STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO.: CRT 01863-98
DCR DOCKET NO.: EB27HL-33396

MICHAEL HEUSSER,	)	
	)	
Complainant,	)	**ADMINISTRATIVE ACTION**
	)	
v.	)	**FINDINGS, DETERMINATION AND ORDER**
	)	
NEW JERSEY HIGHWAY AUTHORITY,	)	
	)	
Respondent.	)	
	)	

APPEARANCES:

Jeffrey E. Fogel, Esq., appeared for the complainant.

Stefani C. Schwartz, Esq., and Jason J. Lavery, Esq. (Schwartz Simon Edelstein Celso & Kessler LLP, attorneys), appeared for the respondent.

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to an application for attorney's fees and costs by the complainant, Michael Heusser (Complainant). After previous orders addressed the merits of the complaint and other remedies, on March 11, 2005, the Honorable Thomas E. Clancy, Administrative Law Judge (ALJ), issued an initial decision[1] ordering the respondent, New Jersey Highway Authority (Respondent), to pay Complainant $380,068.86 in attorney's fees and costs. Having independently reviewed the record

[1] Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "Exhibit" shall refer to the exhibits as marked by the ALJ below; "TR" shall refer to the transcripts of the administrative hearings; "CE" and "RE" shall refer to Complainant's and Respondent's exceptions to the initial decision, respectively; and "CR" and "RR" shall refer to Complainant's and Respondent's replies to exceptions, respectively.

and the ALJ's decision, the Director adopts the ALJ's initial decision ordering attorney's fees and costs as modified herein.

PROCEDURAL HISTORY

On March 11, 1992, Complainant filed a verified complaint alleging that Respondent unlawfully demoted him based on his disability (cerebral palsy) in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The complaint was amended on May 25, 1993, to allege that Respondent failed to provide Complainant with reasonable accommodations that would enable him to perform his job. Respondent filed an answer denying the allegations of unlawful discrimination. On July 21, 1993, before the Division's investigation was complete, the Division transmitted this matter to the Office of Administrative Law (OAL) for a hearing at the request of Complainant pursuant to N.J.A.C. 13:4-12.1(c).

Hearings were held before ALJ Mary Louise Lucchi-McCloud over the course of 21 days during January, February, May, October and December 1995, and January, February, April and June 1996. In addition, both before and during the hearings, there were numerous written and oral arguments on motions before the ALJ, several requests to the Director for interlocutory review of certain evidentiary decisions of the ALJ, and one request for review of an interlocutory decision of the Director filed with the Appellate Division of the Superior Court of New Jersey, which the court declined. The record was closed on November 8, 1996.

On August 6, 1997, Judge Lucchi-McCloud issued an initial decision dismissing the complaint. After being granted an extension of time to do so, Complainant filed exceptions to this decision. On February 5, 1998, the Director issued an order adopting certain findings and conclusions in the ALJ's initial decision, but rejecting the ALJ's dismissal of the complaint. Based on the evidence in the record, and after consideration of the exceptions and replies submitted by the parties, the Director concluded that Respondent unlawfully discriminated against Complainant in violation of the LAD, and remanded this matter back to the OAL for the limited purpose of

determining appropriate remedies.

After remand, ALJ Lucchi-McCloud took some limited additional testimony, but did not conclude this matter. On or about October 16, 1998, Complainant advised that he was no longer seeking reinstatement to the Maintenance Person 1 position as he had transferred to a toll collector position, and was satisfied with that position. However, he did not withdraw the rest of his claim against Respondent. In late 2000, over two years after the remand and following the retirement of ALJ Lucchi-McCloud, this matter was reassigned by the Office of Administrative Law to the Honorable Arnold Samuels, ALJ, for settlement and case management purposes only. As the parties were unable to reach a settlement, this matter was reassigned by the OAL to ALJ Thomas E. Clancy in early 2001. After conferences with the parties and consideration of the parties' stipulations and submissions, as well as review of evidentiary materials previously submitted to ALJ Lucchi-McCloud, on June 8, 2001 ALJ Clancy issued a partial initial decision addressing all outstanding issues except attorney's fees and costs. In that partial initial decision, the ALJ awarded Complainant $53,439 in back pay, and assessed $25,000 in emotional distress damages and a $2,000 statutory penalty.

The parties submitted exceptions and replies to the ALJ's partial initial decision, and on December 27, 2001, the Division issued an order adopting the ALJ's recommended decision with modifications, including a reduction of the emotional distress damages to $15,000. The Division then remanded this matter for the ALJ to address the award of attorney's fees and costs, in accordance with the ALJ's June 8, 2001 partial initial decision.

Nearly two years after the remand, ALJ Clancy commenced additional hearings addressing the attorney fee application. These hearings took place on November 12, 13, and 14, 2003 and April 20, 2004, during which both parties proffered expert testimony. The OAL record was closed on November 4, 2004. The time for the issuance of an Initial Decision was extended by the OAL Director until March 19, 2005, via an Order of Extension dated January 27, 2005. On March 11, 2005, the ALJ issued Part II of his Initial Decision, awarding $380,068.86 in attorney's fees and

costs to Complainant.

The parties were granted two extensions of time to file exceptions and replies to the ALJ's initial decision. As a result, the Director requested and was granted two extensions of time to file the final decision. After Complainant submitting exceptions and replies within the extended deadlines, Complainant submitted supplemental counsel fee certifications in July 2005, as well as a motion for reconsideration of a portion of a prior Director's order. Respondent was granted an extension of time to respond to Complainant's supplemental certifications, and the Director was granted a third extension of time to file the final decision, which is now due on September 8, 2005.

This Order will be structured in such a way as to present each finding of the ALJ as stated in his March 11, 2005 decision, followed immediately by each exception of Complainant and/or Respondent as it relates thereto, and then the Director's decision as it relates to that particular finding and any exceptions. It is anticipated that this method will provide the most simplified means of addressing and resolving each issue.

THE DIRECTOR'S FINDINGS AND CONCLUSIONS

The New Jersey Law Against Discrimination is a fee-shifting statute, which allows a prevailing injured party to shift the responsibility for payment of its legal fees to its adversary. N.J.S.A. 10:5-27.1; see also, Rendine v. Pantzer, 141 N.J. 292 (1995). Fees should ordinarily be awarded unless special circumstances would make a fee award unjust. Hunter v. Trenton Housing Authority, 304 N.J. Super. 70, 74-75 (App. Div. 1997). The magnitude of the relief obtained in relation to the relief sought is irrelevant to determining whether a litigant is a prevailing party for the purposes of a fee award under the LAD. Warrington v. Village Supermarket, Inc., 328 N.J. Super. 410, 421-422 (App. Div. 2000). The Director concludes that Complainant is a prevailing party in this matter, and that an award of counsel fees is appropriate in this case.

The starting point for calculating a reasonable attorney's fee is computation of the "lodestar," which is derived by multiplying the number of hours reasonably expended on the

litigation by a reasonable hourly rate. Rendine v. Pantzer, supra, 141 N.J. at 334-35. After computing the lodestar, it is sometimes appropriate to enhance the fees by applying a multiplier to compensate counsel for the risk of not being paid at all. Id. at 332.

In the present case, Complainant's counsel employed a somewhat unique arrangement for representing Complainant, which is relevant to the ALJ's rulings on both the lodestar and the enhancement. Specifically, attorney Peter van Schaick, who specializes in employment law, was originally retained by Complainant. ID 7. Rather than litigating the case himself, van Schaick contracted with Susan Abraham to be lead counsel, and with Diana Jeffrey and Louis Raveson to assist and handle parts of the representation. TR 11/14/03, p. 9, 10, 13. At the end of 1995, when Abraham could no longer continue because of pregnancy, van Schaick contracted with Ross London to take over Abraham's role as lead counsel. TR 11/13/03, p. 62; TR 11/14/03, p. 6, 16. Beginning in or around 2000, van Schaick contracted with Jeffrey Fogel to take over as lead counsel. Throughout the pendency of this matter, van Schaick himself periodically performed some attorney functions, including advising and planning trial strategies, in a manner that he described as similar to the role of a senior partner in a law firm advising associates. TR 11/12/03, p. 121. Van Schaick also performed paralegal duties at some points in this litigation.

