IN THE
SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 21-0603

NORVAL ELECTRIC COOPERATIVE INC.,

Appellant/Cross-Appellee

v.

SHALAINE LAWSON,

Appellee/Cross-Appellant

On appeal from the Montana Seventeenth Judicial District Court, Valley County
Nos. DV 2020-11 and DV 2020-15 (Laird, J.)

REPLY BRIEF IN SUPPORT OF CROSS-APPEAL

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INTRODUCTION

The Valley County District Court ("District Court") awarded fees and costs to Shalaine Lawson ("Lawson") as the prevailing party pursuant to 49-2-505(8), MCA which allows for reasonable attorney's fees and costs. NorVal Electric Cooperative, Inc. ("NorVal") did not appeal the award. Nonetheless NorVal explains in its response to Lawson's cross-appeal why it "disagrees" with the award.

Leaving aside NorVal's improper argument, if this Court affirms the discrimination finding (based on sexual harassment) and the retaliation finding, or either one of these findings, it follows that the award should be upheld. An additional basis for the full fee award is the fact that the Hearing Officer Decision awarded injunctive relief against NorVal, which the District Court affirmed in its final Order. NorVal never appealed the injunctive relief award.

Lawson's cross-appeal contends that the District Court erred in not applying a multiplier to the awarded fees and costs. The cross-appeal was based on the relevant facts adjudicated by the District Court, the requisite factors for a multiplier which were satisfied but not applied, and the irreconcilable findings by the District Court concerning the attorney hourly rate found to be the "market" and "reasonable" rate. NorVal's response to the cross-appeal ignored the adjudicated facts, the clear arguments, and the applicable law. As to the points raised by NorVal, they miss the

mark. Further, when the points are analyzed they actually bolster Lawson's cross-appeal.

I. Standard Of Review.

NorVal contends that Lawson must establish on her cross-appeal "that [the] District Court 'acted arbitrarily without employment of conscientious judgement or exceeded the bounds of reason.'" (NorVal brief, p.19, citation omitted). Lawson's cross-appeal however contends that because the District Court did not apply the requisite factors, the standard is whether the District Court's "interpretation of the law is correct." (Lawson Response and Cross-Appeal, hereinafter "Cross-Appeal," p. 36, citation omitted.) Along these lines, "although appellate courts generally review a trial court's award of attorney fees for an abuse of discretion, the deferential review inherent in the abuse of discretion standard is inappropriate when the issue is whether a trial court applied the appropriate standard." *Ihler v. Chisholm ("Ihler II")*, 2000 MT 37, ¶ 32, 298 Mont. 254, 263, 995 P.2d 439, 445, multiple citations omitted. Also, in reliance on other cases *Ihler II* further noted that the "deferential review [is] modified when [the] issue is whether [the] District Court applied the appropriate criteria," and "a fee award which is based on an inaccurate view of the law is an abuse of discretion." (*Ibid,* citations omitted.)

II. NorVal's Indirect And Improper Arguments Calling Into Question The Fee Award Highlight The Support For The Multiplier Request.

As it must, NorVal acknowledges that it did not appeal the attorney fee award. (NorVal brief, p. 18.) Despite this, NorVal then explains that it "disagrees with the District Court's rejection of [NorVal's] evidence about the hourly rate sought or time spent by Lawson's attorney…" (*Ibid*.) In this vein, NorVal argues that "[e]ven though Lawson's attorney agreed to represent [Lawson] at a rate of $250.00 per hour, [Lawson] asked for an attorney's fee award at $325.00 per hour [ ]" and the "District Court acceded to that request." (NorVal brief, p. 17.)

