Docket: **1684CV02580-BLS2**
Date: **June 4, 2018**
Parties: **FRANCOISE PARKER V. ENERNOC, INC. and ERIC ERSTON[1]**
Judge: **/s/Kenneth W. Salinger Justice of the Superior Court**

MEMORANDUM AND ORDER DENY DEFENDANTS' POST-TRIAL MOTIONS, FINDINGS OF FACT AS TO REASONABLE ATTORNEYS' FEES, AND ORDER AS TO FORM AND AMOUNT OF JUDGMENT

A jury found that EnerNOC, Inc., did not pay Francoise Parker the full sales commission she had earned, and thereby breached Parker's employment contract and violated the Massachusetts Wage Act. It also found that EnerNOC fired Ms. Parker to avoid its future contractual obligation under an alleged "true-up" policy to pay commissions on an already completed sale, in violation of the implied covenant of good faith and fair dealing. And the jury found that both EnerNOC and Eric Erston are liable for retaliating against Ms. Parker because she complained that she was being discriminated against based on her sex and because she complained that she was not paid the full commission owed to her by EnerNOC as wages. The jury awarded Ms. Parker a total of $374,161.82 in unpaid sales commissions, $40,000 as compensation for emotional distress, and $240,000 in punitive damages only against EnerNOC.

EnerNOC and Mr. Erston have moved for judgment notwithstanding the verdict or a new trial as to damages awarded in connection with the "true-up" policy, and for remittitur of the punitive damage award. Ms. Parker seeks an award of reasonable attorneys' fees. And the parties disagree as to what part of the damage award is subject to trebling under Wage Act.

The Court will deny Defendants' motion for JNOV, a new trial, or remittitur, because the jury's verdict is supported by the evidence. It will award $390,750 in attorneys' fees, rather than the $540,285 requested by Parker. And it concludes that

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[1] Plaintiff voluntarily dismissed with prejudice her claim against Timothy Healy, for personal liability under the Wage Act, before the case went to the jury.

under the Wage Act the $25,063.34 in commissions that were due and payable on Parker's last day of employment must be trebled, but that the $349,098.48 that the jury awarded as damages under the Wage Act for retaliation may not be trebled.

1. Defendants' Post-Trial Motions. Defendants argue that the jury's findings regarding an alleged "true-up" policy and its award of punitive damages are not supported by the evidence. The Court disagrees.

1.1. True-Up Policy. Ms. Parker helped EnerNOC close a software sales contract with Eaton Industries (Ireland) Ltd. on March 4, 2016. This deal was far and away, by an order of magnitude, the largest sale in EnerNOC's history.

The contract between EnerNOC and Eaton had a so-called "termination for convenience" ("TFC") clause under which Eaton was free to terminate the deal after one year. EnerNOC took the position that, under its published sales commission policy, it was only obligated to pay Parker a sales commission on the guaranteed first year of revenues from Eaton, even if Eaton never terminated the contract. The jury found that EnerNOC had a binding "true-up policy" for customer deals that had a TFC clause, and thus was contractually obligated to pay additional sales commission for the remainder of the

contract if Eaton did not exercise its termination right at the end of the first year. And the jury also found that EnerNOC breached the implied covenant of good faith and fair dealing by firing Ms. Parker to avoid paying commissions she would have earned under the "true-up" policy if the Eaton contract was not terminated. Eaton renegotiated but did not terminate its contract after one year.

The jury's verdict with respect to the true-up policy and the implied covenant are supported by the evidence. The finding that EnerNOC had such a true-up policy was reasonably based on testimony of Gregg Dixon and Eric Erston, who each served as EnerNOC's senior vice president for marketing and sales, and confirmatory internal EnerNOC emails marked as exhibits 55, 56, 104, and 105. The implicit finding that Ms. Parker relied on the true-up policy when she kept working for EnerNOC to land the Eaton deal is supported by Parker's testimony that (i) she understood that EnerNOC's sales commission policies required EnerNOC to pay a commission up front on the initial guaranteed term of a software

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contract with a TFC clause, and then to pay an additional commission on the rest of the contract if the customer did not exercise its TFC rights and therefore the rest of the contract became a second guaranteed revenue stream, and (ii) she relied upon that understanding in working to land the Eaton contract.

