

2013 WL 6920860
Only the Westlaw citation is currently available.
United States District Court,
W.D. Missouri,
Central Division.

Michael BARRETT, IV, et al., Plaintiffs,
v.
Donald M. CLAYCOMB, et al., Defendants.

No. 2:11-CV-04242-NKL.
|
Dec. 9, 2013.

Attorneys and Law Firms

Anthony E. Rothert, Grant R. Doty, American Civil Liberties Union of Missouri Foundation, St. Louis, MO, Jason D. Williamson, New York, NY, for Plaintiffs.

Kent L. Brown, Judith A. Willis, Jefferson City, MO, for Defendants.

ORDER

NANETTE K. LAUGHREY, District Judge.

*1 Pending before the Court are Plaintiffs Michael Barrett, IV, et al.'s Motion for Attorney's Fees and Expenses, [Doc. # 239], and Motion to Approve and Direct Notice of Class Counsel's Motion for Attorney's Fees and Expenses, [Doc. # 240].

I. Background

Plaintiffs filed this class action suit challenging the constitutionality of Linn State Technical College ("Linn State")'s mandatory, suspicionless drug-testing policy on September 14, 2011. At that time, Plaintiffs sought a declaratory judgment finding that this policy is facially unconstitutional and moved for a temporary restraining order and preliminary injunction. Plaintiffs also moved to

certify a class comprised of current and future Linn State students. The Court certified the class proposed by Plaintiffs and, after holding an evidentiary hearing, granted Plaintiffs' motion for a preliminary injunction.

Defendants filed an interlocutory appeal and the Eighth Circuit Court of Appeals vacated the preliminary injunction, on the ground that Plaintiffs had failed to show the requisite likelihood of success on the merits with respect to their facial challenge. Plaintiffs then clarified their claims before this Court as specifically asserting an as-applied challenge and moved for the entry of a new preliminary injunction. A second preliminary injunction was entered and the case proceeded to trial.

Following a July 1, 2013 bench trial, the Court entered a declaratory judgment in favor of Plaintiffs, finding that Linn State's drug-testing policy is unconstitutional as applied to all class members not enrolled in Linn State's Aviation Maintenance, Electrical Distribution Systems, Industrial Electricity, Power Sports, and CAT Dealer Service Technician programs. The Court also permanently enjoined Defendants from testing any students not enrolled in these programs. Defendants' appeal of this decision is pending.

As the prevailing party in this matter, Plaintiffs now move for an award of \$218,899.50 in attorney's fees and \$4,033.07 in expenses. More specifically, Plaintiffs seek attorney's fees for the three attorneys involved in prosecuting this case, Anthony E. Rothert, Jason D. Williamson, and Grant R. Doty, who ask to be compensated at hourly rates of \$325.00, \$300.00, and \$250.00, respectively. In addition, Plaintiffs seek compensation for services rendered by a paralegal at an hourly rate of \$30.00. Plaintiffs also request reimbursement for certain expenses advanced by Class Counsel, which consist of: \$124.88 for serving the complaint and summons, \$65.00 for serving witness subpoenas, \$45.42 in postage and delivery costs, \$824.09 in hotel costs, and \$2,973.68 in travel costs for Williamson, who travelled to Missouri from New York City multiple times to assist this case.

II. Discussion

A. Whether the Court Should Consider Plaintiffs' Motion for Fees

Defendants argue that it would be inappropriate to resolve Plaintiffs' motion for fees at this time, due to the pending appeal of the Court's final judgment on the merits. It is well-established, however, that "[a] 'district court retains jurisdiction over collateral matters, such as attorney's fees ..., while an appeal is pending.'" *Peter v. Jax*, 187 F.3d 829, 833 n. 2 (8th Cir.1999) (quoting *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1107 n. 3 (8th Cir.1999)); accord *Harmon v. U.S. Through Farmers Home Admin.*, 101 F.3d 574, 587 (8th Cir.1996). Furthermore, there are several advantages to the prompt filing and resolution of a motion for attorney's fees. In particular:

*2 Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind. It also enables the court in appropriate circumstances to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case.

