

August 23, 2002
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Sue Rice Gossett

Date of Filing: May 25, 2001

Case Number: VBH-0062

This Initial Agency Decision concerns a whistleblower complaint filed by Sue Rice Gossett (Gossett) against her former employer, the Safety and Ecology Corporation (SEC), under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. SEC is a sub-contractor of Bechtel Jacobs Corporation (BJC), the DOE's Managing Contractor at the Portsmouth Site in Piketon, Ohio (Portsmouth). In an Interlocutory Decision dated May 8, 2002, I determined that SEC had retaliated against Gossett for engaging in protected activity and that therefore Gossett is entitled to relief. Accordingly, the Interlocutory Decision states:

Within 30 days of receipt of this Interlocutory Decision, Sue Rice Gossett shall submit to the Office of Hearings and to the Safety and Ecology Corporation, a detailed statement setting forth the precise remedies she is seeking as well as supporting documentation. The Safety and Ecology Corporation shall, within 30 days from its receipt of Sue Rice Gossett's statement, submit a responsive document to the Office of Hearings and Appeals and to Sue Rice Gossett.

Interlocutory Decision at 16.

On June 7, 2002, Gossett submitted a detailed statement (Gossett's June 7, 2002 Statement) setting forth the precise remedies she is seeking as well as supporting documentation. In her statement, Gossett seeks the following remedies: reinstatement, back pay, reimbursement of litigation costs and expenses including attorney's fees, and expungement of information from her personnel file. On July 8, 2002, SEC submitted its response to Gossett's June 7, 2002 statement (SEC's July 8, 2002, Response). On July 17, 2002, Gossett submitted a rebuttal to SEC's July 8, 2002, Response (Gossett's Rebuttal).

The remedies for retaliation available under the DOE Whistleblower Protection Regulations are set forth at 10 C.F.R. § 708.36, which provides:

(a) *General remedies.* If the initial or final agency decision determines that an act of retaliation has occurred, it may order:

- (1) Reinstatement;
- (2) Transfer preference;
- (3) Back pay;
- (4) Reimbursement of [the complainant's] reasonable costs and expenses, including attorney and expert-witness fees reasonably incurred to prepare for and participate in proceedings leading to the initial or final agency decision; or
- (5) Such other remedies as are deemed necessary to abate the violation and provide [the complainant] with relief.

(b) *Interim relief.* If an initial agency decision contains a determination that an act of retaliation occurred, the decision may order the contractor to provide [the complainant] with appropriate interim relief (including reinstatement) pending the outcome of any request for review of the decision by the OHA Director. Such interim relief will not include payment of any money.

REINSTATEMENT

Since I have found that Gossett's termination was a retaliatory act on the part of SEC, it is clear that reinstatement is an appropriate remedy. SEC recognizes this fact. However, SEC contends that Gossett must be fully re-trained and re-qualified before she can be reinstated. Obviously, it is reasonable to expect that Gossett must have all of the safety, hazardous materials and radiological training required of a radiation control technician (RCT) at the Portsmouth site. Accordingly, I find that Gossett should receive such training and qualification at SEC's expense and while included on SEC's payroll as a senior RCT.

Moreover, it is reasonable to expect that Gossett be required to successfully complete such training and receive passing scores on a re-qualification examination. Accordingly, I find SEC may administer a re-qualification examination to Gossett after Gossett has been reinstated for at least 180 days. If Gossett does not receive a passing score on this exam, she should be administered another re-qualification examination after 30 days and continue her employment as a Senior RCT as well as her training, until this second re-qualification examination is administered to her and the results made available. If Gossett does not receive a passing score on this second re-qualification examination, SEC may place Gossett on leave without pay until she is able to receive a passing score on a re-qualification examination.

Once Gossett has re-qualified, she shall be afforded the same opportunity to work as a senior RCT, and thereby receive overtime and premium pay, as is normally and customarily afforded to other qualified senior RCTs at the Portsmouth Site.

BACK PAY

Gossett has requested \$85,930.35 of compensation for lost back pay including interest. Gossett's June 7, 2002 Statement at 4. SEC notes that its concerns about Gossett's calculation of her total back pay are "... not significant enough to merit disagreement." SEC's July 8, 2002 Response at 2. 10 C.F.R. § 708.36(a)(3) clearly indicates that compensation for lost back pay is an appropriate remedy for retaliation. Accordingly, I have determined that Gossett's request for \$85,930.35 in back pay compensation and interest shall be granted.

