

Thereupon, the Plaintiff voluntarily dismissed Counts 1 and 5 of his Complaint.

Thereupon, the Court heard counsel's arguments and ruled on pending motions *in limine*, which grounds and rulings are more particularly stated in the record.

Thereupon, the Court seated a jury composed of Christopher Joseph Scritchfield, Brenda Mae Scritchfield, Patty Ann Aversa, Marcus James Bowles, Noelle Rex Smith and Kathryn Mary Biafore. Said jury being first duly sworn to well and truly try the case was qualified without objection from counsel.

Thereupon, the parties presented their opening statements, and the Plaintiff presented his case-in-chief by calling as witnesses: Jamie L. Kelley, Christopher A. Moyer, Nathan S. Kincaid, John Martin and himself.

At the close of the Plaintiff's evidence, the Defendant moved the Court for judgment as a matter of law on Counts 2, 3, 4 and 6 of the Plaintiff's Complaint. The Court granted the motion as to Counts 2 and 6 and denied the motion as to Counts 3 and 4 without prejudice to its renewal at the close of all the evidence.

Thereupon, the Defendant presented its case-in-chief by calling as witnesses: Patrick L. Stevens, Sr., and Tammy E. Hendricks.

At the close of all of the evidence at the trial of the case, the Defendant again moved for judgment as a matter of law as to Counts 3 and 4 of the Plaintiff's Complaint. The Court denied the motion and submitted the matter to the jury.

Thereupon, the Court met with counsel to review proposed jury instructions and verdict forms previously submitted by counsel. Counsel for the Defendant objected to the form of the proposed jury instructions and verdict forms, which grounds are more particularly stated in the record.

Thereupon, the Court instructed the jury as to the law in this action, and

counsel for the parties made their closing arguments.

At the conclusion of the closing arguments, the Court submitted the case to the jury and allowed the jury to retire to the jury room for deliberations.

After some deliberations, the jury requested another copy of the verdict forms. The jury then returned to the Courtroom with the following verdicts:

FAILURE TO NOTIFY OF FAMILY MEDICAL LEAVE ACT ("FLMA") (sic) RIGHTS

Do you find from a preponderance of the evidence:

1. That the Plaintiff was eligible for FMLA leave?

Answer Yes or No Yes

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That the Plaintiff was entitled to FMLA leave?

Answer Yes or No Yes

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That the Plaintiff gave Fairmont Tool proper notice of his need for leave?

Answer Yes or No Yes

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That Fairmont Tool denied Plaintiff FMLA benefits to which he was entitled?

Answer Yes or No Yes

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

5. That the Plaintiff was harmed by the denial of his FMLA benefits?

Answer Yes or No Yes

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

6. That the Plaintiff should be awarded damages?

Answer Yes or No Yes

If your answer is "Yes,"

Lost Wages: \$3,520
Benefits: \$881.22
Other Damages: \$N/A

7. That the Plaintiff failed to mitigate his damages?

Answer Yes or No No

If your answer is "Yes,"
in what amount? \$N/A

NET DAMAGES (No. 6 minus No. 7): \$4,401.22

TORT OF OUTRAGE

Do you find, by a preponderance of the evidence:

1. That Fairmont Tool intended to inflict emotional distress upon the Plaintiff, or disregarded a substantial probability of causing severe emotion distress?

Answer Yes or No Yes

If your answer is "No" to Question No. 1, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes" to Question No. 1, go to the next question.

2. That Fairmont Tool's conduct was extreme and outrageous?

Answer Yes or No Yes

If your answer is "No" to Question No. 2, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes" to Question No. 2, go to the next question.

3. That Fairmont Tool's conduct was the proximate cause of the Plaintiff's distress?

Answer Yes or No Yes

If your answer is "No" to Question No. 3, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes" to Question No. 3, go to the next question.

4. That the emotional distress sustained by the Plaintiff were severe?

Answer Yes or No Yes

If your answer is "No" to Question No. 4, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes" to Question No. 4, go to the next question.

