

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOAN ESHELMAN,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
AGERE SYSTEMS, INC.,	:	No. 03-CV-1814
Defendant.	:	

**MEMORANDUM OPINION**

TIMOTHY R. RICE  
U.S. MAGISTRATE JUDGE

November 16, 2005

Plaintiff Joan Eshelman seeks an award of \$162,976.25 in attorneys fees and \$15,391.34 in costs as a prevailing party pursuant to 42 U.S.C. § 12205 and 43 Pa. Cons. Stat. § 962(c.2). Following a four-day trial, a jury awarded Eshelman \$200,000 in damages from defendant Agere Systems, Inc. (“Agere”) for its violation of Eshelman’s rights under the Americans with Disabilities Act (“ADA”) and the Pennsylvania Human Relations Act (“PHRA”). The jury also found Agere did not discriminate in violation of the Age Discrimination in Employment Act (“ADEA”) and the PHRA, and also did not retaliate against Eshelman in violation of the ADA and the PHRA.

For the following reasons, I will reduce Eshelman’s fee petition by 15 percent to reflect her unsuccessful ADEA claim.

**I. Procedural History**

The case involved a novel issue whether a cancer survivor’s chemotherapy-related

memory impairment constituted a substantial limitation on the major life activities of working and thinking. A full discussion of the facts and legal issue is set forth in Eshelman v. Agere Systems, Inc., 2005 WL 2671381 (E.D. Pa. Oct. 19, 2005) (denying motion to overturn jury verdict).

In an October 21, 2005 order, I noted Agere concedes Eshelman is entitled to reasonable attorney's fees under the ADA, does not contest the reasonable hourly rate claimed by Eshelman's counsel, and does not contest the costs claimed by Eshelman. I ordered Eshelman to submit a revised petition reflecting "a reduction proportionate to her limited degree of success" and to reply to each specific charge contested by defendant. I also encouraged the parties to confer and attempt to resolve any itemized objections, as suggested in Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) (ideally litigants should settle amount of fee). Settlement efforts apparently proved futile. Moreover, neither party accepted my offer to host a settlement conference or hear oral argument on the contested issues. In response to my order, Eshelman has submitted a revised petition reducing her initial request of \$153,808.75 by \$7,702.50 to exclude work "associated specifically with the ADEA and retaliation claims," and increasing the request by \$16,870 for subsequent work relating to post-trial motions and the revised fee petition.

Although I will rule on each item contested by Agere, the overarching objection is that because Eshelman succeeded on only one of three claims, her fee petition should be reduced by at least 50 percent.

## **II. Legal Standard**

The appropriate rate is determined by examining the attorney's usual billing rate and the prevailing market rate in the relevant community. Hensley, 461 U.S. at 433; Robinson v.

Fetterman, 387 F.Supp.2d 432, 435 (E.D. Pa. 2005) (Bartle, J.); Bjorklund v. Phila. Housing Auth., 2003 WL 22988885 (E.D. Pa. 2003) (Savage, J.), aff'd, 118 Fed. Appx. 624 (3d Cir. 2004) This rate is then multiplied by the number of hours reasonably expended by plaintiff's counsel in litigation. Hensley, 461 U.S. at 433. Excessive, redundant, and unnecessary hours should be excluded. For example, an experienced attorney demanding a high hourly rate cannot bill an inordinate amount of time for legal work within his area of expertise. Robinson, 387 F.Supp.2d at 436 (citing Bell v. United Princeton Properties, Inc., 884 F.2d 713, 721 (3d Cir. 1989)).

