NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KATHLEEN J. DELANOY, *Plaintiff*, v. TOWNSHIP OF OCEAN, et al., *Defendants*.	Civil Action No.: 3:13-cv-1555 (PGS)(DEA) **MEMORANDUM AND ORDER**

SHERIDAN, District Judge.

This matter concerns the calculation of attorney's fees following the acceptance of an Offer of Judgment. Plaintiff, Kathleen J. Delanoy ("Delanoy"), was employed as a police officer with the Ocean Township Police Department ("Township"). On January 22, 2013 Delanoy filed a Complaint against the Township and former Chief of Police, Antonio V. Amodio, Jr. (Retired) for alleged discrimination and retaliation stemming from her pregnancy in violation of the New Jersey Law Against Discrimination (NJLAD), Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act. She sought compensatory, consequential and punitive damages, reasonable counsel fees, costs and expenses, and equitable relief. Defendant is still employed by the Township.

In January 2014, Defendants requested that Plaintiff provide executed HIPPA authorizations to obtain medical records about Plaintiff's pregnancy because Plaintiff alleged that she wanted lighter duty during a complicated pregnancy and claimed emotional distress. Plaintiff then made an informal application for a protective order, claiming that medical records were irrelevant because she was asserting "garden variety" emotional distress. During an April 1,

2014 hearing, Magistrate Judge Arpert ordered Plaintiff's counsel to submit a Consent Order or Stipulation about this, but a Stipulation was not submitted by Plaintiff until December 5, 2014. On April 2, 2014, the Court entered an Order directing Plaintiff to "promptly obtain and produce her medical records" with redactions. When Plaintiff didn't comply, the Court entered another order dated April 25, 2014 directing Plaintiff to provide the records no later than April 30, 2014. Plaintiff filed a Motion for Reconsideration on May 9, 2014.

On April 28, 2014, Plaintiff filed a Motion for leave to file a First Amended Complaint. Two days later, Plaintiff filed a motion for extension of time to complete discovery and to compel discovery.

At the June 16, 2014 Settlement Conference with Judge Arpert, Plaintiff sought equitable relief (changes to the terms of the maternity leave policy) and damages of $500,000 exclusive of attorney's fees and costs, or $650,000 with fees and costs. No settlement was reached.

On September 30, 2014, the court denied Plaintiff's Motion for Reconsideration, and denied Plaintiff's motion seeking leave to file an Amended Complaint and motion requesting an order compelling discovery for reasons further set forth below. Plaintiff filed a motion for reconsideration of the September 30 order on October 14, which was denied on May 12, 2015. On May 26, 2016, Plaintiff filed an appeal to this Court to vacate the May 12 order; this Court affirmed that order.

Pursuant to the September 30 order, Defendants sent a letter to Plaintiff requesting medical records, and Plaintiff produced redacted records from only one health care center on October 14.

On November 2, 2014, Defendants moved to dismiss the complaint under Fed. R. Civ. P. 41(b) for failure to follow the Court's prior orders about producing medical records. Plaintiff

then filed an opposition and cross-motion for a protective order; but Plaintiff provided her medical records from the other hospital anyway on November 28. On June 29, 2015, the Court entered a Memo and Order denying Defendants' Motion to Dismiss and Plaintiff's Motion for a Protective Order.

On August 31, 2015, Judge Arpert filed an order after holding an in camera review stating that Plaintiff's unreacted medical records did not have to be produced to Defendants because "the redacted portions of the records do not contain any relevant information or content that is likely to lead to the discovery of admissible evidence pursuant to Federal Rule of Civil Procedure 26(b)."

On September 4, 2015, Defendants served Plaintiff's counsel with an Offer of Judgment to resolve all claims for $51,000 plus reasonable attorney's fees and costs to be determined by the Court. Plaintiff accepted on September 18. A dispute arose over whether prejudgment interest was included. On October 30, 2015, Judgment was entered in favor of Delanoy against Defendants. This matter concerns the reasonableness of the attorney's fees.