Because they did not wish to work on a contingency basis, Van Schaick contracted with Abraham, London, Jeffrey and Fogel to work for specified hourly rates: $60 per hour for Abraham and London and $25 per hour for Jeffrey. Van Schaick paid Abraham, London and Jeffrey at these rates at or near the time they performed the work, and issued 1099 forms for the fees he paid to them. Van Schaick also contracted and paid Fogel an hourly rate, although the record is less than absolutely clear as to what that rate was. Tr. 11/13/03, p. 56; see also CE 4, fn 3.[2] Van Schaick

[2]Van Schaick testified that, as of the date of his testimony regarding counsel fees, he had received bills from Fogel for most of the work Fogel had done on this case, and had paid him for the bills submitted. TR.11/13/03, p.28-29.

did not contract to pay Raveson directly for his work; instead, Raveson agreed to wait and collect fees as part of any counsel fees awarded in this case. TR 11/13/03, p. 26; TR 11/14/03, p. 33, 34.

In his decision concerning reasonable attorney's fees and costs, Judge Clancy addressed rulings he previously made that have an impact on the lodestar and its multiplier, if any. Those rulings numbered 1 through 8 are summarized and analyzed by the Director as follows:

1. Time spent by Complainant's attorneys in dealing with the media is not compensable. This finding was not excepted to by either party, and thus is adopted as decided.

2. Complainant's attorneys' unspecific, recreated time entries are noncompensable. This finding is herein adopted as a legal conclusion, in that neither party disputes that any time entry which does not specify its particulars and is recreated after the fact will not be compensable. See, Rendine v. Pantzer, 141 N.J. 292 (1995).

3. Complainant's attorneys' specific, reconstructed time records are only usable and probative on the issue of compensability where exceptional circumstances occur. Neither party excepted to this specific ruling, but the sufficiency of reconstructed time records are addressed in exceptions to Ruling #12, discussed below. The Director adopts this Ruling as modified in Ruling #12.

4. Any and all submissions by Complainant's attorneys must be sufficiently detailed to allow meaningful review and scrutiny and to enable an assessment of the reasonableness of the expenditures claimed. This finding is adopted in accordance with the Rendine and Szczepanski standards, which are among the standards applied throughout this Order.

5. All of Complainant's attorneys' travel time is compensable at the rate of 50% of whatever hourly rate is finally approved for each attorney's substantive work on this case. This finding is undisputed and adopted.

6. The services of Louis S. Raveson, who failed to qualify as an expert, are non-compensable in their entirety (modified to allow for payment for certain services provided by Mr. Raveson as an attorney). Complainant requests fees both for Raveson's work as an expert in preparing a verbal summary of the essential job duties of Complainant's position, and for his work as an attorney in this matter. The ALJ ruled that Raveson's services in preparing the verbal summary are non-compensable, but his billings for attorney work, discussed in Ruling #18 below, are compensable.

Complainant excepted to this finding, arguing that it was reasonable to retain Raveson to prepare a verbal summary of essential job duties, because the essential duties were a key issue in dispute, and also because ALJ Lucchi-McCloud suggested that such a summary would be useful. CE 36-37. On the merits of this case, the ALJ had admitted into evidence raw data regarding the time members of three maintenance crews spent on specific tasks during 1991 and 1992, as well as computer printouts summarizing the raw data. In a bench ruling on December 22, 1995, the ALJ refused to admit the verbal summary (actually a written narrative) that gave examples of specified employees who spent the majority of their time on certain tasks but were never assigned to other tasks. Director's February 5, 1998 Order, p. 18. On January 16, 1996, the Division denied Complainant's request for interlocutory review of the ALJ's inadmissibility ruling. After the ALJ issued her initial decision on the merits, by order dated February 5, 1998 the Director declined to overrule the ALJ's decision excluding the verbal summary. After review of the record and the exceptions, and for the reasons discussed in Ruling #20 below, the Director adopts the ALJ's ruling that Raveson's fees related to the verbal summary are non-compensable.

7. Respondent's status as a public entity shall not be taken into account as a vehicle to diminish or to lessen whatever attorneys' fees are ultimately awarded in this matter. Respondent excepts to this ruling, arguing that the cases relied upon by the ALJ hold that fee awards against public entities are not completely precluded, but those cases do not address

the issue raised in this matter – whether the fact that any award will be paid with taxpayer dollars should be one consideration in determining the amount of fees awarded. RE 30-31.

Respondent relies on a balancing test applied by the Appellate Division in Yakal-Kremski v. Denville Tp. Bd. Of Educ., 329 N.J. Super. 567 (App. Div. 2000), which, in addition to other factors, balances the public interest in fully reimbursing plaintiff's economic losses against the fact that limited public funds are available for such payments. Id. at 574, citing Furey v. County of Ocean, 287 N.J. Super. 42, 45 (App. Div. 1996). Both Yakel-Kremski and Furey addressed fee awards under the Tort Claims Act, N.J.S.A. 59:9-5, a statute which raises policy issues that differ significantly from the policies underlying the fee shifting provisions of the LAD.[3] In actions under the Tort Claims Act, the defendant is always a public entity or public employee, and for that reason the public entity status of the payor has implications that go to the crux of that statute. The Appellate Division recently distinguished the LAD from the Tort Claims Act in concluding that prejudgment interest, which is not permitted against public entities under the Tort Claims Act, is available against public entities in LAD claims. Potente v. County of Hudson, 378 N.J. Super. 40, 49 (App. Div. 2005) (noting the New Jersey Supreme Court's recognition of the fundamental differences between the LAD and the Tort Claims Act.) Moreover, the fee award provisions of the Tort Claims Act are narrowly defined in the statute itself, completely precluding fee awards where the plaintiff is awarded any damages for pain and suffering.

Under the Tort Claims Act, the statutory purpose is to award "reasonable attorney fees which are sufficient to compensate the attorney for the work performed, while seeking neither to encourage nor discourage attorneys from undertaking meritorious causes of action against the governmental entity or its employees." Furey, supra, 287 N.J. Super. at 46. In contrast, under the

[3]When citing LAD cases regarding the import of a contingency agreement in assessing a fee award, the court in Furey specifically noted that it did not mean to imply that the policy considerations under the LAD are the same as those applicable to Tort Claims actions against public entities or public employees. 287 N.J.Super. at 46.

LAD, in appropriate cases an enhancement is added to market rates to encourage attorneys to take cases in which there is a risk of nonpayment. Rendine v. Pantzer, 141 N.J. 292, 339 (1995). Such fee enhancements carry out the public policy goal of affirmatively assisting discrimination victims to compete in the market for legal services. Ibid. Thus, the fee shifting provision of the LAD differs markedly from the fee award section of the Tort Claims Act, and neither Furey nor Yakel-Kremski establishes standards that must be applied in LAD cases.

Respondent also cites H.I.P. v. Hovnanian, 291 N.J. Super. 144 (Law Div. 1996) in support of its contention that the Furey/Yakel-Kremski balancing test must be applied in LAD cases. RE 31-32. In H.I.P. the court awarded fees under the LAD and other antidiscrimination statutes against both a private developer and a public official, jointly and severally. On a motion for reconsideration, the court did not change the amount of fees awarded to the plaintiff, but allocated 1/3 of the total to the public official and 2/3 to the private defendant. Although the court cited Furey's language about the need to consider public entity status of the payor, the H.I.P. court did not reduce the amount the plaintiff would receive based on public entity status, but merely considered that status in deciding how much of the total would be paid with public funds. 292 N.J. Super. at 167-168.

Thus, the cases cited by Respondent are distinguishable, and the Director finds no basis to disturb the ALJ's ruling on this issue. Accordingly, this exception is denied, and the Director will not consider Respondent's public status in determining the amount of fees to be awarded, or the amount of the enhancement.

8. Respondent's legal bills in this matter are discoverable by Complainant's attorneys. Respondent takes exception to this finding, arguing that time spent defending a LAD action is not relevant to determining whether the hours billed to represent Complainant exceed those competent counsel would expend to prosecute the LAD claim. RE 36-37. As neither the ALJ nor the Director relied on information regarding Respondent's legal bills in reaching the fee determinations or calculations, the Director does not find good cause to set aside or otherwise

address this finding.

The following additional findings were rendered by the ALJ in his March 11, 2005 Partial Initial Decision Part II ruling:

9. The testimony of Andrew Dwyer, Esq., petitioner's expert, did not constitute a net opinion and his testimony shall not be excluded from consideration. Dwyer testified on behalf of Complainant concerning reasonable rates of compensation for employment law attorneys. Respondent excepts to this finding, arguing that Mr. Dwyer reached his conclusions about market rates for Complainant's attorneys without sufficiently familiarizing himself with the type of work each attorney performed in this case, or the skills of each. RE 34-35. Specifically, Respondent points to Dwyer's testimony that "he had no idea which attorney performed which work throughout the course of these proceedings", or who "performed what work in the underlying case." RE 34. Respondent contends that Dwyer's reliance on their resumes, the certification of Complainant's prior expert witness, and the certification of Respondent's expert witness was inadequate to support his conclusions. RE 35.