Defendants note that Parker never expressly stated that her understanding was based on the true-up policy described by Dixon and Erston, never expressly said that she relied upon that policy, and never even referred to a "true-up" policy that was separate and apart from the published sales commission policy.

But the evidence as a whole nonetheless supported a reasonable inference that Parker knew about and reasonably relied upon the existence of the true-up policy in working diligently on EnerNOC's behalf to make the sale to Eaton, as explained above. "The inferences drawn by a jury from the evidence 'need only be reasonable and possible and need not be necessary or inescapable.'" Commonwealth v. Kelly, 470 Mass. 682, 693 (2015), quoting Commonwealth v. Casale, 381 Mass. 167, 173 (1980).

1.2. Punitive Damages. Defendants also argue that the jury's award of $240,000 in punitive damages under G.L. c. 151B is excessive. The Court disagrees.

The Supreme Judicial Court has held that to decide whether an award of punitive damages is excessive, a court should consider "the degree of reprehensibility of the defendant's conduct," whether the punitive damages are too far in excess of the "actual harm inflicted on the plaintiff," and how the punitive damage award compares to "the civil or criminal penalties that could be imposed for comparable misconduct." Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 109 (2009), quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575, 580, 583 (1996).

None of these factors suggests that the punitive damage award in this case was excessive.

First, the jury could have found that EnerNOC engaged in repeated and escalating retaliation against Ms. Parker during early 2016 for complaining that she was being treated unfairly because of her sex. It could have found that in February 2016, after another Enterprise Business Development Manager named John Hartnett left the firm, EnerNOC deliberately did not assign any of his

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accounts to Parker because she had complained that EnerNOC had proposed a new sales commission policy that discriminated against Parker because of her sex. The jury could also have found that EnerNOC barred Parker from attending the March 2016 "EnergySmart" conference, which was a key client

relations and sales development opportunity, because she complained that she was denied the chance to pick up any of Hartnett's accounts because of her sex. And the jury could have found that EnerNOC fired Parker a few days later in part because she complained that she had been barred from the EnergySmart conference because of her sex.

Second, the jury awarded less in punitive damages ($240,000) than it awarded to compensate Mr. Parker for economic and emotional harm ($389,098.48).[2] By this measure, the punitive damage award is not excessive. Compare Haddad, 455 Mass. at 92, 109-110 ($1 million in punitive damages not excessive compared to $972,774 in compensatory damages); Dalyrymple v. Winthrop, 50 Mass. App. Ct. 611, 621 (2000) ($300,000 in punitive damages not excessive compared to $275,000 in compensatory damages).

Third, although the $240,000 punitive damage award is 24 times the $10,000 maximum civil penalty that could be awarded against EnerNOC for a first-time violation of this sort, see G.L. c. 151B, § 5, that fact does not mean that this award must be reduced. "[S]trict equivalence between punitive awards and possible civil penalties is not necessary in order for an award to meet constitutional requirements." Aleo v. SLB Toys USA, Inc., 466 Mass. 398, 420 (2013). The SJC upheld an $18 million punitive damage award that was roughly 14 times the available civil penalties, and cited with approval decisions upholding punitive damages that are 20 or 25 times the available civil penalties. Id.

Considering all of these factors, the Court is not convinced that the punitive damage award in this case was excessive.

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[2] The jury found that Ms. Parker was entitled to receive $349,098.48 to compensate her for unpaid commissions that she lost because of unlawful retaliation, plus an additional $40,000 to compensate her for emotion distress she suffered because EnerNOC unlawfully retaliated against her.

2. Award of Reasonable Attorney's Fees. Ms. Parker is entitled to collect reasonable attorneys' fees and costs because she prevailed on her Wage Act and retaliation claims. See G.L. c. 149, § 150; G.L. c. 151B, § 9.

