U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

Sheila White	)	
Complainant-Intervenor	)	
v.	)	
	)	**HUD Number 05-98-0045-8**
Gertie Wooten (Her Heirs/Assigns))	)	
HUD's Respondent	)	.

ORDER GRANTING COMPLAINANT-INTERVENOR SHEILA WHITE'S MOTIONS TO SUGGEST THE DEATH OF RESPONDENT GERTIE WOOTEN; TO SUBSTITUTE THE ESTATE OF GERTIE WOOTEN AS RESPONDENT; AND FOR ATTORNEY'S FEE PETITIONS

I. Introduction and Procedural Background

This proceeding was initiated in May 2001 when the U.S. Department of Housing and Urban Development ("HUD") filed a Charge of Discrimination under the Fair Housing Act (the "Act"), 42 U.S.C. § 3601, *et seq.*, against Respondent Gertie Wooten for discriminatory statements made to Complainant-Intervenor, Sheila White. On December 3, 2004, then presiding United States Administrative Law Judge Robert Andretta concluded that Respondent was not liable under the Act. However, on February 2, 2007, the U.S. Court of Appeals for the Seventh Circuit reversed HUD's Final Order and found the Respondent liable. During the appeals process, on or about April 12, 2006, Respondent Wooten died.

As a consequence of Respondent Wooten's death, on February 1, 2008, Complainant-Intervenor Sheila White sought to amend the named Respondent, substituting the Respondent's Estate as the Respondent, by filing a Combined Motion to Suggest the Death of Respondent Gertie Wooten and for the Substitution of The Estate of Gertie Wooten for Decedent-Respondent. Complainant-Intervenor also seeks attorney fees as per the Verified Petition for Attorney Fees and Costs, filed on October 1, 2007.

HUD's Office of General Counsel, Fair Housing Enforcement Division (OGC-FHED) agrees that a ruling on the combined motion, as well as the pending attorney fee petition should be decided at this time and by this Court. Though afforded the opportunity, Counsel for the Estate of Gertie Wooten elected not to file a response on these issues.

II. Substitution of Parties

A. Applicable Law

Fed. R. Civ. P. 25 (a), ("Rule 25"), Substitution of Parties, addresses the circumstance when a party dies and the claim has not been extinguished. It provides that the Court may order the substitution of the proper party if a motion to that effect is made within 90 days after service of a statement noting the death.[1]

Whether or not a claim survives the death of a party depends on the law under which the cause of action arose.[2] Generally, "statutory claims that are primarily penal in nature do not survive the wrongdoer's death,[3] while statutory provisions with a remedial purpose may survive."[4]
With respect to tort actions, claims against a decedent's estate that are for penalties do not survive because the wrongdoer is beyond punishment, however "actions to recompense or compensate a plaintiff for a harm inflicted upon him by a decedent do survive, for an estate can . . . compensate for injury to the same extent as the decedent had he lived."[5]

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[1]The relevant text provides: Substitution of Parties. (a) Death. (1) *Substitution if the Claim Is Not Extinguished*. If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed . . . (3) *Service*. A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner**.** Service may be made in any judicial district.

[2] *Bracken v. Harris and Zide, L.L.P.*, 219 F.R.D. 481, 483; U.S. Dist. LEXIS 271 (N.D. Cal. 2004), noting that the critical inquiry is whether the statute is primarily remedial in nature;.

[3]*See United States v. Oberlin*, 718 F.2d 894, 896 (9th Cir. 1983), and *Schreiber v. Sharpless*, 110 U.S. 76, 80; 28 L. Ed. 65, 3 S. Ct. 423 (1884) (actions based upon penal statutes do not survive the death of the plaintiff)).

[4]*See Continental Assurance Co. v. American Bankshares Corp.*, 483 F. Supp. 175, 177 (E.D. Wis. 1980), involving securities fraud and stating that actions which are remedial in nature survive the death of the defendant.

[5] *Bracken*, 219 F.R.D. at 483, *Derdiarian v. Futterman Corp.*, 223 F. Supp. 265, 269 (S.D.N.Y. 1963)

B. Discussion

In the instant case, the cause of action arose under the Fair Housing Act, which is remedial in nature.[6] Furthermore, the majority of the Complainant-Intervenor's claim is for the *emotional distress* and *humiliation* she and her children suffered as a result of Respondent Wooten's statements, which were tortuous in nature. Therefore, on both of these grounds, Complainant-Intervenor's claim survived the death of Respondent Wooten.

