

**VIRGINIA:  
IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA**

HENRY LEWIS )  
 )  
Plaintiff, )  
v. )  
 )  
CITY OF ALEXANDRIA, ) Case No. 12002242  
VIRGINIA )  
 )  
Defendants. )

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**PLAINTIFF'S MOTION TO BIFURCATE PROCEEDINGS TO DETERMINE  
PLAINTIFF'S REASONABLE ATTORNEY'S FEES AND LITIGATION COSTS**

Plaintiff Henry Lewis, by and through his undersigned counsel, brings this Motion to Bifurcate his entitlement to attorney's fees and litigation costs and in support states as follows.

**INTRODUCTION**

This case is brought against the City of Alexandria by former City employee Henry Lewis pursuant to the anti-retaliation provisions of the Virginia Fraud Against Taxpayers Act ("VFATA"). Va. Code § 8.01-216.8. Plaintiff alleges that he was subjected to unlawful discrimination when he was terminated by the City in retaliation for his efforts to prevent false claims and fraud on the City of Alexandria. Among the damages sought by plaintiff are his reasonable attorney's fees and costs pursuant to the mandatory fee shifting provisions of the VFATA. Plaintiff now brings this motion to establish a procedure for adjudicating his attorney's fees claim, and states as follows.

**CERTIFICATION OF COUNSEL**

Counsel for the plaintiff certifies that prior to filing this motion he and counsel for the defendant corresponded via email about the subject matter and wording of this Motion and the attached draft Order. While counsel for the plaintiff and counsel for the defendant were unable

to agree on the exact wording of the Order, counsel for the plaintiff is authorized to represent to the Court that the City of Alexandria agrees generally with the concept of bifurcating the issue of plaintiff's reasonable attorney's fees and has no particular objection to the Court hearing that matter via written petition supported by sworn declarations.

### **LEGAL STANDARD AND ARGUMENT**

It is well-known that the "American Rule" requires each litigant to bear its own fees and costs in the absence of a statute or other rule to the contrary. *Mullins v. Richlands Nat. Bank*, 241 Va. 447, 449, 403 S.E.2d 334, 335 (Va.,1991). This case however is brought pursuant to the anti-retaliation provisions of the VFATA; those provisions provide that plaintiff shall, if successful on the merits of the case, be entitled to an award of his reasonable attorney's fees and litigation costs. Va. Code § 8.01-216.8.

In federal courts Fed. R. Civ. P. 54(d) provides for a post-judgment presentation of evidence regarding a party's entitlement to attorney's fees. There is no comparable rule in Virginia; however, Va. Sup. Ct. Rule 3:25(D) does provide that upon a motion by any party the Court shall, in advance of trial, establish a procedure to adjudicate any entitlement to attorney's fees. Va. Sup. Ct. Rule 3:25 was added in 2009, but even prior to the rule's adoption it was common for litigants in Virginia state courts to seek a court order bifurcating the issue of attorney's fees and costs from the trial on the merits. *See, Chesapeake & Potomac Tel. Co. v. Sisson & Ryan, Inc.*, 234 Va. 492, 500, 362 S.E.2d 723, 728 (1987) ("The parties agreed to submit the question of attorneys' fees to the trial court following the verdict.").

There are many reasons why it is preferable to bifurcate the issue of plaintiff's reasonable attorney's fees and litigation expenses. First and foremost plaintiff's counsel will need to meet the evidentiary burden of establishing, first, his reasonable hourly rate and then second that a

reasonable number of hours were spent on the case. These two elements require not only the detailed testimony of counsel but also expert testimony from other lawyers regarding the reasonable hourly rate, the hours reasonably expended, and other factors making the fee sought reasonable.

It would be cumbersome, expensive and unworkable to try to present this kind of evidence to the jury during trial on the merits. Instead, plaintiff presents the attached Order and asks that the Court enter it. The Order establishes that plaintiff shall not be required to present evidence of his reasonable attorney's fees and litigation costs at the trial on the merits of this matter; rather if successful plaintiff's entitlement to reasonable attorney's fees and litigation costs shall be handled in the same manner as fee petitions in federal courts.

More specifically, the attached proposed Order provides that in the event plaintiff prevails in this case, plaintiff shall establish his reasonable attorney's fees and litigations costs by way of a written Petition for an Award of Reasonable Attorney's Fees and Litigation Costs; the petition shall be filed within 14 (fourteen) days of an entry of judgment in his favor. Plaintiff's Petition for an award of attorney's fees and litigation costs shall establish the reasonable nature of the hourly rate of his lawyers and the reasonable number of hours expended by his lawyers on this case; as such, it shall be supported by evidence and supporting testimony establishing those elements and analyzing the fee sought. All evidence plaintiff wishes to place before the Court must be supported by written declarations under oath.

The Petition itself shall not exceed twenty pages in length, exclusive of the written declarations and other exhibits attached to the petition in support of the requested award.

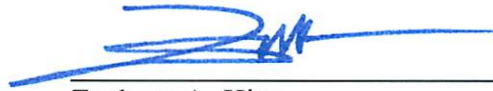
Defendant shall file any opposition to the petition within 10 (ten) days of plaintiff's filing. The defendant's opposition shall not exceed 20 pages, exclusive of any evidence or declarations that the defendant wishes to submit to contradict the plaintiff's declarations and evidence.

Oral argument shall then take place on the Wednesday civil motions day following the defendant's opposition.

### CONCLUSION

For the foregoing reasons, plaintiff asks the Court to enter the attached Order.

For Plaintiff Henry Lewis through Counsel:



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### CERTIFICATE OF SERVICE

This is to certify that I served a copy of Plaintiff's Motion to Bifurcate on the following counsel on 8/16/2012 via electronic mail and regular mail to:

Heather R. Skeeles-Shiner, Assistant City Attorney  
Office of the City Attorney  
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Zachary A. Kitts