Fed.R.Civ.P. 54 advisory committee's note to the 1993 Amendments. As Defendants offer no countervailing interests that might be served by delaying the consideration of this motion, the Court declines to postpone ruling the matter.

Apart from the pending appeal, Defendants do not dispute that Plaintiffs, as the prevailing party in this litigation, are entitled to an award of reasonable attorney's fees pursuant to 42 U.S.C. § 1988. Defendants do, however, assert a number of objections to the size of the award requested by Plaintiffs. Each of these objections is addressed, in turn, below.

B. The Reasonableness of the Hourly Rates

Defendants contest the reasonableness of the \$325.00 and \$250.00 hourly rates requested by attorneys Rothert and Doty, respectively. "As a general rule, a reasonable hourly rate is the prevailing market rate, that is, the ordinary rate for similar work in the community where the case has been litigated." *Moyasis v. DTG Datanet*, 278 F.3d 819, 828 (8th Cir.2002) (quotation omitted). In

deciding upon the appropriate rate, "courts may draw on their own experience and knowledge of prevailing market rates." *Warnock v. Archer*, 397 F.3d 1024, 1027 (8th Cir.2005). The prevailing market rate is only a starting point, however, as the rate charged should also take into account the experience, skill, and expertise of the attorneys as well as the complexity, significance, and undesirability of the case. See *Casey v. City of Cabool, Mo.*, 12 F.3d 799, 805 (8th Cir.1993); *McDonald v. Armontrout*, 860 F.2d 1456, 1460 (8th Cir.1988). Furthermore, in civil rights actions, "[t]he relevant market for attorneys ... may extend beyond the local geographic community. A national market or a market for a particular legal specialization may provide the appropriate market." *Casey*, 12 F.3d at 805. A contrary rule "might have the effect of limiting civil rights enforcement to those communities where the rates are sufficient to attract experienced counsel," a result that directly contravenes the aims of section 1988. *Id.*

In support of the requested hourly rates, Rothert submitted an affidavit attesting to his experience and expertise in cases involving civil rights violations. [Doc. # 242-1]. Doty likewise submitted an affidavit regarding his background and experience. [Doc. # 242-3]. Both attorneys further averred that, based on their personal knowledge of prevailing market rates and consultations with other attorneys in this field, the proposed rates are reasonable. [Docs. 242-1; 242-3]. Plaintiffs also submitted surveys of attorney billing rates from across the State of Missouri for 2011, 2012, and 2013, which further evince the reasonableness of the rates requested by Rothert and Doty. See [Doc. # 242-1 at 24-52]. In addition, Plaintiffs submitted an affidavit from Richard B. Scherrer, an experienced civil litigation attorney who practices in Missouri. After recounting his own background, qualifications, and prior experience working with Rothert and Doty, Scherrer averred that the rates requested by Rothert and Doty "are actually low," and thus "more than justified, reasonable, fair and [] well within the rates customarily charged by lawyers with the same or similar experience and expertise in the various districts of the federal district courts of Missouri for the same or similar type of litigation." [Doc. # 242-4 at 1-2]. While Defendants have not objected to Williamson's requested hourly rate of \$300.00, it bears mention that similar materials were submitted in support of this request. Finally, Plaintiffs claim an hourly rate of only \$30.00 for their paralegal, which is substantially less than rates that have been found reasonable in other cases tried in Missouri for this type of work, see *Holland v. City of Gerald, Mo.*, No. 4:08CV707 HEA, 2013 WL 1688300, at *4 (E.D.Mo. Apr. 18, 2013) (approving paralegal hourly rates of \$90.00 and \$75.00), and Defendants do not contest the reasonableness of this rate.