Regarding whether Complainant-Intervenor's Motion for Substitution was timely filed, it is noted that the ninety-day limitations period under Rule 25 does not begin to run until "a formal suggestion of death is made on the record.[7] Mere reference to a party's death in court proceedings or pleadings is not sufficient to trigger the running of the limitations period for filing a motion for substitution."[8] Instead, the 90 day period begins to run only *after* the formal filing of service of the statement noting the death.

Here, although notice of Respondent's death was first made on the record on June 13, 2007 through the Charging Party's filing of a motion for a ruling on damages,[9] no formal Suggestion of Death was filed by either party until February 1, 2008. As such, Complainant-Intervenor's

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[6] The Fair Housing Act was intended by Congress to have "broad remedial intent." Alexander v. Riga, 208 F.3d 419, 425 C.A.3 (Pa.),2000, citing *Havens Realty v. Coleman*, 455 U.S. 363, 380, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982).

[7] *Grandbouche v. Lovell*, 913 F.2d 835, 836 (10th Cir. 1990), 1990 U.S App. LEXIS 15575, citing *Miller Bros. Constr. Co.*, 505 F.2d 1031, 1034-35 (10th Cir. 1974) (holding "Rule 25 provides that suggestion of death on the record is made by service of a statement of the fact of the death on the parties as provided in Rule 5, F.R.Civ.P. . . . The 90 day time limitation does not commence until this has been done.").

[8] *Grandbouche*, 913 F.2d at 836-37; *See Kaldaway v. Gold Serv. Movers, Inc.*, 129 F.R.D. 475, 477 (S.D.N.Y. 1990)(court's order noting plaintiff's death and placing case on suspended calendar, which was mailed to counsel for all parties, including decedent's counsel, insufficient to trigger the ninety-day limitations period); *Tolliver v. Leach*, 126 F.R.D. 529, 530-31 (W.D. Mich. 1989) (defense counsel's statement concerning defendant's death, made on record during discovery conference, insufficient to trigger limitations period); *Gronowicz v. Leonard*, 109 F.R.D. 624, 626-27 (S.D.N.Y. 1986) (letter from party's attorney to court notifying court of party's death insufficient suggestion of death to trigger limitations period).

[9] *See* Charging Party's Motion for a Ruling on Damages and Civil Penalty.

Motion for the Substitution of the Estate of Gertie Wooten as Respondent, which was filed on the same date as the motion to suggest death, was perforce, timely filed.

III. Attorney's Fees and Costs

Next at issue is Complainant-Intervenor's Petition for Attorney Fees under 42 U.S.C. § 3612(p) of the Act, as implemented by regulation 24 C.F.R. 180.705. Complainant-Intervenor seeks a total of $26,691.31 to cover litigation fees and costs expended by her attorney from May 2001, through October 1, 2007, totaling 151.3 hours.[10] Respondent has filed no opposition challenging the right to the fees nor to the amount sought.

A. Applicable Law

Section 3612 provides, in relevant part:

> (p) *Attorney's fees*. In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under section 812 [42 USCS § 3612], the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.

A prevailing party is one who achieves its sought after results on any significant issue in litigation. [11] Furthermore, 24 C.F.R. § 180.705 (b), the regulation implementing §3612, specifically allows payment of attorney's fees to the prevailing Intervenor.

Section 180.705 provides, in relevant part:

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[10] Complainant-Intervenor suggests three hourly rates for work performed by her attorney: $75/hr for less-complex/clerical tasks; $180/hr for work performed from 2001 to 2003; and $225/hr for post-2004 work performed, taking into account inflation and an increase in work complexity and volume as well as her experience and expertise. *See* Complainant Intervenor's Verified Petition for Attorney's Fees and Costs at 4-5; *see also* Counsel's Affidavit in Support of Petition for Attorney Fees and Costs, Group Exhibit 4: Out-of-Pocket Expenditures: Summary Table.

[11] *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, 357-358 (7th Cir. 1991).