After computing the lodestar (reasonable hours expended multiplied by reasonable hourly rate), I must determine if the fee should be reduced for time spent pursuing unsuccessful claims unrelated to the "ultimate result achieved." Hensley, 461 U.S. at 435; see generally Robinson, 387 F.Supp.2d at 436-37 (court must be careful to calculate the lodestar before considering exclusions for time on unsuccessful claims). This reduction is not a straightforward mathematical computation because counsel may recover fees for the litigation as a whole if all the claims involve a common core of facts and were based on related legal theories. Id. The rationale for this analysis rests on the inherent difficulty, and near impossibility, of separating hours on a claim-by-claim basis. Id.; Bjorklund, 2003 WL 22988885 at \*3. Thus, unless the lawsuit involved distinctly different claims based on different facts and theories, I should "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." Hensley, 461 U.S. at 435. If a reduction is appropriate, I have discretion to identify specific hours that should be eliminated or to reduce the award to account for the limited success. Id. at 436-37. I may not, however, adjust the lodestar to reflect

a certain ratio between the fees and damages awarded. Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1042-43 (3d Cir. 1996).

### **III. Discussion**

#### **A. Itemized Objections to Lodestar**

Agere does not contest the hourly rates of attorney Surkin (\$425), attorney Rosenblum (\$200) and attorney Fiorentino (\$150). It does, however, contest the reasonableness of some hours and maintains the fee petition includes “excessive, vague, and unreasonable hours.” I resolve Agere’s three itemized objections as follows:

1. Objection C-a (double billing by attorney Surkin). Agere contends attorney Surkin billed \$1,062.50 for a 2.5 hour initial meeting on December 5, 2001, and then billed \$425 for a second initial consultation meeting on January 31, 2002. Attorney Surkin maintains, however, that no hours were charged for the January 31 entry. I accept Mr. Surkin’s representation that no double billing occurred; to the extent any mathematical error was made to include \$425, it should be excluded.

2. Objection C-b (trial preparation entries). Agere maintains all such entries are vague and must be excluded. Eshelman agrees to reduce the entry by 0.5 hours based on his work on the unsuccessful ADEA claim. Agere’s objection ignores the reality of trial preparation, i.e., an attorney cannot be expected to itemize his bill by specific task/subject when mapping overall trial strategy and preparing to present a complex ADA and ADEA case to a jury. I overrule the objection.

3. Objection D (attorney Calo’s rate). In light of attorney Calo’s limited role in the case and the limited complexity of the tasks she performed, I will reduce her hourly rate from

\$225 to \$150, the same rate charged by attorney Fiorentino, who provided excellent work during the trial and post-trial stages of this matter.

**B. Hensley Reductions**

Agere attempts to portray plaintiff's ADA verdict as a limited success and maintains she should not be "rewarded" for pursuing unsuccessful claims. Eshelman, meanwhile, claims counsel's task during discovery and at trial was the same regardless whether her theory of discrimination was disability, age, or retaliation.

First, the disability and retaliation claims are not distinctly different claims based on different facts and theories. Both theories involved the same core factual allegations and were based on closely related legal theories. See Hensley, 461 U.S. at 435. I noted this fact during trial. See Aug. 4, 2005 Tr. at 46-47, 61. Moreover, a jury award of \$200,000 in damages constitutes full relief under the ADA in a close case such as this. See Eshelman, 2005 WL 2671381 at \*8, \*9, \*13 (noting that the evidence also would have supported a jury verdict for defendant). A jury's decision to render a split verdict on the related ADA theories does not merit a reduction in the fee award when Eshelman's ADA claim featured a common core of facts. See Bjorklund, 2003 WL 22988885 at \*3.

Second, the ADEA claim is factually and legally distinct. Although Eshelman now maintains it was difficult to determine which discriminatory motive Agere employed – age or disability – almost all of the evidence related solely to Eshelman's chemotherapy side effects and Agere's decision to lay her off based on her memory problems. As I noted at trial, Eshelman's age was at best a collateral issue. See August 4, 2005 Tr. at 78. Although I denied Agere's motion for pre-verdict judgment on the ADEA claim, I noted Eshelman's ADEA theory

was “troubling” and opined she was unlikely to prevail given the scant evidence her age was a factor in the decision to end her employment. Resolving the ADEA claim required the jury to examine different – and complex – legal rules, as well as examine the conduct of the parties from a distinct perspective. The jury was required to focus on separate and distinct motivations, actions, and conduct. Moreover, Eshelman’s attorneys were required to tailor their trial presentation, discovery, and pre-trial filings to reflect the distinct ADA and ADEA theories.

