IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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| ALVIN KENNEDY and ELIEZER FELICIANO, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | |
| MUNICIPALITY OF ANCHORAGE, | ) | |
| Defendant. | ) | |
| | ) | Case No. 3AN-10-8665 CI |

**ORDER**

## I. INTRODUCTION

Plaintiffs seek enhanced attorney's fees relative to the judgments that they have obtained against the Municipality of Anchorage for hostile work environment, retaliation, and breach of the implied covenant of good faith and fair dealing. Plaintiffs' requested enhanced attorney's fees are the actual attorney's fees that they will pay to their lawyer. MOA requests that the plaintiffs' attorney's fee award be limited to the amount calculated under Civil Rule 82(b)(1). The court declines to award the plaintiffs their actual attorney's fees; however, utilizing the principles set forth in Civil Rule 82(b)(3)(A)-(K), the court enhances plaintiffs' attorney's fees to twice what the plaintiffs would have recovered under Civil Rule 82(b)(1).

## II. FACTS

Alvin Kenney and Eliezer Feliciano are two former minority Anchorage Police Department detectives who resigned from APD in 2011.[1] Plaintiffs worked in the now disbanded Metro Drug Unit. They claim that ADP created a hostile work environment by racially discriminating against them and retaliating against them in many ways after they filed discrimination complaints with the Municipality of Anchorage Office of Equal Opportunity in September 2009 after Metro was disbanded. They believe that, as minority officers, they were placed in positions inferior to those chosen by APD for the white officers who were part of Metro. Plaintiffs allege that the hostile work environment and retaliation continued after they filed this lawsuit on June 29, 2010.[2]

Plaintiffs' retaliation claims include years of efforts by Mark Mew, the then APD police chief, to get Kennedy and Feliciano indicted. Specifically, Mew made at least three attempts to have the Federal Bureau of Investigation conduct investigations of Kennedy and, by inference, Feliciano so that the FBI would recommend federal indictments to the Department of Justice. APD also requested that the State of Alaska Office of Special Prosecutions and Appeals open two criminal investigations of

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[1] Kennedy is African American. Feliciano is Hispanic.

[2] Plaintiffs' third amended complaint consists of 29 pages of alleged acts of discrimination and retaliation.

Kennedy and/or Feliciano. Ultimately, an Assistant United States Attorney for the Northern District of California declined to prosecute Kennedy or Feliciano.[3] Likewise, OSPA has declined to prosecute Kennedy or Feliciano although the OSPA cases remain open technically.

This case represents the longest running and most complicated matter that has ever been before this court. The litigation has spanned seven years. There were two long running trials. The parties have deposed well over 50 witnesses. At the second trial, plaintiffs called 17 witnesses to testify; MOA called 14 witnesses. The parties have presented the court and the juries with thousands of pages of exhibits at the trials.[4] The parties also presented the court with dozens of contentious motions that the court had to decide.

Some specifics will demonstrate the court's subjective views as to the magnitude of the case. Currently, the case filings span 36 volumes of court files. The first 15 of those volumes were generated through the time that the Supreme Court

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[3] The office of the United States Attorney for the District of Northern California became involved because the United States Attorney for the District of Alaska recused herself from the case because she and other Assistant United States Attorneys for the District of Alaska had worked with Kennedy and Feliciano on numerous federal drug cases.

[4] At the second trial, plaintiffs' final exhibit list detailed 184 potential exhibits. Defendant's final exhibit list enumerated 386 potential exhibits.

accepted a Petition for Review that ultimately resulted in a published opinion.[5] The remaining 21 volumes have been generated since that time. The court has literally written a book of substantive decisions in this case. By the court's count, its substantive decisions total 266 pages. The court has issued at least 96 substantive legal decisions in the case. The 266 pages do not include the numerous one or two page orders that resolved legal issues without explanation.

As noted above, the case was tried twice. The court held an 18 day jury trial in March 2014. That trial resulted in a hung jury on the retaliation claim and a defense verdict on the hostile work environment claim. The court granted a new trial on the hostile work environment claim. The court held a 23 day jury trial in January and February 2017. That trial resulted in a plaintiffs' verdict on all claims. On May 22, 2017, the court entered judgment against MOA and in favor of Kennedy and Feliciano.

