IN THE COURT OF APPEALS OF MARYLAND

September Term, 2004

No. 111

MANOR COUNTRY CLUB,

Petitioner,

v.

BETTY FLAA,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS

BRIEF OF METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AND MARYLAND EMPLOYMENT LAWYERS ASSOCIATION AS *AMICI CURIAE*

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STATEMENT OF INTEREST

The Metropolitan Washington Employment Lawyers Association (MWELA) and the Maryland Employment Lawyers Association (MELA) are legal membership organizations whose constituents represent plaintiffs in employment and civil rights litigation in, respectively, the Washington metropolitan area and throughout the State of Maryland. The trial court's disposition of the fee petition in this case threatens to undermine important statutory rights that protect individuals in the State of Maryland by deterring competent counsel from accepting civil rights cases. Because the outcome will directly impact future client representation, MWELA and MELA members have a concerted interest in the fair resolution of the issues on appeal. MWELA participated as an *amicus* in the case of *Friolo v. Frankel*, 373 Md. 501 (2003), the case that serves as the foundation for the issues in this appeal. Therefore, we offer our views to the Court.

ISSUES PRESENTED

1. Whether the method of calculating attorneys' fees in this case endangers private enforcement of the law and undermines the public policy behind Montgomery County's fee-shifting statute.
2. Whether the decision of the Panel failed to comply with settled law by disregarding the lodestar amount and substituting a "cost-benefit" analysis that placed a subjective and improperly low value on discrimination claims.
3. Whether the decision below erred by failing to award any attorney fees for the time spent pursuing a fee petition.

STATEMENT OF THE CASE

Appellant, Betty Flaa, first brought claims of discrimination against Manor Country Club ("Manor") in 1993, and Flaa's counsel began work on this case in May, 1994. Over the course of the next six years, the parties engaged in extensive proceedings, including broad discovery. The ten-day hearing in this case commenced on May 17, 1999. Flaa prevailed at the hearing, and prevailed again on the subsequent

review by the Montgomery County Public Accommodations Panel (the "Panel") of the Montgomery County Office of Human Rights.

While Flaa had multiple legal theories of discrimination, the same relief was available for each claim. The primary relief that was available was injunctive and equitable relief pursuant to Mont. County Code sec. 27-7(f)(1), and there was also the possibility of up to $1,000 in damages pursuant to Mont. County Code sec. 27-7(k)(4). Flaa received complete injunctive relief, including an order that Manor "cease and desist" from all discriminatory activities, establish a formal written policy against discrimination, establish a confidential and fair process for handling complaints of discrimination and provide access for Commission staff to monitor compliance. Flaa also was awarded $750 in damages out of a maximum possible award of $1,000. Accordingly, Flaa received nearly all of the potential remedy that was available to her under Chapter 27 of the Montgomery County Code.

Manor defended against all of Flaa's claims by claiming that it was not a "public accommodation," and therefore was not covered by the Montgomery County anti-discrimination laws. This jurisdictional issue was a matter of first impression, and both sides expended a considerable amount of time and effort addressing the question. E1153. The time spent on the "public accommodation" jurisdictional issue was equally necessary for each of Flaa's claims.

As the prevailing party, Flaa was entitled to an award of reasonable attorney fees. After each successful stage of the proceedings, Flaa submitted an attorney fees petition for the fees to date, commencing with a request for $11,700 submitted in July 1997, and increasing in amounts over the next six years. Rather than pay an amount that—then and now—appeared to be fair and reasonable, Manor continued to litigate and oppose Flaa's fee petitions. The Hearing Examiner who conducted the hearing and heard the testimony awarded Flaa approximately $125,000 in fees and costs. E318 n.79. At this stage, the most recent substantive analysis of the fee petition appears at E1131 (the "Panel Opinion"). The Circuit Court issued a brief order affirming the Panel Opinion without separately analyzing the issues. The Panel and the court below awarded Flaa only

$22,440 in fees and costs, representing a reduction of more than 90% in time actually spent on the case. E1138. Accordingly, this brief addresses the analysis in the Panel Opinion rather than the Circuit Court.

Amici have filed separately because we do not believe that the Panel correctly calculated the "lodestar" fees in the first instance in accordance with the extensive federal precedent adopted by the Court of Appeals in *Friolo v. Frankel*, 373 Md. 501 (2003). Specifically, the Panel appears to have reasoned backwards, first setting a cap on the maximum fees it would allow ($25,000), and then determining the number of hours that would fit within the cap. E1135. The Circuit Court left the Panel's opinion in place with minimal discussion. E1327. The Court of Special Appeals properly reversed, finding that the Panel had skipped the necessary threshold step of determining the reasonable number of hours actually expended on the case by plaintiff's counsel before applying the remaining adjustment factors.

SUMMARY OF THE ARGUMENT

The "lodestar" method of calculating fees—i.e., the multiplication of the hours reasonably spent on the case by a reasonable hourly rate—has been the established method of calculating fee awards for decades, and it has been repeatedly endorsed by the Supreme Court. *See Hensley v. Eckerhart*, 461 U.S. 424, 456 (1983), and *Friolo v. Frankel*, 373 Md. 501, 819 A.2d 354 (2003). That method—more than any other—fairly compensates prevailing parties for the amount of lawyer time necessary to litigate the case, and deters recalcitrant discriminators from violating the law. This is the "most useful starting point" for analyzing fee petitions, as this Court noted in *Friolo, infra.* As the Court of Special Appeals held, the Panel erred by failing to start its analysis of the fee petition with the threshold issue of calculating the "lodestar" value by multiplying "reasonable hours times reasonably hourly rates." Calculating the lodestar value is a necessary first step, and only then can the various factors be considered to adjust the lodestar value up or down, as necessary. Instead, the Panel capped the fee award based on an improper cost-benefit analysis where it determined the maximum fee that it viewed this "type" of case was worth, and then reasoned backwards to meet that cap. This

analysis, where fees are viewed in proportion to the tribunal's subjective assessment of the value of a case, is even more arbitrary than the now-rejected notion of "proportionality" (that a fee award has to remain proportional to the amount of relief provided) that has been rejected by the federal courts. *City of Riverside v. Rivera*, 477 U.S. 561, 577 (1986) (approving $240,000 fee petition on a judgment of $33,000 in damages).