***3** Having considered Plaintiffs’ submissions in light of the relevant factors and the Court’s own experience and knowledge of prevailing market rates, the Court finds that the requested rates are reasonable for the work performed in this case. Defendants’ sole basis for opposing the rates requested by Rothert and Doty is the fact that these two attorneys were awarded hourly rates of \$300.00 and \$225.00, respectively, in a recent but wholly unrelated case. *See Snider v. Peters*, 928 F.Supp.2d 1113, 1119 (E.D.Mo.2013). Rates charged in prior cases carry no special significance, however, “as ‘a reasonable hourly rate is not itself a matter of binding precedent,’ but, instead, a figure to be determined on a case-by-case basis.” *Gilster v. Primebank*, 884 F.Supp.2d 811, 872 (N.D.Iowa 2012) (quoting *Farbotko v. Clinton Cnty. of New York*, 433 F.3d 204, 208 (2d Cir.2005)). Based solely on the circumstances of the present case, the rates requested by Rothert and Doty, as well as those requested by Williamson and Class Counsel’s paralegal, are reasonable.

C. Williamson’s Fees and Expenses

While Defendants do not object to the reasonableness of the \$300.00 hourly rate requested by Williamson, they do object to his involvement in this case and any award that includes Williamson’s travel time and expenses. Defendants maintain that it was unnecessary for Rothert and Doty to seek the assistance of co-counsel from New York City and that, as a result, any award that fully compensates Williamson’s travel would be excessive. Plaintiffs respond that neither Rothert nor Doty had significant experience with Fourth Amendment or drug-testing cases prior to this litigation, which made it reasonable for them to seek Williamson’s assistance due to his expertise in this area.

Refusing to compensate civil rights litigants that reasonably seek assistance from specialists in such matters would be contrary to the purposes of section 1988. *See Casey*, 12 F.3d at 805 (“A refusal to pay for experience and expertise will exact a cost in the form of inexperience and, perhaps, incompetence.”). While Defendants claim that Williamson’s services were unnecessary because Rothert and Doty were fully capable of litigating this case, it is pure speculation to suggest that the result of this case would have been the same absent Williamson’s significant contributions. Furthermore, Defendants’ claim that, with respect to this litigation, “[t]he case law is straightforward, and the issues and facts relatively uncomplicated,” [Doc. # 252 at 2], seems

disingenuous considering that this case presented a first-impression question of constitutional law that resulted in two appeals, one of which is still pending. *Cf. Casey*, 12 F.3d at 805 (“The City could not continue to contend that they have no liability here at all, with one breath, and then assert that this case was a ‘pushover’ for plaintiff with the next.”). Finally, Defendants have not suggested that an equally competent and willing specialist was available more locally. Accordingly, there is no merit to Defendants’ suggestion that it was wholly unnecessary for Plaintiffs’ to seek Williamson’s services.

***4** Nonetheless, the number of hours of travel time for which Williamson seeks compensation at his fully hourly rate is troubling. The Eighth Circuit has “permitted recovery of the full hourly rate for attorney-travel time,” *Rose Confections, Inc. v. Ambrosia Chocolate Co., a Div. of W.R. Grace & Co.*, 816 F.2d 381, 396 (8th Cir.1987), but has never held “that fees for travel time must always be awarded at the full hourly rate,” *McDonald*, 860 F.2d at 1463. Rather, this decision is committed to the discretion of the district court. *See id.* In this case, Plaintiffs request compensation at an hourly rate of \$300.00 for 51 hours of travel time between Missouri and New York City, [Doc. # 242–2 at 5–9, 11], for a total of \$15,300.00, in addition to travel costs of \$2,973.68, [Doc. # 242 at 2]. Yet, Williamson’s time sheet does not indicate whether this transit time was spent working and, if so, whether this time was devoted solely to this case. In addition, one of the five trips to Missouri included in Williamson’s time sheet primarily involved identifying potential plaintiffs, [Doc. # 242–2 at 5–6], and another trip was made solely to participate in mediation, [Doc. # 242–2]. It is not immediately evident why Williamson’s Fourth Amendment expertise was needed, in-person, for these undertakings.

