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

Abdul–Shahid Farrakhan MUHAMMAD, Darrell X. McKinney, individually and on behalf of all others similarly situated, Plaintiffs,
v.
Thomas COUGHLIN, et al., Defendants.

No. 91 CIV. 6333(LAP). | July 9, 1998.

Opinion

MEMORANDUM AND ORDER

PRESKA, District J.

***1** Plaintiffs move to determine their status as prevailing parties under 42 U.S.C. § 1988(b). Plaintiffs seek recovery of attorneys' fees incurred in connection with a previous motion to enforce a Stipulation and Order of Settlement, dated January 5, 1995 (the "Order"). More specifically, plaintiffs seek to recover fees incurred for: (1) bringing the motion to enforce the Order; and (2) monitoring defendants' compliance with the Order before filing the motion to enforce. For the reasons that follow, I find that plaintiffs are prevailing parties and that they are entitled to recover fees incurred in monitoring defendants' compliance with the Order and for their motion to enforce the Order.

BACKGROUND

The facts of this case are thoroughly recited in *Muhammad v. City of New York Dep't of Corrections,* 904 F.Supp. 161, 167–87 (S.D.N.Y.1995), *appeal dismissed,* 126 F.3d 119 (2d Cir.1997), familiarity with which is assumed. Those facts necessary to an understanding of the present motion follow.

This action arises from a suit originally brought *pro se* by Abdul–Shahid Farrakhan Muhammad ("Muhammad"), jail inmate and member of the Nation of Islam ("NOI") religion, against the City of New York Department of Corrections ("DOC") for alleged violations of his rights to practice his religion pursuant to 42 U.S .C. § 1983. I subsequently appointed Gibson, Dunn & Crutcher ("GD & C") to represent plaintiff. Two amended complaints joined a total of seven additional NOI followers as plaintiffs and alleged violations of the Religious Freedom Restoration Act ("RFRA"), 42 U .S.C. § 2000bb *et seq.,* the First Amendment to the Constitution of the United States and the Constitution and laws of the State of New York.[1] The New York State Department of Correctional Services ("DOCS"), among others, were joined as defendants. The second amended complaint sought, *inter alia,* certification of a class of NOI followers who are or will be incarcerated in the City and State correctional systems. Defendants responded by stipulating that any injunctive relief awarded to plaintiffs would be implemented system-wide, rendering moot the need to certify a class. During trial, DOCS settled with plaintiffs under the Order.[2]

In an October 28, 1996, letter to DOCS' counsel, GD & C stated its belief that, given an increased number of NOI inmates, DOCS should hire another NOI minister to comply with paragraph 9 of the Order.[3] (Declaration of Mitchell A. Karlan, dated August 18, 1997, at ¶ 5 and Ex. B ("Pl.Decl.")). On November 15, 1996, GD & C requested that I schedule a pre-motion conference regarding DOCS' alleged non-compliance with paragraph 9. (Pl. Decl. ¶ 6 and Ex. C). DOCS' counsel responded to GD & C with assurances that DOCS had been notified of the October 1996 letter and that a further response was forthcoming. (Pl. Decl. ¶ 7 and Ex. D).

After further correspondence, GD & C renewed its request for a conference with this Court in January of 1997. (Pl.Decl.¶ 9). Meanwhile, GD & C deposed, by telephone, Jimmie Harris ("Harris"), Director of Ministerial Services for DOCS. (Pl. Decl. ¶ 10 and Exs. E & F). Subsequent to the deposition, GD & C received a written response to unanswered deposition questions. *See id.* On February 6, 1997, GD & C requested an evidentiary hearing to determine whether DOCS should be found in contempt for violating paragraph 9 of the Order. (Pl. Decl. ¶ 11 and Ex. G). Plaintiffs then filed, in March of 1997, a motion for an order to enforce the second sentence of paragraph 9 of the Order. (Pl.Decl.¶ 12).