The Director finds no merit in Respondent's contention that, in the absence of specific information regarding the nature of the substantive work each attorney performed in this case, or their skill level in performing that work, Dwyer's conclusions are not supported by sufficient factual evidence. The fee shifting provisions of the LAD presume that attorneys will be compensated at prevailing market rates for attorneys of comparable skill, experience and reputation. Rendine, supra, 141 N.J. at 337. This standard does not require that hourly rates be based on an analysis of the specific tasks performed by an attorney on a particular case. The Director concludes that Dwyer's evaluation of the resumes and certifications regarding each attorney's education, skills and experience, his own familiarity with some of the attorneys, and his comparison of this information with his knowledge of prevailing rates in the relevant legal community, both based on his surveys and other personal knowledge as an employment law litigator, provided a sufficient factual basis

to support his conclusions as to the reasonable hourly rates for each attorney. Accordingly, Dwyer's testimony shall be considered competent evidence, and this finding is herein adopted.

10. The appropriate market rates for each of the petitioner's attorneys are the following:

J. Fogel	**$350 per hour**
S. Abraham	**$60 per hour**
R. London	**$60 per hour**
D. Jeffrey	**$25 per hour**
P. van Schaick	**$250 per hour**
L. Raveson	**$250 per hour.**

Respondent takes exception to the hourly rates awarded to van Schaick and Raveson, arguing that $250 is excessive for either of these attorneys under the circumstances of this case. RE 14-16. As to Raveson, Respondent also argues that a prior ruling of the ALJ denying all fees for his work precludes any fee award for his work; this exception is discussed under Ruling #18, below. Complainant takes exception to the compensation/fees awarded to everyone except Fogel, arguing that the rates for van Schaick and Raveson are too low, and the compensation for Abraham, London and Jeffery should be based on current market rates rather than designated as costs at the negotiated rates van Schaick paid for their services. CE 3-10.

In his exceptions, Complainant contends that the appropriate hourly rate for van Schaick is $350. CE 14. Except for travel time and hours related to the fee application (discussed elsewhere in this order), the Director agrees that $350 is the appropriate current market rate for van Schaick's attorney work. Complainant's expert testified that attorneys of comparable experience charge $450 per hour, and that the $350 requested is at or below market rate for van Schaick. TR. 11/12/03, p. 27-28. In setting van Schaick's hourly rate at $250, the ALJ relied, in part, on uncited evidence that van Schaick has had virtually no in-court litigation experience in the past several

years. ID 9 . The Director does not find this relevant, as van Schaick is an extremely experienced litigator, with a specialization in representing plaintiffs in employment law cases. TR 11/12/03, p. 116-117. Moreover, he testified that, although he often uses per diem attorneys, he works on many cases himself and tried a case to verdict during the spring prior to his testimony. TR 11/13/03, p. 60-61. Neither does the fact that van Schaick "chose not to occupy the FIRST CHAIR in this case," ID 9, justify reducing his hourly rate. To the contrary, by employing less experienced attorneys to handle the bulk of the litigation, van Schaick minimized the number of hours that would be billed at the appropriate higher rate for an attorney of his caliber, and he also billed at a paralegal rate for the work which did not require his attorney skills. Respondent's expert did not dispute the conclusion that van Schaick's experience level warranted $350 per hour, but reasoned that it was "a bit much" based on van Schaick's "background role" in this case. TR 4/20/04, p. 72. There is simply no support for reducing the hourly rate on this basis, as van Schaick's expertise was applied to his attorney work in this case. Respondent's expert also reasoned that van Schaick should be awarded $195 per hour, because he offered his services to his client at that rate. TR 4/20/04, p. 71. This rationale is contrary to the law, as the retainer agreement between an attorney and a client does not limit the rate that can be awarded. Szczepanski, supra, 141 N.J. at 358. Accordingly, based on the evidence in the record, the Director concludes that the appropriate current hourly rate for van Schaick's attorney work is $350. The ALJ designated the per diem hours of Abraham, London and Jeffrey as "costs" rather than counsel fees (ID 8, 16), awarding reimbursement of the actual amount van Schaick disbursed to each attorney and omitting these services from the lodestar. As noted above, Complainant's legal representation was provided in a unique manner. Complainant initially retained van Schaick to represent him in this matter, and van Schaick, who is a solo practitioner, contracted out the majority of the legal and paralegal work on this case to other attorneys. Van Schaick entered into contracts with Fogel, Abraham, London and Jeffrey at negotiated hourly rates, which van Schaick paid directly to them at or near the time they

performed the services. Van Schaick's arrangement with Raveson provided that he would be paid at the conclusion of the case for his work as an attorney,[4] in an amount to be determined in the fee award. ID 7; TR 11/14/03, p. 33, 41.

The Director concludes that the ALJ erred in treating legal services provided by Abraham, London and Jeffrey (hereinafter, "the per diems") as "costs" and excluding them from the lodestar. Although van Schaick contracted with outside counsel to take on parts of this litigation, his periodic payments to them for hours billed are in some relevant ways similar to a law firm's disbursement of salaries to associates or paralegals. In paying the per diems while this case was pending, van Schaick bore the risk that he would not be reimbursed for those expenditures. A law firm bears a similar risk that, after paying wages to its employees for time devoted to a particular case, it may be denied a counsel fee award at the close of the case. For this reason, hours billed by associates and paralegals are included in the lodestar and are subject to enhancement to compensate for the firm's risk of non-payment. In this respect, there is no reason payments to the per diems should be treated differently from a law firm's fees for its associates or paralegals, since the same need to attract competent counsel applies to this arrangement as well. Although, as discussed below, van Schaick's arrangement differed in other material ways from a law firm's relationship with its associates or paralegals, the risk of non-payment is not significantly different. The per diem fees should be included in the lodestar, subject to enhancement as discussed below.

The next question is what hourly rates are reasonable for the per diems. After considering the specific parameters of van Schaick's working arrangement, the Director concludes that it is appropriate to set the hourly rate for each of the per diems at the actual rate paid for their work on this case, plus interest. Current rather than historical rates are normally awarded to compensate for hardships incurred due to delayed payment of counsel fees, because an attorney's expenses

[4]For Raveson's non-attorney work in relation to the "verbal summary," van Schaick paid him $120 per hour, at or near the time Raveson performed that work. ID 7, TR 11/14/03, p. 33.

are not deferred while waiting for payment that will be awarded only at the close of a case. Rendine, supra, 141 N.J. at 337. However, based on the specific working relationship between van Schaick and the per diems, the Director concludes that it is appropriate to employ an alternative method to compensate for the delay in this case. Based on van Schaick's peculiar staffing arrangement, awarding current rates for the per diems would provide him with a greater award than is reasonable. Although the court in Rendine held that current rather than historical market rates should be awarded to compensate for the delay in payment, it relied on the U.S. Supreme Court's ruling in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 716 (1987) (Delaware Valley II), which acknowledged use of either current rates or an adjustment of the fee to reflect its present value. Ibid.

In Missouri v. Jenkins, 491 U.S. 274, 283-284 (1989), the Court discussed the rationale for compensating attorneys for hardships incurred due to delay in payment, and noted in particular that the demands of that case precluded the attorney from accepting other employment for nearly three years, and that he also had to borrow money to pay his staff, and pay interest on the loan. 481 U.S. at 284, n. 6. In the present case, van Schaick himself devoted a relatively small number of hours to this matter as compared with the per diems, and for that reason he was available to take on other cases which would provide direct payment to him during the pendency of this matter. Moreover, in a traditional law firm arrangement, the owners or partners bear the cost of dedicating the billable hours of their associates and other employees to a case in which payment must wait for a fee award. In contrast, van Schaick bore no lost opportunity cost for the work hours of the per diems, as any other fee-generating work the per diems declined would have paid them directly, rather than generating income for van Schaick. Thus, his arrangement with the per diems preserved van Schaick's ability to generate income and greatly mitigated the impact of the delay in payment. Therefore, the primary justification for awarding current rates does not exist in an arrangement where a coordinating attorney contracts out a substantial portion of legal services.

