IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

FILED
DEC 03 2004
ARLEMB. COYLE, CLERK
BY [signature] Deputy

WILLIE RUSSELL, ET AL

PLAINTIFFS

VS Case No. 1:02CV261-D-D

ROBERT L. JOHNSON, ET AL DEFENDANTS

REBUTTAL DECLARATION OF STEPHEN F. HANLON REGARDING PLAINTIFFS' MOTION FOR ATTORNEYS FEES AND EXPENSES

Stephen F. Hanlon, pursuant to 28 U.S.C. § 1746, makes the following rebuttal declaration in support of Plaintiffs' motion for Attorneys Fees and Expenses herein and in opposition to the State Defendants' Memorandum in Opposition thereto:

1. I previously filed a Declaration in this case in support of Plaintiffs' motion for award of attorneys fees and expenses, dated July 17, 2003.

2. I have reviewed the State defendants' Memorandum in Opposition to Plaintiffs' Motion for Attorneys Fees and Expenses and submit this rebuttal declaration.

3. I have represented many prevailing plaintiffs in civil rights litigation in the federal district courts of this country for the past 25 years. During that period of time, I have routinely sought and obtained compensation by the district courts of this country for time expended on attorneys fee applications. The Fifth Circuit has squarely held that "... fees-on-fees are 'directly and reasonably incurred in proving an actual violation of plaintiff's rights and therefore

recoverable under section 1997e(d)." Volk v. Gonzalez, 262 F.3d, 528, 535 (5th Cir. 2001). In this particular case, remarkably little work (approximately 27.3 hours) is being submitted for time spent in preparation of the fee application, given the complexity of the work involved.

4. With respect to Defendants' complaint that several of our time entries in the time submitted in Plaintiffs' motion for attorneys fees and expenses in this case are lumped or bunched, as suggested by the Court in ACLU v. Barnes, 168 F. 3d, 423, 429 (11 Cir. 1999), I have reviewed our time records, our notes, the case file and correspondence and state that the following times are good faith estimates for the following time entries:

Stephen F. Hanlon

7/11/02	Confer with Winter and McDuff regarding same	.5
7/16/02	Confer with Winter regarding same	.3
8/13/02	Review memo regarding same	.5
10/22/02	Conference call hearing	.4
2/02/03	Conference with J. Balsamo	1.0
2/03/03	Conference with P. Winter regarding same	.3
4/07/03	Conference with P. Winter regarding same	.5

Heather E. Caramello

2/10/03	Prepare trial documents for trip to Mississippi	1.0
	Travel to Clarksdale, Mississippi	6.0
	Balance of time for trial preparation as described in time entry	5.0
2/11/03	Participate in tour of Unit 32-C, Parchman Death Row, including interviews with inmates to determine whether and to what extent conditions had changed	7.0

	Balance of time in trial preparation as described	7.2
2/12/03	Entire time spent in trial preparation as described therein	14.5
2/13/03	Entire time spent in trial preparation as described therein	14.5
2/14/03	Prepare additional exhibits and papers for trial	2.0

5. In my 25 years of work in representing prevailing parties in attorneys fees petitions in civil rights cases, I have occasionally faced the claim by the losing party's lawyer that the plaintiff's fees should be reduced because the plaintiff achieved only a partial or limited success with regard to the relief sought in the suit. A cursory examination of Unit 32-C before the institution of this lawsuit and after the conclusion of this lawsuit would immediately reveal that the plaintiffs achieved overwhelming success in this case and that this case is uniquely unsuited to the narrowly crafted partial success limitation on claims for civil rights attorneys fees..

