



In the Matter of:

KENNETH TIPTON,

ARB CASE NO. 04-147

COMPLAINANT,

ALJ CASE NO. 2002-ERA-030

v.

DATE: December 18, 2008

**INDIANA MICHIGAN POWER
COMPANY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

John T. Burhans, *Burhans Law Offices*, St. Joseph, Michigan

For the Respondent:

Daryl M. Shapiro, Timothy J. V. Walsh, *Pillsbury Winthrop Shaw Pittman LLP*, Washington, District of Columbia

ORDER ON ATTORNEY'S FEES

Kenneth Tipton complained that the Respondent, Indiana Michigan Power Company (I&M), terminated his employment in violation of the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003). The Administrative Review Board (ARB or Board) issued a Final Decision & Order on September 29, 2006, affirming the Administrative Law Judge's (ALJ) decision that I&M violated the ERA when it fired Tipton in retaliation for his whistleblower activities. I&M appealed the Board's decision to the United States Court of Appeals for the Sixth Circuit. I&M also filed a motion for reconsideration with the Board as well as a motion to stay the Board's decision pending a final decision on I&M's appeal of the Board's decision to the Court of Appeals. On June 27, 2007, the Board issued an Order Granting

Reconsideration and Denying Motion for Stay, granting I&M's request for reduction of Tipton's front pay award and denying I&M's requests to discount the award to present value and stay the case. On May 20, 2008, the Sixth Circuit affirmed the Administrative Review Board's decision in this case.

Before us at this time are Tipton's Petition and Supplemental Petition for Attorney Fees and Costs for Work Performed before the Board (Supplemental Petition) and Petition for Attorney Fees and Costs in the Sixth Circuit Court of Appeals. The petitions, which I&M opposes, seek \$16,487.89 in attorney's fees and costs for work before the ARB, \$720 in supplemental fees and costs before the ARB, and \$44,688.58 in attorney's fees and costs for work before the Court of Appeals.

DISCUSSION

We begin first with the language of the ERA. If the Secretary of Labor determines that a respondent has violated the Act, the Secretary "at the request of the complainant shall assess against the person against whom an order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued." 42 U.S.C.A. § 5851(b)(2)(B).

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. *Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 5 (ARB May 29, 2003).

The attorney requesting fees bears the burden of proof that the claimed hours of compensation are adequately demonstrated and reasonably expended. *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161; ALJ No. 2003-STA-055, slip op. at 2 (ARB April 3, 2008). The burden is also on the attorney to demonstrate the reasonableness of his hourly fee by producing evidence 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. *Gutierrez v. Regents Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 11 (ARB Nov. 13, 2002).

Attorney's Fees before the ARB

Tipton's attorney initially requested \$16,487.89 in attorney's fees and costs for work performed before the Board from July 9, 2004, through October 16, 2006. This amount represents 69.8 hours of work performed by counsel at an hourly rate of \$225, \$500 for secretarial costs, and \$282.89 for costs of photocopying and postage. Tipton also submitted a request for \$720 in supplemental attorney's fees for representation and work before the Board. This amount represents 3.2 hours of attorney time at an hourly

rate of \$225. The Complainant has submitted a fully itemized and documented fee petition. We find the level of detail in the descriptions of the services to be adequate. We also find the hourly rate of \$225 to be reasonable. Moreover, I&M does not object to the hourly rate billed.

We agree with I&M that .4 hours on December 9, 2004, which counsel spent on accounting and tax issues related to Tipton's damages award, are not compensable because the work is not related to litigation of the case and therefore was not "reasonably incurred" in connection with Tipton's complaint. 42 U.S.C.A. § 5851(b)(2)(B). See *Leveille v. New York Air Nat'l Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-003, 1994-TSC-004, slip. at 3 (ARB Dec. 16, 2003). Time spent on coordination of payment of damages and tax consequences of damages is not compensable under the whistleblower laws. *Id.* For the same reason, we disallow .6 hours on December 12-14, 2006, and the 1.4 hours spent on November 29, 30, and December 6, 2007, described in Tipton's Supplemental Petition. This attorney work also involved accounting and tax issues.