2.1. Legal Standards for Awarding Fees. "While the amount of a reasonable attorney's fee is largely discretionary, a judge 'should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." Twin Fires Investment, LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 429-430 (2005) (reviewing award of attorney's fees under c. 93A), quoting Linthicum v. Archambault, 379 Mass. 381, 388-389 (1979). "No one factor is determinative, and a factor-by-factor analysis, although helpful, is not required." Twin Fires at 430, quoting Berman v. Linnane, 434 Mass. 301, 303 (2001). "[T]rial courts need not, and indeed should not, become green-eyeshade accountants" in determining what amount of attorneys' fees is reasonable in a particular case. Fox v. Vice, 563 U.S. 826, 83845 (2011). "The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." Id.

"The basic measure of reasonable attorney's fees is a 'fair market rate for the time reasonably spent preparing and litigating a case.'" Stowe v. Bologna, 417 Mass. 199, 203 (1994), quoting Fontaine v. Ebtec Corp., 415 Mass. 309, 326 (1993); accord Killeen v. Westban Hotel Venture LP, 69 Mass. App. Ct. 784, 790 (2007) (applying this methodology to attorney fee award under the Wage Act). Plaintiffs have "the burden of showing that the claimed

rate and number of hours are reasonable." Commonwealth v. Ennis, 441 Mass. 718, 722 (2004), quoting Society of Jesus of New England v. Boston Landmarks Comm n, 411 Mass. 754, 759 (1992).

"Calculation of reasonable hourly rates should begin with the average rates in the attorney's community for similar work by attorneys of the same years' experience." Ennuis, 441 Mass. at 722, quoting Stratos v. Department of Pub. Welfare, 387 Mass. 312, 323 (1982). Parties seeking attorney's fees "have the

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burden to produce satisfactory evidence that the rates 'are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.' " Society of Jesus of New England, 411 Mass. at 759 n.11, quoting Blum, 465 U.S. at 895 (1984).

2.2. Findings as to Hours Worked. The Court finds that the total number of hours spent on legal work for which Ms. Parker seeks compensation is excessive, in part for the reasons discussed in Defendants' opposition to the motion seeking an award of attorneys' fees.

Parker seeks compensation for three lawyers, a paralegal, and a law clerk. She says that her lead trial counsel (Robert Berlutti) spent 403 hours working on this case, and that the lawyer who second chaired the case (Michael Bednarz) spent 684.9 hours on the matter. Parker also seeks compensation for 172.5 hours spent by a third lawyer (Edward Whitesell) who did not participate in the trial and never interacted with Defendants' counsel. Finally, she seeks reimbursement for 300.6 hours of work by a paralegal and 340.7 hours by a law clerk.

In the exercise of its discretion, the Court will reduce the reimbursable hours of legal work as follows. It will not award any amount for time spent by Mr. Whitesell because that work appears to be redundant and unnecessary. Much of his time was spent reviewing work by the two other lawyers. This case could easily have been handled by Mr. Berlutti and Mr. Bednarz alone. The Court will only award compensation for 350 hours of work by Mr. Berlutti and 550 hours of work by Mr. Bednarz. These reductions are warranted in part because some of the work on this case (like the preparation and filing of a lengthy trial brief) was unnecessary, and in part because some of the work was spent on substantial discovery that was relevant only to the sex discrimination claim as to which Defendants prevailed. And the Court will only award compensation for 275 hours of work by a paralegal and 150 hours of work by a legal work because the additional hours spent by these two individuals was excessive.

2.3. Findings as to Hourly Rates. The Court finds that the requested hourly rates of $495 for Mr. Berlutti, $300 for Mr. Bednarz, $150 for a paralegal, and $75 for a law clerk are reasonable. Ms. Parker provided no real evidentiary

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support for these hourly rates. But the Court finds, based on its own experience in reviewing many other requests for attorneys' fees, that these figures appear to reflect prevailing market rates for similar services by persons with comparable experience. Cf. Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 629 (1978) (judge may rely on his or her "own experience as a judge and expertise as a lawyer" in setting reasonable attorney's fees); Borne v. Haverhill Golf & Country Club, Inc., 58 Mass. App. Ct. 306, 325 (2003) ("Generally, a judge—and particularly the trial judge—can, from the judge's own experience, determine an award of legal fees; there is no requirement for an evidentiary hearing.").