ANALYSIS:

I. Lodestar Analysis

The New Jersey Law Against Discrimination allows for attorney's fees. N.J. Stat. Ann § 10:5-27.1 A prevailing party is entitled to attorney's fees, and a plaintiff prevails "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). Once a plaintiff meets this threshold of being a "prevailing party," the question turns to reasonableness of the fees. *Singer v. State*, 95 N.J. 487, 496 (1984). "The most useful starting point for determining the amount of a reasonable fee…is the number of

hours reasonable expended on the litigation multiplied by a reasonable hourly rate. This arithmetic result or 'lodestar' may then be adjusted upward or downward…" *Id.* Also, "The most important factor in dealing with this part of the question is the actual results obtained." *Id.* at 499-500. The fee award does not have to be proportional to the Offer of Judgment. *See Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1222 (3d Cir. 1995) (stating that "there is no rule that the fees awarded may be no larger than the damages award.")

Plaintiff's counsel asserts that he is clearly the prevailing party on all claims because of the Offer of Judgment. Plaintiff's counsel argues that his time expended on the litigation was reasonable. Reasonableness is determined under the lodestar analysis, which is calculated by considering the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433. Courts are only supposed to exclude as unreasonable those hours that are "excessive, redundant, or otherwise unnecessary." *Id.* at 434. Courts should count hours "that competent counsel reasonably would have expended to achieve a comparable result." *Rendine v. Pantzer*, 141 N.J. 292, 336. According to *Rendine*:

> Generally, a reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community. Thus, the court should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonable comparable skill, experience, and reputation.

Rendine, 141 N.J. at 337, quoting *Rode v. Dellarciperete*, 892, F. 2d 1177, 1183 (3d Cir. 1990). Similarly, the Third Circuit uses the "community market approach," which requires the court to "assess the experience and skill of the attorneys and compare their rates to those of comparable lawyers in the private business sphere." *Student Public Interest Research Group of New Jersey v. AT&T Bell Labs*, 842 F.2d 1436, 1447 (3d Cir. 1988). The Third Circuit considers the Community Legal Services of Philadelphia (CLS) Fee Schedule as evidence of the "community

market rate." *Maldonado v. Houstoun*, 256 F.3d 181, 187 (3d Cir. 2001). The CLS lists $600-650 as the hourly rate range for attorneys with more than 25 years of experience. Judge Arleo has stated that "the requested hourly billing rates…ranging from $350-$500 for partners; $225-$300 for associates; and $105-$130 for paralegals, are well within, if not below, the prevailing rates in New Jersey." *Chaaban v. Criscito*, 2013 WL 1737689, *11 (D.N.J. 2013). Here, Plaintiff's counsel, who has more than 25 years of experience, is requesting $450, which is reasonable.

While Defendants do not dispute the $450/hour rate, they do argue that the attorney's fees should be reduced due to unreasonableness in terms of hours billed and unnecessary and unsuccessful motions. The court should analyze the difference between the relief initially sought and what the plaintiff was ultimately awarded. *Packard-Bamberger & Co. v. Collier*, 167 N.J. 427, 446 (2001). Here, at the initial Settlement Conference, Plaintiff called for a change in the maternity policy and $500,000 in compensatory damages, not including attorney's fees and costs, or in the alternative, $650,000 including fees and costs. Ultimately, Plaintiff accepted $51,000 in damages with no equitable relief.

In response, Plaintiff claims that his hours paled in comparison to those of Defendants' counsel. Defendants' counsel billed 712 hours from January 28, 2013 to August 31, 2015, while Plaintiff is seeking compensation for 284.4 hours. (See Certification of Counsel in Reply, Exs. B-5, B-6, and B-7). Plaintiff certifies that the actual hours expended were greater, but were reduced in his discretion.

