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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STEVEN J. ALEXANDER, ET AL.

'05 SEP 19 P1:45

Plaintiffs,

vs.

Case No. 03-C-611

CITY OF MILWAUKEE, ET AL.

Defendants.

**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR
MOTION FOR REIMBURSEMENT OF ATTORNEY FEES AND COSTS
PURSUANT TO 42 U.S.C. § 1988**

I. Plaintiffs are entitled to reimbursement of attorney fees and costs in this case.

To recover attorney fees, the plaintiff must be a "prevailing party" in that the plaintiff succeeded on any significant issue in litigation which achieved some benefit the parties sought in bringing this suit. Ekanem v. Health and Hospital Corp., 778 F.2d 1254, 1257 (7th Cir. 1985); *citing* Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983). "The proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought." Id. There is no question that the plaintiffs in this case were the prevailing party allowing recovery for attorney fees, costs and disbursements pursuant to 42 U.S.C. § 1988. All 17 plaintiffs prevailed on their claims against each of the 6 individually named defendants and the City of Milwaukee on the basis that each and every defendant intentionally discriminated against each and every plaintiff.

In this particular case, the plaintiffs' attorney is requesting that the prevailing market rate in Milwaukee for a prevailing attorney with the same or similar experience as the plaintiffs' attorney in a discrimination case which is \$250 per hour. (See Kelly Aff. at ¶s 3-4; Fuchs Aff. at ¶s 3-8). Moreover, when

“... considering the relationship between the extent of success and the amount of the attorney fees awarded, the Court stated: “where a plaintiff has obtained excellent results [in the underlying action], 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.” Hensley v. Eckerhart, 461 U.S. 424, 435 (1983); *see also* Riverside v. Rivera, 477 U.S. 561, 569 (1986). Thus, where a plaintiff has significant success under [a] 42 U.S.C. § 1983 action, generally his or her attorneys are entitled to full compensatory fees pursuant to 42 U.S.C. § 1988(b).

Bialk v. Milwaukee County, 180 Wis.2d 374, 379, 509 N.W.2d 334 (Ct. App. 1993).

(emphasis added).

“The ‘starting point’ in setting an attorney’s fee under §§ 1988(b) and 2000(e-5)(k) is to determine the ‘lodestar’ figure – that is, the number of hours reasonably expended on the litigation multiplied by a reasonably hourly rate.” Reynolds v. Alabama Department of Transportation, 926 F.Supp.1448, 1453 (M.D. Ala. 1995); *citing* Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983); *accord* Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988). Once the lodestar fee is determined by the court, it should then determine if the fee is to be adjusted upward or downward. Id.

In making these determinations, the court is guided by the twelve factors. Id. These factors include:

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions;
- (3) The skill required to perform the legal services properly;
- (4) The preclusion of other employment by the attorney due to acceptance of the case;
- (5) The customary fee in the community;
- (6) Whether the fee is fixed or contingent;
- (7) Time limitation imposed by the client or circumstances;
- (8) The amount involved and the results obtained;
- (9) The experience, reputation and ability of the attorney;
- (10) The undesirability of the case;
- (11) The nature and length of the professional relationship with the clients; and
- (12) Awards in similar cases.

People Who Care v. Rockford Board of Education, School District No. 205, 90 F.3d 1307, 1310 at fn. 1 (7th Cir. 1996).

All of which were taken into account and detailed in the Affidavit of William R. Rettko In Support Of Motion For Reimbursement of Attorney Fees And Costs Pursuant To 42 U.S.C. § 1988 in paragraph 7 subparts 1 – 12. In addition, plaintiffs rely on the Supporting Affidavits of Walter F. Kelly and John F. Fuchs for establishment of the prevailing market rate for attorney fees in this type of a case for prevailing plaintiffs. (see Kelly Aff. at ¶s 3-4; Fuchs Aff. at ¶s 3-12). As such, the plaintiffs are requesting that their attorney be reimbursed \$357,250 for his 1,429 hours expended through the economic damages portion of the case which concluded on August 30, 2005. (see Rettko Aff. at Exhibit “A”).

Further, the plaintiffs request reimbursement for their disbursements paid as detailed in the billing summary provided by their attorney based upon attached Exhibit “A” to the Rettko Affidavit, attached Exhibit “C” to the Rettko affidavit, and paragraphs 9, 12, 15, and 16 in the Rettko Affidavit. This request accounts for reimbursement of electronic legal research, photocopies, extra ordinary mailing expenses, long distance telephone expenses, meals, parking, mileage, deposition transcripts, witness fees, subpoena fees, service fees, filing fees, expert witness fees, supplies needed specifically to be used at trial, exhibits to be used at trial, courier fees and process server fees. It has been established that reasonable expenses absorbed by the practicing attorney incurred in the preparation of the case and during the litigation of the matter are reimbursable under § 1988. American Charities For Reasonable Fundraising Regulation, Inc., v. Pinellas County, 278 F.Supp.2d 1301, 1328 (M.D. Fla. 2003). In this respect, reimbursement for travel, meals, lodging, photocopying, long-distance telephone calls, computer legal research, postage, facsimiles, Federal Express, courier services, paralegals and expert witnesses are recoverable under § 1988. Id.

