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United States District Court, N.D. Illinois.

Denise WATSON, et al., Plaintiffs,
v.
Michael SHEAHAN, et al., Defendants.

No. 94 C 6891. | Sept. 30, 1998.

Opinion

MEMORANDUM OPINION AND ORDER

BUCKLO, J.

***1** This case was brought under 42 U.S.C. § 1983 on behalf of a class of individuals who were allegedly detained for an unconstitutional period of time after their legal release from custody.[1] The parties settled the case and defendants agreed to pay each class claimant $90 and to pay plaintiffs' attorney's fees and costs, including costs of settlement. Plaintiffs and their attorney, Mr. Morrissey, initially petitioned for $1,070,955 in attorney's fees and $80,463.76 in costs. They subsequently filed an additional fee petition seeking additional attorney's fees of $106,601.25 and costs of $15,130.54. Both petitions are consolidated in this decision. For the reasons set forth below, I award plaintiffs $344,094.95 in attorney's fees and $92,196.91 in costs.

[1] Plaintiffs also attached a state law claim for false imprisonment.

Attorney's Fees

Under 42 U.S.C. § 1988, the prevailing party in a Section 1983 suit may obtain reasonable attorney's fees as determined by the court. Mr. Morrissey, however, claims that Section 1988 is not applicable since the parties settled this case by creating a common fund whereby all eligible class members can recover $90 each. He argues that with the creation of a common fund, he is entitled to attorney's fees under common fund principles rather than the applicable fee-shifting statute.

To support his position, Mr. Morrissey argues that "when a settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorney's fees, equitable fund principles must govern the court's award of the attorney's fees." *Florin v. Nationsbank of Georgia, N.A.,* 34 F.3d 560, 563 (7th Cir.1994) (quoting *Skelton v. General Motors Corp.,* 860 F.2d 250, 256 (7th Cir.1988), *cert. denied,* 493 U.S. 810, 110 S.Ct. 53, 107 L.Ed.2d 22 (1989)). In both *Florin* and *Skelton,* a settlement fund was created whereby the defendants deposited the total amount of the settlement. *Florin,* 34 F.3d at 562 (depositing $15,448,304.66 in fund to settle ERISA claims); *Skelton,* 860 F.2d at 251 (depositing $17 million in fund to settle claims under the Magnuson–Moss Act). Further, the settlement agreement specifically provided that the defendants were relieved from potential liability for statutory attorney's fees and that class counsel could instead, petition the court for an award of fees from the settlement fund. *Florin,* 34 F.3d at 564; *Skelton,* 860 F.2d at 251. Both courts held that common fund principles applied because the parties specifically agreed to waive liability for attorney's fees under the fee-shifting statute and to allow the defendants to petition for attorney's fees from the common fund. *Florin,* 34 F.3d at 563–64; *Skelton,* 860 F.2d at 254–55.

Florin and *Skelton* are inapplicable to this case because there is no common fund upon which to draw. The parties did not agree to establish a common fund and set aside a total settlement figure to be divided by the class members but rather, specified that each member was to receive $90. In addition, the settlement agreement did not relieve the defendants from their statutory liability for fees under Section 1988 nor did it specifically contemplate the payment of attorney's fees out of a common fund. In fact, the parties, in their joint motion for preliminary approval of the class settlement agreement, disputed how to determine attorney's fees. The defendants agreed to pay attorney's fees, but maintained that all fees were to be calculated on the basis of Section 1988. Plaintiffs preserved the right to request attorney's fees under a common fund theory, but defendants did not agree to pay fees under that theory.

***2** In addition,

> Supreme Court decisions suggest ... that common fund recoveries should not be allowed in Title VII and civil rights cases, because ... allowing recoveries from a common-fund would place "an undesirable emphasis ... on the importance and recovery of damages." ... This focus on damages would contradict Congress's purpose in providing for fee-shifting in these cases, which was

> "to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive and declaratory relief."

Evans v. City of Evanston, 941 F.2d 473, 479 (7th Cir.1991) (quoting *Blanchard v. Bergeron,* 489 U.S. 87, 95, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989)), *cert. denied,* 505 U.S. 1219 (1992).

Finally, applying common fund principles when none was agreed to in the settlement agreement would work to the detriment of the plaintiffs. Mr. Morrissey asks the court to create a common fund based on his estimate of the size of the common fund ($3,569,850), calculated by multiplying the estimated sized of the class (39,665) by $90. Then, he requests 30% of that fund amount, totaling over $1 million. That $1 million would necessarily reduce the recovery of each plaintiff from $90 to something over $60. On the other hand, if defendants pay each class member $90 and pay costs and attorney's fees under Section 1988, there will be no reduction in the plaintiffs' award. The defendants will pay plaintiffs' attorney's fees and costs on top of the $90 that they are already required to pay each class member. This form of payment will ensure that the plaintiffs receive the full benefits of the class settlement while still awarding plaintiffs' attorney fees and costs for his time and effort in pursuing this litigation.