Also, Plaintiff's explain that settlement negotiations should not be used to determine the fees. "Absent a showing of bad faith, 'a party's declining settlement offers should [not] operate to reduce an otherwise appropriate award." *Ortiz v. Regan*, 980 F.2d 138, 141 (2d Cir. 1992). Furthermore, "The Supreme Court has rejected the notion that the fee award should be reduced

'simply because the plaintiff failed to prevail on every contention raised in the law suit.'" *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 378 (3d Cir. 1987). Although the actual award may be significantly lower than what was originally sought, the Offer of Judgment satisfied "all issues." The Court will not decrease the lodestar amount, which is further elaborated below.

Defendants claim that Plaintiff's counsel filed many late and unsuccessful motions, including discovery motions, a motion to amend the complaint to add additional defendants, a motion to extend and compel discovery, and motions for reconsideration, which were all denied. Plaintiff filed a motion for leave to file a First Amended Complaint on April 28, 2014, and then filed a motion for an extension of time to complete and compel discovery two days later. The Court submitted an Order on April 25, 2014 directing plaintiff to provide medical records no later than April 30, 2014, but Plaintiff filed a Motion for Reconsideration on May 9, 2014. In a September 30, 2014 order, the Court found that "given the extensive factual and procedural history concerning the issue of Plaintiff's medical records, the Court finds that the present Motion for Reconsideration borders on being frivolous." As such, Defendants request that the Court deny any compensation for hours in Table 1 of Exhibit 6. However, Judge Arpert did ultimately decide following an in-camera hearing that certain portions of the medical records had no relevant value for Defendants case, lending some credence to Plaintiff's motion for reconsideration. The Court will not deny compensation from Table 1.

In regard to Plaintiff's Motion seeking leave to file an Amended Complaint, the Court said that "Plaintiff has unacceptably failed to adhere to the discovery deadlines," despite several extensions, showed "no good cause why she only now seeks to add these new parties," and the long gap constituted "undue delay." Any joinder was deemed futile because it was barred by the statute of limitations. Defendants request that the Court deny any compensation for hours set

forth in Table 2 of Exhibit 6. Similarly, for the motion to extend and compel discovery, Judge Arpert found that it lacked merit, and arguments were "vague and unsupported by specific references to the record." Defendants also requests denial of compensation in Table 3 of Exhibit 6. The Court will deny compensation for Table 2 (1.8 hours) because it appeared there was "no good cause" for Plaintiff's motion. However, the motion to amend to extend and compel discovery, while "vague and unsupported," may not have been as clearly erroneous since it was not barred by the statute of limitations. The Court will allow compensation from table 3.

On October 14, 2014, Plaintiff filed a Motion for Reconsideration of the Court's September 30, 2014 Order, denying Plaintiff's motions seeking leave to file and amend the Complaint and an order compelling discovery. This was denied. Defendants therefore requests that the Court deny compensation in Table 4 of Exhibit 6. On October 25, 2014, Plaintiff filed a motion to extend time for filing an expert report, which was denied by the Court on November 6, 2014 as it did not set forth "good cause" to modify the existing scheduling order under Rule 16(b). Defendants also point out that it appears that a motion for reconsideration of the Court's November 6, 2014 order was drafted but not filed, and any compensation for hours set forth in Table 5 of Exhibit 6 should be denied. The Court will not second guess the first motion for reconsideration and will permit compensation from table 4. However, since the motion from table 5 was never filed, compensation for table 5 (2.6 hours) will be denied.

On May 26, 2015, Plaintiff filed an appeal to this Court to vacate the May 12, 2015 order of the Magistrate Judge. This Court affirmed the Order on May 12, 2016. Since this motion did not advance the cause of action, compensation under Table 6 of Exhibit 6 should be denied, according to Defendants. The Court will not question the merit of this motion, and will allow the compensation under table 6.