In the event there is any confusion stemming from NorVal's improper argument, the original $250.00 hourly rate was based on an hourly basis agreement reached in early November 2017 between the Shea Law Office ("SL") and Lawson. (11/5/21 District Court Order, hereinafter "11/5/21 Order," p. 3.) Pursuant to that agreement, Lawson paid SL fees for services in November and December 2017. "However, it soon became clear that Lawson would not be able to pay for legal services on an hourly basis, [and] because of this and her untenable predicament at NorVal, Shea's firm reluctantly agreed to represent Lawson on a contingency basis in 2018." (11/5/21 Order, p. 3.) As to Lawson's then untenable predicament, NorVal insisted that Lawson was only permitted to assert her sexual harassment complaint against Craig Herbert to Craig Herbert. (Cross-Appeal, p. 5.)

The contingency basis agreement provided ongoing legal services to Lawson so she could continue to litigate, and ultimately vindicate, her civil rights. At the same time, given NorVal's "overall uncompromising tenacity with which it has prosecuted its defense" "throughout this proceeding" SL has not been paid for its legal services for now almost five years. (11/5/21 Order, pp. 3, 11.)[1]

As for the requested $325.00 hourly rate, "[w]hen attorney's fees are awarded, the current market rate must be used. The current market rate is the rate at the time of the fee petition, not the rate at the time services were performed." *Lanni v. New Jersey*, 259 F.3d 146, 148 (3rd Cir. 2001), citations omitted. The fee petition in this case was filed on March 16, 2021. (11/5/21 Order, p. 2.) In the fee petition SL requested an hourly rate of $325 for its services as part of the initial lodestar calculation. The District Court found "that it's reasonable to charge Shea's current $325 per hour irrespective of the increase [from the original rate reached in November 2017]." (11/5/21 Order, p. 14.)

In connection with Lawson's inability to continue paying for legal services on an hourly basis, a multiplier to the lodestar calculation for an award of reasonable attorney fees in a civil rights case may be appropriate when an attorney agrees to

[1]Due to "a series of egregious acts of sexual harassment and retaliation by NorVal" Lawson "was forced to go on medical leave on November 3, 2017." (11/5/21 Order, p. 2.)

represent a civil rights plaintiff who cannot afford to pay the attorney. *Perdue v. Kenny A.,* 559 U.S. 542, 555 (2010).

Also, despite not filing an appeal of the fee award, NorVal snidely notes that it should only be required to pay "a *properly* calculated lodestar amount" or an amount "if *indeed* calculated based on a reasonable hourly rate multiplied by a reasonable expenditure of time…" (NorVal brief, pp. 18, 19, emphasis added.) NorVal's focus on just the lodestar calculation – which has already been adjudicated and not appealed – overlooks that the "calculation of the lodestar amount is the beginning – not the end – in determining 'a reasonable attorney's fee.'" *Machowski v. 333 N. Placentia Property, LLC* 38 F.4th 837, 840 (9th Cir. 2022), multiple citations omitted.

III. NorVal Missed The Relevancy Of The Extended Procedural History.

NorVal is critical of Lawson's "lengthy recitation of the procedural history of this case." (NorVal brief pp. 2, 7.) NorVal missed the relevancy of the extended procedural history.

Lawson provided this Court with the five-year procedural history of this case because "where the protracted nature of proceedings results in an 'extraordinary outlay of expenses' or 'exceptional delay in the payment of fees' a multiplier may be warranted to provide reasonable fees." (11/5/21 Order, p. 16, citing *Perdue,* 559

U.S. at 554-56, emphasis added.) The $48,258.44 in expenses (as of August 2021) were found "reasonable," and NorVal has been solely responsible for the extended procedural history. (11/5/21 Order, p. 17.) That is, NorVal ignored Lawson's efforts to "initiate settlement negotiations," "Herbert was less than forthright through [the] HRB's investigation" in 2018, and NorVal has "tenaciously disputed [Lawson's] complaint throughout this proceeding." (11/5/21 Order, pp. 3, 4; Cross-Appeal, p. 30, citations omitted.) Additionally, NorVal's "dilatory tactics" which have included, among other things "changing its position on purely factual matters" "have wasted considerable time for the Court and Lawson's counsel" and "exponentially increased costs to both parties…" (Cross-Appeal, p. 33, citations omitted.)

