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United States District Court, S.D. New York.

Shirley WILDER, et al., Plaintiffs,
v.
Blanche BERNSTEIN, individually and as Administrator of the New York City Human Resources Administration, et al., Defendants.

No. 78 Civ. 957(RJW). | June 18, 1998.

Opinion

MEMORANDUM DECISION

WARD, J.

***1** Plaintiffs have filed an application, pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1920, for attorney's fees and out-of-pocket litigation expenses totaling $169,560.43. For the reasons hereinafter stated, plaintiffs are awarded $155,949.32 in attorney's fees and $3,061.03 for out-of-pocket litigation expenses.

BACKGROUND

This action was brought in March 1978 pursuant to 42 U.S.C. §§ 1983, 1985 and 1986, and 28 U.S.C. §§ 2201 and 2202 by a class of children in New York City's child welfare system. In a Judgment dated April 28, 1987, this Court gave final approval to a stipulation of settlement ("the settlement"), which guaranteed the rights of children in New York City's foster care system to

> receive services without discrimination on the basis of race or religion and to have equal access to quality services and to ensure that appropriate recognition be given to a statutorily permissible wish for in-religion placement in a manner consistent with principles ensuring equal protection and non-discrimination as defined in applicable New York State and federal laws, regulations and the Constitution.

Stipulation of Settlement at ¶ 4. Familiarity with the Opinion in which this Court gave its conditional approval to the settlement, dated October 8, 1986 and reported at 645 F.Supp. 1292 (S.D.N.Y.1986), *aff'd,* 848 F.2d 1338 (2d Cir.1988), is presumed.

The instant controversy involves attorney's fees for the prevailing plaintiffs, who seek compensation for work relating to postjudgment monitoring of the settlement. While the parties have a history of reaching agreement as to the fees recoverable by plaintiffs for postjudgment monitoring activities,[1] recently, they have been unable to settle their fee disputes. In February 1997, plaintiffs filed an application ("the 1997 Fee Application") seeking fees and expenses totaling $139,852.31. Familiarity with the Court's August 12, 1997 Opinion ("the 1997 Opinion") awarding plaintiffs $72,149.15 in attorney's fees and $2,813.46 in out-of-pocket expenses for the six-month period ending June 30, 1996 is presumed.

Currently before the Court is plaintiffs' application for attorney's fees and out-of-pocket expenses incurred as a result of postjudgment monitoring activities during the period from July 1, 1996 through June 30, 1997. Thus, it is for the second time in the past year that the Court is asked to rule on an application for attorney's fees in this case. In the instant application, plaintiffs seek $166,499.40 in attorney's fees and $3,061.03 in out-of-pocket expenses. Arguing that the fees sought are unreasonable and that plaintiffs seek reimbursement for activities that are not part of their monitoring functions, defendants contend that plaintiffs should be awarded no more than $137,851.43 in fees and expenses.

DISCUSSION

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizes district courts to award prevailing parties in civil rights cases "a reasonable attorney's fee as part of the costs." In addition to recovering attorney's fees incurred in *litigating* a civil rights case, "[s]everal courts have held that, in the context of ... 42 U.S.C. § 1988, postjudgment monitoring of a consent decree is a compensable activity for which counsel is entitled to a reasonable fee." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 559, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) (citing *Garrity v. Sununu,* 752 F.2d 727, 738–39 (1st

Cir.1984); *Bond v. Stanton,* 630 F.2d 1231, 1233 (7th Cir.1980); *Miller v. Carson,* 628 F.2d 346, 348 (5th Cir.1980); *Northcross v. Board of Educ. of Memphis City Schools,* 611 F.2d 624, 637 (6th Cir.1979), *cert. denied,* 447 U.S. 911 (1980)). Under the lodestar approach adhered to by this Circuit, "attorney's fees are calculated by multiplying the number of billable hours that the prevailing party's attorneys spend on the case by 'the hourly rate normally charged for similar work by attorneys of like skill in the area.' " *New York State Ass'n for Retarded Children, Inc. v. Carey,* 711 F.2d 1136, 1140 (2d Cir.1983) (quoting *City of Detroit v. Grinnell Corp.,* 560 F.2d 1093, 1098 (2d Cir.1977)).[2]