The facts at the first trial were dramatically different from the facts at the second trial. Prior to the first trial, the court issued a 2011 pre-trial ruling that did not permit questioning of witnesses about on-going criminal investigations.[6] The court's ruling was consistent with existing case law. The court's ruling remained in effect for the first trial. Indeed, at the end of the first trial, the court propounded Jury Instruction

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[5] *Kennedy v. Municipality of Anchorage*, 305 P.3d 1284 (Alaska 2013).

[6] Order dated August 31, 2011, at ¶ 2.

No. 18 that advised jurors that law enforcement agencies could not provide details about ongoing investigations.

By the time of the second trial, the court concluded there were no ongoing effective criminal investigations against Kennedy or Feliciano. Thus, at the second trial, the jurors learned that APD through Mew was engaged in a multi-year campaign to get Kennedy and Feliciano indicted after they made their OEO discrimination complaints to MOA and after they filed the instant lawsuit.

Specifically, the jurors learned that, after the Kinko's incident, Mew commissioned APD Sergeant James Bucher to conduct an investigation that included interviews with nine APD officers, one Alaska State Trooper, and one FBI agent. The interviewees were chosen because they did not like Kennedy or Feliciano. The interview statements contained negative views of the plaintiffs. Although those negative views did not provide any identifiable evidence of indictable conduct by Kennedy or Feliciano, the Bucher report and the interview statements were provided in 2010 by Mew to the office of the United States Attorney for the District of Alaska and the special agent in charge (the SAC) of the Anchorage FBI office as part of APD's request that a criminal investigation be undertaken.[7] Part of the FBI investigation was

[7] The Bucher report is dated September 8, 2010, and was admitted into evidence at the second trial as Exhibit 1091. The interview statements were admitted into evidence at the second trial as Exhibits 1092 through 1107.

to include the 2010 Kinko's incident where Kennedy walked into Kinko's on Northern Lights in Anchorage when there was an ongoing drug stake out operation intended to arrest an individual who the state and federal authorities hoped would arrive to pick up a FedEx package that contained illegal drugs.

Through Mew, APD was concerned that Kennedy's actions were part of a course of conduct to alert his drug informants of police activity that would get them arrested and charged with drug crimes. If true, Mew's concerns would be significant because Kennedy and Feliciano not only had been Metro drug cops but also had been federal credentialed APD officers assigned to the Drug Enforcement Administration to conduct multi-state drug investigations relating to the interstate transfer of illegal drugs to Alaska.

There were multiple problems with APD's concerns over the Kinko's incident as shown by the evidence at the second trial. First, Kennedy went to Kinko's to fax a medical authorization form to his mother's doctor in Chicago relating to medical and nursing home care. Because Kennedy knew that he was being watched closely by APD after his OEO complaint and the filing of the instant lawsuit, he elected to take leave time to transmit this document from a neutral location rather than use APD facilities for the personal business. Second, after Kennedy left Kinko's someone called Kinko's to change the addressee of the package to the name of a Kennedy

informant, an act that ostensibly appeared to tie Kennedy to the drug package. Third, Anthony Henry, an APD lieutenant, asked one of the on-site officers to prepare two reports of the events at Kinko's. One of the reports was the public version. It was a sanitized version that cast Kennedy in a more unfavorable light. The second version had more detail and was not so critical of Kennedy. Both reports ended up in the FBI computer files and were obtained by plaintiffs during the course of this case. Fourth, APD did not do a thorough investigation of the Kinko's incident. Mew referred the matter to the FBI for investigation along with the Bucher report and the interview summaries.

The first FBI SAC concluded that there was no basis to investigate Kennedy or Feliciano. After the initial SAC was replaced as part of a normal FBI employment rotation, Mew asked the next SAC to re-look at the material he submitted for investigation. The new SAC authorized an investigation that extended over a long period of time. The FBI obtained the plaintiffs' financial records and conducted other investigations.

Shortly after November 8, 2013, four months or so before the first trial, Mew was told verbally by the second SAC that the assistant U.S. Attorney for the Northern District of California in charge of the matter had determined that there was no basis for criminal charges against Kennedy or Feliciano and had so informed the FBI in

writing.[8] However, Mew was concerned that the FBI had not investigated the Kinko's incident properly and asked for more investigation. Thus, at the time of the first trial, Mew knew that the United States probably wasn't going to press charges against Kennedy or Feliciano but the final closing letter had not yet arrived at APD. Mew did not disclose this knowledge when he testified at the first trial. Likewise, prior to or during the first trial, MOA's counsel did not disclose this information to plaintiffs' counsel or the court.