Further, NorVal has filed appeals at every stage during this litigation. That is, it appealed the Hearing Officer's Decision in November 2019, the Human Rights Commission's Final Agency Decision in March 2020, and the District Court's Final Judgment in November 2021. Lawson only filed cross-appeals after NorVal filed its appeals,[2] and her cross-appeals have been successful.

Lawson acknowledges that NorVal has had a right to file its appeals. However, to date, NorVal's appeals have been denied in their entirety. Given this,

[2] Lawson did however file an appeal of the Human Rights Bureau's dismissal of her Complaint in June 2018. This appeal was time consuming because of the "incomplete or inaccurate facts provided by NorVal" to the investigator. (11/5/21 Order, p. 11.) The appeal was successful and resulted in an expedited discovery and briefing schedule and a hearing before a Montana Human Rights Bureau Hearing Officer. (*Id.*, at p. 4.)

in the event this Court affirms the liability finding against NorVal on either (or both) the sexual harassment or the retaliation finding, Lawson will be entitled to her reasonable fees and costs. See *Trent v. Valley Elec. Ass'n., Inc*., 41 F. 3rd 524, 526, 527 (9th Cir. 1994) (describing black letter law that a retaliation claim can be established even if the underlying harassment claim is not proven).

Also, as discussed below, the Hearing Officer's Decision awarded injunctive relief against NorVal, and this serves as an additional basis for the full award of attorney fee's and costs. Given the circumstances, it is only reasonable that some sort of multiplier should have been applied by the District Court. Further, it is respectfully submitted that it would be reasonable to do so on remand if this Court issues a remand Order to the District Court.

In connection with the above, the touchstone in attorney fee case is reasonableness, and reasonableness is clearly explicit in the governing statute, *i.e.,* 49-2-505(8), MCA. *Ihler, II, ¶ 35.*

In sum, the extended procedural history of this case and resulting prolonged delay in payment of fees is highly relevant to the requested fee multiplier. See *Trulsson v. Cty. of San Joaquin Dist. Attorney's Office*, No. 11-cv-02986, 2014 U.S. Dist. LEXIS 152821, 2014 WL 5472787, at *7-9 (E.D. Cal. Oct. 28, 2014) (following an approximately $2 million jury verdict in an employment

discrimination and retaliation action, the Court awarded a 1.5 multiplier because the recovery was "exceptional", and the plaintiff's counsel had been working on the case for three years, "a significant amount of time for a solo practitioner to go unpaid"); *Hensley v. Eckerhart,* 461 U.S. 424, 448-49 (1983) (explaining that fee-shifting in contingency cases often requires "paying more than [the contingency attorney's] customary hourly rates…" based on the "the time value of money…"); and *Perdue,* 559 U.S. at 554-56 (approving a multiplier to account for unanticipated delays in payment.)

Finally, it bears noting that "[a]lthough delay and the risk of nonpayment are often mentioned in the same breath, adjusting for the former is a distinct issue" in fee multiplier requests. *Pennsylvania v. Delaware Valley Citizens Counsel For Clean Air*, 483 U.S. 711, 716 (1987). The distinct issue of a contingency factor is discussed below.

IV. NorVal's Argument Concerning the Contingency Aspect Ignores The Irreconcilable Findings By The District Court And The Applicable Law.

NorVal ignored altogether that SL has been working on this case on a contingency basis for now almost 5 years. NorVal also chose not to address the irreconcilable findings by the District Court concerning the hourly rate noted in Lawson's cross-appeal. That is, the District Court "received sworn statements from several attorneys averring that Shea's $325 rate is reasonable for similarly situated

attorneys in his practice area throughout the state, and the Court finds these statements credible." (11/5/21 Order, p. 13.) At the same time the District Court found $325 "reflects the contingency risk that Shea undertook to represent his client as well as a resulting four-year delay in payment for his services." (*Id.*, p. 14.) The record provided no support, and contradicted, this second finding. Also, the two findings cannot be reconciled. (Cross-Appeal, p. 45.)