Lodestar analysis has become the standard for analyzing attorney fee petitions not only because the Supreme Court said so, but because it is the most logical approach. In many respects, analyzing a fee petition is analogous to determining the value of services provided in a typical *quantum meruit* action. Whether the service is provided by a plumber, mechanic, accountant or lawyer, the starting point for determining the value of services is to determine the amount of time spent on the job and the customary hourly rates for that type of labor. But "hours times rates" is just another way of saying "lodestar." To be sure, there are other factors which can come into play to adjust that initial calculation up or down, but it is impossible to "adjust" a dollar amount that has not yet been calculated, as the Panel's opinion aptly demonstrates. For example, in a *quantum meruit* suit by a bricklayer for work he performed in constructing a new house, it does not make sense to commence the analysis with how much the house is worth; the starting point must be to determine how much time he actually spent on the project, whether those hours were reasonable, and what the hourly rate is in that area for bricklayers of comparable skill and experience. It would be improper for the court to skip over the amount of labor involved and decide that the bricklayer's work was performed on an ugly house and, on that basis alone, award the bricklayer payment for only ten percent of what he billed. However, that is, essentially, the Panel's approach in this case when it declared that this type of "case" could not be worth more than $25,000 in fees, period. E1135. But that amount was announced without any reference to how much time was reasonably spent on discovery, motions, trial preparation, trial, fee petitions and appeals.

When a court jumps to consideration of adjustment factors without calculating the amount of effort reasonably expended on the litigation, the opinion is essentially untethered to the only guidepost courts have consistently found useful, namely, the initial lodestar calculation. It is one thing for a court to exercise its discretion by deducting attorney hours spent on clerical tasks or unnecessary work, but such reductions are tethered to the record and are subject to meaningful appellate review. But where, as here, a tribunal simply "discusses" a laundry list of factors but without attaching any specific reductions to each factor, it interferes with meaningful review. On this record, it is impossible to discern what amount of hours or fees was deducted (or enhanced) for each of the factors listed in the Montgomery County Code fee-shifting statute.

The lodestar is based on hourly rates and hours worked, and in this case, the hourly rates were not challenged. Thus, the only issue in this fee petition was to determine the number of hours for which plaintiff's counsel should have been compensated. In fact, the Panel ducked the primary question with which it was presented—determining the amount of attorney time reasonably necessary to litigate the case and achieve the broad relief obtained. The Panel stated that it was a volunteer group and had neither time nor staff to review the voluminous time entries, but that duty cannot be evaded so easily. If the Panel did not wish to examine the record before it, it had the option of relying on the hearing examiner's opinion—he not only presided over the 10-day hearing, he also performed a careful review of the time entries in making his recommended fee award.

The Panel ultimately ordered a fee award covering a decade of litigation amounting to only $22,400. E1138. This award was barely sufficient to pay for the amount of attorney time for a single lawyer at the 10-day hearing (there were actually two attorneys for each side at the hearing), and made no provision for time spent in discovery, research, motions, trial preparation, and appeals. The Panel also allowed no time at all for preparing the fee petition and responding to Manor's strong opposition thereto, notwithstanding the well-established rule that time spent on a fee petition is itself compensable. Manor's defense of the Panel's opinion actually highlights one of the

major weaknesses, namely, the fact that it is impossible to discern which hours or tasks the Panel excluded from compensation as unreasonably expended. In fact, a close reading of the key passage shows that the number was arbitrarily plucked out of thin air. E1135. This is the pragmatic reason that the federal courts have required that courts start with the lodestar calculation and justify, with some specificity, any additions or reductions to that amount.

The cost/benefit analysis applied by the Panel in this case poses a serious threat to the viability of anti-discrimination laws. Although Flaa prevailed in her case, she was awarded less than one tenth of the costs she incurred in securing compliance with the law. As the Supreme Court has emphasized under similar circumstances, "the more obstacles that are placed in the path of parties who have won significant relief and then seek reasonable attorney's fees, the less likely lawyers will be to undertake the risk." *Hensley v. Eckerhart*, 461 U.S. at 456. Without competent lawyers available to take these cases, the law's protections will ring hollow.

Similarly, affirming the Panel's fee award would provide a powerful incentive to defendants to wage scorched earth campaigns in defending these cases, recognizing that running up the cost of the litigation (without a meaningful opportunity for recovery) would further discourage individuals and attorneys from pursuing civil rights cases. Litigation costs rise when discriminating defendants choose not to engage in timely and meaningful settlement discussions (even when the amount in controversy is modest, as was the case here), or when they engage in dilatory discovery tactics, or unwarranted motions practice. In short, this case took 10 years because of defendant's choice of tactics, and they should not now be heard to complain about the cost that their conduct imposed on plaintiff and her counsel.

In its brief, Manor Country Club makes what is essentially a simplistic textual argument, namely, that the differences in wording between the Montgomery County fee-shifting statute on the one hand, and the fee-shifting language in federal statutes and in the Maryland Wage law on the other hand, require different types of analysis. This argument does not hold water, as we show below. More importantly, the relevant

provision in the Montgomery County Code has been amended to make its language more similar to the federal statutes, thereby suggesting that Manor is wrong in suggesting that a substantive difference was ever intended by the variation in statutory language.

ARGUMENT

The Supreme Court warned long ago that the calculation of fee awards "should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Unfortunately, the current litigation has already passed that point, but *amici* hope that a clear statement of the correct procedure may help to forestall future protracted battles over attorney fees. The Panel appears to have reasoned backwards, starting with a presumed maximum fee award and then shoehorning within that figure the number of hours it would allow to be compensated. Below, we summarize the steps that should be followed in calculating the fees and the order in which those steps should be taken, i.e., starting with calculating the "lodestar" value (hours worked multiplied by reasonable hourly rates). We then address how some of the factors used to adjust the lodestar value should have been considered in the context of this case.

As a threshold matter, it is important to note that all parties agree—as they must on this record—that Flaa was the prevailing party who was entitled to a fee award under the applicable fee-shifting statute. (Manor disputes the degree of success, but not the fact that Flaa prevailed.) Accordingly, we do not address that determination. Nor do *amici* intend to suggest that all the attorney fees requested by plaintiff's counsel should have been awarded without adjustment in this case. But we do contend that the Panel's decision utterly failed to focus on the amount of effort reasonably expended, but instead made a series of legal errors resulting in an arbitrary conclusion. These errors resulted in substantial detriment to the plaintiff.

I. FEE-SHIFTING STATUTES ARE AN IMPORTANT PART OF CIVIL RIGHTS LAWS THAT SEEK TO ERADICATE DISCRIMINATION THROUGH PRIVATE SUITS

Discrimination has long vexed our society, and the nation's anti-discrimination laws serve vital public interests. As one Court noted, "Congress had a momentous

purpose in mind when it enacted Title VII, which was nothing less than the eradication of discrimination in employment throughout society." *Blue v. United States Dept. of Army*, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1580 (1991). Although smaller in geographic scope, Montgomery County's anti-discrimination statute has an equally momentous purpose. And Montgomery County followed the same model as Congress by subsidizing private suits with attorney fee-shifting as the primary way of achieving this important public purpose. The Supreme Court has long recognized that the important societal value of civil rights cases far exceeds the value of the remedy to a particular plaintiff:

> As an initial matter, we reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, **a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms**. *See Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053-1055, 55 L.Ed.2d 252 (1978). And, Congress has determined that "the **public as a whole has an interest in the vindication of the rights** conferred by the statutes enumerated in § 1988, **over and above the value of a civil rights remedy to a particular plaintiff**...." *Hensley*, 461 U.S., at 444, n.4, 103 S.Ct., at 1945, n.4 (BRENNAN, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, **a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards**.

