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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Garrett White, M.D., a North Carolina  
citizen,

No. CV-08-0890-PHX-NVW

10

Plaintiff,

**ORDER**

11

vs.

[Not for Publication]

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AKDHC, LLC, dba Arizona Kidney  
Disease & Hypertension Center, an  
Arizona limited liability company,

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Defendant.

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Pending before the Court is Defendant Arizona Kidney Disease & Hypertension Center, LLC's ("AKDHC") Motion for Attorneys' Fees and Non-Taxable Costs (doc. # 96). In connection with the motion, the Court has considered AKDHC's Amended Memorandum (doc. # 106), Plaintiff Garrett White's Response (doc. # 110), and AKDHC's Reply (doc. # 111).

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**I. Background**

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On May 8, 2008, White sued AKDHC for breach of contract, breach of the implied covenant of good faith and fair dealing, and racial discrimination in violation of 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981. The claims were predicated on AKDHC's termination of White's employment as a nephrologist due to his communicative misconduct and failure to remit to the company all honoraria received for giving paid lectures.

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1 On May 1, 2009, AKDHC filed its Motion for Summary Judgment (doc. # 68) on  
2 all four claims, which this Court granted in its entirety. (Doc. # 92). In evaluating the  
3 racial discrimination claims, the Court found that by failing to demonstrate that he was  
4 similarly situated to other employees outside of his protected class, White had not  
5 established a prima facie case of racial discrimination. (*Id.* at 18-19.) It also found that  
6 White had produced insufficient evidence to negate the “same actor” inference that the  
7 termination was not racially-motivated in light of the fact that approximately ten of the  
8 individuals who voted to terminate White’s employment were the same individuals who  
9 initially voted to hire him. (*Id.* at 21-22.)

10 Having prevailed on all claims, AKDHC filed its Motion for Attorneys’ Fees and  
11 Non-Taxable Costs (doc. # 96) on October 16, 2009. Pursuant to the parties’  
12 Employment Agreement, A.R.S. § 12-341.01, 42 U.S.C. § 2000e-5(k), 42 U.S.C. 1988(b),  
13 and other applicable law, AKDHC seeks \$230,086.50 in attorneys’ fees, \$12,518.62 in  
14 related non-taxable expenses, and \$33,079.84 in fees and expenses incurred in preparing  
15 the fee application.

## 16 **II. Attorneys’ Fees for the Contract Claims**

### 17 **A. Employment Agreement Entitles AKDHC to Fees**

18 On September 12, 2003, White and AKDHC, through its CEO Susan Price, signed  
19 an Employment Agreement. Provision 15.8 of the Employment Agreement states:

20 In the event it becomes necessary for either party to employ counsel to  
21 enforce any of the provisions of this Employment Agreement, or for the  
22 breach thereof, then, in that event, the losing party agrees to pay the  
prevailing party all costs and expenses incurred, including reasonable  
attorneys’ fees.

23 Pursuant to the above mandatory fee-shifting provision, because AKDHC prevailed on  
24 White’s claims of breach of the employment agreement and breach of the covenant of  
25 good faith and fair dealing, AKDHC is entitled to reasonable attorneys’ fees incurred in  
26 defending against the two claims. *See Chase Bank v. Acosta*, 179 Ariz. 563, 575, 880  
27 P.2d 1109, 1121 (Ct. App. 1994) (“[T]he court lacks discretion to refuse to award fees  
28 under a contractual provision.”).

1                   **B. Reasonableness of Amount Sought**

2                   AKDHC seeks \$10,704.00 in fees specifically incurred in defending against the  
3 two contract claims and \$137,833.66 (or two thirds) of the general fees not readily  
4 assignable to any specific claim, for a total of \$148,537.66.

5                   **1. Amount is Presumptively Reasonable.**

6                   Determining a fee award involves calculating the “lodestar figure” by multiplying  
7 the number of hours reasonably expended on the litigation by a reasonable hourly rate.  
8 *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000). The “lodestar figure” is  
9 presumptively reasonable. *Pennsylvania v. Delaware Valley Citizens’ Council for Clean*  
10 *Air*, 478 U.S. 546, 565 (1986); *Fischer*, 214 F.3d at 1119 n.4. In calculating the lodestar  
11 figure, courts must consider the relevant *Kerr* factors, which include:

- 12                   (1) the time and labor required, (2) the novelty and difficulty of the questions  
13 involved, (3) the skill requisite to perform the legal service properly, (4) the  
14 preclusion of other employment by the attorney due to acceptance of the case,  
15 (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time  
16 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.

