADA and related state law litigation for disability discrimination, and noted there are very few attorneys in the country, let alone Southern New Jersey, that specialize in ADA practice.

In further support, plaintiffs counsel presented testimony by Richard Yaskin, an attorney who litigates primarily employment discrimination cases and who testified that \$450 was a reasonable rate. After the evidentiary hearing, plaintiffs counsel submitted a retainer letter from a former client in which he stated that his normal billable rate was \$450 per hour but that he would bill at a rate of \$400 "per professional courtesy and [the client's] past assistance of the disabled."

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In contrast, the defendant argued that Lasky's counsel did not establish that he was entitled to \$450 per hour and suggested an award "in the \$300 range" because plaintiffs counsel had been awarded \$360 in a separate ADA case less than a year earlier. The court rejected this argument because plaintiffs counsel distinguished himself because he exclusively handles ADA and related state law matters in courts around the country.

The court went on to say, "Accounting for the relatively unique nature of plaintiff's counsel's practice, his years of experience, skill, and expertise, and the testimony and other evidence presented by plaintiff's counsel, the court will award plaintiff's counsel an hourly billable rate of \$400." The court also gave deference to evidence of Lasky's retainer agreement, which recited an hourly rate of \$400. The end result was an award of 497.8 hours at the rate of \$400 per hour for a total counsel fee award of \$199,120.

Among the issues to be gleaned from these decisions, as I see it, is the fact that the court did not have a problem awarding almost 500 hours for a relatively simple ADA case that did not even proceed to trial. Moreover, the rate of \$400 per hour was deemed reasonable based on the attorney's experience handling ADA cases and the lack of comparators due to this specialized area of the law. There were no compelling circumstances warranting either an upward or downward departure in the lodestar.

Finally, it is worth noting that the court did not feel constrained to award the same hourly rate as a prior reported opinion less than a year earlier. This suggests a flexible, case-by-case approach to analyzing counsel fee issues—much like the interactive process in the underlying statute at issue.

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.

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