For all of the above reasons, common fund principles should not be applied to this case. Plaintiffs' attorney's fees and costs are sufficiently compensated under Section 1988. Section 1988 provides that in a federal civil rights action, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. A reasonable attorney's fee is calculated by multiplying the number of hours reasonably expended on the litigation times the prevailing hourly market rate in the relevant community. *Blum v. Stenson,* 465 U.S. 886, 888, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Enhancements for risk are not permitted under fee-shifting statutes such as Section 1988. *Barrow v. Falck,* 977 F.2d 1100, 1105 (7th Cir.1992) (citing *City of Burlington v. Dague,* 505 U.S. 557, 566–67, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992)).

A. Initial Fee Petition

Plaintiffs claim that the "lodestar"[2] for this case is $258,015.75. Defendants present over 330 objections to the underlying calculation and claim that the amount should be $156,206.80. The objections are repetitive and can be grouped into eight categories.

[2] Plaintiffs' reference to a lodestar stems from their argument that the basic fee (hours times reasonable hourly rate) should be enhanced. As noted, Section 1988 does not permit enhancement.

1. Mr. Morrissey's Hourly Rate

***3** Defendants object to Mr. Morrissey's hourly rate of $235. Mr. Morrissey's hourly rate is supported by affidavits, and was upheld as a reasonable rate in *Hvorcik v. Sheahan,* 92 C 7329, at 5 (N.D.Ill. Oct. 30, 1997) (Shadur, J.) (Fee Petition Reply Brief, Ex. FF). Further, Mr. Morrissey can receive $235 per hour even though a significant amount of work was performed at his former rate of $200. The Seventh Circuit held that calculating fee awards based on the attorney's current rate is a reasonable method to compensate attorneys for delays in payment. *Smith v. Village of Maywood,* 17 F.3d 219, 221 (7th Cir.1994).

Defendants also claim that Mr. Morrissey's rate was capped subsequent to the enactment of the Prisoner Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(d)(3). The PLRA limits counsel's attorney's fees in an "action brought by a prisoner who is confined to any jail, prison, or other correctional facility." *Id.* § 1997e(d)(1). This case, however, involves claims by persons who were legally released from the above correctional facilities but were detained over 10 hours before being physically released from custody. Thus, the PLRA is not applicable to this case.

2. Two Attorneys Appeared on a Matter

Defendants, without citing any authority, object to two of plaintiffs' attorneys being present at two depositions and two court appearances. The Seventh Circuit has agreed that it is reasonable in a lengthy complex litigation, with substantial discovery, to have more than one attorney attend a court appearance or a deposition. *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.,* 63 F.3d 516, 525 (7th Cir.1995), *cert. denied,* 516 U.S. 1115, 116 S.Ct. 916, 133 L.Ed.2d 846 (1996). Therefore, four instances of billing by two attorneys is not unreasonable and excessive.

3. Delegating Work to Associates

Defendants claim that Mr. Morrissey should have delegated numerous court appearances and depositions to

an associate with a lower hourly billing rate. I disagree. *Compare Bankston v. State of Illinois,* 60 F.3d 1249, 1256 (7th Cir.1995) (refusing to reduce an attorney's rate based on the rationale that in a large Chicago law firm, associates with lower rates would have done the work).

4. Travel Time

Defendants claim that class counsel is not entitled to compensation for travel time because the travel times were excessive and exceeded the time spent on the purpose of the trip. The Seventh Circuit, however, allows compensation for travel time on the grounds that travel time represents an opportunity-cost to the attorney. *In re Maurice,* 69 F.3d 830, 834 (7th Cir.1995).

5. Clerical/Ministerial Work

Clerical or ministerial duties, such as summarizing depositions, filing and serving complaints, preparing subpoenas, and filing motions and other court documents, that can be performed by clerical staff, should not be part of the attorney's fee. *See, e.g., Connolly v. National Sch. Bus Serv., Inc.,* 992 F.Supp. 1032, 1038 (N.D.Ill.1998) (eliminating time for tasks performed by an attorney that should have been completed by clerical staff); *Webb v. James,* 967 F.Supp. 320, 324 (N.D.Ill.1997) (same). The objectionable fees identified by the defendants are for clerical tasks and thus, the fees are reduced by $1,743.50.

6. Work Allegedly Related to Other Litigation

***4** Defendants claim that a number of entries related to other lawsuits brought by class counsel against defendants should not be charged to this litigation. With the exception of objection 83,[3] most of the entries are directly related to this case in that: (1) they reflect counsel's responses to inquiries by plaintiffs in other suits on whether or not they were part of the class action; (2) they involved conversations with Sheriff Sheahan's attorney; and (3) they included the review of a class member's records. The only costs that are not legitimately part of this litigation are the $435.75 relating to work on the strip-search of female members of the class.[4] A separate lawsuit was brought on that issue and those fees must be recovered, if appropriate, in that litigation.

[3] Plaintiffs' counsel withdraws this fee of $50.

[4] Objections 75–76 and 311–12.