That stated, van Schaick's out of pocket payments to the per diems clearly deprived him of use of his money, and it is appropriate to compensate him for that loss. Because his payment to the per diems was a form of investment, a more appropriate vehicle for compensating for the delay in this case is to award interest on the historical rates, at the rates provided by the Rules of Court.

The Director recognizes that this alternative method of compensating for the delay in payment may appear to stray from the Rendine standard, but concludes that the Rendine court did not contemplate this type of attorney staffing arrangement when it concluded that awarding current hourly rates would be an appropriate method for compensating counsel for payment delays. The Director also recognizes that Rendine does not require, as a pre-condition for awarding current rates, specific evidence of any hardships incurred due to the delay in payment. However, given the peculiar circumstances of counsel's contractual staffing arrangement, the Director concludes that where, as here, it is evident that counsel has affirmatively employed other methods to counteract or at least greatly minimize the impact of the delay in receiving payment, the rationale for awarding current hourly rates simply does not make sense. Combining the decade-plus tenure of this case with this particular staffing arrangement, use of current rates for work van Schaick paid for eight or ten years ago would vastly exceed reasonable compensation for the delay in payment. In assessing the historic rates, the Director concludes that the negotiated per diem rates should be used for Abraham, London and Jeffrey, plus interest calculated in accordance with the New Jersey Rules of Court.

Because Fogel also had a per diem arrangement with van Schaick, and his services decreased the impact of the payment delay on van Schaick's business operations, it is appropriate to award him historic rates as well.[5] However, because Fogel did not begin work in this case until

[5]Although the ALJ did not find that van Schaick paid Fogel for his work on this case, the record reflects that Fogel, like Abraham, London and Jeffrey, submitted bills to van Schaick, who periodically paid him at an agreed hourly rate. TR 11/13/03, p.28-29.

2000, the historic rates for his work more closely approximate the current rates. Respondent does not except to the ALJ's award of $350 per hour for Fogel's work. Because the expert certifications and testimony provided in 2003 regarding his hourly rate are virtually contemporaneous with his work on this case, the Director concludes that in Fogel's case the historic and current rates are the same, and the appropriate hourly rate for Fogel's non-fee application work is $350. Because there is no difference between the current and historic rates, there is no need to add interest to compensate for the delay in payment for Fogel's services.

Raveson was not paid by van Schaick for his attorney work; he agreed that he would be paid at the close of the case at the rates awarded for his work under the LAD's fee shifting provisions. TR 11/13/03, p. 26-27. By performing legal services in this matter beginning in 1994, but receiving no payment until this fee award, Raveson himself experienced all the negative impacts of payment delay which have prompted the courts to award current rather than historic rates. Thus, although Raveson's services as a contract attorney freed up van Schaick's time in the same manner as the other contract attorneys, and thus minimized the impact of the delay on van Schaick, in Raveson's case the contract arrangement does not justify using historic rates. The rationale for using current rates should apply to Raveson, because he should be compensated for the hardships incurred by waiting for payment for his work.

Complainant seeks $300 per hour for Raveson's work. CE 11,15; TR 11/12/03, p. 27. The ALJ awarded $250 for Raveson's work, because he believed that was the rate requested for his services. ID 9. However, Raveson testified that he did not really recall what rate had been requested for his work on this matter, but he thought he had been seeking $250 an hour for a while. TR 11/14/03, p. 42. The ALJ noted Raveson's "vast trial experience and professorial acumen." ID 9. The Director finds that the record supports the ALJ's characterization of Raveson's relevant experience, and that the testimony of Complainant's expert supports the conclusion that $300 per hour is at or below the market rate for someone of Raveson's experience. TR 11/12/03, p. 27.

Since current rates are to be awarded, the fact that Raveson had been seeking $250 previously is not determinative. Although Respondent's expert reasoned that Raveson should receive a lower rate for research work, TR 4/20/04, p. 76, the Director concludes that Raveson's expertise was appropriately applied to his attorney work in this case. After review of the record and the parties' exceptions, the Director concludes that $300 is the appropriate hourly rate for Raveson's work on this case.

11. With respect to the time utilized for the preparation of the fee applications in this case, Messrs. Fogel and van Schaick should be paid $350 per hour and $250 per hour, respectively. No enhancement shall be applied to the fees charged for the fee application. While this finding was not excepted to by either Complainant or Respondent, courts have held that where work performed on fee applications does "not require a high degree of legal skill or expertise, plaintiff's lawyers should not recover fees for these services at the same rate as for their work on the merits of the case." See Robb, supra at 411, in which an hourly rate of $200 was reduced to $150 for a fee application, and a rate of $150 was reduced to $125.

Federal courts have also held where fee application work did not require great legal skill, an hourly rate for fee application work of two-thirds the rate for the case in chief was reasonable. Richerson v. Jones, 506 F. Supp. 1259, 1265 (E.D.Pa.1981). See also, Institutionalized Juveniles v. Secretary of Pub. Welfare, 568 F. Supp. 1020, 1034 (E.D.Pa.1983), aff'd in part, vacated in part on other grounds, 758 F.2d 897 (3d Cir.1985). Based upon the complexity of the issues addressed in this fee application, the Director awards an hourly rate of $250 for Fogel and van Schaick, representing approximately two-thirds of the rate awarded to them for the case in chief.

The Director affirms the ALJ's ruling that no enhancement shall be awarded for hours spent on the fee application, as counsel's risk of loss was substantially reduced after Complainant prevailed on the merits of his claims. HIP v. Hovnanian, 291 N.J. Super 144, 162 (Law. Div. 1996).

12. By and large, the records submitted by petitioner's attorneys were sufficiently

contemporaneous, authenticated and detailed to allow meaningful review and scrutiny and to enable an assessment of the reasonableness of the expenditures claimed. Respondent excepts on the basis that counsel should not be compensated for hours for which they did not keep contemporaneous time records, and asserts that certain billing entries were not maintained contemporaneously, but were added later when the time records of co-counsel disclosed some consultation or other joint activity. RE 6-9. Complainant did not except.

Respondent also takes exception to the ALJ's statement that he lacked the necessary familiarity with what transpired before Judge Lucchi-McCloud to determine whether the hours billed for periods in which she presided over this case were unjustified, unreasonable and/or excessive. ID 17. While the ALJ should have made his own evaluation with regard to the reasonableness of all hours billed, the Director has now conducted a thorough investigation of the record and did, in fact, determine that additional reductions of the hours submitted were warranted.

Regarding reconstructed records, Respondent contends that S. Abraham added 19 hours of missing time entries to her original billing records, consisting of some type of discussion with co-counsel. RE 7. P. van Schaick's billings originally omitted 18.15 hours, which were later found in cross-referencing his hours with other attorneys and thus included. Ibid. Respondent contends that van Schaick also had his secretary cross-reference London's time sheets with those of the other attorneys to look for omitted time records, but Respondent does not specify that any particular billings or hours for London's work that should be omitted on this basis. RE 8.

With regard to these missing hours spent speaking and/or working with another attorney and subsequently added as a result of cross-referencing with other attorneys' records, there is no case law precluding compensation for billings reconstructed in this way. While reconstructed time records are disfavored, fees based on such records are permitted where the billings are meticulously scrutinized to ensure that they are reasonable. Szczepanski v. Newcomb Medical Center, Inc., 141 N.J. 346, 367-368 (1995). The Director finds that the cross-referencing employed

by counsel serves as an additional means of confirming the accuracy of billing records, and concludes that these reconstructed billing entries are compensable.

Respondent also excepts on the basis that certain billing entries were too vague and unspecific to be compensable. RE 9-11. As an example of vague billing entries, Respondent cites references to preparation and review of an unidentified memo. In addition, Respondent asserts that repeated billing entries referring to "plan approach" and "status reports" are inherently vague, and that in the absence of specific information about the purpose or function of the status reports, the hours billed should be excluded as unnecessary and duplicative work resulting from van Schaick's nontraditional staffing arrangement.

S. Abraham's time records listed 8.20 hours for "plan approach", and 3.85 for updates and status reports to other attorneys; van Schaick's billings included 8.3 hours to "plan approach" and 7.65 hours in updates and status reports. R. London also billed 3.1 hours for status reports. The ALJ included all of these hours in the lodestar. The Director concludes that the time records for "plan approach," updates and status reports provide insufficient information to determine whether the time billed was reasonably expended. Accordingly, the lodestar shall be reduced by 12.05 hours for Abraham, 15.95 hours for van Schaick, and 3.1 hours for London, and this finding is adopted as modified.

