

FEDERAL MARITIME COMMISSION

Statement of the Commission

On Attorney Fees

Docket No. 21-14

Issued December 28, 2021

Section 41301(a) of Title 46 of the United States Code allows a person to file with the Commission a complaint alleging violations of certain parts of Title 46, Subtitle IV (often referred to as “the Shipping Act”). Prior to 2014, if the person filing a complaint (“complainant”) proved an alleged violation, and the Commission awarded reparations, the Commission would also award the complainant “reasonable attorney fees.”¹ The applicable statute did not, however, authorize awarding attorney fees to the person alleged to have violated Title 46 (“the respondent”) if the complainant failed to prove a violation.² In other words, a successful complainant that obtained reparations was automatically entitled to reasonable attorney fees, whereas a successful respondent was ineligible for attorney fees.

In 2014, Congress changed the attorney fee statute so that “the prevailing party may be awarded reasonable attorney fees.”³ This affected attorney fee awards in three significant ways. First, both prevailing complainants *and* prevailing respondents were now eligible to recover reasonable attorney fees. Second, an award of attorney fees was no longer conditioned on an award of reparations. Third, the Commission now had the discretion to award fees rather than being required to do so.⁴ The Commission subsequently issued a Final Rule amending its attorney fee regulations to implement the statutory changes.⁵

Since that time, the Commission has ruled on several fee petitions and further refined its approach to attorney fees. Additionally, shippers have suggested that lack of clarity about a complainant’s liability for a respondent’s attorney fees might deter shippers from filing

¹ Shipping Act of 1984, Pub. L. No. 98-237, § 11(g), 98 Stat. 67, 80-81 (“For any complaint filed within 3 years after the cause of action accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury . . . caused by a violation of this Act plus reasonable attorney’s fees.”); *see also* Final Rule: Organization and Functions; Rules of Practice and Procedure; Attorney Fees, 81 Fed. Reg. 10508,10509 (Mar. 1, 2016).

² 81 Fed. Reg. at 10509 (noting that Commission interpreted pre-2014 attorney fee provision as providing for attorney fees only to prevailing complainants).

³ Howard Coble Coast Guard and Marine Transportation Act of 2014, Pub. L. No. 113-281, §402, 128 Stat. 3022, 3056; 46 U.S.C. § 41305(e).

⁴ *See* 81 Fed. Reg. at 10509.

⁵ 81 Fed. Reg. at 10508; *see also* 46 C.F.R. § 502.254.

complaints. The Commission thus finds it appropriate to issue this Policy Statement summarizing its approach to attorney fee timing, procedures, eligibility, and entitlement.

A. Timing

If a prevailing party wants to receive attorney fees, the party must file a petition within 30 days after a decision is “final.”⁶ A decision is final for attorney fee purposes when the time for seeking judicial review of the decision has expired or when a court appeal has terminated.⁷ A petition for attorney fees that is filed before the decision is final under that definition is premature, and the Commission may defer ruling on a premature petition or deny it without prejudice to refile when ripe. Similarly, absent unusual circumstances, the Commission will not make findings on eligibility or entitlement to attorney fees before a petition is filed.⁸

B. Procedures

The procedures for filing attorney fee petitions are set forth in 46 C.F.R. § 502.254. The party seeking a fee award is responsible for filing a petition. The burden is on the petitioner to, in the petition, establish that it is eligible for and entitled to fees, document the appropriate hours, and justify the reasonableness of the rates.⁹ The standard of proof is preponderance of the evidence.¹⁰

C. Eligibility

The Commission may only award attorney fees under § 41305(e) to a prevailing party in a private party complaint proceeding.¹¹ In determining whether a party has prevailed, and thus eligible for attorney fees, the Commission looks for a “material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.”¹² Generally, a complainant is a prevailing party if the presiding officer (Administrative Law Judge

⁶ 46 C.F.R. § 502.254(c)(1).

⁷ 46 C.F.R. § 502.254(c)(1). In most instances, an aggrieved party has sixty days to seek judicial review of a Commission decision. 28 U.S.C. §§ 2342(3)(B), 2344.

⁸ *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, 3 F.M.C.2d 59, 82 (FMC 2021) (holding it would be “premature to make any additional findings on attorney fees” in decision on the merits because the “appropriate time to address attorney fees is when addressing a timely petition under 46 C.F.R. § 502.254(c)”).

⁹ See 46 C.F.R. § 502.254(d); *Logfret, Inc. v. Kirsha, B.V.*, 2 F.M.C.2d 110, 113 (FMC 2020).

¹⁰ *Logfret*, 2 F.M.C.2d at 113.