The upshot of all of these events was that MOA was able to hide from the court and the jury the fact that APD had been engaged, at that point in time, in an unsuccessful three year effort to get Kennedy and/or Feliciano federally indicted. MOA and its lawyers were able to hide this information based on the court's ruling of no evidence about ongoing criminal investigations.

APD's criminal pursuit of Kennedy and Feliciano did not stop with the FBI. As early as 2010, APD referred two matters to OSPA for potential criminal prosecution of Kennedy and/or Feliciano.[9] One of the matters has never been clearly identified

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[8] Ex. 1086 at the second trial. The letter from the assistant U.S. Attorney for the Northern District of California was dated November 8, 2013.

[9] The matters were SP10-01939 referred by MOA to OSPA in March 2010 and SP11-0420 referred by MOA to OSPA on May 25, 2011. Plaintiffs submitted public records requests to the State of Alaska regarding these OSPA files. When OSPA did not produce the requested information, the plaintiffs commenced separate litigation against

because the OSPA file was essentially empty. The other matter involved the Donnelly case.[10] Donnelly was a drug dealer charged with multiple drug felonies. Eventually Donnelly pled guilty to one count of second degree misconduct involving a controlled substance and received a sentence of 16 years to serve with eight years suspended and five years of probation.

APD claimed that Kennedy acted improperly by transferring some drug evidence from the Donnelly case file to a dummy case file so that the drugs, which were connected to Kennedy's confidential informant, would not be revealed to Donnelly's defense lawyer and hence to Donnelly. Kennedy orchestrated this drug transfer to protect his confidential informant from revenge activities by Donnelly.

At the first trial, MOA had its in-house "star" witness, Lt. Anthony Henry, testify about an 18 month full-time investigation he conducted of Metro to determine what went wrong such that APD disbanded the unit. The Henry audit, which resulted in a massive Henry audit report, was authorized and directed by Mew. One of Henry's

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the State of Alaska to obtain the contents of the files. Plaintiffs were successful partially in the litigation. They obtained some of the OSPA file documents that were otherwise produced in this litigation. However, plaintiffs never obtained the documents that reflected the mental impressions of the state prosecutors who were principally John Skidmore and Sue McLean.

[10] *State v. Donnelly*, Case No. 3AN-09-6360CR.

many conclusions was that Kennedy's actions in the Donnelly case were improper and amounted to a *Brady* violation.[11]

Henry's testimony at the first trial about the Donnelly case was supplemented by the expert testimony of Michael Levine, MOA's paid expert from New York. Mr. Levine opined, as a police practice's expert, that Kennedy's actions were indeed illegal and amounted to a *Brady* violation.

The plaintiffs were hampered in their ability to respond to the Henry and Levine testimony by the court's order that prevented them from obtaining information about ongoing police investigations. Yet MOA was able to use the facts of the Donnelly case to paint Kennedy in a bad light.

There were multiple problems with MOA's construct of the Donnelly case evidence and MOA's efforts to hide behind the "no evidence of ongoing investigations" ruling in failing to disclosure what was really going on. All of this changed dramatically by the second trial.

Lt. Anthony Henry turned out not to be the "star" witness that MOA portrayed him to be at the first trial. In fact, by the time of the second trial, he was no witness at all.

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[11] *Brady v. Maryland*, 373 U.S. 83 (1963)(holding that prosecutors have a duty to disclose exculpatory evidence to defendants).

By the fall of 2013, Mew knew that there were potential serious problems with Anthony Henry. By then, Mew found out that in 2010 Henry had impaired two serious investigations of members of the Alaska National Guard for alleged sexual assaults by Guard members against fellow Guard members and civilians and for alleged illegal drug dealing by members of the Alaska National Guard. Henry allegedly ordered investigating APD officers to disclose the names of sexual assault victims and Guard whistleblowers to General Thomas Katkus, the head of the Alaska National Guard and a former APD command officer who had worked with Henry. After the disclosures occurred, the investigative leads promptly dried up. The State of Alaska has never prosecuted any of the suspected Guard members for illegal drug charges or sexual assault.

Rather than promptly conduct an investigation of Henry, Mew delayed the investigation so that MOA could present Henry as a credible witness at the first trial to testify adversely about Kennedy and Feliciano. The court and the jury at the second trial knew of Mew's motivations because they were disclosed by Mew as a result of an independent investigation of Henry by Lt. Col. John "Rick" Brown, a retired Pennsylvania police officer hired by MOA to conduct the investigation.