The recovery of reasonable attorney's fees and costs will be permitted as follows:

(b) To the extent that an intervenor is a prevailing party, the respondent will be liable for reasonable attorney's fees unless special circumstances make the recovery of such fees and costs unjust.

B. Discussion

The Supreme Court has explicated that reasonable attorney's fees are calculated by multiplying the number of hours reasonably expended on the case by a reasonable hourly rate.[12] The applicant has the burden of establishing the amount of hours expended, as well as the reasonableness of the rate, for work performed on litigation.[13] The applicant must submit to the Court "full and specific accountings [sic] of their time, that is to submit affidavits that are based upon contemporaneous time records and that give specifics such as dates and the nature of the work performed."[14]

Here, Complainant-Intervenor has submitted a detailed line-by-line accounting of work performed related to litigation; dates performed; the amount of time expended; the applicable hourly rate; as well as the costs incurred for each entry.[15] I find that Complainant-Intervenor has met the above stated burden of providing an accounting of work and costs expended on litigation.

The reasonableness of the hourly rate should be based on the prevailing market rates in the relevant community; that is, the applicant must establish that the rate is comparable to those in

[12] *Earl E. Gibson, et al. v. Timothy Bangs and Karen Simpson*, HUDALJ 05-90-0293-1(4/16/93); *See Blum v. Stenson*, 465 U.S. 886, 888 (1984).

[13] *Gibson*, HUDALJ 05-90-0293-1(4/16/93); *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (interpreting the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988). Similar language is found in the Fair Housing Act at 42 U.S.C. § 3612(p)).

[14] *Gibson*, HUDALJ 05-90-0293-1(4/16/93) (quoting *Hall v. City of Auburn*, 567 F. Supp. 1222, 1227 (D. Me. 1983)).

[15] *See* Affidavit in Support of Petition for Attorney Fees and Costs, Exhibit 4.

the community for similar services by lawyers of comparable skill, experience and reputation.[16] Additionally, an attorney's expertise is a factor in determining a reasonable rate.[17]

In support of the three-level hourly rate requested by Complainant-Intervenor,[18] Leslie Matlaw, counsel for Complainant-Intervenor, submitted an Affidavit which includes a July 17, 2002 Order from the Chicago Commission on Human Relations ("CCHR"), examining and adjudging Ms. Matlaw's Hourly Rate for Fair Housing case work.[19] At that time, The CCHR determined that a reasonable hourly rate for her work was $180/hr—given her fair housing experience and expertise as well as having practiced for ten years. In the past 5 years since the last construed value of Ms. Matlaw's services, she has practiced heavily in fair housing cases.[20] In addition to her private law practice, Ms. Matlaw regularly provides legal advice and technical assistance to Housing Providers and their attorneys. She has also served as a Justice Department and HUD-approved Fair Housing Trainer. Thus, Ms. Matlaw is highly qualified for the type of legal service required by this case. I, therefore, conclude that the rate is a reasonable hourly rate to be awarded in this case.

IV. Conclusion

For the foregoing reasons, the Estate of Gertie Wooten is substituted as the Respondent in place of Gertie Wooten, the original Respondent in this proceeding. Further, Respondent's attorney is entitled as a matter of law to an award of attorney fees. Counsel's hourly rates are reasonable, given her expertise, experience, and the prevailing rates where the case was conducted. The number of hours claimed are also deemed reasonable.

ORDER

For the foregoing reasons, Complainant-Intervenor's Combined Motions to Suggest the Death of Respondent Gertie Wooten; to Substitute the Estate of Gertie Wooten as Respondent; and for

[16] *Blum*, 465 U.S. at 895.

[17] *Id.* at 898.

[18] *See supra* note 8.

[19] Final Order awarding of Attorneys fees by the CCHR for *In the Matter of Ruth Byrd and Russel Hyman*; *See* Verified Petition for Attorney's Fees and Costs at 2.

[20] *See* n.10, listing case work.

Attorney's Fee Petitions are hereby **GRANTED**. Respondent is **ORDERED** to pay the sum of $26,691.31 for Ms. Matlaw's attorney fees and costs.[21]

ORDERED, this 16th day of May, 2008.

/s/

William B. Moran
United States Administrative Law Judge
Washington, D.C.

[21]This amount consists of $25,612.50 in attorney fees and $1,078.81 for litigation expenses.