

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

EQUAL EMPLOYMENT OPPORTUNITY)	
COMMISSION,)	
)	
Plaintiff,)	
v.)	No. 2:08-CV-02642-SHL-tmp
)	
MEMPHIS HEALTH CARE CENTER,)	
INC.,)	
)	
Defendant.)	

ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEY'S FEES

Before the Court is Defendant Memphis Health Center, Inc.'s ("MHC") Motion for Attorney's Fees filed December 16, 2013, submitting that the Plaintiff, Equal Employment Opportunity Commission ("EEOC"), pay MHC's attorney's fees of \$97,539.75 and costs and expenses of \$6,742.44. (D.E. #111.) MHC brought the motion pursuant to Fed. R. Civ. P. 54(d), the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), and based on instructions from the Sixth Circuit Court of Appeals on remand to this Court. On January 24, 2014, the EEOC filed a Response in Opposition to Defendant's Motion for Attorney's Fees. (D.E. #123.) MHC responded February 7, 2014, with a Response in Opposition to Defendant's Motion for Attorney's Fees. (D.E. #128.)

For the following reasons, the Court **GRANTS** Defendant's Motion for Attorney's Fees, although the exact amount to be awarded requires additional documentation.

I. Factual Background

This case for attorney's fees stems from a lawsuit in which the EEOC sued MHC alleging violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq. Rita Smith ("Ms. Smith") was employed as a dental assistant in the Rossville, Tenn., office of MHC, a non-profit federally qualified community health center which has offices in and around Memphis. (Dep. of William L. Jackson ("Jackson Dep."), March 5, 2010, 33-34.) Ms. Smith was born January 21, 1952. (Dep. of Rita H. Smith ("Smith Dep."), Dec. 18, 2009, 9.) She worked at MHC during the summer of 1982 before returning the following summer to take a permanent position. (Id. at 214.) Ms. Smith worked for MHC until August 2007, when the company cited a shortage of work at the Rossville office and laid her off, with severance. (Smith Dep. at 48; Dep. of Oscar Webb ("Webb Dep."), March 4, 2010, 46.) Ms. Smith filed two grievances with MHC following her termination. The first complained that she was laid off because of her employer's favoritism to a newly hired co-worker and that a "bias(ed) decision was made." (Smith Dep. at 59; Ex. 4 to Smith Dep.: "Grievance Report" of August 15,

2007.) The second grievance, which came after the first was denied, claimed she was laid off because she had previously filed a claim for workers' compensation benefits. (Smith Dep. at 100; Ex. 6 to Smith Dep.: "Final Grievance (Against CEO)".) MHC also denied the second grievance. (Jackson Dep. at 87.)

MHC then hired Ms. Smith to work as a telephone operator at its call center, where she began working on October 2, 2007. (Smith Dep. at 223.) When a dental assistant job came open in January 2008 at MHC's corporate office in Memphis, Ms. Smith applied. (Ex. 4 to Webb Dep.: "Application for Promotion or Transfer.") She was told she would be interviewed for the position, but was not given a firm date for the interview. (Smith Dep. at 228-229.) Ms. Smith came to work on Friday, February 8, 2008, dressed in jeans and tennis shoes for "casual Friday," and was told that her interview would be that day. (Id.) MHC interviewed three candidates for the position and eventually hired one of them, Deborah Phillips-Tolliver ("Ms. Phillips-Tolliver"). Ms. Phillips-Tolliver was born January 12, 1959, making her almost seven years younger than Ms. Smith. (Dep. of Deborah Phillips-Tolliver, May 24, 2010, 7.) In passing over Ms. Smith for the job, the interviewers said she did not take the interview seriously, and cited concerns MHC doctors she

had previously worked with had with her work style. (Webb Dep. at 69, 72-74, 88; Ex. 4 to Webb Dep.)

