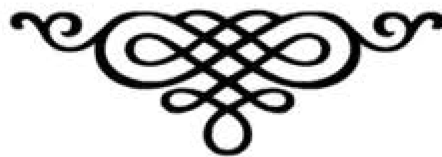
325610 – Mazyn Barash v SMART

FINAL ORDER
Daniel H. Krichbaum, Director



STATE OF MICHIGAN
CIVIL RIGHTS COMMISSION

MICHIGAN DEPARTMENT OF CIVIL RIGHTS
ex rel Mazyn Barash
Claimant,

Case No. 325610

v.

SUBURBAN MOBILITY AUTHORITY
FOR REGIONAL TRANSPORTATION,
Respondent.

OPINION AND
FINAL ORDER

At a meeting of the Michigan Civil Rights Commission
Held in Lansing, Michigan on the 21st day of May 2012

In accordance with the rules and the Michigan Civil Rights Commission (Commission), a Hearing Referee heard proofs and arguments in this matter during seventeen days of hearing held between November 7, 2007 and June 4, 2009. This hearing referee subsequently issued a report recommending a dismissal of this case without a finding of liability.

The Commission considered exceptions filed by both parties and heard oral argument in July of 2011. On October 13, 2011, in an opinion prepared by Commissioner Mike Zelley, the Commission rejected the hearing referee's report. After stating its findings of fact and conclusions of law the Commission's opinion and order finds SMART to be liable, concluding that Petitioner "presented facts sufficient to establish that Respondent violated the Elliott-Larsen Civil Rights Act and Title VII of the Civil Rights Act of 1964 by discriminating against him on the basis of his national origin." The October 13, 2011 Opinion is made part of this Order by reference.

The Commission did not make a determination on damages or attorney fees in its October 13, 2011, Order, instead soliciting briefs on damages from the parties. Following receipt of the briefs, the Commission, on January 18, 2012 remanded the case to the Michigan Appellate Hearing System for the appointment of a new referee for the purpose of holding a hearing on, and issuing a proposal for decision covering, damages, attorney fees and a motion for suppression filed by Respondent. The second hearing officer's proposed findings were issued on April 24, 2012 and are made part of this Order by reference.

The parties were provided an opportunity, and both did submit, exceptions to the recommendations, and oral argument before the Commission was held on May 21, 2012. Having considered all of the above, and following discussion held as part of an open meeting, the Commission voted to adopt the second referee's Proposal for Decision with one exception. The Commission rejected the referee's conclusion that Claimant had not mitigated and was therefore not entitled to recover any economic damages for lost wages prior to his termination. The Commission stated: "We believe Claimant Barash is entitled to, and we do award, economic damages for lost wages during the time he was employed," and adopted the hearing officer's conclusion that absent the failure to mitigate Claimant would be entitled to "the difference between sick leave pay and full pay for 26 weeks and 78 weeks of pay for his unpaid leave time." (PFD, p. 23) The Commission's May 21, 2012, order, which also includes the specific amounts included below, is made part of this Order by reference.

The Commission therefore makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Commission adopts and incorporates the findings of fact as stated in the opinion prepared by Commissioner Zelley and adopted by the Commission October 13, 2011.

2. The Commission further adopts and incorporates the findings of fact as stated in the Proposal For Decision prepared by the Michigan Administrative Hearing System and adopted by the Commission May 21, 2012.

CONCLUSIONS OF LAW

1. The Commission adopts and incorporates the conclusions of law as stated in the opinion prepared by Commissioner Zelley and adopted by the Commission October 13, 2011.

2. The Commission further adopts and incorporates the conclusions of law as stated in the Proposal For Decision prepared by the Michigan Administrative Hearing System and adopted by the Commission May 21, 2012, EXCEPT THAT THE COMMISSION REJECTS the conclusions (PFD, p. 24) that Claimant should be denied compensation for lost wages during the full period during which he was employed, AND INSTEAD FINDS that Claimant is entitled to the difference between sick leave pay and full pay for 26 weeks, and that he is entitled to full pay for 78 weeks of his unpaid leave time.

Therefore:

IT IS HEREBY ORDERED that:

A. Respondent cease and desist from discriminating against any employee by creating, maintaining, or failing to address a hostile work environment.

B. Respondent's Motion to strike Claimant's Evidence and Documents Produced after the Hearing Record was closed is GRANTED.

C. Claimant is awarded $68,016.00 for lost wages and/or other economic damages together with statutory interest

D. Claimant is awarded $150,000.00 for mental/emotional distress and/or other non-economic damages.

E. Respondent shall remit $83,925.00 to the Schechter Law Firm for attorney fees.

F. Respondent shall remit $37.325.75 to the Akeel Law Firm for attorney fees.

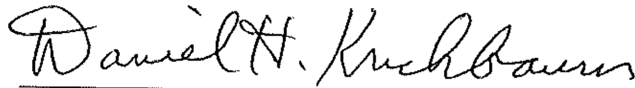
G. Respondent shall reimburse $2,331.67 to the Schechter Law Firm for costs.

H. Respondent shall reimburse $1,017.20 to the Akeel Law Firm for costs.

I. Statutory interest shall be awarded from the date of the filing of this civil rights complaint on June 8, 2004 until the judgment is satisfied.

J. This is a final order and resolves this case.

Michigan Civil Rights Commission



May 25, 2012
Date

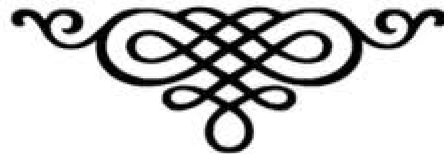
Daniel H. Krichbaum, Director

NOTICE OF RIGHT TO APPEAL

You are hereby notified of your right to appeal within thirty (30) days to the Circuit Court of the State of Michigan having jurisdiction as provided by law. MCLA 37.2606

325610 – Mazyn Barash v SMART

May 21, 2012
OPINION & ORDER
Michael Zelley, Commission Chair



STATE OF MICHIGAN
CIVIL RIGHTS COMMISSION

MICHIGAN DEPARTMENT OF CIVIL RIGHTS
ex rel Mazyn Barash
Claimant,
v
SUBURBAN MOBILITY AUTHORITY
FOR REGIONAL TRANSPORTATION,
Respondent.

ORDER
Case No. 325610

At a meeting of the Michigan Civil Rights Commission
Held in Lansing, Michigan on the 21st day of May 2012

The Michigan Civil Rights Commission ("Commission") having previously determined that discrimination occurred and that SMART was liable therefore; having remanded the matter to the Michigan Administrative Hearing System (MAHS) for a calculation of damages, a calculation of attorney fees and a ruling on Respondent's Motion to strike Claimant's Evidence and Documents Produced after the Hearing Record was closed; having reviewed the Proposal For Decision (PFD) prepared by the Administrative Law Judge assigned by MAHS; having reviewed the exceptions to the PFD submitted by both parties; having heard the arguments of the parties, and after due consideration and discussion having voted in favor of the following:

IT IS HEREBY ORDERED that the Proposal for Decision is adopted by the Commission in its entirety, with the following exception(s):

We believe Claimant Barash is entitled to, and we do award, economic damages for lost wages during the time he was employed.

IT IS FURTHER ORDERED THAT Respondent's Motion to strike Claimant's Evidence and Documents Produced after the Hearing Record was closed is GRANTED.

IT IS FURTHER ORDERED THAT damages are awarded in the amount(s) of:

$*68,016.00*___ for lost wages and/or other economic damages

$*150,000.00*__ for mental/emotional distress and/or other non-economic damages.

IT IS FURTHER ORDERED THAT attorney fees are awarded in the amount(s) of:

$*83,925.00* payable to the Schector firm.

$*37.325.75* payable to the Akeel firm.

IT IS FURTHER ORDERED THAT costs are awarded in the amount(s) of:

$*2,331.67* payable to the Schector firm.

$*1,017.20* payable to the Akeel firm.

Michigan Civil Rights Commission
Michael Zelley Chair

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

IN THE MATTER OF:

Michigan Department of Civil Rights,
ex rel Mazyn Barash,

Petitioner,

v.

Suburban Mobility Authority for Regional Transportation (SMART),

Respondent.
______________________/

Docket No. 12-000022-CR

Agency No. 325610

Agency: Civil Rights

Case Type: Civil Rights

Issued and entered
this ___ day of April, 2012
by Steven J. Kibit, Administrative Law Judge
Michigan Administrative Hearing System

PROPOSAL FOR DECISION ON REMAND FROM THE MICHIGAN CIVIL RIGHTS COMMISSION FOR DETERMINATION OF DAMAGES AND ATTORNEY'S FEES

The Michigan Civil Rights Commission was created by the Michigan Constitution of 1963 to carry out the guarantees against discrimination articulated in Article I, Section 2. As further stated in Article V, Section 29, the state constitution directs the Commission to investigate alleged discrimination against any person because of religion, race, color or national origin and to "secure the equal protection of such civil rights without such discrimination." Public Acts 453 and 220 of 1976 and subsequent amendments have added sex, age, marital status, height, weight, arrest record, and physical and mental disabilities to the original four protected categories.

PROCEDURAL HISTORY

Petitioner Mazyn Barash was employed by Respondent Suburban Mobility Authority for Regional Transportation (SMART) from 1989 to April 4, 2007. Barash is also an American citizen of Iraqi national origin.

On June 8, 2004, Petitioner filed a complaint with the Michigan Department of Civil Rights (MDCR). In that complaint, Petitioner asserted that Respondent violated the Elliot-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101 *et seq.*, and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 USC 2000e *et seq.*, by discriminating against him on the basis of his national origin. (June 8, 2004 Charge of Discrimination by Petitioner).

As later stated, Petitioner specifically charged:

> V. During his employment, Claimant has, and continues to be, subjected to harassment based on his national origin, including but not limited to, derogatory comments such as calling Claimant a "rag head," a "towel head," and asking Claimant where his camel was.
>
> VI. Claimant was also subjected to offensive and stereotypical drawings and cartoons which were intended to and did ridicule persons of Claimant's national origin.
>
> VII. Respondent's supervisory personnel were made aware of the derogatory comments, conduct and drawings, but took no action to stop the harassment and/or insure that no further harassment occurred.
>
> VIII. The conduct and communication to which he was subjected and continues to be subjected substantially interfered with claimant's employment and/or created a hostile, intimidating and offensive working environment.
>
> * * *
>
> X. As a direct and proximate result of Respondents' unlawful discrimination, Claimant has suffered, and continues to suffer, loss of wages and benefits, medical expenses, humiliation, extreme embarrassment, extreme emotional distress, and mental anguish.

(June 19, 2006 Charge of Discrimination by the MDCR)[1]

After the issuance and service of the charge, the Michigan Civil Rights Commission (the "Commission") referred this matter to a hearing referee pursuant to MDCR and Commission Rule 37.12. Seventeen days of hearing were held before Hearing Referee Goldman over an eighteen (18) month period (the "Goldman Hearing"). The hearing commenced on November 7, 2007 and concluded on June 4, 2009. As noted by the referee in his subsequent report, the testimony taken during those hearing fills over 2,300 transcript pages and over 100 exhibits that were admitted into evidence. Post-hearing briefs and reply briefs were also exchanged.

[1] Petitioner initially filed other specific charges, but they were later withdrawn or dismissed voluntarily. (Tr. I, pages 20-21; Tr. II, pages 12-15; Tr. III, pages 45-46, 57-68; Goldman Hearing Exhibits A and B).

Hearing Referee Goldman subsequently issued a report recommending a dismissal of this case. As found by the referee, in every case where Petitioner produced evidence of allegedly discriminatory conduct: (1) the conduct bore no relationship to Petitioner; (2) the conduct bore no relationship to Petitioner's national origin; (3) the evidence was not brought to the attention of Respondent until the hearing; (4) Respondent had no authority over the matter; (5) the conduct was patently inoffensive; or (6) the conduct did not or could not intimidate Petitioner.

On February 10, 2011, Petitioner filed his Exceptions to the Hearing Referee's Report and a brief in support of those exceptions. In those filings, Petitioner argued that the referee ignored both compelling evidence and the law in making his findings, and that the Commission should find that unlawful discrimination did occur.

In response, on March 14, 2011, Respondent submitted a Response to Petitioner's Exceptions and argued that Petitioner ignores all the evidence against him in the record and distorts the hearing record itself. Respondent also noted that the hearing referee was in the best position to judge the credibility of witnesses and that his opinion should be adopted.

Petitioner then filed a Reply Brief in Response to Respondent's Post Hearing Brief on or about March 23, 2011. In that reply, Petitioner again argued that the totality of the circumstances demonstrates that unlawful workplace harassment occurred and that Respondent failed to properly respond to it.

The Commission heard oral arguments from the parties during its July 2011 meeting.

On October 13, 2011, the Commission adopted an opinion and order finding liability in this matter and ruling that Petitioner "presented facts sufficient to establish that Respondent violated the Elliot-Larson Civil Rights Act and Title VII of the Civil Rights Act of 1964 by discriminating against him on the basis of his national origin." (October 13, 2011 Opinion and Order by the Michigan Civil Rights Commission, page 1).

In that opinion and order, the Commission, after stating the elements of his claim that Petitioner had to establish, found that Petitioner is a member of a protected group and that he was subjected to communication and conduct on the basis of his protected status, *i.e.* his national origin. (October 13, 2011 Opinion and Order by the Michigan Civil Rights Commission, pages 1-2). With respect to the communication and conduct Petitioner was subjected to on the basis of his national origin, the Commission noted that, while not an exhaustive list, Petitioner was subjected to:

a. Threatening phone calls
b. Poster depicting a camel in cross-heirs [sic] with words, "I'd fly 10,000 [sic] miles to smoke a camel" at the workplace
c. Poster depicting Statute of Liberty extending middle finger with words, "We're coming 'M-Fers'" at the workplace

d. A Letter referring to Claimant as a "Sand" N-ger,
e. The outrageous conduct of co-worker, Rodney Bolton, including:
   i. Calling Claimant a "Raghead,"
   ii. Wearing a towel on his head,
   iii. Telling Claimant he smokes camels,
   iv. Telling Claimant he wishes he could "kill all Iraqis,"
f. Co-Workers telling Claimant he "'f's camels," and
g. Co-Workers calling Claimant a "Saddam lover."

