IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

SHAWANNA NELSON **PLAINTIFF**

v. **CASE NO.: 1:04-CV-0037 JMM-JWC**

PATRICIA TURENSKY **DEFENDANT**

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND COSTS

On June 1, 2004 Officer Turensky was added as a defendant in this lawsuit. On July 28, 2004 Judge Jerry W. Cavaneau entered an order to serve Officer Turensky (Docket Entry #12). Officer Turensky filed an answer on August 13, 2004. From August 13, 2004 until July 15, 2010 Officer Turensky vigorously defended this lawsuit.

Officer Turensky was deposed on September 7, 2006 and testified that she did not know why she was taking Plaintiff to the hospital on the afternoon of September 20, 2003. She confirmed this testimony at trial and further testified that she did not notice Plaintiff's pain during labor. She maintained that Arkansas Department of Corrections ("ADC") policy dictated shackles be placed on Plaintiff after Plaintiff was taken to a hospital room, changed into a gown, put into a hospital bed and was in the final stages of labor. The ADC policy prohibited shackles at this juncture.

Nonetheless, Officer Turensky denied liability and this matter was tried to a jury after extensive briefing to U.S. Magistrate Judge Jerry W. Cavaneau, U.S. District Judge James M.

Moody and the Eighth Circuit United States Court of Appeals. The jury found in favor of Plaintiff and that Defendant's action was unconstitutional.

Pursuant to 42 U.S.C. 1988 this Court may award attorneys to the prevailing party in a 42 U.S.C. § 1983 cause of action. As a result of six (6) years of litigation, the Plaintiff's attorneys have incurred fees and expenses as follows:

Paul J. James	$ 52,373.26
Cathleen V. Compton	$ 56,117.41
Elizabeth Alexander	$ 29,913.10
Holly Dickson	$ 6,106.93
TOTAL	$144,510.70

The foregoing fees and expenses are reasonable and the Plaintiff requests an order from the Court for payment of the fees and costs.

Although the jury awarded nominal damages, Ms. Nelson is entitled to a fully compensatory fee. In *Lowry ex rel. Crow v. Watson Chapel School Dist.*, 540 F.3d 752 (8th Cir. 2008), the defendants argued that the trial court should not have awarded attorney fees because plaintiffs had recovered only nominal damages for violation of their First Amendment rights. The Eighth Circuit rejected this argument:

> Although plaintiffs received only nominal damages, their victory was not merely technical. Plaintiffs obtained an injunction that benefitted all of the students in the school district, and the free speech right vindicated was not readily reducible to a sum of money.

Lowry, 540 F.3d at 765.

The same is true in this case. It is undisputed that Ms. Nelson's suit resulted in a policy change that benefits current and future ADC prisoners – the functional equivalent of an injunction. Moreover, her lawsuit – particularly her victory before the *en banc* Eighth Circuit -- brought widespread attention to the practice of shackling pregnant prisoners, which has since

been abandoned by a number of states and by the federal government. Ms. Nelson's suit "'vindicate[d] important civil and constitutional rights that cannot be valued solely in monetary terms.'" *Blanchard v. Bergeron,* 489 U.S. 87, 96 (1989), quoting *Riverside v. Rivera*, 477 U.S. 561, 574 (1986). And "[b]ecause damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief." *Lowry,* 540 F.3d at 764 (quoting *Riverside*, 477 U.S. at 575).

Nelson understands that, "'the degree of the plaintiff's overall success goes to the reasonableness of a fee award.'" *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (internal quotation omitted) and that the Supreme Court has held that in certain instances a prevailing civil rights plaintiff who receives only nominal damages might not be entitled to attorneys' fees. However, such cases are rare and are distinguishable from this case. In *Farrar*, the plaintiff asked for $17 million in compensatory damages and received only $1; indeed, the "litigation accomplished little beyond giving [him] 'the moral satisfaction of knowing that a federal court concluded that [his] rights had been violated' in some unspecified way." *Id.*, quoting *Hewitt v. Helms*, 482 U.S. 755, 762 (1987). Conversely, Shawanna Nelson's lawsuit resulted in the modification of specific correctional policies in Arkansas on the shackling of pregnant women. It also brought attention to this practice, which has since been abandoned by a number of states and by the federal government. Ms. Nelson's suit "'vindicate[d] important civil and constitutional rights that cannot be valued solely in monetary terms.'" *Blanchard v. Bergeron,* 489 U.S. 87, 96 (1989), quoting *Riverside v. Rivera*, 477 U.S. 561, 574 (1986).