I&M objects to the time requested for researching the issue of deliberate violations, contending that such research was premature because I&M had not yet appealed the issue to the Court of Appeals. Since I&M did eventually appeal the issue, the time is compensable. Whether the work is viewed as work performed before the Board or the Court of Appeals, the fee was "reasonably incurred . . . by the complainant for, or in connection with, the bringing of the complaint" in this case. 42 U.S.C.A. § 5851(b)(2)(B).

I&M argues that Tipton's counsel is not entitled to fees for 4.6 hours spent in attempting to obtain attorney's fees and costs for work performed before the ALJ. We have held that a prevailing plaintiff's counsel is entitled to fees for time spent in preparing a fee petition. See *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-034, slip op. at 10 (ARB Dec. 29, 2000). We are mindful, however, of the Supreme Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). We conclude that Tipton's counsel is entitled to compensation for 4.6 hours on October 19, 2005, and March 1, 2006, spent on work related to his attorney's fee request. We also consider the 1.2 hours on November 23, 2007, spent reviewing the ALJ's Attorney Fee Order to be compensable.

Tipton requests \$282.89 for reimbursement of costs for photocopying documents and \$500.00 for secretarial costs. As I&M noted, secretarial costs, in-house reproduction, postage, and express mail charges for services are part of the overhead of the attorney's office and are not separately recoverable, absent an extraordinary need. Tipton's fee petition does not allege an extraordinary need for supplemental secretarial services over and above traditional office overhead allowances. *Wheeler v. Durham City Bd. of Educ.*, 585 F.2d 618, 623 n.7 (4th Cir. 1978). Therefore, we disallow the request for photocopying and other secretarial costs.

We award the remainder of attorney's fees and costs requested for work before the ARB because the hours expended and the hourly rate are reasonable, and the fees were reasonably incurred in connection with litigation of the case.

Attorney's Fees before the United States Court of Appeals for the Sixth Circuit

We turn first to I&M's challenge to the Board's authority to award attorney's fees for work performed before the Court of Appeals. I&M contends that the Sixth Circuit's decision in *DeFord v. Sec'y of Labor*, 715 F.2d 231 (6th Cir. 1983), bars us from awarding fees for work before the Sixth Circuit. As we read *DeFord*, however, the Secretary is not foreclosed from awarding attorney's fees to a complainant who prevails in his or her own whistleblower case before the Sixth Circuit. *Scott v. Roadway Express, Inc.*, ARB No. 01-065, ALJ No.1998-STA-008, slip op. at 3 (ARB May 29, 2003).¹

In *DeFord*, the Sixth Circuit held that the fees the complainant sought did not arise from his whistleblower complaint against the Tennessee Valley Authority, in which he prevailed, but rather from his related appeal of the Secretary's damages award in his whistleblower case. In *Scott* we distinguished *DeFord* from cases in which a party successfully defends a respondent's appeal to the Court of Appeals and ruled that "Scott is entitled to attorney's fees and costs for defending the decision of the Board and the original attorney's fee award in the Circuit Court." *Scott*, slip op. at 3.

We now turn to Tipton's fee petition for work performed before the Sixth Circuit. Tipton's attorney requests a total of \$44,688.58 in attorney's fees and costs.² This amount represents 174.6 hours of work performed by counsel at an hourly rate of \$225, 75 hours of paralegal work at an hourly rate of \$65, and \$528.58 in costs for postage and travel expenses, including board, lodging, and parking. The Complainant has submitted a fully itemized and documented fee petition. We find the level of detail in the descriptions of the services to be adequate. We also find the hourly rate of \$225 to be reasonable. Moreover, I&M does not object to the hourly rate billed.

