CIVIL RIGHTS COMMISSION

STATE OF HAWAI'I

WILLIAM D. HOSHIJO, Executive Director, on behalf of the complaint filed by KAY LORRAINE BATE,	)	Docket No. 13-001-E-RH-SH-R
and	)	SUPPLEMENTAL FINAL DECISION AND ORDER REGARDING COMPLAINANT-INTERVENOR'S APPLICATION FOR ATTORNEYS' FEES AND COSTS
KAY LORRAINE BATE,	)	
Complainant-Intervenor,	)	
vs.	)	
RESEARCH INSTITUTE FOR HAWAII.USA and CHRISTOPHER DAMON HAIG, as an individual,	)	
Respondents.	)	

SUPPLEMENTAL FINAL DECISION AND ORDER REGARDING COMPLAINANT-INTERVENOR'S APPLICATION FOR ATTORNEYS' FEES AND COSTS

I. Introduction

This case was vigorously prosecuted by the Executive Director together with Complainant-Intervenor Bate ("Complainant") and just as vigorously defended by Respondents Research Institute for Hawaii.USA and Christopher Damon Haig over a period of seven years.

On June 7, 2007, Complainant filed a complaint against Respondents with the Hawai'i Civil Rights Commission ("HCRC"),

alleging hostile work environment harassment based on religion and sex, and termination based on religion and in retaliation for opposing unlawful harassment. On December 14, 2011 the Executive Director completed his investigation of the complaint and issued a Notice of Finding of Reasonable Cause to Believe that Unlawful Discriminatory Practices Have Been Committed. During this investigation period, Complainant was represented by counsel. On February 6, 2013 the Executive Director served a final conciliation demand letter and conciliation agreement on Respondents. Respondents' deadline to respond was February 22, 2013, and the case did not conciliate.

The Executive Director requested the docketing of the complaint on February 25, 2013 and on March 8, 2013 the complaint was docketed for a contested case hearing. On March 12, 2013 Complainant filed a motion to intervene in the contested case hearing and on April 8, 2013 the Hearings Examiner granted Complainant's motion to intervene. Subsequently, the parties propounded numerous sets of written discovery requests, took numerous party and witness depositions, and filed numerous motions regarding discovery, motions for summary judgment and motions in limine. The contested case hearing was held on September 23, 24; October 15, 16, 17, 21, 22 and December 3 and 9, 2013. After the hearing the parties filed proposed findings of fact and conclusions of law, as well as

post-hearing briefs.

The Hearings Examiner issued his Findings of Fact; Conclusions of Law and Recommended Order ("proposed decision") on March 14, 2014. The parties filed exceptions to the proposed decision on March 27, 2014 and statements in support of the proposed decision on April 11, 2014. The Commission held oral argument on the exceptions and statements in support of the proposed decision on April 30, 2014.

The Commission issued its Final Decision and Order on August 26, 2014 finding and concluding that:

a) Complainant was an employee of RIH under HRS Chapter 378 and was not estopped from so contending;

b) Respondents subjected Complainant to harassment based on her religion (Jewish) and sex (female) in violation of HRS § 378-2 and HAR §§ 12-46-109(a) and 12-46-151;

c) Respondents discharged Complainant from employment because of her religion in violation of HRS § 378-1(a)(1(A) and HAR § 12-46-151;

d) Respondents also discharged Complainant in retaliation for complaining about the harassment in violation of HRS § 378-2(a)(2);

e) Respondent RIH is liable for Haig's harassment of Complainant because Haig was Complainant's supervisor under HAR §§ 12-46-109(b), and is liable for Complainant's termination and retaliation under HRS § 378-2 and HAR § 12-46-151;

f) Respondent Haig is individually liable to Complainant for the harassment, termination, and retaliation because RIH was a shell corporation operating as Haig's alter ego;

g) Haig is not individually liable to Complainant under HRS § 378-2(a)(3) for aiding and abetting discrimination because that claim was not raised before the contested case hearing in this matter; and

h) Complainant shall be awarded back pay, compensatory damages for emotional distress, punitive damages, attorneys' fees and costs, and other equitable relief pursuant to HRS § 368-17. The specific award of attorneys' fees and costs is to be submitted to and determined by the Commission.

The entire text of the Commission's August 26, 2014 Final Decision and Order is hereby incorporated by reference.

Pursuant to the Commission's August 26, 2014 Final Decision and Order, Complainant filed her Application for Statutory Award of Attorneys' Fees and Costs on September 16, 2014. Respondents filed their Opposition to Complainant's Application for Statutory Award of Attorneys' Fees and Costs on September 30, 2014 on the grounds that Complainant's attorneys: a) charged excessive and unreasonable hourly rates for their attorneys and support staff; b) over-billed for duplicative time; c) requested an improper lodestar enhancement; d) failed to prove documentation demonstrating that costs were actually incurred; and e) included non-compensable costs in her request.