Following the first trial, Mew had Henry investigated by Brown. Lt. Col. Brown conducted an extensive investigation resulting in the exhaustive Brown report.

Lt. Col. Brown reported that the charges against Henry were substantiated and further that Henry was not truthful during the investigation. Brown also criticized Mew for not investigating Henry promptly when he learned of Henry's problems.

As a result of the Brown report, MOA fired Henry and disciplined Mew by ordering him suspended for two weeks without pay. Henry disagreed with the conclusions of the Brown report and MOA's actions in terminating him from employment with APD. Henry promptly responded to his firing by commencing his own multi-million dollar lawsuit against MOA for discrimination, retaliation, and wrongful termination. That lawsuit remains pending in federal court.

By virtue of these events, Henry became a hostile witness who MOA elected not to call as a witness at the second trial. The court refused to allow MOA to play the Henry trial testimony from the first trial or admit into evidence the Henry audit because of the extreme prejudice to plaintiffs who could not cross-examine an absent Henry with the events that had occurred after the first trial.

MOA also elected not to call Michael Levine at the second trial. Presumably that decision resulted from the fact that Levine's opinions were based on the Henry audit that was no longer a part of the evidence. Besides, there were other problems with the Henry and Levine theories about Kennedy's misconduct in the Donnelly case. Plaintiffs presented evidence that Kennedy's actions amount to an accepted police

tactic called a "wall-off" that is used to prevent a criminal defendant from becoming aware of the activities of a confidential informant. Also at the second trial according to the court's recollection, prosecutors from the Donnelly case testified that they wouldn't have had to disclose the transferred evidence if, as was the case, Donnelly pled to a felony unrelated to the transferred evidence and before the State's pre-trial disclosures were due.

OSPA has kept open, even until now, the two criminal referrals from APD against Kennedy and/or Feliciano. However, the court concluded that there was no significant possibility of criminal prosecution and allowed evidence to be presented at trial about the OSPA cases.

The court allowed into evidence at the second trial portions of the Brown report as comparator evidence about how complaints against white officers at APD were thoroughly investigated whereas complaints against minority officers such as Kennedy and Feliciano were not.[12] Mew's statements to Brown about his motivations for delaying investigation of Henry so that Henry's testimony could be presented favorably by MOA at the first trial were admitted into evidence at the second trial as admissions of a party opponent.[13]

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[12] *Mitchell v. Teck Cominco Alaska, Inc.*, 193 P.3d 751, 761 (Alaska 2008).

[13] Alaska Evidence Rule 801(d)(2).

There was another troubling evidentiary/disclosure issue that occurred between the first trial and the second trial. This issue involved motion practice although the disclosure evidence was never used at the second trial.[14] As part of discovery, plaintiffs had requested OEO documents about racial discrimination at APD. While certain evidence was produced, a key OEO report that criticized APD for racial discrimination that it denied in the present litigation was not forthcoming. After the first trial, Mew allegedly discovered this adverse report in his desk. Although the ultimate disclosure of this document was accompanied by affidavits from the involved attorneys and Mew, the court has never understood how such an unflattering document could have been overlooked during discovery.

At the conclusion of the second trial, the jury returned a verdict favorable to plaintiffs on all claims. The jury awarded Kennedy $380,000.00 in past wage loss, $70,304.00 in future wage loss, and $395,372.00 in past mental anguish. The jury awarded Feliciano $358,000.00 in past wage loss, $70,304.00 in future wage loss, and $483,232.00 in past mental anguish.[15] The past loss jury awards were supplemented

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[14] *See* court's order dated May 19, 2015.

[15] In *Kennedy v. Municipality of Anchorage*, 305 P.3d 1284 (Alaska 2013), the Alaska Supreme Court held that plaintiffs could recover garden variety emotional distress damages related to a successful hostile work environment and/or retaliation claim. Neither the Supreme Court nor this court knew at the time of the appellate decision that APD had been and would be engaged in a five year campaign to get Kennedy and

by pre-judgment interest. The principal plus interest award in favor of Kennedy was $1,073,189.26. The principal plus interest award in favor of Feliciano was $1,158,374.21. The court entered judgments against MOA on May 22, 2017.