On November 3, 2014, Defendants moved to dismiss Plaintiff's Complaint under 41(b) for not following the Court's orders about producing medical records. Plaintiff then filed an opposition and several cross-motions for a protective order [ECF No. 49, 50, 55]. But on November 28, Plaintiff provided her medical records anyway, and on June 29, 2015 the Court entered an Order denying the Motion to Dismiss and Plaintiff's Motion for a Protective Order. The Court noted that "Plaintiff failed to comply with the Court's Orders requiring the production of her medical records until approximately seven months after the deadline set by the Court," noting that any further failure to comply with orders could result in sanctions. Therefore, Defendants request that the Court deny compensation for hours in Tables 7 and 8 of Exhibit 6. However, as previously stated, Plaintiff may have had valid reasons to oppose production of the medical records. The Court will allow the compensation in Tables 7 and 8.

Defendants also argue that administrative work should not be billed. Attorneys cannot charge for tasks that should be delegated to non-professional assistance. *See Halderman v. Pennhurst State School & Hosp.*, 49 F.3d 939, 942 (3d Cir. 1995). In Table 9 of Exhibit 6, Defendants point to administrative tasks that are billed at $450. These expenses should be denied, according to Defendants. Some, but not all of the entries in table 9 appear to be administrative: ("Finalize transmittal letter" [.1]; "Arrange for hand delivery and filing of Complaint [.2]"; "Communication with courier" [.2]; "Track and Confirm delivery of USPS" [.2]; "scheduling of Faller and Green deposition" [.1]; "File motion to vacate order on motion for reconsideration" [.2]; "File ECF cross motion for protective order protecting plaintiff's medical records from disclosure by K. Delanoy" [.2]). Therefore, 1.2 hours will be deducted.

Courts often allow attorneys to charge clients for travel time and costs. *See Matter of Estate of Reisen*, 313 N.J. Super. 623, 636 (Ch. Div. 1998). But Defendants claim that while an

attorney may be compensated for travel time, such time should not be compensated at a normal rate when time records do not indicate that legal work was done during the travel. *Daggett v. Kimmelman*, 617 F. Supp. 1269, 1282 (D.N.J. 1985); see also *Posa v. City of East Orange*, 2005 WL 2205786, *5-6 (reducing billing rate by fifty percent for travel time). Here, Plaintiff's counsel billed 12.3 hours of travel at his rate of $450, without showing that he performed legal services related to the case. Defendants claims that this compensation should be reduced, or, in the alternative, the Court should reduce the lodestar by a percentage of time spent traveling. Since Plaintiff has not provided any evidence of legal work performed during travel, the Court will reduce the rate for the time spent traveling by 50 percent. This would make the rate $225, and Plaintiff will be compensated $2,767.50 for travel time.

Defendants also assert that the Court should deny any compensation for hours Plaintiff's counsel spent doing legal research due to his expertise. According to *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983), "A fee applicant cannot demand a high hourly rate—which is based on his or her experience, reputation, and presumed familiarity with the applicable law—and then run up an inordinate amount of time researching that same law." Also, "the higher the hourly rate charged by an attorney based upon his or her skill and experience, the shorter the time it should take the attorney to perform a particular task." *In re Johnson & Johnson Derivative Litig.*, 2013 WL 11228425, at *23 (D.N.J. 2013). According to Defendants, Table 10 of Exhibit 6 shows how Plaintiff spent many hours researching legal issues in his field of expertise and this should be reduced. However, there is no indication that Plaintiff worked particularly slowly despite his expertise. As previously noted, Defendants billed for considerably more hours than Plaintiff. Also, as Plaintiff's counsel explains, it is important to keep up to date

on legal developments. Over the course of three years, Plaintiff's counsel billed 17.4 hours on legal research, which seems reasonable. The Court will not deduct this.

Plaintiff also seeks attorney's fees for his reply papers. Originally, only a moving brief and an opposition brief were permitted in the attorney's fee application, but Plaintiff asked the Court for permission to file a reply brief. The Court granted this request, but there was no indication that Plaintiff would seek compensation for this, and the Court was not mindful that such fees would be charged to Defendants. It is not fair to charge the entire amount to Defendants—the $10,620 that Burke charged for the 23.6 hours reviewing and responding to Defendants' opposition. The Court will allow compensation for this reply brief, but at one-half of his $450 rate. The Court will award $5,310 for this time.

