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United States District Court, N.D. Illinois, Eastern Division.

Jane DOE, Plaintiff,
v.
CALUMET CITY, Illinois, et al., Defendants.

No. 87 C 3594. | Feb. 15, 1991.

Opinion

MEMORANDUM OPINION AND ORDER

***1** This 42 U.S.C. § 1983 ("Section 1983") class action is now approaching its fourth anniversary. On December 12, 1990 this Court issued a 32–page memorandum opinion and order (the "Opinion," 754 F.Supp 1211 (N.D.Ill.1990)) holding the members of the plaintiff class entitled to a judgment against Calumet City, Illinois as a matter of law on the issue of liability.[1] Plaintiffs' counsel promptly moved for an interim award of $300,000 in attorneys' fees under 42 U.S.C. § 1988 ("Section 1988"), and that motion has now been fully briefed. For the reasons stated in this memorandum opinion and order, plaintiffs' motion is granted.

Section 1988 provides for the award of fees to the "prevailing party" in civil rights actions such as those brought under Section 1983. Where as here plaintiffs' success on the merits is conclusively established by the Opinion—after all, what remains for determination is not whether Calumet City is liable, but rather what damages it will be required to pay to plaintiffs—the latters' "prevailing party" status is assured. That being so, this case fits like a glove the conditions for interim fee awards as prescribed by Congress and confirmed in *Hanrahan v. Hampton,* 446 U.S. 754, 757 (1980) (per curiam):

It is evident also that Congress contemplated the award of fees *pendente lite* in some cases. S.Rep. No. 94–1011, *supra,* at 5; H.R.Rep. No. 94–1558, *supra,* at 7–8. But it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal. The congressional Committee Reports described what were considered to be appropriate circumstances for such an award by reference to two cases—*Bradley v. Richmond School Board,* 416 U.S. 696 (1974), and *Mills v. Electric Auto–Lite Co.,* 396 U.S. 375 (1970). S.Rep. No. 94–1011, *supra,* at 5; H.R.Rep. No. 94–1558, *supra,* at 8. In each of those cases the party to whom fees were awarded had established the liability of the opposing party, although final remedial orders had not been entered. The House Committee Report, moreover, approved the standard suggested by this Court in *Bradley,* that " 'the entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees ...,' " H.R.Rep. No. 94–1558, *supra,* at 8, quoting *Bradley v. Richmond School Board, supra,* at 723, n. 28. Similarly, the Senate Committee Report explained that the award of counsel fees *pendente lite* would be "especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on *all* issues." S.Rep. No. 94–1011, *supra,* at 5 (emphasis added).

Nor has that principle been dimmed by developments in the decade that has intervened since *Hanrahan v. Hampton* was decided (see the discussion under headnotes 2–4 of *Richardson v. Penfold,* 900 F.2d 116, 118–19 (7th Cir.1990)). This case presents a classic instance of the situation described in *Bradley,* 416 U.S. at 723 (relied on both by Congress in enacting Section 1988 and by the Supreme Court in construing that statute in *Hampton*):

***2** To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel, and discourage the institution of actions despite the clear congressional intent to the contrary evidenced by the passage of § 718. A district court must have discretion to award fees and costs incident to the final disposition of interim matters. See 6 J. Moore, Federal Practice ¶ 54.70(5) (1974 ed.).

Calumet City does not challenge those legal principles. Instead its expressed concern is that the requested interim award, sought to be obtained without a full-blown evidentiary hearing and determination, may prove to be excessive. And it is of course true that such a prospect is more worrisome where the plaintiff is not a single deep-pocket entity capable of restitution if that were to prove necessary, but rather consists of a large group of class members of indeterminate means.

As real and as legitimate as those concerns may be in the abstract, any application of those concerns to the facts of *this* case shows the perceived problems to be wholly theoretical rather than real. Three lawyers have devoted, according to their records, an aggregate of over 3,300 hours to the case.[2] Although the lawyer who accounts for about 60% of that time is 1984 law school graduate Elizabeth Dale ("Dale"), who is not personally known to this Court, plaintiffs' lead counsel Kenneth Flaxman ("Flaxman," who accounts for all but a little over 100

hours of the remaining time) is an experienced civil rights litigator of demonstrated skill not only in this action but in others before this Court and its colleagues. And plaintiffs' R.Mem. 2 reports a number of earlier cases in this District Court in which the hourly rates approved for both Flaxman and Dale—even though lower than those sought here[3]—would generate a lodestar figure far above the amount of the interim award now requested.[4]

Accordingly this Court finds that the requested interim award of $300,000 in attorneys' fees carries with it the virtual certainty that it could not prove excessive in terms of the final fee award that this action will produce. And to guard against even that remote prospect, this Court orders that although the award is technically made to the plaintiff class, Flaxman himself will be held personally liable for restitution if any amount *were* to prove refundable to Calumet City. With that condition built into the award, Calumet City is ordered to pay $300,000 in interim attorneys' fees for the plaintiff class, such payment to be made directly to Kenneth R. Flaxman.[5]

1 Plaintiff class comprises all women who have been arrested on a misdemeanor or ordinance violation in Calumet City on or after April 16, 1982. Calumet City's liability is predicated on unconstitutional strip searches conducted by its Police Department without any particularized belief that any of the arrestees possessed either a weapon or contraband—that is, without any specific justification for the extraordinarily offensive invasion of the arrestees' privacy.

2 Another 600 hours had been spent by a paralegal.

3 It is of course well established that the delay factor in recovery of fees may be compensated for in more than one way—most frequently courts take the easier route of awarding current hourly rates for all time expended, even time spent several years back, although historical rates plus an interest component are a more precise measure (see this Court's discussion in *In re Telesphere Securities Litigation,* 753 F.Supp. 716 (N.D.Ill.1990) and its earlier opinions cited there). In any event, the interim request is low enough to make it unnecessary for this Court to pass on the specific allowability of the now-requested hourly rates for purposes of the current motion.

4 It is worth noting that among the materials submitted with the Reply Memorandum are two separate determinations by this Court's colleague Honorable Prentice Marshall that specifically commend Flaxman on his efficiency as well as the high quality of his substantive work. That has been this Court's experience as well, and it adds a comfort factor to the apparent "cushion" between the interim award and the amount of fees likely to be approved ultimately.

5 One thing the parties did not address in their briefing is the timing for the payment of the interim award. On or before February 20, 1991 counsel for the parties are directed to apprise this Court as to an agreed date for that payment or, failing that, are to file in this Court's chambers their respective cross-submissions limited to that subject.