***2** Prior to the hearing, DOCS maintained that it was unable to hire any additional ministers due to a hiring freeze. (Pl. Decl. Ex. E. at 14–17). However, as Harris testified at the hearing, the freeze did not preclude hiring when a ministerial seat was vacated. Under these circumstances, a budget waiver could be obtained to fill the vacant seat. (Pl. Decl. Ex. H at 19). Generally, DOCS fills vacated ministerial seats by hiring a minister of the same faith. (Pl. Decl. Ex. H at 25, 34). However, if the ratios of ministers available to inmates of a certain faith are "not in proper alignment, then [DOCS tries] to make

the appropriate adjustments ... based on vacancies that surface." (Pl. Decl. Ex. H at 38).

According to DOCS, as of February 3, 1997, it had filled approximately 43 vacated ministerial seats since January 1, 1995. (Pl. Decl. Ex. F at 3). As of April 1, 1997, NOI inmates at DOCS numbered approximately 1,300. (Pl. Decl. Ex. H at 21). After January 5, 1995, but before June 11, 1997, DOCS hired one NOI minister, Minister Robert Muhammad ("Minister Muhammad"). (Pl. Decl. Ex. H at 24–25). As a general rule, which DOCS contends is not a firm policy, DOCS tries to maintain one full-time minister for every 400 inmates of a particular religion. (Pl. Decl. Ex. H at 37).

A budget waiver was obtained to hire Minister Muhammad, in compliance with the first sentence of paragraph 9 of the Order. (Pl. Decl. Ex. H at 4, 19). On June 3, 1997, one week before the evidentiary hearing, Dr. Raymond Broaddus ("Broaddus"), DOCS Deputy Commissioner for Program Services, held a meeting with three New York NOI ministers and notified them that DOCS would be hiring 2 .5 additional NOI ministers. (Pl. Decl. Ex. H at 14). He also informed them of the hearing to be held the following week. (Pl. Decl. Ex. H at 9). Prior to this meeting, DOCS had not sought any additional budget waivers to hire additional NOI ministers. (Pl. Decl. Ex. H at 19).

At the hearing on June 11, 1997, DOCS represented to this Court and to plaintiffs that it would be hiring 2.5 additional NOI ministers. (Pl.Decl.¶ 14). GD & C and this Court agreed that DOCS would unquestionably be in compliance when this hiring took place. (Pl.Decl.¶ 15). After further monitoring of DOCS to ensure compliance with this promise, plaintiffs filed the instant motion. Defendants oppose this motion on the ground that plaintiffs are not "prevailing parties" under 42 U.S.C. § 1988(b). For the reasons that follow, plaintiffs' motion is granted.

DISCUSSION

Plaintiffs seek to recover attorneys fees and expenses under 42 U .S.C. § 1988(b), which provides that "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, ... 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 ...." Reimbursement of legal fees and expenses to prevailing parties provides "an incentive for lawyers to accept these often time-consuming cases ... [while] filter[ing] out meritless cases ." *Marbley v. Bane,* 57 F.3d 224, 233 (2d Cir.1995). Under section 1988, Congress directed that prevailing parties " 'should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust." ' *Campaign for a Progressive Bronx v. Black,* 631 F.Supp. 975, 980 (S.D.N.Y.1986) (quoting S.Rep. No. 94–295, 94th Cong., 1st Sess. 40 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 807).

I. *Attorneys' Fees and Expenses in Connection with the Motion to Enforce the Order*

***3** Plaintiffs first contend that they are entitled to attorneys' fees and expenses incurred by their motion to enforce paragraph 9 of the Order. Specifically, plaintiffs argue that since their motion proved to be the "catalyst" for DOCS' change in position, plaintiffs have "prevailed" for purposes of section 1988.

