



**In the Matter of:**

**MARK VAN,**

**COMPLAINANT,**

**v.**

**PORTNEUF MEDICAL CENTER,**

**RESPONDENT.**

**ARB CASE NOS. 11-028  
12-043**

**ALJ CASE NO. 2007-AIR-002**

**DATE: July 23, 2013**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Nick L. Nielson, Esq., *Nielson Law Office, Pocatello, Idaho***

*For the Respondent:*

**Paul D. McFarlane, Esq.; Tyler J. Anderson, Esq.; Patricia M. Olsson, Esq.; and David J. Dance, Esq.; *Moffat, Thomas, Barrett, Rock & Fields, Chartered, Boise, Idaho***

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.**

### **SUPPLEMENTAL ORDER AWARDING ATTORNEY'S FEES**

Mark Van alleged that his employer, Portneuf Medical Center (PMC), terminated his employment in violation of the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act).<sup>1</sup> After a hearing, a United States Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) concluding that PMC was liable for violating AIR-21's employment protection

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<sup>1</sup> 49 U.S.C.A. § 42121 (Thomason/West 2011). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2012).

provisions, and awarding monetary and equitable relief to Van. Subsequently, the ALJ entered a supplemental order awarding Van attorney's fees and expenses. PMC appealed both orders to the ARB. Van moved to dismiss PMC's petition of the ALJ's order awarding Van attorney's fees and expenses as untimely. We affirmed the ALJ's Decision and Order on liability and remedy, denied Van's motion to dismiss, and affirmed the ALJ's supplemental order awarding attorney's fees and expenses to Van.<sup>2</sup>

Van submitted a Petition for Attorney Fees and Costs On Appeal of \$11,908.75 for work before the ARB. PMC has not filed any objections.

As a successful AIR 21 complainant, Van is entitled to receive all costs and expenses, including attorney's fees, reasonably incurred in litigating his complaint.<sup>3</sup> The regulations governing AIR 21 provide for the award of attorney's fees incurred by a complainant who prevails in appealing his or her case to the ARB.<sup>4</sup>

The ARB uses the "lodestar method" to calculate attorney's fees. This requires multiplying the number of hours reasonably expended by a reasonable hourly rate.<sup>5</sup> An attorney requesting fees must demonstrate that the claimed hours of compensation are adequately identified and reasonably expended.<sup>6</sup> The burden is also on the attorney to demonstrate the reasonableness of his hourly fee by showing that the requested rate is in line with fees prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.<sup>7</sup>

We have reviewed the application for attorney's fees for services on Van's behalf before the ARB from February 14, 2011, through June 29, 2012. We find that the hours claimed were reasonably expended in defense of Van's complaint. Also, the attorney representing Van, Nick L. Nielson, has demonstrated the reasonableness of his hourly fee of \$125.00 an hour and \$60.00

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<sup>2</sup> *Van v. Portneuf Med. Ctr.*, ARB Nos. 11-028, 12-043; ALJ No. 2007-AIR-002 (ARB Jan. 13, 2013).

<sup>3</sup> 49 U.S.C.A. § 42121(b)(3)(B)(iii); 29 C.F.R. § 1979.109(b). *See Evans v. Miami Valley Hosp.*, ARB Nos. 08-039, -043; ALJ No. 2006-AIR-022, slip op. at 3 (ARB Aug. 31, 2009).

<sup>4</sup> 29 C.F.R. § 1979.110(d) ("If the Board concludes that the party charged has violated the law, . . . the Board shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred."). *See generally Jackson v. Butler & Co.*, ARB Nos. 03-116, -144; ALJ No. 2003-STA-026 (ARB Aug. 31, 2004).

<sup>5</sup> *Evans v. Miami Valley Hosp.*, ARB Nos. 08-039, -043; ALJ No. 2006-AIR-022, slip op. at 3 (ARB Aug. 31, 2009).

<sup>6</sup> *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161; ALJ No. 2003-STA-055, slip op. at 3 (ARB Apr. 3, 2008).

<sup>7</sup> *Evans*, ARB Nos. 08-039, -043, slip op. at 3.

an hour for paralegal Tonia R. Allred. Accordingly, we order PMC to pay Van's attorney the amount of \$11,908.75.<sup>8</sup>

**SO ORDERED.**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

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<sup>8</sup> See *Patino v. Berken Mfg. Co.*, ARB No. 06-125, ALJ No. 2005-AIR-023 (ARB Sept. 17, 2010) (affirming unchallenged fees and costs reasonably incurred in litigating the case).