5. What amount of damages, if any, do you find the Plaintiff has proven to be the proximate result of

Fairmont Tool's discrimination?

Emotional Distress: \$50,000

Annoyance: \$75,000

Inconvenience: \$50,000

Total: \$175,000

6. What amount of damages, if any, do you find should be deducted from the Plaintiff's damages for his failure to mitigate his damages?

Reduction of Damages: \$0

7. Net Damages (Total of No. 5 minus No. 6): \$0

8. If you awarded the Plaintiff damages, do you find that Fairmont Tool's conduct was malicious or that they acted with a conscious, reckless and outrageous indifference to the health, safety, and welfare of others?

Answer Yes or No Yes

9. If you answered "Yes" to Question No. 9, then you may award punitive damages to the Plaintiff:

Punitive Damages: \$150,000

After reading the verdict forms, the Court inquired of counsel if there was any objection to the form of the verdict as signed by the foreperson, and there were no objections. Neither party desired to have the jury polled.

Thereupon, the Court thanked and discharged the jury.

After discharging the jury, the Court discovered a calculation error on the Tort of Outrage verdict form. More specifically, the jury inserted \$0 on the blank in Paragraph No. 7. The Court ordered that the jury return to conduct further deliberations. The jury returned and corrected the error by inserting \$175,000.00 on the blank in Paragraph No. 7. The Court again inquired of counsel if there was any objection to the form of the verdict as signed by the foreperson, and there were no objections.

Thereupon, the Court again thanked and discharged the jury, and the Court was adjourned.

Thereupon, the Court entered an *Amended Judgment Order* on February

27, 2018 reflecting the above findings and verdicts, as well as an *Order Denying in Part and Granting in Part Defendant's Motion for Judgment as a Matter of Law and Alternative Request for a New Trial*, entered February 27, 2018, remitting the jury verdict of \$150,000.00 in punitive damages related to Count IV for the reasons stated therein.

Thereupon, the Court entered an *Order Granting Plaintiff's Motion for Prejudgment Interest, Liquidated Damages, Reasonable Attorney Fees, and Litigation Costs, In Part* on February 27, 2018, awarding Plaintiff liquidated damages and prejudgment interest in the amount of \$5,633.56 (including interest at the rate of 7% per annum as set by the Supreme Court for 2017), as well as attorney's fees in the amount of \$57,435.00 and costs in the amount of \$4,571.26, all based upon the jury's verdicts as to Counts III and IV, as aforesaid.

Thereupon, the Court entered an *Order Granting Defendant's Motion For A New Trial* on June 13, 2018, setting aside the jury's verdict as to Count IV (Tort of Outrage) and granting a new trial on said claim, and voiding the *Amended Judgment Order* entered February 27, 2018, all for the reasons set forth in said Order.

Thereupon, the Court entered an *Order Denying Defendant's Rule 50(b) Motion As To Count III* on October 5, 2018, and ordered that no judgment order would be issued concerning the jury's verdict as to Count III (FMLA Rights) until after the retrial of Count IV (Tort of Outrage) and not until further Order of the Court, as more fully set forth therein.

Thereupon, on October 4, 2019, Plaintiff submitted a proposed Order indicating his intent to voluntarily dismiss Count IV (Tort of Outrage). On October 9, 2019, the Court entered an *Order Dismissing Tort of Outrage Complaint*.

Thereupon, on November 27, 2019, Plaintiff submitted a proposed *Order*

Setting Pre-Judgment and Post-Judgment Interest, purportedly awarding Plaintiff pre-judgment interest at the rate of 5.5% per year and post-judgment interest from the date of verdict at the rate of 5.5% per year on "the judgment awarded to Plaintiff by order dated February 27, 2018," a reference to the since VOIDED *Amended Judgment Order* of February 27, 2018.

Thereupon, on December 4, 2019, Defendant filed *Defendant's Objections to Plaintiff's Proposed Order Setting Pre-Judgment and Post-Judgment Interest and Defendant's Motion For Status Conference And Other Relief Regarding Attorney Fees, Liquidated Damages And Interest* with the Court.