REIMBURSEMENT OF COSTS AND EXPENSES

Gossett has requested a total of \$127,283.04 of compensation for costs and expenses incurred in pursuing her remedies under 10 C.F.R. § 708. Gossett's June 7, 2002 Statement at 5. The \$127,283.04 figure includes \$123,082.50 of requested attorney's fees, \$125 for out-of-pocket expenses, and \$4,075.54 of "standard" expenses (travel, telephone, postage, overnight delivery and photocopying). *Id.* SEC, in turn, contends that Gossett's request for attorney's fees is excessive, her request for expenses inadequately documented, and that her request includes non-reimbursable items.

Attorney's Fees

10 C.F.R. § 708.36(4) specifically provides for the award of attorney's fees for a prevailing complainant. Attorney's fees in Part 708 cases have generally been calculated by the use of the "lodestar" approach described by the U.S. Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (*Blanchard*). *See, e.g., Ronald A. Sorri, 23 DOE & 87,503 (1993), affirmed as modified, 24 DOE ¶ 87,509 (1994)*. Under the "lodestar" methodology, the "starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1939 (1983); *Burlington v. Dague*, 112 S. Ct. 2638, 2640 (1992) (*Dague*); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088, 3098 (1986) (*Delaware Valley I*). The amount to be awarded depends on the unique facts of each case. *Hensley*, 103 S. Ct. at 1937. The party seeking an award of fees bears the burden of submitting evidence supporting the hours worked and the rates claimed. *Webb v. Board of Education of Dyer County, Tennessee*, 105 S. Ct. 1923, 1928 (1985). There is a strong presumption that the lodestar calculation results in a reasonable fee. *Dague*, 112 S. Ct. at 2641; *Delaware Valley I*, 106 S. Ct. at 3098.

Gossett requests a total of \$123,082.50 of attorney's fees. Gossett asserts that this figure was determined by using the standard "lodestar" calculation. SEC does not dispute Gossett's reliance upon the lodestar calculation, but rather claims that Gossett's calculation of attorney's fees is excessively high because it uses an unreasonably high rate and an excessive number of hours. SEC's July 8, 2002, Response at 2-3.

The fee applicant has the burden of producing satisfactory evidence that his requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See Blum v. Stenson*, 104 S. Ct. 1541(1984). Therefore,

“a reasonable hourly rate” must be “calculated on the basis of rates and practices prevailing in the relevant market.” *Missouri v. Jenkins*, 109 S. Ct. 2463, 2470 (1989); *Blanchard, supra*; *Riverside v. Rivera*, 106 S. Ct. 2686 (1986).

In support of her contention that \$300 is a reasonable hourly rate for the services of her attorney, Charles J. Fitzpatrick, Gossett has submitted the declaration of Ann Lugbill, an attorney with considerable litigation experience in the Southern District of Ohio as well as substantial experience in the fee application process.

1/ Lugbill’s declaration asserts:

In my opinion, in a case of this type, an hourly rate of \$250 to \$300 per hour for Mr. Fitzpatrick, an experienced lawyer in a very specialized field, is exceedingly reasonable, if not below the rates normally charged by most attorneys of comparable experience who regularly and successfully practice in this area of hotly-contested whistleblower litigation involving DOE nuclear sites.

Lugbill Declaration at 8. SEC claims that the Lugbill Declaration fails to satisfy Gossett’s burden of showing that \$300 is a reasonable rate. SEC’s July 8, 2002, Response at 2. SEC has articulated a number of arguments in support of this claim.

First, SEC contends that no other complainant in a whistleblower protection proceeding before the Office of Hearings and Appeals (OHA) has received more than \$175 an hour in attorney’s fees. *Id.* at 6. This contention is without merit. In *C. Lawrence Cornett*, Case No. VWX-0010 (1997) (*Cornett*), an OHA Hearing Officer specifically approved the use of a rate of \$265 per hour in calculating a whistleblower complainant’s compensation for attorney’s fees using the lodestar methodology. *Cornett*, at 2. Moreover, only a handful of OHA decisions have considered the awarding of attorney’s fees in proceedings under Part 708, and none of these cases has sought to establish a nationwide ceiling on attorney’s fees. Instead, the cases have clearly established that reasonable rates for attorney’s fees are to be determined on a case-by-case basis after due consideration of whether the rates requested are comparable to those currently prevailing in the local community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

Second, SEC contends that “Counsel for SEC has been unable to locate any decision of the Southern District of Ohio published on Lexis which has awarded \$300 per hour in any *contested* fee decision.” SEC’s July 8, 2002 Response at 6-7 (emphasis supplied). This self-serving assertion by SEC’s counsel, who has not claimed to be an expert in the area of attorney’s fees, has no evidentiary weight and therefore fails to rebut the Lugbill Declaration.