13. The total number of hours submitted by S. Abraham should be reduced from 1007.9 to 991.65 because of duplicative legal work she performed. The hours deducted by the ALJ were for time billed by both Abraham and London for work they did together after London formally entered his appearance as lead counsel. Complainant takes exception to the ALJ's exclusion of these hours, arguing that it was necessary and reasonable for London to consult with Abraham even after London entered his appearance, to ensure a smooth transition. CE 25. Complainant notes that London did not bill for time spent learning the law, and that London's time familiarizing himself with the facts and underlying documents should be compensable. Respondent

agrees with the ALJ's deduction of these 16.25 hours from Abraham's billings, but argues that the ALJ erred in awarding fees for both Abraham and van Schaick for a November 3, 1993 meeting with an expert that both attorneys attended. RE 13. The dual attendance at this meeting is addressed in Ruling #25, below. The Director agrees with the ALJ that Complainant has not demonstrated that Abraham's billings for these services after London's appearance were reasonable and necessary, and affirms the ALJ's deduction of these 16.25 hours.

14. The total number of travel hours billed by S. Abraham should be halved and subtracted from the 991.65 billable hours referred to above, thus reducing her billable hours to 983.65. The practice of compensating travel time at 50% of the hourly rate for work on the merits of a LAD case was affirmed by the Appellate Division in Lewis v. Jersey City Police, 97 N.J.A.R. 2d (CRT) 11 (App. Div. 1997). See also, HIP v. Hovnanian, 291 N.J. Super. 144 (Law Div. 1996). Accordingly, this finding is herein adopted.

15. The total number of travel hours billed by R. London should be halved and subtracted from the 668.1 "billable" hours referred to in his certification dated September 4, 2003. Hence, his "billable" hours are reduced to 660.6. For the reasons stated in finding #14, above, this finding is herein adopted.

16. The total number of hours dedicated by petitioner's attorneys to an unsuccessful motion for summary decision and interlocutory appeal of the order denying said motion are non-compensable in their entirety. Complainant takes exception to this ruling, arguing that filing both the motion and interlocutory appeal were reasonable legal strategies supported by the law, and that if the motion had been granted, counsel's billable hours would have been significantly reduced. CE 27-33. Based upon the specific procedural history of this case and the substance of the motion, the Director concludes that the ALJ did not err in excluding these hours. While not every unsuccessful motion or interlocutory appeal would be found to be per se

non-compensable, the ALJ did not abuse his discretion in finding that "(Complainant's) attorneys should have prudently forborne from filing said motion as well as the interlocutory appeal." In a case such as this one, in which fees are disproportionate to Complainant's damage award, the ALJ and the Director have a duty to carefully scrutinize the hours billed to determine whether reasonably competent counsel would have expended as many hours for the results achieved. Szczepanski v. Newcomb, supra, 141 N.J. at 366-367.

Here, there were genuine issues of material fact in dispute at the time the summary decision motion and interlocutory appeal were filed. Although Complainant argues, in part, that the facts and arguments developed in the motion were also used later in addressing other issues in this case, Complainant fails to demonstrate that the specific hours expended were necessary and were not duplicative of later billings for research on reasonable accommodation issues.

Complainant also analogizes the denial of fees for these activities to courts' denial of fees for separate, unsuccessful claims. CE 30. The Director does not find this analogy persuasive. In denying compensation for the summary judgment motion and interlocutory appeal, the decisionmaker is evaluating the reasonableness of counsel's decision to devote the number of hours expended to specific litigation strategies. The ALJ concluded, and the Director agrees, that the it was not reasonable to move for summary decision based on the specific issues addressed, with relevant factual issues in dispute. This is not the same criteria applied to denial of compensation for distinct, unsuccessful claims. Moreover, to the extent that the precise argument raised in the summary judgment motion is to be scrutinized, although Respondent's failure to comply with the collective bargaining agreement (cba) was some evidence of its failure to comply with the LAD, there has been no ruling in this case that found the cba violation dispositive of any material issue. In focusing on the cba violation as dispositive, Complainant's motion actually isolated and made this issue distinct from the broader rulings which determined the outcome of this case. The Director concludes that, in these specific circumstances, and in light of other billings in

this case, these hours were not reasonable or necessary. This finding is herein adopted.

17. With respect to D. Jeffrey, the total number of hours claimed as billable (namely 110.2 hours) should be reduced to 69.8 hours, in that 22 of her billed hours duplicated the charges separately charged by S. Abraham for days in court without an explanation as to why such an arrangement was necessary, and also another 18.4 hours should be subtracted as they are attributed to the unsuccessful interlocutory appeal referred to in Ruling #16 above. Complainant takes exception to the ALJ's exclusion of the 22 hours for hearing attendance as duplicative, arguing that it was reasonable and necessary to have Jeffrey attend these hearings to assist Abraham. CE 27. Complainant argues that Jeffrey's undertaking of tasks such as taking notes during testimony and numbering and keeping track of evidence and exhibits freed Abraham to concentrate on presentation of evidence. CE 27-28. Complainant argues that, for this reason, the separate billings for the same hearing dates did not constitute duplicative work. CE 28.

Employing more than one attorney at a hearing is not per se unnecessary or duplicative. See, e.g. Lockley v. Turner, 344 N.J. Super. 1, 28 aff'd 177 N.J. 413 (2003). The Director finds that Complainant has provided a sufficient explanation to justify the reasonableness of the billings for Jeffrey for services rendered at these hearings. Accordingly, these 22 hours shall be added back into the lodestar, as her assistance during these hearings is neither unreasonable nor unjustified.

Regarding the additional 18.4 hours the ALJ deducted for Jeffrey's work on an unsuccessful interlocutory appeal, the Director affirms the ALJ's exclusion of these hours, for the reasons discussed in Ruling #16 above. This finding is herein adopted as modified.

18. The legal services provided by L. Raveson in this matter (but not those performed as an alleged expert) are compensable. After ruling that Mr. Raveson's billings for expert services and relating to the verbal summary are not compensable, as discussed in Ruling #6 above, the ALJ awarded fees for 32.1 hours of Raveson's work as an attorney, which he found

to be reasonable and necessary. Respondent excepted to this ruling, arguing that the ALJ's prior denial of all fees for Raveson is "law of the case." RE 14. The Director finds no merit in this argument. Except for specified matters relating to the hearing itself delineated in N.J.A.C. 1:1-14.10(k), any ruling of the ALJ is subject to review by the agency head at the conclusion of the case. N.J.A.C. 1:1-18.6; N.J.A.C. 1:1-14.10 (j).

In awarding fees for 32.1 hours, the ALJ ruled that 12.4 hours billed are not compensable because they were duplicative of charges billed by Abraham for trial attendance and travel on January 9, 1995, January 10, 1995 and January 12, 1995. ID 13. A review of the transcripts does not indicate that Raveson played any significant role in court – no taking of testimony or entering any statements on the record. He seems to have been in court as an observer, or to assist. Moreover, on each of the three days billed, Diana Jeffrey also appeared in court, ostensibly to assist Abraham in her capacity as trial attorney. The Director finds that, under the particular circumstances of this case, it was reasonable for Abraham to use Jeffrey as a trial assistant, as discussed above, but that Raveson's presence in court on each of those three days, and concomitant billing for same, was duplicative and unnecessary. Accordingly, the Director affirms the ALJ's deduction of 12.4 hours for Raveson's court appearances when both Abraham and Jeffrey were also present.

The ALJ also ruled that an additional 5.3 hours are not compensable because the billings were vague or for unnecessary work. Ibid. Neither party excepted to these deductions or the reasonableness of the remaining hours. The Director adopts this ruling as decided.

19. No expert fees are recoverable herein absent express authorization by statute, court rule or contract. The Director rejects this ruling and concludes that expert fees are available under the LAD, and will be awarded as part of the costs where reasonable and necessary for the litigation. In support of his ruling, the ALJ cited State Dept. of Environmental Protection v. Standard Tank Cleaning Corp., 284 N.J. Super. 381, 410 (App. Div. 1995), but that case is distinguishable

as it does not address expert costs in LAD actions. In Standard Tank Cleaning, the Appellate Division held that an award of "reasonable costs of preparing and litigating the case" under N.J.S.A. 58:10A-10 (a water pollution enforcement statute) could include fees for outside experts hired by the State, but would not encompass counsel fees for the Attorney General or the State DEP. Id. at 411. The court in that case specifically distinguished the water pollution statute from the LAD, citing the LAD as an example of a statute in which the Legislature expressly provided for an award of reasonable attorney's fees. Id. at 410.