7. Fees Related to Unsuccessful Motions

Defendants claim that plaintiffs are not entitled to fees related to their unsuccessful motions for summary judgment, for issue preclusion, and to join Charles McGuire as plaintiff. "[T]he court should subtract time for losing claims, but a losing argument in support of a successful claim for relief is fully compensable." *Kurowski v. Krajewski,* 848 F.2d 767, 776 (7th Cir.) (construing *Hensley v. Eckerhart,* 461 U.S. 424, 433–35, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)), *cert. denied,* 488 U.S. 926 (1988). "A court's focus should not be limited to the success/failure of each of the attorney's actions [, but] ... should be upon whether those actions were reasonable." *People Who Care v. Rockford Bd. of Educ.,* 90 F.3d 1307, 1314 (7th Cir.1996).

In this case, plaintiffs settled their claims for $90 even though they originally sought over $80,000 each. (*See* Second Amended Complaint). Before settling the claims, plaintiffs filed motions for summary judgment and issue preclusion. Although the motions were unsuccessful, they were not unreasonable in that they may have sparked settlement negotiations. The hours spent on the summary judgment motions, however, were excessive. Plaintiffs used two attorneys and one law clerk to spend 351.47 hours (or $50,339.20) on summary judgment litigation that was not wholly successful. While plaintiffs successfully defended against the defendants' motion for summary judgment, plaintiffs were unsuccessful in their own motion for summary judgment. Given the excessive hours spent on an unsuccessful summary judgment motion and the limited settlement recovery ($90 rather than the requested $80,000), I reduce the hours reimbursed for each attorney/clerk by 25 percent. *See, e.g., Ruehman v. Village of Palos Park,* No. 91 C 8355, 1997 WL 187320, at *4 (N.D.Ill. Apr. 11, 1997) (finding 363.1 hours spent by four attorneys on partially successful summary judgment litigation excessive and reducing the hours for each attorney by 25%). Plaintiffs' attorney's fees are accordingly reduced by $12,584.80.

In addition, plaintiffs' attorneys' fees for the motion to add Charles McGuire to this litigation are not compensable. Plaintiffs were essentially attempting to add another claim to this litigation, involving plaintiffs who were incarcerated and were subjected to extended detention. The court denied the addition of this claim; therefore, plaintiffs are not a prevailing party on any claim involving incarceration and extended detention. Thus, $1,875.50 of fees associated with Charles McGuire are denied.

8. Other Fees

***5** Defendants contest fees related to the pretrial order, claiming that an order was never filed in this matter; fees related to the enforcement of the settlement agreement; and certain erroneous billing. Other than the agreed to reduction of $447 for errors, the other fees were reasonable. The plaintiffs could not ignore the court's order to file a pretrial order. Further, there was legitimate concern that defendants were considering reneging on the settlement agreement.

In summary, certain of defendants' objections have merit. Accordingly, I have reduced plaintiffs' initial fee to $240,879.20.

B. Second Fee Petition

Plaintiffs seek an additional $106,601.25 in attorney's fees relating to settlement. Defendants present another 101 objections, claiming that plaintiffs' attorney is only entitled to $51,677.38 in fees. Defendants argue that travel times were excessive, that some work was related to other litigation, and that the PLRA limits the rates which attorneys and paralegals can charge. These objections are similar or identical to those that I denied in the initial fee petition and are denied in the second petition.

The defendants also argue that much of the time spent speaking to members of the plaintiff class or processing claims should not have been performed by an attorney but should have been handled by paralegals. I agree. An attorney was not needed to handle the claims processing. Thus, the time for claims processing will be billed at a paralegal rate, resulting in a $3,385.50 fee reduction.

Finally, the defendants object to fees for the preparation of the fee petition. The defendants claim that Mr. Morrissey cannot recover fees for the time he spent on the fee petition. The Seventh Circuit, however, has found fees for the preparation of fee petitions compensable as long as the time spent on preparation is not disproportionate to the time spent on the merits of the case. *Ustrak v. Fairman,* 851 F.2d 983, 988 (7th Cir.1988). Since Mr. Morrissey only spent 20.4 hours on the fee petition as compared to 800 hours on the case, I will allow all the fees for preparation.

Costs

A. Initial Fee Petition

Plaintiffs seek $80,463.76 in costs. The defendants object to $415.13 of the costs. The $84.63 of interest for delinquent payment on a bill will be deducted. It is unreasonable and unnecessary for the defendants to pay charges on delinquent accounts. In addition, the $112.50 for a general phone repair will also be deducted since it is not directly attributable to this litigation. The $218.00 for the deposition transcript of Robin Wells, however, is recoverable as Ms. Wells is a member of the plaintiff class and her transcript was reviewed for use in this lawsuit. Thus, plaintiffs' costs will be reduced by $197.13 for a total of $80,266.63.

B. Second Fee Petition

Plaintiffs seek an additional $15,130.54 in costs. Since defendants have already paid $3,200.26 of those costs, plaintiffs are only entitled to $11,930.28.

Conclusion

***6** Under 42 U.S.C. § 1988, plaintiffs can recover $344,094.95 in attorney's fees and $92,196.91 in costs.