(October 13, 2011 Opinion and Order by the Michigan Civil Rights Commission, page 2)

The Commission also ruled that the above communication and conduct was unwelcome and that it was intended to, and did, substantially interfere with Petitioner's employment. (October 13, 2011 Opinion and Order by the Michigan Civil Rights Commission, pages 2-3). Finally, the Commission further concluded that Petitioner established the Respondeat Superior element of his claim, *i.e.* that Respondent either knew or should have known of the unwelcome communication and conduct and that Respondent failed to take the appropriate corrective action. (October 13, 2011 Opinion and Order by the Michigan Civil Rights Commission, pages 3-4).

While it found liability, the Commission did not address damages at the time of its opinion and order. A hearing date for damages was set for December 5, 2011.

On October 28, 2011, Petitioner filed a Brief on Damages. Petitioner seeks a total of $1,336,333.00 in damages. Those damages include economic damages, non-economic damages, attorney's fees, costs, and sanctions. With respect to economic damages, Petitioner seeks $897,079 in compensation for his total loss of income and benefits as a result of the wrongful termination and $20,151.50 in compensation for loss of salary while he was employed. Petitioner also seeks $250,000 for mental and emotional distress, $130,384.50 in attorney's fees, and $3,719.00 in costs. Regarding sanctions, Petitioner asserted that Respondent had improperly retaliated against one of Petitioner's former co-workers for assisting Petitioner in this matter and, consequently, Respondent should have to pay $35,000 for violating MCL 37.2605.

On November 11, 2011, Respondent filed a Brief in Opposition to Petitioner's Brief on Damages. In that response, SMART argues that Petitioner is not entitled to economic damages given his limited claims and the evidence in this case, as well as his failure to mitigate any damages. SMART also argues that, to the extent Petitioner is entitled to economic damages, they are limited to the time he was working for Respondent and are much less than he asserts. Additionally, Respondent argues that Petitioner is not entitled to compensation for non-economic damages because he failed to present any evidence regarding how he was affected by Rodney Bolton's conduct and comments. Respondent further argues that it is entitled to a hearing on the claim for attorney's fees and that there is no basis for awarding sanctions in this case.

Respondent also filed a Motion to Strike Petitioner's Evidence and Documents Produced After the Hearing Record Was Closed. In that motion, Respondent asserts that Petitioner attached new evidence to his brief, including an expert's report, and that such evidence is improper given that the record is closed. In the alternative, Respondent argues that it should be given the opportunity to respond to such evidence and submit its own expert report. Respondent also acknowledges that some of the evidence would be appropriate with respect to the determination of attorney's fees.

On November 29, 2011, Petitioner filed a Response to Respondent's Motion to Strike. In that response, Petitioner argues that, given the nature of the proceedings in this case and the admission of evidence without regard to the strict rules of evidence, the new evidence offered by Petitioner should be considered as it will only help the Commission in making its decision.

Petitioner also submitted a Reply Brief to Respondent's Opposition in which he asserts that his wrongful termination was always an issue in this case and that the termination was the final act of discrimination. Petitioner also asserts that he both demonstrated and properly calculated his damages.

Subsequently, at a meeting of the Commission to hear oral arguments on damages, the Commission decided to remand this matter to a new hearing officer. On January 18, 2012, the Commission ordered:

> **IT IS HEARBY ORDERED** that this matter is hereby remanded to the Michigan Department of Licensing and Regulatory Affairs ("LARA") for the assignment of a new hearing officer. On remand the hearing officer is requested to make a decision/recommendation on the following issues: (1) a calculation of damages based on a review of the administrative record complied below and the briefs submitted by Claimant and Respondent, through their respective attorneys; (2) a decision on Respondent "Motion to Strike Claimant's Evidence and Documents Produced After the Hearing Record was Closed"; and (3) a hearing and recommendation as to the calculation of attorney's fees to be awarded in this matter.
>
> **IT IS FURTHER ORDERED** that except as to issue 3, above, the hearing officer's review of this matter will be limited to a review of the administrative record complied below. There shall be no new evidence presented, nor the record reopened, as the issues (1) and (2), above. However, as to issue (3), the hearing officer shall make a record and take testimony from witnesses presented by the parties in order to calculate attorney's fees.

(January 18, 2010 Order by the Michigan Civil Rights Commission)

The matter was assigned to this Administrative Law Judge following remand and, after due notice, a hearing on attorney's fees was held on February 8, 2012. Attorney Shereef Akeel appeared and testified on Petitioner's behalf. Attorney Lynn Shector also testified as a witness for Petitioner. Attorney Heidi Hudson appeared on behalf of Respondent.

Following the hearing, the record was left open until March 2, 2012, so that the parties could submit additional briefs and evidence missing from the record. Both parties submitted such a brief. Respondent also provided transcripts requested by this Administrative Law Judge while Petitioner's representative indicated by e-mail that the missing evidence he was to provide was not entered into as an exhibit during the earlier hearing and was therefore not part of the record.

EXHIBITS

Transcripts of Goldman Hearing:

Tr. I	=	Hearing Transcript, Volume I, November 7, 2007
Tr. II	=	Hearing Transcript, Volume II, January 3, 2008
Tr. III	=	Hearing Transcript, Volume III, January 4, 2008
Tr. IV	=	Hearing Transcript, Volume IV, January 10, 2008
Tr. V	=	Hearing Transcript, Volume V, January 15, 2008
Tr. VI	=	Hearing Transcript, Volume VI, January 31, 2008
Tr. VII	=	Hearing Transcript, Volume VII, September 8, 2008
Tr. VIII	=	Hearing Transcript, Volume VIII, September 12, 2008
Tr. IX	=	Hearing Transcript, Volume IX, September 15, 2008
Tr. X	=	Hearing Transcript, Volume X, April 6, 2009
Tr. XI	=	Hearing Transcript, Volume XI, April 8, 2009
Tr. XII	=	Hearing Transcript, Volume XII, April 9, 2009
Tr. XIII	=	Hearing Transcript, Volume XIII, April 20, 2009
Tr. XIV	=	Hearing Transcript, Volume XIV, April 21, 2009
Tr. XV	=	Hearing Transcript, Volume XV, April 27, 2009

Tr. XV-B = Hearing Transcript, Volume XV-B, April 29. 2009

Tr. XVI = Hearing Transcript, Volume XVI, June 2, 2009

Tr. XVII = Hearing Transcript, Volume XVII, June 4, 2009

Goldman Hearing Exhibits:

Petitioner's Revised List of Admitted Exhibits:

2a. Charges of Discrimination, Case No. 325610

3. E-mail from Barash to Janet Dillard and Lynn Shector, 2/10/05

6. Written statement by Greg Thorn, 4/19/04

8. Written Release from Thomas LaCombe to Barash, 6/25/04

9. Write-up of Barash #4147, 4/9/02

9a. CD recording of Rodney Bolton at time clock

9b. CD recording of Bolton singing

10. Letter from Barash to LaCombe, 10/15/04

14b. Written statement by Joseph Mathis, 11/9/04

15. W-2 forms for Mathis

18. SMART's policy on audio recordings

18a. Letter from Anthony Feyers to LaCombe, 7/2/04

19. Write-up of Jim Brashear, 7/1/04

20. Write-up of Bolton, 6/22/04

21. Citation to Barash from Veterans of Foreign Wars

22. Citation to Barash from City of Roseville

23. Photograph of Bolton with towel on his head

24. Photograph of Aladdin towel

25a. Photographs of posters hanging in plant

25b. Photographs of posters hanging in plant

27. Excerpt from Saghy website (disc and power point)

30. Medical bills for Barash from Patricia Kearney

32. W-2 forms for Barash

35. Memo from Brashear to Craig Hodges, 2/6/04

36. Note from Hodges to Brashear, 2/6/04

37. Written statement from Brashear, 4/19/04

39. Request for leave by Barash, 3/21/04

39a. Write-up of Barash, No. 4379, 3/25/04

39b. Write-up of Barash, No. 4381, 3/25/04

40. 30225 MDCR Chronology of Activity 1-7

41. 312688 MDCR Chronology of Activity 1-5

42. Arbitration decision re: suspension of Robert Shelton

43. Written statement by James Havers, 4/19/04

44. Diagram of Oakland Maintenance Area

45. Diagram of offices of Hodges and Keith Taylor

46. CD recording, 2/21/05

47. CD recording and transcript, 12/21/05

48. Letter from LaCombe to Barash re: third impartial medical opinion, 6/9/05

49. Petition by union membership, 3/27/03

50. Letter from Barash to LaCombe re: third impartial medical opinion, 6/17/05

51. Termination letter to Barash, 4/4/07

52. Employee Violation Record re: termination of Greg Thorn, 7/12/04

53a. Written statement by Brashear, 7/25/03

58. Memo from Rick Kibbe, 6/25/04

61. Statement to police by Taylor re: Greg Thorn, 6/25/04

66. $2,500 check donation from UAW, 2/20/02

67. Letter from LaCombe to Peter, 6/17/03

72. Elbert Dulworth time cards, 1997-2002

73a. Undated written statement by Mathis re: Hodges' warning of Bolton

79. CD recording

79a. Transcript of CD recording (ex. 79)

85. Transcript of recording, 1/17/06

Respondent's List of Admitted Exhibits:

A. MDCR Charge of Discrimination and Dismissal Order, #312688

B. MDCR Charge of Discrimination and Dismissal Order, #313934

G. Memo from Keith Taylor to Barash, 4/8/03

H. Postings from Barash's website

K1. Letter from LaCombe to Dillard, 11/9/04

K2. Posting from SMART, 11/04

K3. Posting from SMART, 10/01

L. Memo from Taylor to Barash, 6/2/03

M. Memo from John Waddell to Dulworth, 11/4/07

N. Letter from LaCombe to Michael Michniak, 3/20/98

S. Memo from LaCombe to SMART supervisors, 10/15/03

T. Petition to recall Barash

U. Posting by Andy Williams

V. Letter from Bolton, 4/15/04

W. Drawing by Kibbe

X. Statement to MDCR by Havers, 3/4/05

Y. Statement to MDCR by Thorn, 3/25/05

AA. Class action grievance, 10/13/03

BB. Employee grievance by Barash, 11/3/03

EE. Letter from LaCombe to Barash, 3/17/04

GG. Letter from Astalos to Feyers, 5/25/04

JJ. Letter from LaCombe to Brashear, 5/2/04

KK. Letter from LaCombe to Michniak, 5/2/04

MM. Release from LaCombe to Barash, 6/25/04

RR. Memo from Perkins to Barash, 9/23/04

UU. Psychiatric Evaluation of Barash by Dr. Edward Dorsey, 5/12/05

WW. E-mail from Taylor to Hodges, 3/19/03

XX. Collective Bargaining Agreement

ZZ. Employment application by Barash, 9/29/88

Unnumbered Exhibit: Deposition and progress notes of Kearney

Exhibits Attached to Various Briefs:

Petitioner's Brief on Damages:[2]

Exhibit A: Commission's Opinion and Order

[2] As discussed below, a number of exhibits attached to Petitioner's Brief on Damages are the subject of a motion to strike and this Administrative Law Judge finds that Exhibits B and C of that brief should be stricken.

Exhibit B: Report of Nitin V. Paranje, Ph.D., 10/26/11

Exhibit C: Medical bills

Exhibit D: Excerpt from Tr. X

Exhibit E: W-2 forms for Petitioner

Exhibit F: Excerpt from Collective Bargaining Agreement

Exhibit G: W-2 forms for Mathis

Exhibit H: Charge of Discrimination, Case No. 325610

Exhibit I: Excerpt from Tr. XVII

Exhibit J: Excerpt from Tr. VII

Exhibit K: Excerpt from Tr. II

Exhibit L: Excerpt from Transcript of Kearney's Depostion

Exhibit M: Affidavits of Lynn Shector, Michelle Vocht, and William Roy and billing sheets from Roy, Shector & Vocht P.C.

Exhibit N: Cashier's check from Barash to Shector, 4/13/10

Exhibit O: Affidavit of Shereef Akeel and Billing Statements

Exhibit P: 2010 Attorney Income and Billing Rate Key Findings Report from the Economics of Law Practice in Michigan

Respondent's Opposition to the Brief on Damages:

Exhibit 1: Complaint and Charge in MDCR No. 325610, 6/8/04

Exhibit 2: Charge in MDCR No. 325610, 6/19/06

Exhibit 3: Report by Hearing Referee Goldman

Exhibit 4: Commission's Opinion and Order

Exhibit 5: Report of Walworth and Nayh, P.C., 11/8/11

Exhibit 6: W-2 forms for Barash and Mathis

Exhibit 7: Report of Walworth and Nayh, P.C., 11/10/11

Exhibit 8: Report of Ronald Smolarski, 11/8/11

Exhibit 9: Complaint and Notice of Dismissal in MDCR No. 383536

Petitioner's Response to Respondent's Motion to Strike:

Exhibit A: Commission Rules

Exhibit B: Hearing Referee Manual

Exhibit C: Final Prehearing Order, 7/25/08

Exhibit D: Report of Nitin V. Paranje, Ph.D., 10/26/11

Exhibit E: Report of Nitin V. Paranje, Ph.D., 11/28/11

Exhibit F: Report of Walworth and Nayh, P.C., 11/10/11

Exhibit G: Spreadsheet by Smolarski

Petitioner's Reply Brief to Respondent's Opposition to Brief on Damages:

Exhibit A: Commission Rules

Exhibit B: E-mail from Goldman, 3/17/08

Exhibit C: Final Prehearing Order, 7/25/08

Exhibit D: Hearing Referee Manual

Exhibit E: Excerpt from Tr. XI

Exhibit F: Excerpt from Petitioner's Brief on Damages

Exhibit G: Case law

Exhibit H: Report of Nitin V. Paranje, Ph.D., 10/26/11

Exhibit I: Report of Nitin V. Paranje, Ph.D., 11/28/11

Exhibit J: Report of Walworth and Nayh, P.C., 11/10/11

Exhibit K: Spreadsheet by Smolarski

Exhibits Admitted During the Evidentiary Hearing Before ALJ Kibit:

Exhibit A:	Affidavits of Lynn Shector, Michelle Vocht, and William Roy
Exhibit B:	Billings Sheet from Roy, Shector & Vocht P.C.
Exhibit C:	2010 Attorney Income and Billing Rate Key Findings Report from the Economics of Law Practice in Michigan
Exhibit D:	Biography of Michelle Vocht
Exhibit E:	Biography of William Roy
Exhibit F:	Biography of Lynn Shector
Exhibit G:	Costs Sheet from Roy, Shector & Vocht P.C.
Exhibit H:	Affidavit of Shereef Akeel and Updated Billing Statement
Exhibit I:	Original Billing Statement from Akeel & Valentine, PLC.