¹¹ 81 Fed. Reg. at 10511.

¹² 81 Fed. Reg. at 10512 (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)).

or Commission) awards the complainant reparations or issues a cease-and-desist order.¹³ A respondent is generally a prevailing party when the presiding officer rebuffs a complainant's claims.¹⁴ For instance, a respondent prevails if the presiding officer grants the respondent's motion to dismiss with prejudice¹⁵ or grants the complainant's request for voluntary dismissal with prejudice.¹⁶

D. Entitlement

In considering whether to award attorney fees to an eligible party, that is, whether the party is entitled to fees, the Commission's discretion is guided by one overarching consideration, three general principles, and several factors. "The primary consideration in determining entitlement to attorney fees is whether such an award is consistent with the purposes of the Shipping Act"¹⁷ Further, there is no presumption for or against awarding attorney fees.¹⁸ The Commission also treats prevailing complainants and prevailing respondents the same with respect to the attorney fee analysis.¹⁹ And, when determining whether to award attorney fees, the Commission is informed by the principle that "parties should be encouraged to litigate meritorious claims and defenses,"²⁰ and attorney fee liability should not be imposed in a way that would chill the filing of credible claims and defenses.²¹

¹³ 81 Fed. Reg. at 10512; *CMI Distrib., Inc. v. Service by Air, Inc.*, Docket No. 17-05, Order Denying Petition for Attorney Fees at 6-7 (FMC Nov. 24, 2021); *Adenariwo v. BDP Int'l*, Docket No. 1921(I), 2017 FMC LEXIS 27, *5 (FMC June 28, 2017).

¹⁴ *Baltic Auto Shipping, Inc. v. Hitrinov*, Docket No. 14-16, 2017 FMC LEXIS 16, *23-24 (FMC Oct. 25, 2017).

¹⁵ *Logfret*, 2 F.M.C.2d at 113; *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, Inc.*, Docket No. 14-04, 2016 FMC LEXIS 58, *13 (FMC Sept. 14, 2016).

¹⁶ *Baltic*, 2017 FMC LEXIS 16 at *24.

¹⁷ 81 Fed. Reg. at 10515.

¹⁸ 81 Fed. Reg. at 10515; *id.* at 10513 ("In addition, Congress's decision to amend § 41305 so that the award of fees is now discretionary rather than mandatory indicates an intent to eliminate the automatic award of attorney fees, and the Commission believes that any presumption in favor of fee awards would frustrate that intent.") (internal citations omitted). Nevertheless, awarding fees is also not "the exception," because there is no presumption against fee awards. *Id.*

¹⁹ 81 Fed. Reg. at 10513-14, 10515.

²⁰ 81 Fed. Reg. at 10515.

²¹ *Edaf Antillas*, 2016 FMC LEXIS 58 at *28-29 (Doyle, Commissioner, concurring).

The Commission also weighs several factors when addressing attorney fees: frivolousness, objective unreasonableness (in the factual and legal components of a case), motivation, litigation misconduct, deterrence, and compensation.²²

*Objective unreasonableness/Frivolousness.*²³ Objectively unreasonable claims or defenses are those that are clearly without merit or “patently devoid” of a legal or factual basis.²⁴ Failing to prosecute a claim, for instance, may be considered an objectively unreasonable failure to substantiate the legal and factual components of a case.²⁵ That a claim or defense was not successful does not necessarily mean it was objectively unreasonable or frivolous.²⁶ If a non-prevailing party’s claims or defenses are based on plausible interpretations of the law or colorable arguments, this factor will weigh against awarding fees to the prevailing party.²⁷

Motivation. This factor weighs toward awarding fees if the non-prevailing party is improperly motivated, i.e., it asserted claims or defenses not because of their merit but because it sought “to knowingly gamble on an unreasonable legal theory in order to achieve a secondary gain” such as settlement or harassment or financial damage to a competitor.²⁸

Litigation misconduct. Commission rules prohibit parties from filing pleadings, discovery requests, motions, or other documents for improper purposes, such as harassing others or causing unnecessary delay.²⁹ Not only might the Commission sanction a party for such conduct, but the misconduct could also weigh in favor of awarding attorney fees to a prevailing adversary. Knowing and repeated disregard of ALJ or Commission orders by a non-prevailing party, for instance, may give rise to attorney fee liability.³⁰

²² *Edaf Antillas*, 2016 FMC LEXIS 58 at *14. This list of factors is nonexclusive, however, and the Commission may consider additional factors in a particular case.

²³ The “frivolousness” and “objective unreasonableness” factors overlap significantly. *See Logfret*, 2 F.M.C.2d at 114 n.6.