6. In the Fifth Circuit's opinion in this case, the plaintiffs prevailed on seven of the ten injunctions scrutinized by the Fifth Circuit, including all of the major claims in this case. Plaintiffs did not prevail on three unquestionably minor injunctions: (1) reducing the general preventive maintenance schedule and program to writing; (2) returning inmates' clothing without foul smell; and (3) requiring the inmates to wear sneakers instead of flip flops while exercising and providing inmates with a shaded area for exercise and access to water. Hensley v. Eckerhard, 461 U.S. 424 (1983) sets out the "proper method of calculating attorneys' fees when the plaintiff prevailed on less than all claims." Id. Under Hensley "[w] here all theories derived from a common core of operative facts, the focus should be on the significance of overall results as a function of total reasonable hours … [and] [i] it is improper to make the reduction based on

a simple ratio of successful issues to issues raised." In this case, all theories derived from a common core of operative facts and therefore the Court's focus should be on the significance of the overall results, and it would be improper to make a reduction based on a simple ratio of successful issues raised. The simple fact of the matter is that this Court found pervasive Eighth Amendment violations in Unit 32-C, and all of the major injunctive relief ordered by this Court was upheld on appeal. The Rendon case cited by State Defendants to support its partial success argument here is wholly inapposite. In that case, the court reduced a fee award where "counsel had expended considerable time and effort on plaintiffs' (unsuccessful) claims of discriminatory hiring and termination practices." As this Court knows, that was hardly the case on the three minor unsuccessful claims in this case.

7. The issues involved in the trial and Fifth Circuit appeal in this case are some of the most complex issues in any litigation in which I have been involved in my 38 years of practicing law. I cannot imagine Ms. Winter working on the brief and preparing for the oral argument in less time than she did here (124.50 hours and 49.60 hours respectively). In point of fact, three lawyers from my law firm and myself read the briefs and conducted a moot court for Ms. Winter in preparation for oral argument, and none of that time is being submitted in this fee petition. All of the work Ms. Winter did on the post trial brief, as well as the work that Ms. Fettig did on the post-trial brief, as well as all of the work by Chesterfield Smith Fellow Heather Caramello, was absolutely essential. It is remarkable that Ms. Winter was able to draft the complaint in under 20 hours. The five and a half hours that Ms. Winter spent drafting a memo to the Commissioner was the foundation for this Court's and the Fifth Circuit's finding that plaintiffs have exhausted administrative remedies in this case. A cursory review of the Fifth Circuit's opinion reveals just how important this document was in that court's extensive analysis

of the exhaustion issue. The time spent by Ms. Fettig in writing affidavits in this case was absolutely essential to the preliminary injunctive relief initially sought in this case. The same is true of the 15.6 hours that Ms. Fettig spent reviewing Mr. Russell's file.

8. In my 38 years of practicing law, I have never seen a more efficiently prepared and tried case. Each attorney had distinct responsibilities and made distinct contributions to the result in this case. This case was managed with remarkable efficiency. Not a single deposition was taken. This is the leanest case, in terms of the time spent by the attorneys, that I have ever participated in, especially considering of the complexity of the issues and the importance of the case to the clients.

9. The capped PLRA rates that we are seeking for Ms. Winter and myself in this case, namely $169.50 per hour, are 50 cents an hour less than the rates that Holland & Knight routinely bills for **first year associates** in our Atlanta office. Given Ms. Winters' years of experience and her degree of expertise, a lawyer with similar experience and expertise in the Holland & Knight offices in Washington, D.C. would be billed out to paying clients at a rate of $400 an hour. My current rate for paying clients is $440 per hour. Thus, the limitations imposed by the Prison Litigation Reform Act upon the rates that this Court can award Plaintiffs will result in an enormous windfall for the Defendants.

10. With respect to the August 6, 2002 expense of $5, 352.59 which we have submitted for Plaintiffs' environmental expert James J. Balsamo, Jr.'s expenses for an inspection tour of Parchman and facility in Mississippi, we are hereby withdrawing $5,000 of that amount, which was for expert fees and not expenses, and was inadvertently included in the expenses submitted for reimbursement. Otherwise, I believe the total expert expenses submitted for reimbursement, once this $5,000 is retracted, is $8,802, which would cover four experts, each

making two trips to Mississippi, which is a little more than $1100 per trip, which seems entirely reasonable to me.