## III. DISCUSSION

### A. The Civil Rule 82(b)(1) Attorney's Fee Award.

The computation of the normal attorney's fee award requires a fair bit of explanation. One must start with Civil Rule 82(b)(1), which sets forth a schedule for the award of attorney's fees based on the judgment plus prejudgment interest. The rule is consistent with the Alaska Supreme Court's dictate that pre-judgment interest must be calculated as a percentage of the principal award plus prejudgment interest.[16] For contested cases such as this that go to trial, the attorney's fee award under Civil Rule 82(b)(1) is 20% of the first $25,000.00 of the principal plus interest and 10% of the remaining principal plus interest.

The attorney's fee calculation is complicated by the manner in which the court entered the separate judgments for Kennedy and Feliciano on May 22, 2017. For

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Feliciano indicted. The plaintiffs testified as to their continual fear of indictment and the emotional distress emanating therefrom. The jury obviously believed that APD's indictment campaign amounted to continuing retaliation and believed that plaintiffs suffered substantial emotional distress damage as a result.

[16] *ERA Helicopters, Inc. v. Digicon Alaska, Inc.*, 518 P.2d 1057, 1063 (Alaska 1974).

Kennedy, the principal award was $845,676.00. However, the damage award included an award of $70,304.00 for future lost wages/benefits. Thus, prejudgment interest must be calculated on $775,372.00, the total principal award minus the award for future damages. Prejudgment interest starts to run on the earlier of the date that the complaint was served or that the defendant received written notice of the claim.[17] The applicable interest start date in this case is June 29, 2010, the date of filing of the complaint. The applicable interest rate is 4.25%.[18] The actual interest award on Kennedy's claim is $227,513.26. For Kennedy's claim, the subtotal of the principal award subject to interest ($775,372.00) and the interest award ($227,513.26) is $1,002,885.76.

In the May 22, 2017, judgment, the court placed the figure of $1,002,885.76 in the subtotal for Kennedy's award. However, the court's actions were confusing if not simply wrong. The court intended that $1,002,885.76 would be added to $70,304.00 (the future lost wages/benefits) to get the correct subtotal of $1,073.189.26. The attorney's fee award must be computed on the correct subtotal of $1,073.189.26.

Because the court's methodology is not readily apparent in the judgment entered, the court will prepare an amended judgment that clearly sets for the

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[17] AS 09.30.070(b).

[18] AS 09.30.070(a).

methodology and the result of the principal award. The court takes this action *sua sponte* pursuant to Civil Rule 60(a), which allows the court to correct clerical mistakes at any time. However, the court's amended judgment will be *nunc pro tunc* May 22, 2017.[19]

Utilizing the correct principal plus interest subtotal of $1,073,189.26 for Kennedy and applying the Civil Rule 82(b)(1) schedule for contested cases with trial, Kennedy's attorney fee award would be $109,818.93.

The same analysis applies to Feliciano's attorney's fee calculation under Civil Rule 82(b)(1). Feliciano's principal award was $911,536.00 inclusive of a $70,304.00 award for future lost wages/benefits. Feliciano's principal award on which prejudgment interest should be calculated was $841,232.00. For Feliciano, prejudgment interest was also calculated at the rate of 4.25% from June 29, 2010. Feliciano's prejudgment interest award is $246,838.21. The subtotal of the award subject to prejudgment interest and the prejudgment interest is $1,088.070.21. To this subtotal, the court must add the future damage award of $70,304.00 to obtain the

[19] The *nunc pro tunc* action is important because neither party appears to have appealed the May 22, 2017, judgment within the 30 days allowed by Appellate Rule 204(a)(1). The court is not intending to extend the appeal time for the underlying judgment by the entry of the amended judgments. Of course, the appeal time has not run for this attorney's fee decision, the court's denial of plaintiffs' motion for additur, or the clerk's rulings on the contested cost bill.

subtotal of $1,158.374.21. This second subtotal is the basis for the computation of attorney's fees utilizing the Civil Rule 82(b)(1) schedule for contested cases with trial. The actual computation of the attorney's fee percentage applied to the subtotal results in a Civil Rule 82(b)(1) award of $118,337.42.

**B. Plaintiffs Are Entitled to Enhanced Attorney's Fees Pursuant to Civil Rule 82(b)(3).**

**1. (A) The complexity of the litigation.**

This case is the most complex case that has ever been presented to this court. The litigation has already spanned seven years. As detailed above, the parties have engaged in extensive motion practice sometimes on state of the art legal issues in employment cases. The parties took numerous depositions, presented 31 witnesses at the second trial, and proposed hundreds of exhibits involving many thousands of pages. The court has issued at least 96 substantive rulings and has written 266 pages of lengthy orders. The shear complexity of the litigation justifies enhanced attorney's fees to the prevailing party.