***2** Plaintiffs in this litigation are represented by Children's Rights Inc. ("CRI"), a national nonprofit children's advocacy organization (formerly the Children's Rights Project of the American Civil Liberties Union). That CRI is nonprofit does not preclude plaintiffs from being awarded fees under 42 U.S.C. § 1988. In *Blum v. Stenson,* the Supreme Court held that "[t]he statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

For the period from July 1, 1996 through June 30, 1997, plaintiffs seek attorney's fees in the amount of $166,499.40 for services rendered by CRI attorneys and paralegals, and out-of-pocket litigation expenses in the amount of $3,061.03. The defendants, led by the City of New York ("defendants" or "the City"), argue that the award sought is excessive and that plaintiffs: (1) are not entitled to recover fees for prior fee applications, or at least that the fees sought for such motions should be drastically reduced; (2) should not be compensated for their unsuccessful efforts to enjoin the City's employment of Ann O'Rielly, a member of the neutral panel charged with ensuring compliance with the settlement; (3) cannot receive fees for activities that are not part of their monitoring functions; (4) have not demonstrated the reasonableness of the proposed hourly rate for one of their paralegals; and (5) submitted insufficiently detailed time sheets. These arguments will be addressed in turn.

I. Prior Fee Disputes

It is well settled in this Circuit that prevailing parties may recover attorney's fees incurred in litigating fee applications. *Reed v. A.W. Lawrence & Co., Inc.,* 95 F.3d 1170, 1183–84 (2d Cir .1996). In *Reed,* the Second Circuit observed that

> [i]f an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased.... Such a result would not comport with the purpose behind most statutory fee authorizations, *viz,* the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies.

Id. at 1184 (quoting *Prandini v. National Tea Co.,* 585 F.2d 47, 53 (3d Cir.1978)).

A. The Settlement of the 1994–95 Fee Dispute

In the Fall of 1996, plaintiffs' counsel began preparing a motion for $818,579.36 in attorney's fees for monitoring activities conducted from January 1, 1994 through December 31, 1995. Before that motion was filed with the Court, the parties agreed to settle the fee dispute for $600,000.

In their current fee application, plaintiffs seek $6,136 in fees and expenses for their counsel's preparation of the 1994–95 fee application, which was never filed. Defendants object on the ground that this motion work was unnecessary, as the fee dispute was ultimately settled. Plaintiffs' submissions to the Court make clear that they had a great deal of difficulty in getting defendants to negotiate the 1994–95 fee dispute. Therefore, they began preparing a fee application.

***3** Although the 1994–95 motion was never filed, it may have been instrumental in propelling defendants to the negotiating table. Moreover, plaintiffs assert that it was used as a starting point in drafting the 1997 Fee Application. Finally, plaintiffs were successful in obtaining fees for the 1994–95 billing period. Therefore, work performed on the 1994–95 fee application is compensable. Since it was not filed, however, the lodestar will be reduced by 50%, and plaintiffs will be awarded $3,068 rather than the $6,136[3] billed for the unfiled motion.

B. The 1997 Fee Application

Plaintiffs seek approximately $16,602 in fees and expenses for litigating the 1997 Fee Application.

Defendants argue that because plaintiffs did not prevail on the 1997 Fee Application, they should not be awarded fees for litigating that motion.

On February 7, 1997, defendants served on plaintiffs a Rule 68 Offer of Judgment to settle plaintiffs' claim for attorney's fees from January 1, 1996 through June 30, 1996 for $75,000. Plaintiffs rejected defendants' offer, and, on February 18, 1997, filed with the Court an application seeking fees and expenses totaling $139,852 .31. In their papers opposing plaintiffs' application, defendants suggested to the Court that plaintiffs be awarded $65,838.21 in fees and expenses.