Like the Board, the Sixth Circuit has held that "[t]he starting point for determining a reasonable fee is the lodestar, which is the product of the number of hours

¹ The Fourth Circuit in *Blackburn v. Reich*, 79 F.3d 1375, 1378 (4th Cir. 1996) questioned the Sixth Circuit's conclusion in *DeFord* that the Secretary and the court had mutually exclusive authority to award costs and that DeFord's appeal to the Sixth Circuit did not arise from the same case that TVA appealed to the court.

² Tipton's counsel initially requested a total of \$49,008.58 in attorney's fees and costs, but now has withdrawn his request for 19.2 hours of time spent on his appeal of his front pay award before the Sixth Circuit, amounting to a reduction of \$4,320 in his fee request. Complainant's Reply Brief to Respondent's Opposition to Complainant's Petition for Attorney Fees and Costs in the Sixth Circuit Court of Appeals, p. 4. We have adjusted Tipton's fee request accordingly.

billed and a reasonable hourly rate.” *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 616 (2007). According to the Sixth Circuit, a reasonable fee is one that is “adequately compensatory to attract competent counsel yet which avoids producing a windfall for lawyers.” *Id.*

Tipton requests \$528.58 for reimbursement of costs for postage and travel expenses. As we noted above, postage is part of the overhead of the attorney’s office and reimbursement of postage costs is not separately recoverable, absent an extraordinary need. Tipton has not alleged or demonstrated extraordinary need. Therefore, we disallow the request for postage.

I&M contends that the costs requested for counsel’s travel expenses related to the oral argument before the Court of Appeals are part of overhead and therefore not reimbursable. Our authority to award a reasonable attorney’s fee under the ERA includes the authority to award those reasonable out-of-pocket expenses incurred by the attorney, which are normally charged to a fee-paying client in the course of providing legal services. *See Wheeler*, 585 F.2d at 623-624. Travel expenses such as those Tipton’s counsel incurred in connection with the oral argument in this case are therefore compensable.

I&M also urges us to reject Tipton’s request for reimbursement of \$4,875 in paralegal expenses because the description of the work reveals it to be secretarial in nature and therefore part of overhead. We have reviewed the descriptions of the paralegal work and find it to be traditional paralegal work. We also note that “encouraging the use of lower-cost paralegals rather than attorneys wherever possible . . . ‘encourages cost-effective delivery of legal services’” *Missouri v. Jenkins*, 491 U.S. 274, 288 (1989). We therefore find the paralegal hours to be compensable.

Finally, with regard to both fee petitions, Tipton requests a fee increase equal to the Consumer Price Index to compensate counsel for the delay in his receipt of his attorney’s fee award. The ARB has used a formula for determining the amount of any fee enlargement to compensate attorneys for delay in receiving their fee awards. *Doyle v. Hydro-Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 15-16 (ARB May 17, 2000), *overturned on other grounds*, *Doyle v. United States Sec’y of Labor*, 285 F.3d 243 (3d Cir. 2002). A fee increase should be the lesser of the additions calculated as follows:

- (1) the number of hours multiplied by the current rates of the attorneys, or
- (2) the amount of the award plus the amount of the award multiplied by the percentage change in Consumer Price Index – All Urban Consumers, U.S. city average (CPI-U).

Since counsel’s current rate is the rate he charged for work before the ARB and Court of Appeals, the calculation based on the number of hours multiplied by counsel’s

current rate yields the lesser amount. We therefore decline to add any increase to the fee award requested.

CONCLUSION

Tipton's attorney has submitted appropriately itemized and documented attorney fee applications. With the exceptions noted, we find the hours expended and the hourly rates charged are reasonable. We reduce the requested hours for attorney work before the ARB by .4 hours and disallow costs of \$782.89, resulting in a total award of \$15,615. We reduce the hours requested in Tipton's Supplemental Petition by 2 hours for a total supplemental award of \$270. Finally, we reduce Tipton's request for attorney fees and costs before the Sixth Circuit by \$16.25 and award the total amount of \$44,672.33.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge