UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Marjorie Fish, Kathleen Gill, June Goemer, Christine Jazwinski, Lora Robinson, and Mary Clifford on behalf of themselves and a class of similarly situated persons,

Plaintiffs,

v.

St. Cloud State University, Minnesota State University System a/k/a Minnesota State Colleges and Universities a/k/a MnSCU, f/k/a MSUS, and the Inter Faculty Organization,

Defendants.

Civil No. 6:96-155 (DWF/RLE)

MEMORANDUM OPINION AND ORDER ON PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

Tammy Friederichs, Esq., Dorothy Buhr, Esq., and Edwin Sisam, Esq., Sisam & Watje, 7230 Metro Boulevard, Minneapolis, MN 55439; and Ronald Futterman, Esq., Futterman & Howard, 122 S. Michigan Avenue, Suite 1850, Chicago, IL 60603, appeared on behalf of Plaintiffs.

Gary Cunningham, Assistant Attorney General, Minnesota Office of the Attorney General, Suite 1100, 445 Minnesota Street, St. Paul, MN 55101, appeared on behalf of Defendants St. Cloud State University and Minnesota State University System.

Introduction

The above-entitled matter came on for hearing before the undersigned United States District Judge on June 7, 2001, pursuant to the Plaintiffs' motion for attorneys' fees and costs. Plaintiffs are a class of female faculty at St. Cloud State University. In 1996, Plaintiffs filed this action alleging gender discrimination in compensation, terms and conditions of employment, and promotion and tenure. In December of 2000, the parties entered into a settlement agreement which was approved by this Court on March 26, 2001. Plaintiffs are entitled to costs and

FILED JUN 12 2001
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reasonable attorneys' fees they incurred in prosecuting their successful claims. *See* 42 U.S.C. § 2000e-5(k); Minn. Stat. § 363.14, subd. 3. Plaintiffs have petitioned the Court for $226,367.31 in costs; $3,799,763.90 in attorneys' fees[1]; and an "enhancement" pursuant to *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). The State of Minnesota objects to the amount of fees and costs, alleging: (1) that the number of hours billed is inflated, reflecting duplicative, unnecessary, and unsuccessful efforts; (2) that the number of hours does not reflect the Plaintiffs' failure to succeed on certain claims and limited success on others; (3) that the hourly rates proffered by Plaintiffs are too high, in light of the quality and experience of Plaintiffs' counsel; and (4) that the costs billed are unreasonable.

Discussion

Parties who bring in an action brought pursuant to Title VII are entitled to reasonable attorneys' fees and costs for those claims on which they prevail. 42 U.S.C. § 2000e-5(k). Plaintiffs who obtain relief through settlement are considered prevailing parties for purposes of the award of attorneys' fees. *See Maher v. Gagne*, 448 U.S. 122, 129 (1980).

In calculating reasonable attorneys' fees, the Court begins by calculating the "lodestar"–the product of the number of hours reasonably expended on the litigation and the reasonable hourly rate at which those hours should be billed. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In addition, the Court may award an enhancement, over and above the lodestar amount, if the Plaintiffs can demonstrate exceptional success and exceptional quality of representation; the Court may not award an enhancement, however, solely on the basis of the

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[1] This figure reflects Plaintiffs' proffered objective current rates applied to all hours billed; the Court may, at its discretion, choose to apply either the objective current rate to all hours billed or objective historic rates plus interest. *See Cotter v. Bowen*, 879 F.2d 359, 365 (8th Cir. 1989).

quality of representation, or the complexity or novelty of the issues presented, because these factors will generally be reflected in the lodestar calculation. *See Blum v. Stenson*, 465 U.S. 886, 898-899 (1984).

1. The Lodestar

Plaintiffs have provided the Court with invoices reflecting the total number of hours expended by each attorney for Plaintiffs and by paralegals. Plaintiffs have also proffered proposed reasonable hourly rates for each attorney and for paralegal services. Those figures are summarized in the table below.

Plaintiff's Proposed Lodestar Analysis

	Hours	Hourly Rate	Billing
Edwin Sisam	2,942.65	$470	$1,383,046.00
Dorothy Buhr	2,999.30	$443	$1,328,690.00
Tammy Friederichs	2,447.00	$381	$932,307.00
Sisam Paralegals	776.30	$115	$89,275.00
Ronald Futterman	105.60	$470	$49,632.00
Joan Matlack	7.00	$329	$2,303.00
Laurie Wardell	39.60	$329	$13,028.40
Futterman Paralegals	12.90	$115	$1,483.50
Total			**$3,799,763.90**

Defendants allege that both the number of hours and the hourly rates proposed by Plaintiffs are inflated. First, Defendants allege that the number of hours billed should be reduced by at least 30% to account for duplication of effort and "over-lawyering." Second, Defendants allege that all hours billed by the Futterman firm (Futterman, Matlack, Wardell, and the Futterman

paralegals) should be eliminated. Finally, Defendants suggest reasonable hourly rates of $225 per hour for Mr. Sisam, $175 per hour for Ms. Buhr, and $175 per hour for Ms. Friederichs.[2]

In determining a reasonable hourly rate, the Court should look to the prevailing market rate in the community in which the litigation is situated, specifically at the prevailing rate for similar legal services performed by attorneys of comparable skill, experience, and reputation. *See McDonald v. Armontrout*, 860 F.2d 1456, 1458 (8th Cir. 1988). Plaintiffs have provided the Court with a report on the billing rate of Twin Cities law firms in class action litigation; the report, prepared by a management consultant named Robert Hayden, reflects survey answers of only seven area firms in November of 2000.[3] That survey indicates that, for first chair counsel, the hourly rates range from $240 to $525, with the mean at $374 and the median at $350. For second chair counsel, the survey indicates a range from $185 to $350, with a mean at $259 and a median at $250.[4]

Plaintiffs have requested a billing rate for Mr. Sisam and Mr. Futterman that is equal to the third-highest reported first chair rate in the Hayden class action report. For Ms. Buhr and Ms. Friederichs, they have requested a billing rate higher than any reported second chair rate, and, in the case of Ms. Buhr, higher than the mean first chair rate. For Ms. Wardell and

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[2] Defendants do not seem to challenge Plaintiffs' proposed rates for paralegal work. That rate, $115 per hour, falls between the 75th and 90th percentile on the Hayden general survey and would seem to be appropriate.

[3] Plaintiffs argue that the Court, if it awards fees based on the current rate, should add 4.34% to these figures to reflect the approximate yearly increase in attorneys' fee rates in the Twin Cities.

[4] Plaintiffs allege that all three attorneys from Sisam and Watje were considered "first chair." This seems a trifle excessive. Mr. Sisam has four years more experience than either Ms. Buhr or Ms. Friederichs. The Court concludes that Mr. Sisam should be considered first chair, and Ms. Burh and Ms. Friederichs are more appropriately considered second chair.

Ms. Matlack, they have requested a rate that is equal to the third-highest reported second chair rate in the Hayden class action report.

While the Court could ideally rely solely on a report of class action hourly rates, the Court notes that the Hayden class action report reflects only seven firms in the area and fails to account for years of experience. Mr. Sisam was admitted to practice in 1987, and Ms. Buhr and Ms. Friederichs were admitted in 1991. Given their rather limited experience, the Court would be remiss in not taking that factor into account.

The class action survey does indicate, however, that the rates commanded for class action litigation are higher than the average rates for general litigation (as reflected in the 2000 general Hayden report). The Court concludes that it should adopt rates at the upper limit of the general survey for attorneys with experience similar to these attorneys–rates which, incidentally, are near the median of the class action survey. Specifically, the Court concludes that a rate of $350 per hour for Mr. Sisam and Mr. Futterman[5] is appropriate, and a rate of $225 per hour for each of the other attorneys is appropriate.

To the extent that the Defendants allege that Plaintiffs' reported hours reflect redundancy of effort and use of attorneys for matters which could have been handled by paralegals, the Court finds that these somewhat reduced billing rates will compensate for any "over-lawyering" which might have occurred.

To the extent that the Plaintiffs allege that the complexity of the case should result in a higher hourly fee, the Court does not agree. Rather, the complexity of the case is reflected in the

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[5] Although Mr. Futterman was second chair, he has been an attorney since 1967; given the length of his experience, he should be compensated at a rate more akin to that commanded by first chair counsel.

reasonable number of hours to be billed. To that end, the Court finds that the number of hours billed is generally appropriate and reasonable given the complexity of the case.