City of Riverside v. Rivera, 477 U.S. 561, 574 (1986) (emphasis added). The public goals of anti-discrimination statutes were realized in this case. Here, due to the efforts of Plaintiff Flaa through her counsel, she was able to secure an end to certain gender discrimination at the Manor Country Club as a place of public accommodation. In obtaining this far-reaching relief, Ms. Flaa's counsel was compelled by Manor's dogged defense to expend many hours navigating uncharted areas of law on the public accommodations issue, establishing important principles of law and prevailing on behalf of her client.

The Panel's disposition of the fee request in this case was extremely unfair to Flaa in particular, and, more importantly, would threaten the public policy behind the fee-

shifting approach to civil rights cases if adopted by this Court. Fee shifting provisions, such as the one at issue here, enable citizens who could not otherwise afford to do so the opportunity to vindicate important rights. As the Supreme Court has emphasized,

> Fee awards have proved an essential remedy. … If private citizens are to be able to assert their … rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Rivera, 477 U.S. at 577. (specifically rejecting argument that statutory fee awards should be "proportionate to the amount of damages a plaintiff recovers" and affirming award of more than $240,000 in attorneys fees and costs on a judgment of $33,000 in damages).

The issue of proportionality between attorney fees and relief lies at the heart of the Panel's decision. The Supreme Court has squarely rejected the contention that attorney fees must be proportional to the dollar value of relief awarded. There are two specific reasons why proportionality is an improper consideration. First, many civil rights cases seek injunctive relief as the primary remedy, which is exactly what Ms. Flaa was seeking. (No one contends that Ms. Flaa litigated for 10+ years for the possibility of recovering up to $1,000.) It is difficult to put a dollar value on injunctive relief. But the law at issue specifically contemplated that some cases would be litigated through trial and beyond, notwithstanding the $1,000 cap on money damages, and would encompass full fee-shifting. Second, fee-shifting statutes exist precisely because percentage fees alone (i.e., contingency fees) are inadequate to attract competent counsel in many civil rights cases. This case aptly demonstrates that pragmatic fact—it is difficult to imagine any lawyer agreeing to take this matter through filing, discovery, hearing and appeals if she knew her fee would be strictly limited either to a percentage of the $1,000 dollars at issue or even to some multiplier. Fee-shifting statutes exist to enable the litigation of civil rights cases that may involve small dollar amounts. For that reason, this Court's recognition in *Friolo* of the important role of fee-shifting applies with equal force here as it does under the Wage Payment statute where claims are often for modest amounts of back wages due.

The abundant amount of federal case law in this area, developed over decades of fee-shifting litigation under federal civil rights statutes, is a valuable body of experience that should guide this Court in reviewing the Panel's opinion not because it is controlling but because it is sensible; *Friolo v. Frankel*, 373 Md. 501, 522 (Md., 2003) ("More important to us than the *fact* that the Federal courts have embraced the lodestar approach is *why* they have done so . . . " (emphasis original)). Rather than accept the "momentous purpose" of cases challenging discrimination, the Panel in Flaa's case appeared to express disdain or even hostility towards Flaa's case, *see, e.g.,* E1135 ("We believe that an attorney has a responsibility to dissuade clients or potential clients from launching costly litigation, knowing that the other party will incur enormous defense costs, where the cost/benefit ratio of that litigation is low."). The Panel apparently placed little value on the benefit of requiring Manor Country Club to comply with the County's anti-discrimination laws for the first time, nor on the benefit of establishing that Manor and clubs like it may be places of public accommodation subject to these laws. As discussed below, it appears that the arbitrary award of fees in this case is due more to the Panel's view that discrimination cases are not worth the cost rather than to any proper legal consideration of the effort expended.

II. THE STARTING POINT FOR FEE AWARDS IS CALCULATING THE LODESTAR AMOUNT, AND THIS WAS NOT DONE BELOW

Maryland has adopted the well-traveled path of the federal courts in determining fee awards under fee-shifting statutes, at least for some fee-shifting statutes. *See, e.g., Friolo v. Frankel*, 373 Md. 501, 819 A.2d 354 (Md. 2003) (adopting the analysis in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983)). Nowhere in Manor's brief is there a rational justification for departing from that approach in this case.

There is a definite order to the lodestar analysis described by *Friolo*—the tribunal must calculate the "lodestar" amount before applying any of the various adjustment factors. *Friolo*, 373 Md. at 504, 523 ("the **most useful starting point** for determining the amount of a reasonable fee [is] the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. . . " (internal quotes omitted, emphasis

added)). The Panel did not follow this sequence, which is a fatal flaw in its approach. In light of this Court's decision in *Friolo* adopting *Hensley* and three decades of federal precedent, the burden is on Manor Country Club to demonstrate how the lodestar analysis can be applied while ignoring completely "the most useful starting point," the lodestar itself. As a result of its skipping this starting point, the Panel did not identify anywhere—because it could not—what specific adjustments it was making to the lodestar. That is, the Panel should have shown more precisely how many hours it permitted (or disallowed) for each stage of the litigation, along with an explanation of the legal and factual basis for each such reduction. By skipping the threshold task of determining the hours necessary to litigate the case, the Panel had no way to show either the scope or the magnitude of the downward adjustments it was purportedly making. This is in direct contradiction to this Court's instruction in *Friolo*:

> We shall hold generally that, in actions under fee-shifting statutes, including the two at issue here . . . the lodestar approach is ordinarily the appropriate one to use in determining a reasonable counsel fee. We stress, however, that the approach we approve is broader than simply hours spent times hourly rate but also includes careful consideration of **appropriate adjustments to that product**, which, in almost all instances, will be case-specific. Under that approach, it is necessarily incumbent upon the **trial judge to give a clear explanation** of the factors he or she employed in arriving at the end result. Unfortunately, the judge did not do so in this case. We shall remand the case for a further proceeding and a better explanation.

373 Md. at 504-05 (emphasis added). Other courts have also focused on the necessity of a court showing its calculations:

> The court's order on attorney's fees must allow meaningful review -- the district court must articulate the decisions it made, give principled reasons for those decisions, and show its calculation. If the court disallows hours, it must explain which hours are disallowed and show why an award of these hours would be improper.

