



In the Matter of:

DAISY ABDUR-RAHMAN,

**ARB NOS. 13-080
13-085**

and

RYAN PETTY,

**ALJ NOS. 2006-WPC-002
2006-WPC-003**

COMPLAINANTS,

DATE: March 30, 2015

v.

DEKALB COUNTY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

**Robert N. Marx, Esq. and Jean Simonoff Marx, Esq.; Marx & Marx, L.L.C.;
Atlanta, Georgia**

For the Respondent:

Randy C. Gepp, Esq.; Taylor English Duma LLP, Atlanta, Georgia

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy
Chief Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge**

**FINAL DECISION AND ORDER
AFFIRMING AWARD OF ATTORNEY'S FEES AND COSTS**

Complainants Daisy Abdur-Rahman and Ryan Petty appeal (ARB No. 13-085) and Respondent Dekalb County appeals (ARB No. 13-080) from the Administrative Law Judge's Attorney Fee Order (July 15, 2013) issued in this case, which arises under the Federal Water

Pollution Control Act (FWPCA), 33 U.S.C.A. § 1367 (West 2001) and the FWPCA's implementing regulations, 29 C.F.R. Part 24 (2014).

The Administrative Law Judge (ALJ) heard the case and denied the complaint. Both parties appealed. The Administrative Review Board (ARB or Board) reversed that denial and remanded the case. *Abdur-Rahman v. Dekalb Cnty.*, ARB Nos. 10-074, 08-003; ALJ Nos. 2006-WPC-002, -003 (ARB May 18, 2010); Order Denying Reconsideration (ARB Feb. 16, 2011). On remand, the ALJ ordered reinstatement, and awarded damages. Order (Oct. 19, 2011); Decision and Order on Damages on Remand (Jan. 17, 2012) (D. & O.). The ALJ subsequently granted Respondent's motion for reconsideration, ALJ Decision and Order on Motion for Reconsideration (Feb. 17, 2012) and denied Complainants' motion for reconsideration, ALJ Decision and Order Denying Motion for Reconsideration (Mar. 19, 2012). Both parties appealed. The ARB upheld the ALJ's decisions on remand. *Abdur-Rahman v. Dekalb Cnty.*, ARB Nos. 12-064, -067; ALJ Nos. 2006-WPC-002, -003 (ARB Oct. 16, 2014).

Having prevailed in this matter, Complainants filed with the ALJ a petition seeking an award of attorney's fees in the amount of \$518,106.50, and costs and expenses in the amount of \$41,326.88, for legal services performed on Complainants' behalf in 2005-2007, 2010, and 2011. Respondent's Appendix Tab 2; *see also* Attorney Fee Order at 1 n.1.

By Order dated July 15, 2013, the ALJ awarded Complainants \$396,724.25 in legal fees and \$27,843.15 in costs and expenses. The ALJ awarded lower hourly rates than requested for 2005, 2006, and 2010 and disallowed significant time for those years, resulting in approximately \$98,000 in reductions. And while the ALJ granted the requested \$400 hourly rate for work performed after 2010, when this case was before the ALJ on remand, he again disallowed significant time, resulting in approximately \$25,000 in reductions from that requested by Complainants. ALJ Attorney Fee Order (July 15, 2013).

Both parties appeal the ALJ's award of legal fees and costs. In ARB No. 13-080, Respondent Dekalb County appeals, urging the ARB to both reduce the attorney hourly fee rate the ALJ awarded to a maximum of \$300 per hour, and reduce the number of compensable hours allowed. Complainants have filed a response to which Dekalb County has filed a reply. (ARB No. 13-080). Complainants also appeal from the ALJ's order, urging reversal both of the ALJ's denial of compensation for certain time expended and the ALJ's rate determinations, and requesting a fee enhancement for the delay in processing this case. Respondent has filed a response to which Complainants have filed a reply. (ARB No. 13-085).

JURISDICTION AND STANDARD OF REVIEW

The ARB has the delegated authority to act for the Secretary of Labor in review of ALJ decisions issued pursuant to the FWPCA. Secretary of Labor Order 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg.