Thereupon, on December 6, 2019, Plaintiff filed *Plaintiff's Motion to Strike Defendant's Motion for Status Conference and Other Relief*.

Thereupon, on January 15, 2020, Defendant filed *Defendant's Motion For Relief Regarding Order Dismissing Tort Of Outrage Complaint*.

Thereupon, the Court entered an *Order Granting Defendant's Motion For Relief Regarding Order Dismissing Tort Of Outrage* on March 19, 2020, in which the Court VOIDED the *Order Dismissing Tort of Outrage Complaint* entered October 9, 2019 and DISMISSED Plaintiff's claim for Tort of Outrage (Count IV), with prejudice.

It is **ORDERED** that *Plaintiff's Motion to Strike Defendant's Motion for Status Conference and Other Relief* is hereby **DENIED**.

In its *Motion For Status Conference And Other Relief* filed December 6, 2019 and *Motion to Alter, Revise or Amend* filed May 29, 2020, Defendant requests confirmation that the *Order Granting Plaintiff's Motion For Prejudgment Interest, Liquidated Damages, Reasonable Attorney Fees, And Litigation Costs, In Part* entered February 27, 2018, was necessarily voided when this Court voided the underlying *Amended Judgment Order* entered February 27, 2018, and that the Court revisit the

award of liquidated damages, prejudgment interest and attorney fees and costs in light of the subsequent post-trial rulings and circumstances set forth above.

After reviewing the pleadings of the parties and analyzing pertinent legal authority, the Court is of the opinion that *Defendant's Motion For Status Conference And Other Relief Regarding Attorney Fees, Liquidated Damages And Interest* should be **GRANTED**, in part, and **DENIED**, in part. It is **ORDERED** that the *Order Granting Plaintiff's Motion For Prejudgment Interest, Liquidated Damages, Reasonable Attorney Fees, And Litigation Costs, In Part* entered February 27, 2018, is hereby **VOIDED**. However, the Court is of the opinion that *Plaintiff's Motion for Prejudgment Interest, Liquidated Damages, Reasonable Attorney Fees, and Litigation Costs* should be **GRANTED**, in major part, and makes the same findings set forth in the *Order Granting Plaintiff's Motion* entered February 27, 2018, and restated herein as follows:

(1) **Liquidated Damages and Prejudgment Interest.** The Family and Medical Leave Act provides that "[a]ny employer who [interferes with the exercise of rights or discriminates in violation of the FMLA] shall be liable to any eligible employee affected . . . for damages equal to the amount of wages, salary, employment benefits, or other compensation denied or lost . . . by reason of the violation . . . the interest on the amount . . . and an additional amount as liquidated damages equal to the sum of the amount [of damages and interest]." See, 29 U.S.C. § 2617 (2008). Prejudgment interest on FMLA damages is mandatory rather than discretionary, and the FMLA entitles a wronged employee to an additional award of liquidated damages equal to the sum of the amount awarded for damages and the interest on that amount. See, *Dotson v. Pfizer*, 558 F.3d 284 (4th Cir. 2009) at 302, 303.

(2) Plaintiff Opyoke is entitled to both prejudgment interest on his FMLA damages and liquidated damages equal to the sum of those damages plus the interest.

A Marion County jury found that Plaintiff Opyoke suffered economic damages totaling \$4,401.22. Plaintiff Opyoke's employment with Defendant ended on July 20, 2015. Prejudgment interest, from the date of his termination to the date of the damages award, at the 7% per annum set by the Supreme Court for 2017 totals \$616.17. Therefore, Plaintiff Opyoke is entitled to liquidated damages in the amount of \$5,633.56 (the sum of damages and prejudgment interest).

(3) Thus, Plaintiff Opyoke is entitled to \$5,633.56 in prejudgment interest and liquidated damages under the mandates of the Family and Medical Leave Act.