Norman v. Housing Authority of Montgomery, 836 F.2d 1292, 1304 (11th Cir. 1988) (internal quotations and citations omitted). As in *Friolo*, the Panel's opinion in this case did not provide a clear explanation of the adjustments that it made to the "product" (of

hours multiplied by reasonable rates) because the Panel did not even calculate that lodestar value in the first place.

First, we should clarify the terminology used because sloppy language can invite sloppy reasoning. Manor's brief, and to a lesser extent the Panel opinion, misuses the term "lodestar." The "lodestar" refers only to the initial value of fees calculated by multiplying the "reasonable number of hours" by the "reasonable hourly rate." *Id.* All of the other considerations—including those referenced in *Hensley,* those listed in Rule 1.5 of the Maryland Rules of Professional Conduct and those listed in Montgomery County Code Sec. 27-7(k)(1)—are factors to be used in "adjusting" the lodestar value up or down. The lodestar amount and the adjustment factors are sometimes referred to collectively as the "lodestar approach," *Friolo* 373 Md. at 512, but that is merely shorthand for an analysis that commences with the lodestar value of "reasonable hours times reasonable rates." In contrast, the papers sometimes refer to the adjustment factors themselves as "the lodestar." That is a wrong impression, and leads to some confusion in the analysis presented by Manor.

This terminology is important because it guides the analysis along the proper path. What the panel should have done was start its analysis with a lodestar value, and then make adjustments to that figure as necessary based on a proper analysis of the considerations listed in Sec. 27-7(k)(1). Instead, the panel never calculated an initial lodestar value; it proceeded directly to the adjustment factors in which it apparently chose to cap fees at $25,000 regardless of the actual tasks and effort and before it ever determined the number of hours reasonably spent on the case. E1135. In short, the Panel reasoned backwards—it first decided on a cap, then shoehorned the number of hours that would fit within that cap.

Once the hourly rates and the number of hours are determined, there is a strong presumption that the lodestar value is the correct amount for a fee award under fee-shifting statutes:

> The "lodestar" figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence. **We have established a "strong**

> **presumption" that the lodestar represents the "reasonable" fee**, *Delaware Valley I, supra*, 478 U.S., at 565….

City of Burlington v. Dague 505 U.S. 557, 562 (1992) (emphasis added). The Panel and the court below never gave Flaa the benefit of this presumption because it failed to start its analysis by calculating the lodestar. In this case, only one-half of the lodestar calculation required serious analysis because the Panel had no qualms about the hourly rates charged by Flaa's counsel. E1136. Accordingly, the only open issue was the number of hours that were reasonably expended on the case. For this analysis, the starting point is to look at the hours claimed and then adjust as necessary. This the Panel did not do.

In a vain attempt to defend the Panel's action, Manor's brief frames the issue with a false dichotomy:

> ". . . is [the] agency required to start its analysis with a calculation of reasonable rate multiplied by reasonable hours, **or** is it required to determine reasonable attorney's fees in accordance with the dictates of the statute that provides it with the authority to award attorney's fees?

Manor Opening Brief at 2 (emphasis added). This question invites faulty reasoning because it is a false choice. It is quite easy to do both. A true dichotomy presents two choices that are simultaneously mutually exclusive and mutually exhaustive. In contrast, the two choices offered by Manor are neither. That is, it is not only possible but necessary "to determine reasonable attorney's fees in accordance with the dictates of the [Montgomery County] statute" and still comply with *Friolo* by "start[ing] its analysis with a calculation of reasonable rate multiplied by reasonable hours." In that regard, it is significant that the very first factor listed by the Montgomery County Code at the time required the tribunal to calculate the "time and labor required." Montg. County Code Sec. 27-7(k)(1)(a). Once it is clear that the "choice" posited by Manor is non-existent, the rest of its argument falls apart.[1] Thus, there is no conflict between the lodestar

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[1] Manor's second issue is also deficient because it is based on a faulty factual premise. Manor asserts that the Panel reviewed each of the adjustment factors in detail but this ignores the fact that the Panel did not provide any accounting for how its review affected the calculation. As explained below, the Panel treated all of the factors as the proverbial "black box" into which all of the Section 27-7(k)(1) factors are poured and a

approach adopted by *Friolo* and the dictates of the Montgomery County Code. As further support, the Montgomery County Code has been amended to remove the specific factors referenced in the prior version, leaving in place only the "reasonable attorney's fees" guidepost. See Montgomery County Code, Ch. 27 § -8(a)(1)(A) (2004). This further undermines Manor's contention that the County Code intended to be out of step with the prevailing approach to attorney fees.

III. THE PANEL SUBSTITUED IMPROPER AND SUBJECTIVE DETERMINATIONS IN PLACE OF PROPER CONSIDERATION OF THE FACTORS USED TO ADJUST THE LODESTAR VALUE UP OR DOWN

Once the lodestar amount has been calculated, the tribunal should then consider a variety of factors that may require the lodestar value to be adjusted up or down as appropriate. *Friolo*, 373 Md. at 524; *Hensley*, 461 U.S. at 463; Montg. County Code Sec. 27-7(k)(1). The Panel committed serious legal errors with respect to two of the factors: (1) the degree of success, and (2) the time and labor required.

A. The Plaintiff's Relative Success Is Measured By The Relief Obtained, Not By The Number Of Claims Won

The Panel apparently evaluated Flaa's success based on the number of claims won, rather than on the relief she obtained. This was legal error. This is an important issue that arises in many fee-shifting cases, so we address the issue even though it is unclear whether this error had any negative impact on the actual fees awarded to Flaa.[2]

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magic number pops out. But the Panel was required to state with some specificity which entries, or which groups of entries, it was discounting or disallowing. This it never did. Accordingly, it failed to comply with *Hensley* and *Friolo*.

[2] At face value, the Panel merely refused to enhance the potential fee award based on relative success, E1138, although the overall negative assessment of the plaintiff's case permeates this and other sections of the Panel's opinion, e.g., E1135-1138. For example, the Panel wrote—apparently as a negative—that "there was one (and only one) proven instance of 'discrimination.' " E1137. The tone of this quote and the passage that follows is disapproving, which reflects a lack of understanding that any instance of discrimination is a wrong worth righting. Indeed, many worthwhile lawsuits only allege a single instance of discrimination.