The Court has thus revised Plaintiffs' proposed lodestar analysis to reflect more reasonable hourly rates.

The Court's Lodestar Analysis

	Hours	Hourly Rate	Billing
Edwin Sisam	2,942.65	$350	$1,029,927.50
Dorothy Buhr	2,999.30	$225	$674,842.50
Tammy Friederichs	2,447.00	$225	$550,575
Sisam Paralegals	776.30	$115	$89,275.00
Ronald Futterman	105.60	$350	$36,960
Joan Matlack	7.00	$225	$8,910
Laurie Wardell	39.60	$225	$1,290
Futterman Paralegals	12.90	$115	$1,483.50
Total			**$2,393,263.50**

2. Reduction for Limited Success

Defendants allege that Plaintiffs' proposed fees should also be reduced because Plaintiffs did not prevail on some of their claims and had only limited success on others.

First, with respect to discrimination in compensation, Defendants attempt to parse out individual theories which ultimately were not reflected in the settlement agreement. However, the Court does not parse out individual theories upon which a plaintiff prevails and those on which she does not; if a party prevails on a claim, the fee award will not be reduced because the plaintiff did not prevail on one or a few individual theories to support that claim. *See Casey v.*

City of Cabool, Mo., 12 F.3d 799, 806 (8th Cir. 1993); *Hendrickson v. Branstad*, 934 F.2d 158, 164 (8th Cir. 1991).

With respect to the claims relating to terms and conditions of employment (hostile work environment), Defendants note that Plaintiffs received no monetary compensation for hostile work environment. The monetary award was denoted "back pay," and, pursuant to the express terms of the settlement agreement, the $600,000 monetary settlement was distributed only to class members who "alleged a discriminatory pay claim." Settlement Agreement at 7. Plaintiffs did, however, obtain some injunctive relief with respect to the terms and conditions claim (specifically, some record keeping and reporting requirements regarding claims of harassment and some training on resolution of discrimination complaints). Thus, according to *Hensley*, 461 U.S. at 435, Plaintiffs are considered the prevailing party on their terms and conditions claim, even though they obtained only limited relief on this particular claim.

The promotion and tenure claim is more troubling. On the one hand, Plaintiffs did obtain some injunctive relief on the promotion and tenure claim similar to, though even more comprehensive than, the injunctive relief obtained for the harassment claim. Under *Hensley*, then, the Plaintiffs prevailed on this claim. However, only one individual promotion–for named plaintiff Lora Robinson–was secured by the settlement agreement. Fifty-five women with promotion or tenure claims were promoted during the pendency of the litigation. But Plaintiffs have offered absolutely no evidence that the promotions were prompted by the litigation so as to fall within the "catalyst" theory of success. Even if Plaintiffs had provided such evidence, it is unlikely that, given the current state of the law, those promotions could be attributed to the litigation for purposes of determining Plaintiffs' degree of success. *See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 121 S. Ct. 1835

(2001).[6] Moreover, those few women with promotion and tenure claims outstanding at the time of settlement had their claims dismissed without prejudice so that they could pursue those claims independently. Thus, while Plaintiffs may have technically prevailed on the merits, they cannot legitimately claim to have achieved complete success on the promotion and tenure claim.

Given the limited success of Plaintiffs on the promotion and tenure claim and the terms and conditions claim, coupled with the extent to which discovery on these claims was distinct from discovery on the pay claim, the Court finds that the lodestar amount should be reduced by some percentage to account for the Plaintiffs' limited success. Defendants suggest a 50% reduction in fees; that is excessive. The Court finds that a 15% reduction in fees adequately reflects the limited success Plaintiffs had on two claims without unduly undercutting the fees for the clear success on the pay claim. A fifteen percent reduction in the lodestar figure leaves Plaintiffs with reasonable attorneys' fees of $2,034,274.