After not being hired for the dental assistant's position, Ms. Smith filed a charge with the EEOC on February 20, 2008. (Ex. 11 to Jackson Dep.: "Charge of Discrimination.") On September 30, 2008, the EEOC filed an action against MHC in the United States District Court for the Western District of Tennessee, alleging violations of the ADEA. (D.E. #1.) The EEOC specifically asserted claims for age discrimination and retaliation.

II. Procedural Background

MHC submitted a motion for summary judgment on July 12, 2010. (D.E. #37.) On September 10, 2010, the district judge granted the motion. (D.E. #76, "Summ. J. Order.") In dismissing the case, the court ruled that the EEOC failed to meet its burden of establishing a claim for either age discrimination or retaliation. (Id. at 15.)

The court first found that the EEOC failed to establish a prima facie case of age discrimination. In order to do so under the ADEA, the plaintiff must establish that: (1) she was a member of a protected class, meaning she was at least forty (40) years old; (2) she was subjected to an adverse employment

action; (3) she was qualified for a position; and (4) a substantially younger individual was accepted for the position instead of the plaintiff. (See Summ. J. Order at 8)(citing Skelton v. Sara Lee Corp., 249 F. App'x 450, 456 (6th Cir. 2007); Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 459-460 (6th Cir. 2004); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 69 (6th Cir. 1982)). MHC stipulated to the first three elements of the EEOC's prima facie case, but asserted that the seven-year age difference between Ms. Smith and Ms. Phillips-Tolliver did not qualify as substantially younger under the fourth prong. The court agreed with MHC, relying on the Sixth Circuit's decision in Grosjean v. First Energy Corp., 349 F.3d 332 (6th Cir. 2003). The Sixth Circuit suggested in Grosjean that a seven-and-a-half or eight-year age gap represents the lower boundary for demonstrating substantially younger. Id. at 340.

Alternatively, the Court ruled that even if the EEOC had satisfied the fourth prong of the age discrimination test that it had failed to carry its burden under the McDonnell Douglas/Burdine burden-shifting framework that applies to ADEA cases.¹ Because the EEOC failed to demonstrate that the

¹Under the McDonnell Douglas/Burdine burden-shifting formula "the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the

legitimate, non-discriminatory reasons MHC offered for not hiring Ms. Smith were merely a pretext, it could not sustain a discrimination claim, according to the court. (Summ. J. Order at 13.)

The court also rejected the EEOC's claim that MHC's decision not to hire Ms. Smith for the dental assistant's position constituted retaliation for prior protected activity.² The EEOC claimed that the grievances Ms. Smith filed with MHC constituted complaints about age discrimination. According to the court, however, neither grievance qualified. (Summ. J. Order at 14.) The court held that because the EEOC's retaliation claim did not include an assertion that Ms. Smith engaged in protected activity, it failed to make its prima facie case of retaliation. (Summ. J. Order at 14-15.)

plaintiff succeeds in proving the prima facie case the burden shifts to the defendant 'to articulate some legitimate nondiscriminatory reasons for the employee's rejection.' Third, should defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Texas Dep't of Comm. Affairs v. Burdine, 450 U.S. 248, 252-253 (1981)(citations omitted).

²"In order to establish a prima facie case of retaliation, the plaintiff must show: (1) that the plaintiff engaged in protected activity; (2) that the defendant had knowledge of the plaintiff's protected conduct; (3) that the defendant took an adverse employment action towards the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." E.E.O.C. v. Memphis Health Ctr., Inc., 526 F. App'x 607 (6th Cir. 2013)(citing Weigel v. Baptist Hosp. of E. Tenn., 302 F.3d 367, 381 (6th Cir. 2002)).

MHC filed a motion on October 5, 2010, in the district court seeking an award of attorney's fees and costs, totaling \$70,389.83, pursuant to Fed. R. Civ. P. 54(d)(1) and the EAJA. (D.E. #80.) The district judge referred the motion for attorney's fees to a magistrate judge the next day. (D.E. #81.) The prevailing party in a lawsuit may recover fees from the losing party only in limited circumstances, the so-called "American Rule," including when statutes specifically authorize it. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). MHC asserted that the EAJA applies to the ADEA claims, allowing such fee shifting.³ The magistrate judge determined the EAJA applies to ADEA claims, and held that the only element at issue under the EAJA was whether the government's position was substantially justified. (D.E. #94, Report & Recommendation, 12.)