In its August 12, 1997 Opinion granting plaintiffs' application, the Court awarded plaintiffs $74,962.61 in fees and expenses. The amount of fees awarded was much closer to the sum suggested by defendants in their opposition papers, and to defendants offer of judgment, than to that urged by plaintiffs in their fee application. *See Wilder v. Bernstein,* 975 F.Supp. 276 (S.D.N.Y.1997). Plaintiffs' success with their 1997 fee application was limited in several respects, including: (1) under *West Virginia Univ. Hosps., Inc. v. Casey,* 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991), this Court held that plaintiffs were not entitled to shift $24,562 in expert fees; (2) the hourly rates for the attorneys awarded by the Court were lower than those sought by plaintiffs; (3) attorney time spent in transit was reduced by half; and (4) due to cryptic and clustered time entries, the Court reduced by 10% the lodestar calculations for two of the principal attorneys.

In the exercise of its discretion, the Court may consider the degree of success achieved by a prevailing party in determining the reasonableness of the attorney's fee award. Indeed, the Second Circuit recently noted that "[a] lodestar reduction for lack of success is, of course, embraced by *Hensley* ... and *Farrar,* which stated that 'the most critical factor in determining the reasonableness of a fee award is the degree of success obtained.' " *Quaratino v. Tiffany & Co.,* 129 F.3d 702, 709 (2d Cir.1997) (citing *Hensley v. Eckerhart,* 461 U.S. 424, 434–35, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) and *Farrar v. Hobby,* 506 U.S. 103, 114, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)). The relative success of a prevailing plaintiff usually refers to the liability phase of a civil rights case. The Court sees no reason, however, why limited success on a fee application should not operate to reduce the amount of fees awarded for litigating that fee application.

***4** While plaintiffs are entitled to recover fees for litigation of the 1997 Fee Application, the Court believes that their limited success warrants a reduction in the lodestar. Accordingly, the $16,602 in attorney's fees sought by plaintiffs will be reduced by 30%, and plaintiffs will be awarded $11,621.40 for litigating the 1997 Fee Application.[4]

II. Plaintiffs' Efforts to Enjoin the City's Hiring of Ann O'Rielly

During the billing period at issue in this application, the City sought to hire Ann O'Rielly, the Executive Director of the neutral panel established to monitor compliance with the settlement ("the *Wilder* Panel"). Contending that the City's hiring of Ms. O'Rielly would create a conflict of interest, counsel for plaintiffs vigorously opposed it. In their fee application, plaintiffs seek reimbursement for $7,222 in attorney's fees and expenses incurred in opposing the City's employment of Ms. O'Rielly. Defendants argue that, since plaintiffs did not succeed in enjoining the City's employment of Ann O'Rielly, they should not be compensated for fees incurred with regard to those efforts.

As Executive Director of the *Wilder* Panel, Ms. O'Rielly regularly spoke with the individual parties, the Court, and other panel members regarding monitoring issues. During these conversations, Ms. O'Rielly would often impart her opinions on the monitoring of the consent decree and seek the points of view of those with whom she was speaking. Accordingly, plaintiffs were very concerned that

> Ms. O'Rielly, who had functioned as the eyes and ears of the Court for over two years, and who had a very good sense of where the relevant persons and the Court stood on various issues, was going to become an advocate for defendants' positions.... Plaintiffs were also legitimately concerned that Ms. O'Rielly would unwittingly use opinions and information she had appropriately gathered as Executive Director of the *Wilder* Panel against plaintiffs' interests in this case if she became employed by defendants.

Aff. of Susan Lambiase in Supp. of Pls.' Mot. for Costs and Fees at ¶ 23–24.

The Court must consider whether "at the time the work was performed, a reasonable attorney would have engaged in similar expenditures." *Grant v. Martinez,* 973

F.2d 96, 99 (2d Cir.1992) (citation omitted), *cert. denied,* 506 U.S. 1053, 113 S.Ct. 978, 122 L.Ed.2d 132 (1993). Ultimately, the Court did not prohibit the City from hiring Ms. O'Rielly. The risk of a conflict of interest was real, however, and the Court did think the matter a serious one. Indeed, the Court spoke to the parties three times about the potential conflict of interest, twice in court and once over the telephone. The Court, having itself given the matter a great deal of consideration, likewise believes that a reasonable attorney in the position of plaintiffs' counsel would have engaged in a similar expenditure of time. Therefore, plaintiffs will be compensated for attorney's fees and expenses incurred in opposing the City's hiring of Ms. O'Rielly.

