

EMPLOYMENT & IMMIGRATION LAW

Contingent Fee Enhancements Are Alive and Well in N.J.

Revisiting *Rendine v. Pantzer's* treatment of fee-shifting under the LAD

By Catherine P. Wells and
Denise J. Pipersburgh

Although the New Jersey Supreme Court has consistently looked to federal law for interpretive guidance with regard to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. (the NJLAD), the Court has a history of departing from federal precedent when it comes to contingency fee enhancements under the NJLAD. Indeed, in a recent decision, *Walker v. Guiffre*, 209 N.J. 124 (2012), the New Jersey Supreme Court reaffirmed its prior holding in *Rendine v. Pantzer*, 141 N.J. 292 (1995), a landmark decision, holding that contingent fee enhancements are permitted in attorney fee awards under the NJLAD's fee-shifting provision, N.J.S.A. 10:5-27.1.

In *Rendine*, a pregnancy discrimination case brought under the NJLAD, the

Wells is the chairwoman of the employment group at Wolff & Samson PC in West Orange. Pipersburgh is an associate in the group.

New Jersey Supreme Court first considered the propriety of contingent fee enhancements under state law. In ruling that such enhancements are appropriate under the NJLAD, the *Rendine* court recognized that the United States Supreme Court had already rejected fee enhancements under federal fee-shifting statutes in *City of Burlington v. Dague*, 505 U.S. 557 (1992). Acknowledging that its holding was a rare departure from following federal precedent with respect to civil rights matters, the New Jersey Supreme Court stated that “[a]lthough we have often incorporated the reasoning of federal cases construing analogous federal statutes in our interpretation of the LAD, we have not been reluctant to depart from federal precedent when we deem it appropriate.”

The *Rendine* court held that, after establishing the lodestar, which is the number of hours worked multiplied by the prevailing hourly rates, a trial court “should consider whether to increase that fee to reflect the risk of non-payment in all cases in which the attorney’s compensation entirely or substantially is conditioned on a successful outcome.” Contrary to the Supreme Court’s holding in *Dague*, the *Rendine* Court concluded that a fee is not “reasonable” unless it is “adjusted to reflect the actual risk that the attorney will not receive payment if the suit does not succeed.” The Court also held that, ordi-

narily, contingency enhancements should range between 5 percent and 50 percent of the lodestar.

In 2010, the United States Supreme Court revisited the issue of contingent fee enhancement under federal fee-shifting statutes in a case where a trial court awarded a 75 percent enhancement based upon the superior performance and results obtained by counsel. In *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010), a class-action lawsuit instituted on behalf of children in the Georgia foster care program, the plaintiffs sought injunctive and declaratory relief under both the federal and state civil rights statutes. Following a settlement where the only remaining issue to be resolved was the class counsels’ fee application under 42 U.S.C. § 1988, the district court calculated the lodestar and then enhanced the fee award by 75 percent. The district court reasoned that an enhancement was warranted because the results class counsel obtained were “extraordinary,” and the lodestar did not take into account that counsel advanced millions of dollars in expenses, counsel was not paid for several years after the services were provided and the counsel fee was purely contingent. The Eleventh Circuit affirmed the decision, although the panel was splintered on the propriety of the enhancement, with each judge writing a separate opinion.

Having previously held that contingent fee enhancements under federal fee-shifting statutes should only be granted in extraordinary circumstances, the *Perdue* Court reversed, finding that a fee enhancement was not warranted based upon superior performance and results. To justify an enhancement, the Court explained that

the party seeking a fee enhancement must demonstrate that there is some factor warranting an enhancement that the lodestar does not take into account. The Court then identified six “important rules” that the lodestar method of calculation takes into account, including that it generally results in a reasonable fee that will induce counsel to undertake a representation, and there is a presumption of reasonableness because it is based upon the hours expended and reasonable market rates. Moreover, enhancements should be granted only when the party seeking the enhancement can point to specific evidence that the enhancement is not based upon a factor subsumed in the lodestar.

Two separate panels of the Appellate Division interpreted *Perdue* to call into question the New Jersey Supreme Court’s prior decision in *Rendine*. See, e.g., *Walker v. Guiffre*, 415 N.J. Super. 597 (App. Div. 2010); *Humphries v. Powder Mill Shopping Plaza*, 2011 WL 6127 (N.J. Super. 2011). The New Jersey Supreme Court thereafter granted certification and consolidated both appeals in *Walker v. Guiffre*, 209 N.J. 124 (2012). There, the New Jersey Supreme Court considered, once again, the principles governing contingency fee enhancements under several state statutes containing fee-shifting provisions. In each appeal, the Court was called upon to consider a challenge to the continued validity of contingent fee enhancements recognized decades earlier in the context of the NJLAD’s fee-shifting provision.

The *Walker* appeal involved a plaintiff that had signed a retail installment contract to purchase a vehicle, which included an inflated, but nonitemized charge labeled a “documentary service fee.” The plaintiff filed a class-action complaint alleging violations of the New Jersey Consumer

Fraud Act, N.J.S.A. 56:8-1 (CFA), and the Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 (TCCWNA), based upon the dealer’s deceptive practice of charging a higher fee than the New Jersey Motor Vehicle Commission.

After a class was certified, the trial court granted summary judgment in favor of the plaintiff finding a per se violation of the CFA, the TCCWNA and the pertinent regulations. Given that the plaintiff had prevailed on her claims, the trial court concluded that she was entitled to a fee award and, after calculating the lodestar, the trial court awarded a contingent fee enhancement equal to 45 percent. On appeal, the decision was reversed, vacating the counsel fee award and remanding for reconsideration in light of the United States Supreme Court’s holding in *Perdue*.

The companion case, *Humphries v. Powder Mill Shopping Plaza*, involved a disabled individual who utilized a motorized wheelchair and van equipped with a wheelchair platform lift. The plaintiff in the *Humphries* case instituted an action against a shopping complex owner, alleging violations of Title III of the Americans with Disabilities Act, 42 U.S.C.A. §§12181-12189, and the NJLAD inasmuch as there were inadequate van-accessible spaces, and the ramp to the sidewalk was too steep for use by a wheelchair. As part of a pretrial settlement, the defendants agreed to modify curb ramps and to make other modifications to ensure compliance with the ADA and the NJLAD. As part of that settlement, the plaintiff received a nominal payment in the amount of \$2,500, and the parties agreed that the attorney fee award would be resolved by the trial court. In fixing the fee award, the trial court awarded a fee enhancement of 20 percent, after concluding that the litigation was the type that advanced the public good and that would not be brought without

the promise of a fee award. The Appellate Division reversed because that plaintiff did not present sufficient evidence to support a fee enhancement given the stringent standards enunciated in *Perdue*.

In each case, the New Jersey Supreme Court reversed the Appellate Division, noting that the analyses underlying the United States Supreme Court’s decisions in *Dague* and *Perdue* were squarely addressed and rejected when the New Jersey Supreme Court decided *Rendine*. Instead, the New Jersey Supreme Court reaffirmed its adherence to the rationale enunciated in *Rendine*, where it concluded that fee enhancements were appropriate to ensure a reasonable fee and it established guidelines to assist trial courts in fixing the amount of an enhancement. The New Jersey Supreme Court nonetheless noted that the record before the court presented an opportunity to further clarify the guidelines for enhancements outlined in *Rendine*. In fact, the New Jersey Supreme Court noted that in cases such as *Humphries*, where the principal relief sought is almost purely equitable relief and there is an intention to advance the public interest, those factors weigh in favor of an enhancement at the highest end of the spectrum as set forth in *Rendine*.

The decision in *Walker* makes clear that the New Jersey courts, at least insofar as the interpretation of state fee-shifting provisions are at issue, will continue to utilize the lodestar approach to calculate a fee and award fee enhancements under appropriate circumstances. Finally, it further appears, given the New Jersey Supreme Court’s clarification with regard to enhancements, that the decision is intended to encourage litigants and their counsel to undertake those unique cases involving primarily equitable relief, as opposed to monetary awards, to ensure that those civil rights matters are addressed. ■