NorVal relies on *Ihler II* to claim that a "lodestar calculation is not to be enhanced based on the contingent risks of this type of litigation." (NorVal brief, p. 19.) As a threshold matter, *Ihler II* also held that "[a]s stated in *Dague*, some accounting for the risk of contingency is normally figured into the computation of the lodestar, by either greater hours claimed or higher hourly wages." *Ihler II*, ¶ 37. In this case, there is no indication in the District Court's Order that it accounted for the risk of contingency by figuring in greater hours or higher hourly wages. Indeed, in its analysis of the hours expended, the Court repeatedly noted that all of the "requested hours are reasonable." (11/5/21 Order, pp. 9-11.) Moreover, the District Court found the hourly rate of $325 was "reasonable" and the "market" rate and the Court did not increase that rate for any portion of the reasonable hours expended. In this respect, the Ninth Circuit has held that in applying a multiplier "it is perfectly appropriate for a District Court to award an hourly rate higher than is customarily

charged by the Plaintiff's attorney or than is set forth in the retainer fee agreement." *Guam Society of Obstetricians and Gynecologists v. Ada,* 100 F.3d 691, 697 (9th Cir. 1996), multiple citations omitted.

As noted above, *Ihler II* cited *City of Burlington v. Dague,* 505 U.S. 557 (1992). In *Dague,* the majority held that a contingency fee multiplier was not permitted under the federal fee-shifting statute at issue in that case. However, multiple state Supreme Court rulings have held that they are not bound by *Dague* in interpreting state fee-shifting statutes and have expressly held that contingency fee multipliers are permitted. See *Joyce v. Federated National Insurance Company,* 228 So.3d 1122, 1133 (Sup. Ct. of Fla. 2017) (the Court held that it was not bound by *Dague* and found that the use of contingency fee multipliers for attorney fee awards under state statutes are allowed and there is no rare and exceptional circumstance requirement before a contingency fee multiplier can be applied), and *Ketchum v. Moses*, 17 P.3d. 735, 742 (Sup. Ct. of Ca. 2001) (the Court noted that a "contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable" thereby allowing for multipliers for contingent risks).

Also, multiple Ninth Circuit cases have applied contingency fee multipliers based on fee-shifting statutes. See *Kelly v. Wengler*, 7 F. Supp. 3d 1069, 1083-1084

(D. Idaho 2014) (the District Court applied multipliers of 2.0 and 1.3 to two different attorneys' hours based on their risk in taking the contingent civil rights case at issue and the need to give other counsel incentives to take similar cases, and the District Court ruling was affirmed on appeal); *Trulsson v. County of San Joaquin Dist. Atty.'s Office*, No. 2:11-CV-02986-KJM-DAD, 2015 U.S. Dist. LEXIS 152821, at *17-18, 19-21 (E.D. Cal. Oct. 28, 2014) (Court applied a multiplier of 1.5 due to, among other factors, the contingent risk in pursuing the underlying state discrimination claims); *Rodriguez v. County of Los Angeles* 891 F.3d. 776, 809 (U.S. District Court of Appeals 9th Cir. 2018) (Court affirmed a 2.0 multiplier for attorney's fees where the Plaintiff undertook a substantial risk in a contingency case, and faced "aggressive opposition" in "a years-long litigation").

Leaving all the above aside, even assuming arguendo that the risk of contingency was factored into the lodestar (as noted above, it was not) and that the District Court correctly determined not to utilize the contingency risk as part of its decision not to apply a multiplier, there remained a host of other *Kerr* factors[3] that were fully satisfied that warranted a multiplier. These included, but were not limited to, the following:

[3] The *Kerr* factors are set forth in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir. 1975). As noted by the District Court, the sixth *Kerr* factor is "whether the fee is fixed or contingent[.]" (11/5/21 Order, p. 8.) Despite listing this as a factor, the District Court did not apply this factor.