***5** As discussed in Section I.B, *supra,* it is within the Court's discretion to reduce the lodestar for lack of success. The City's hiring of Ms. O'Rielly raised serious concerns. Plaintiffs' lack of success in persuading the Court to prohibit or restrict the City's employment of Ms. O'Rielly, however, warrants a 30% reduction in the lodestar. Accordingly, plaintiffs will be awarded $5,055 for their opposition of the City's employment of Ms. O'Rielly, rather than the $7,222 they requested.

III. Non–Monitoring Activities

In their fee application, plaintiffs seek reimbursement for time their attorneys spent preparing a paper on the status of *Wilder v. Bernstein* and addressing Family Court practitioners on the same subject.[5] Defendants argue that these are non-monitoring functions which are not compensable under 42 U.S.C. § 1988.

Plaintiffs' counsel were invited to speak about *Wilder* 's status to Family Court practitioners who needed to know the status of the implementation and the class members' rights. The practitioners who attended the lecture represent the same clients in Family Court that CRI represents in this case. The Court believes that this sharing of information can only benefit the class members and, indeed, is necessary to represent them adequately. Accordingly, the time spent by plaintiffs' counsel preparing a status report on this case and sharing it with Family Court practitioners is a legitimate monitoring function, and is thus compensable.

IV. Hourly Rates

In their application, plaintiffs seek an hourly rate of $75 for Clara F. Goetz, a CRI paralegal. In its August 12, 1997 Opinion, the Court established hourly rates of $60 for paralegals with less than one year of experience, and $75 for paralegals with one or more years of experience. Contending that Ms. Goetz had less than one year of experience during the billing period in question, defendants urge the Court to establish an hourly rate of $60 for her.

A review of Ms. Goetz's resume reveals that prior to joining CRI, she served as the director of administration of a music school in New York. When she began working for CRI, she had a Master's Degree, paralegal certification with honors, and prior paralegal and administrative experience. By contrast, the paralegal for whom the Court had set an hourly rate of $60 was an undergraduate intern with less than one year of experience. In spite of the fact that she may have had slightly less than a year of experience as a paralegal, the Court believes that Ms. Goetz's education and substantial professional experience warrant an hourly rate of $75. Therefore, there will be no adjustment based on the hourly rate accorded Ms. Goetz.

V. Time Sheets

Defendants contend that the following time entries of Ms. Lowry and Ms. Lambiase are not compensable because they are vague and do not specify the nature of the work performed:

Vague time entries of Ms. Lowry:

Date	Time	Description
7/25/96	0:15	Review documents

8/22/96	0:10	Review data
10/15/96	0:10	Conference w/ SL re progress of tasks
10/16/96	0:10	Review documents
11/20/96	0:25	Review documents, correspondence
1/3/97	0:10	Review SL memo
2/6/97	0:15	Review documents

Vague time entries of Ms. Lambiase:

Date	Time	Description
7/16/96	0:05	Review documents
9/5/96	0:05	Met w/MRL re TC to EW
9/11/96	0:15	TC w/MRL
10/5/96	0:40	Review documents
10/10/96	0:25	Review documents; file, read, discard
10/21/96	0:13	TC w/ M. Halperin re meeting; meet w/RKK re same

10/30/96	0:30	Edit memo; review documents to prepare same
5/14/97	0:39	[No description]

***6** This Court has already made clear that it finds entries that fail to identify the subject matter of the documents reviewed or the topic of conversation in a telephone conference unacceptable. *Wilder v. Bernstein,* 975 F.Supp. 276, 286 (S.D.N.Y.1997). In its August 12, 1997 decision, the Court reduced by ten percent the lodestars for Ms. Lowry and Ms. Lambiase for vague entries just like those detailed above. Thus, it should have been clear to plaintiffs at the time they prepared the instant application that the above entries would not suffice.

In their reply memorandum of law in support of their fee application, however, plaintiffs supplement the entries challenged by providing the context in which they were made. Pls.' Reply Mem. at 20–22 nn. 15–27. With the exception of three entries, this supplementation provides sufficient information to prevent the entries from being vague. Plaintiffs were unable to provide additional information, however, for the fifteen-minute entry of Ms. Lowry dated February 6, 1997, and the twenty-five and thirty-nine minute entries of Ms. Lambiase dated October 10, 1996 and May 14, 1997, respectively.

