UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Agnes M. Guard, individually and as personal representative of the Estate of George Guard, Charging Party, and Agnes M. Guard, Intervenor, v. Ocean Sands, Inc., Respondent.	HUDALJ 04-90-0231-1 Date: March 28, 1994

INITIAL DECISION AND ORDER ON APPLICATION FOR ATTORNEY FEES

Background

On December 14, 1993, Intervenor, Agnes M. Guard, filed a Petition for Attorney Fees. She seeks $19,655.17 in attorney fees and costs. Respondent Ocean Sands filed a Response to the Petition on January 14, 1994. Intervenor filed a Reply to the Response on January 28, 1994. After considering all the parties' submissions, I find that Intervenors are entitled to a portion of the requested fees.

Intervenor seeks fees for George McLain, her attorney during this litigation; for her previous attorney, Daniel Lobeck[1]; and, expert witness fees for Ted Yeatts, an engineer,

[1]Mr. Lobeck was Ms. Guard's attorney prior to HUD's issuing a Determination of Reasonable Cause in this case. Because Mr. Lobeck was to be a witness at the hearing, Ms. Guard retained Mr. McLain to represent her in this matter.

and for Mr. Lobeck's testimony at the hearing.

Mr. McLain filed an affidavit stating that he expended 92.10 hours of work on the case at a rate of $175.00 per hour, the asserted prevailing market rate, for a total of $16,117.50. In addition, Mr. McLain incurred $470.92 in out of pocket expenses. Mr. Lobeck filed an affidavit stating that he provided 9.9 hours legal services to Mr. and Ms. Guard specifically connected to this Fair Housing litigation at $120.00 per hour, and 1.6 hours at $125.00. Mr. Lobeck also incurred $6.25 in costs that the Guards paid. Additionally, Mr. Lobeck charged $930.00 for his time appearing as a witness at the hearing. In sum, the fees sought for Mr. Lobeck total $2,124.25. Mr. Yeatts billed $942.50 for his time spent testifying as an expert witness. In support of their statements, affiants also submitted complete, itemized work schedules with dates, time expended, and work performed.

Respondent contends that Intervenor is not entitled to fees for the following reasons: she did not file a timely petition for attorney's fees; Intervenor's contribution to this matter's resolution was duplicative of the Government's work; Mr. Lobeck was not entitled to expert witness fees; there was no showing of the reasonableness of the fees; and, Mr. Lobeck did not provide adequate documentation of his Fair Housing Act specific work for Intervenor.

Applicable Law

The Fair Housing Act, as amended 42 U.S.C. §§ 3601, *et seq.* ("the Act"), provides that a prevailing party in an administrative proceeding is entitled to recover attorney fees. 42 U.S.C. § 3612(p); *see* 24 C.F.R. § 104.940. A prevailing party is one whose success on significant issues achieves sought after benefits. *See Busche v. Burkee,* 649 F.2d 509, 521 (7th Cir.), *cert. denied,* 454 U.S. 897 (1981); *see also Dixon v. City of Chicago,* 948 F.2d 355, 357-58 (7th Cir. 1991).[2]

The burden of establishing the reasonableness of the requested rate, as well as the number of hours expended on litigation, is on the applicant. *Hensley v. Eckerhart,* 461 U.S. 424, 433, 437 (1983). A reasonable rate is the prevailing market rate in the relevant legal community. *Blum v. Stenson,* 465 U.S. 886, 895 (1984). An attorney's expertise is a consideration in determining the rate. *See id.* at 898; *Buffington v. Baltimore County, Md.,* 913 F.2d 113, 130 (4th Cir. 1990), *cert. denied,* 499 U.S. 906 (1991). Accordingly, the applicant must establish that the claimed rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum,* 465 U.S. at 895 n.11.

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[2]These and numerous cases cited in this decision are cases interpreting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("CRA Fees Act"). Cases interpreting the CRA Fees Act also apply to the Fair Housing Act. *See* 42 U.S.C. § 3602(o); *see also* House Judiciary Comm., *Fair Housing Amendments Act of 1988,* H. Rep. No. 711, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2174 (amendments to the Act make its fee provision similar to those in other civil rights statutes).

An applicant must submit an accounting of the time expended on litigation, ordinarily including an affidavit providing dates and the nature of the work performed. *See Calhoun v. Acme Cleveland Corp.,* 801 F.2d 558 (1st Cir. 1986). The applicant's counsel need not "record in great detail how each minute of . . . time was expended. But at least counsel should identify the general subject matter of . . . time expenditures." *Hensley,* 461 U.S. at 437 n.12. The application for fees must be sufficient to ascertain that the applicant's attorney worked on an issue upon which applicant prevailed, that the work did not constitute an unwarranted duplication of effort, and that the time involved was not excessive. *See id.* at 434, 437; *Tomazzoli v. Sheedy,* 804 F.2d 93, 97 n.5 (7th Cir. 1986).