Considering that travel time comprises a significant portion of Williamson’s fee, nearly fifteen percent of his total request, and that not all of this travel appeared necessary, full compensation for this time is not appropriate. *See El-Tabeach v. Clarke*, 616 F.3d 834, 842 (8th Cir.2010) (“In all events, hours that are excessive, redundant, or otherwise unnecessary must be excluded.” (quotation omitted)). In addition, the Supreme Court, in assessing the reasonableness of attorney’s fees awarded under section 1988, has found it relevant that:

In many cases, attorney’s fees awarded under § 1988 are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is

based. Instead, the fees are paid in effect by state and local taxpayers, and because state and local governments have limited budgets, money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services.

Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 559 (2010). As the fees in this case are to be awarded against a public university, this concern cannot be wholly ignored in assessing whether it would be excessive to award fees at Williamson's full hourly rate for time in transit.

In light of these considerations, an award of \$150.00 per hour, half of Williamson's \$300.00 hourly rate, is appropriate for time spent traveling to and from Missouri. In addition, Plaintiffs may recover only three-fifths of Williamson's travel expenses, which reflects a reduction for the two seemingly unnecessary trips to Missouri.

Defendants have not contested any of the other expenses that Plaintiffs seek to recover. Reasonable expenses of the kind a law firm would ordinarily bill to its client may be included in an attorney's fee award under section 1988. *Williams v. ConAgra Poultry Co.*, 113 F. App'x 725, 728 (8th Cir.2004); *see also SapaNajin v. Gunter*, 857 F.2d 463, 465 (8th Cir.1988) ("Reasonable expenses of litigation incurred by counsel on the prevailing side can be awarded as part of the fees due under Section 1988. Such awards are not for court costs proper, but for reasonable expenses of representation."). Having reviewed the expenses claimed by Plaintiffs and the supporting documentation, the Court finds that, with the exception of Williamson's travel costs as discussed above, the claimed expenses are reasonable and recoverable.

D. Whether Fees Should Be Awarded for Time Worked Before the Complaint Was Filed

*5 Defendants object to Plaintiffs' request for attorney's fees for time spent identifying and recruiting potential plaintiffs before this action was filed. In response, Plaintiffs claim that Defendants have mischaracterized these efforts, as Class Counsel did not begin seeking to identify potential plaintiffs until after the American Civil Liberties Union received a complaint from a Linn State student who expected to submit to the drug testing. According to Plaintiffs, this student was reluctant to

proceed as the only plaintiff, for fear of potential retribution. Consequently, Plaintiffs maintain, time spent identifying other potential named plaintiffs is fully compensable. Plaintiffs' account is corroborated by the time sheets submitted by Class Counsel, which reflect time spent addressing "standing issues, potential plaintiffs," researching "organizational standing requirements," and preparing "declaration drafts based on discussions with students." [Doc. # 242-2 at 5-6]. Notably, at the same time that this work was being performed, Class Counsel were also drafting and revising the complaint. [Doc. # 242-2 at 5].

As this case was, from the outset, pursued as a class action, the time spent identifying and interviewing potential named plaintiffs is fully compensable. "Section 1988 does not limit fee awards to work performed after the complaint is filed, but allows recovery of fees for time spent beforehand investigating facts and researching the viability of potential legal claims." *McDonald v. Armontrout*, 860 F.2d 1456, 1462 (8th Cir.1988). The investigation and research Class Counsel performed prior to filing the complaint in this case were essential to ensuring that the putative class would be adequately represented. To find that this work is not compensable would be contrary to the aims of section 1988. *See Casey*, 12 F.3d at 805. Accordingly, the Court finds that the time spent on pre-lawsuit activities identified by Class Counsel may properly be included in the attorney's fee award in this case.

E. Whether the Lodestar Amount Should Be Reduced

Defendants argue that Plaintiffs' failure to succeed on their facial challenge justifies a reduction in the total attorney's fee award. The appropriate starting point for determining the amount of a reasonable fee is the reasonable hourly rate multiplied by the hours reasonably expended on the litigation, commonly referred to as the lodestar amount. *Marez v. Saint-Gobain Containers, Inc.*, 688 F.3d 958, 965 (8th Cir.2012). This amount "is presumptively a reasonable fee, and most factors relevant to determining the amount of a fee are subsumed within the lodestar." *Casey*, 12 F.3d at 805. For the reasons set forth above, the hourly rates requested by Plaintiffs are reasonable. With the exception of the matters discussed above, Defendants do not contest the reasonableness of the number of billable hours reported by Class Counsel. Having reviewed the itemized time records submitted by Class Counsel, the Court finds that the total hours worked are also reasonable.