II. Attorneys' fees

HRS § 368-17(a) provides, in pertinent part, that the remedies ordered to a prevailing complainant in proceedings under HRS Chapter 368 may include "[p]ayment to the complainant

of all or a portion of the costs of maintaining the action before the commission, including reasonable attorney's fees and expert witness fees, when the commission determines that award to be appropriate." In ruling on a petition for statutory attorneys' fees and costs under this statute, and under other statutes governing attorneys' fees awards, a court or administrative agency must first determine whether the petitioner is a "prevailing party" in the legal proceeding for which fees and costs are sought. *Kaleikini v. Yoshioka*, 129 Hawai'i 454, 460, 304 P.3d 252, 258 (2013), *reconsideration denied,* No. SCAP-11-0000611, 2013 WL 2156245 (Haw. May 17, 2013)(adjudicating attorneys' fees under Hawai'i's private attorney general doctrine); *Sierra Club v. Dep't of Transp.* (Superferry II), 120 Hawai'i 181, 215, 202 P.3d 1226, 1260 (2009)(same).

In the proceedings before the Commission, Complainant was a "prevailing party." She prevailed against Respondents RIH and Haig on all but one of the claims she raised against them. While Respondents have requested a trial by jury on these claims, as is their right under *SCI Mgmt. Corp. v. Sims*, 101 Hawai'i 438, 71 P.3d 389 (2003), this does not change the fact that Complainant was a prevailing party before the Commission.

Under the plain language of HRS § 368-17(a)(9), it is the *Commission* that determines whether an award of attorneys' fees

and costs incurred in maintaining an action before the Commission is appropriate, and if so, in what amount. For this reason, we reject Respondents' argument that Complainant is not a "prevailing party" before the Commission under HRS § 368-17(a), and we hold that she is. While the Commission's decision might be stayed pending the jury's verdict and Circuit Court judgment, it is nonetheless the Commission's statutory prerogative to determine what attorneys' fees and costs should be awarded for prosecuting the action before the Commission. We make that determination in this Supplemental Final Decision and Order.

The starting point for determining what would constitute a reasonable attorneys' fee under HRS § 368-17(a)(9) is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *DFS Group, L.P. v. Paiea Props.*, 110 Hawai'i 217, 222, 131 P.3d 500, 505 (2006)(quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1982)). This amount is generally referred to as the "loadstar fee." *Schefke v. Reliable Collection Agency, Ltd.*, 96 Hawai'i 408, 443, 32 P.3d 52, 87 (2001), as amended (Oct. 11, 2001)(calculating reasonable attorneys' fees under HRS §§ 378-5(c) and 388-11(c) in an age discrimination/retaliation case under HRS Chapter 378).

The party requesting fees has the ultimate burden of proving that the requested fees were reasonably and necessarily

incurred. *DFS Group*, at 222, 131 P.3d at 505. Once a *prima facie* showing to this effect is made, the party opposing the fee application has a burden of rebuttal that requires submission of evidence that challenges the accuracy and reasonableness of the hours charged or other facts asserted by the prevailing party in its submitted affidavits. *Blum v. Stenson*, 465 U.S. 886, 892 n. 5 (1984); *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992); *Toussaint v. McCarthy*, 826 F.2d 901, 904 (9th Cir. 1987).

A. The Number of Hours Reasonably Expended on the Case

Applying the loadstar method of calculating a reasonable fee, our first task is to determine how many hours were shown by the fee application and supporting documents to have been "reasonably expended" in the prosecution of Complainant's claims before the Commission. In light of the plain language of HRS § 368-17(a)(9), which authorizes fees incurred in "maintaining the action before the Commission," we hold that under Hawai'i law, attorneys' fees for work performed in connection with the Commission's administrative process are compensable. In this regard, Hawai'i law harmonizes with federal authority under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(5). *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (holding that federal courts have subject matter jurisdiction over claims brought solely to recover attorney's fees incurred in Title VII-related administrative proceedings before the

United States Equal Employment Opportunity Commission); *Porter v. Winter*, 603 F.3d 1113, 1114 (9th Cir 2010)(same).

Respondents posit that attorneys' fees and costs should not be awarded to employment discrimination complainants who intervene in proceedings before the Commission (or, presumably in circuit court) because their participation is unnecessary. They base this position on the argument that a complainant's interests are adequately protected by HCRC enforcement staff.