ISSUES and APPLICABLE LAW

(1) Based on a review of the administrative record compiled below and the briefs submitted by the parties, what amount of damages should be awarded in this case?

The ELCRA provides that damages may be recovered for any "injury or loss caused by each violation of this act". MCL 37.2801(3). Additionally, that section of the statute has been interpreted to include any damages which "flow" from the discrimination. *Schafke v. Chrysler Corp.*, 147 Mich App 751, 754, 383 NW2d 141, 143 (1985) (citation omitted). Such damages may include damages for humiliation, embarrassment, outrage and disappointment as well as loss of wages, loss of pension rights and employee benefits, loss of seniority and loss of employment. *Schafke*, 147 Mich App at 754 (citation omitted). Similarly, the Civil Rights Act of 1991 also allows the complaining party in a Title VII action to recover compensatory and punitive damages against a defendant who has engaged in unlawful intentional discrimination. *See* 28 USC 1981a(a)(1).

(2) Should Respondent's "Motion to Strike Claimant's Evidence and Documents Produced After the Hearing Record was Closed" be granted?

Pursuant to the Michigan Administrative Procedures Act, the Administrative Law Judge in this case has the authority to regulate the course of the hearing and to rule on objections to offers of evidence. MCL 24.275; 24.280. Similarly, the MDCR and Commission Rules provide that hearing officers have full authority to

control the hearing, to admit or exclude evidence, and to rule on motions. MCRC and Commision Rule 37.12(7).

(3) What amount of attorney's fees should be awarded in this matter?

Attorney fees are available in cases brought under Title VII by virtue of 42 USC 2000e–5(k). Attorney fees are likewise available in cases brought under ELCRA. M.CL 37.2801(3). Under the attorney fee provision of Title VII, a prevailing plaintiff "ordinarily is to be awarded attorney's fees in all but special circumstances." *Christiansburg Garment Co. v. EEOC*, 434 US 412, 417, 98 S Ct 694, 54 L Ed 2d 648 (1978); *Morrison v. Circuit City Stores, Inc.*, 317 F3d 646, 673 n. 15 (CA 6, 2003). In determining what constitutes a reasonable attorney fee, the court is required to multiply the number of hours reasonably expended in litigating and trying the case, by a reasonable hourly rate, known as the "Lodestar" method. *Hensley v. Eckerhart*, 461 US 424, 433, 103 S Ct 1933, 76 L Ed 2d 40 (1983). That initial amount can then be increased or decreased in light of other factors and considerations. *Hensley*, 461 US at 434.

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. Petitioner is an American citizen who was born in Iraq and is of Iraqi descent. (Tr. X, page 9).

2. In 1989, Petitioner began his employment with Respondent. He was eventually promoted to a position as high as mechanic, before voluntarily returning to the position of assistant mechanic. (Tr. X, pages 17, 33-34).

3. In the course of his employment, Petitioner was subjected to unwelcome communication and conduct on the basis of his Iraqi descent. The unwelcome communication and conduct also substantially interfered with his employment. (October 13, 2011 Opinion and Order by the Michigan Civil Rights Commission, pages 2-3).

4. As found by the Commission, the unwelcome communication and conduct included threatening phone calls, offensive posters, a letter referring to Petitioner as a "Sand Nigger", outrageous conduct by his co-worker Rodney Bolton, and other offensive statements by co-workers. (October 13, 2011 Opinion and Order by the Michigan Civil Rights Commission, page 2).

5. As found by the Commission, Respondent has Respondeat Superior liability for the unwelcome communication and conduct as it either knew or should have known of the communication and conduct, and it failed to take the appropriate corrective action. (October 13, 2011 Opinion and

Order by the Michigan Civil Rights Commission, page 3).

6. While Petitioner testified regarding earlier unwelcome communication or conduct, the earliest event identified by the Commission was the receipt of a letter calling Petitioner a "Sand Nigger" in March of 2003. (Tr. X, page 107; Tr. XII, pages 29-30).

7. Petitioner also observed the offensive posters in April of 2003 at Respondent's Wayne Terminal. (Tr. X, pages 39-40).

8. Petitioner complained about the posters with the MDCR and the posters were taken down soon after. (Tr. X, pages 51-53).

9. In early 2004, Bolton began to make inappropriate comments toward Petitioner. (Tr. XI, page 136; Tr. XII, pages 50-55).

10. On or around April 22, 2004, Bolton, among other things, wore a towel on his head and called Petitioner a "Raghead". (Tr. X, pages 110-111).

11. In August of 2004, Petitioner went off work and on worker's compensation due to a sprained thigh and lower back. (Tr. XI, page 12).

12. On September 12, 2004, while out on worker's compensation, Petitioner returned to Respondent's Macomb Terminal. (Tr. X, page 134). According to Petitioner, he went to the terminal because he had heard that the posters similar to the offensive ones found at the Wayne Terminal were still being displayed and he wanted to take a picture of the posters. (Tr. X, page 134).

13. On September 13, 2004, Petitioner returned to work. (Tr. XI, page 13).

14. In a letter dated September 23, 2004, Petitioner was suspended for five days. (Tr. XI, pages 13-14; Goldman Hearing Exhibit RR).

15. As stated in that letter, Petitioner had previously been told that he needed permission to visit the Macomb Terminal and permission to be on any work premises while off on worker's compensation. Petitioner had also been previously warned regarding unauthorized visits and photography. The letter further stated that Petitioner was observed behaving suspiciously with a camera and interacting with a previously-discharged employee. The letter also noted that, subsequent to Petitioner's visit, property valued in the excess of $1,300 was found missing and an investigation had been started. Per the letter, Petitioner was being suspended for his combined offenses. (Goldman Hearing Exhibit RR).

16. Petitioner did not file any grievances with respect to the suspension. (Tr. XII, pages 78-79).

17. Petitioner also began treatment with Patricia Kearney, a limited licensed psychologist, in September of 2004. (Kearney Deposition, pages 4, 38-39). They met weekly for around two years, and then every three weeks thereafter. (Kearney Deposition, pages 5-6).

18. According to Petitioner, he sought treatment for anxiety, depression and stress. (Tr. XI, pages 42-43). According to Kearney, Petitioner presented with a number of issues, including a depressed mood, anxiety, problems concentrating, problems eating, and problems related to a stressful situation at work. (Kearney Deposition, pages 6, 38-39).

19. On September 30, 2004, prior to returning to work from his suspension, Petitioner requested a leave of absence from work. (Tr. XI, pages 13-14). Kearney supported that request with her recommendation that he be taken off work. (Kearny Deposition, page 7).

20. Pursuant to the applicable collective bargaining agreement, an employee could receive six months/26 weeks of sick leave if the leave request is supported by a doctor's note. During those six months, the employee would receive a percentage of his pay. (Tr. XVI, page 90).

21. During his first six months of leave, Petitioner received 55% of his salary. (Tr. XIII, page 22).

22. On or about October 3, 2004, while he was on leave, Petitioner received threatening phone calls. (Tr. XI, pages 8-12).

23. Also, on or about October 29, 2004, a friend and co-worker of Petitioner recorded other co-workers making offensive comments about Petitioner based on Petitioner's national origin. (Goldman Hearing Exhibits 79 and 79a). Petitioner was not present during the conversation, but he later heard the recording. (Tr. XII, pages 42-46).

24. The collective bargaining agreement also provided that, after six months of leave, an employee could seek either (1) disability retirement, if he could never work again, or (2) up to two years of unpaid medical leave. Respondent also retained the right to have its own doctor examine the employee. (Tr. XVI, pages 91-96).

25. At the end of Petitioner's first six months of leave, Respondent requested that he be examined by its doctor. (Tr. XVI, page 95).

26. In May of 2005, Dr. Edward Dorsey issued a report finding that Petitioner was psychiatrically fit to return to work. (Goldman Hearing Exhibit UU).

27. On the basis of that report, Respondent sent Petitioner a letter telling him

to return to work. (Tr. XVI, page 96).

28. On June 17, 2005, Petitioner requested a Third Impartial Medical Examination, as was his right under the applicable collective bargaining agreement. (Goldman Hearing Exhibit 50). The Third Impartial Medical Examination is a means of resolving a dispute between doctors over whether an employee can return to work. (Tr. XVI, pages 98-99).

29. However, Respondent never pursued a Third Impartial Medical Examination. (Tr. XI, pages 102-103; Tr. XVI, pages 96-97). According to Thomas LaCombe, Respondent's former Director of Human Resources, he decided not to force the issue and to allow Petitioner to remain on unpaid leave due to concerns he had regarding the cost and difficulties that would be incurred as a result of pursuing a Third Impartial Medical Examination. (Tr. XVI, pages 5-6, 96-98).

30. Subsequently, Respondent never ordered or asked Petitioner to return to work. (Tr. XI, page 106).

31. Petitioner did not look for other work while on leave because he did not want to surrender his position with Respondent. (Tr. XI, page 43).

32. According to Kearny, Petitioner's depression stabilized during the course of her treatment of him, his interest in pleasure increased and he returned to his previous level of functioning. (Kearney Deposition, page 13).

33. Given that improvement, in Kearney's view, it was Petitioner's decision whether he wanted to return to work. She did recognize there was a danger of relapse if he returned to work only to face the original issues that lead to treatment. (Kearney Deposition, pages 13-16).

34. According to Kearney, she also stopped writing letters regarding Petitioner's ability to return to work. (Kearney Deposition, pages 54-55).

35. In Petitioner's view, he could not return to work without the Third Impartial Medical Examination taking place and Respondent therefore prevented him from returning to work like he wanted to by denying him that examination. (Tr. XII, pages 20-31).

36. The applicable collective bargaining agreement in this case also provided that Respondent could terminate any employee who had been on leave for 30 months. If the employee meets the qualifications, he can apply for disability retirement at that time. (Tr. XVI, page 91).

37. On April 4, 2007, Respondent sent Petitioner a letter notifying that his employment was terminated on the basis that the collective bargaining agreement provided that any employee off on disability leave for 30

months and who was not eligible for disability retirement shall be terminated. (Goldman Hearing Exhibit 51).

38. Petitioner never requested an extension of leave or disability retirement. He also never filed a grievance regarding the termination of employment. (Tr. XII, pages 31-33; Tr. XIII, pages 64-65).

39. According to Kearney, Petitioner continued his treatment with her despite his improvement because of the support she provided and he was still receiving treatment as of December 19, 2007. (Kearney Deposition, page 38). According to Petitioner, he stopped treatment with Kearney in September of 2007 because he could no longer afford it. (Tr. XI, page 48).

CONCLUSIONS OF LAW

I. Damages

After finding that Respondent had violated the ELCRA and Title VII, the Commission remanded the case to this ALJ for, among other things, "a calculation of damages based on a review of the administrative record complied below and the briefs submitted by Claimant and Respondent, through their respective attorneys[.]" In total, Petitioner seeks $1,336,333.00 in damages and the requested damages are to include economic damages, non-economic damages, attorney's fees, costs, and sanctions. Respondent appears to argue that, outside of minimal attorney's fees and costs, Petitioner is not entitled to any damages at all.

As a preliminary matter, this Administrative Law Judge would note that the Commission did not distinguish between the state law ELCRA violation and the federal law Title VII violation in its opinion and order, and that there is a close relationship between the two statutes.

With respect to the hostile work environment claim at issue in this case, both ELCRA and Title VII have similar elements that must be shown. For the ELCRA, in order to establish a prima facie case of discrimination based on hostile work environment, a plaintiff must prove that: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of her protected status; (3) the employee was subjected to unwelcome conduct or communication involving his/her protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *Quinto v. Cross & Peters Co.*, 451 Mich 358, 368-369; 547 NW2d 314 (1996); *Radtke v. Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993); *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 629; 576 NW2d 712 (1998). Whether a hostile work environment was created by the unwelcome conduct is determined by whether a reasonable person, in the totality of the circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having

the purpose or effect of creating an intimidating, hostile, or offensive employment environment. *Quinto*, 451 Mich at 369. To prove a hostile work environment claim under Title VII, a plaintiff must establish: (1) they were a member of a protected class; (2) they were subjected to unwelcome harassment; (3) the harassment was based on plaintiff's protected status; (4) the harassment affected a term, condition, or privilege of employment; (5) the employer is liable. *See Ejikeme v. Violet*, 307 Fed Appx 944, 949 (CA 6, 2009). "To prevail on a hostile work environment claim, a plaintiff must show that his work environment was both objectively and subjectively hostile." *Ejikeme*, 307 Fed Appx at 948. Courts must examine the totality of the circumstances to determine whether or not a hostile work environment exists. *Harris v. Forklift Sys., Inc.*, 510 US 17, 23, 114 S Ct 367, 126 L Ed 2d 295 (1993)).

Given those similar elements, it is not surprising that courts discussing hostile work environment claims often use the case law arising from the two statutes interchangeably. For example, Michigan courts will examine federal cases for guidance in adjudicating Michigan civil rights claims. *See, e.g., Downey*, 227 Mich App at 627 n. 3 ("Although federal precedence interpreting the federal Civil Rights Act is not binding on Michigan courts interpreting our own civil rights statutes, federal precedence can be used as a guidance by Michigan courts."). *See also Betts v. Costco Wholesale Corp.*, 558 F3d 461, 467 (CA 6, 2009) (discussing Michigan law and how federal law is related).

Here, neither the Commission nor the parties identify any material differences between the two statutes and they appear to rely on both state and federal cases without distinction. This Administrative Law Judge will do the same.

With respect to those damages, the ELCRA provides that damages may be recovered for any "injury or loss caused by each violation of this act". MCL 37.2801(3). Additionally, that section of the statute has been interpreted to include any damages which "flow" from the discrimination. *Schafke*, 147 Mich App at 754 (citation omitted). Such damages may include damages for humiliation, embarrassment, outrage and disappointment as well as loss of wages, loss of pension rights and employee benefits, loss of seniority and loss of employment. *Schafke*, 147 Mich App at 754.