On her distinct ADEA claim, therefore, Eshelman failed to prevail and she should not be awarded fees. I reject Eshelman’s attempt to suggest nominal reductions on the rationale that the ADEA and ADA theories were inextricably intertwined.

As the debate in this case demonstrates, the parties are unable to parse the billing records for specific hours related to the ADEA claim. Although Agere has cited four examples of specific hours that should be excluded as related to the unsuccessful retaliation or ADEA claims, see September 23, 2005 Brief at 6-7, this method is imprecise. Agere acknowledges these examples are merely intended to illustrate the need for a Hensley reduction. Likewise, I am unable to target specific hours that should be eliminated and will exercise my discretion to reduce the award on a percentage basis to account for Eshelman’s unsuccessful ADEA claim. Hensley, 461 U.S. at 436-37.

For all the reasons set forth, and taking the degree of success of the litigation into account, I will reduce the lodestar by 15 percent pursuant to Hensley. Eshelman’s modified fee petition is rejected. In addition, Eshelman is directed to decrease by 20 percent the amount billed for preparation and litigation of the partially successful fee petition. I find this reduction fair and appropriate under Hensley, which requires exclusion of any hours incurred seeking and litigating

fees ultimately deemed unjustified. See Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897, 924 (3d Cir. 1985).<sup>1</sup> A primary debate in this fee litigation concerned Eshelman's entitlement to fees for its unsuccessful retaliation and ADEA claims.

The Hensley reduction should be computed on Eshelman's original fee, i.e., before it subtracted its proposed reduction of \$7,702.50, and after recalculation of attorney Calo's work at lower rate of \$150 per hour, and after recalculating charges related to the fee petition. The overall reduction of 15 percent is merited because although the unsuccessful ADEA claim was separate and distinct from the ADA claim, it was not an equal focus or integral part of the trial. Agere's proposed reduction of 50 percent is unwarranted and excessive. Accordingly, the vast majority (85 percent) of Eshelman's fee petition is merited based on the overall relief obtained in relation to the hours reasonably expended.

To avoid any dispute over the ultimate mathematical computation, see Bell, 884 F.2d at 725 (remand based on plaintiff's claim that court's computation was "riddled with mathematical errors"), Eshelman's counsel shall prepare a revised computation of fees and costs consistent with this opinion, review it with Agere's counsel, reach agreement on the computations,<sup>2</sup> and submit it for final approval within seven (7) days.

An appropriate Order follows.

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<sup>1</sup> It appears Eshelman billed approximately 24.6 hours for work related to her fee petition (10.9 hours for attorney Surkin and 13.7 hours for attorney Fiorentino).

<sup>2</sup> By reaching agreement on the computations, neither party will waive its objections to my resolution of the fee petition. The goal is to ensure that the parties agree on the mathematical adjustments, regardless whether they agree the adjustments I ordered were proper.

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**ORDER**

And now, this 16th day of November, 2005, upon consideration of plaintiff's fee petitions and defendant's objections thereto, it is hereby ORDERED that plaintiff's petition is GRANTED IN PART and DENIED IN PART, for the reasons set forth in the accompanying Memorandum Opinion. To avoid any dispute over the ultimate mathematical computation, plaintiff shall prepare a revised computation of fees and costs consistent with the accompanying Memorandum Opinion, review it with defendant's counsel, reach agreement on the computations, and submit it for final approval of the Court within seven (7) days.

BY THE COURT:

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TIMOTHY R. RICE  
U.S. MAGISTRATE JUDGE