²⁴ *Logfret*, 2 F.M.C.2d at 114.

²⁵ *Edaf Antillas*, 2016 FMC LEXIS 58 at *14-15.

²⁶ *Logfret*, 2 F.M.C.2d at 114; *id.* at 115 (distinguishing insufficient allegations under pleading standards from objectively unreasonable allegations); *Baltic*, 2017 FMC LEXIS 16 at *29.

²⁷ *See Baltic*, 2017 FMC LEXIS 16 at *30.

²⁸ *Logfret*, 2 F.M.C.2d at 116 (quoting *Creazioni Artistiche Musicali, S.R.L. v. Carlin Am., Inc.*, Case No. 14-cv-9270, 2017 U.S. Dist. LEXIS 124082, at *10 (SDNY Aug. 4, 2017)); *Logfret, Inc. v. Kirsha, B.V.*, 2 F.M.C.2d 35, 40 (ALJ 2020).

²⁹ 46 C.F.R. § 502.6(a).

³⁰ *Edaf Antillas*, 2016 FMC LEXIS 58 at *15.

Deterrence. The Commission may also award attorney fees to deter conduct, such as failing to respond in Commission proceedings³¹ or repeatedly engaging in prohibited acts.³² Considerations of deterrence may also, however, weigh against awarding fees. The “purposes of the Shipping Act are met when complainants are able to raise potential violations, even under unusual or unique circumstances, without the chilling impact of having to pay [r]espondents’ attorney fees.”³³

Compensation. Compensation is a factor in certain cases. Because every prevailing party could argue it would not be made whole without an award of attorney fees, placing too much emphasis on compensation would violate the principle that there is no presumption in favor of awarding fees.³⁴ In some circumstances, however, the need to compensate a prevailing party may weigh in favor of awarding attorney fees. For example, this might be a factor where a prevailing complainant is an individual shipping household goods.³⁵

Since the 2014 changes to the attorney fee statute, only once has the Commission required an unsuccessful shipper-complainant to pay an eligible respondent’s attorney fees.³⁶ There, the Commission awarded fees because the complainant “failed to substantiate the legal and factual components of its case, knowingly disregarded the ALJ’s orders on numerous occasions, abandoned its claim, forced multiple [r]espondents to expend significant resources of both time and money in their defense and, perhaps most egregiously, failed to terminate the claim when it could have limited the expense of the Respondents,” despite “[a]mple opportunity to withdraw its claim.”³⁷ In contrast, complainants who raise non-frivolous claims in good faith, who litigate zealously but within the rules and for proper purposes, and who comply with

³¹ *Edaf Antillas*, 2016 FMC LEXIS 58 at *15-16 (“We believe that deterring complainants from failing to prosecute their claims by awarding respondents attorney fees furthers the purposes of the Shipping Act. Proceedings that continue on because of non-responding parties like this one, waste the time and resources of both respondents and the Commission and potentially delay the resolution of other complaint proceedings.”).

³² See *CMI Distrib., Inc.*, Order Denying Petition for Attorney Fees at 11-12; *id.* at 12 (“Were there any indication that [non-prevailing respondent] had engaged in similar violative conduct regarding other shippers, or that it might do so in the future, this factor would weigh in favor of a fee award.”). A finding that a respondent has violated Title 46 or Commission regulations is not itself sufficient for the Commission to award fees to the complainant. If so, a prevailing complainant would always be entitled to attorney fees, which would be contrary to the principles that there is no presumption in favor of fees and that prevailing complainants and respondents should be treated similarly. See 81 Fed. Reg. at 10514 n.12, 10515. Rather, there must be a particular reason or need to deter the unlawful conduct at issue. See, e.g., *CMI*, Order Denying Petition for Attorney Fees at 12.

³³ *Logfret*, 2 F.M.C.2d at 117 (quoting *Logfret*, 2 F.M.C.2d at 40).

³⁴ *CMI Distrib., Inc.*, Order Denying Petition for Attorney Fees at 14.

³⁵ See *CMI Distrib., Inc.*, Order Denying Petition for Attorney Fees at 14.

³⁶ *Edaf Antillas*, 2016 FMC LEXIS 58. The Commission has also awarded attorney fees to a shipper-complainant once since 2014 – the household good shippers in *Gruenberg-Reisner v. Overseas Moving Specialists*, Order Granting Petition for Attorney Fees at 23, Docket No. 1947(I) (SCO Nov. 3, 2017).

³⁷ *Edaf Antillas*, 2016 FMC LEXIS 58 at *14-15.

Commission orders are at little risk of attorney fee liability if they are unsuccessful, absent unusual circumstances.

By the Commission.

William Cody
Secretary