69,378 (Nov. 16, 2012). This delegated authority includes the award to a prevailing party under the FWPCA of legal fees and costs reasonably incurred. 29 C.F.R. §§ 24.109(d)(1), 24.110(d). The ARB reviews an ALJ's award of attorney's fees under an abuse of discretion standard. The ALJ's award will be set aside only if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.¹

DISCUSSION

Under the FWPCA, a successful complainant is entitled to the award of all costs and expenses, including attorney's fees, *reasonably incurred* in bringing the complaint. The prevailing complainant is entitled to an assessment against a person found to have violated the FWPCA's employee protection provisions of "a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees), as determined by the Secretary of Labor, to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings." 33 U.S.C.A. § 1367(c). See 29 C.F.R. § 24.109(d)(1) (governing the award under the FWPCA of attorney's fees and costs incurred by a complainant before the ALJ), 29 C.F.R. § 24.110(d) (governing an award before the ARB).

Reasonableness is the key. Accordingly, the ARB has endorsed the lodestar method to assess the reasonableness of requested attorney's fees.² This requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.³ The attorney requesting fees bears the burden of proof that the claimed legal hours are adequately

¹ As the ARB noted in *Smith v. Lake City Enters., Inc.*, ARB Nos. 12-112, -113; ALJ No. 2006-STA-032 (ARB Sept. 12, 2013), "the ARB has embraced the abuse-of-discretion standard applied by federal appellate courts in the review of a district court's attorney fee award." Slip op. at 3 (citing *Grissom v. The Mills Corp.*, 549 F.3d 313, 320 (4th Cir. 2008) ("Our review of the district court's award is sharply circumscribed; we have recognized that because a district court has close and intimate knowledge of the efforts expended and the value of the services rendered, the fee award must not be overturned unless it is clearly wrong.")).

² E.g., *Smith v. Lake City Enters.*, ARB Nos. 12-112, -113; slip op. at 3; *Evans v. Miami Valley Hosp.*, ARB Nos. 08-039, -043; ALJ No. 2006-STA-047, slip op. at 3 n.8 (ARB Aug. 31, 2009); *Eash v. Roadway Express, Inc.*, ARB Nos. 02-008, -064; ALJ No. 2000-STA-047, slip op. at 7 (ARB June 27, 2003); *Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 5 (ARB May 29, 2003). See *Perdue v. Kenny A.*, 559 U.S. 542, 546 (2010).

³ *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161; ALJ No. 2003-STA-055, slip op. at 2 (ARB Apr. 3, 2008); *Jackson v. Butler & Co.*, ARB Nos. 03-116, -144; ALJ No. 2003-STA-026 (ARB Aug. 31, 2004).

demonstrated and reasonably expended⁴ Unreasonably expended hours include those that are (1) excessive in relationship to the task performed, (2) redundant or duplicative because multiple attorneys performed the same task, or (3) unnecessary or inappropriate because the task is not properly billed to clients.⁵

A complainant seeking an award of legal fees must submit evidence documenting the hours worked and the rates claimed, as well as records identifying the date, time, and duration necessary to accomplish each specific activity and all claimed costs.⁶ The burden of proof is also on the complainant to demonstrate the reasonableness of the attorney's hourly fee by producing evidence that the requested rate is in line with legal fees prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.⁷

I. Respondent's Appeal, ARB No. 13-080

Respondent's Challenge to the ALJ's Hourly Rate Determinations

The Marxes claimed an hourly rate of \$350 for services provided through 2007 and \$400 per hour for work performed commencing in 2010. Respondent's Appendix Tab 2. The Marxes argued that the requested rates were appropriate for the services they rendered in this case.

The ALJ awarded hourly rates of \$285 for attorney Jean Simonoff Marx and \$295 for attorney Robert N. Marx for work performed in 2005 and 2006. The ALJ further found that an hourly rate of \$350 was appropriate for work performed by either attorney from 2007 through December 2010. The ALJ next found that the hourly rate of \$400 for both attorneys was reasonable for work performed after December 2010.

⁴ *Id.* at 10.