17 *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

18                   AKDHC arrived at its \$148,537.66 figure by multiplying the number of hours  
19 spent litigating this case by the hourly rate of each attorney involved. White maintains  
20 that many of the hours expended were unnecessary and that the rates charged by  
21 AKDHC’s counsel were excessive for the local market. Neither contention is persuasive.  
22 First, while the rates charged by AKDHC’s counsel are at the high end of the local  
23 Phoenix market, they are not excessive for lawyers of the skill and experience of  
24 AKDHC’s counsel. Second, to the extent the time and effort expended in this  
25 aggressively-litigated case may be characterized as unreasonable or unnecessary, it was  
26 by no means at AKDHC’s behest. White significantly amended his complaint twice  
27 during the case, either abandoning or adding new claims each time. Because he had a  
28 parallel case pending in state court for the first four months of this federal action, it was

1 necessary for AKDHC to spend time researching the implications of claim and issue  
2 preclusion. As far as discovery is concerned, White conducted a total of ten depositions,  
3 all of which AKDHC was forced to defend. In contrast, AKDHC conducted  
4 approximately three, one of which was White's deposition. Finally, AKDHC's vigorous  
5 defense of this case was more than justified in light of White's initial valuation of his case  
6 at \$1.8 million and the fact that AKDHC prevailed on all the relief sought. Therefore, the  
7 \$148,537.66 figure is presumptively reasonable.

8 **2. The March 4, 2009, Order Warrants a Slight Reduction.**

9 White contends that this Court's March 4, 2009, order, which approved the parties'  
10 stipulated dismissal of Defendant Susan Price with each party to bear its own fees and  
11 costs associated therewith, requires a 50% reduction in general fees incurred by AKDHC  
12 before that date. White arbitrarily bases his 50% figure on the fact that the order reduced  
13 the number of defendants from two to one. The argument lacks merit.

14 The great majority of time spent defending Susan Price occurred before White  
15 initiated this action on May 8, 2008. By that date, White had already deposed Ms. Price  
16 and AKDHC had already conducted discovery with respect to the two state law claims  
17 asserted solely against Ms. Price in the state court action and later in White's First  
18 Amended Complaint (doc. # 30) in this action. AKDHC is not seeking fees incurred prior  
19 to May 8, 2008. At the hearing on this motion, AKDHC stated that only \$3,183.00 of the  
20 general fees were devoted solely to defending Ms. Price in this action. Therefore, only  
21 \$3,183.00 will be deducted from the \$148,537.66 lodestar figure pursuant to the March 4,  
22 2009, order.

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25 **3. Two Thirds of the General Fees is Reasonable.**

26 While AKDHC argues that the general fees should be apportioned three ways,  
27 with a third assigned to each of the contract claims and a third assigned to the  
28 discrimination claims collectively, White argues that they should be apportioned four

1 ways between each of the four claims. Setting aside arbitrary distinctions between  
2 claims, the Court starts with a baseline presumption that the majority of general fees not  
3 readily assignable to any specific claim would likely have been incurred regardless of the  
4 nature and number of claims asserted. From there, it cannot be said that AKDHC's  
5 request for two thirds of the general fees is unreasonable. Therefore, in connection with  
6 the two contract claims, AKDHC is entitled to an award of \$148,537.66 less the  
7 \$3,183.00 incurred solely in defending Ms. Price prior to March 4, 2009, for a total of  
8 \$145,354.66.

### 9 **III. Attorneys' Fees for the Discrimination Claims**

10 In connection with White's Title VII and 42 U.S.C. § 1981 discrimination claims,  
11 AKDHC seeks \$12,673.00 in fees specifically incurred to defend against the two claims  
12 and the remaining third of the general fees not readily assignable to any specific claim,  
13 for a total of \$81,548.83.<sup>1</sup>

14 "Attorneys' fees in civil rights cases should only be awarded to a defendant in  
15 exceptional circumstances." *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1980).  
16 Therefore, a prevailing defendant in a Title VII or 42 U.S.C. § 1981 action may recover  
17 attorneys' fees and expenses only upon a finding that "the claim was frivolous,  
18 unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly  
19 became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); *see also*  
20 *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir. 1994). Although not  
21 necessary, a finding of subjective bad faith in bringing or continuing to litigate a claim  
22 provides "a stronger basis" for awarding fees to the defendant. *Christiansburg*, 434 U.S.  
23 at 421-22. Finally, "it is important that a district court resist the understandable  
24 temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not  
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26 <sup>1</sup>There is an apparent calculation error in AKDHC's Amended Memorandum (doc.  
27 # 104). While page 12 indicates the amount sought in connection with the discrimination  
28 claims is \$81,548.83, the summation of the billing entries in Exhibit G (doc. # 104-5)  
indicates a total amount of \$81,589.83. The lower amount will be used.

1 ultimately prevail, his action must have been unreasonable or without foundation.” *Id.*  
2 “Decisive facts may not emerge until discovery or trial.” *Id.* at 422.