Third, SEC claims that Lugbill’s attorney’s fee expertise is limited to *Qui Tam* actions and that therefore her opinion should not be relied upon in a whistleblower forum because she lacks sufficient experience in such proceedings. SEC’s July 8, 2002 Response at 7. There is no evidence in the

1/ In addition, Lugbill has co-authored and updated chapters on attorney’s fee law in a West Group publication entitled *Litigating Wrongful Discharge Claims*. She is also the co-author of *Representing the Terminated Employee in Ohio*.

record supporting this assertion. I note that Lugbill's declaration specifically indicates that her practice has focused upon whistleblower litigation and employment law. Lugbill Declaration at 2. Moreover, Lugbill's experience in the subject matter is further supported by her publication history.

Fourth, SEC cites, as evidence that \$150 an hour would constitute a reasonable lodestar rate, a recent case in which the Federal District Court for Southern District of Ohio rejected a prevailing party's request for a lodestar rate of \$250 an hour and instead calculated the lodestar using a rate of \$150 an hour. *Tinch v. Dayton*, 199 F. Supp. 758 (S.D. Ohio 2002). That determination was based upon prevailing rates in civil rights cases in the local community. The determination of a reasonable lodestar rate is made on a case-by-case basis and must take into account the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. See *Blum v. Stenson*, 104 S. Ct. 1541(1984). In the present case, there is ample evidence that an attorney of comparable skill, experience, reputation and willingness to take the case was not available in the local community. Affidavit of Sue Rice Gossett at 2-4; Lugbill Declaration at 6-8; Affidavit of Charles J. Fitzpatrick at 2-3. In such circumstances, it is clear that a complainant must pay a substantial premium in order to obtain competent counsel. Accordingly, I find that the *Tinch* decision neither reflects the local market for the services of DOE whistleblower proceeding counsel nor requires that we use only the local market to determine a reasonable rate for attorney's fees.

Finally, SEC contends that the rate should be adjusted downward to reflect the relative ease in which whistleblower complainants can, SEC alleges, prevail in actions under 10 C.F.R. Part 708. 2/ This contention is based upon a flawed assumption, i.e. that success in the DOE's whistleblower protection program does not require skilled, determined and experienced counsel. Our experience has shown that the contrary is true.

Departmental policy favors the protection of the rights of alleged whistleblower under Part 708, and reasonable fees should be awarded to encourage attorneys to take these cases. See *Ronald Sorri* (Case No. LWA-0001), 23 DOE ¶ 87,503 at 89,018 (1993), and cases cited therein. Downward adjustment of the hourly rate on the basis of the SEC's contentions would clearly be inconsistent with this Departmental policy.

Gossett has requested that her lodestar be calculated using a total of 407.5 hours for Charles J. Fitzpatrick, Esq. and 6.9 hours for Lori Borski, Esq. SEC contends that Gossett's request for hours is excessive. Specifically, SEC contends that: (1) Gossett improperly requests attorney fees for 16.3 hours of travel by her attorney, (2) Gossett's hours should be capped at 12 per day during the period beginning on October 21, 2002, and continuing through October 25, 2002, 3/ and (3) 6.9 hours of attorney fees claimed for Lori Borski should be disallowed because it is insufficiently documented.

2/ Experience has shown that the majority of whistleblower complainants are unable to prevail in actions under 10 C.F.R. Part 708.

3/ The hearing took place on October 22, 23 and 24 of 2002.

Gossett claims a total of 14.3 hours for Fitzpatrick's services on October 21, 2002, the day that Fitzpatrick traveled from San Antonio, Texas, to the Piketon, Ohio area where the hearing took place. Fitzpatrick's invoice indicates that 9.5 hours of that time was spent traveling to Columbus and Chillicothe and working on Gossett's case. Egan and Associates Invoice at 4. SEC claims that it is inappropriate to bill for travel time. However, both the billing invoice itself and a July 17, 2002 letter from Fitzpatrick indicate that Fitzpatrick was working on Gossett's case while he was traveling. Successful whistleblower complainants are entitled to be compensated for fees charged for legal work performed while their attorneys are in transit. *Ronald A. Sorri* (Case No. LWX-0014) (1994). Therefore, I find SEC's objections concerning attorney travel time to be without merit.