The law is well-settled that a party need not have received relief in the form of a final judgment in order to be deemed "prevailing" for section 1988 purposes. *See Hewitt v. Helms,* 482 U.S. 755, 760–61, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987); *Haley v. Pataki,* 106 F.3d 478, 483 (2d Cir.1997). The Supreme Court has indicated that under "its 'generous formulation [,] ... plaintiffs may be considered 'prevailing parties' ... if they succeed on any significant issue in litigation which obtains some of the benefit the parties sought in bringing suit." ' *Marbley,* 57 F.3d at 233 (quoting *Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)). Thus, the fact that plaintiffs did not receive a final judgment in their motion to enforce the Order does not present a bar to recovering attorneys' fees. *See id.* at 233–34.

Defendants quote, in isolation, language from *Hanrahan v. Hampton,* 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980), for the proposition that "plaintiffs are considered to have prevailed for § 1988 purposes only if they have 'established [their] entitlement to some relief on the merits of [their] claims, either in the trial court or on appeal ." ' Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Attorneys' Fees, Costs and Disbursements Under 42 U.S.C § 1988, at 7 (quoting *Hanrahan,* 446 U.S. at 757) ("Def.Mem."). However, nothing contained in *Hanrahan* overrules settled law that a final judgment following a full trial on the merits is not required in order to be deemed a prevailing party under section 1988. *See Hewitt,* 446 U.S. at 760–61 ("A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment ... [and w]hen that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor."); *Marbley,* 57 F.3d at 233–34 (rejecting a similar argument made in light of isolated language from *Farrar*). Indeed, in *Haley,* the Court of Appeals cited *Hanrahan* for this express proposition. *See* 106 F.3d at 483.

With this understanding of section 1988 in mind, courts have established different criteria for determining when a party has prevailed. The predominant theory is commonly referred to as the "catalyst" theory. *See, e.g., Johnson v. Lafayette Fire Fighters Ass'n,* 51 F.3d 726, 730 (7th Cir.1995) (requiring a causal link and a determination that the suit was not "frivolous, unreasonable, or groundless"); *Collins v. Romer,* 962 F.2d 1508, 1512 (10th Cir.1992) (requiring a causal link between the lawsuit and defendant's change in conduct and a showing that this conduct was required by law). The Court of Appeals continues to adhere to the catalyst theory and requires the movant to show "a causal connection between the litigation and the recovery of benefits." *McManus v. Gitano Group, Inc.,* 59 F.3d 382, 384 (2d Cir.1995). Consistent with this requirement is the idea that the "lawsuit [was] the catalyst in bringing about a goal sought in litigation, by threat of victory (and not by dint of nuisance and threat of expense) ...." *Marbley,* 57 F.3d at 234–35.

***4** Defendants err in relying on *Nadeau v. Helgemoe,* 581 F.2d 275 (1st Cir.1978). As defendants correctly recite, the First Circuit requires plaintiffs to show "[f]irst, ... that their efforts were a 'necessary and important factor' in achieving the favorable result ... [and] second, ... that they are legally entitled to the relief sought." (Def. Mem. at 5). However, this two-part test requires more than the Court of Appeals' "causal connection" requirement, and the second prong has been expressly rejected by the Court of Appeals. *See Marbley,* 57 F.3d at 235 (rejecting the Tenth Circuit's requirement that the defendant's change in position was required by law because it is "unnecessary and may defeat some meritorious claims for attorneys' fees").

Plaintiffs satisfy the Court of Appeals' interpretation of the "catalyst theory" and have thus "prevailed" for section 1988 purposes. One week prior to the evidentiary hearing, Broaddus announced plans to hire the additional 2.5 NOI ministers at a meeting with NOI ministers where he also informed them of the motion and related hearing (the "Meeting"). (Pl. Decl. Ex. H at 9 & 12–13). At that time, the hiring had not taken place, but rather was only promised. At the hearing, both sides agreed that if the additional ministers were, in fact, hired, then DOCS would be in compliance with the Order. (Pl. Decl. Ex. H at 48–49).