**2. (B) The length of the trial.**

There have been two trials, one in March 2014, and one in January and February 2017. The first jury trial lasted 18 days. The second jury trial lasted 23 days. These trials are the longest civil jury trials that have ever been heard by this court. The length of the two jury trials also justifies an enhanced attorney's fee award.

3. **(C) The reasonableness of the attorneys' hourly rates and the number of hours expended.**

This factor is biased in favor of cases where the attorney bills on an hourly basis. However, in this case, the prevailing parties' counsel has represented to the court that he has a contingency fee agreement that provides for attorney's fees of 35% of the gross recovery. Plaintiffs' counsel has not provided the court with an affidavit to document the contingency fee arrangement or a copy of the contingency fee agreement. Yet the contingency fee percentage is not abnormal. In other cases, the court often sees contingency fee agreements that provide for a 1/3 attorney's fees recovery through trial and a larger percentage recover such as 40% in the event of an appeal. The bottom line is that the represented contingency fee rate is reasonable.

4. **(D) The reasonableness of the number of attorneys used.**

This factor is not applicable.

5. **(E) The attorneys' efforts to minimize fees.**

This case represented scorched earth litigation. This case was the legal equivalent of the trench warfare employed by the combatants on the Western Front in World War I. Neither side made any effort to minimize fees. In fact, the attorneys litigated every conceivable issue. MOA did everything in its power to litigate the plaintiffs into surrender. Conversely, the plaintiffs did the same thing.

### 6. (F) The reasonableness of the claims and defenses pursued by each side.

The court does not fault the parties for vigorous advocacy. This case presented the parties and the court with a number of state of the art employment issues such as the availability of emotional distress damages in hostile work environment and retaliation cases, the proper measure of past damages where there was an overlay of replacement employment and multiple pensions at issue, the proper admissibility of comparator evidence, and the appropriate legal definitions for the hostile work environment and retaliation claims.

### 7. (G) Vexatious or bad faith conduct.

The court has ruled that that it would not impose sanctions on MOA for what plaintiffs perceived as a fraud upon the court.[20] The court ruled that the plaintiffs failed to show by clear and convincing evidence that MOA engaged in fraudulent conduct "involving a corruption of the judicial process itself," much less the "egregious circumstances" necessary to prove a fraud upon the court.[21] Yet, the court's prior order does not end the matter. The court may consider vexatious or bad

[20] *See* order dated June 26, 2015.

[21] *Alaska Fur Gallery*, 345 P.3d at 86 (quoting *Murray v. Ledbetter*, 144 P.3d 492, 499 (Alaska 2006)).

faith conduct by a party as a basis for awarding enhanced attorney's fees at the conclusion of the litigation.[22]

MOA's actions in conducting what this court believes, based on the jury verdict, was a five year campaign to get Kennedy and Feliciano indicted in retaliation for filing a OEO complaint and a lawsuit claiming hostile work environment and retaliation is troubling. Even more troubling is MOA's failure to disclose at the first trial that it was not likely to get an indictment of Kennedy or Feliciano. Likewise, Mew's decision not to investigate Henry for serious misconduct prior to the start of the first trial so that MOA could present its "star" witness in a good light was a very bad tactic. The bad judgment was accentuated by MOA's failure to tell anyone at the trial about the problem. Based on Mew's rationalization of his behavior to Lt. Col. Brown, the jury could well have concluded, and the citizens of Anchorage could well conclude, that MOA and its lawyers were more interested in winning the lawsuit than protecting the citizens of Anchorage from sexual assault and illegal drug dealing by members of the Alaska National Guard and police misconduct relating thereto.

The "hide the ball" litigation tactics that MOA employed in this case rarely work. The consequences of such action are usually not good if the dirty tricks are discovered. Richard Nixon learned that lesson the hard way in an incident known as

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[22] *Ware v. Ware*, 161 P.3d 1188, 1199 n.49 (Alaska 2007)

Watergate. MOA has learned the same lesson in this case. Part of the lesson for MOA will be an enhanced attorney's fees award to the plaintiffs.