Given that standard, it is imperative to determine what the exact violations of law in this case were. As stated by the Commission with respect to the second element of the hostile work environment claims:

> The record is clear that the Claimant was subjected to communication or conduct on the basis of his national origin. While not an exhaustive list, the Commission notes that Claimant was subject to the following communication or conduct on the basis of his ethnic origin, to wit:
>
> a. Threatening phone calls
> b. Poster depicting a camel in cross-heirs [sic] with words, "I'd fly 10,000 [sic] miles to smoke a camel"

> at the workplace
> c. Poster depicting Statute of Liberty extending middle finger with words, "We're coming 'M-Fers'" at the workplace
> d. A Letter referring to Claimant as a "Sand" N-ger,
> e. The outrageous conduct of co-worker, Rodney Bolton, including:
>   i. Calling Claimant a "Raghead,"
>   ii. Wearing a towel on his head,
>   iii. Telling Claimant he smokes camels,
>   iv. Telling Claimant he wishes he could "kill all Iraqis,"
> f. Co-Workers telling Claimant he "'f's camels," and
> g. Co-Workers calling Claimant a "Saddam lover."

(October 13, 2011 Opinion and Order
by the Michigan Civil Rights Commission, page 2)

Given that Opinion and Order by the Commission, in addition to the rest of the record, the scope of the violations of law in this case is neither as limited as argued by Respondent nor as expansive as argued by Petitioner.

Respondent argues that the sole conduct at issue is what Bolton did and what SMART management did in response to Bolton's actions. There is support for such a position as that is how Hearing Referee Goldman described the issue before him (Tr. III, pages 56-57) and Petitioner expressly withdrew a number of his other claims, including claims alleging that SMART retaliated against him or that other conduct created a hostile working environment (Tr. I, pages 20-21; Tr. II, page 5-6, 12, 15, 57-68). Along those same lines, Petitioner's representative also noted repeatedly throughout the hearing that "Sand Nigger" letter was not being litigated. (Tr. X, page 107; Tr. XI, pages 120-121; Tr. XII, pages 29-30)

Contrary to Respondent's argument, Bolton's conduct and SMART's response is not a complete list of what the Commission identified as the unlawful communication/conduct in this case. While the issues were narrowed in this matter, the Commission chose to address all aspects of the case and, as described above, communications like the "Sand Nigger" letter were found to be part of the unwelcome communication and conduct in this case. Similarly, the Commission also specifically found that:

> While Mr. Bolton may have been the principal perpetrator, the unwelcome communication and conduct was not limited to Mr. Bolton. The record reflects that there was some communication and conduct from other sources, as well. In fact, some of those sources were "anonymous", which meant that any of Claimant's co-workers could have been involved.

(October 13, 2011 Opinion and Order

by the Michigan Civil Rights Commission, page 3)

(Opinion and Order). Therefore, despite Respondent's arguments to the contrary, this Administrative Law Judge declines to base the damages in this case solely on Bolton's conduct and SMART's response.

Similarly, this Administrative Law Judge rejects Petitioner's expansive identification of the unlawful violations in this case. Petitioner appears to assert that he is entitled to damages arising from a number of actions, including the hostile working environment, Petitioner's suspension, and the termination of Petitioner's employment. In response to Respondent's argument that he narrowed his claims during the hearing, Petitioner notes that the Commission's jurisdiction is not limited to the charges or complaints filed by the MDCR and that the Final Prehearing Order submitted by the parties contained allegations that SMART had retaliated against Petitioner by, among other things, terminating him.

This Administrative Law Judge finds Petitioner's attempt to assert claims of retaliation and wrongful discharge to be somewhat disingenuous. In the voluminous record of a hearing involving contentious parties, Hearing Referee Goldman repeatedly attempted to articulate what issues were before him and, as cited to Respondent above, Petitioner repeatedly narrowed the issue to what Bolton did and SMART's response to Bolton's actions. Petitioner's representative did discuss what damages he was seeking, including lost wages, but that discussion was always in terms damages arising from the hostile work environment and never based on any wrongful discharge. (Tr. XI, pages 56-58).

In any event, regardless of whether a wrongful termination or suspension was properly alleged, there is simply no finding that such actions occurred. While the list of unlawful communication/conduct identified above by the Commission was not meant to be exclusive, there is no finding, or even discussion, in the Commission's opinion that either Petitioner's termination or suspension was unlawful. The Commission found that SMART either knew or should have known of the unwelcome communication and conduct by its employees and that it failed to take corrective action. That is enough to satisfy the respondeat superior element of Petitioner's hostile work environment claim, but it does not suggest that Respondent retaliated against Petitioner or even took any overt unlawful actions. Therefore, despite Petitioner's arguments to the contrary, this Administrative Law Judge declines to expand upon the violation of law found by the Commission or base damages on an unlawful termination or suspension.

Given the rejection of Respondent's attempt to limit and Petitioner's attempt to expand the scope of the violation in this case, this Administrative Law Judge will assess the damages in this case in light of the violations of law identified by the Commission in its Opinion and Order. Accordingly, Petitioner is entitled to damages that flow from the hostile work environment created by the unwelcome conduct of Petitioner's co-workers, based on Petitioner's national origin, which was intended to and did substantially interfere with his employment

A. Economic Damages

With respect to economic damages, Petitioner specifically seeks $897,079 in compensation for his total loss of income and benefits as a result of the wrongful termination and $20,151.50 in compensation for loss of salary while he was employed. The alleged loss of salary while employed encompasses both Petitioner's suspension and his sick leave. Respondent, on the other hand, argues that Petitioner is not entitled to any economic damages as any new claims of wrongful termination are not part of this case and he is not entitled to compensation for economic losses based on his hostile work environment claim. Respondent also argues that, even if Petitioner is entitled to economic damages, he improperly calculated those damages.

Regarding the termination of Petitioner's employment and the alleged loss of income and benefits as a result of that termination, this Administrative Law Judge finds that Petitioner is not entitled to any of the economic damages he seeks given the violations of the law identified in this case. As discussed above, damages must flow from the discrimination. Here, Petitioner fails to demonstrate how his alleged loss of income, benefits and salary flowed from the hostile work environment in this case. There is no discussion or finding in the Commission's opinion regarding any wrongful termination and, instead, the Commission only discussed Respondent's failure to respond to its employees actions. (October 13, 2011 Opinion and Order by the Michigan Civil Rights Commission). Petitioner does appear to argue that he still was under mental/emotional distress as a result of the hostile work environment at the time of his termination (Tr. XI, pages 42-43), but he did not try to seek permanent disability based on those effects (Tr. XIII, pages 64-65) and he was terminated pursuant to the applicable collective bargaining agreement (Petitioner's Hearing Exhibit 51; Respondent's Hearing Exhibit XX). Petitioner also failed to grieve that termination or request any extension of leave. (Tr. XII, pages 31-33).

Case law further demonstrates that economic damages, such as lost wages, cannot be awarded for a successful hostile work environment claim where the termination of employment itself was lawful. *See e.g.*, *Betts*, 558 F3d at 474 (applying Michigan law) ("it would be erroneous for the Court to permit these three Plaintiffs to recover lost wages when their termination was deemed lawful. Since they were not wrongfully terminated, Costco has correctly identified a clear error of law in the jury's award for lost wages."). *See also Spencer v. Wal-Mart Stores, Inc.*, 469 F3d 311, 317 (CA 3, 2006) (holding that a hostile-work-environment claim alone in the absence of a successful constructive-discharge claim is insufficient to support an award for lost wages); *Mallinson-Montague v. Pocrnick*, 224 F3d 1224, 1236-37 (CA 10, 2000) (same).

In the alternative, Petitioner could show that, even if there was no wrongful termination in this case, he is entitled to economic damages because the violations that did occur constituted a constructive discharge of his employment. Under this analysis, the question is whether his failure to return to work was a natural consequence flowing from the discriminatory act. "[A] constructive discharge occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign." *Jacobson v. Parda Fed Credit Union*, 457 Mich 318, 325-326;

577 NW2d 881 (1998), rev'd on other grounds by *Joliet v. Pitoniak*, 475 Mich 30, 32, 715 NW2d 60, 63 (2006). However, Petitioner does not argue in his motion for damages that he was constructively discharged and, instead, improperly argues that the termination itself was unlawful. Moreover, there does not appear to be any evidence of such a constructive discharge. While Petitioner produced some testimony alluding to a hostile and unsafe work environment continuing in his absence, at least some of the hostile environment had been fixed and Petitioner's information was secondhand. (Tr. XI, pages 10, 38-39, 88-89, 92-93). Additionally, Petitioner specifically testified that he wanted to return to work and was only unable to do so because Respondent's doctors would not clear him. (Tr. XII, pages 19-21). Given Petitioner's admitted willingness to return to work, he cannot receive damages based on a constructive discharge theory. Petitioner cannot demonstrate that a reasonable person in his place would feel compelled to resign and the Commission made no such finding.

As with his claim for loss wages based on his termination, Petitioner is not entitled to any loss wages from the time he was suspended for five days. Petitioner did not grieve that suspension (Tr. XII, page 79) or ultimately allege that the suspension was unlawful (Tr. III, pages, 42-46). While Petitioner presented some evidence suggesting that it was wrong to suspend him (Tr. XII, pages 78-79), there was no finding by the Commission regarding any wrongful suspension (October 13, 2011 Opinion and Order by the Michigan Civil Rights Commission, page 2). Moreover, Petitioner fails to argue or demonstrate how his alleged economic damages from the suspension flowed from the actual discrimination in this case, *i.e.* the hostile work environment, and he is therefore not entitled to any such damages.

However, with respect to Petitioner's sick leave, he can demonstrate economic damages that flowed from the hostile work environment. Petitioner asserts that he was on leave due to his anxiety, depression or stress arising out of the hostile work environment. (Tr. XI, pages 12, 42-43, 48, 88-89; Kearney's Deposition and Progress Notes). Moreover, as discussed above, when SMART did produce evidence that a doctor had found Petitioner ready to return to work, Petitioner requested an impartial third evaluation, as was his right under the CBA, and Respondent chose not to pursue a challenge to Petitioner's leave. (Tr. XVI, pages 96-101; Tr. XVII, pages 92-99; Respondent's Hearing Exhibit UU). Accordingly, Respondent cannot dispute the reasons for the leave or its validity at this juncture. Therefore, the record in this case suggests that Petitioner was on leave for over two years because of his anxiety, depression or stress. It is undisputed that Petitioner's anxiety, depression and stress flowed from the hostile work environment in this case and, as such, Petitioner appears to be entitled to the wages he lost as a result of his injury.

Nevertheless, this Administrative Law Judge would first note that the amount of those damages is unclear. Pursuant to the Collective Bargaining Agreement in this case, Petitioner received 55% of his pay during the first twenty-six (26) weeks of his leave and no pay for the remaining time he was on leave. (Tr. XIII, pages 21-23). Therefore, at the very least, Petitioner would be entitled to the difference between sick leave pay and full pay for 26 weeks and 78 weeks of pay for his unpaid leave time.

However, Petitioner also appears to seek overtime pay that he claims to have lost due to being out on leave. Regarding the amount of that overtime pay, Petitioner provides W-2 forms for his coworker Joseph Mathis (Exhibit G to Petitioner's Brief on Damages) and notes that the CBA requires that Respondent equalize overtime between identical employees within the same shift (Exhibit F to Petitioner's Brief on Damages). Respondent disputes whether Mathis is such an identical employee and that Petitioner has proven any loses at all. Moreover, the record fails to provide adequate evidence to resolve the issue of lost wages.

In any event, whatever the amount of lost wages during the leave would be, Petitioner is not entitled to those economic damages because he failed to mitigate them. Under both federal and Michigan law, a defendant may raise the defense that the plaintiff failed to mitigate his damages by seeking and accepting employment. *See*, *e.g.*, *Stockman v. Oakcrest Dental Center, P.C.*, 480 F3d 791, 798 (CA 6, 2007); *Rasheed v. Chrysler Corp.*, 445 Mich 109, 517 NW2d 19, 27 (1994). The goal of mitigation is the prevention of unnecessary economic loss. *Stockman*, 480 F3d at 798. The burden of showing that a plaintiff did not use reasonable care and diligence to mitigate damages is on the Respondent in this matter. *Hance v. Norfolk Southern Ry. Co.*, 571 F3d 511, 521 (CA 6, 2009); *Morris v. Clawson Tank Co.*, 459 Mich 256, 266, 587 NW2d 253, 258 (1998)

With respect to the mitigation of damages, Petitioner's briefs and his testimony provide that he wanted to return to work, but was prevented from doing so by Respondent. (Petitioner's Brief on Damages, pages 4-5; Tr. XII, pages 20-31). According to Petitioner, as Respondent prevented him from returning to his old job and the collective bargaining agreement prevented him from working at other jobs while on leave, Petitioner could not mitigate his damages any more than he did.

Petitioner's argument that Respondent would not let him return to work despite Petitioner's attempts to do so, and that he therefore mitigated his damages, is completely illogical and contradicts the evidence in this case. The collective bargaining agreement provides for an impartial third medical examination in cases where there is a dispute regarding leave. Here, there was such a dispute as Respondent's doctor said Petitioner could return to work. In response to that finding, Petitioner asked for the third impartial examination. It was his right to do so under the collective bargaining agreement, but there would be no need for the examination if Petitioner was trying to return to work. The third impartial medical examination was not a requirement to return to work and Petitioner's request for it only prevented Respondent from requiring that Petitioner return to work immediately. Respondent could have pursued the impartial medical examination, but it chose not and abandoned any challenge to Petitioner's leave. Petitioner therefore remained on that leave by his choice. Given Petitioner's testimony and the arguments in his briefs that he wanted to return to work and could have returned to work, Petitioner failed to mitigate his damages when he chose to remain on leave. Accordingly, his is not entitled to any economic damages he incurred because of that leave.

B. Non-economic Damages

With respect to non-economic damages, Petitioner seeks $250,000 for mental and emotional distress. In response, Respondent asserts that Petitioner failed to demonstrate any non-economic damages that were the result of the violations of law in this case. For the reasons discussed below, this ALJ finds that Petitioner should be awarded $150,000 in non-economic damages.