Prior to the instant case, the Sixth Circuit had not ruled on whether a determination of "substantially justified" should be done by evaluating the government's position *in toto*, or by analyzing each distinct claim. Other Circuits have adopted

³The EAJA § 2412(d)(1)(A) allows a party to recover attorney's fees as long as (1) the claimant is the prevailing party; (2) the government's position must not have been substantially justified; (3) there must be no special circumstances that make an award unjust; and (4) a fee application must be submitted to the court within thirty days of final judgment and be supported by an itemized statement. Comm'r, I.N.S. v. Jean, 496 U.S. 154, 158 (1990).

varying approaches. Compare Cinciarelli v. Reagan, 729 F.2d 801, 809 (D.C. Cir. 1984)(analyzing substantial justification for two distinct factual and legal events separately); Hanover Potato Products, Inc. v. Shalala, 989 F.2d 123, 131 (3d Cir. 1993)("We have already held that substantial justification on the part of the Government in opposing one of the plaintiff's *claims* does not render its position substantially justified as to all of its other claims.")(emphasis in original)(citing Goldhaber v. Foley, 698 F.2d 193, 197 (3d Cir. 1983)); with Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 139 (4th Cir. 1993)("Although an unreasonable stance taken on a single issue may thus undermine the substantial justification of the government's position, that question can be answered only by looking to the stance's effect on the entire civil action."); United States v. Jones, 125 F.3d 1418, 1429 (11th Cir. 1997)("When the defendant is the prevailing party on each intertwined claim, and one claim is substantially justified, but the other is not, it would be unfair not to reimburse defendants for the EAJA fees needed to combat the whole case presented by the United States.") The magistrate judge adopted a segmented approach to analyzing the claims, consistent with the D.C. Circuit's decision in Cinciarelli. The magistrate judge rationalized that the EEOC's claims overlapped somewhat as both grew out of MHC's decision not to hire Ms. Smith for the dental assistant position, but

were not so complex or intertwined that they could not be examined separately. (Report and Recommendation at 14-15.)

The magistrate judge then found the EEOC's age discrimination claim to be substantially justified. (Id. at 15.) He determined that the EEOC satisfied the first three prongs of its prima facie case of age discrimination. (Id.) He then found that while Ms. Smith failed to satisfy the fourth prong of her prima facie case for age discrimination in the district court's ruling for summary judgment, there was a reasonable basis in law and fact to support the EEOC's claim in his determination of substantial justification. (Id.) The magistrate judge first found that the EEOC had a reasonable basis in law and fact to support its position that Ms. Phillips-Tolliver was substantially younger than Ms. Smith. (Id. at 16.) Similarly, he found a reasonable basis for the EEOC's position that MHC's reasons for not hiring Ms. Smith were pretext for discrimination. (Id. at 17.) After finding the age discrimination claim substantially justified, however, the magistrate judge determined the retaliation claim lacked substantial justification because Ms. Smith had engaged in no protected activity. "Even under the most generous reading, these grievances do not explicitly or implicitly make an allegation of age discrimination." (Id. at 21.)

Having found substantial justification for only one of the EEOC's two claims, the magistrate judge recommended that MHC's Motion for Attorney's Fees be granted in part and denied in part. (Id. at 25.) He concluded that because the retaliation and discrimination claims overlapped in both law and fact, and that based on the billing records the court could not identify the attorney's fees spent on each claim, he attributed fifty percent of the attorney's fees to each. (Id.) After dividing attorney's fees and expenses in half, the magistrate judge recommended an award of \$25,552.26 in attorney's fees and \$3,362.54 in costs and expenses. (Id. at 25-26.)

