

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RENAE MARABLE, et al.,

Plaintiffs,

v.

DISTRICT HOSPITAL PARTNERS, L.P.,

Defendant.

Civil Action No. 01-02361 (HHK)(AK)

MEMORANDUM ORDER¹

Pending before the Court are Plaintiffs' Motion to Compel Payment of Expert's Reasonable Fee for Defendant's Deposition [128], Defendant's Opposition [131], and Plaintiffs' Reply [132].

I. Background

John A. Veres III, Ph.D., is Plaintiffs' expert and an accomplished professional in the statistical analyses and industrial psychology fields. (Pls.' Mot. to Compel at 2.) Dr. Veres attended a deposition at the office of DLA Piper USA in Washington, D.C. on February 2, 2009, in compliance with a notice of deposition that Defendant served on him. (*Id.*) The deposition required Dr. Veres to travel from his hometown of Montgomery, Alabama and stay overnight in the District of Columbia. (*Id.*) Dr. Veres submitted a bill for his appearance at the deposition totaling \$9,256.92 on February 4, 2009. (*Id.* at 3.) The charges included 4.75 hours of preparation time and 5.5 hours of deposition time billed at Dr. Veres' standard rate of \$450 per

¹ United States District Judge Henry H. Kennedy, Jr., referred this case to the undersigned Magistrate Judge for disposition of all pending and future discovery-related motions pursuant to Local Civil Rule 72.2(a). (*See* Order [129] dated 03/17/09.)

hour, 12.25 hours of travel time billed at \$225 per hour (half his standard rate), and travel expenses. (*Id.*; Def.'s Opp'n Ex. C.)

Plaintiffs' counsel contacted Defendant's counsel about reimbursement for travel expenses before the deposition, and Defendant's counsel indicated that it did not intend to pay for Dr. Veres' travel expenses. (Pls.' Mot. at 2; *see also* Def.'s Opp'n Ex. A; Def.'s Opp'n Ex. B.) Defendant's counsel ultimately paid Dr. Veres \$1,375 for 5.5 hours of deposition time at the rate of \$250 per hour and refused to pay the remaining balance on the invoice. (Pls.' Mot. at 3.) Defendant later admitted that it should have paid Dr. Veres \$1,512.50 for 5.5 hours of deposition time at the rate of \$275 per hour, the rate that it deemed reasonable. (Def.'s Opp'n at 2, 6.) In addition to not reimbursing Dr. Veres his full rate for time spent in the deposition itself, Defendant refuses to pay Dr. Veres for time he spent preparing for the deposition, time traveling to the deposition, and travel expenses. (Pls.' Mot. at 3.)

II. Discussion

A. Reasonableness of Expert Fee

_____ Federal Rule of Civil Procedure 26(b)(4)(C) provides that "unless manifest injustice would result, the court must require that the party seeking discovery: (I) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B)." FED. R. CIV. P. 26(b)(4)(C). The decision on what is a reasonable fee is within the discretion of the court. *Feliciano v. County of Suffolk*, 246 F.R.D. 134, 137 (E.D.N.Y. 2007); *Fisher-Price, Inc. v. Safety Ist, Inc.*, 217 F.R.D. 329, 333 (D. Del. 2003); *Edin v. Paul Revere Life Ins. Co.*, 188 F.R.D. 543, 546 (D. Ariz. 1999). Some courts consider the following seven factors when determining the reasonableness of an expert's fee:

(1) the witness's area of expertise; (2) the education and training required to provide the expert insight which is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality, and complexity of the discovery responses provided; (5) the fee actually charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to assist the court in balancing the interests implicated by Rule 26.

Fisher-Price, 217 F.R.D. at 333; *Edin*, 188 F.R.D. at 546. The circumstances of each case determine the weight the court should give any particular factor. *New York v. Solvent Chem. Co., Inc.*, 210 F.R.D. 462, 468 (W.D.N.Y. 2002). Ultimately, courts must strike a balance between allowing plaintiffs to choose their own experts and preventing defendants from being "unfairly burdened by excessive ransoms which produce windfalls for the plaintiff's experts." *Anthony v. Abbott Labs.*, 106 F.R.D. 461, 465 (D.R.I. 1985).

Plaintiffs move the Court to order Defendant to pay Dr. Veres at a rate of \$450 per hour for the time he spent in the deposition. (Pls.' Mot. at 7.) Defendant argues that Dr. Veres' rate is not reasonable because it is not comparable to the rates of other experts, namely Defendant's own expert, who only charges \$275 per hour. (Def.'s Opp'n at 4-5.) However, the circumstances here suggest that the more relevant factors are Dr. Veres' expertise, the rate he charges Plaintiffs, and the rate he typically charges on similar matters. Dr. Veres' extensive publications and litigation experience related to racially-discriminatory hiring practices indicate that he is an accomplished expert in the field. (Pls.' Reply at 5.) In addition to expertise, courts "look to the fee being charged by the party who retained the expert, and the fees traditionally charged by the expert on related matters." *Solvent Chem.*, 210 F.R.D. at 468. Dr. Veres' rate of \$450 per hour was his usual and customary rate for all private litigants at the time of deposition. (Pls.' Mot. at 7.) Dr. Veres, however, had increased his usual and customary rate from \$400 per hour to \$450 per hour on January 1, 2009. (*Id.*) Under these circumstances, the Court finds \$400 per hour to

be the reasonable and appropriate rate because it was Dr. Veres' standard rate from 2005 through 2008 and the rate he presumably charged Plaintiffs for his services prior to January 1, 2009. (*Id.*) The Court therefore concludes that Defendant was not justified in compensating Dr. Veres at a rate of only \$250 per hour, and the Court will order Defendant to reimburse Dr. Veres for 5.5 hours of deposition time at the rate of \$400 per hour.

B. Preparation Time

_____The next question is whether compensation for "time spent in responding to discovery" in Federal Rule of Civil Procedure 26(b)(4)(C) includes time spent preparing for a deposition. FED. R. CIV. P. 26(b)(4)(C). This Circuit has permitted the required payment of fees and expenses "incidental to the expert's services." *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984, 990 (D.C. Cir. 1979). District courts in other circuits have also required compensation for time spent preparing for a deposition. *Solvent Chem.*, 210 F.R.D. at 471; *Fleming v. United States*, 205 F.R.D. 188, 190 (W.D. Va. 2000). However, in *United States ex rel. Fago v. M&T Mortgage Corp.*, Judge Facciola declined to recognize that time spent preparing to respond to a deposition notice was compensable as a general rule. 238 F.R.D. 3, 15 (D.D.C. 2006). Instead, Judge Facciola urged consideration of the circumstances in each individual case, specifically the complexity of the issues involved and the interval of time between the production of expert reports and the deposition, to determine the predominate purpose of the preparation time. *Id.* at 15 (finding that expert fees were not appropriate because the issues were not complex and the expert had produced his report only three months earlier).

While Plaintiffs ask the Court to order Defendant to pay for all of Dr. Veres' preparation time, Defendant argues that none of Dr. Veres' preparation time is compensable. (Def.'s Opp'n at 2-3.) The circumstances in this case suggest that Dr. Veres should be compensated for some

of the 4.75 total hours he spent preparing for the deposition. Dr. Veres had produced his expert report approximately four months before his deposition, and in order to prepare for the deposition, he spent 2.5 hours reviewing the report, complex data sets, and accompanying analysis. (Pls.' Mot. at 10; Pls.' Reply at 3-4.) It appears that Dr. Veres' time reviewing documents was "solely or predominantly for the purpose of responding to the opposition party's discovery." *Fago*, 238 F.R.D. at 15. Furthermore, preparation of this sort can aid in the efficiency and productivity of a deposition, reducing its time and cost. *Hose v. Chicago & N.W. Transp. Co.*, 154 F.R.D. 222, 227-228 (S.D. Iowa 1994).

Accordingly, Dr. Veres is entitled to compensation for the 2.5 hours he spent reviewing documents in preparation for the deposition. While courts are divided on the rate of compensation for preparation time, this Court is not inclined to set an expert's rate for preparation time below his standard rate. *Compare Packer v. SN Servicing Corp.*, 243 F.R.D. 39, 43 (D. Conn. 2007) (finding that an expert's preparation time may be compensated at the same rate as deposition time), *with Boos v. Prison Health Servs.*, 212 F.R.D. 578, 580 (D. Kan. 2002) (explaining that \$200 per hour is a reasonable rate for document review where an expert's rate for deposition time is \$500 per hour). The Court therefore will order Defendant to reimburse Dr. Veres for 2.5 hours of preparation time at the hourly rate of \$400 per hour.

Defendant specifically objects to Dr. Veres' charge of one hour at \$450 per hour for communications with his counsel. (Def.'s Opp'n at 3.) As Judge Facciola noted in *Fago*, preparation time can include "consultation between the responding party's counsel and the expert to prepare the expert to best support the responding party's case and to anticipate questions from seeking parties' counsel." 238 F.R.D. at 15 (*quoting Rhee v. Witco Chem. Corp.*, 126 F.R.D. 45, 47 (N.D. Ill. 1989)). These types of communications represent trial preparation, and the

opposing side should not have to pay for them. *Id.* Because his emails and phone conversations with Plaintiffs' counsel may have been akin to trial preparation, Dr. Veres is not entitled to bill Defendant for that time.

Defendant also objects to Dr. Veres' charge of 1.25 hours at \$450 per hour for "gather[ing], [and] print[ing] docs." (Def.'s Opp'n at 3.) Indeed, some courts have refused to compensate experts at their normal hourly rate for administrative tasks. *Packer*, 243 F.R.D. at 43-44 ("time spent collecting documents . . . should not be compensated"); *Fisher-Price*, 217 F.R.D. at 334. Likewise, this Court finds Dr. Veres' charge of \$450 per hour for 1.25 hours of gathering and printing documents unreasonable. Dr. Veres is entitled to bill Defendant at a reduced hourly rate for these clerical services but not at the same rate as his expert services. The Court will therefore order Defendant to pay Dr. Veres half of his hourly rate, or \$200 per hour, for the time he spent preparing documents.²

C. Travel Time

The issue of whether the "reasonable fee" provision in Federal Rule of Civil Procedure 26(b)(4)(C) includes travel time and expenses is also in dispute. FED. R. CIV. P. 26(b)(4)(C). Defendant argues that it should not be burdened by the Plaintiffs' choice of an expert from Alabama. (Def.'s Opp'n at 5.) However, this Circuit includes travel time and expenses in the reasonable fee that experts are entitled to receive from the party requesting the deposition. *Haarhuis v. Kunnan Enters., Ltd.*, 177 F.3d 1007, 1015-1016 (D.C. Cir. 1999) (affirming bankruptcy court's finding that expert should be paid "portal-to-portal"); *Marine Petroleum*, 641 F.2d at 990 (finding incidental expenses compensable). Courts in other circuits agree that an

² As explained in Part II.A, *supra*, the Court considers \$400 per hour to be Dr. Veres' reasonable hourly rate.

expert should be reimbursed for reasonable travel costs. *Rogers v. Penland*, 232 F.R.D. 581, 582 (E.D. Tex. 2005); *Solvent Chem.*, 210 F.R.D. at 472.

Defendant's claim of burden because Plaintiffs' expert lives or works in Alabama ignores the election made by Defendant to depose him in the District of Columbia. The less expensive alternative would have been to depose Dr. Veres by video conference, thereby eliminating all of his travel costs. The oft raised argument by a party taking a deposition that it needs to closely observe and monitor the deponent's demeanor to assess how he or she will appear to a jury does not apply with nearly the same force to a seasoned expert such as Dr. Veres. Having made the decision to depose him in the District of Columbia, Defendant cannot now avoid paying for his travel costs.

A charge of half Dr. Veres' reasonable rate, or \$200 per hour, for 12.25 hours of travel time to and from Montgomery, Alabama and Washington, D.C. appears reasonable under the circumstances. Additionally, Dr. Veres' lodging, transportation, and food expenses while in Washington, D.C. all appear to be reasonable. Finally, the Court is not inclined to re-examine the cost of Dr. Veres' standard fare plane tickets, as the market price will be presumed to be reasonable. Accordingly, the Court will order Defendant to pay Dr. Veres \$2,450 for his travel time and \$1,888.17 for his travel expenses.

D. Expenses and Attorneys Fees

Plaintiffs seek to recover attorney's fees and expenses for the preparation of their motion to compel and their reply to Defendant's opposition. (Pls.' Mot. at 12-13.) Federal Rule of Civil Procedure 37 provides:

If the motion [to compel] is granted – or if the disclosure or requested discovery is provided after the motion was filed – the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the

party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37(a)(5)(A). Given Dr. Veres' high hourly rate, Defendant's opposition to pay the full balance of his invoice for charges related to the deposition was substantially justified. Accordingly, the Court will deny Plaintiffs' request for attorney's fees and expenses.

III. Conclusion

For the foregoing reasons, it is this 4th day of June, 2009, hereby

ORDERED that Plaintiffs' Motion to Compel Payment of Expert's Reasonable Fee for Defendant's Deposition [128] is **granted in part and denied in part**; and it is further

ORDERED that Defendant shall pay Plaintiffs' expert \$400 per hour for 5.5 hours of deposition time, or \$2,200. Defendant shall also pay Plaintiffs' expert \$400 per hour for 2.5 hours of time reviewing documents and \$200 per hour for 1.25 hours of time preparing documents, or a total of \$1,250; and it is further

ORDERED that Defendant shall pay Plaintiffs' expert \$200 per hour for 12.25 hours of travel time, or \$2,450. Defendant shall also pay Plaintiffs' expert \$1,888.17 for travel expenses.

/s/
ALAN KAY
UNITED STATES MAGISTRATE JUDGE