As a preliminary matter, this ALJ would note that, per his brief, Petitioner seeks $250,000 for mental and emotional distress on the basis that he should be awarded $100 a day for the seven years of mental/emotional distress he has suffered. However, Petitioner does not identify the origin of the formula he uses and there does not appear to be a legal basis for it. Accordingly, this ALJ declines to apply Petitioner's $100 per day for seven years analysis.

In demonstrating mental and emotional damages, "[i]t is well established that victims of discrimination may recover for psychic injuries such as humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish that flow from discrimination." *Hyde v University of Michigan Regents*, 226 Mich App 511, 522; 575 NW2d 36 (1997). *See also Betts*, 558 F3d at 472 (finding that the district court erred in awarding damages for emotional distress where there was no material evidence in the record regarding any emotional distress that the plaintiff suffered as a result of the hostile work environment and, instead, her distress flowed from the financial difficulties she faced after her nondiscriminatory discharge).

"Michigan law allows recovery for mental anguish based on the plaintiff's own testimony; however, there must be 'specific and definite evidence of [a plaintiff's] mental anguish, anxiety or distress.'" *Moody v. Pepsi-Cola Metro. Bottling Co., Inc.*, 915 F2d 201, 210 (CA 6, 1990) (quoting *Wiskotoni v. Mich. Nat'l Bank-West*, 716 F2d 378, 389 (CA 6, 1983) (applying Michigan law)). Likewise, compensatory, or non-economic damages, for emotional distress are recoverable in a Title VII case, so long as the plaintiff supports such claim with competent evidence. *Carey v. Piphus*, 435 US 247, 264, 98 S Ct. 1042, 55 L Ed 2d 252 (1978); *Turic v. Holland Hospitality, Inc.*, 85 F3d 1211, 1215 (CA 6, 1996).

In this case, according to Petitioner's testimony, he went on leave because of anxiety, depression, and stress. (Tr. XI, page 89). He also felt that the workplace was unsafe and that he lived in fear of what would happen if he returned to work. (Tr. XI, pages 10, 38, 89). Even outside of work, Petitioner was also fearful for both himself and his family. (Tr. X, page 158; Tr. XI, page 8).

Petitioner testified that he went to treatment with Kearney once a week while on leave in order to receive treatment for anxiety, depression and stress. (Tr. XI, pages 42-43). He also testified that he felt helpless due to what happened and like a rotten person after being terminated. (Tr. XI, pages 44, 46). Petitioner further testified that Bolton's actions made him feel embarrassed and emasculated. (Tr. X, page 115).

Petitioner's wife also testified that Petitioner does not talk about what happened to him and that he is ashamed that he was subjected to such discrimination and hatred. (Tr. II, page 78). She further testified that the situation they have been put in by Respondent has caused stress, anxiety and depression for both her and Petitioner. (Tr. II, page 87).

Similarly, in September of 2004, Kearney recorded Petitioner as presenting with a number of issues, including a depressed mood, anxiety, problems concentrating, problems eating, and problems related to a stressful situation at work. (Kearney Deposition, pages 6, 38-39). Kearney further noted that Petitioner possessed some symptoms of post traumatic stress disorder, felt helpless, shameful and embarrassed, and feared for his for life. (Kearney Deposition, pages 13, 26-27, 41).

As discussed above, Kearny eventually determined that Petitioner's depression stabilized during the course of her treatment of him, his interest in pleasure increased and he returned to his previous level of functioning. (Kearney Deposition, page 13). She did, however, acknowledge the danger of relapse and continued to treat Petitioner. (Kearney Deposition, pages 13-16, 38). Additionally, Petitioner testified that his issues were still ongoing at the time of the Goldman Hearing and that he only stopped professional treatment in September of 2007, after three years of treatment, because he could no longer afford it. (Tr. XI, page 48).

In addition to examining Petitioner's evidence regarding his mental and emotional distress, this ALJ will also look to other ELCRA or Title VII cases to see what damages where awarded and what those courts relied on. However, this ALJ is mindful of the fact that a "court should not attempt to reconcile widely varied past awards for analogous injuries which in the abbreviated appellate discussion of them seem somewhat similar." *Moody*, 915 F2d at 211 (internal quotations omitted); *see also Champion v. Outlook Nashville, Inc.*, 380 F3d 893, 905 (CA 6, 2004) ("Endeavoring to compare awards is difficult and often unfruitful, because the factual circumstances of each case differ so widely and because it places reviewing courts in the position of making awkward assessments of pain and suffering better left to a jury.").

This Administrative Law Judge would also note that those other reviewing courts were not awarding damages as a matter of first impression. Instead, they were determining whether to set aside a jury award of damages as excessive because it is beyond the maximum damages the jury reasonably could find to be compensatory for a party's loss. *American Trim, LLC v. Oracle Corp.*, 383 F3d 462, 475 (CA 6, 2004) (internal quotation omitted). Accordingly, in the cases upholding jury awards as justified, the court concluded that the verdict awarded was not beyond the maximum damages the jury reasonably could find to be compensatory for the party's loss and there is nothing to suggest that the awards of damages in those cases could not have been higher.

Nevertheless, as discussed below, relevant factors used in those other cases for determining mental and emotional damages include whether or not the plaintiff was terminated from his or her employment, how long the emotional injury lasted and whether it is ongoing, and whether evidence of physical manifestations of emotional distress or any extensive medical treatment for his symptoms is present.

While amounts may differ depending on the facts and circumstances of the individual cases, courts have consistently recognized an increased severity of emotional or mental injury where the injury is in response to a wrongful termination rather than just a hostile work environment. For example, in *Lentz v. City of Cleveland*, the Sixth Circuit rejected a jury award of approximately $708,000 for mental and emotional distress in part because the plaintiff in that case "did not lose his job, pay, benefits, or position" and therefore did not suffer the same level of financial stress felt by plaintiffs who were terminated or never rehired. *Lentz v. City of Cleveland*, 333 Fed Appx 42, 50 (CA 6, 2009).

On remand, the district court in *Lentz* subsequently reduced the damages award for emotional harms to $200,000 in part because the plaintiff did not lose his job. *Lentz v. City of Cleveland*, 694 F Supp 2d 758, 770 (ND Ohio 2010) (O'Malley, J.). As found by that court, while the fact that the plaintiff was not fired does not justify the conclusion that his emotional harm was not meaningful, the plaintiff did not suffer the financial stress felt by many other plaintiffs in similar cases because he was still collecting a paycheck. *Lentz*, 694 F Supp 2d at 768. *See also West v. Tyson Foods, Inc.*, 374 Fed Appx 624, 642-643 (CA 6, 2010) (affirming the district court's decision not to remit a jury award of $750,000 for a hostile work environment/constructive discharge claim); *Miller v. Alldata Corp.*, 14 Fed Appx 457 (CA 6, 2001) (affirming jury verdict of $300,000 under Michigan law to plaintiff who experienced disparate treatment on the basis of her gender, was ultimately terminated, and experienced emotional distress as a result); *Lilley v. BTM Corp.*, 958 F2d 746 (CA 6, 1992) (upholding jury award of $350,000 for employee who was fired immediately after telling company president that he had filed a complaint with the EEOC regarding age discrimination and subsequently experienced anguish and embarrassment that required him to seek psychiatric help).

However, even if a termination of employment occurred, the award of damages still depends on the amount of mental and emotional distress suffered and there is no set amount. *See, e.g., Garner v. Grenadier Lounge*, No. 06-13318, 2008 WL 2761158, *6 (ED Mich. July 15 2008) (Whalen, M.J.) ("In view of Plaintiff's testimony, her financial and emotional vulnerability at the time she was wrongfully terminated, and the totality of the circumstances in this case, I find that an award of $35,000.00 for emotional damages is appropriate. This amount is well within the range of awards in similar cases."); *Means v. Jowa Security Services*, 176 Mich App 466, 440 NW2d 23 (1989) (upholding an award of $38,900 where the plaintiff testified that the financial strain resulting from his termination caused him to suffer embarrassment and humiliation).

Here, Petitioner did testify that he felt like a rotten person after being terminated. (Tr. XI, page 46). However, as discussed above, the termination of Petitioner's employment was not found to be a violation by the Commission and Petitioner cannot base any damages on that termination or rely on that termination as a factor in determining the amount of his emotional and mental distress.

In the second factor identified above, courts examine how long the emotional injury lasted and whether it is ongoing. For example, in the *Lentz* case discussed above, the

Sixth Circuit also remanded the jury's $708,000 emotional distress award in part because the plaintiff's emotional injury was not "ongoing" and did not appear to justify such a reward. *Lentz*, 333 Fed Appx at 50.

On remand, the district court noted that "[t]he fact that other courts have allowed emotional distress damages up to $300,000 for plaintiffs who suffered emotional distress similar to those experienced by Lentz, but did so for shorter periods of time, indicates that a reasonable jury could award Lentz higher damages than those plaintiffs—upward from $150,000." *Lentz*, 694 F Supp 2d at 768 -769. Ultimately, that district court reduced the jury's award to $200,000 for the two years the plaintiff suffered an emotional injury. *Lentz*, 694 F Supp 2d at 770.

Similarly, in another Sixth Circuit decision, *Denhof v. City of Grand Rapids*, 494 F3d 534 (CA 6, 2007), the Sixth Circuit took into account how long the injury had lasted when affirming a district court's decision to remit a $1 million judgment down to $350,000. *Denhof*, 494 F3d at 547. The plaintiffs in that case were two female police officers who alleged retaliation, harassment, and discrimination. *Denhof,* 494 F3d at 536–542. The alleged retaliation included being placed on restrictive leave. *Denhof*, 494 F3d at 536-542. The Sixth Circuit concluded that, "[t]here is no question that the city's actions caused the plaintiffs humiliation and mental anguish, but the plaintiffs did not present any evidence of serious or long-lasting mental injuries." *Denhof*, 494 F3d at 547.

While *Denhof*, where each plaintiff still received $350,000, demonstrates that even short-term emotional distress may support a jury award of substantial damages if it is severe enough, both it and the *Lentz* case reiterate that how long an emotional injury lasts and whether it is ongoing should affect the award of damages. *See also Bailey v. USF Holland, Inc.*, 526 F3d 880, 887-888 (CA 6, 2008) (affirming district court's award of $350,000 in compensatory damages per plaintiff for humiliation and mental anguish suffered over six years due to a hostile work environment).

Here, Petitioner's testimony reflects that, while the period during which he was subjected to a hostile work environment was relatively short, his emotional distress arising from the violations was significant and still ongoing years later.

As discussed above, while Petitioner testified regarding earlier unwelcome communication or conduct, the earliest event identified by the Commission was the receipt of a letter calling Petitioner a "Sand Nigger" in March of 2003. (Tr. X, page 107; Tr. XII, pages 29-30). Subsequently he observed the offensive posters in April of 2003 before they were soon taken down. (Tr. X, pages 39-40, 51-53). From early 2004 until he took leave on September 30, 2004, Petitioner also had to endure Bolton's conduct and other comments. (Tr. X, pages 110-111; Tr. XI, pages 13-14, 136; Tr. XII, pages 50-55).

Petitioner then took a leave of absence in September of 2004 and, outside of one ten-minute period in July of 2005, he was absent from SMART from that time until the termination of his employment. (Tr. XII, pages 19-20). However, while Petitioner was not directly subjected to a hostile work environment while on leave, he did receive

threatening phone calls on or about October 3, 2004. (Tr. XI, pages 8-12). Also, on or about October 29, 2004, a friend and co-worker of Petitioner recorded other co-workers making offensive comments about Petitioner based on Petitioner's national origin. (Goldman Hearing Exhibits 79 and 79a). Petitioner was not present during the conversation, but he later heard the recording. (Tr. XII, pages 42-46).

Petitioner also testified regarding his distress over those actions and he started receiving professional treatment as early as September of 2004. The treatment was for anxiety, depression and stress. (Tr. XI, pages 42-43). Kearney also recorded Petitioner as presenting with a number of issues, including a depressed mood, anxiety, problems concentrating, problems eating, and problems related to a stressful situation at work. (Kearney Deposition, pages 6, 38-39). Kearney further noted that Petitioner possessed some symptoms of post traumatic stress disorder, felt helpless, shameful and embarrassed, and feared for his for life. (Kearney Deposition, pages 13, 26-27, 41). According to Kearney, there was some improvement with Petitioner's symptoms (Kearney Deposition, page 13), but he still wanted treatment years later and Kearney continued to find that such treatment was appropriate. (Kearney Deposition, pages 13-16, 38; Tr. XI, page 48).

The third factor identified above, *i.e.* whether evidence of physical manifestations of emotional distress or any extensive medical treatment for his symptoms is present, can weigh in favor of or against awarding greater damages depending in the circumstances. *See Lentz*, 694 F Supp 2d at 770 (reducing a damages award of approximately $708,000 for emotional harms to $200,000 in part because the plaintiff presented little evidence of physical manifestations of emotional distress or any extensive medical treatment for his symptoms.); *Fuhr v. Sch. Dist. of Hazel Park*, Case No. 99–76360, 2002 U.S. Dist. LEXIS 27245, *8 (ED Mich. Feb. 21, 2002) (Steeh, J.), aff'd *Fuhr v. Sch. Dist. of Hazel Park*, 364 F3d 753, 762 (CA 6, 2004) ($245,000 judgment affirmed for noneconomic damages where the plaintiff had "two years of treatment with a psychologist and psychiatrist, 37 sick days from work, treatment for stress with a gastro-interologist," and was prescribed various medications.).

Here, as described above, Petitioner does not appear to have exhibited any physical manifestations of emotional distress. However, he was receiving professional treatment from September of 2004 onward. Moreover, as discussed above, while Petitioner had demonstrated some improvement by the end of his treatment years later, he wanted to continue with that treatment and Kearney also recognized the benefits of continuing treatment. (Tr. XI, page 48; (Kearney Deposition, pages 13-16, 38).

This Administrative Law Judge takes Petitioner's testimony and evidence regarding the mental and emotional distress he has suffered very seriously and, taking the entire record into account, finds that Petitioner should be awarded $150,000 in non-economic damages as a result of those injuries.