*6 Nonetheless, in some instances, other factors may justify adjusting the fee award upward or downward, “including the important factor of the ‘results obtained.’” *Marez*, 688 F.3d at 965 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). A reduction of the lodestar amount may be appropriate where the plaintiff asserts “distinctly different claims for relief that are based on different facts and legal theories,” such that “counsel’s work on one claim will be unrelated to his work on another claim.” *Hensley*, 461 U.S. at 434–35. In such a case, “no fee may be awarded for services on [an] unsuccessful claim.” *Id.* at 435. Where “a plaintiff has achieved only partial or limited success, ... the most critical factor is the degree of success obtained.” *Id.* at 436.

At the same time, however, a reduction for partial success may not be warranted where the lawsuit involved “a common core of facts” or was “based on related legal theories.” *Id.* at 435. In such a case, “[m]uch of counsel’s time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims.” *Id.* Thus, in a case based on interrelated legal theories or a common factual basis, “[a] plaintiff can be compensated for work on unsuccessful claims if they are sufficiently related to the successful claim.” *Marez*, 688 F.3d at 965; *see also Casey*, 12 F.3d at 806 (“Once a party is found to have prevailed, [a] fee award should not be reduced merely because a party did not prevail on every theory raised in the lawsuit.” (quotation omitted)). To determine the appropriate fee in these circumstances:

[T]he district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. 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,... 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.

Hensley, 461 U.S. at 435 (citation omitted). The dispositive consideration in this context “is whether the issues upon which plaintiff’s counsel spent time are interrelated to the central issues of the case.” *Casey*, 12 F.3d at 806.

In this case, Defendants argue that the lodestar amount should be reduced by fifty-percent because Plaintiffs’ facial challenge to the drug-testing policy failed. Considering the nature and result of this litigation, however, such a sizeable reduction is not warranted. First, Plaintiffs’ facial and as-applied challenges to the drug-testing policy were closely intertwined, both legally and factually. Consequently, it would be difficult if not impossible to sever the hours reasonably expended pursuing one theory from the hours spent working on the other. *Cf. Frost v. Town of Hampton*, No. CIV 09–CV–339–JL, 2010 WL 1667290, at *6 (D.N.H. Apr. 23, 2010) (“Here, the plaintiffs’ facial and as-applied challenges were closely related, both legally and factually. They cannot be severed for purposes of calculating the fee award.”).

*7 Second, and more importantly, Plaintiffs obtained the desired relief for a substantial majority of the class members. Specifically, Plaintiffs prevailed on their claim that the suspicionless drug-testing policy is unconstitutional with respect to current and future students enrolled in all but five of the approximately thirty programs offered at Linn State. As “the most critical factor is the degree of success obtained,” *Hensley*, 461 U.S. at 436, and Plaintiffs prevailed on the claims of well over fifty-percent of the class members, a fifty-percent reduction in the lodestar amount is not appropriate.

Nonetheless, Plaintiffs’ incomplete success does justify some reduction in the lodestar amount. Plaintiffs failed to obtain any relief for a portion of the individuals included in the certified class, so a proportional reduction is fitting. *See id.* (“[T]he most critical factor is the degree of success obtained.”). Neither party, however, has ever submitted any evidence regarding the number of students enrolled in the various programs offered at Linn State. Consequently, the only available starting point for assessing an award that fairly represents Plaintiffs’ degree of success is the proportion of programs with respect to which Plaintiffs’ constitutional challenge succeeded.