According to the testimony at the hearing, Broaddus learned of plaintiffs' motion to enforce the Order approximately one week before the hearing. (Pl. Decl. Ex. H at 36–37.) In addition, because Broaddus mentioned the hearing and the motion at the Meeting, he must have learned of the motion prior to the Meeting. (Pl. Decl. Ex. H at 9). Given these time frames, Broaddus' action to satisfy the Order quickly followed his first becoming aware of plaintiffs' motion.

In response, DOCS offers an alternative explanation for its change in position. This explanation, based upon Broaddus' testimony, asserts that the decision to hire an additional 2.5 ministers resulted from meetings which began "five or six months" prior to the date of the hearing, June 11, 1997. (*Id.* at 35; Def. Mem. at 6). From this fact, defendants argue that the hearing was not a catalyst for the eventual additional hiring. *See* Def. Mem. at 6. This argument ignores the fact that plaintiffs began correspondence with DOCS concerning this matter on October 28, 1996, some seven and a half months prior to the hearing. (Pl.Decl.Ex. B). Thus, by Broaddus' own testimony, he only first began considering the matter *after* plaintiffs first raised the issue in correspondence with defendants. Also, Harris testified that discussion about a budget waiver to hire additional NOI chaplains began a month or so prior to the hearing on plaintiffs' motion to enforce the Order and some time after Harris' deposition had been taken in connection with that motion. (Pl. Decl. Ex. H at 19). Given the undisputed chronology that (1) plaintiffs raised the issue of an additional NOI minister in October, 1996; (2) Broaddus commenced meetings with NOI representatives thereafter, during which meetings he mentioned plaintiffs' motion; (3) Harris began discussing a budget waiver for an additional NOI minister after his deposition in connection with the motion; and (4) the decision to seek a waiver to hire an additional NOI minister was made within the week before the hearing (*Id.* at 22–23), I find that there is a clear causal connection between plaintiffs' motion and DOCS' decision to hire additional NOI ministers. I reject as not credible DOCS' conclusory denial that its decision to hire additional NOI ministers had anything to do with plaintiffs' motion. (*Id.* at 28; *see also id.* at 35).[4]

***5** In addition, " 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained." ' *Farrar v. Hobby,* 506 U.S. at 114 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). Certainly, DOCS' promise to hire 2.5 additional ministers when plaintiffs originally requested only one satisfies this factor. Plaintiffs obtained what they sought and more.

Finally, I do not need to reach the question of whether plaintiffs would actually have prevailed on the merits; rather, I need only determine that plaintiffs' claim is not "frivolous, unreasonable or groundless." *Koster v. Perales,* 903 F.2d 131, 134 (2d Cir.1990) (internal quotation marks and citation omitted). Without deciding the merits of the motion to enforce the Order, I find that plaintiffs had reasonable grounds for bringing it. Therefore, I find that plaintiffs are prevailing parties under section 1988 and are entitled to an award of attorneys' fees in connection with their motion to enforce the Order.

II. ***Attorneys' Fees and Expenses in Connection with Monitoring Compliance with the Order***

Plaintiffs also argue that they are entitled to attorneys' fees and expenses incurred while monitoring DOCS' compliance with the Order. "Several courts have held that, in the context of ... 42 U.S.C. § 1988, post-judgment 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 Education,* 611 F.2d 624, 637 (6th Cir.1979), *cert. denied,* 447 U.S. 911 (1980)); *see also Wilder v. Bernstein,* 975 F.Supp. 276, 280 (S.D.N.Y.1997), *reconsideration denied,* 982 F.Supp. 264 (S.D.N.Y.1997); *Hurley v. Coombe,* No. 77 Civ. 3847(RLC), 1996 WL 46889, at *2–*3 (S.D.N.Y. Feb.6, 1996).