The yardstick used to measure success is the total relief awarded, as explained by the Supreme Court:

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass **all hours** reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. . . . Litigants in good faith may raise alternative legal grounds for a desired outcome, and **the court's rejection of**, or failure to reach certain grounds **is not a sufficient reason for reducing** a fee. **The result is what matters.**

Hensley, 461 U.S. at 435 (emphasis added). The same principle was recognized by this Court:

> Judge Wilner, writing for the Court in *Friolo*, adopted the analysis set forth in *Hensley* for awarding fees to partially successful litigants. *Friolo, supra*, 373 Md. at 523-25, 819 A.2d 354. **The key inquiry, therefore, is the degree of success achieved by the plaintiff**. *Id*. at 525, 819 A.2d 354. For example, if a "plaintiff has obtained 'excellent results,' the attorney should recover 'a fully compensatory fee.' " Id. at 524-25, 819 A.2d 354 (citing *Hensley*, supra, 461 U.S. at 435, 103 S.Ct. 1933). "Conversely, if the plaintiff has achieved 'only partial or limited success,' the product of hours reasonably spent on the litigation times the hourly rate 'may be an excessive amount,' even where the 'claims were interrelated, nonfrivolous, and raised in good faith.' " *Id*. at 525 (citing *Hensley, supra*, 461 U.S. at 436, 103 S.Ct. 1933).

Garcia v. Foulger Pratt Dev., Inc., 155 Md. App. 634, 673-674 (Md. App. 2003) (emphasis added). Flaa received complete injunctive relief and 75% of the statutory cap on damages. Thus, Flaa obtained nearly all the relief it was possible to receive in her litigation, especially since injunctive relief was always the primary goal of this case.[3] Plaintiffs often allege multiple causes of action or claims in an effort to obtain relief, but the success of the litigation is measured by the relief awarded, not by the number of

[3] That the case was primarily about injunctive relief is amply demonstrated by the way the case was defended. It is implausible that Manor would have litigated the case so hard or incurred the substantial defense costs it did to defend a monetary claim that was worth at most $1,000. Instead, both Manor and Flaa were litigating over the principle of

counts in the complaint. To illustrate this point, consider the following hypothetical situation:

> ABC Corporation discovers that its Treasurer absconded with a large sum of money that belonged to the company. The company sues the Treasurer and alleges three causes of action, (1) embezzlement; (2) breach of fiduciary duty; and (3) conversion. At trial, the company prevails on count 3 (conversion) and loses on the other two counts. The court orders return of all the money taken by the Treasurer.

When analyzed correctly in accordance with *Friolo* and *Hensley*, the plaintiff corporation's degree of success in this hypothetical is complete because it recovered 100% of the money taken. The company could not have done any better even if it prevailed on all three claims. When analyzed incorrectly, i.e., as the Panel did below, the hypothetical corporation obtained success on only one-third (1/3) of its claims.

In the case at bar, Flaa got all of the injunctive relief that it was possible to get, and nearly all of the monetary relief that it was possible to get. Looked at another way, Manor has not identified any relief—save the additional $250 under the damages cap—that Flaa could have obtained if she had prevailed on all claims. In the context of fee-shifting, Flaa's litigation achieved its goals, and that is hardly the "limited success" referred to in *Friolo* and *Hensley* as a justification for large reductions of the lodestar fee.

Where, as here, the plaintiff achieves nearly all the relief sought, the presumptive fee award is equal to all of the hours reasonably spent on the litigation:

> With respect to the second factor--the level of success--the Court concluded that, when the plaintiff has obtained "excellent results," the attorney should recover "a fully compensatory fee." [] Normally, **that would encompass all hours spent on the litigation, without reduction** because the plaintiff failed to prevail on every claim, and, indeed, in cases of "exceptional success," an enhanced award may be justified.

Friolo at 524-25 (emphasis added, citations omitted). The Panel did not properly apply the *Friolo/Hensley* measure of success to Flaa's petition for attorney fees.

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whether the club was entitled to discriminate or had to comply with the rules generally applicable to places of public accommodation.

As stated in *Friolo*, there are cases where a plaintiff's separate claims for relief are not overlapping. In those cases, the separate and independent claims are treated almost as separate lawsuits, and the plaintiff is not entitled to recover fees for the time spent on a separate suit where he or she was not the prevailing party. The question is whether the unsuccessful claims relate to a common core of facts, thereby rendering the claims related for purposes of awarding attorney fees:

> The [*Hensley*] Court treated unrelated claims as if they had been raised in separate lawsuits, and therefore "no fee may be awarded for services on the unsuccessful claim." That issue, the Court surmised, **might not arise often**, as civil rights cases usually involve a single claim and **in other cases the relief sought frequently involves a common core of facts** or related legal theories. In those situations, **counsel's time will usually be devoted to the overall litigation, making it difficult to divide the hours expended on a claim-by-claim basis, and the claims should therefore be regarded as related**.

Friolo at 524 (emphasis added, citations omitted). In the case at bar, all three of Flaa's claims related to sex discrimination at Manor Country Club. Generally, evidence of any incident of sex discrimination by the same actors is relevant to proving a hostile environment claim or to prove discriminatory motive or intent in another instance. Accordingly, Flaa would reasonably conduct discovery and put on evidence of any known or suspected incidents of sex discrimination to support all three of her claims.

More significantly, the jurisdictional question—whether Manor was a place of public accommodation subject to Section 27 of the Montgomery County Code—applied equally to all three claims. Indeed, the jurisdictional question seems to have been the primary basis upon which Manor defended itself and the most time-consuming issue in discovery and the hearing. Because all three claims related to the existence or absence of discrimination at Manor, and the substantial jurisdictional issue applied to all claims equally, it is difficult to say that the claims should be "treated … as if they had been raised in separate lawsuits." The hostile environment and the individual instance of discrimination are easily related. The disparate impact claim presents a closer call, but some additional analysis may be needed to determine if the disparate impact claim was

truly independent or was sufficiently interrelated; for example, the same jurisdictional issue applied to that claim and many of the witnesses and records may have been relevant with or without that claim. One of the ways to show that claims are interrelated is to demonstrate that many of the same witnesses and same discovery issues would have been necessary with or without the additional claim.

In conclusion, Flaa's attorney fee petition should not have been reduced at all on the grounds of lack of success. Most, if not all, of her claims were interrelated and based on a common core of facts, and she achieved nearly all the relief that it was possible to obtain on those claims.

B. Even If Unsuccessful Claims Were Independent, The Panel Discounted Improperly

While the Panel Opinion does not show that the claims were independent, *amici* briefly address the issue of how to discount for independent and unsuccessful claims in the event that the Court provides guidance on this topic.

According to *Friolo* and *Hensley*, a plaintiff cannot recover for the time expended on unsuccessful claims if they were unrelated to the successful claims. When this situation exists, though, courts must be careful to eliminate only the hours expended on the unsuccessful claims.