Discussion

Entitlement

Respondent was found to have violated the Act and was assessed damages. Accordingly, Intervenor is a prevailing party and Respondent is liable for reasonable attorney fees. *See* 24 C.F.R. § 104.940(b).

Respondent contends that Intervenor is not entitled to fees because her petition for fees was filed so close to the regulatory deadline for appealing the Secretary's final decision that Respondent was unable to accurately assess the economic costs of an appeal, and was therefore prejudiced. Respondent is mistaken. As a threshold matter, Respondent has misread HUD's timing regulations for an appeal. Section 104.950(a) of 24 C.F.R. provides that a party may appeal the Secretary's final decision to the United States Court of Appeals within 30 days of the final decision. On October 4, 1993, the Secretary remanded the decision for reconsideration. The initial decision after the remand was issued on November 15, 1993. That decision became final on December 15, 1993, one day after Intervenor submitted her petition. Respondent had until January 14, 1994, to appeal the final decision, not November 3, 1993, as it argued in its brief. Nevertheless, even if Respondent had read the regulation correctly, I disagree with its main point. I have wide discretion not to award attorney fees if "special circumstances make the recovery of such fees and costs unjust." 24 C.F.R. § 104.940(b). Intervenor's request for attorney fees is neither unusual nor surprising, and the Fair Housing Act and its accompanying regulations clearly provide for such fees. 42 U.S.C. § 3612(p). There is no evidence that the December 14, 1993, petition has prejudiced Respondent in any way.

However, I will not grant recovery for the expert witness fees of either Mr. Lobeck or Mr. Yeatts. Expert witness fees are not recoverable as part of attorney

fees unless the statute authorizing attorney fees explicitly includes expert fees. *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991).[3]

Hourly Rates and Time Expended

Mr. Lobeck provided a affidavit detailing the hours he spent working for the Guards on Respondents' Fair Housing violations. Despite Respondents' assertions that he could not have provided such a detailed accounting of his time, I find the figures to be reasonable. Additionally, the figures are provided in a sworn statement, and Respondent has provided insufficient evidence to create doubt as to Mr. Lobeck's veracity. Mr. McLain also submitted a detailed affidavit of his work with the Guards. He guided them through the entire litigation process. Intervenor also submitted an affidavit from a local attorney familiar with civil litigation and civil rights cases. In that affidavit, the attorney stated that a reasonable rate for Mr. McLain's work, given his experience, would be between $150.00 to $225.00 per hour, and a reasonable time would have been 100 hours. Considering the affidavits, which are sufficiently detailed to allow me to draw a conclusion, I find that both attorneys charged reasonable fees and expended reasonable numbers of hours.

Respondents also claim that Mr. McLain's work was duplicative of the Government's efforts and unhelpful to me in deciding the case. I disagree. In *Grove v. Mead School District*, the Supreme Court let stand a holding by the Ninth Circuit Court of Appeals that "[a]wards to intervenors should not be granted unless the intervenor plays a significant role in the litigation." 753 F.2d 1528 (1985); *cert. denied*, 474 U.S. 826 (1985). Mr. McLain's efforts were primarily focused on the recovery of damages while the Government's were focused primarily on liability. That the ultimate recovery of damages was lower than the amount originally sought is irrelevant; that he was able to recover any damages is the measure of his effectiveness. Therefore I do not find Mr. McLain's work duplicative.

Conclusion and Order

Intervenors as prevailing parties are entitled to an award of attorney fees, but not expert fees.

Accordingly, within 45 days of the date this initial decision becomes final, Respondent is ORDERED to pay Intervenor $16,588.42 for Mr. McLain ($16,117.50 in

[3]The Civil Rights Act of 1991, Pub. L. No. 102-166, amended § 706(k) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(k)) to conform to *Casey*'s requirement that the awarding of expert fees must be explicitly authorized by the fee-shifting provisions of the underlying statute. The Fair Housing Act contains no explicit authorization, and has not been modified.

fees and $470.92 in out of pocket expenses) and $1,394.25 for Mr. Lobeck ($1,388.00 in fees and $6.25 in out of pocket expenses) for a total of $17,982.67.

/s/

SAMUEL A. CHAITOVITZ
Administrative Law Judge