As has already been stated, for purposes of a section 1988 award, parties are considered to have prevailed when they vindicate rights through a consent judgment of the type obtained herein. *See supra* Part I. Plaintiffs have shown with their motion to enforce the Order that active and ongoing monitoring by GD & C is necessary to ensure DOCS' continued compliance with the Order. I am "entitled to believe that relief would occur more speedily and reliably if ... monitoring ... occurred, and that this [is] a necessary aspect of plaintiffs' 'prevailing' in the case." *Garrity,* 752 F .2d 738–39. Not only is GD & C's post-judgment monitoring "essential to the long-term success of the plaintiff's suit[,]" *Northcross,* 611 F.2d at 637, "it is clear that if such [post-judgment monitoring] services have already been rendered, they should be compensated." *Id.*

DOCS contests this claim for monitoring fees by arguing that the Prison Litigation Reform Act of 1995 ("PLRA") bars recovery for monitoring compliance with the Order.[5] Because the PLRA explicitly provides fee recovery for enforcement, but not monitoring, efforts *per se,* DOCS contends that the exclusion prevents recovery for plaintiffs' post-judgment monitoring of the Order. I decline to reach this question since I find that the attorneys' fee provision of the PLRA does not apply retroactively to this case.

***6** As the Court of Appeals recently indicated, there are four approaches to the retroactivity question. First, the PLRA could be applied to all fee awards entered after its effective date, regardless of when the underlying work was actually performed. *See Blissett v. Casey,* No. 1126, 1998 WL 337260, at *2 (2d Cir. June 25, 1998) (citing *Alexander S. v. Boyd,* 113 F.3d 1373, 1377 (4th Cir.1997), *cert. denied,* 522 U.S. 1090, 118 S.Ct. 880, 139 L.Ed.2d 869 (1998)). Second, the PLRA could be held not to apply if the plaintiff's attorneys filed their appearance before the enactment, regardless of when the underlying work was actually performed. *See id.* (citing *Hadix v. Johnson,* No. 96–2567, 1998 WL 177343, at *6 (6th Cir. Apr.17, 1998)). Third, the PLRA could apply to post-enactment work but not to work done before its enactment. *See id.* (citing *Williams v. Brimeyer,* 122 F.3d 1093, 1094 (8th Cir.1997)). Fourth, a district court could determine, on a case-by-case basis, whether to apply the PLRA based upon such factors as the extent of the services performed before enactment and the reliance by plaintiff and his attorneys on the pre-PLRA fee regime. *See id.*

In *Blissett,* defendant only argued that the Court of Appeals should adopt the Fourth Circuit's approach of rejecting all fee awards entered after the PLRA's effective date, and the Court of Appeals rejected this argument reasoning that it "would produce serious injustice in numerous cases." *See id.* Accordingly, the court did not address the other possible approaches. *See id.* at *3. After observing that one of plaintiff's attorneys had performed 100 percent of his work prior to the PLRA's effective date, and that other attorneys had performed only 15 percent of their work prior to the PLRA's effective date, the Court of Appeals reasoned that retroactive application

> would retroactively diminish the plaintiff's judgment by causing the application of a portion up to 25 percent to his attorneys' fees, and would also retroactively diminish his attorneys' reasonable expectations of compensation in the event they prevailed. Absent a clear statement of congressional intent favoring such a result, we will follow the "traditional presumption" against retroactivity, *Landgraf v. U.S.I. Film Prods.,* 511 U.S. 244, 280, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994), and conclude that the Act does not necessarily apply to all awards of fees made after its effective date.

Id.