The EEOC timely objected on August 24, 2011, to the magistrate judge's Report and Recommendation, asserting a misapplication of the EAJA to the EEOC, that the ADEA and retaliation claims were so intertwined that the court should view them as a whole, and that the magistrate judge arbitrarily split the attorney's fees and costs in half. (D.E. #95.) MHC replied on September 23, 2011, asserting that the government's position as a whole was unjustified and it was entitled to all of its attorney's fees. (D.E. #100.) The district court adopted the magistrate judge's Report and Recommendation in its entirety the same day. (D.E. #104.)

On November 17, 2011, the EEOC timely appealed to the Sixth Circuit, again arguing error with the court's application of the EAJA to the EEOC, its use of a claim-by-claim analysis rather than a holistic approach, its determination that the retaliation claim was not substantially justified, and its award of fifty percent attorney's fees. E.E.O.C. v. Memphis Health Ctr., Inc., 526 F. App'x 607, 611 (6th Cir. 2013). MHC cross-appealed, arguing it should have been granted 100 percent of its requested attorney's fees and costs. Id.

The Sixth Circuit affirmed in part and reversed in part. It held that the district court correctly applied the EAJA to the EEOC in ADEA cases. Id. at 612-613. However, it held that the district court erred following the determination that there was substantial justification for the age discrimination claim but not for the retaliation claim. The Sixth Circuit stated that, at that point, "the court should have determined what impact that dichotomy had on the government's case as a whole." Id. at 615. Instead of the atomized claim analysis the magistrate judge employed, the Sixth Circuit held that the Court should have used a holistic approach to determine substantial justification. Id.

On remand, the Sixth Circuit directed the Court to perform an analysis to determine whether the government's position as a whole was substantially justified to make the threshold

determination for awarding fees under the EAJA. Id. Then, if the Court makes the determination that an EAJA fee award is proper, the award amount should be guided by Hensley v. Eckerhart, 461 U.S. 424, 436 (1983).

III. Analysis

Evaluating a case as an inclusive whole is not susceptible to a precise litmus test. See U.S. v. Heavrin, 330 F.3d 723, 730 (6th Cir. 2003). The Sixth Circuit's mandate in analyzing the instant case starts with the following threshold question: are the age discrimination claim and the retaliation claim intertwined legally and factually or are they distinct? Memphis Health Ctr., 526 F. App'x at 615. If the claims are sufficiently intertwined, an insubstantial justification for one claim can render the government's entire overall position unjustified. Id. (citing U.S. v. Jones, 125 F.3d 1418, 1429 (11th Cir. 1997)). If the claims are distinct, determining which is more prominent in driving the case is required to make the substantial justification determination. Memphis Health Ctr., 526 F. App'x at 615 (citing Gatimi v. Holder, 606 F.3d 344, 350 (7th Cir. 2010)). In any case, the EEOC bears the burden of demonstrating substantial justification of its position. Pickering v. Mukasey, 306 F. App'x 246, 248 (6th Cir. 2009)(citing E.W. Grobbel Sons,

Inc. v. Nat'l Labor Relations Bd., 176 F.3d 875, 878 (6th Cir. 1999)).

The defendant argues that the age discrimination claim predominates over the retaliation claim. However, as the Sixth Circuit instructs, the threshold question is not which claim predominates, but rather whether the claims are distinct or sufficiently intertwined legally and factually. The age discrimination and retaliation claims share a common core of facts. Both, most obviously, hinge on MHC not re-hiring Ms. Smith when the dental assistant's position came open. Moreover, Ms. Smith asserted that her initial grievances against MHC included claims of age discrimination that formed the foundation for her later claims of retaliation. In its objection to the magistrate judge's findings that there was not substantial justification for the retaliation claim, the EEOC even asserted that the "ADEA claim and the retaliation claim are so intertwined that they should be viewed as a whole," and that "(o)ne single event - failing to hire Ms. Smith - fuels both claims." (D.E. #95 at 7.) Even if the retaliation claim was secondary and derived from the age discrimination claim, as the EEOC asserts that MHC implicitly admits, its secondary nature cannot undermine the fact that the claims rely on the same core of common facts.