⁵ *Id.*

⁶ *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR 010, slip op. at 2 (ARB Mar. 7, 2006).

⁷ *Evans*, ARB Nos. 08-039, -048; slip op. at 3; *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161; ALJ No. 2003-STA-055, slip op. at 3 (ARB Apr. 3, 2008); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 2 (ARB Feb. 6, 2004); *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-005, slip op. at 15 (ARB Dec. 30, 2002) (citations omitted). *See Eddleman v. Switchcraft, Inc.*, 965 F.2d 422, 424 (7th Cir. 1992) (market rate is that normally charged by lawyers of similar ability and experience in the community to their paying clients for the type of work in question).

The ALJ arrived at these rates by considering the documentation counsel provided regarding fees prevailing in Georgia for similar services by lawyers of reasonably comparable skill, experience, and reputation. Specifically, the ALJ noted counsel's own declarations, affidavits from multiple attorneys, Orders and Opinion and Orders in multiple cases, and newspaper clippings. The ALJ added, "Counsel has also supported their requested rate by reference to their qualitative and quantitative legal experience in the area of employment retaliation." ALJ Order at 2. The ALJ next considered Respondent's challenges to this evidence and Complainants' counsel's arguments in support of its evidence. The ALJ found two cited cases "unpersuasive" as the rates therein were not contested, and he noted another cited case was only partially supportive of the requested rates. *Id.* at 3. The ALJ next found "persuasive, yet not conclusive," evidence that a magistrate in a Georgia case called "Redmond," found reasonable a rate of \$350 per hour for Counsel's work therein, noting, however, that the magistrate did not actually award fees at that rate. *Id.* at 4. The ALJ concluded:

In ruling in counsel's favor, the court merely offered a comparison between the contingency fee and a \$350.00 per hour alternative arrangement. *Redmond* []. Therefore, not only does the court's comment constitute dicta in that case, it also does not reflect a full consideration of the reasonableness of the \$350.00 per hour rate, as that issue was not before that court. Therefore, the court's comment is not conclusive as to the reasonableness of that rate.

Id.

The ALJ next found "reasonable" the rates of \$285 for Jean Simonoff Marx and \$295 for Robert N. Marx for work performed in 2005 and 2006, that \$350 was "appropriate for work performed by either" attorney from 2007 through December 2010, and that \$400 for both attorneys was "reasonable" "for any work performed . . . after December 2010." The ALJ explained his reasoning as follows

In arriving at these figures, I take judicial notice of the *2005 Survey of Law Firm Economics* and *2007 Survey of Law Firm Economics*. The *Survey* lists the average, lower quartile, median, upper quartile, and ninth decile of hourly rates by attorney experience level cross-referenced with, inter alia, state, size of firm, and litigation area. In considering these statistics, as I did in my November 3, 2006 Order, I find the "upper quartile" category to be applicable to Counsel. In applying this elevated category, I again note the complexity of this case, the skill counsel has demonstrated, and the favorable comments of the *Redmond* Court concerning a \$350.00 per hour fee.

Id.

Considering Jean Simonoff Marx, the ALJ continued:

Ms. Marx has been licensed to practice law since 1987 and has nearly 25 years of experience litigating cases in the employment field. The *2005 Survey* lists the upper quartile of hourly rates for attorneys of 16-20 years of experience in Georgia as \$298.00 per hour; the upper quartile for attorneys of this experience level who practice in firms under nine lawyers is \$249.00 per hour; and the upper quartile for attorneys of this experience level in the employment litigation area is \$310.00. When these values are averaged, the result is \$285.00 per hour. *I continue to find this rate reasonable based on the evidence presented for the 2005 and 2006 fees.*

Id. (emphasis added).

Considering Robert N. Marx, the ALJ determined:

Mr. Marx has been licensed to practice law since 1987 and reported thirty-five years' experience litigating cases in the employment field. The *2005 Survey* lists the upper quartile of hourly rates for attorneys of 21-30 years of experience in Georgia as \$331.00 per hour; the upper quartile for attorneys of this experience level who practice in firms of under nine lawyers is \$250.00 per hour; and the upper quartile for attorneys of this experience level in the employment litigation area is \$325.00. When these values are averaged, the result is \$302.00 per hour. I previously found the amount of \$295.00 per hour having erroneously reported that \$304.00 was the upper quartile of attorneys of this experience level in the employment litigation area. *My finding of \$295 per hour remained unchallenged until 2011. I continue to find \$295.00 per hour reasonable based on the evidence presented for the 2005 and 2006 fees.*

Id. at 4-5.