SEC correctly notes that Fitzpatrick's invoice claims that 84.4 hours can be attributed to one five day period, October 21, 2001 through October 21, 2001. While it is true that Fitzpatrick's invoice claims an average of 17 hours a day for this five day period, it must also be borne in mind that this five day period began one day before and concluded one day after a 3 day hearing. Competent counsel are always well prepared for trial-type proceedings, and the high degree of preparedness exhibited by Mr. Fitzpatrick at the hearing, as well as his exceptional success in the proceeding, constitute more than sufficient evidence of his long hours of preparation.

Gossett has also requested to be reimbursed for the services of an attorney, Lori Borski, for 6.9 hours at the rate of \$110 an hour. SEC has objected to this request claiming it is insufficiently documented. SEC's July 8, 2002 Response at 8 n.4. I agree. Gossett has not submitted any evidence that the rate of \$110 requested for Borski's services is reasonable, and I will not approve those fees.

Based upon my review of Gossett's Statement and the supporting Affidavit and attachments, I have decided to approve the majority of her request for attorney's fees. As indicated above, she has sufficiently documented 407.5 hours of work performed on her case and has affirmed that \$300 is a reasonable hourly billing rate. Accordingly, I have concluded that Gossett should be awarded attorney's fees of \$122,250, using the "Iodestar" approach.

Other Costs and Expenses

Gossett has requested reimbursement for \$125 of out-of-pocket expenses she incurred in pursuing her whistleblower remedy. Apparently, SEC does not object to this request. *See* SEC's July 8, 2002, Response at 10. I therefore will direct SEC to reimburse Gossett for these \$125 worth of out-of-pocket expenses she incurred.

Gossett has also requested reimbursement totaling \$4,075.54 for travel, telephone, postage, overnight delivery, and copying expenses incurred by Fitzpatrick in representing Gossett. SEC has objected to several aspects of Gossett's request for these expenses. Specifically, SEC contends that Gossett (1) failed to indicate the dates on which many of the claimed expenses occurred, (2) failed to itemize claimed travel expenses, (3) exceeded DOE guidelines for photocopying charges, (4) requested reimbursement for fax transmission and long distance phone calls which are actually "overhead" charges, and (5) charged a reproduction fee of \$740.17 in connection with the preparation of a reply brief.

SEC's July 8, 2002 Response correctly notes that Gossett has failed to sufficiently document many of the expenses incurred on her behalf by her attorney. Since the burden of proof is on Gossett to show that she incurred such expenses, I must reject Gossett's request for reimbursement for most of those expenses incurred on her behalf by her attorney. Accordingly, I am rejecting all but \$302.02 of Gossett's request for reimbursement of those expenses incurred on her behalf by her attorney. I am granting Gossett's request for reimbursement of those services listed in the June 2, 2002 invoice that are dated and sufficiently described.

Therefore, I will approve a total of \$427.02 of Gossett's request for reimbursement of "other costs" and expenses.

OTHER REMEDIES

Gossett's June 7, 2002 Statement requests "that SEC be required to remove from her personnel file all information pertaining to her repeated reassignments within the SEC workforce during the time of her employment prior to her termination on January 19, 2001." Gossett's June 7, 2002 Statement at 5. However, SEC asserts that Gossett's personnel file "never contained any document concerning her transfers." SEC's July 8, 2002 Response at 3. Since SEC has affirmed that Gossett's personnel file does not contain any documents relating to her reassignments, there is no need for me to grant this request. Gossett's June 7, 2002 Statement also requests that a memo from her former supervisor, Joseph Shuman, to her be removed from her personnel file. SEC's July 8, 2002 Response affirms that the Shuman memo is not included in her personnel file. SEC's July 8, 2002 Response at 3.

It Is Therefore Ordered That:

- (1) The Request for Relief filed by Sue Rice Gossett under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.
- (2) Safety and Ecology Corporation shall immediately return Sue Rice Gossett to her position as a Senior Radiation Control Technician from which she was terminated in January 2001, in accordance with the instructions set forth above.
- (3) Safety and Ecology Corporation shall pay Sue Rice Gossett \$86,055.35 in compensation for her in violation of 10 C.F.R. Part 708.
- (4) Safety and Ecology Corporation shall pay Charles J. Fitzpatrick, Esq. \$122,677.02 as attorney's fees incurred while representing Sue Rice Gossett in this Part 708 proceeding.
- (5) Safety and Ecology Corporation shall pay the above amounts to Sue Rice Gossett and Charles J. Fitzpatrick and reinstate Sue Rice Gossett as a senior radiation technician within 20 days of the date of this Order.

(6) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after receipt of the decision.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: August 23, 2002