While across-the-board percentage cuts are tempting for their ease, that approach generally works to the detriment of plaintiffs by over-discounting from the lodestar value. Consider the hypothetical above (*infra*, at 14) where ABC Corporation prevailed on only one out of three claims. The across-the-board percentage cut would lead to a 67% (2/3) reduction in costs awarded. But that simplicity sweeps away too much. For example, the cost of filing and serving a three-count complaint is <u>not</u> three times greater than the cost of filing and serving a one-count complaint. More apt here, Flaa's cost of addressing the jurisdictional question in this three-count case was the same as if there had only been one claim, and the jurisdictional issue apparently required the single largest block of time. Therefore, discounting the entire lodestar value based on the percentage of claims won or lost would vastly overshoot the mark. As a corollary, not all claims are equally complex

or equally time consuming, and courts should not be too quick to order an across-the-board cut that inadvertently equates the time spent on unlike claims.

The Panel's decision is somewhat contradictory on these issues, and these contradictions highlight some of the legal errors. While stating that it would apply a "percentage rate reduction," E1134, the Panel never identified the percentage discount it would apply, i.e., whether the discount was supposed to be 10% or 90%. This omission does not appear to be accidental but structural, i.e., the percentage cannot be determined unless an initial lodestar is determined before the final fee award is made. This serves to highlight the fact that the Panel failed to start its analysis with a lodestar value, and so had no value to subject to a percentage discount. Even in cases where percentage discounts are appropriate, the percentage is always be tied to factual findings based on the record. Here, the Panel offered no factual predicate for deciding what percentage of the time entries it deemed excessive, improper or redundant.

The Panel's analysis was also ambivalent on the time entries themselves. The Panel criticized appellant's counsel for having multiple tasks "bundled" within a single time entry, but then noted that such time entries were "frequently done in the practice of law." E1134. While there may be cases where fees should be discounted substantially for inadequate time records, this does not appear to be such a case. Indeed, a 90%-plus reduction appears punitive on this record. In any event, the Panel has to disclose what it is doing and why—it cannot use a percentage rate reduction without disclosing the percentage used and establishing a legally sufficient basis for arriving at that percentage figure.

Another major oddity in this case was the fact that the hearing officer who actually conducted the hearing, heard all the testimony, and saw the lawyers in action awarded the plaintiff nearly full fees and costs (approximately $125,000 out of about $130,000 requested at that time). E318 n.79. In contrast, the Panel members that reduced the award to $22,400 did not have that experience or intimate knowledge. The federal courts grant broad discretion to the trial courts to decide fee petitions precisely because the trial courts have a better sense of what the case needed in terms of discovery, witnesses and trial

presentation. Applied to this case, no deference should be given to the Panel, who sat as an appellate body, but deference could be given to the hearing officer who presided over the trial. Furthermore, the Panel bemoaned the fact that it is comprised of volunteers without paid staff, and then admitted that it did not examine the detailed record of time entries submitted in support of the fee petition in a misguided effort to justify its lack of analysis. E1134. There is no easy way out. If the Panel was not willing to get its hands dirty by reviewing the time entries itself, it could have relied on its hearing officer to conduct the more detailed review (as he, in fact, did). If the Panel did not want to accept the hearing officer's painstaking review of the time entries, they were compelled to spend the time necessary to carry out their responsibilities.

To the extent that the Panel intended to fault the adequacy of the time records themselves, that is belied by this record. Indeed, Manor itself challenged approximately $67,000 worth of time entries on the grounds of duplication of efforts, clerical tasks and other issues. E1206, E1243-1258. (It is significant to note that the fee award to plaintiff would have been approximately $200,000 even if the Panel sustained 100% of Manor's objections and awarded only the undisputed portion of the fees sought. This is because Manor challenged only $67,000 of fees out of a petition seeking about $276,000 in fees. E1188. It should raise some red flags that the Panel slashed fees so far beyond what the opposing counsel suggested.) In light of Manor's demonstrated ability to review the time entries and identify potential concerns, the Panel had the same opportunity but chose not to spend the time. This is an inadequate basis to sustain the Panel's slashing of the lodestar amount by almost 90% after the plaintiff established that Manor Country Club was a place of public accommodation and obtained the broad injunctive relief she sought.

C. The Panel Improperly Substituted A Cost/Benefit Analysis Rather Than Analyzing The Time And Labor Required To Litigate The Case

There is one (improper) factor that appeared to trump all other considerations in the Panel's analysis. In the section entitled "Time and Labor Required," the Panel declared that $25,000 was the maximum possible fee in a case of this "type." E1135. In

context, that appears to be disparaging the case as a whole. The meaning of the final paragraph in that section of the Panel's Opinion is central to the issues in this appeal:

> On the issue of what amount a reasonable client would pay, we cannot fathom how any person, dealing with the facts alleged, could have decided that it was worth $250,000 or so to litigate these issues. We believe that an attorney has a responsibility to dissuade clients or potential clients from launching costly litigation, knowing that the other party will incur enormous defense costs, where the cost/benefit ratio of that litigation is low. In this case particularly, damages were capped under the statute. Rather, it is our decision on this issue that any reasonable client would not have been willing to spend more than $25,000 to pursue claims of the type made in this proceeding.

E1135 (emphasis added); *see also* E1136 ("we do not believe that a rational, fee paying client would have incurred more than $250,000 in fees in the pursuit of this action."). Virtually every sentence of this paragraph merits closer scrutiny, and we provide that analysis below. As we show below, this sentiment does not make sense on many levels. Foremost, Ms. Flaa could have had no idea when she started this case that Manor Country Club would fight so long and so hard for the right to violate the Human Rights Act. That is, no reasonable client or lawyer would have dreamed that this case would have lasted more than ten years when commencing the case. Thus, there was never a point in time where a "rational, fee paying client" actually made a decision to spend $250,000 in fees—there was a decision to challenge discrimination, and the case was aggressively defended by Manor. In that regard, it would be interesting to have Manor Country Club disclose the total attorney hours that have been expended on its behalf as a reflection of what a rational, fee-paying client might spend on this litigation.

1. The Panel Reasoned Backwards, Setting The Maximum Fee Range First And Then Determining How Many Hours Would Fit Within That Range

The last sentence of the quoted paragraph betrays the central importance of this passage to the Panel's actual decision. The final sentence of the quoted paragraph states that "it is our decision," confirming that this paragraph embodies the ultimate decision about the proper amount of fees. That same final sentence also sets a maximum amount of $25,000, which is quite close to what the Panel awarded ($22,400). Thus, it is

reasonably clear that the Panel reasoned backwards, first setting a dollar value cap on fees, and then calculating the number of hours it would allow so as to fall within that cap. Compare E1135 with E1138.