We reject this argument. The plain language of HRS § 368-17(a)(9) directs that attorneys' fees and costs may be awarded to a complainant who has prevailed in administrative proceedings before the Commission. No exception for attorneys' fees and costs incurred by a complainant-intervenor appears in the statute, and we cannot and will not read such an exception into it. Indeed, the Commission has previously rejected the very argument Respondents make here. In a 1998 Declaratory Relief decision, *In the Matter of FEP No. WH-5137, FEP No. 6827, EEOC No. 37B-95-0011,* DR No. 98-013 (Sept. 15, 1998), this Commission held that, because a complainant has a "clear and direct interest" in proceedings before the Commission, party status should be 'freely granted' to a complainant when sought." Recognizing that complainants' interests in Commission enforcement proceedings often diverge from the interests of the Executive Director, Commission regulations also provide for

intervention by complainants in Commission proceedings. HAR § 12-46-25.

Respondents' contention that the fees requested by Complainant are excessive because they reflect unnecessary duplication of effort is better-founded. In computing the lodestar fee compensable under HRS § 368-17(a)(9), we must ascertain the time counsel actually spent on the case and subtract hours that represent duplicative, unproductive, excessive, or unnecessary work. *Tirona v. State Farm Mut. Auto. Ins. Co.*, 821 F. Supp. 632, 636 (D. Haw. 1993)(citing *Hensley v. Eckerhart*, 461 U.S. at 432-433). Hours that are excessive, redundant, or otherwise unnecessary are not reasonably expended. *Hensley*, at 434.

What constitutes "reasonable" time expended on a case is a highly contextual inquiry. The more vigorously the case is defended, the more time complainant's counsel must spend in prosecuting it. A thorough review of the docket sheet in this case shows that Respondents' counsel defended the case vigorously, resisting discovery on numerous occasions, challenging the availability of claims, and contesting issues, such as Complainant's status as an employee, that multiple state or federal agencies had already determined in her favor. Respondent Haig walked out of his deposition and refused to return. Discovery motions ensued. Before the contested case

hearing was held in this case, Respondents filed motions for summary judgment on six distinct grounds. This, of course is a party's prerogative. But one cannot defend a case this vigorously and then fault the opposing party for responding in kind with an equally vigorous resistance to that defense.

Using co-counsel, or having more than one attorney present at a deposition, meeting, or hearing is not, *per se*, unreasonable. Whether the attendance at a hearing or meeting or the expenditure of effort by more than one attorney is duplicative varies with the nature of a particular case and task. *Compare, U.S. ex rel. Thompson v. Walgreen Co.*, 621 F. Supp. 2d 710, 727 (D. Minn. 2009) (noting that qui tam work raises complex questions and frequent consultation with the Government at various stages of the case, reducing hours for only some duplication of effort); *U.S. ex rel. John Doe I v. Pennsylvania Blue Shield*, 54 F. Supp. 2d 410 (M.D. Pa. 1999)(declining to reduce hours when multiple lawyers attended meetings); *with Farris v. Cox*, 508 F.Supp. 222, 226 (N.D. Cal.1981) (reduction of time where multiple attorneys attended depositions and hearings); *U.S. ex rel. Miller v. Bill Harbert Intern. Const. Inc.*, 601 F. Supp. 2d 45, 53 (D.D.C. 2009) (reducing time for duplication of effort where number of attorneys on particular tasks was deemed excessive).

As the Ninth Circuit has noted in *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008):

> Determining whether work is unnecessarily duplicative is no easy task. When a case goes on for many years, a lot of legal work product will grow stale; a competent lawyer won't rely entirely on last year's, or even last month's, research; cases are decided; statutes are enacted; regulations are promulgated and amended. A lawyer also needs to get up to speed with the research previously performed. All this is duplication, of course, but it's necessary duplication; it is inherent in the process of litigating over time.

Moreover, in determining whether hours spent prosecuting a complex and vigorously defended civil rights case were reasonably spent, we should seriously consider, although we think not entirely defer to, the prosecuting lawyer's professional judgment. As the Ninth Circuit opined in *Moreno*:

> It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning. By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.

Id.

Whether work performed by multiple attorneys or their attendance at meetings or hearings is deemed unreasonably duplicative depends the stage of the case and the nature of the

task for which the time is billed. So for example, the fact that multiple attorneys divided the work required to oppose Respondents' six motions for summary judgment filed in the summer of 2013 does not *per se* render their participation unnecessary or their billed hours unreasonably duplicative.

After carefully scrutinizing the time billed and comparing it with the voluminous pleadings file in this case, we cannot agree entirely (although as subsequent analysis will show, we do agree partially) with Respondents' contention that Complainant's counsel overstaffed this case.