3. Enhancement

> An upward adjustment to an attorney's lodestar hourly rate is permissible "in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986). "Because the lodestar amount may already compensate the applicant for exceptionally good service and results, however, the fee applicant must do more than establish outstanding service and results. The applicant also must establish that the quality of service rendered and the results obtained were superior to what one reasonably should expect in light of the hourly rates charged

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[6] The *Buckhannon* case held that a plaintiff could not rely on the catalyst theory to obtain prevailing party status. The case here is not directly on point. Plaintiffs may be considered the prevailing party simply on the basis of the injunctive relief awarded; the question becomes, once they have cleared that initial hurdle, whether any collateral success prompted by the litigation may be considered in determining the extent to which Plaintiffs got what they were asking for. Although the *Buckhannon* case is not directly on point, then, its logic would seem to suggest that the answer is "no," Plaintiffs counsel cannot be credited with the promotions which were not an explicit part of the settlement agreement.

> and the number of hours expended." *In re Apex Oil Co.*, 960 F.2d 728, 732 (8th Cir. 1992).

Forshee v. Waterloo Indus., 178 F.3d 527, 532 (8th Cir. 1999). The Court finds that the services rendered by Plaintiffs' counsel were of excellent quality, and the results obtained were certainly favorable to the Plaintiffs. However, the quality of services and degree of success are not "superior" in light of the number of hours expended and the hourly rate awarded. In other words, the Court has already compensated Plaintiffs' counsel for the quality of their work and the degree of their success by allowing more billable hours at a rate higher than that to which these attorneys might otherwise be entitled.

The Court further notes that there is no evidence of excessive delay on the part of the Defendants. To be sure, this litigation has been long and slow. But, given the nature of the allegations, the complexity of the litigation, and the court's own sometimes slow process, the delay is not unreasonable. Defendants have defended this case vigorously, as is their right; there is no evidence, however, that Defendants have dragged out the process through frivolous motion practice or obstructionist tactics.

The Court finds that this case is not one of those "rare" and "exceptional" cases in which a fee enhancement is justified.

4. Costs

Generally speaking, the Court finds the costs claimed by Plaintiffs to be reasonable. The Court will exclude three groups of costs, however. First, there is a March 31, 1996, expenditure in the amount of $1,468.75 to Gregg M. Corwin & Associates for "professional services regarding class action lawsuit"; without any identification of the substance of these services, the Court cannot conclude that the expenditure was necessary or reasonable. Second, there are

notations for expenditures,[7] totaling $854.58, marked "miscellaneous"; again, without further clarification as to the nature of these expenditures, the Court will not allow Plaintiffs to recover them. Finally, the Court disallows claims for expenses personally incurred by the named plaintiffs; the named plaintiffs each received compensation above and beyond that granted to the class members, and the Plaintiffs have cited no authority for awarding them personal costs as well. Thus, in sum, the Court disallows $18,494.95 of the requested $226,367.31 in costs; the awarded costs total $207,872.36.

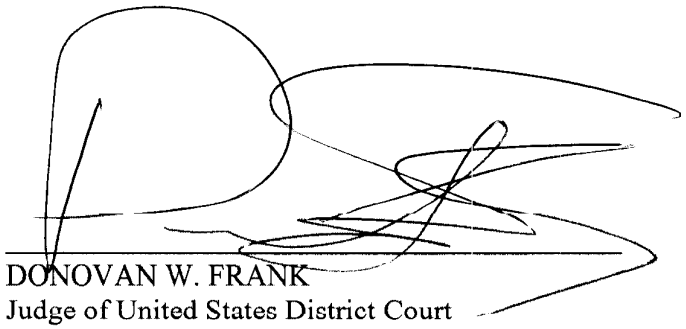
For the reasons stated, **IT IS HEREBY ORDERED**:

1. Plaintiffs' motion for attorneys' fees and costs (Doc. Nos. 224 and 232) is **GRANTED IN PART** and **DENIED IN PART** as follows:

a. Plaintiffs shall recover from Defendants the sum of $2,034,274.00 for attorneys' fees;

b. Plaintiffs shall recover from Defendants the sum of $207,872.36 for costs.

Dated: June 12, 2001



DONOVAN W. FRANK
Judge of United States District Court

[7] Those notations are on August 14, 1997 ($295.50); May 28, 1998 ($119.89); July 28, 1998 ($39.56); August 24, 1998 ($92.75); September 1, 1998 ($63.62); September 18, 1998 ($38.00); November 17, 1998 ($39.19); December 16, 1998 ($33.12); December 17, 1998 ($23.72); July 28, 1999 ($39.56); September 20, 1999 ($33.40); and January 5, 2000 ($36.27). The Court generally allowed "miscellaneous meeting expenses."