The LAD does not expressly address expert witness fees, but provides for an award of "a reasonable attorney's fee as part of the cost...." N.J.S.A. 10:5-27.1.[6] Accordingly, the plain language of the LAD demonstrates that the Legislature has provided both for attorney's fees and for other types of costs. There have been no reported LAD decisions categorically denying expert fees or otherwise excluding them from the types of "costs" that can be awarded. In the Appellate Division's decision in Rendine v. Pantzer, 276 N.J. Super. 398, 447 (App. Div. 1994), the court noted that the trial judge awarded post-judgment disbursements which included an expert fee, and affirmed without any comment on the expert fee award. The Supreme Court modified the counsel fee award to reduce the fee enhancement, but declined to disturb the trial court or Appellate Division orders in any other respect. 141 N.J. 292, 345-346 (1995). Based on the silence of the appeals courts in the seminal LAD case interpreting N.J.S.A. 10:5-27.1, the Director concludes that expert witness fees may be awarded as part of the "costs" in LAD cases.

In the present case, the Director concludes that the expert fees for Richard Drach ($3,600) and Leonard Anderson ($10,390) are reasonable and necessary for the litigation, and shall be

[6] The ALJ accurately cited this section of the LAD, but went on to assert that September 2002 amendments to the LAD added some express mention of expert fees (ID 13). This is not the case; the September 2002 amendments expanded the remedy to provide counsel fees and costs to housing authorities and the attorney for the Division, but did not delineate specific types of "costs" to be included. N.J.S.A. 10:5-27.1.

reimbursed as part of the costs. As discussed elsewhere in this Order, the expert costs for L. Raveson are denied.

20. The claimed amount of $34,370.12 for the costs of the Verbal Summary should be reduced by $23,434.58, the amount sought for the "expert services" rendered by L. Raveson, because the ALJ has already ruled that said services are not compensable. Complainant excepted to this ruling, arguing that Raveson's work in preparing the verbal summary is compensable. CE 36-39. Respondent also excepted, arguing that the ALJ erred in excluding only the $23,434.58, and that all attorney's fees and costs associated with the verbal summary and tally of job data should be excluded as unproductive and unnecessary. RE 37-39.

In his February, 1998 Order for Reversal and Remand, a prior Director ruled that the verbal summary was in essence unsatisfactory. As stated,

> To the extent that the verbal summary includes factual or legal conclusions about the reasonableness of accommodations, such conclusions are beyond the scope of the drafter's knowledge or expertise. Moreover, the ALJ accepted the respondent's testimony that the verbal summary was not accurate because a significant portion of the crew members' work hours were excluded. The Director declines to overrule the ALJ's decision to exclude this particular verbal summary because of concerns regarding its accuracy and because it contains certain conclusory statements that were not within the expertise of the preparer.

It is thus made clear that, despite Complainant's claim that the verbal summary was prepared in response to a specific request from the ALJ and is therefore compensable, in fact such submission was not deemed satisfactory and thus fails to meet the threshold standard of compensability. See finding #6, above. In a case such as this one, in which fees are disproportionate to Complainant's damage award, the ALJ and the Director have a duty to carefully scrutinize the hours billed to determine whether reasonably competent counsel would have expended as many hours for the results achieved. Szczepanski v. Newcomb, supra, 141 N.J. at 366-367. After carefully reviewing

the billing records, the prior rulings, and the exceptions and replies, the Director concludes that the total fees and costs expended for the verbal summary, as listed on Exhibit P-2, Sub. B, were not reasonable and necessary, and are therefore not compensable. The Director modifies this finding to reflect an additional exclusion of the balance of $10,935.54 costs from Exhibit P-2, Sub. B, which were allowed by the ALJ.

The Director finds no merit in Respondent's argument that billings of van Schaick (3.8 hours) and Abraham (30.6 hours) associated with the tally of job data should also be excluded. RE 39. The attorney work in evaluating the job data and preparing the statistical summaries and testimony that were ultimately admitted into evidence were reasonable and necessary in presenting Complainant's case. The Director concludes that these hours are compensable.

21. The hours spent by J. Fogel in this case since late 2000 and continuing through approximately December 27, 2001 (when the Director's Decision was rendered in Part I of this case) constitute a recognizable portion of this case's "lodestar". This finding is undisputed by either party and is herein adopted.

22. The hours spent by J. Fogel on this case following the December 27, 2001 Director's Decision for Part I are not entitled to be enhanced or multiplied. The Director agrees that these hours will not be enhanced, as they were solely devoted to the fee application, as discussed in Ruling #11 above. This finding is undisputed by either party and is herein adopted.

23. The hours spent by P. van Schaick, Esq., performing paralegal tasks constitutes specific costs attributable to the "overhead" for this case. The ALJ deemed this work to be compensable at the rate of $65 per hour, based upon Mr. van Schaick's claim of the reasonableness of such a rate in January 1999. Complainant took exception to the ALJ's use of the historic rate rather than the current rate, argued that an hourly rate of $100 should be awarded, and also took exception to the ALJ's exclusion of van Schaick's paralegal work from the hours

subject to enhancement. CE 39.

As discussed above, current rather than historic rates are generally awarded to compensate for the delay in payment. Rendine, supra, 141 N.J. at 337. Since van Schaick's time devoted to paralegal work on this case directly precluded him from engaging in other fee-generating employment during the pendency of this case, it is appropriate to award him the current market rate for his paralegal work. After review of the record, the Director finds that the reasonable current rate for van Schaick's paralegal work is $75 per hour. Further, the Director concludes that the ALJ erred in treating the paralegal services provided by van Schaick as "overhead" and excluding them from the fee enhancement. Paralegal services are routinely billed as part of the lodestar subject to enhancement. See, e.g., Blakey v. Continental Airlines, Inc., 2 F.Supp. 2d 598, 610 (D.N.J. 1998). There is no reason the paralegal services provided by van Schaick should be treated differently from services provided by a non-attorney paralegal, and van Schaick should not be disadvantaged for his honesty in designating his non-attorney services as paralegal work. **2 4 .**

The hours spent by P. van Schaick on this case following the December 27, 2001 Director's Decision for Part I are not entitled to be enhanced or multiplied. The Director agrees that these hours will not be enhanced, as they were solely devoted to the fee application, as discussed in Ruling #11 above. As discussed in Ruling #25 below, Respondent excepts to language in this ruling and elsewhere, ostensibly placing the burden of proof on Respondent to disprove the reasonableness of hours billed. Except as to the language regarding the burden of proof, discussed below, the Director adopts this ruling.

25. The remaining hours submitted by P. van Schaick for consideration, namely 427.4 hours, should be reduced by another 22.7 hours in order to reach what his appropriate "lodestar" is. This reduction addresses the time expended on the unsuccessful 1994 summary judgment motion and subsequent interlocutory appeal, as discussed in finding #16, above. This finding is herein adopted.

Respondent excepted to the ALJ's failure to further reduce van Schaick's hours to eliminate billings for dual attorney attendance at trials or meetings. RE 13. Specifically, Fogel and van Schaick both billed for a case management conference on October 16, 2000, with Fogel billing 4.2 hours and van Schaick billing 3.6 hours. For a court conference on October 25, 2000, Fogel billed 2.5 hours and van Schaick billed 4.5 hours. Ibid. Under both Rendine, supra, and Szczepanski, supra, Complainant has not demonstrated that the work of two highly experienced attorneys on these occasions was reasonable and necessary. Respondent also argues that the ALJ erred in awarding fees for both Abraham and van Schaick (3.8 hours) for a November 3, 1993 meeting with an expert that both attorneys attended. RE 13. As Complainant has not shown that this dual attendance was not duplicative, the Director concludes that van Schaick's attendance was not reasonable and necessary. The Director will deduct van Schaick's 3.8 hours for this meeting, and van Schaick's 8.1 hours for the conferences attended by Fogel, for a total of 11.9 additional hours to be deducted from van Schaick's lodestar. This finding is modified accordingly.

Respondent also excepts to certain language in this finding, claiming that the ALJ erred by placing the burden of proof on Respondent to "disprove the necessity, appropriateness and reasonableness of van Schaick's hours (404.7) and hours attributable to 'overhead.'" RE 39. In support, Respondent cites Blakey, supra, along with Blum v. Stenson, 465 U.S. 886 (1984) as placing the burden of proof on the party requesting attorney's fees.