II. Fee Enhancement

Plaintiff also seeks enhancement of the fee award. In *Walker v. Giuffre*, 209 N.J. 124 (2012), the New Jersey Supreme Court allowed for fee enhancement: "After the lodestar has been established, the trial court may increase the fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome." *Walker*, 209 N.J. at 133. The Court went on to say: "In particular, we fixed the ordinary range for a contingency enhancement as being between five and fifty percent and we also identified the typical range as being between twenty and thirty-five percent of the lodestar." *Id.* The *Walker* court explained:

> In evaluating a contingency enhancement, a "court's job simply will be to determine whether a case was taken on a contingent basis, whether the attorney was able to mitigate the risk of nonpayment in any way, and whether other economic risks were aggravated by the contingency of payment"…We observed that courts may also consider such questions as the strength of the claim, proof problems, and the likelihood of success, because all of those may operate as disincentives to attorneys that the fee-shifting mechanism is designed to counteract."

This case was taken on a contingency, Plaintiff's counsel claims that he was unable to mitigate the risk of nonpayment, and he asserts that other economic risks were aggravated by the contingency. The retainer agreement was a complete contingency agreement. Here, plaintiff's counsel seeks a 35% enhancement of the lodestar. Contingency enhancement is strongly favored in New Jersey. *See Coleman v. Kaye*, 87 F.3d 1491, 1511 (3d Cir. 1996), abrogated on different grounds by *Nance v. City of Newark*, 501 Fed.Appx. 123 (3d Cir. 2012). Also, a U.S. District Court exercising supplementary jurisdiction over claims brought under LAD should conduct the *Rendine* analysis where Plaintiff wins on that claim. *See Hurley v. Atlantic City Police Department*, 933 F. Supp. 396, 430 (D.N.J. 1996). Judge Irenas provided a 1/3 enhancement of the lodestar fee in *Hurley*, even though "plaintiff's case was strong." *Id.* In *Rendine*, the N.J. Supreme Court also used a 1/3 enhancement where defendants vigorously resisted plaintiff's claims, and the risk of nonpayment was moderate. *Rendine*, 141 N.J. at 344-45.

Defendants disagree that Plaintiff could not mitigate the risk of non-payment, or that economic risks were aggravated by the contingency of non-payment. According to Defendants, Plaintiff did not provide a settlement demand at the Initial Scheduling Conference, and then made an unreasonable demand at the June 16, 2014 conference.

Plaintiff's counsel argues that he repeatedly called for settlement, but nothing came of it until 33 months later, when the final pre-trial conference was approaching and Defendants filed an Offer of Judgment. Plaintiff's counsel also claims that the risk was substantial because Defendants consistently denied liability, and the Equal Employment Opportunity Commission's Final Determination had said it was "unable to conclude that the information obtained establishes a violation with respect to Charging Party's allegations that she was discriminated against."

According to Plaintiff, numerous attorneys allegedly requested thousands of dollars in attorney's fees from Delanoy to take her case before Plaintiff's attorney took it on contingency.

Defendant explains that the cases cited by Plaintiff were resolved by a jury or Court order after a hearing on the merits. This case was resolved by an Offer of Judgment. In addition, two out of the three claims were not filed under LAD (where New Jersey has very favorable fee enhancements), but Title VII and the Americans with Disabilities Act. Instead, the enhancement request should also be subject to the federal fee shifting statute under 42 U.S.C. § 1988, according to Defendants. Under this statute, the party seeking the adjustment has the burden of showing that an adjustment is necessary. *Ullman v. Superior Court of PA*, 603 F. App'x 77, 80 (3d Cir. 2015). Here, it appears that the heart of this case concerned the LAD. In contrast, see *Arc of New Jersey, Inc. v. Township of Voorhees*, 986 F. Supp. 261 (D.N.J. 1997), where Court did not apply a fee enhancement because LAD played a small part in the case, and the court did not want plaintiff's to plead LAD claims for the purpose of obtaining a fee enhancement. *Township of Voorhees*, 986 F. Supp. at 274 (explaining that "enhancements are more appropriate in cases…in which the NJLAD plays a much more integral role in a party's litigation strategy.")