While Petitioner now asserts that he was wrongfully terminated, that argument was rejected above and, despite Petitioner's testimony regarding the distress he felt at losing his job, he should not be compensated from such an injury. However, Petitioner did

face a hostile work environment, including threats and other outrageous conduct. Petitioner did not have to endure that hostile environment for one long, continuous period, but he did face multiple acts of unwelcome communication and conduct, both before and after he went on leave. Moreover, that unwelcome communication and conduct greatly affected him and he is still dealing with those effects today, years after the events occurred. Accordingly, in this Administrative Law Judge's view, Petitioner should be awarded $150,000 in non-economic damages as compensation for his mental and emotional distress.

C. Attorney's Fees and Costs

Petitioner also seeks attorney's fees and costs as part of his Brief on Damages. The issue was subsequently remanded to this court and an evidentiary hearing was held. This Administrative Law Judge's findings regarding Petitioner's request will be discussed below.

D. Sanctions

Lastly, Petitioner seeks damages in his Brief on Damages as a result of his Renewed Motion for Sanctions. Petitioner first brought this motion during the hearing before Goldman and requested that Respondent be sanctioned for (1) retaliating against Joseph Mathis because Mathis assisted Petitioner in this matter and (2) violating the sequestration order issued for witnesses. (Tr. VII, pages 114-118).

Respondent argued that it had a legitimate reason for the discipline it took against Mathis. (Tr. VII, pages 115-117). Hearing Referee Goldman took the matter under advisement. (Tr. VII, pages 117-118).

Given the limited nature of the order of remand to this court, it is not clear if Petitioner's Renewed Motion for Sanctions is before this Administrative Law Judge. However, as it was part of the Brief on Damages and the matter was remanded in part for a determination on damages, the issue will be addressed here.

To the extent the motion is before the court, this Administrative Law Judge finds that it should be denied. The record lacks sufficient evidence to find that Respondent retaliated against Mathis or that the sequestration order was violated. Mathis also has other avenues in which to pursue any grievances he has against SMART.

E. Conclusion on Damages

Recovery of damages for injury or loss caused by each violation of the law is permitted under ELCRA and Title VII, but such damages must flow from the violation of the statute. Here, given the nature of the violation found by the Commission, the only damages flowing from the violation of the statute are non-economic damages based on Petitioner's mental and emotional distress. As discussed above, this Administrative Law Judge concludes that those damages should be in the amount of $150,000.

II. Motion to Strike

As described above, the Commission also referred this matter to this Administrative Law Judge for a decision on Respondent "Motion to Strike Claimant's Evidence and Documents Produced After the Hearing Record was Closed". In making that decision, the Commission also limited this Administrative Law Judge to the administrative record complied below and the briefs submitted by the parties.

Respondent moves to strike Exhibits B, C, M, N, O and P of Petitioner's Brief on Damages from the record on the basis that they were submitted long after the record closed in this matter. Its request can also be divided into two groups and this Administrative Law Judge finds that only some of those exhibits should be stricken.

With respect to Exhibits M, N, O and P, Respondent asserts that they are untimely, but it also concedes that those exhibits could properly support a request for attorney's fees. If that is the case, then Respondent only requests an evidentiary hearing and an opportunity to rebut the evidence. As discussed above, an evidentiary hearing was held, the four exhibits were admitted as evidence during the evidentiary hearing, and Respondent had its opportunity to address the exhibits. Accordingly, Respondent's motion to strike is moot with respect to Exhibits M, N, O and P of the Brief for Damages.

With respect to Exhibits B and C, Respondent argues that those two exhibits are untimely and that they should be stricken. The Exhibits in question are an expert report of Nitin V. Paranje, Ph.D., dated October 26, 2011 and various medical bills submitted by Petitioner to support his claim for economic damages.

This Administrative law Judge has authority under the Administrative Procedures Act to regulate the course of the hearings and rule on the admissibility of evidence. MCL 24.271 *et seq*. Similarly, MDCR and Commission Rule 37.12(7) provides that hearing commissioners or referees shall have the full authority to control the procedure of a hearing, to admit or exclude evidence without regard to the strict rule of evidence, and to rule upon all motions and objections.

Here, Petitioner asserts that the new information would be helpful in determining damages, but he fails to offer any reason or excuse as to why the evidence was not timely submitted. As discussed above, seventeen days of hearing were held before Hearing Referee Goldman over an eighteen (18) month period. Petitioner therefore had plenty of opportunity to produce the evidence in question and have them be part of the record complied below. Moreover, the final prehearing order and witness list was not completed until months after the hearings began and Petitioner failed to identify any expert. Hearing Referee Goldman also specifically ordered that the record was closed after that final prehearing order was entered and Petitioner offers no basis for reopening it.

Respondent also properly notes that allowing the new exhibits would prejudice Respondent as Respondent would have no opportunity to cross-examine or impeach Petitioner's expert and medical records. Respondent did submit some new evidence in

its opposition to Petitioner's request for damages, but giving Respondent an opportunity to submit untimely evidence is not a substitute for cross-examining Petitioner's expert and evidence.

Given the prejudice Respondent would suffer, in addition to the complete absence of any reason why Petitioner did not submit the new evidence during the hearing, this Administrative Law Judge finds that Exhibits B and C attached to Petitioner's Brief on Damages should be stricken from the record and not considered when assessing damages. Additionally, this Administrative Law Judge will not consider the new evidence Respondent submitted in response to the now-stricken exhibits.

III. Attorney's Fees and Costs

A. Fees

As discussed above, this matter is also before this Administrative Law Judge for a recommendation as to the calculation of attorney's fees and costs to be awarded. Ordinarily, each party must bear its own attorney fees. *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 US 240, 95 S Ct 1612, 44 L Ed 2d 141 (1975). However, Title VII expressly authorizes that a district court "[i]n its discretion, may allow the prevailing party ... a reasonable attorney's fees as part of the costs [of a Title VII action]...." 42 USC 2007e–5(k). Similarly, the Elliott–Larsen Civil Rights Act provides that a court may award "all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate." MCL 37.2802.

Once a court determines that a party is entitled to fees and costs as a prevailing party, the primary concern is whether the fee is reasonable. *Blum v. Stenson*, 465 US 886, 893–95, 104 S Ct 1541, 79 L Ed 2d 891 (1984); *Geier v. Sundquist*, 372 F3d 784, 791 (CA 6, 2004).

In determining a reasonable fee for Title VII cases, the starting point is to determine the "lodestar," calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Hensley*, 461 US at 434; *Isabel v. Memphis*, 404 F3d 404, 415 (CA 6, 2004). The party seeking attorney's fees bears the burden of proving the reasonableness of the hours and the rates claimed. *Hensley*, 461 US at 433–34. A prevailing party is not entitled to recover for "hours that are excessive, redundant, or otherwise unnecessary." *Id.* at 434.

The court determines the reasonableness of the claimed hourly rates by reference to the prevailing market rate in the relevant community, regardless of whether the plaintiff is represented by private or nonprofit counsel. *See Johnson v. Clarksville*, 256 Fed Appx 782, 783 (CA 6, 2007), citing *Missouri v. Jenkins by Agyei*, 491 US 274, 285, 109 S Ct 2463, 105 L Ed 2d 229 (1989). The Sixth Circuit has described reasonable hourly rates as those that "do not exceed the market rates necessary to encourage competent lawyers to undertake the representation in question." *Coulter v. Tennessee*, 805 F2d 146, 149 (CA 6, 1986).

Moreover, attorneys seeking fees must maintain time records that are sufficiently detailed to allow the court to determine the reasonableness of the hours expended with a high degree of certainty that the hours were actually expended. *Imwalle v. Reliance Med. Prods., Inc.*, 515 F3d 531, 553 (CA 6, 2008).

Furthermore, where the trial court determines that hours are excessive or duplicative, it may make "a simple across-the-board reduction by a certain percentage." *Hudson*, 130 F3d at 1209 (approving an across-the-board reduction of 25% for duplication of effort), citing *Coulter*, 805 F2d at 152 (approving a 50% across the board reduction for certain items due to multiple representation as the danger of duplication and wasted resources is difficult to measure); *see also Saint–Gobain Autover USA, Inc. v. Xinyi Glass N. Am., Inc.*, 707 F Supp 2d 737, 764–65 (ND Ohio 2010) (Lioi, J.) (finding that a 50% reduction in fees "is a fair and expeditious solution to determining the sum total of reasonable fees") (collecting cases).

The Sixth Circuit has also noted:

> Courts in this circuit have reduced attorney fees on the basis of insufficient billing descriptions where the attorney did not "maintain contemporaneous records of his time or the nature of his work," [*Keener v. Dep't of the Army*, 136 FRD. 140, 147 (MD Tenn 1991), aff'd on decision of the district court by *Keener v. Dep't of the Army*, No. 91–5442, 1992 WL 34580, 1992 U.S.App. LEXIS 2822 (CA 6, Feb.24, 1992)], and where billing records "lumped" together time entries under one total so that it was "impossible to determine the amount of time spent on each task." [*Cleveland Area Bd. of Realtors v. Euclid*, 965 F Supp 1017, 1021 (ND Ohio 1997)]. On the other hand, this court has upheld an award of attorney fees and found billing records to be adequate where entries made by counsel "were sufficient even if the description for each entry was not explicitly detailed," [*McCombs v. Meijer, Inc.*, 395 F3d 346, 360 (CA 6, 2005)], and where the attorney provided the court with computerized calendars and file information indicating the dates and times of work performed. [*Sigley v. Kuhn*, Nos. 98–3977/99–3531, 2000 WL 145187, 2000 U.S.App. LEXIS 1465 at *20–21 (CA 6, Jan. 31, 2000); see also *Anderson v. Wilson*, 357 F Supp 2d 991, 999 (ED KY 2005)] (holding that the Plaintiffs had satisfied their burden to provide sufficiently detailed billing records where counsel provided the court with "itemized statements describing the subject matter, the attorney, the time allotment, and the charge for all work done on Plaintiffs' case").

Imwalle, 515 F.3d at 553.

Each case is fact specific and there is no precise formula for determining fees. *Hensley*, 461 US at 436. The most critical factor is the degree of success obtained. *Id.* However, there is a "strong presumption that the lodestar represents the reasonable fee." *Burlington v. Dague*, 505 US 557, 562, 112 S Ct 2638, 120 L Ed 2d 449 (1992).

Similarly, the Michigan Supreme Court has described the following methodology for review of an attorney's fee petition:

> In determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. The court may consider making adjustments up or down to this base number in light of the other factors listed in [*Wood v. Detroit Auto. Inter-Ins. Exch.*, 413 Mich 573, 321 NW2d 653 (1982)] and MRPC 1.5(a).

Smith v. Khouri, 481 Mich 519, 530, 751 NW2d 472 (2008).

The *Wood* case cited by the *Smith* court listed six factors for consideration, while Michigan Rule of Professional Conduct 1.5(a) sets forth eight factors, which overlap the *Wood* factors. *See Smith*, 481 Mich at 530. The factors set forth in Mich. R. Prof. Cond. 1.5(a) are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. Mich. R. Prof. Cond. 1.5(a). Michigan law also places on the party seeking attorney's fees the burden of proving that the requested fees are reasonable. *Smith*, 481 Mich at 530. "In determining 'the fee customarily charged in the locality for similar legal services,' the trial courts have routinely relied on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan." *Smith*, 481 Mich at 530 (collecting cases).

Here, Petitioner employed two separate firms over the course of these proceedings. Both submitted billings sheets and Respondent challenges the amount of attorney's fees sought. Pursuant to the above case law, this Administrative Law Judge will calculate the lodestar amount of fees properly sought by each firm and then adjust the final fee award upwards or downwards in light of the relevant factors.

Petitioner seeks a total of $104,400.00 in attorney's fees from the first firm he employed: Roy, Shector & Vocht, P.C. (the "Shector firm"). Specifically, as outlined in Exhibit B at the evidentiary hearing, Petitioner requests: $89,850.00 for 299.50 hours of work performed by attorney Lynn E. Shector; $9,525.00 for 31.75 hours of work performed by attorney William A. Roy; and $5,025.00 for 16.75 hours of work performed by attorney Michelle E. Vocht. All three attorneys billed at the same rate: $300 per hour.

In response, Respondent argues that the Shector firm is not entitled to any award of attorney's fees because its billing records are so inaccurate, vague and inconsistent that the purported fees fail to meet the threshold of reasonableness. For instance, Respondent argues that the billing sheet provided by the Shector firm is clearly incomplete and therefore cannot be considered accurate. As noted by Respondent, the Shector firm's billing sheet appears to have been printed out on October 18, 2011 and to encompass the time period of October 18, 2007 to October 18, 2011. Shector's testimony also confirms that the billing sheet appears to encompass those dates. However, the first entry on the billing sheet is for February 8, 2008. By that date, Shector has already participated in nine days of hearing and, presumably, multiple hours of work in conjunction with those hearings. Given the absence of any entries prior to February 8, 2008, the billing sheet appears woefully incomplete.

Shector could not explain the lack of further billing during her testimony and the significant omissions do cast doubt on the accuracy of the billing sheet as a whole given the time period it purportedly covers. However, to the extent charges for those hearing dates and other work were omitted, Petitioner was under-billed and the Shector firm is the one being harmed. The Shector firm is, for whatever reason, not seeking fees for all the work it did and the entire billing sheet need not be discarded because the firm is doing so.

Respondent also argues that the Shector firm's billing sheet should be rejected because the sole witness who testified regarding it, Shector herself, was evasive and not credible during her testimony. However, while the cross-examination of Shector could have gone smoother, this Administrative Law Judge does not find that Shector was evasive or deliberately misleading. In particular, it should be noted that Shector was testifying regarding specific billing sheet entries she made years ago and she conceded that she did not remember much regarding specific entries. Overall, this Administrative Law Judge found Shector to be generally credible. To the extent she was a difficult witness, it does not merit rejecting any award of attorney's fees.

According to Respondent, the attorney's fees sought by the Shector firm must be reduced because the three attorneys who worked on Petitioner's case from that firm all billed at the same, excessive rate. In Respondent's view, based on the "Economics of Law Practice" article provided by Petitioner, the appropriate rate for attorneys with the Shector firm's level of experience is in the 50th percentile and not the 75th percentile they claimed. However, Respondent fails to explain its reasoning or method it has for determining the rates the Shector firm should have used. Nor is the article submitted by Petitioner to be applied so mechanically. As discussed above, the court determines the reasonableness of the claimed hourly rates by reference to the prevailing market rate in

the relevant community and reasonable hourly rates as those that "do not exceed the market rates necessary to encourage competent lawyers to undertake the representation in question." *Coulter*, 805 F2d at 149. Here, given the average rates provided by the article in the context of civil rights cases, firm size and years of experience, the rate used by the Shector firm's attorneys are reasonable, if a little higher than average. Accordingly, this Administrative Law Judge will accept the rates used by the Shector firm.