While the ALJ does in fact state that "respondent has not disproven the necessity, appropriateness and reasonableness of p. van Schaick's fee application hours by a fair preponderance of the credible evidence," in his analysis and discussion Judge Clancy cites to his "contacts with messrs. Fogel and van Schaick during the hearings in this matter, my exhaustive review of their fee certifications, my observation of their demeanors and my assessment of their credibility" as his basis for finding that "their 'lodestar' amounts consist of a number of hours that each of them reasonably expended on this case, multiplied by a reasonably hourly rate, as required

by Szczepanski v. Newcomb Medical Center, 141 N.J. 346,354 (1995) and Rendine v. Pantzer, 141 N.J. 292, 334-335 (1995)." Clearly, the ALJ did not place the burden on Respondent to disprove anything other than what Complainant had already established in compliance with case law. Accordingly, the Director does not find that the ALJ shifted the burden of proof to Respondent. The Director clarifies the ALJ's ruling to squarely place the burden on Complainant to prove the reasonableness of the hours expended. Moreover, the Director's scrutiny of the fees requested has placed the burden of proof on Complainant.

26. New Jersey's fee-shifting statutes do not require proportionality between the result achieved for the petitioner and whatever "reasonable compensation" is ultimately awarded to the petitioner's attorneys. Respondent excepts to this ruling, arguing that the fee award should be reduced, or enhancements denied, where the fees are disproportionate to the results achieved by the prevailing party. RE 37. Specifically, Respondent contends that Complainant's waiver of the relief he originally sought (reinstatement to his former position), and the award of only $97,198 in monetary relief compel the conclusion that the hours expended by counsel are excessive for the results achieved. Initially, the magnitude of the relief obtained in relation to the relief sought is irrelevant to determining whether a litigant is a prevailing party for the purposes of a fee award under the LAD. Warrington v. Village Supermarket, Inc., 328 N.J. Super. 410, 421-422 (App. Div. 2000). Although a prevailing party's failure to prevail on all distinct claims may justify reducing the fee award, in the present case Complainant prevailed on all of his legal claims; he merely waived one particular form of equitable remedy to redress Respondent's LAD violations. In furtherance of the LAD's public interest objectives, counsel fees need not be proportional to the amount of monetary relief awarded to the prevailing party. Szczepanski v. Newcomb Medical Center, supra, 141 N.J. at 366-367. Nevertheless, determining the appropriate fee award generally requires careful examination of counsel's submissions to verify that the attorneys' hours were reasonably expended, and the decisionmaker's responsibility to do so is

heightened in cases in which the fee requested is disproportionate to the monetary relief awarded. Ibid.

Here, Complainant did, in fact, ultimately achieve a reasonably high degree of success on his legal claims, and was awarded back pay as well as emotional distress damages. In evaluating the fees requested, both the ALJ and the Director have scrutinized the hours billed to ensure that the time spent was reasonable. Accordingly, Respondent's exceptions to this ruling are denied.

27. The "lodestar" amounts should be enhanced by 25%.

In Rendine v. Pantzer, 141 N.J. 292, 337 (1995), the seminal New Jersey case on this issue, the New Jersey Supreme Court held that the trial court, after having carefully established the lodestar, should consider whether to increase that fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome. Courts considering enhancements under the LAD have not required "pure" contingency in order to warrant an enhancement, but instead have awarded multipliers in cases where fees were "substantially" or "predominantly" contingent. Lanni v. State of New Jersey, 259 F.3d 146 (3rd Cir. 2001). In deciding whether to enhance the lodestar award, the Rendine court noted that consideration must be given to whether the attorney was able to mitigate the risk of nonpayment in any way and whether other economic risks were aggravated by the contingency of payment. Id. at 339. It is the actual risks or burdens that are borne by the lawyer that determine whether an upward adjustment is called for. Id. at 339-340. (citation omitted). Moreover, even in cases in which an attorney has negotiated a contingent fee payment, the risk of nonpayment might remain substantial because of the specific problems of proof, and the hazards inherent in all litigation and the vigorous defense of an adversary. Id. at 340. However, the risk of nonpayment may be "somewhat offset by the prospect of substantial compensation, independent of the court awarded fee, in the event of a large recovery." Id. at 344. In appropriate cases, the lodestar also may be enhanced to reflect that the litigation in some measure advanced the public interest. Id. at 341;

Lockley v. Turner, 344 N.J. Super. 1, 28 (App. Div. 2001).

Complainant argues that an enhancement of 75% should be added to the legal fees awarded because of the significant financial risks taken by Complainant's counsel and the public interest advanced by the litigation. CE 43. Of this 75%, Complainant seeks a 50% enhancement based on the risk of non-payment borne by counsel and the ALJ's finding that "there were no mitigating circumstances in place to offset the risk of non-payment." CE 45, citing ID 12. Complainant contends that van Schaick's retainer agreement with Heusser provided for a fee only if Complainant was successful, that Heusser paid no fee upon execution of the retainer, and that once the case was transmitted to OAL Heusser was to pay only costs and van Schaick "would take attorney's fees as awarded..." CE 44, citing TR 11/12/03, P.118. Complainant also points out that given the facts of this case, there was no prospect of a substantial damage award which could have provided counsel with compensation greater than the prospective lodestar amount, and there was a significant risk that Complainant could lose this case given its facts and Respondent's vigorous defense. CE 46. Moreover, Complainant argues that an additional 25% enhancement is warranted due to the public interest served in advancing the purposes of the LAD for all persons with a disability. CE 47. Complainant maintains that this case clearly establishes standards to be addressed in nearly every disability discrimination case, and provides guidelines for determining essential job functions when considering whether an employee can perform a job with reasonable accommodation. Ibid. Complainant contends that Director's orders generated by this litigation established rules governing the use of summaries of work assignments to prove essential functions, as well as the principle that an employee need not request an accommodation to be entitled to one. CE 48.

Respondent, on the other hand, argues that Complainant is not entitled to any enhancement of fees, as he "failed to demonstrate any of the prerequisites which warrant the award of a positive multiplier." RE 18-30. In support, Respondent contends that Complainant's counsel did not secure

reinstatement, the primary relief sought by Complainant, RE 18, and failed to meet the criteria under R.P.C. 1.5 for awarding counsel fees. RE 20-23. Respondent also argues that a positive multiplier is inappropriate where the fees sought are grossly disproportionate to the damages awarded Complainant. RE23-24, citing Szczepanski v. Newcomb Medical Center, Inc., supra. Further, Respondent urges that van Schaick mitigated his risk of non-payment by including language in his retainer agreement with Heusser that gave van Schaick control over the attorney-client relationship. RR 4-5. This provision secured payment at van Schaick's normal hourly rate of $195/hour for all hours worked if Heusser decided to drop the case against van Schaick's advice, and similarly required Heusser to pay van Schaick at that rate for all prospective hours if Heusser decided to continue the case against van Schaick's advice. RR 4, citing Exhibit CT-1. Respondent asserts that because of this provision van Schaick's risk of non-payment was minimal. Finally, Respondent argues that there was no evidence that this case advanced the public interest in that the ALJ noted that it was "a fairly straightforward pedestrian, run-of-the-mill garden variety civil rights case." RR 5, citing ID 20. Based on the foregoing, Respondent urges the Director to apply a "negative multiplier" to the lodestar amount. RR 14.

After a careful review of the record, the Director concludes that Complainant is a prevailing party under the LAD, and that this was substantially a contingency fee arrangement (see finding #26, above). Accordingly, some enhancement or multiplier of the lodestar is warranted. Moreover, Complainant correctly asserts that this case provided an advancement of the public interest in that it helped clarify standards governing an employer's duty to engage in the "interactive process" and clarified responsibilities of the employer to the employee in the context of reasonably accommodating employees with disabilities. Rendine, supra, 141 N.J. at 341, citing Delaware Valley II, supra, 483 U.S. at 751.

However, the Director finds that the risk of non-payment to Complainant's counsel was significantly mitigated by the language in the retainer agreement executed between Complainant

and Mr. van Schaick. The agreement allowed for the payment of fees in the event Complainant did not accept Mr. van Schaick's advice to either proceed with or terminate litigation, depending on the circumstances. Van Schaik testified that this provision was a form of "client control" to protect him from a client forcing him to go to trial on a case that he felt should not be tried. TR 11/13/03, P. 73-74. This language significantly reduced counsel's risk of non-payment. The Director also finds that counsel mitigated his risk by contracting out substantial portions of this litigation, which dramatically reduced the time he personally invested in Complainant's case. Accordingly, in view of the totality of the circumstances in this case, the Director finds that an enhancement or multiplier of the lodestar in the amount of ten percent is reasonable. This finding is modified accordingly.