- The unrefuted testimony that SL was precluded from taking on billable work on "numerous instances" during the past five years due to the demands of the case. (Cross-Appeal, p. 48; citation omitted.)

- The novelty and difficulty of the questions involved. (*Ibid*.)

- The unrefuted testimony and the Court's finding that Lawson's case was "undesirable" and Lawson was unable to retain any other law office other than SL. (11/5/21 Order, pp. 2, 13.)

- The unrefuted testimony and the Court's finding that the parties proceeded under an expedited discovery, briefing and hearing schedule. (11/5/21 Order, p. 4.)

- The "unprecedented" award and the "excellent results" obtained by SL "in this action, which, contrary to NorVal's assertion, are clearly the product of Shea's meticulous representation." (11/5/21 Order, p. 10.)

- The nature and length of the professional relationship with Lawson. (Cross-Appeal, p. 49.)

- Awards in similar civil rights cases wherein Courts have applied multipliers of 2.0 and 1.5 where counsel obtained "excellent results" with less compelling facts supporting a multiplier than the adjudicated facts in this case. (Cross-Appeal, p. 49.)

V. NorVal Misstated Lawson's Argument About Exceptional Results Justifying A Multiplier.

NorVal claims that Lawson merely asserts that because she "prevailed" in the underlying litigation this is "a justification for enhancement of the lodestar determination…" (NorVal brief, p. 19.) This was not Lawson's argument. Instead, Lawson cited, as did the District Court, a clear line of cases that allow for a multiplier for "excellent results." (8/16/21 FOF/COL, pp. 43, 44; 11/5/21 Order, p. 16.) Along these lines the District Court repeatedly found that Lawson achieved "excellent" results; "[b]y every available metric, the results that Shea Obtained for Lawson are excellent." (11/5/21 Order, pp. 10, 14, 16.)

Following its above mistaken argument, NorVal argues that Lawson's claim for a multiplier would "swallow the rule." (NorVal brief, p. 23.) This argument overlooks that NorVal's expert witness on the fee petition described the ruling in Lawson's favor obtained by SL as "unprecedented." (8/16/21 FOF/COL, p. 22; citations omitted.) Also, Lawson's damage award was the largest in Montana Human Rights Bureau history, the District Court's Order increasing Lawson's front pay award removed the "historically" (albeit incorrect) damages cap previously utilized by the Montana Human Rights Bureau and the Montana Human Rights Commission, and the results obtained by SL "dramatically changes the landscape" of Montana Human Rights Bureau cases. (Cross-Appeal, pp. 34, 48, citations omitted.)

Moreover, NorVal's argument runs counter to the black letter law concept that the "amount of the fee, of course, must be determined on the facts of each case." *Hensley*, 461 U.S. at 430, no. 4; See also *Chase v. Bearpaw Ranch Ass'n*., 2006 MT 67, ¶ 36, 331 Mont. 421, 133 P. 3d 190, citation omitted, holding that the "reasonableness of attorney's fees must be ascertained under the unique facts of each case." Clearly, the unique facts and extraordinary results in this case warrant some sort of multiplier.

VI. NorVal's Reliance On Dicta In *Laudert* Overlooks the Central Holdings of *Laudert* and Nationwide Caselaw.

NorVal relies on *Laudert v. Richland Cty. Sheriff's Dep't*, 2001 MT 287 ¶ 17, 307 Mont. 403, 38, P.3d 790 to assert that fee shifting statutes were not designed "to replicate the amount a private attorney would receive in other types of litigation…." It is respectfully submitted that this statement from *Laudert* is mere dicta. Moreover, and perhaps more importantly, the case *Laudert* relied upon for this statement – *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* 478 U.S. 546 (1986) – does not support this statement. That is, *Delaware Valley Citizens' Council for Clean Air* actually only stated that the federal clean air statutes under review in that case were not "intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client." (*Id.* at p. 565.)