Although neither Heller nor Borne hold that a judge may rely upon her or his own knowledge of prevailing market rates for legal work when awarding attorneys' fees, it appears that doing so is permissible under Massachusetts

law. See Handy v. Penal Institutions Comm'r of Boston, 412 Mass. 759, 767 (1992) (affirming fee award by single justice based on plaintiffs' affidavits as well as single justice's "own personal knowledge of hourly rates in the Boston area at all relevant historical times"); Edinburg v. Edinburg, 22 Mass. App. Ct. 192, 198 (1986) (attorneys' fees may be awarded without evidentiary hearing where judge has "first hand knowledge of the work performed and of going rates") (dictum) (quoting Robbins v. Robbins, 19 Mass. App. Ct. 538, 543 n.10 (1985) (dictum)).[3]

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[3] There is a sharp split among the United States Courts of Appeals—and even among different panels within the Ninth Circuit—regarding whether trial judges may rely upon their own experience in determining a reasonable hourly rate when awarding attorneys' fees. Compare Garcia-Goyco v. Law Envtl. Consultants, Inc., 428 F.3d 14, 22 (1st Cir. 2005) (court may rely on "its own knowledge and experience regarding attorneys' rates and the local market"), Farbotko v. Clinton County of New York, 433 F.3d 204, 209 (2d Cir. 2005) (court may rely upon "rates awarded in prior cases and the court's own familiarity with the rates prevailing in the district"), Miller v. Dugan, 764 F.3d 826, 831 (8th Cir. 2014) ("When determining reasonable hourly rates, district courts may rely on their own experience and knowledge of prevailing market rates.") (quoting Hanig v. Lee, 415 F.3d 822, 825 (8th Cir. 2005)), and Ingram v. Oroudjian, 647 F.3d 925, 928 (9th Cir. 2011) (court may rely, "in part, on its own knowledge and experience" in determining reasonable hourly rate), with McClain v. Lufkin Indus., Inc., 649 F.3d 374, 383 (5th Cir. 2011) ("The hourly fee awarded must be supported by the record; the district court may not simply rely on its own experience in the relevant legal market to set a reasonable hourly billing rate.") (quoting League of United Latin Am. Citizens v. Roscoe I.S.D., 119 F.3d 1228, 1234 (5th Cir. 1997)); Gonzalez v. City of Maywood, 729 F.3d 1196, 1206 (9th Cir. 2013) (court may not determine reasonable hourly rate based solely "on its experience and knowledge of prevailing rates in the community, ... without relying on evidence of prevailing market rates"), and United Phosphorus, Ltd. v. Midland Fumigant, Inc., 205 F.3d 1219, 1234 (10th Cir. 2000) (same).

2.4. Conclusions as to Total Fees and Costs. For the reasons discussed above, the Court will award $390,750 in attorneys' fees, calculated as follows:

	Rate	Hours	Total Fee
Atty Berlutti	$495	350	$173,250
Atty Bednarz	$300	550	$165,000
Paralegal	$150	275	$ 41,250
Law Clerk	$75	150	$ 11,250
Total			$390,750

The Court finds that Ms. Parker's request for $5,844.63 in costs is reasonable and will award that amount.

3. Form and Amount of Judgment.

3.1. Liquidated Damages under the Wage Act. The jury found that Ms. Parker was owed $25,063.34 in sales commission that were due and payable on her last day of employment. By statute, Parker is entitled to have that amount trebled as liquidated damages. See G.L. c. 149, § 150.