Moreover, even though the Court ordered the parties to split the Special Master fee, the plaintiffs respectfully request that this be reconsidered because when everything was completed,

the special master's assessment of the wage and pension loss was almost identical to that of the plaintiffs' economic expert, Dr. Perlman. More specifically, there were two main contentions between the plaintiffs and the defendants in this part of the case. The first was that the plaintiffs contended that their overtime earnings should not be offset from their past and future wage loss, while the defendants argued that all overtime earnings should be used to offset the past wage loss without any mitigation taking place for flex-time earnings a plaintiff would have earned as a Captain. In addition, the defendants argued that overtime should be projected to offset future wage earnings as well. The parties' positions were about \$200,000 to \$250,000 apart on wage projections.

However, the defendants caused a special master to be appointed because they chose a 4.65% discount rate in comparison to the plaintiffs 1.25% discount rate and the special masters 1.7% discount rate. In short this difference put the parties about \$1.2 million apart on pension loss projections. It is the plaintiffs' position that the defendants should reimburse them for their payment to the special master because it was their position that was ultimately found to be extreme. As such, the plaintiffs request that their expenses through August 31, 2005 in the amount of \$62,391.26 be reimbursed by the court.

Additionally, the plaintiffs request that their paralegal be reimbursed at the hourly rate of \$90 for her 520.80 hours expended in this case through August 31, 2005 in the total amount of \$46,872. In summary the plaintiffs request reimbursement of \$466,513.26 for all attorney fees, paralegal fees and expenses incurred through August 31, 2005.

II. Plaintiffs request that their attorney fees be enhanced.

There is a strong presumption that the lodestar is the reasonable fee. City of Burlington v. Dague, 505 U.S. 557, 562, 112 S.Ct. 2638, 2641, 120 L.Ed.2d 449 (1992). Further, when a district court makes an enhancement of that fee, it must explain with a reasonable degree of specificity its findings and reasons for the enhancement. Walker v. U.S. Department Of Housing

And Urban Development, 99 F.3d 761, 771(5th Cir. 1996). Nonetheless, the upward adjustment of the lodestar is permissible in rare and exceptional cases. Pennsylvania v. Delaware Valley Citizens' Council for Clear Air, 478 U.S. 546, 565, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986). “[A]s a general rule, the upward adjustment for risk may be no more than one third of the lodestar, and ‘[a]ny additional adjustment [for risk] would require the most exacting justification.’” Geier v. Sundquist, 372 F.3d 784, 794 (6th Cir. 2004), citing Pennsylvania v. Delaware Citizens' Council for Clean Air, 483 U.S. 711, 730, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987).

This is one of those rare and exceptional cases requiring an enhancement of the lodestar fee. More specifically, Attorney John Fuchs who is an experienced civil rights litigator is on record in this matter as stating that due to the high risk involved in civil rights/discrimination cases, his firm would no longer consider taking a case similar to this case. (Fuchs Aff. at ¶ 12). Additionally, the plaintiffs went to just about every large law firm in the cities of Milwaukee and Madison to find a firm to represent them in this matter, but found no takers. (Rettko Aff. at ¶7 sub 10). In most cases, the plaintiffs were simply told that they could not prevail on a reverse discrimination case against the City of Milwaukee. Id. In similar circumstances, the Ninth Circuit found that the application of a 2.0 multiplier was required in the San Francisco market to ensure that counsel would accept civil rights contingency fee cases. Bernardi v. Yeutter, 951 F.2d 971, 975 (9th Cir. 1991), citing Fadhl v. City and County of San Francisco, 859 F.2d 649, 651 (9th Cir. 1988). As such, due to the undesirability of the case, the risk involved for the attorney that took the case, the complex nature of the issues involved, the daily and continuous motions filed by the defense in their Stalingrad defense, and due to the exceptional results achieved, the plaintiffs respectfully request that the court apply a 2.0 multiplier to the attorney fees and costs awarded.

III. The plaintiffs request reimbursement of their used vacation, holiday and comp time to attend the trial.

The plaintiffs collectively used \$29,971.91 in vacation, holiday and comp time to attend their trial. (see Rettko Aff. at Exhibit D). It is the plaintiffs position that they are entitled to be reimbursed for this time which is normally a benefit to be used by the employee for family. *Id.* Instead, they used this time to protect their civil rights and right to be free from intentional discrimination in the work place by attending their trial in this case. In other words, but for the defendants acts of intentional discrimination and their unwillingness to resolve the matter short of trial, the plaintiffs were forced to use their well earned vacation, holiday and comp time to attend the trial.

Although plaintiffs have not found any specific case on point to allow for the payment of this request and have generally found that reimbursement is generally tied to expenses and fees normally billed by the attorney, the plaintiffs have not found any case directly on point to say that they are prohibited from receiving the requested payment. Moreover, the prevailing plaintiff may recover "all reasonable expense incurred in care preparation, during the course of the litigation, or as an aspect of settlement of the case." Reynolds v. Alabama Department of Transportation, 926 F.Supp. 1448, 1459 (M.D. Ala. 1995), citing Dowdell v. City of Apopka, Florida, 698 F.2d 1181, 1192 (11th Cir. 1983). Simply put, the plaintiffs case benefited by their attendance and was a necessary use of the time for the benefit of their individual cases and of the group. The defendants should not be allowed to benefit from their denial of this reimbursement. As such, all but Anthony Smith request reimbursement as identified in Rettko Affidavit at Exhibit D.

CONCLUSION

For all the reasons argued above, the plaintiffs respectfully request that their attorney fees and costs through August 31, 2005 be reimbursed in the amount of \$466,513.26 and that that amount be enhanced by a 2.0 multiplier for a total figure of \$933,026.52. In addition, the plaintiffs respectfully request that the court award them reimbursement of \$29,971.91 for used vacation, holiday and comp time used to attend the trial.

Dated this 19th day of September, 2005.

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