3 As a preliminary matter, although this aggressively-litigated case was certainly  
4 charged with emotion, the Court does not conclude that White brought his claims in  
5 subjective bad faith. Therefore, the inquiry turns on whether the claims were frivolous or  
6 otherwise lacked foundation. That is a close question. AKDHC argues that because  
7 White failed to establish a prima facie case of racial discrimination, and because he failed  
8 to come even remotely close to negating the “same actor” inference, an award of fees is  
9 warranted. While both assertions were true for purposes of summary judgment, the  
10 strength of the claims for purposes of awarding fees must be evaluated from the  
11 perspective of what White knew at the outset rather than what he knew at the close of  
12 discovery.

13 To establish a prima facie case of racial discrimination, White had to prove that (1)  
14 he belonged to a protected class, (2) he was qualified for his job, (3) he was subjected to  
15 an adverse employment action, and (4) he was similarly situated to more favorably-  
16 treated employees outside of his protected class. *See Moran v. Selig*, 447 F.3d 748, 753  
17 (9th Cir. 2006). He knew from the outset that he could establish the first three elements  
18 with relative ease. However, the merits of the fourth element were likely unknown prior  
19 to discovery. At the close of discovery, it was evident that White was not similarly  
20 situated to other employees in all material respects because while others had been  
21 reprimanded for behavioral issues, no one else had kept honoraria in supposed  
22 contravention of AKDHC’s “common pot” remittance policy. However, there is nothing  
23 to suggest that White was aware of that fact prior to filing his complaint. Therefore, on  
24 balance the Court concludes that White’s discrimination claims were not frivolous or  
25 groundless simply because he failed to establish a prima facie case of discrimination at  
26 the close of discovery.

27 The same holds true for the “same actor” inference. “[W]here the same actor is  
28 responsible for both the hiring and the firing of a discrimination plaintiff, and both actions

1 occur within a short period of time, a strong inference arises that there was no  
2 discriminatory motive.” *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270-71 (9th  
3 Cir. 1996). In this case, because approximately ten of the shareholders who voted  
4 unanimously to terminate White’s employment had voted to hire him three years earlier,  
5 there was a strong inference that the termination was not racially-motivated. White knew,  
6 prior to filing suit, which shareholders had interviewed him. However, it is unclear  
7 whether he knew at that time which shareholders had voted to hire and fire him.  
8 Therefore, it cannot be said that White’s discrimination claims were frivolous or  
9 groundless in light of the now-apparent applicability of the same actor inference. For  
10 these reasons, the Court will exercise its discretion to deny fees for the discrimination  
11 claims.

#### 12 **IV. Non-Taxable Expenses**

13 AKDHC also seeks \$12,518.62 in non-taxable expenses. For the same reason the  
14 Court’s March 4, 2009, order warranted no general 50% reduction in fees, it warrants no  
15 such reduction in non-taxable expenses. The amount incurred by AKDHC solely in  
16 defending Ms. Price prior to March 4, 2009, has already been deducted. Furthermore, the  
17 roughly \$6,861.04 in travel expenses incurred by AKDHC’s counsel is reasonable.  
18 Therefore, AKDHC is entitled to \$12,518.62 in non-taxable expenses.

#### 19 **V. Attorneys’ Fees & Expenses Incurred in Seeking Fees & Expenses**

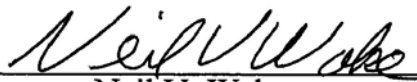
20 Arizona law allows the prevailing party to recover attorneys’ fees and expenses  
21 incurred in seeking an award of attorneys’ fees and expenses post-judgment. *See*  
22 *Schweiger v. China Doll Rest.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (Ct. App. 1983);  
23 *see also Gametech Int’l, Inc. v. Trend Gaming Sys., L.L.C.*, 380 F. Supp. 2d 1084, 1101  
24 (D. Ariz. 2005). In connection with preparing its fee application, AKDHC has incurred  
25 \$33,079.84 in fees and non-taxable expenses to date. Because AKDHC is entitled to  
26 65.07% of the total amount of fees and expenses sought in connection with the underlying  
27 claims, it is reasonable to award that same percentage of fees and expenses incurred in  
28 preparing the fee application. *See Harris v. McCarthy*, 790 F.2d 753, 758059 (9th Cir.

1 1986) (affirming district court's award of fees incurred in preparing the fee application in  
2 the same proportion that fees were awarded on the underlying claims). Therefore,  
3 AKDHC is entitled to an additional \$21,525.05 in fees and expenses incurred in preparing  
4 and defending this fee application, which, together with the \$157,873.28 awarded on the  
5 underlying claims, amounts to \$179,398.33. AKDHC is also entitled to post-judgment  
6 interest on that amount pursuant to 28 U.S.C. § 1961.

7 IT IS THEREFORE ORDERED that AKDHC's Motion for Attorneys' Fees and  
8 Non-Taxable Costs (doc. # 96) is granted in the amount of \$179,398.33.

9 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of AKDHC,  
10 LLC, against Plaintiff Garrett White, M.D., for attorneys' fees in the amount of  
11 \$179,398.33, plus interest at the federal rate until paid.

12 DATED this 15<sup>th</sup> day of March, 2010.

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Neil V. Wake  
United States District Judge  
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