The claims' inseparability does not imply that each is substantially justified. In remanding the case, the Sixth Circuit held that MHC waived any argument that the age discrimination claim was not substantially justified by failing to object to the magistrate judge's findings on the issue. Memphis Health Ctr., 526 F. App'x at 611 n.1. Therefore, a finding that the retaliation claim is also substantially justified would assure that the overall claim was also substantially justified, precluding a finding for attorney's fees and costs. The EEOC's protests notwithstanding, however, there is nothing to suggest error in the magistrate judge's ruling regarding the lack of substantial justification for the retaliation claim or the district court's subsequent adoption of the recommendation.

After determining that the claims are sufficiently factually and legally intertwined and the retaliation claim was not substantially justified, the question becomes whether that insubstantial justification renders the EEOC's entire overall position unjustified. We hold that it does. We start with the proposition that "while part of the government's case may have merit, it is still plausible that its position as a whole lacks substantial justification." Memphis Health Ctr., 526 F. App'x at 615 (citing Heavrin, 330 F.3d 723; United States v. Jones, 125

F.3d at 1429; Hanover Potato Prods., Inc. v. Shalala, 989 F.2d 123, 131 (3rd Cir. 1993)). When claims are driven by a common core of facts, as is the case here, it is even more likely that the lack of substantial justification for one claim can overwhelm the entire claim. The defendant, unlike the plaintiff, must approach different claims with the same zest. When the claims are interrelated, preparation necessarily bleeds from one claim to another, so that when "the factual bases are the same, and the legal issues are intertwined, the defendant must fight each claim with the same trial preparation and legal research." Jones, 125 F.3d at 1429. While the legal tests for demonstrating age discrimination and retaliation differ, in this case the claims are so intertwined that disproving each required legal efforts that are inseparable.

A second related reason for finding the EEOC's overall position unjustified is purely practical. In situations where claims share a common factual core, "(m)uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." Hensley v. Eckerhart, 461 U.S. at 435 (1983). The magistrate judge confronted this precise problem in his attempts to determine the appropriate award of attorney's fees in this case. Once there is a finding that claims are sufficiently

intertwined, unless one claim plays an obviously inferior role to the other, determining the amount of time spent on each claim will be a practical impossibility. Here, the intertwined nature of the claims, along with the significant role that the retaliation claim played in the litigation, combines to present such a case.

Finally, awarding MHC attorney's fees and costs for defending the intertwined claims in this case is consistent with the EAJA's root purpose of eliminating "for the average person the financial disincentive to challenge unreasonable government actions." Comm'r, I.N.S. v. Jean, 496 U.S. at 163 (citing Sullivan v. Hudson, 490 U.S. 877, 883 (1989)). Confronted by these related claims from the EEOC, MHC could have elected to forgo the litigation process entirely and settled the matter. Instead, it challenged the government's claims and was granted summary judgment. Prevailing at summary judgment does not guarantee a defendant automatically recover attorney's fees and costs under the EAJA - one must also demonstrate that the government's claims lacked substantial justification. This increased burden protects against unwarranted recoveries. When a defendant meets that burden, as MHC did in this instance, awarding attorney's fees serves the EAJA's core purpose. We find, therefore, that because the EEOC's overall position in

this case lacks substantial justification, awarding attorney's fees and costs is proper.

IV. Attorney's Fees

Before determining the appropriate amount of attorney's fees and costs Defendant can recover, MHC must provide the Court itemized records of billing and legal costs updated through this appeal in support of its claim for \$97,539.75 in attorney's fees and \$6,742.44 in costs and expenses.

IT IS SO ORDERED, this 7th day of July, 2014.

s/ SHERYL H. LIPMAN

UNITED STATES DISTRICT JUDGE