A central purpose of Shawanna Nelson's lawsuit was to bring about changes in policy and reform the law on this issue. This distinguishes this case starkly from *Farrar,* where the recovery of compensatory damages was the primary motive of the litigation. In that case, the

Supreme Court held that "'*Where recovery of private damages is the purpose of ... civil rights litigation*, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.'" *Farrar*, 606 U.S. at 114, quoting *Riverside v. Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring in judgment) (emphasis added). However, where a purpose other than the recovery of private damages predominates, "the degree of the plaintiff's overall success" cannot be measured by the amount of damages alone. In this case, "the vindication of the asserted...right...ha[s] served a public interest, supporting the amount of the fees [to be] awarded." *Riverside,* 477 U.S. at 586 (Powell, J., concurring in judgment). *See also, Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (noting that "in complex civil rights litigation involving...challenges to institutional practices...the range of possible success is vast"); *accord, Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 790 (1989) (holding that "the *degree* of the plaintiff's success in relation to other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee" and noting that Congress intended fees to be awarded when a civil rights plaintiff "has prevailed on an important matter in the course of litigation.")

The law of the Eighth Circuit distinguishes between plaintiffs who receive nominal damages because of a failure to prove their entitlement to compensation, and plaintiffs who undertake litigation primarily for non-pecuniary purposes. "In *Farrar,* private damages were the purpose of the litigation.... Here, in contrast, the purpose of the litigation was not private damages." *Lowry ex rel. Crow v. Watson Chapel School Dist.*, 540 F.3d 752, 764 (8th Cir. 2008). Thus, where a plaintiff's civil rights suit has brought about substantial reforms in the policies and practices of the defendants, no reasonable inquiry into the degree of success can look to the amount of damages alone. Indeed, "[b]ecause damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil

rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief." *Id.; cf. Warnock v. Archer,* 380 F.3d 1076, 1084 (8th Cir. 2004) *Loggins v. Delo*, 999 F.2d 364, 369 (8th Cir. 1993).

The post-*Farrar* jurisprudence of the Eighth Circuit has incorporated the three factors that Justice O'Connor weighed in her *Farrar* concurrence, 506 U.S. at 121, to determine whether a civil rights plaintiff has achieved a merely "technical" victory unworthy of a fee award. These factors are "1) the difference between the amount recovered and the damages sought; 2) the significance of the legal issue on which the plaintiff prevailed; and 3) any public goal or purpose the litigation might have served." *Jones v. Lockhart,* 29 F.3d 422, 424 (8th Cir. 1994). Employing these factors, the Court of Appeals has found fee awards appropriate in civil rights cases even where damages were nominal. For example, in *Jones,* the Eighth Circuit found a fee award appropriate even though the plaintiff recovered only $2, because of the "important public purpose" of the litigation and because "vindication of the constitutional right to be free from cruel and unusual punishment is a significant legal issue in contrast to the injury to a business interest alleged in *Farrar.*" *Id.* Likewise, in *Murray v. City of Onawa,* the Court of Appeals found a fee award appropriate where the plaintiff recovered only $1 because "allegations of police abuse and misconduct are serious legal issues" and because "a clear public policy is served by this case." 323 F.3d 616, 619 (8th Cir. 2003). Like these cases, Shawanna Nelson's suit was brought primarily to reform public policy and influence the law on an important issue. The suit achieved this purpose successfully. Accordingly, this court should, like the Supreme Court, "reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *Riverside,* 477 U.S. at 574 (noting that "the amount of damages a plaintiff recovers is...only one of many factors that a court should consider in calculating an award of attorney's fees").

Defendant may argue that the Prison Litigation Reform Act ("PLRA") restriction on fees set forth in 42 U.S.C. § 1997(e)(d) applies to this case. It does not. This lawsuit was initially filed while Plaintiff Shawanna Nelson was still incarcerated. However, the lawsuit against Defendant Turensky was not filed until June 1, 2004 (Docket Entry #10). U.S. Magistrate Judge Jerry W. Cavaneau did not allow Turensky to be served until July 28, 2004 (Docket Entry #12). Turensky did not answer until August 13, 2004. Shawanna Nelson was released from prison on June 23, 2004.

On February 7, 2005, Officer Turensky filed an answer to an amended complaint (Docket Entry #19). On April 13, 2010, in order to clarify the PLRA fee restriction issue, Plaintiff filed a Motion for Leave of Court to file an amended complaint (Docket Entry #94). In her Motion, Plaintiff specifically alleged that the PLRA did not apply because Plaintiff was no longer a prisoner. Officer Turensky did not object to Plaintiff's Motion and an Order granting Plaintiff's Motion for Leave was granted (Docket Entry #15).

A Second Amended Complaint was then filed on May 5, 2010 in which Plaintiff once again alleged non applicability of the PLRA. Subsequently, this lawsuit was tried July 14th and 15th, 2010. This was over six (6) years after Plaintiff Shawanna Nelson was released from prison.

Plaintiff's June 23, 2004 release from prison occurred prior to U.S. Magistrate Jerry W. Cavaneau's July 28, 2004 Order that allowed Officer Turensky to be made a party. Officer Turensky did not file a pleading in this case until August 8, 2009. The complaint was amended two times after Plaintiff's release.