Additionally, Respondent challenges the Shector firm's practice of billing in increments of .25 hours. As argued by Respondent, by doing so, the Shector firm would charge $75 for a one minute phone call. However, Shector testified that she did not bill Petitioner for such small items and the billing sheet does not record many entries for times less than an hour of work. To the extent it does so, those bills should be judged on their own merits. This Administrative Law Judge agrees that it would be preferable for the Shector firm to record time in smaller increments, but respondent points to no authority requiring law firms to bill in increments of .1 hours and the Shector firm does not appear to have abused its billing in this case with frequent entries of small amounts of time.

Respondent further argues that the billing sheet provided by the Shector firm only contains vague description of tasks and that it is impossible to examine, especially in light of Shector's lack of memory regarding specific entries. As discussed above, the Sixth Circuit has found both that attorneys seeking fees must maintain time records that are sufficiently detailed to allow the court to determine the reasonableness of the hours expended with a high degree of certainty that the hours were actually expended, and that billing records are adequate even where the description for each entry was not explicitly detailed. *Imwalle*, 515 F3d at 553 (citing *McCombs*, 395 F3d at 360). Accordingly, this Administrative Law Judge will examine specific disputed entries on their own merits rather than rejecting the entire billing statement due to a lack of detail.

With respect to specific disputed entries, Respondent first argues that the Shector firm incorrectly billed on multiple days and cannot recover for those entries. As noted by Respondent, the Shector billed for arbitration appearances on a number of occasions where no hearing was held. Specifically, a total of 26 hours were so billed: 4 hours were billed on September 10, 2008; 2 hours on September 14, 2008; 3 hours on September 17, 2008; 8 hours on September 18, 2008; 1 hour on September 20, 2008; and 8 hours on September 22, 2008.

During her testimony, Shector conceded that no hearings were held on those dates and that the billing entries were therefore miscoded. However, she also testified that, on a number of occasions, a scheduled arbitration hearing was turned into a settlement conference on the order of the Hearing Referee after she arrived. Shector could not remember any specific dates when that occurred. She further testified that, as it took her a half-hour to get to the hearing location, the 1 hour billed on September 20, 2008 could have been a day where she went to the arbitration hearing only to find it had been cancelled.

This Administrative Law Judge appreciates that Shector was being asked to testify regarding billing entries made years ago, but the 26 hours billed for hearing appearances on days there were no hearings must be stricken. While the entries may have been merely miscoded, no evidence demonstrates that is the case and the burden is on the firm seeking fees to establish those fees. Here, given the errors in the entries and the lack of any further details, in addition to Shector's lack of memory regarding those disputed entries, that burden has not been met.

Other entries Respondent challenges include the billings made by attorneys Roy and Vocht for 50.5 hours spent reviewing and summarizing the hearing transcripts prior to Shector drafting a final trial brief for the hearing referee. First, Respondent argues that the entries should be stricken because neither Roy nor Vocht testified during the evidentiary hearing. However, Shector did testify regarding the firm's billing process as a whole and how it was generated in the course of the firm's ordinary business. Moreover, to the extent that the entries by Roy and Vocht would even be considered hearsay, this Administrative Law Judge would note that, while the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable in administrative hearings, the agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. MCL 24.275. The billing sheet used by the Shector firm is such admissible evidence and any objection Respondent has to the billings of other attorneys in the firm should only go to the weight of the evidence provided by Petitioner.

As argued by Respondent, the billing sheet provides no further details for those entries beyond Roy sometimes identifying what transcripts he was reviewing. However, it is not clear what further details those attorneys could have provided in the billing sheet and Shector specifically testified that she received summaries from both Roy and Vocht. Moreover, as someone who also had to review the voluminous record in this case, this Administrative Judge finds that 50.5 hours is a reasonable amount of time for Roy and Vocht to spend reviewing and summarizing the hearing transcripts.

Respondent also argues that it was inefficient to have Roy and Vocht review and summarize the hearing transcripts rather than Shector, who worked on the case and would be preparing the final trial brief. In response, Shector testified that, given the contentious nature of the hearings, she wanted to have new and un-emotional eyes review the file in order to possibly find things she would miss. After reviewing the record, this Administrative Law Judge finds the decision to have other attorneys review the transcripts to be entirely justified for the reason given by Shector.

With respect to the trial brief prepared by Shector, Respondent argues that the billing for 84.5 hours to complete such a task is unreasonable. Specifically, Respondent asserts that the majority of the brief is a restatement of testimony offered during the hearing and that Shector approximately billed 1.3 hours per page. Other than stating that Shector was drafting her brief, the billing sheet provides no further details and Shector could not remember what she did with respect to any particular entry when testifying. Instead, she had to rely on what she billed at the time.

While this Administrative Law Judge found Shector to be generally credible, the number of hours billed for drafting the brief should be reduced. During her testimony, Shector acknowledged that this case did not present any new and complex issues for someone with her experience and that no research had to be completed when drafting the brief. Moreover, while the case is fact-intensive, summaries of the hearing transcripts were provided to her and she had been the attorney for Petitioner throughout the hearing. The billing sheet fails to provide any details regarding how she drafted the trial brief and, as discussed above, attorneys seeking fees must maintain time records that are sufficiently detailed to allow the court to determine the reasonableness of the hours expended with a high degree of certainty that the hours were actually expended. *Imwalle*, 515 F3d at 553. Furthermore, where a court determines that hours are excessive or duplicative, it may make "a simple across-the-board reduction by a certain percentage." *Hudson*, 130 F3d at 1209 (approving an across-the-board reduction of 25% for duplication of effort), citing *Coulter*, 805 F2d at 152 (approving a 50% across the board reduction for certain items due to multiple representation as the danger of duplication and wasted resources is difficult to measure). Here, given the lack of details and the excessive hours billed for drafting the trial brief, this Administrative Law Judge that the charges for that task should be reduced by 50%, or 42.25 hours.

Given the above conclusions, this Administrative Law Judge finds that the lodestar amount of attorney's fees with respect to the Shector firm is a total of $83,925.00 for 279.75 hours of work. Specifically, that amount includes: $69,375.00 for 231.25 hours of work performed by Shector; $9,525.00 for 31.75 hours of work performed by Roy; and $5,025.00 for 16.75 hours of work performed by Vocht.

Petitioner seeks a total of $39,568.50 in attorney's fees from the second firm he employed: Akeel & Valentine, PLC (the "Akeel firm"). Specifically, as outlined in Exhibit H at the evidentiary hearing and Petitioner's Supplemental Brief on Damages, Petitioner requests: $117.50 for .5 hours of work performed by attorney Glenn Valentine; $7568.00 for 35.2 hours of work performed by attorney Syed Akbar; $11,350.50 for 48.3 hours of work performed by attorney Shereef Akeel; and $20,532.50 for 95.5 hours of work performed by attorney Muneeb Ahmad. Valentine and Akeel bill at $235.00 per hour while Akbar and Ahmad bill at $215.00 per hour.

In response, Respondent argues that the billings submitted by the Akeel firm should be discounted entirely as they are inconsistent, vague and unclear. Respondent also notes that, while four attorneys billed for work in this case, only Akeel testified at the evidentiary hearing.

As discussed above, this Administrative Law Judge rejects the notion that billings by attorneys who did not testify must be rejected outright. Here, Akeel testified regarding his firm's billing process as a whole and how it was generated in the course of the firm's ordinary business. To the extent that the billing sheet would be considered hearsay, this Administrative Law Judge would note that, while the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable in administrative hearings, the agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

MCL 24.275. Such is the case here and any objection Respondent has to the billings of other attorneys in the firm goes to the weight of the evidence provided by Petitioner.

However, as correctly noted by Respondent, the amount of fees Petitioner now seeks with respect to his second group of lawyers significantly differs from the amount identified in his original brief on damages. For example, the second bill removes a number of entries that the Akeel firm now recognizes as improper. This Administrative law Judge would note that the majority of those improper entries were first identified by Respondent in its Opposition to the Brief on Damages. Akeel was the sole witness addressing the bills and he could offer no explanation for why errors in billing were made. Nor were the errors insignificant.

While later corrected, the errors in the first bill do cast doubt on the entire billing process used by the Akeel firm. Nevertheless, this Administrative Law Judge will not entirely strike the billing sheets used by the firm as it can still demonstrate some reasonable hours worked. To the extent clear errors were made and charges needed to be removed, those corrections have already been made.

Respondent also argues that the Akeel firm's billing sheets must be rejected because the two bills are inconsistent with respect to the bills incurred during the timeframe covered by both bills. While significant differences between the bills would create some doubt regarding when entries were made and their accuracy, Respondent errs in identifying the dates encompassed by the first bill. As stated in Akeel's affidavit, which was provided along with the first bill as exhibits to Petitioner's Brief on Damages, the first bill only covers Petitioner's attorney fees with the Akeel firm through September of 2011 and not, as asserted by Respondent, through October 20, 2011. (Affidavit of Shereet Akeel, ¶ 19-22; attached as part of Exhibit O to Petitioner's Brief on Damages). While the first billing sheet may have been printed on October 20, 2011 and used in a brief submitted October 28, 2011, it did not include fees for October of 2011. Petitioner could have made the amount of attorney's fees he seeks current as of the time he filed his Brief for Damages, but he did not do so and did not claim to have done so. In light of the proper dates, there is no conflict between the two bills and no basis for rejecting the evidence.

As argued by Respondent during the evidentiary hearing, Petitioner also should have supplemented his evidence regarding billing prior to the evidentiary hearing. However, no supplement was requested by Respondent or ordered by this Administrative Law Judge prior to the evidentiary hearing. Respondent also had an adequate opportunity to address the more recent billings during the evidentiary hearing and in its subsequent brief submitted weeks after the hearing.

Respondent also seeks to reduce the amount of fees that should be awarded with respect to the Akeel firm on the basis that much of the work that firm performed was duplicative of the work performed by the Shector firm. In particular, Respondent asserts that the Akeel firm spent over 40 hours reviewing the case despite the fact that Shector firm already had reviewed the case following the hearing before Hearing Referee Goldman and had already generated summaries of that hearing dates. However, the

Akeel firm is separate from the Shector firm. It was also hired at a different point in the case and for a different purpose. It is reasonable that the Akeel firm would perform its own review and, consequently, those hours should not be stricken.

Respondent further argues that the Akeel firm also engaged in improper billing by conferencing within the firm and having two attorneys review the appeal brief. However, this Administrative Law Judge finds those entries to be reasonable rather than unnecessary or duplicative. Respondent offers no basis for finding otherwise.

According to Respondent, the billing by the Akeel firm for tasks such as making copies of exhibits, taking copies of exhibits to Kinkos for printing and picking up the briefs from Kinko's and delivering them should also be rejected. Those entries were made by attorney Ahmad for the dates of February 9th through February 11th of 2011 and claim 4.75 hours of work at a rate of $215.00 an hour. While the entry for the initial copying also included a review of all the pleadings, the other entries would not appear to require an attorney at all. Moreover, attorney Ahmad did not testify at the evidentiary hearing and attorney Akeel, who did testify, could not explain why having an attorney bill at his usual rate for those tasks was reasonable. Given the lack of evidence supporting the reasonableness of the billing, this Administrative Law Judge finds that fees should not be awarded for those 4.75 hours of work by Ahmad.

Other billings questioned by Respondent include the work claimed by Akeel in September of 2011 in relation to a response to Petitioner's Motion to Recuse and hours identified by Akbar in October of 2011 as preparation for a hearing. Respondent specifically notes that no motion to recuse was ever filed and that Akbar does not appear to have ever attended any hearing following his preparation. The mere fact that no motion was ever formally filed or any later hearing actually attended does not mean the work was not performed or that any work was unreasonable. Whether certain members of the Commission should recuse themselves was clearly an issue at one point and the hearing could have simply been cancelled.

This Administrative Law Judge finds that the Akeel billings be accepted, as he specifically testified regarding the work he performed during the dispute over Commissioners, while the Akbar billings be rejected. Akbar did not testify as a witness and Akeel could not identify what hearing Akbar was preparing for, what work he did, or why he did not subsequently attend any hearing. Without such evidence, the billings for October 12, 2011 and October 13, 2011 by Akbar are unreasonable and the alleged 6.1 hours of work should not result in fees.

Respondent also disputes the bill for 2.70 hours of work by Akeel on February 22, 2011. As noted on the billing sheet, Akeel identified that time as a meeting with client. Respondent correctly notes that the appeal brief had already been filed at the time of that meeting and that bills for other meetings, between February 23, 2011 and July 28, 2011, were removed from the second bill by Petitioner as they did not arise from this case. However, this case was still ongoing at the time of the meeting and this Administrative Law Judge finds Akeel to be credible when he testified that the February 22nd meeting related to this case.

Therefore, in light of the conclusions made above, this Administrative Law Judge finds that the lodestar amount of attorney's fees with respect to the Akeel firm is $37,235.75. Specifically, that amount includes: $117.50 for .5 hours of work performed by attorney Glenn Valentine; $6256.50 for 29.1 hours of work performed by attorney Syed Akbar; $11,350.50 for 48.3 hours of work performed by attorney Shereef Akeel; and $19,511.25 for 90.75 hours of work performed by attorney Muneeb Ahmad.

Regarding the additional factors identified by both federal and Michigan courts as potentially relevant in determining attorney's fees, this Administrative Law Judge finds that none of those factors should affect the award of fees in this case. Significantly, the record is silent with respect to most of those factors, such as the undesirability of Petitioner's case and awards in similar cases. Moreover, Petitioner does not appear to seek to increase the amount of fees in light of those factors and the few arguments Respondent makes for reducing any award of attorney fees because of the additional factors are unpersuasive.

Petitioner does argue that, with respect to Shector's fees, the time and labor required by the circumstances of this case supports his claim fees. Specifically, Petitioner asserts that, as testified to by Shector, Respondent engaged in numerous stonewalling tactics in an attempt to delay the proceedings and deny Petitioner justice. According to Petitioner, those delays often took the form of improper objections and the introduction of irrelevant evidence and arguments. Respondent, on the other hand, asserts that Shector was responsible for any delay and that her case-in-chief comprised the bulk of the hearings in this case.