A review of the fees petition reveals that Complainant's attorneys were, in many contexts, careful not to charge for activities that were unnecessarily duplicative. For example, attorney Andrew L. Pepper, who worked at Bronster Hoshibata on Complainant's case between June 28, 2013 and October 23, 2013, did not charge for his attendance at the HCRC contested case hearing on days when he was not conducting witness examination (See, e.g. Exhibit A to Complainant's Application for Statutory Award of Fees, entry dated 9/23/2013). Attorney Jeannette Holmes Castagnetti, who worked at the Bronster law firm on Complainant's case between and January 3, 2007 and September 24, 2010, did not charge for many of her expended hours spent in meetings with co-counsel (See, e.g. Exhibit A to Complainant's Application for Statutory Award of Fees, entries dated

12/28/2007, 1/22/2008, 3/2/2008, 3/9/2008, 4/19/2008, 4/20/2008, 5/2/2008, 9/21/2008, 9/28/2008, 10/1/2008, 10/25/2008, 11/15/2008, 11/21/2008, 7/24/2009, 3/24/2010). Attorney Catherine Aubuchon, who worked on Complainant's case at Bronster Hoshibata between May 23, 2013 and August 29, 2014, did not bill for the time she spent familiarizing herself with the case (See Exhibit A to Complainant's Application for Statutory Award of Fees, entries dated 5/23/2013 and 5/24/2014). Lead counsel Margery S. Bronster frequently did not charge for time she spent meeting with associates on tasks they were conducting under her supervision, or for time attending pre-trial motion hearings during which she did not argue. (See, e.g., Exhibit A to Complainant's Application for Statutory Award of Fees, entries dated 6/14/2013, 7/26/2013, 8/12/2013).

The mere fact that, over the years during which the instant case was pending, various Bronster Hoshibata associates contributed to its prosecution, does not render the work they performed duplicative *per se*. It is not inherently unreasonable to have different associates, or multiple associates performing different tasks, working on a complex, vigorously defended case that extends over a seven year period. To a significant extent, different members of Complainant's litigation team played different roles at different times in the prosecution of the case. So, for example, attorneys Andrew Pepper and Margery

Bronster played a lead role in coordinating Complainant's oppositions to the Respondents' six summary judgment motions filed in the summer of 2013, while playing no role in preparing various motions and statements relating to the pre-hearing conference, which tasks were handled by Bronster Hoshibata attorney Catherine Aubuchon under the supervision of co-lead counsel Susan Ichinose. Our review of the time records submitted with the instant fee application show that, on most occasions, co-lead counsel Margery Bronster and Susan Ichinose were careful not to bill time for the same meeting, deposition session, or hearing.

However, even though Complainant' counsel took steps to minimize duplication in their billed time, Respondents' contention that the time spent was at times unnecessarily duplicative is in some instances well-founded. On some occasions, co-lead counsel Margery Bronster and Susan Ichinose, along with a lower-billing Bronster Hoshibata associate, met with the client or with other lawyers working on the case. In some of these meetings, it would be reasonable for one partner-level attorney and one lower-level associate, with or without a paralegal, to meet with a client. However, having two high-charging, experienced, partner-level attorneys billing for such meetings is ordinarily not reasonable, particularly when the partner-level lawyer is accompanied by a lower-level associate.

Similarly, while it may be reasonable in complex cases like this to have different lawyers conducting different portions of the oral argument in motion hearings, or to have different lawyers examining different witnesses in the contested case hearing, it is ordinarily not reasonable for a lawyer to bill time spent listening to other lawyers argue or conduct examinations, except when waiting for his or her own imminent turn to participate.

At the end of the day, the reasonableness of the hours spent on a contingency fee case can be assessed through the application of a relatively straightforward principle: the number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client. *Id.* at 1111 (citing *Hensley v. Eckerhart*, 461 U.S. at 434). Because we believe that some of the duplicative time billed in this case would not have been tolerated by a paying client, we must reduce the number of hours included in calculating the loadstar fee. *See Hensley,* at 434 (stating that hours that are not properly billed to a paying client are also not properly billed to an adversary pursuant to statutory authority). In this regard, we take note that, on most occasions, Respondents were represented at depositions and hearings by one partner-level attorney and one lower-level associate attorney. We view this as important, although not conclusive, evidence of what a well-resourced

client would be willing to pay his or her lawyer.[1]

Table 1, below, specifies by biller the hours being omitted from the loadstar calculation because of unreasonable duplication.

Table 1

Duplicative Time Omitted from Loadstar Calculation
(by biller)

Biller's Last Name	**Billing Date**	**Time Subtracted (in hours)**	**Reason for Adjustment**
Bronster	03/26/07	1.5	Overstaffing of Mtg. w/ HCRC
Bronster	03/02/08	0.25	Duplication Bronster & Ichinose
Bronster	03/09/08	0.5	Duplication Bronster & Ichinose
Bronster	03/26/08	1	Duplication Bronster & Ichinose
Bronster	09/21/08	0.25	Duplication Bronster & Ichinose
Bronster	02/27/12	0.75	Duplication Bronster & Ichinose
Bronster	09/23/13	7.5	Hearing; Did only opening statement

[1] We note that Respondents have not disclosed in their opposition to Complainant's application for fees what they, over the past seven years, paid to the various lawyers who worked on this case. Assessing the reasonableness of Complainant's fee request would be simpler had Respondents provided this information in their opposition papers.