2. The Panel Erred By Making The Fee Award Proportional To The Monetary Judgment, A Concept Rejected By The Supreme Court

The penultimate sentence of the quoted paragraph shows that the panel thought the monetary value of relief (rather than the broad injunctive relief) was paramount, and that any fee award had to be proportional to the capped damage award: "In this case particularly, damages were capped under the statute." E1135. But it is clear from the action of both parties to this case that the possibility of up to $1,000 in damages was not driving this case. The preceding sentence of that paragraph shows the Panel's clear disdain for a civil rights suit under a statute where fees are shifted to the defense and monetary relief is limited:

> We believe that an attorney has a **responsibility to dissuade clients** or potential clients from launching costly litigation, knowing **that the other party will incur enormous defense costs**, where the **cost/benefit ratio** of that litigation **is low**.

This sentence reveals the Panel's sentiments; in short, the Panel faulted plaintiff's counsel for not carrying out her "responsibility" to "dissuade" Ms. Flaa from pursuing her claim. But that position is inimical to civil rights claims in general. Courts have specifically rejected the "proportionality" method of awarding fees when interpreting the analogous fee shifting provisions under federal law. *Rivera*, 477 U.S. at 577 ("a rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988."); *see also Quaratino v. Tiffany & Co.*, 166 F.3d 422, 426 (2d Cir. 1997) (rejecting trial court's award of 50% proportionality award as abuse of discretion, and instead ordering lodestar calculation). In *Rivera*, the Supreme Court affirmed an award of more than $240,000 in attorneys' fees and costs on a judgment of $33,000 in damages.

There is no way to reconcile the Panel's strongly worded concerns about the damage cap with the Supreme Court's holding in *Rivera*. The Panel stated that the "the cost/benefit ratio of that litigation is low" . . . "[i]n this case particularly, [where] damages were capped under the statute." E1135. With monetary damages capped at $1,000 and attorney rates over $200 per hour, it is difficult to imagine that any claim could ever pass muster under the Panel's "cost/benefit" analysis. That is, <u>any</u> claim that went through the stages of complaint filing, discovery and a full hearing would certainly incur far more than four or five hours of attorney time. Thus, the Panel's approach is not only contrary to *Rivera* and to the Montgomery County Code but also creates a "Catch-22" situation because no prevailing party could win at hearing without incurring attorney fees many times larger than the $1,000 cap.

This paradox highlights the problem with the Panel's analysis in Flaa's case. Flaa was the prevailing party, which means that she is presumptively entitled to be compensated for the attorney time spent litigating her case. At a minimum, her case required a complaint to be filed, discovery to be conducted and responded to, hearing preparation, and the conduct of a hearing. The hearing itself lasted 10 days and had 37 witnesses (Flaa had 17 witnesses and Manor had 20). E181. Both Flaa and Manor each had two lawyers at the hearing. E181. The Hearing Examiner who conducted the hearing, saw the evidence, heard the testimony and observed the attorneys awarded Flaa approximately $125,000 in fees and costs, before the additional appeals were filed in this case. E318 n.79. Yet the Panel slashed that recommended award to an amount ($22,400) that barely covered the cost of attendance of one lawyer at the 10-day hearing itself (while both sides had two lawyers at the hearing). Moreover, the Panel's fee decision essentially gave no compensation for discovery, legal research on a matter of first impression (jurisdiction), preparation time, or the fee petition itself.[4]

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[4] As discussed below, the Panel suggested that no fee-paying client would incur some of the fees sought by Flaa. It is interesting to note, for example, that Manor saw fit to have two lawyers attend the hearing on its behalf, and presumably Manor is a rational, fee-paying client. This fact is strong evidence that it was reasonable for Flaa to have two

Adding insult to injury, the Panel showed greater concern for the defendant's attorney fees than for the plaintiff's costs ("the other party will incur enormous defense costs"). E1135. This turns fee-shifting statutes on their head, because the "momentous purpose" of such statutes is to encourage lawsuits where market forces alone would not enable the plaintiff to obtain counsel. That purpose is strongest where, as here, the primary relief is injunctive rather than financial. At the risk of engaging in hyperbole, the Panel's opinion that "the limited relief available" in Flaa's case does not justify the fees could apply equally to the early challenges to the Jim Crow laws—how would this panel evaluate the cost/benefit ratio on a suit seeking to establish the right of minorities to sit in the front of a bus or share a water fountain with others? Such suits also produced little or no money damages, but ended repugnant discriminatory practices and helped establish what are now bedrock principles of equality.[5] The Panel may not have placed much value on the broad injunctions requiring Manor Country Club to comply with Montgomery County's anti-discrimination laws, but Ms. Flaa does, and so do many

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lawyers do the same. Indeed, on remand, it would be interesting to know how many hours Manor's lawyers have worked on the case and for how many of those hours they have been paid. If, for example, Manor has compensated its lawyers for more hours at higher rates than Flaa seeks here, that should be strong evidence that the plaintiff's counsel's billings were reasonable and would have been paid by a fee-paying client such as Manor Country Club.

[5] The Supreme Court rejected the proportionality concept for fee awards based in part on the fact that civil rights cases often seek non-monetary relief:

> Rather, Congress made clear that it "intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." Senate Report, at 6, U.S.Code Cong. & Admin.News 1976, p. 5913 (emphasis added). "[C]ounsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter. ' "

Rivera 477 U.S. at 575 (some citations omitted).

others. The Panel's subjective valuation of the expected benefits of this type of litigation is simply wrong and outside the proper legal considerations.

3. The Defendant Controls The Costs of Civil Rights Litigation

The quoted paragraph also betrays a factual misconception. The Panel stated: "we cannot fathom how any person, dealing with the facts alleged, could have decided that it was worth $250,000 or so to litigate these issues." But this is looking at the fee issue from the wrong end of the telescope. At the time that Flaa commenced this action, she had no way of knowing that Manor would fight so tenaciously for the right to discriminate. It would have been quite reasonable to predict that the case could have been resolved much earlier and at far lower cost. But once the complaint was filed, Flaa could not control the costs forced upon her by a vigorous defense.

A basic truth of civil rights litigation is that the defendant generally controls how expensive the litigation is. The Supreme Court expressly recognized this reality in *Rivera*:

> Thus, petitioners could have avoided liability for the bulk of the attorney's fees for which they now find themselves liable by making a reasonable settlement offer in a timely manner. While petitioners did offer respondents $25,000 in settlement at the time the jury was deliberating the case, this offer was made, as the District Court noted, "well after [respondents' counsel] had spent thousands of dollars on preparation for trial...." App. 237-238. "The government **cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response**." *Copeland v. Marshall*, 205 U.S.App.D.C. 390, 414, 641 F.2d 880, 904 (1980) (en banc).

Rivera, 477 U.S. at 580 n.11 (emphasis added). Applying that reasoning to this case, Manor could have stopped defending its right to discriminate after the initial finding, when Flaa sought only $11,700 in fees. Indeed, Manor could have conceded that it was covered by the Montgomery County anti-discrimination law. With a cap on damages, Manor could have responded to Flaa's initial complaint by offering $1,000 and agreeing to the same type of restrictions—ending discriminatory practices and instituting a fair complaint process—for far less than either side spent in attorney fees at the first stage.

Instead, Manor made a decision to litigate vigorously in its efforts to escape all coverage by the Montgomery County Code's anti-discrimination provisions. This was a considered strategy by Manor; there are consequences to Manor's choice, and one of them is that they drove up the plaintiff's attorney fees.

The fact that defendants exert a large degree of control over the cost of litigation was noted by Judge Posner in a recent case involving the propriety of punitive damages:

> [A large net worth] enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee.
>
> **In other words, the defendant is investing in developing a reputation intended to deter plaintiffs**. It is difficult otherwise to explain the great stubbornness with which it has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included.

Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.) (emphasis added). Judge Posner could have been talking about Manor Country Club's decision to defend not only the merits of this action, but the years it has spent disputing the fee award. Indeed, Manor may well have spent more money opposing Ms. Flaa's fee award then it would have incurred if it had simply paid the initial award.

If the Panel's approach were allowed to become the standard, it would create a perverse incentive for defendants to engage in scorched earth litigation. A defendant could, as a matter of policy, respond to discrimination complaints by writing to plaintiff's counsel and saying, "we are going to fight this case tooth and nail and run up your fees to $200,000 but, because the damage amount is capped, you will never be able to recover more than $25,000 in fees." This would completely nullify the whole purpose of fee-shifting statutes.

Another paradox is that the Panel explicitly recognized that Manor would "incur enormous defense costs" in litigating this case for ten years, but seems not to recognize that the plaintiff also incurred enormous costs for ten years of litigation. Ten years of

litigation come from a defense that insisted on litigating aggressively to the bitter end. Nearly all cases can be amicably resolved on a reasonable basis, even if some discovery or a hearing is required. The fact that there have been ten years of litigation can be laid squarely at the feet of Manor, whose choices—including its refusal to admit the threshold question of jurisdiction—led directly to the protracted and expensive course of litigation.

4. The Question Of What A Fee-Paying Client Would Pay Is A Guide To Determining Which Hours Are Excessive Or Redundant; It Is Not An Opportunity For The Tribunal To Reject The Case As A Whole

The Panel fundamentally misunderstood and misapplied the concept of determining "what a fee-paying client" would pay. This concept appears in *Friolo* and *Hensley*, and is tied directly to the admonition that a petitioner (or court) must eliminate attorney time that was excessive, redundant or unnecessary:

> The Court admonished that hours that were "excessive, redundant, or otherwise unnecessary" should be excluded, as hours not properly billed to one's client are also not properly billed to the adversary.

Friolo, 373 Md. at 523-24 (citations omitted, citing *Hensley*). So, for example, if a fee-paying client would not ordinarily pay to have two attorneys attend a single deposition, or for an attorney to make photocopies or organize a pleadings file, then those time charges should be eliminated from a fee petition as well. Thus, the reference to "what a fee-paying client would reasonably expect to pay" in the Panel opinion, E1134, was designed only as a guidepost to whether specific, individual time entries should be eliminated or reduced through billing judgment or through court review.

In contrast, the Panel twisted this concept from a guidepost to evaluate individual time entries to a yardstick to measure the cost/benefit ratio of civil rights litigation as a whole. That is the only explanation for the Panel's critical statement:

> On the issue of what amount a reasonable client would pay, **we cannot fathom how any person**, dealing with the facts alleged, **could have decided that it was worth $250,000 or so to litigate these issues**…. Rather, it is our decision on this issue that any reasonable client would not have been willing to spend more than $25,000 to pursue **claims of the type made** in this proceeding.

E1135 (emphasis added); *see also* E1136 ("we do not believe that a rational, fee paying client would have incurred more than $250,000 in fees in the pursuit of this action.") The Panel did not question whether it was reasonable for Manor to spend an equivalent amount defending the lawsuit, nor did it deal with the policy issues discussed in *Rivera* relating to the fact that civil rights cases are often brought for non-pecuniary reasons. Both Congress and Montgomery County chose to enact fee-shifting as a way to encourage private suits to eradicate discrimination in all its forms, and that policy is strongest when the litigation would not make economic sense in the absence of fee-shifting.

The Panel evidently believed that Flaa's lawyer should have "dissuade[d]" her from pursuing her rights and forcing Manor to comply with Montgomery County's anti-discrimination laws. E1135. Legally, that was not the Panel's decision to make, and it was an improper foundation for its decision in this case. But the Panel Opinion shows that this sentiment greatly affected the ultimate fee award.

D. The Panel And Circuit Court Erred By Refusing To Reimburse Any Time Spent On The Fee Petition Itself

As this case demonstrates, filing a fee petition is not a trivial matter. It can require the review and consideration of many years' worth of time records, drafting and obtaining affidavits regarding the reasonable efforts and hourly rates, and briefing all of the adjustment factors listed in *Friolo* and *Hensley*. Preparing and filing a request for attorney fees is an integral part of the litigation, and that time is equally subject to fee-shifting. *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 162, 110 S.Ct. 2316, 2321 (1990).

It is now settled that "fees on fees" are normally awarded. Because fee-shifting is designed to shift the financial burden of certain types of litigation, forcing prevailing plaintiffs to litigate fee petitions without reimbursement would effectively nullify the balance enacted in the law:

> [D]enying attorneys' fees for time spent in obtaining them would "dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees. . ."

Commissioner, I.N.S. v. Jean, 496 U.S. 154, 162, 110 S.Ct. 2316, 2321 (1990) (citations and quotation marks omitted), *citing Gagne v. Maher*, 594 F.2d 336, 344 (2nd Cir. 1979) *aff'd on other grounds*, 448 U.S. 122, 100 S.Ct. 2570 (1980); *c.f. Friolo*, 373 Md. at 519 (recognizing that fees continue to accrue during post-trial proceedings and appeals).

In the case at bar, Flaa was the prevailing party, filed extensive papers in connection with her fee petition, filed a revised fee petition at the express request of the Panel and engaged in substantial effort to analyze the factors set forth in Montgomery County Code Section 27-7(k)(1). Whether the Panel thought that the time devoted to the fee petition was excessive (it did not say so), the time spent on that part of the endeavor was not zero. Accordingly, it was clear error for the Panel to make no award at all for time spent petitioning for fees. The same general approach applies to "fees on fees" as to other fees, i.e., the Panel should have started by determining the reasonable hours expended, then adjusted as necessary.

CONCLUSION

For the reasons set forth above, The Metropolitan Washington Employment Lawyers Association and the Maryland Employment Lawyers Association, *as amici*, respectfully urge this Court to reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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