The ALJ continued by next considering the fee rate for compensable time thereafter:

The *2007 Survey*, the most recent purchased by the Court, lists the upper quartile of hourly rates for attorneys in Georgia for an attorney with 16-20 years of experience as \$405.00, 21-30 years as \$420.00, and an attorney with 31 years of experience or more as

\$515.00. The upper quartile for firms of two to eight lawyers with 21-30 years of experience is \$306.00 and for 31 or more years of experience is \$338.00 [] The upper quartile for an attorney practicing employment litigation with 16-20 years of experience as \$350.00, 21-30 years as \$375.00, and an attorney with 31 years of experience or more as \$425.00. *Thus, even at a superficial glance, Counsel's request for \$350.00 from 2007 to January 2010 is reasonable and request for \$400.00 thereafter is reasonable and consistent with the relevant evidence provided by Counsel.*

Id. at 5 (footnote omitted).

Respondent argues that the fee rates awarded are unsupported by the evidence Counsel submitted and urges the Board to set rates. Respondent thus argues that the ALJ did not hold Counsel to their burden of proof to establish a reasonable rate but determined rates by use of judicial notice. Respondent largely dismisses the evidence Counsel submitted as faulty and not helpful in meeting their burden. Complainants' counsel argue that substantial evidence supports the rates the ALJ set "regardless of whether or not the [ALJ] took judicial notice of any survey, and regardless of whether some other court gave some other attorney some other award in some other case." Complainants-Appellants' Response to Respondent's Petition for Reduction of Attorney's Fees at 1-14.⁸ They cite declarations, relevant Atlanta market cases, their professional qualifications despite being a small law firm which, they argue, is not a factor under *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), in determining reasonable hourly rate, and nor is marital status of the firm's attorneys, nor practice area. Complainants-Appellants' Response to Respondent's Petition for Reduction of Attorney's Fees at 1-14.

Upon review, we find that the ALJ considered all the relevant evidence in setting the applicable hourly rates, including but not limited to the evidence submitted and the surveys. Thus, we find the ALJ's hourly rate determinations neither arbitrary, capricious, nor an abuse of discretion, and determine that they are in accord with applicable law.

Respondent's Challenge to the ALJ's Compensable Time Determination

Respondent recognizes that the ALJ made significant reductions in the attorneys' time for which they were entitled to a fee award. Respondent, however, urges the ARB to make additional reductions. Respondent's Brief at 15-24. Dekalb County argues that the ALJ should have made these additional reductions in time for work performed for a number of reasons,

⁸ Conversely, in their appeal, Complainants allege error in the ALJ's hourly fee rates. Complainants urge that time expended should be compensated at the rates they requested. Complainants' Brief at 5-17.

including arguing that the attorneys' times expended on certain tasks are excessive, that their tasks are exaggerated, that the work performed by the attorneys was work that more appropriately could have been accomplished by a paralegal, that the attorneys overstated the complexity of their work, that the work reflects unrealistic billing, that the attorneys' work is inadequately described to warrant any compensation, and that the attorneys' time entries are not otherwise justified as reasonable in the prosecution of this case. Respondent seeks reductions in each category of work for which Complainants' legal counsel claim an award of fees, and, in some categories, urges the ARB to double the reductions the ALJ made or reduce by twenty percent the number of hours for which legal fees are allowed. *Id.* Complainants' counsel counters that the ALJ's determinations are factual, subject not to de novo review by the ARB but to substantial evidence review and thus, Respondent's numerous factual arguments are beyond the ARB's standard of substantial evidence review of factual findings. Complainants' counsel concludes that since substantial evidence supports the ALJ's findings regarding what time is compensable, we must affirm the ALJ's findings and reject all of Respondent's requests for reductions. Complainants' Response Brief at 15-30; *but see* Complainants' Brief at 18-30.