Bronster	10/21/13	4.25	Hearing; Mostly observation
Total Time Subtracted for Bronster		**16**	
Aubuchon	06/13/13	1.5	Deposition Overstaffing
Aubuchon	07/12/13	0.45	Multiple counsel required more meeting time than reasonable
Aubuchon	07/31/13	4.5	Deposition Overstaffing
Aubuchon	08/08/13	0.8	Multiple counsel required more meeting time than reasonable
Aubuchon	10/15/13	7	Hearing overstaffing; Bronster and Ichinose both present; third lawyer unnecessary
Aubuchon	10/16/13	8.1	Hearing overstaffing; Bronster and Ichinose both present; third lawyer unnecessary
Aubuchon	10/17/13	1	Hearing overstaffing; Only conducted examination of Bowerman and Loudat
Aubuchon	10/22/13	3.5	Hearing Overstaffing
Aubuchon	12/03/13	7.5	Hearing overstaffing; Bronster and Ichinose both present; third lawyer unnecessary
Aubuchon	12/09/13	5	Overstaffing of Closing Arguments
Total Time Subtracted for Aubuchon		**39.35**	

Park	08/05/13	0.8	Overstaffing of Meeting
Park	04/05/13	1.5	Billed for hearing at which she played no apparent role
Park	04/08/13	1	Overstaffing of meeting-no apparent role
Park	04/30/13	1.5	Overstaffing of meeting-no apparent role
Total Time Subtracted for Park		**4.8**	
Ichinose	03/26/07	1.5	Overstaffing of Meeting
Ichinose	03/02/08	0.25	Duplication Bronster & Ichinose
Ichinose	03/09/08	0.5	Duplication Bronster & Ichinose
Ichinose	03/26/08	1	Duplication Bronster & Ichinose
Ichinose	09/21/08	0.25	Duplication Bronster & Ichinose
Ichinose	02/27/12	0.75	Duplication Bronster & Ichinose
Ichinose	06/13/12	2	Deposition Overstaffing (Haig deposition "second chair")
Ichinose	07/12/13	0.5	Meeting Overstaffing
Ichinose	07/31/13	2.5	Deposition Overstaffing
Ichinose	10/17/13	7.8	Attended but did not participate in hearing
Ichinose	10/21/13	4.25	Attended but did not participate in most of hearing

Ichinose	10/22/13	8	Attended but did not participate in hearing
Ichinose	12/09/13	7	Attended but did not participate in closing arguments
Ichinose	04/30/13	3.8	Attended but did not participate in hearing on exceptions
Total Time Subtracted for Ichinose		**40.1**	

As Table 1 reflects, the hours claimed by four of Complainant's attorneys in her application for fees and costs must be reduced to account for unreasonable duplication of effort. Margery S. Bronster's loadstar hours must be reduced by sixteen hours, from 309.7 to 293.7. Catherine Aubuchon's hours must be reduced by 39.35 hours, from 528 to 488.65. Jae B. Park's hours must be reduced by 4.8 hours, from 70.2 hours to 65.4 hours. Susan Ichinose's hours must be reduced by 40.1 hours, from 636.6 hours to 596.5 hours.

Time that is not reasonably necessary to the prosecution of the Complainant's claims in the proceedings before the Commission is also not compensable and must be omitted from the loadstar fee. *Tirona*, at 636. The same is true of time that is not directly related to the prosecution of the prevailing party's claims. *Davis v. City of S.F.*, 976 F.2d 1536, 1545 (9th Cir.1992), *vacated in part on other grounds,* 984 F.2d 345 (9th

Cir.1993).

In this case, Complainant's attorneys billed some hours on claims or causes other than those that were pending before the Commission. This included time spent on Complainant's unemployment compensation and unpaid vacation compensation claims, potential whistleblower and ERISA claims, her claim against Respondent Haig for back taxes before the Internal Revenue Service, and a common law claim for intentional infliction of emotional distress. Although we realize that the issues involved in at least some of these claims would have paralleled those involved in determining, for example, whether Complainant was an "employee" or an "independent contractor" for purposes of Chapter 378 coverage, we do not feel that the time billed was sufficiently related to Complainant's Chapter 378 claims to be compensable under HRS § 368-17(a)(9).

Jeannette Holmes Castagnetti, an associate in the Bronster Crabtree & Hoshibata firm, billed a total of 10.2 hours working on such claims. Her hours contributing to calculation of the loadstar fee must therefore be reduced from 91.8 to 81.6. Susan Ichinose billed a total of 2.5 hours relating to these claims. Her loadstar time is therefore reduced from 596.5 hours to 594 hours.