Further, the dicta that NorVal cherrypicked from *Laudert* is contrary to the clear law from the U.S. Supreme Court on the issue. See *Perdue*, 591 U.S. at 551, (the lodestar calculation should "approximate[ ] the fee the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case"; *Hensley*, 461 U.S. at 424, (in a civil rights case wherein the plaintiff prevailed, the "plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter"); *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 286 (1989) (a successful civil rights plaintiff is entitled to a "fully compensatory fee" "comparable to what is 'traditional with attorney's compensated by a fee-paying client.'").

Also, it bears noting that the plaintiff in *Laudert* did not receive any damages in his disability discrimination suit but nonetheless the Court awarded "a full attorney fee award." *Laudert*, ¶ 29. This was due to the fact that as a result of the plaintiff's claim the Court awarded injunctive relief against the defendant requiring it to rewrite its anti-discrimination policies. *Laudert*, ¶ 27.

In affirming the full fee award, *Laudert* explained that civil rights statutes "serve to not only benefit individual plaintiffs but also the broader vindication of

important civil and constitutional rights" and it is important for the Court to examine "whether the claimant's actions further effectuated the purpose for which the [civil rights] statute was enacted." *Laudert*, ¶ 26. Additionally, *Laudert* noted that the "ability of civil rights plaintiffs with bona fide claims to attract competent counsel is also of concern [ ]" and "a reluctance to accept civil rights cases already exists, where costs can be high and, generally, the monetary relief is significantly lower than other private law litigation." citations omitted. *Laudert*, ¶ 28.

As a result of Lawson's claim the Hearing Officer Decision granted injunctive relief against NorVal ordering it to revise its harassment and retaliation policies, and undergo training, and said relief was "sufficiently robust and harsh to ensure NorVal's discriminatory conduct is not repeated." (11/25/21 Order, p. 10.) The injunctive relief against NorVal was affirmed in the District Court's final Order. (11/16/21 District Court Consolidated Final Judgment, pp. 4, 5.) NorVal never appealed the injunctive relief entered against it. Additionally, there was unrefuted testimony that the results of Lawson's case "dramatically changes the landscape" in HRB cases. (Cross-Appeal, p. 48.)

The results in Lawson's case clearly have served the public interest by effectuating the purpose of Montana's Human Rights Act and making employers, including NorVal, more mindful of their compliance with the Act. Additionally,

there was unrefuted expert witness testimony and unrefuted testimony from Lawson's counsel that there is a reluctance to take on civil rights cases without the prospect of a multiplier. (Cross-Appeal, p. 46.)

In sum, when the straightforward facts and law set forth in *Laudert* are reviewed, *Laudert* fully supports Lawson's request for a fee multiplier.

CONCLUSION

A party that prevails on her civil rights claims is entitled to reasonable fees and costs. It is not reasonable for a party to litigate her claim for five years against an "uncompromising" and "tenacious" defendant that "exponentially increased costs to both parties", achieve "excellent" results, benefit the public with her results, have her costs, the attorney expended hours and hourly rates deemed reasonable, and not get paid for legal services for at least five years. The means to remedy this is to apply some sort of multiplier to the awarded fees and costs. Taking into account the applicable law and the undisputed facts, it is respectfully submitted that a multiplier is fair, reasonable, and warranted with respect to all costs and fees incurred by Lawson, and consistent with *Laudert*, inclusive of the fees and costs incurred on this appeal.

DATED this 11th day August, 2022

Thomas ("Todd") D. Shea, Jr.
Attorney for Shalaine Lawson

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(e), M.R.App.P. I certify that this *Reply Brief* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word, is 3,923 words long, excluding Caption, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

/s/ *Todd Shea*

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2022, a copy of the foregoing document was served upon the following by:

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CERTIFICATE OF SERVICE

I, Thomas D. Shea, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Reply to Objections to the following on 08-11-2022:

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