In reviewing the record, this Administrative Law Judge certainly agrees that the hearings before the Hearing Referee were extremely contentious and delayed by numerous, unwarranted delays and objections. However, this Administrative Law Judge also finds that both sides were to blame for any strife between the parties and that Shector's testimony that Respondent unduly dragged out these proceedings is unsupported by the record. Similarly, Respondent's claim that Petitioner improperly delayed and prolonger the case is also rejected.

Despite the long fights between the attorneys, this case does not present any novel or difficult legal issues. Petitioner's attorneys have worked in this area before and, as noted by Respondent, minimal research was required. Moreover, factors such as the skill, experience and reputation of Petitioner's attorney, as well as their professional relationship with Petitioner, would appear to be already reflected in their hourly rate.

With respect to the fee charged, the record is still somewhat unclear as to what fee arrangements Petitioner made with each firm and the arrangement between those two firms. Shector testified that the two firms would work out the issue of attorney's fees later while Akeel testified that there was a handshake agreement to pool the fees, with the Shector firm receiving one-third of any attorney's fees awarded and the Akeel firm receiving the other two thirds. Akeel also testified that Petitioner hired his firm for the appellate portion of the case and paid a retainer of $15,000. Petitioner was then billed

at an hourly rate, but the $15,000 was a cap on what he would pay. Respondent now argues that the Akeel firm and Petitioner limited Petitioner's maximum payment to $15,000 and that the Akeel firm should therefore be limited to such an amount.

The fee factor is simply one factor out of many and it does not impose an automatic ceiling on an award of attorney's fees. *Blanchard v. Bergeron*, 489 US 87, 93, 109 S Ct 939, 944 (1989). Here, given the clear lodestar amounts identified above and the nature of the evidence regarding fee arrangements, any fee-related factor should not be used in this case. The mere fact that the Akeel firm limited Petitioner's maximum payment to it at $15,000 is not dispositive here and does not require that any award of attorney's fees be so limited, especially in light of the amount of work done by both firms in this case.

Regarding the effect of this case on other employment opportunities, Shector testified that she had to clear her entire docket in order to handle Petitioner's matter and, in particular, had to turn down one case that ultimately resulted in a million-dollar judgment. However, she also declined to provide any further details regarding that specific case and acknowledged that she was working on other matters for her firm while Petitioner's case was in progress. Shector's testimony is also unpersuasive in that she failed to offer any reason why she would have to clear her entire docket to handle this one case. Petitioner's matter was fact-intensive and involved a number of hearings, motions and settlement conferences, but it also took place over four years and Shector's work was spread out over that long time period. She clearly could have, and did, work on other matters during that time. Accordingly, assuming she did have to turn down work, any preclusion of employment by Shector due to her acceptance of Petitioner's case does not justify an increase in her attorney's fees.

Finally, Petitioner argues that the amount involved and the results obtained in this case should justify his attorney's fees. In response, Respondent notes that Petitioner lost initially and that he is not entitled to any damages. While Hearing Referee Goldman found in favor of Respondent, the Commission rejected that recommendation and Petitioner is the prevailing party in this matter. Nevertheless, as discussed above, he should receive a lot less in damages than he is seeking. Given Petitioner's mixed success, the results of this matter should not affect the award of attorney's fees beyond establishing that Petitioner is the prevailing party.

Therefore, given the lodestar amounts for both firms employed by Petitioner and the lack of impact by other factors, Petitioner should be awarded $121,160.75 in attorney's fees.

B. Costs

With respect to its costs, both the Shector firm and the Akeel firm submitted billing sheets at the evidentiary hearing. With one exception, this Administrative Law Judge finds that those costs should be awarded.

For the time period of October 18, 2007 to October 18, 2011, the Shector firm seeks $2,349.17 in costs. The various costs include things like photocopying, faxing, parking and postage.

In general, Respondent challenges all of the costs submitted by the Shector firm on the basis that insufficient details are provided regarding what each entry is billing for. For example, when billing for the cost of photocopying, the billing sheet does not identify what is being photocopied or why. However, this Administrative Law Judge finds the entries to be sufficiently detailed for purposes of this review and the entire billing sheet need not be rejected.

Specifically, Respondent challenges the $17.50 charged for parking costs on three dates when no other attorney work was otherwise billed: January 3, 2008; July 8, 2008; and May 27, 2009. This issue was not raised during the evidentiary hearing and the Shector firm did not have a chance to address it. Nevertheless, based on the record before this Administrative Law Judge, the parking costs are improper and the $17.50 will be stricken. Overall, there is $2,331.67 in costs associated with the Shector firm.

In the bill submitted at the evidentiary hearing, the Akeel firm sought $1,387.20 in costs. Included among those costs were postage, Kinko copies, Action Video Fee, and postage. However, during the evidentiary hearing, Akeel acknowledged that the $370.00 charged for Action Video Fee was improper in this case and should be stricken. Additionally, Respondent does not appear to challenge any other costs claimed by the Akeel firm. Therefore, $1,017.20 in costs should be awarded with respect to the Akeel firm.

Accordingly, in total, there is $3,348.97 in recoverable costs in this case between the two firms.

RECOMMENDED DECISION

The Administrative Law Judge, based on the above findings of fact and conclusions of law, recommends that:

(1) The Commission calculate the damages in this case to be $150,000.

(2) The Commission grant Respondent's Motion to Strike Claimant's Evidence and Documents Produced After the Hearing Record was Closed.

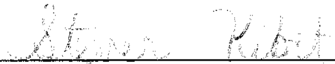
(3) The Commission calculate the attorney's fees and costs in this matter to be $124,509.97.

EXCEPTIONS

MCRC and Commission Rule 37.16(1) provides:

> An order of the commission issued after hearing shall set forth the findings of fact and the basis for its decision. Following a hearing conducted under R 37.12, and prior to a final order, the commission shall transmit to the parties a copy of the report of the hearing commissioners or referees and shall give parties an opportunity to file exceptions and present written arguments to the commission. The commission may permit oral argument prior to its final decision.

Accordingly, any party may, within fourteen (14) days from the date of mailing this decision, file exceptions with the Michigan Administrative Hearing System, P.O. Box 30695, 611 W. Ottawa, 2nd Floor, Lansing, Michigan 48909. Exceptions shall be served on all parties.



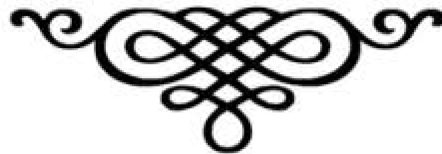
Steven J. Kibit
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc: Mazyn Barash
c/o Shareef Akeel
Heidi Hudson
MCRC

Date Mailed: 4/24/12

325610 – Mazyn Barash v SMART

October 13, 2011
OPINION & ORDER
Michael Zelley, Commissioner



MICHIGAN CIVIL RIGHTS COMMISSION

MICHIGAN DEPARTMENT OF CIVIL,
RIGHTS, EX REL MAZYN BARASH,

Claimant,

Case No. 325610
Hearing Referee: Barry Goldman

vs.

SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORATION (SMART),

Respondent

MICHIGAN CIVIL RIGHTS COMMISSION
OPINION AND ORDER

I – INTRODUCTION

Claimant, an American Citizen of Iraqi descent, filed a complaint with the Michigan Department of Civil Rights (MDCR) claiming that Respondent had discriminated against him on the basis of his national origin. Pursuant to MDCR Rule 12, a hearing was conducted. Following 17 days of testimony over 2 ½ years, the Hearing Referee recommended a dismissal of the matter. The Michigan Civil Rights Commission heard arguments during the July 2011 meeting and is prepared to render an opinion and order.

II – ISSUE PRESENTED

Whether Claimant has presented facts sufficient to establish that Respondent violated the Elliot-Larson Civil Rights Act and Title VII of the Civil Rights Act of 1964 by discriminating against him on the basis of his national origin?

III – RULING

The Michigan Civil Rights Commission rules that Claimant has presented facts sufficient to establish that Respondent violated the Elliot-Larson Civil Rights Act and Title VII of the Civil Rights Act of 1964 by discriminating against him on the basis of his national origin. In making this ruling, the Commission is mindful of the Hearing Referee's recommendation to the contrary and is appreciative of the time and effort put forth conducting the hearing and rendering the recommendation. While the Commission recognizes the unique position the Hearing Referee holds in deciding issues of credibility, the Commission simply cannot follow the recommendation based upon the totality of the record presented.

IV – LAW

Both parties agree that Claimant must establish the following:

(1) That Claimant is a member of a protected group,
(2) That Claimant was subjected to communication or conduct on the basis of his protected status,
(3) That Claimant was subjected to unwelcome conduct or communication involving his protected status,
(4) That the unwelcome conduct was intended to, or did in fact, substantially interfere with his employment or created an intimidating, hostile or offensive work environment, and
(5) Respondeat Superior.

Quinto v. Cross & Peters Co., 451 Mich 358 (1996); ***Hartleige v. McNeilab***, 83 F 3d 767 (6th Cir 1996)

V – ANALYSIS

1. Claimant is a member of a protected group.

It is undisputed that Claimant is an American Citizen of Iraqi descent. Therefore, the Commission finds, and both parties agree, that Claimant is a member of a protected group.

2. Claimant was subjected to communication or conduct on the basis of his protected status.

The record is clear that the Claimant was subjected to communication or conduct on the basis of his national origin. While not an exhaustive list, the Commission notes that Claimant was subjected to the following communication or conduct on the basis of his ethnic origin, to wit:

a. Threatening phone calls,
b. Poster depicting a camel in cross-heirs with words, "I'd fly10,000 miles to smoke a camel" at the workplace
c. Poster depicting Statue of Liberty extending middle finger with words, "We're coming 'M-Fers'" at the workplace
d. A Letter referring to Claimant as a "Sand" N-ger,
e. The outrageous conduct of co-worker, Rodney Bolton, including:
    i. Calling Claimant a "Raghead,"
    ii. Wearing a towel on his head,
    iii. Telling Claimant that he smokes camels,
    iv. Telling Claimant that he wished he could "kill all Iraqis,"
f. Co-Workers telling Claimant he "'f's camels," and
g. Co-Workers calling Claimant a "Saddam lover."

While the Hearing Referee opined, and the Respondent's position seems to be, that the above communication and conduct was simply locker-room trash talk or the result of in-fighting between union factions, the substance of the communication was based on the Claimant's national origin. As such, regardless of how the animosity towards Claimant manifested itself (be it locker-room trash-talk or in-fighting), it was expressed through communication and conduct based upon his national origin at the workplace.

Upon this point, Respondent argues that Claimant was subjected to the above referenced communication and conduct because of his own character flaws, separate and distinct from his national origin. For the sake of argument, even if the Commission believes that Claimant was an unlikeable character, was difficult to deal with interpersonally and professionally, and was a participant, to one degree or another, in some of the work place "trash talk," it is the opinion of the Commission that Claimant was subjected to this communication and conduct because of his protected status. If Claimant acted foolishly, he may rightly be called a fool. But, if Claimant acted foolishly and is a member of a protected

group, the Commission finds that he may not rightly be called, for instance, a "Rag-headed" fool.

3. Claimant was subjected to unwelcome conduct or communication involving his protected status,

The record reflects that the communication and conduct Claimant was subjected to involved his protected status (as noted in section 2, above) and was unwelcome. If the communication or conduct were not unwelcome, Claimant would not have complained to Respondent's management, initially, or the Michigan Department of Civil Rights, ultimately.

4. The unwelcome conduct was intended to substantially interfere with Claimant's employment,

As noted by the Hearing Referee, the principal perpetrator of the unwelcome conduct against Claimant was a co-worker named Rodney Bolton. The Hearing Referee found that Mr. Bolton was clearly intending to irritate the Claimant through offensive and unwelcome conduct.

The Commission finds that, based upon the highly offensive nature of the communication and conduct, as well as what the Hearing Referee termed Mr. Bolton's allegiance to the anti-claimant faction, Mr. Bolton intended to substantially interfere with the Claimant's employment. And, in fact, did interfere with Claimant's employment.

While Mr. Bolton may have been the principal perpetrator, the unwelcome communication and conduct was not limited to Mr. Bolton. The record reflects that there was communication and conduct from other sources, as well. In fact, some of those sources were "anonymous," which meant that any of Claimant's co-workers could have been involved.

5. Claimant has established Respondeat Superior.

The Commission finds that Claimant has established that Respondent either knew or should have known of the unwelcome communication and conduct and that Respondent failed to take appropriate corrective action. As the Hearing Officer noted and as the testimony revealed, Claimant's immediate supervisors were aware of the communication and conduct because Claimant either made direct complaints to his supervisors or the communication occurred in the presence of supervisors. Additionally, Respondent's Human Resource Director, who could properly be described as "upper management," was aware of the communication and conduct of which Claimant complained.

Even if the Respondent did not have direct knowledge of the complaints (which the Commission finds it did), the Respondent should have known of the

communication and conduct because the record shows that ethnic intimidation permeated Respondent's workplace through posters, cartoons and language.

Respondent's attempts to address Claimant's complaints were feeble and terribly ineffective at correcting the problem. While the principal perpetrator, Rodney Bolton, was instructed to stop his offensive conduct, Respondent never disciplined Mr. Bolton. And, Mr. Bolton and others continued their offensive conduct after Respondent verbally admonished Mr. Bolton.

Respondent did allow the MDCR to perform diversity training to address Claimant's complaints. However, the record reflects that employees were publically discouraged from attending the training. Without the full support of Respondent and its employees, the training was ineffective and the unwelcome conduct and communication continued.

It is clear that Respondent considered the conduct and communication to be union faction issues. The complaints were not properly investigated by Respondent's supervisors and not properly addressed by Respondent. While the genesis of the unwelcome conduct and communication may have been in-fighting, trash talk or union politics, Respondent was still obligated to investigate illegal communication and conduct and take reasonable steps to prevent it. The record is clear that Respondent simply failed to do so in this case.

VI – CONCLUSION

The Michigan Civil Rights Commission rules that Claimant has presented facts sufficient to establish that Respondent violated the Elliot-Larson Civil Rights Act and Title VII of the Civil Rights Act of 1964 by discriminating against him on the basis of his national origin.