Complainant's counsel also billed for work on press releases and related matters. Lead counsel Margery Bronster

billed a total of .6 hours on press-related matters, and her associate, Catherine Aubuchon, billed 2.2 hours. Co-lead counsel Susan Ichinose billed a total of 1.3 hours on press-related activities.

Because there is no Hawai'i authority on this subject, we look to federal law for guidance on whether time spent of press releases or other public relations activities are compensable in connection with a statutory fee petition. We agree with the analysis set forth in *Davis v. City of S.F.*, and hold that, at least in this case at this time, the press work billed by Complainant's counsel is not compensable under HRS § 368-17(a)(9) because it is not "directly and intimately related to the successful representation" of the client. *Davis*, at 1545. This does not mean that press-related activity could never be compensable in a civil rights proceeding before the Commission; it simply means that the *Davis* standard, which we find well-founded, was not satisfied in this case.

Accordingly, after omitting time spent on press-related activities, Margery Bronster's hours reasonably billed are reduced from 293.7 to 293.1. Susan Ichinose's hours are reduced from 594 hours to 592.7 hours. Catherine Aubuchon's reasonably billed hours are reduced from 488.65 to 486.45.

In summary, while we do not agree with many of Respondents' objections made in their opposition to Complainants fee request,

we do agree that some of the time billed by counsel was unnecessarily duplicative or otherwise non-compensable. Accordingly, the following hours per lawyer[2] will be used in calculating the lodestar fee in this case:

- Susan Ichinose: 592.7 hours
- Margery S. Bronster: 293.1 hours
- Andrew L. Pepper: 131.7 hours
- Jeannette Holmes Castagnetti: 81.6 hours
- Catherine Aubuchon: 486.45 hours
- Jae B. Park: 65.4 hours
- Dana A. Barbata: 51.6 hours
- Mia Obciana: 40.5 hours

B. Reasonable Hourly Rates

Having determined how many hours were reasonably expended in prosecuting the case, our next task is to determine a reasonable hourly rate for each attorney who worked on the case. *DFS Group*, at 223, 131 P.2d at 506. These hourly rates should be calculated according to prevailing market rates in the relevant community for professionals of similar experience, skill and competence." *Kaleikini v. Yoshioka*, 129 Hawai'i 454,

[2] Paralegal fees are considered later in our decision in connection with the calculation of compensable costs.

472, 304 P.3d 252, 270 (2013), reconsideration denied, No. SCAP-11-0000611, 2013 WL 2156245 (Haw. May 17, 2013) (citing Blum v. Stenson, 465 U.S. 886 (1984)).

Respondents object to the hourly rates Complainant's counsel used to calculate the lodestar fee. They seek to substitute other hourly rates gleaned from one unpublished and two published Hawai'i state court decisions.

Respondents' arguments fail because they are not supported by any actual evidence. Complainant's counsel, Margery Bronster, submitted a declaration establishing that the rates billed for each staff member in her law firm in this case are the hourly rates charged her law firm's actual paying clients. This declaration was accompanied by the Declaration of Hawai'i attorney Paul Alston, who averred that the rates Ms. Bronster's law firm were charging reflected market rates, except that, in his opinion, Ms. Bronster's claimed rate of $400/hr. was too low. Susan Ichinose's requested hourly rate of $375 was supported by evidence in the form of her own declaration, her curriculum vitae, and the declaration of David F. Simons, who stated that the rate Ms. Ichinose was claiming in the fee petition was below the prevailing market rate in the relevant community for a lawyer of her experience and expertise. This evidence is sufficient to establish the appropriate rate for lodestar purposes. *Bouman v. Block*, 940 F.2d 1211, 1235 (9th

Cir. 1991)(citing *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210-1211 (9th Cir.1986)).

Although they took positions in their brief regarding what hourly rates are "reasonable," Respondents submitted no actual evidence to support their claims. The three cases to which Respondents point to tell us too little about the attorneys whose hourly rate the courts set in those cases to be useful here. We know from the opinions only those lawyers' years of experience. We do not know what similar cases they had handled, the level of their expertise, the amounts they actually billed paying clients, the nature of their law practices, or their reputations in their communities.

The fee applicant bears the burden of coming forward with evidence establishing the facts required to calculate the loadstar fee. *Hensley* at 437. Once he or she has done so, the party opposing the fee application has a burden of rebuttal that requires submission of evidence challenging the facts asserted by the prevailing party in its submitted affidavits. *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992)(citing *Blum v. Stenson*, 465 U.S. 886, 892 n. 5 (1984); *Toussaint v. McCarthy*, 826 F.2d 901, 904 (9th Cir.1987)). Respondents have failed to adduce any actual evidence to counter the factual showing Complainant made. We therefore adopt the reasonable hourly rates proffered in the fee application. These hourly

rates are as follows for each lawyer whose time will be used in calculating the loadstar fee:

- Susan M. Ichinose: $375
- Marjorie S. Bronster: $400
- Andrew L. Pepper: $256
- Jeannette Holmes Castagnetti: $212
- Catherine Aubuchon: $247
- Jae B. Park: $218
- Dana A. Barbata: $175
- Mia D. Obciana: $175

C. The Loadstar Fee and Question of Enhancement

Having determined the number of hours reasonably spent in prosecuting the prevailing party's case before the Commission and the reasonable hourly rate for each attorney for whom fees are sought, it remains to multiply, for each lawyer, these two factors then sum the products to yield the loadstar fee. Table 2 summarizes these calculations:

Table 2
Loadstar Fee Calculation

Attorney Name	**Hours Reasonably Expended**	**Reasonable Hourly Rate**	**Per-Attorney Loadstar**
Susan M. Ichinose	592.7	$375	$222,262.50
Margery S. Bronster	293.1	$400	$117,240
Andrew L. Pepper	131.7	$256	$ 33,715.20
Jeannette Holmes Castagnetti	81.6	$212	$ 17,299.20
Catherine Aubuchon	486.45	$247	$120,153.15
Jae B. Park	65.4	$218	$ 14,257.20
Dana A. Barbata	51.6	$175	$ 9,030
Mia Obciana	40.5	$175	$ 7,087.50
Loadstar Fee for Bronster Hoshibata			$318,782.25
Loadstar Fee for Law Firm of Susan M. Inchinose			$222,262.50

In *Schefke*, the Hawai'i Supreme Court held that the loadstar fee is presumptively the reasonable fee. *Schefke*, at 443, 32 P.3d at 87. However, that fee may be adjusted based on a consideration of twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714 (5th Cir. 1974), overruled on other grounds by *Blanchard v. Bergeron*, 489 U.S. 87 (1989). In other words, under *Schefke*, a Hawai'i court or administrative agency has the discretion in appropriate circumstances to

enhance the loadstar fee through application of a multiplier. Schefke at 452, 32 P.3d at 96.

In determining whether or not to enhance the loadstar fee through the application of a multiplier, a court or administrative agency must consider the following questions: (1) whether an attorney has taken the case on a contingency fee basis; (2) whether that attorney has been able to mitigate the risk of nonpayment in any way, and (3) whether other factors besides the risk of nonpayment also justify enhancement. *Id.* at 454, 32 P.3d at 98. Mitigating factors include a client's agreement to pay some portion of the lodestar amount, regardless of the outcome of the case, or a contingent fee contract in a suit seeking substantial damages. *Id.* at 455, 32 P.3d at 99. Additionally, a court or administrative agency may consider whether the case involves interests of public importance, the unpopularity of the plaintiff or the plaintiff's cause in the community, and the level of the defendant's obstreperousness. *Id.*

In the instant case, both the Law Firm of Susan M. Ichinose and Bronster, Crabtree and Hoshibata, later Bronster Hoshibata, took the case on a contingency basis and gave up other work in order to prosecute Complainant's claims before the Commission. The case certainly involves matters of public importance. It is the first religious harassment case litigated to decision before

the Commission. It is also a retaliation case, and retaliation cases are of particular law enforcement significance because retaliation has a pernicious tendency to chill mobilization of civil rights protections. Moreover, the case required Complainant's counsel to defend well-resourced Respondents who vigorously defended against Complainant's claims.

On the other hand, both Bronster Hoshibata and the Law Office of Susan M. Inchinose found ways to minimize the risks of non-payment. First, the case sought substantial damages from "deep pockets" Respondents. This upside risk counter-balanced the downside risk of non-payment. Second, the staffing arrangement between Bronster Crabtree and Hoshibata (later Bronster Hoshibata) and the Law Office of Susan M. Ichinose allowed both firms to minimize the impact of taking the case on a contingency fee basis, and allowed them to distribute work in a way that maximized the strengths of the different lawyers involved and freed them up to handle other work.

Taking all of these factors into account, we decide that a fee enhancement, or multiplier, would not be appropriate in this case. Under *Schefke*, a "reasonable fee" is a fee that would attract competent counsel in light of all the factors characterizing the case under consideration. *Id.* at 452, 32 P.3d at 96. The lodestar fee, in our view, satisfies this standard without a multiplier, and so we decline to award a

multiplier here. We therefore determine that Complainant is entitled to receive reasonable attorneys' fees in the amount of $541.044.75, plus excise tax of 4.712 percent in the amount of $25,494 for a total fee award of $566,538.75.

III. Costs

HRS § 368-17(a)(9) provides for the payment to a prevailing complainant of "all or a portion of the costs of maintaining the action before the commission . . .". In her application for fees and costs, Complainant submitted a bill of costs totaling $47,655.64, plus excise tax.[3]

Respondents objected to numerous aspects of the bill of costs. We find some of these objections meritorious and some non-meritorious, and we adjust the bill of costs accordingly.