8. **(H) The relationship between the amount of work performed and the significance of the matters at stake.**

The stakes in this litigation were enormously high. APD wanted to maintain its appearance of integrity and racial equality in the treatment of its employees. Kennedy and Feliciano wanted to show that all was not well at APD and that, in fact, APD discriminated against minority officers and retaliated against them when they made claims of a hostile work environment. It took seven years of vigorous litigation for the plaintiffs to obtain the facts to show the jury that they should prevail. When the true facts were put on the table over a 23 day trial, the jury agreed with the plaintiffs. The extraordinary effort required to obtain a favorable plaintiffs' verdict in this case calls for an enhanced award of attorney's fees.

9. **(I) The extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts.**

An enhanced award of attorney's fees will not be so onerous as to deter MOA from defending against legitimate claims. This case became front page headline news the day that it was filed. The day after the filing Mew told assembled APD officers at fall out that there was no merit to plaintiffs' claims, that the lawsuit would be defended

vigorously, and that APD would never settle the lawsuit. Throughout the case, Mew maintained MOA's constitutional right to defend itself. And MOA defended the case as vigorously as it could. But there are consequences to a vigorous defense that extends over seven years and ultimately involves the exposure of conduct that a jury found offensive. In addition to an adverse verdict and bad publicity, one of the consequences to MOA is an enhanced fee award.

MOA has continued to defend numerous cases over the years. It is a frequent flyer litigant in Anchorage Superior Court. This enhanced award will not deter MOA from defending cases in the future. But maybe, just maybe, the award will cause MOA to evaluate cases more carefully in the future.

**10. (J) The extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer.**

Obviously MOA wanted to portray its police department as a non-discriminatory organization of integrity. Those considerations go way beyond this case. From evidence offered at the first trial, the Municipal Assembly had authorized over one million dollars to outside counsel in the defense of this litigation. The outside defense costs now three years and another trial later have surely been much greater than one million dollars. As Mew said, MOA would never settle the lawsuit. MOA pulled out all the stops to win this case. Unfortunately, for the citizens of

Anchorage, MOA lost the case. The loss puts MOA and APD in a bad light and, for taxpayers, the judgment and the attorney's fees incurred in defending the case will result in at least incrementally higher taxes. Part of the fallout from the case will be an enhanced award of attorney's fees.

**11. (K) Other factors deemed relevant.**

The court has already documented adequate reasons for an enhanced attorney's fee award. No additional reasons are necessary.

**C. The Amount of the Enhanced Award.**

Pursuant to Civil Rule 82(b)(3) and the factors discussed above, the Alaska Supreme Court has approved trial court awards of 86% and 75% of the actual attorney's fees incurred by a prevailing party.[23] The Alaska Supreme Court has affirmed this court when it enhanced attorney's fees to 35% of the actual fees incurred by the prevailing party.[24]

In this case, the enhancement must be more than the 35% of actual fees incurred by the prevailing party in *Alaskaland.com*. The plaintiff in that case

[23] *Ware v. Ware*, 161 1188, 1199 n.49 (Alaska 2007), and *Cole v. Bartels*, 4 P.3d 956, 961 (Alaska 2000).

[24] *Alaskaland.com, LLC v. Cross*, 357 P.3d 805, 825-26 (Alaska 2015).

presented weak theories for recovery and litigated the case heavily but the case was resolved on motion practice.

Here the litigation took seven years and involved two lengthy trials and raised the ugly specter of bad litigation tactics by MOA. As noted above, there are numerous additional reasons why the attorney's fee award should be enhanced. On the other hand, parties are certainly entitled to their good faith right to litigate cases especially where there is a significant monetary dispute and there are issues relating to the general reputation of the litigant in the community.

This court does not believe that the actions of MOA warrant full attorney's fees as claimed by plaintiffs or that an 86% or 75% award of actual attorney's fees is warranted. Yet plaintiffs are entitled to a significant enhancement of their Civil Rule 82(b)(1) attorney's fee award as a result of the Civil Rule 82(b)(3) factors that support such an enhanced award.

The court concludes that plaintiffs are entitled to double the attorney's fees that they would have received under a Civil Rule 82(b)(1) award. For Kennedy, that means that his normal attorney's fee award of $109,818.93 shall be increased to $219,637.85. For Feliciano, that means that his normal attorney's fee award of $118,337.42 shall be increased to $236,674.84.