Notwithstanding Respondent's various challenges to the compensable hours allowed, we find the ALJ's hourly determinations neither arbitrary, capricious, nor an abuse of discretion and that these determinations are in accord with law. The ALJ provided a thorough discussion of all the relevant evidence and, in an exhaustive analysis of the law as applied to the facts of this case, provided a rational basis for each time allowed or disallowed and the reasons therefor, including any adjustment in rate for the work described. The ALJ supported each allocation and/or reduction with supporting determinations and rulings and rendered a comprehensive analysis of the amount of time Counsel adequately justified for compensation. Further, the ALJ acted within his discretion in determining the persuasive value of the evidence Counsel offered in the furtherance of the Complainants' case.

II. **Complainants' Appeal, ARB 13-085**

Complainants' challenge to the ALJ's reductions, disallowances, and hourly rate assessments

Complainants seek reversal of all of the ALJ's reductions, disallowances, and related rates, claiming that they are not sustainable under either a substantial evidence or de novo review standard. Complainants' Brief at 17-28. Based on the foregoing discussion, we deny Complainants' challenges to the ALJ's reductions and disallowances and rates, as we find no abuse of discretion in the ALJ's award. We next separately address Complainants' challenge to the ALJ's denial of a fee enhancement.

Complainants' Request for Fee Enhancement Award

Complainants argue that they are entitled to a fee enhancement under *Perdue*, 559 U.S. 542, as consideration for exceptional delay in payment of fees. Complainants urge the ARB to

award \$400 for all compensable time expended in this case, resulting in an across-the-board twenty percent fee enhancement.

The ALJ considered and rejected Complainants' arguments in support of the fee enhancement request. Specifically, the ALJ noted that fee enhancements are awarded in only exceptional cases and determined, within his discretion, that this case did not constitute such an exceptional case. The ALJ noted that under *Perdue*, a fee enhancement may be awarded in three situations: (1) where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value; (2) if the attorney's performance in the case required an outlay of expenses and the litigation was exceptionally protracted; and (3) where there are extraordinary circumstances in which an attorney's performance involves an exceptional delay in the payment of fees. ALJ Order at 5. Addressing Complainants' argument that they are entitled to a fee enhancement based on the third basis set forth in *Perdue*, the ALJ noted that Complainants initially lost before the ALJ on the initial merits decision of their case, and did not prevail until 2010 when the ARB reversed the ALJ's denial of their complaints and ruled in their favor. *Id.* The ALJ also found unpersuasive the Complainants' assertion that failure to award a fee enhancement would likely deter attorneys from accepting whistleblower cases under the FWPCA. The ALJ found that Counsel's conclusion was unsupported by any proffer of evidence and based on a presumption only. *Id.* at 6.

We find no basis for overturning the ALJ's rejection of Complainants' fee enhancement request. The ALJ, upon acknowledging the Complainants' understandable frustration with the over six years that this case has been pending, correctly noted, however, that "other than asserting six years has passed since the case was filed, reminding the Court of its superior work product, and citing distinguishable cases that preceded the *Purdue* Court's decision, Counsel has done nothing to justify the enhancement." *Id.* at 5-6. See *Purdue*, 559 U.S. 542; *Gray v. Bostic*, 613 F.3d 1035, 1045 (11th Cir. 2010).

CONCLUSION

Based on the foregoing discussion, we **AFFIRM** the ALJ's Attorney Fee Order awarding Complainants' counsel \$396,724.25 in legal fees and \$27,843.15 in costs and expenses, plus interest from the date of this order at the statutory rate found at 26 U.S.C.A. § 6621(a)(2).⁹

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

⁹ *Luder v. Continental Airlines, Inc.*, ARB No. 13-026, ALJ No. 2008-AIR-009, slip op. at 5 (ARB Jan. 7, 2015) (citing *Cefalu v. Roadway Express, Inc.*, ARB No. 09-070, ALJ No. 2003-STA-055, slip op. at 3 (ARB Mar. 17, 2011)).