(4) **Attorney Fees and Costs.** Attorney's fees and costs are also mandatory under the Family and Medical Leave Act. See, 29 U.S.C. § 2617 (a)(3) (2008) ("The court in such action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs in the action to be paid by the defendant") (emphasis added); see also, *Dotson v. Pfizer*, 558 F.3d 284 (4th Cir. 2009). The amount of attorney fees awarded is at the trial court's discretion. *Martin v. Cavalier Hotel Corp.*, 134 F.3d 638 (4th Cir. 1998) (internal citation omitted). The starting point for establishing the proper amount of an award is the number of hours reasonably expended, multiplied by a reasonable hourly rate. *Blum v. Stenson*, 465 U.S. 886, 888, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984). This "reasonable hourly rate" requirement is met by compensating attorneys at the "prevailing market rates in the relevant community." See *Blum*, 465 U.S. at 895. In calculating a reasonable loadstar fee, the district court looks to "the nature and extent of the services supplied, the customary hourly rate of compensation, the number of hours expended, the skill required, the complexity of the case, and the success achieved by the plaintiff." *Id.* (citing *Rum Creek Coal Sales v. Caperton*, 31 F.3d 169 (4th Cir. 1994) at 175). The reasonable number of hours and reasonable rate is determined by reference to the

twelve factor test set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974). See, e.g., *McDonnell v. Miller Oil Co.*, 134 F.3d 638 (4th Cir. 1998) at 640.

(5) The West Virginia Supreme Court reiterated the oft-repeated standard [sometimes called the “Johnson factors” or the “Aetna test”] for awarding attorney’s fees in West Virginia:

Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.”

Syllabus Point 4, *Hollen v. Hathaway Electric, Inc.*, 213 W. Va. 667, 669, 584 S.E.2d 523, 525 (2003) (citing *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974)). Applying these factors to the instant case mandates an award of attorney fees and costs to Mr. Opyoke.

a. Time and Labor. Plaintiff’s counsel has supplied the Court with a detailed statement of the hours expended by counsel in the prosecution of this action which the Court incorporates by reference herein. There is no evidence to suggest that the Court should not accept the itemized time sheet as prime facie evidence of the time exerted prosecuting this case.

b. Novelty and Difficulty of Questions. While employment law tends to be a specialty area of law with numerous federal and state regulations to be studied, interpreted, and applied, Plaintiff’s counsel and their respective firm hold themselves out to be well versed in this area of law. As this matter is not a convoluted matter in

the complex area of employment law generally, this factor is of no consequence to this analysis.

- c. Skills Needed to Perform the Legal Services Properly.** The case at hand proceeded to a multiday trial preceded by multiple depositions, detailed study of the employment practices of the Defendant, and the detailed study of employment law regulation. Plaintiff's counsel's firm has a focus on employment law disputes and such disputes lend themselves to complexities that would have to otherwise be heavily researched by unfamiliar counsel.
- d. Preclusion of other Employment by Attorneys due to Acceptance of the Case.** To the extent that Plaintiff's counsel worked on this case they were not working on other cases. Counsel had to travel to Marion County for pretrial and trial hearings preventing pursuit of other cases. It should be noted, however, that Mr. Lindsay performed the majority of the work and preparation of this case, permitting Mr. Kolenich to pursue other endeavors.
- e. Customary Fee.** Mr. Opyoke did not pay a retainer; any attorney's fee awarded and collected will offset the contingent fee due his counsel.
- f. Fixed or Contingent Fee.** The current action was accepted on a contingent basis on which Plaintiff's counsel would pursue the action incurring costs upfront prior to any compensation. The contingency fee contract rate in this case is 33 1/3 %.
- g. Amount Involved and Results Obtained.** The jury returned a verdict in favor of Plaintiff for both counts. Specifically, the jury awarded Plaintiff \$3,520.00 in lost wages and \$881.22 in past lost benefits in association with his FMLA claim. The jury further awarded Plaintiff \$50,000.00 for emotional distress, \$75,000.00 for annoyance, \$50,000 for inconvenience, and \$150,000.00 in punitive damages in association with Plaintiff's Tort of Outrage claim. The Court, in its Order Denying

Defendant's Motion for Judgment as a Matter of Law Or, in the Alternative, for a New Trial, in part, reduced the award by \$150,000.00 when it determined that punitive damages were an impermissible double recovery resulting in a final award of \$179,401.22 plus prejudgment interests and liquidated damages. The Court, in its Order Granting Defendant's Motion For A New Trial, set aside the jury's verdict as to Count IV (Tort of Outrage) and granted a new trial on said claim for the reasons set forth therein, which claim was subsequently dismissed, with prejudice, by the Order Granting Defendant's Motion For Relief Regarding Order Dismissing Tort Of Outrage, resulting in a final award of \$4,401.22.