Accordingly, fifteen minutes will be deducted from Ms. Lowry's time, and one hour four minutes will be deducted from Ms. Lambiase's time. The total dollar value of this deduction is $309.88. The Court again reminds plaintiffs to omit entries that fail to specify subject matter from any future fee application.

CONCLUSION

For the foregoing reasons, plaintiffs' application pursuant to 42 U.S.C. § 1988 is granted. Plaintiffs are awarded $155,949.32 for attorney's fees and $3,061.03 for out-of-pocket litigation expenses.

It is so ordered.

Footnotes

1 According to defendants, plaintiffs have received attorney's fees in this case in the following amounts: $1,775,000 for the period up to June 27, 1989; $148,000 for the period from 6/27/89 through 11/21/89; $182,852.46 for the period from 11/22/89 through 10/31/90; $222,000 for the period from 11/1/90 through 12/31/91; $530,000 for the period from 1/1/92 through 12/31/93; and $600,000 for the period from 1/1/94 through 12/31/95. These payments total $3,457,852.46.

2 On June 10, 1998, while the Court's decision on the instant motion was pending, the Second Circuit, sitting *en banc,* reheard *Quaratino v. Tiffany & Co.,* 129 F.3d 702 (2d Cir.1997).

In *Quaratino,* the district court departed from the lodestar method and calculated an attorney's fee award using a billing judgment rule. Reasoning that an award of attorney's fees that approximated the damage award in the case was unreasonable, the district court awarded the prevailing plaintiff attorney's fees that equaled half of the damage award. In his Opinion, Judge Martin documented the conflicting decisions of both the Court of Appeals for the Second Circuit and the Supreme Court regarding whether an attorney's fee award should be proportionate to the damages awarded in a case. *Quaratino v. Tiffany & Co.,* 948 F.Supp. 332, 333–36 (S.D.N.Y.1996). Ultimately, Judge Martin expressed his confidence that, "when squarely faced with this issue, the appellate courts will adopt [a] billing judgment' approach ... [which] focuses on the judgment an attorney would exercise in determining the amount of time that should be devoted to a case in light of the anticipated recovery." *Id.* at 336–37.

A panel of the Second Circuit reversed, holding that the district court's application of a billing judgment rule "conflict[ed] with the rationale and legislative intent of the civil rights fee-shifting statutes, f[ell] outside the scope of *Farrar,* and [wa]s in conflict with th[e] [Circuit's] holdings concerning proportionality." *Quaratino,* 129 F.3d at 709. The panel held that, with some minor exceptions, plaintiff was entitled to the full amount of the lodestar. *Id.* at 709–10.

The Court of Appeals, *sua sponte,* ordered a rehearing *en banc.* While this memorandum decision is being filed without the benefit of the wisdom of the full Court of Appeals on the issue of the calculation of attorney's fees, it comports with this Court's

understanding of the current law in this Circuit.

3 In their reply papers, plaintiffs agree to rely on defendants' calculations of the hours spent on each task challenged by them. Pls .' Reply Mem. in Supp. of Mot. for Atty's Fees ("Pls.' Reply Mem.") at 7–8 n. 3.

4 Relying on a convoluted argument that the Court need not detail, defendants ask that plaintiffs' recovery of attorney's fees for the 1997 Fee Application be limited to 15% of the time and expenses billed. There is simply no support for such a reduction. The award plaintiffs ultimately received constituted 54% of what they had requested. Although that might indicate that a 50% reduction is appropriate, much of the work performed by plaintiffs' counsel on the 1997 Fee Application "was necessary to develop the basic application, to provide the Court with a factual basis for establishing rates for the first time in this case, and to clarify continuing issues in this litigation." Pls.' Reply Mem. at 7. Since much of the work would have been performed regardless of the amount of fees and expenses sought, the Court deems a 30% reduction appropriate.

5 Plaintiffs agreed to withdraw their claim for 7 minutes of time counsel spent speaking to the press.