The jury also found that Ms. Parker was entitled to recover $349,098.48 as damages because she was fired in retaliation for complaining that she had not been paid the full commission owed to her for the Eaton contract. Given the evidence presented, it is clear the jury found that this amount would

have been due and payable to Parker one year later if she had not been fired, once Eaton decided not to exercise its contractual right to terminate its software contract.

The Court agrees with Defendants that this damage award for future commissions is not subject to trebling under the Wage Act. The Legislature recognized that a successful Wage Act plaintiff may recover both "lost wages and other benefits" as well as other "damages incurred." Id. But it only made treble damages available for an award of "lost wages and other benefits." By necessary

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implication, treble damages are not available for an award of damages that do not constitute "lost wages and other benefits." Unpaid commissions constitute lost wages, and therefore are subject to mandatory trebling by statute, if they are "due and payable" and can be "definitely determined" as of plaintiffs last day of employment. See Weber v. Coast to Coast Medical, Inc., 83 Mass. App. Ct. 478, 483 (2013). But the $349,098.48 that the jury awarded to Ms. Parker as damages under her retaliation claim was for a commission that did not become due and payable until one year after Parker was fired, when Eaton opted not to terminate its software contract with EnerNOC.

Ms. Parker makes a powerful policy argument in favor of nonetheless trebling this part of the damage award. After all, the jury's findings make clear that the only reason why this additional sales commission amount did not become due and payable until after Parker stopped working for EnerNOC is because she was unlawfully fired in order to avoid having to pay this additional commission amount (in violation of the implied covenant of good faith and fair dealing) and in retaliation for complaining about being denied commissions that were due (in violation of the Wage Act) and in retaliation for complaining about being discriminated against because of her sex (in violation of G.L. c. 151B). Ms. Parker argues that under these circumstances her future commissions should be treated as "wages" subject to mandatory trebling.

The Court must apply the Wage Act as it is written, however. The Legislature specified that sales commissions only count as wages for purposes of the Wage Act if they are "due and payable" and can be "definitely determined" while an employee is still employed. See G.L. c. 149, § 148; Okerman v. VA Software Corp., 69 Mass. App. Ct. 771, 776 (2007). It recognized that employees who prevail on a Wage Act retaliation claim may recover damages as compensation for additional, future economic injury. And the Legislature specified that "lost wages" are subject to trebling as liquidated damages, but left other "damages" out of the trebling provision.

3.2. Statutory Interest under the Wage Act. Ms. Parker is entitled to statutory pre-judgment interest on the single damages awarded to her, but not on

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the trebled portion of her Wage Act damages. George v. National Water Main Cleaning Co., 477 Mass. 371, 372 (2017).

3.3. Judgment against Eric Erston. As both sides agree, EnerNOC and Mr. Erston are jointly and severally liable for a portion of the damages awarded, and for the reasonable attorneys' fees and costs. EnerNOC has sole liability for the $240,000 in punitive damages and the trebling as liquidated damages portion of Ms. Parker's recovery under the Wage Act. The Court will order that judgment be entered in a form that makes this clear.

ORDER

Defendants' motion for judgment notwithstanding the verdict, a new trial, or remittitur is DENIED. Plaintiffs motion for an award of reasonable attorneys' fees is ALLOWED IN PART. The Court will award $390,750 in

attorneys' fees and $5,844.63 in costs.

Final judgment shall enter providing that Ms. Parker shall: (1) recover from EnerNOC, Inc., and Eric Erston, jointly and severally, $389,098.48 in compensatory damages, plus statutory interest on that amount running from August 19, 2016, to the date that final judgment is entered, plus $390,750 in attorneys' fees and $5,844.63 in costs; and (2) also recover from EnerNOC, Inc., only, in addition to the amounts listed above, $25,063.34 in compensatory damages for unpaid wages, plus statutory interest on that amount running from April 1, 2016, to the date that final judgment is entered, plus $50,126.68 in liquidated damages under the Wage Act, plus $240,000 in punitive damages under G.L. c. 151B.

/s/Kenneth W. Salinger Justice of the Superior Court