If plaintiffs are correct in stating that their attorney will receive 35% of the gross award, the court's award of attorney's fees of $219,637.85 to Kennedy amounts to 58.47% percent of the actual attorney's fees that he would incur on a principal plus interest award of $1,073,189.26. For Feliciano, the court's award of $236,674.84 in attorney's fees represents 58.38% of the principal plus interest award that he would receive.[25]

## IV. CONCLUSION

For the reasons set forth above, the court denies plaintiffs' request for actual attorney's fees, but awards plaintiffs enhanced attorney's fees pursuant to Civil Rule 82(b)(3)(A)-(K). The enhanced award shall be twice the attorney's fee award that the plaintiffs would recover under Civil Rule 82(b)(1). Kennedy is awarded $219,637.85 in attorney's fees against MOA. Feliciano is awarded $236,674.84 in attorney's fees against MOA.

[25] The court recognizes that these percentages may not be accurate precisely because the court's computations do not take into account the fact that plaintiffs' lawyer might get a percentage of the attorney's fee award as part of the "gross recovery." The court's computations also do not take into account the fact that costs have not yet been taxed. Depending on how the term "gross recovery" is defined in the contingency fee contract, the plaintiffs' attorney may also be entitled to a percentage of the costs recovered as part of the judgment.

Dated this 5th day of July, 2017, at Anchorage, Alaska.

FRANK A. PFIFFNER
Superior Court Judge

I certify that on 7-5-17 a copy
of the above was mailed to each of
the following at their address of record:

K. Legacki
L. Johnson
P. Weiss

B. Cavanaugh, Judicial Assistant

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

| | | |
|---|---|---|
| ALVIN KENNEDY and ELIEZER FELICIANO, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | |
| MUNICIPALITY OF ANCHORAGE, | ) | |
| Defendant. | ) | |
| | ) | Case No. 3AN-10-8665 CI |

**AMENDED FINAL JUDGMENT IN FAVOR OF ALVIN KENNEDY**

IT IS ORDERED that judgment is entered as follows:

Plaintiff Alvin Kennedy shall recover from and have judgment against defendant Municipality of Anchorage as follows:

| | | |
|---|---|---|
| a. | Principal Amount: | $ 845,676.00 |
| b. | Pre-judgment Interest on $775,372.00 ($845,676.00 - $70,304.00 (future lost wages/benefits)) (Computed at the annual rate of 4.25% from June 29, 2010 to date of Judgment) | $ 227,513.26 |
| c. | **SUBTOTAL:** | $1,073,189.26 |
| d. | Attorney Fees: $219,637.85<br>Date Awarded: 7/5/2017<br>Judge: Pfiffner | $219,637.85 |

e. Costs: $_____

Date Awarded: _____

Clerk: _____

f. **TOTAL JUDGMENT:** $_____

g. Post-judgment Interest Rate: 4.25 percent

Dated this 5th day of July, 2017, at Anchorage, Alaska, *nunc pro tunc May 22, 2017.*

FRANK A. PFIFFNER
Superior Court Judge

I certify that on 7-5-17 a copy
of the above was mailed to each of
the following at their address of record:

K. Legacki
L. Johnson
P. Weiss

B. Cavanaugh, Judicial Assistant

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

| | | |
|---|---|---|
| ALVIN KENNEDY and ELIEZER FELICIANO, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | |
| MUNICIPALITY OF ANCHORAGE, | ) | |
| Defendant. | ) | |
| | ) | Case No. 3AN-10-8665 CI |

**AMENDED FINAL JUDGMENT IN FAVOR OF ELIEZER FELICIANO**

IT IS ORDERED that judgment is entered as follows:

Plaintiff Eliezer Feliciano shall recover from and have judgment against defendant Municipality of Anchorage as follows:

| | | |
|---|---|---|
| a. | Principal Amount: | $ 911,536.00 |
| b. | Pre-judgment Interest on $841,232.00 ($911,536.00 - $70,304.00 (future lost wages/benefits)) (Computed at the annual rate of 4.25% from June 29, 2010 to date of Judgment) | $ 246,838.21 |
| c. | **SUBTOTAL:** | $1,158,374.21 |
| d. | Attorney Fees: $ 236,674.84<br>Date Awarded: 7/5/2017<br>Judge: Pfiffner | |



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e. Costs: $_____

Date Awarded: _____

Clerk: _____

f. **TOTAL JUDGMENT:** $_____

g. Post-judgment Interest Rate: 4.25 percent

Dated this 5th day of July, 2017, at Anchorage, Alaska, *nunc pro tunc May 22, 2017.*

FRANK A. PFIFFNER
Superior Court Judge

I certify that on 7-5-17 a copy
of the above was mailed to each of
the following at their address of record:

K. Legacki
L. Johnson
P. Weiss

B. Cavanaugh, Judicial Assistant