- h. Experience, Reputation, and Ability of Attorneys.** Mr. Lindsay has been practicing in this area of law for approximately two years. Mr. Kolenich has been practicing in this area of law for approximately four years. Both counsel have experience in employment law beyond their admission to the bar in more paralegal type roles.
- i. Undesirability of the Case.** Employment law requires a special knowledge and a substantial amount of time spent in research. The special knowledge required and the cause of action coupled with only a contingent possibility of being paid for one's time and expense makes this case unattractive to some lawyers. Further, Mr. Opyoke's medical condition eventually made it impossible for him to work and thus severely reduced his lost wage damages to \$3,520, which made the case far more undesirable as a contingency case.
- j. Awards in Similar Cases.** Plaintiff's counsel has submitted affidavits regarding their respective experience as well as the affidavit of David M. Hammer. Mr. Lindsay has been practicing in this area of law for approximately two years and billed at the rate of \$200.00/hour. Mr. Kolenich has been practicing in this area of law for

approximately four years and billed at the rate of \$400.00/hour. Mr. Hammer's affidavit testifies that \$400.00/hour for like work in Berkley County and the eastern panhandle is a justifiable rate in the field of employment law and provides a number of examples of rates approved as reasonable by other courts in that area.

- k. However, the case at hand was pursued in Marion County, some three hours and 170 miles away from Berkley County, a bedroom community of the greater Washington, D.C. area. Considering the distance and the mere two years of practice beyond that of his colleague, Mr. Lindsay, the Court is troubled by Mr. Kolenich's billing of \$400.00/hour. As such, Mr. Kolenich's rate will be reduced to \$250.00/hour. While both counsel have experience in employment law beyond their admission to the bar, they are still mere years removed from admission to the bar despite Mr. Hammer's fee awards for the ten plus years of experience in the greater Washington, D.C. area.
- l. Counsel for Plaintiff is requesting fees in the amount of \$67,620 plus costs of \$4,571.26. This Court is of the opinion that the attorney fees should be reduced to \$57,435.00 reflecting a \$250.00/hour rate for Mr. Kolenich's time.

Accordingly, it is **ORDERED** that Plaintiff's Motion for Prejudgment Interest, Liquidated Damages, Reasonable Attorney Fees, and Litigation Costs should be **GRANTED**, in major part. It is **ORDERED** that Plaintiff is entitled to \$4,401.22 in liquidated damages and \$616.17 per annum in prejudgment interest, as well as \$57,435.00 in attorney's fees and \$4,571.26 in costs in relation to the jury's verdict on Count III (FMLA Rights).

Based upon the foregoing, it is accordingly **ORDERED, ADJUDGED and DECREED** that Judgment shall be entered for and Plaintiff shall recover the amount of \$67,639.82.

All objections and exceptions to the foregoing proceedings and rulings are hereby saved and reserved to the parties.

The Circuit Clerk of Marion County is hereby directed to provide certified copies of this Amended Judgment Order to: Karl Kolenich, Klie Law Offices, 85 West Main Street, Buckhannon, WV 26201; and Brian J. Warner, J. Robert Russell, and David L.T. Butler, Shuman McCuskey Slicer PLLC, 1445 Stewartstown Road, Suite 200, Morgantown, WV 26505.

PREPARED BY:

/s/ J. Robert Russell
J. Robert Russell (WVSB #7788)

/s/ Patrick N. Wilson
Circuit Court Judge
16th Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.