Based on this metric, a reduction of twenty-percent will be applied to the lodestar amount in order to account for Plaintiffs' partial success. A starting point of fifteen-percent is fitting based on the fraction of programs with respect to which Plaintiffs' constitutional challenge did not succeed. While this is slightly less than the actual percentage of programs with respect to which the drug-testing policy was upheld, this rounding helps take into account the common factual and legal basis of this lawsuit. As discussed above, this commonality precludes any attempt to sever hours worked on the facial challenge from hours spent on the as-applied challenge, as time spent working on the former necessarily overlapped, in large part, with work that needed to be done to succeed on the latter. *See Hensley*, 461 U.S. at 435; *Marez*, 688 F.3d at 965. For similar reasons, it is not appropriate to tie the fee award too rigidly to the percentage of programs with respect to which Plaintiffs succeeded. Due to their litigation strategy, Class Counsel devoted comparatively little time to specific students or programs, choosing instead to focus on the student body as a whole.

An additional five-percent reduction must be added to account for Plaintiffs' loss on the appeal of the first preliminary injunction. Although this appeal helped further clarify the issues in this case, Plaintiffs should not recover fully for the time spent litigating a facial challenge that was ultimately rejected by the Court of Appeals. Taking into account Plaintiffs' partial success and the overlap between the claims of the successful and unsuccessful class members, a twenty-percent reduction of the lodestar amount is appropriate.

F. Notice to the Rule 23 Class

*8 As this case is a class action certified under Federal Rule of Civil Procedure 23, notice of the motion for attorney's fees must be directed to the class members in a reasonable manner. Fed.R.Civ.P. 23(h). The class members must also have the opportunity to object and a hearing may be held, if necessary. *Id.* Class Counsel submitted for approval a proposed notice form as well as suggestions for its distribution and Defendants responded with three proposed modifications, to which Class

Counsel are generally amenable. Accordingly, the Court approves the form of the notice and its distribution plan, subject to the modifications set forth at the conclusion of this Order.

III. Conclusion

For the foregoing reasons, Plaintiffs' Motion to Approve and Direct Notice of Class Counsel's Motion for Attorney's Fees and Expenses, [Doc. # 240], is GRANTED. Class Counsel are hereby ORDERED to revise their proposed notice to include the following revisions:

1. The last two sentences of Section 1 shall read, "The case has been adjudicated by the Court, though a number of the defendants have appealed. Under federal law, the attorneys for the certified class may apply to the Court for an award of attorney's fees and expense to be paid by the defendants in this case."
2. The following sentence shall be added to the end of the third paragraph of Section 2: "The Court's decision is currently being reviewed by the Eighth Circuit Court of Appeals."

It is further ORDERED that Defendants shall: 1.) post the notice prominently at each of Linn State's campuses; and 2.) e-mail a copy of the notice to each known member of the certified class. The parties shall promptly inform the Court once the notices have been disseminated and the members of the Plaintiff Class shall be afforded forty-five (45) days in which to make any objections.

Plaintiffs' Motion for Attorney's Fees and Expenses, [Doc. # 239], is GRANTED in part and DENIED in part. The Court awards fees and expenses in favor of Plaintiffs and against Defendants in the amount of \$181,979.14, as delineated in more detail, below, subject to objections by the members of the Plaintiff Class.

Attorney	Hourly Rate	x	Billable Hours	=	Lodestar Fee
Rothert	\$325.00		289.1		\$93,957.50
Williamson	\$300.00		271.3		\$81,390.00

	\$150.00	51	\$7,650.00			
Doty	\$250.00	112.3	\$28,075.00			
Paralegal	\$30.00	5.9	\$177.00			
Total Lodestar	+	Expenses	x	Applicable Reduction	=	Total Award
\$211,249.50		\$2,843.60 ¹		0.80		\$171,274.48

\$2,843.60.

F N1. Plaintiffs claimed total expenses in the amount of \$4,033.07, which included \$2,973.68 in travel costs for Williamson. For the reasons discussed above, only three-fifths of Williamson's travel costs are recoverable, which results in a reduction of \$1,189.47. As a result, Plaintiffs' recoverable expenses total

All Citations

Not Reported in F.Supp.2d, 2013 WL 6920860