11. With respect to the matter of appropriateness of reimbursement of Plaintiffs' litigation expenses, the law could not be clearer. *See* Dowdell v. City of Apopka, 698 F.2d 1181, 1192 (11th Cir. 1983):

- ("[A]ll reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under section 1988.". Id. at 1192.
- "As is true in other applications of section 1988, the standard of reasonableness is to be given a liberal interpretation" (citing Gates v. Collier, 616 F.2d at 1275). Id. at 1192.
- "We reject any interpretation of 'reasonable costs' which would penalize attorneys for undertaking civil rights litigation." Id. at 1191.
- "Litigation costs are likely to escalate with inflation and the increasing elaboration of civil rights law. They must not be allowed to whittle away at the fees of the civil right lawyer." Id. at 1191.
- "We hold that, with the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of the litigation, or as an aspect of settlement of the case, may be taxed as costs under section 1988." Id. at 1192.
- "Civil rights litigants may not be charged with selecting the nearest and cheapest attorney. Neither may civil rights attorneys be charged with being financial efficiency experts." Id. at 1192.

- "Travel, telephone and postage expenses are not unusual. All of them have been awarded in the decisions of the courts of this circuit." Id. at 1192.

12. The rationale for an expansive interpretation of § 1988 to include the recovery of out-of-pocket litigation expenses that are not a part of ordinary office overhead was well stated by Judge Posner in Henry v. Webermeier:

> The Act [section 1988] seeks to shift the cost of the winning party's lawyer (in cases within the intended scope of the Act) to the losing party; and that cost includes the out-of-pocket expenses for which lawyers normally bill their clients separately, as well as fees for lawyer effort. The Act would therefore fall short of its goal if it excluded those expenses. What is more, the line between fees and expenses is arbitrary. A lawyer's hourly billing rate includes many overhead expenses such as local telephone calls. It is impossible to believe that Congress would have wanted prevailing parties to get back their lawyers' local telephone expenses (invariably included in the hourly fee) but not their long-distance expenses (invariably billed separately); or to get back their secretarial expenses – which are included in the overhead and therefore billed as part of the lawyer's hourly rate rather than separately – but not the expenses of word processing, often billed separately to the client.

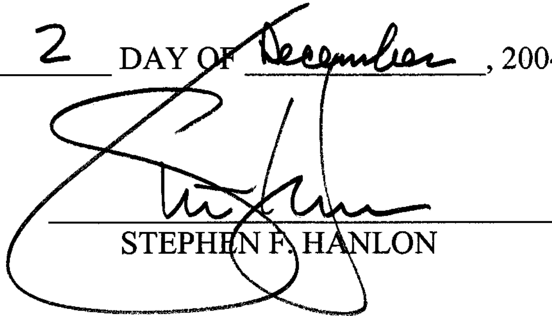
738 F. 2d 188, 192 (7th Cir. 1984).

13. Each of the expenses for which Plaintiffs seek recovery was directly incurred in furtherance of this lawsuit and is of the type that is routinely incurred by counsel in representing their clients.

14. Travel time between the location of counsel and the litigation site is fully recoverable. As Judge Posner has explained, "lawyers invariably charge their clients for travel time" because "when a lawyer travels for one client he incurs an opportunity cost that is equal to the fee he would have charged that or another client if he had not been traveling." Henry v. Webermeier, 930 F. Supp. 1492 (M.D. Ala. 1996); Hall v. Lowder, 263 F. Supp. 2d 1352 (M.D. Ala. 2003).

15. The Defendants' argument that the Plaintiffs are seeking compensation for excessive or otherwise unnecessary hours is perhaps best analyzed using a test set out by Judge Forrester in the seminal attorneys' fees case in the Eleventh Circuit, Norman v. Housing Authority of the City of Montgomery, 836. F.2d 1292 (1988). A lawyer should not be compensated for "hours spent on activities for which he would not bill a client of means who was seriously intent on vindicating similar rights. (Id. at 1301.) In the private practice of law, we frequently encounter a client of means seriously intent on vindicating similar rights. We call these cases "bet the company" cases. This case was a "bet the company" case for our clients. The appalling conditions to which they were being subjected prior to the institution of this law suit provided that the factual predicate for a claim in which they had an enormous stake. With the minor adjustments made in this fees claim by the Declarations of myself and Ms. Winter submitted herewith, the Court can be assured that we are seeking compensation in this case only for hours spent on activities which a lawyer in the private practice would bill to a client of means who was seriously intent on vindicating similar rights.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON THIS 2 DAY OF December, 2004.



STEPHEN F. HANLON

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