Because Plaintiff Shawanna Nelson was released from prison when Judge Cavaneau allowed Officer Turensky to be recognized as a defendant in this lawsuit, the "absurdity exception" to the plain meaning rule should apply to the interpretation of 42 U.S.C. § 1997(e)(d)

in Plaintiff's successful, non-prisoner civil rights action. See *Morris v. Eversley* 343 F.Supp. 2d 234 (S.D.N.Y. 2004).

If Defendants argue U.S. Magistrate Judge Jerry W. Cavaneau's July 28, 2004 order allowing Officer Turensky to be a party has no effect on the applicability of the fee limiting restrictions on the PLRA, Plaintiff contends that the post release amendments take Plaintiff out of the PLRA for purposes of the litigation. Paragraph 3 of Plaintiff's Motion for Leave provides specifically as follows:

> Circumstances have changed since April 15, 2004. The claims against Correctional Medical Services, its employees and the Arkansas Department of Correction's supervisor have been dismissed and Plaintiff is no longer incarcerated as set forth in the Prison Litigation Reform Act 42 USC 1997(e)(a).
>
> (Docket Entry #94).

The Court granted Plaintiff's Motion (Docket Entry #95) and the Amended Complaint was filed on May 5, 2010 (Docket Entry #96). Plaintiff alleged in her Amended Complaint that she was a Pulaski County, Arkansas resident and no longer a prisoner (Paragraph 3, Docket Entry #96). Defendant Turensky admitted Plaintiff was formerly incarcerated in the McPherson Unit (Docket Entry #98). She also alleged in Paragraph 10 of the Amended Complaint (Docket Entry #96) as follows:

> Because she is no longer a prisoner as defined in 42 U.S.C. 1997, the Prison Litigation Reform Act no longer applies to her claims, or to her damages or attorneys' fees.

Based on the foregoing and the previous post release amendments, Plaintiff should not be found to be a prisoner for a deprivation that occurred while she was a patient in the Newport Hospital. None of the previous conditions of confinement allegations that occurred at the McPherson Unit remained in this lawsuit when the Second Amended Complaint was filed.

While the Eighth Circuit Court of Appeals has not ruled on the issue of the effect of a post release amended complaint as to applicability of the PLRA, there is adequate authority from other jurisdictions. *Barnes v. Briley,* 420 F.3d 673 (7th Cir. 2005); *Minix v. Pazera,* 2007 WL 4233455, *2-3 (N.D. Ind., Nov. 28, 2007) (holding that filing of amended complaint after release was equivalent to filing a new complaint, and ex-prisoner need not have met the exhaustion requirement; amendment reasserted a federal claim that had been dismissed); *Morris v. Eversley supra,* 343 F.Supp. 2d 234 (S.D.N.Y. 2004); *Gibson v. Commissioner of Mental Health,* 2006 WL 1234971, *6 (S.D.N.Y., May 8, 2006) (rejecting as "victory of form over substance" dismissal for nonpayment of filing fee under PLRA where the prisoner had been released and his amended complaint was offered when he was no longer a prisoner), relief from judgment denied, 2006 WL 2192865 (S.D.N.Y., Aug. 2, 2006); *Prendergast v. Janecka,* 2001 WL 793251, *1 (E.D.Pa., July 10, 2001) (holding that the PLRA ceases to apply when a post-release amended complaint is filed); *Jackson v. Traquina,* ____ F.Supp.2d _____, 2009 WL 3296677, *2 (E.D.Cal. 2009) (treating amended complaint as commencing action for exhaustion purposes because amendment drastically changed action, from punitive class action for injunction to action for plaintiff's own damages); *see also Segalow v. County of Bucks,* 2004 WL 1427137, *1 (E.D.Pa., June 24, 2004).

In regards to the legal effect when a Plaintiff voluntarily amends a complaint, the Eighth Circuit has held as follows:

> It is well-established that an amended complaint supercedes an original complaint and renders the original complaint without legal effect. *See Washer v. Bullitt County,* 110 U.S. 558, 562, 4 S.Ct. 249, 28 L.Ed. 249 (1984). *Atlas Van Lines v. Karnes,* 209 F.3d 1064, 1067 (8th Cir. 2000)

Also see Wireless Telephone Federal Cost Recovery Fees Litigation, 396 F.3d 922 (8th Cir. 2005).

CONCLUSION

Shawanna Nelson filed this lawsuit and the ADC policy and type of shackles used for pregnant inmates were modified. The ADC policies existing at the time also prohibited use of shackles on inmates in the final stages of delivery. Plaintiff's lawsuit was difficult and brought attention to the practice of guards shackling inmates in the final stages of labor. Her lawsuit was not a frivolous lawsuit and took six (6) years to pursue this issue.

Officer Turensky was not made a party to this suit until after plaintiff's release from prison. Plaintiff amended her complaint several times and obtained leave from the court to do so each time.

The cause pursued by Shawanna Nelson was just. The fees requested for six (6) years to pursue this cause are fair and reasonable. Plaintiff respectfully requests that the fees presented be awarded pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing was served this 13th day of August, 2010, via electronic mail to:

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