NJLAD played an integral role in litigation strategy in this case. However, Plaintiff did only cite to cases that went to trial. This case settled before trial for significantly less than what Plaintiff was originally asking for. Since there was settlement, the risk was mitigated; and part of the reason this case has gone on for so long is because Plaintiff vigorously refused to provide requested medical records in discovery. The Court will not apply a fee enhancement in this case.

III. Costs and Expenses

Plaintiff also seeks costs and expenses. Under fee-shifting statutes, the prevailing party may "recover for such items as meals, lodging, messenger fees, long distance telephone calls,

photocopying, depositions and copies, trial transcripts, and other out of pocket expenses that are of the type that an attorney would normally bill a fee paying client." *Council Enterprises v. City of Atlantic City*, 200 N.J. Super. 431, 443 (Law Div. 1984).

Plaintiff also seeks fees on post-judgment work. "A party entitled to an award of attorneys' fees is also entitled to reimbursement for the time spent litigating its fee application." *Planned Parenthood of Cent. New Jersey v. Attorney General of State of New Jersey*, 257 F.3d 253, 268 (3d Cir. 2002).

However, according to Defendants, Plaintiff's counsel indicated on October 27, 2015 that his son, Donald F. Burke, Jr. would be preparing the application for attorneys' fees. His son was admitted to practice law on December 16, 2011, and billing his rate at $450 an hour would be improper, according to Defendants. But Plaintiff's counsel has certified that work performed by his son was not included in the calculation. The Court will allow compensation for costs, expenses and post-judgment work.

IV. Prejudgment Interest

Finally, Plaintiff requests prejudgment interest. New Jersey provides for this in tort cases: "The Court shall, in tort actions…include in the judgment simple interest…from the date of the institution of the action or from a date 6 months after the date the cause of action arises, whichever is later…" N.J. Court Rule 4:42-11(b). Also, LAD § 10:5-13 states that "all remedies available in common law tort actions shall be available to prevailing parties." N.J. Court Rule 4:42-11 sets forth the method for calculating this interest. Since 2013, Plaintiff calculated this total interest at $3,181.59.

Defendants contend that Plaintiff is precluded from receiving prejudgment interest because she accepted an Offer of Judgment that did not include any prejudgment interest. "The

rules of our court do not provide for prejudgment interest when an offer of judgment is accepted and a judgment is entered." *Estate of Okhotnitskaya ex. Rel. Gazarkh v. Lezameta-Benalcaz*, 400 N.J. Super. 340, 347 (Ch. Div. 2007) citing *Willts v. Eighner*, 168 N.J. Super. 197, 201 (Law Div. 1978); see also *Kane v. U-Haul Intern. Inc.*, 218 Fed.Appx. 163, 169 (3d Cir. 2007). The Offer of Judgment speaks about attorney's fees and costs, but does not mention prejudgment interest. The Court will not award prejudgment interest since this involves an Offer of Judgment.

ORDER:

THIS MATTER having been brought before the Court by Plaintiff's Motion for Attorney's Fees [ECF No. 77], and the Court having considered the moving papers, opposition thereto, and reply; for the reasons stated above, and for good cause shown;

It is on this 16th day of March, 2016,

ORDERED that Plaintiff's motion for attorney's fees is GRANTED in part and DENIED in part as follows:

- Plaintiff's counsel is hereby awarded a lodestar of attorney's fees in the amount of $127,462.50; and
- The request for a *Rendine* enhancement is **DENIED**; and
- The request for costs in the amount of $4,432.25 is **GRANTED**; and
- The request for prejudgment interest is **DENIED**; and
- The total amount of attorney's fees and costs awarded to Plaintiff's counsel is **$131,894.75**; and
- Defendants shall make payment to Plaintiff's counsel within 20 days of this Order.

PETER G. SHERIDAN, U.S.D.J.