ADDITIONAL FINDINGS

On July 8, 2005, J. Fogel submitted a Motion for Reconsideration of Complainant's Emotional Distress Award, along with a supplemental fee certification for his work on said motion and his work on Complainant's exceptions and replies to Part II of the ALJ's Initial Decision. On July 11, 2005, P. van Schaick also submitted a supplemental fee certification for his work on said motion and his work on Complainant's exceptions and replies to Part II of the ALJ's Initial Decision. Respondent submitted a reply to the supplemental fee certifications on July 27, 2005, and J. Fogel submitted a response on August 15, 2005. The Director's rulings on those post-hearing submissions are discussed below.

28. Additional fees as requested by J. Fogel for work on the exceptions and replies shall be reduced, as the hours billed failed to meet the established standards of specificity and lead the Director to conclude that the hours expended were excessive for the work performed. J. Fogel submitted a Certification in which he requested compensation for work performed on Complainant's exceptions and replies to Respondent's exceptions totaling 65.9 hours. The billing statement, however, in large part contains daily entries consisting of the words "research, brief" without any explanation as to the particular issues being researched or briefed at

any given time. While Mr. Fogel asserts that these two words satisfy the Rendine standard of fairly definite information regarding billable hours, the Director disagrees and determines that all billing must be "sufficiently detailed as to allow meaningful review and scrutiny." See findings 4 and 12, above. The certification submitted does not meet this burden. Moreover, in part because P. van Schaick is also requesting fees for work on the same exceptions and replies, Mr. Fogel's lack of specificity makes it impossible to determine whether both attorneys are requesting fees for working on the same issues, or the hours Mr. Fogel expended were otherwise reasonable.[1]

As these supplemental fee requests are for post-hearing work, and are properly raised for the first time before the Director, it is in his discretion to determine whether the hours expended are excessive. Cf., Evans v. Port Authority of New York and New Jersey, 273 F. 3d 346, 362-363 (3rd Cir. 2001) (noting that the forum which adjudicated the substantive issues must exercise judgment to determine how much attorney time is warranted on those issues.) In the absence of virtually any details to justify the time expended, and after review of the complexity of the issues addressed in the exceptions and replies submitted, the Director concludes that the 69.5 hours expended by Mr. Fogel are excessive. In reaching this conclusion, the Director has considered the fact that Mr. van Schaick also spent almost 45 hours in work on the exceptions and replies. The Director also recognizes that some of Complainant's exceptions were persuasive, and that Respondent submitted lengthy exceptions to the initial decision, which required a substantial response. However, given the experience level of Complainant's attorneys in employment discrimination cases (as reflected in their hourly rates), in which substantially similar issues regarding attorney fees and costs are commonly raised and briefed, Complainant's submissions do not warrant the

[1]In his August 15, 2005 letter submission, Mr. Fogel argues that the specificity in Mr. van Schaick's certification is sufficient to demonstrate which issues each attorney spent his time on. Although Mr. van Schaick's certification does clearly designate the issues van Schaick worked on, it cannot necessarily be concluded that Mr. Fogel did not bill for time working on the same issues.

number of hours expended. Mr. Fogel will be awarded fees for 50% of the hours requested for work on the exceptions and replies, or 32.95 hours. See, e.g., Public Interest Research Group v. Stone, 156 F.R.D. 568, 574 (D.N.J. 1994)(reducing hours for specific tasks by 25% to 50% based on conclusion that hours expended were excessive.)

29. Additional fees requested by P. van Schaick for work done on the Reply to Respondent's Exceptions shall be reduced, as work performed on the downward adjustment issue was redundant in nature. The bills submitted by Mr. van Schaick include 22.4 hours clearly marked for work done on the reply to Respondent's exceptions addressing the downward adjustment" issue. Further, there is an additional 9.2 hours listed for work on that issue as well as work on another task. Since counsel did not designate how much of these 9.2 hours was spent on the downward adjustment issue, the Director will allocate half, or 4.6 hours, to work on this issue, for a total of 27 hours allocated to this task.

After review of the parties' submissions, the Director concludes that the hours expended on this issue are excessive. Pages 23 to 31 of Complainant's Reply to Respondent's Exceptions, addressing the downward adjustment issue, do not reflect the need for extensive research, as the standards and arguments are drawn from Szczepanski and Rendine, with citations to a few other cases for points not necessarily unique to the downward adjustment issue. Moreover, it appears that much of the argument was already developed in Complainant's Exception IX, objecting to the ALJ's award of only a 25% enhancement. Based on the novelty and complexity of the issues addressed, the Director concludes that it is appropriate to award Mr. van Schaick fees for 50% of the 27 hours billed for this issue, or 13.5 hours. The remainder of the hours billed by Mr. van Schaick appear reasonable, and will be awarded. This allows a total of 31.2 hours to be awarded to Mr. van Schaick for his work on Complainant's exceptions and replies.

30. Complainant's Motion for Reconsideration of the Emotional Distress Award has been be denied, and no compensation for any work performed on said Motion shall be

awarded. As discussed in the Director's August 19, 2005 motion decision, Complainant's July 2005 motion for reconsideration of the emotional distress damages awarded in December 2001 was untimely and without merit. The Director declines to award any counsel fees for work on this motion.

CONCLUSION AND ORDER

Based on the foregoing, the Director concludes that Complainant is a prevailing party under the LAD and is entitled to a reasonable attorney's fee and costs as set forth in this order and itemized on the following pages. Therefore, the Director hereby orders Respondent, within 45 days from the date of this order, to forward to the Division a certified check payable to Complainant in the amount of $ **456,082.22**. Respondent shall also remit within 45 days any outstanding payments from the Director's December 27, 2001 Order, plus any interest accrued pursuant to the terms of that Order. All payments shall be forwarded to Richard Salmastrelli, New Jersey Division on Civil Rights, P.O. Box 089, Trenton New Jersey 08625. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey.

August 30, 2005

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J. Frank Vespa-Papaleo, Esq., *Director*
New Jersey Division on Civil Rights

CALCULATIONS

Summary of Costs based on findings of the Director

COSTS

Residual expert costs	$ 601.19 ($ 417.25)
Out-of-pocket expenses (unchallenged)	$ 5,651.48 ($ 4,214.32)
Cost of transcript paid by J. Fogel, Esq.	$ 1,757.18 ($1,500.00)
Expert fee for Drach	$ 5,190.20 ($ 3,600.00)
Expert fee for Anderson	$ 12,694.61 ($10,390.00)
*Subtotal	$ 25,894.66 ($20,121.57)

NON-ENHANCEABLE FEE APPLICATION EFFORTS

J. Fogel, Esq. ..... 247.30 hours x $250 = $61,825.00

P. van Schaick, Esq. ..... 33.60 hours x $250 = $ 8,400.00

Subtotal $ 70,225.00

NON-ENHANCEABLE EXCEPTIONS/REPLY

J. Fogel, Esq. ..... 32.95 hours x $250 = $8,237.50

P. van Schaick, Esq. .....31.2 hours x $250 = $7,800.00

Subtotal $16,037.50

LODESTAR AMOUNTS

L. Raveson, Esq. .....32.10 hours x $300 = $ 9,630.00

J. Fogel, Esq. .....72.90 hours x $350 = $ 25,515.00

P. van Schaick, Esq. .....376.85 hours x $350 = $ 131,897.50

P. van Schaick, Esq., for paralegal work ..... = $ 3,270.00

*S. Abraham, Esq., per diem legal services - 910.50 hours x $60 = $ 80,669.10 ($ 54,630)

*R. London, Esq., per diem legal services - 657.50 hours x $60 = $ 58,369.68 ($39,450)

*D. Jeffrey, Esq., per diem legal services - 91.80 hours x $25 = $ 3,307.87 ($ 2,295)

Subtotal $ 312,659.15

10% enhancement of lodestar .....$ 31,265.91

TOTAL $456,082.22

* The subtotals for the costs, as well as for the fees billed by S. Abraham, R. London and D. Jeffrey reflect the amounts after interest has been added at the rates provided by New Jersey Court Rule R. 4:42-11(a)(ii), through August 30, 2005. See finding #10. The amount in parentheses reflects the original subtotal.