First, Respondents argue that Complainant's request for costs should be rejected in its entirety because she did not submit receipts for those expenditures. However, nothing in HRS § 368-17(a)(9), the Hawai'i Administrative Rules, or Hawai'i case law interpreting that section requires that a prevailing party to submit receipts for costs. Here, lead counsel Margery Bronster averred in her Declaration filed with Complainant's

[3] The bill of costs submitted by Complainant did not include paralegal fees. These were included in billing records submitted by the Bronster Hoshibana firm. We consider paralegal fees in this section.

application for fees and costs that her law firm had paid the costs detailed in an exhibit to that Declaration. Respondents have submitted no evidence suggesting, and we have no reason to believe, that Ms. Bronster's averments are untrue. Respondents' first objection is therefore non-meritorious.

Next, Respondents argue that the inclusion of expenses for parking charges is inappropriate. We disagree. Under HRS § 607-9, intrastate travel expenses for witnesses and counsel constitute compensable costs. Parking expenses fall within this category. *Wong v. Takeuchi*, 88 Hawai'i 46, 54, 961 P.2d 611, 619, reconsideration denied (1998).

Respondents object to the inclusion of costs for the purchase of food. On this point, Respondents' opposition is well-founded. The costs of meals are not taxable as costs. *Buscher v. Boning*, 114 Hawai'i 202, 159 P.3d 814 (2007). These charges, totaling $555.26, and appurtenant excise taxes of 4.712 percent, must be removed from the bill of costs. Charges for air conditioning, also included in the bill of costs and opposed by Respondents, must also be removed. These expenses, in our judgment, are more like food, a non-compensable cost, than like parking, which as an element of intra-state travel, is compensable. Therefore, another $314.13, plus excise taxes of 4.712 percent, will be subtracted from Complainant's bill of costs.

Respondents objected to the rate ($125 per hour) at which Complainant's counsel billed paralegal services provided by Bronster Hoshibata employee Joden D. Galmiche. However, as earlier noted, Ms. Bronster testified in her Declaration that these were the rates at which Mr. Galmiche's services were billed to paying clients. Attorney Paul Alston testified in his Declaration that this rate was at prevailing market rates for a paralegal of Mr. Galmiche's experience and ability. We therefore add to Complainant's bill of costs paralegal fees for Mr. Galmiche's services in the amount of $45,012, which represents the amount of time billed (400.7 hours) times his reasonable hourly billing rate ($125/per hour) plus excise taxes of 4.172 percent.

In addition, we will allow costs for expert witness services rendered by Thomas A. Loudat, PhD., and Robert Marvin, M.D., and for medical records from Douglas W. Johnson, M.D. and Gina Ganapathy, M.D., and for a medical records review and report by Robert Marvin, M.D. While we understand that the parties found themselves in a tangled discovery dispute relating to these items, the Hearings Examiner did not exclude them from evidence or impose any other sanction relating to that dispute, and the dispute itself appears to us attributable to less-than-perfect cooperation on all sides.

Finally, we will also allow the expenses associated with videotaping the Deposition of Respondent Haig. In a hostile work environment harassment and disparate treatment case such as this, the outcome often turns on the credibility of the alleged harasser and the decision maker, in this case, Mr. Haig. Under such circumstances, it is not unreasonable to videotape this decision maker's deposition, as gestures, facial expressions, and other elements of non-verbal expression are sometimes important in assessing credibility.

In summary, we disallow costs for food and for air conditioning in the amounts of $555.26 and $314.13, respectively, and add costs for paralegal services rendered by Joden Galmiche in the amount of $45,012.00. This brings the revised bill of costs to a total of $91,798.25. Excise tax of 4.172 percent of this amount comes to $4,325.53. Adding this amount to the total costs sums to $96,123.78.

IV. Order

For the reasons described above, IT IS HEREBY ORDERED that:

1. For those same proceedings, Respondents pay Complainant $566,538.75 as reasonable attorneys' fees and appurtenant excise taxes incurred in the prosecution of the case; and that

2. For proceedings before the Hawai'i Civil Rights Commission, in which Complainant was a prevailing party, Respondents pay her $96,123.78 for compensable costs of suit and appurtenant excise taxes.

Dated: Honolulu, Hawai'i November 18, 2014.

LINDA HAMILTON KRIEGER, CHAIR

RAYMUND LIONGSON, COMMISSIONER

KIM COCO IWAMOTO, COMMISSIONER

WALLACE FUKUNAGA, COMMISSIONER

— excused —
ARTEMIO BAXA, COMMISIONER

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NOTICE: Under HRS § 368-16(a), a complainant and respondent have the right to appeal a final order of the Commission by filing an appeal with the circuit court within thirty (30) days of service of a final decision and order of the Commission.