Applying the holding in *Blissett* to the facts of this case reveals two things. First, the Court of Appeals explicitly rejected only the Fourth Circuit's absolute approach to the retroactivity issue, *i.e.,* the court rejected automatic retroactive application of the PLRA to both pre- and post-PLRA efforts where a plaintiff seeks fees after the PLRA's effective date. Of course, the rejection of this approach is binding and is thus rejected herein. Second,

although the *Blissett* court's discussion of what percentage of the work performed by plaintiff's attorneys was performed prior to the PLRA's effective date might suggest that it is appropriate to refuse to apply the PLRA retroactively where even a minimal amount of work was performed prior thereto, such a suggestion would be an inappropriate reading of the decision. Because defendant did not make any other arguments, this discussion was explicitly limited to rejecting the absolute approach advocated by defendant and adopted by the Fourth Circuit. Accordingly, the viability of the three other options is an open issue in this Circuit, and it is to the question of which of the three should apply in this case that I now turn.

***7** In the first place, as the Court of Appeals indicated, a "presumption against retroactive legislation is deeply rooted in our jurisprudence" because of its potential to violate "[e]lementary considerations of fairness." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 265 (1994). This "fairness" is implicit in the idea that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly[.]" *Id.* Accordingly, retroactive statutes trigger suspicion because they may permit the legislature to "sweep away settled expectations suddenly and without individualized consideration." *Id.* at 266.

In *Landgraf,* the Supreme Court articulated the method for determining whether a newly-enacted statute should be retroactively applied to pending cases. The first step is to determine "whether Congress has expressly prescribed the statute's proper reach." *Id* . at 280. With respect to the PLRA's attorneys' fee provision, Congress did not clearly prescribe its reach, *i.e.,* whether it can be retroactively applied. *See, e.g., Jensen v. Clarke,* 94 F.3d 1191, 1203 (8th Cir.1996); *Blissett v. Casey,* 969 F.Supp. 118, 128 (N.D.N.Y.1997), *aff'd,* 1998 WL 337260 (2d Cir. June 25, 1998).

Landgraf dictates that, since the express language of section 803(d) does not answer the retroactivity question, the next step is to determine whether "the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf,* 511 U.S. at 280. If it does, then such effect precludes retroactive application, "absent clear congressional intent favoring such a result." *Id.; see also Covino v. Reopel,* 89 F.3d 105, 106 (2d Cir.1996) (applying *Landgraf* 's principles to determine the retroactivity of the PLRA's fee provision). Neither the legislative history of PLRA nor the statute itself sheds any light regarding the retroactive application of section 803(d). *See, e.g., Blissett,* 969 F.Supp. at 128. Thus, this inquiry turns on whether section 803(d) would have a "retroactive effect."

To make this determination, "court[s] must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf,* 511 U.S. at 269–70; *see also Covino,* 89 F.3d at 107 (holding that the PLRA's fee requirement could be retroactively applied because of its procedural nature). Answering the query involves considerations of fair notice, reasonable reliance, and the settled expectations of the parties involved. *See Landgraf,* 511 U.S. at 270. As noted above, courts have adopted varying approaches to the retroactivity question. *See Blissett,* 1998 WL 337260, at *2.

With all of the foregoing considerations in mind, essential to deciding whether section 803(d) applies retroactively in this case is a dissection of the chronology of this continuing litigation. The relevant events are as follows:

> ***8** (1) on or about June 17, 1993, at the initial stages of this litigation, I appointed GD & C to represent Muhammad;
> (2) the current plaintiffs joined the action on February 18, 1994, and class certification was sought on July 8, 1994;[6]
>
> (3) DOCS and plaintiffs signed the Order, signifying settlement, on January 5, 1995;
>
> (4) GD & C began monitoring DOCS' compliance with the Order in early 1996;
>
> (5) the PLRA became effective on April 26, 1996; and
>
> (6) the compliance hearing was held on June 11, 1997.
>
> *See Muhammad v. City of New York Dep't of Corrections,* 904 F.Supp. 161, 165–66 (S.D.N.Y.1995); Pl. Decl. ¶¶ 2–5 & 14.

Here, defendants only argue that the PLRA bars plaintiffs from recovering attorneys' fees for monitoring. Thus, the significant period, in the first instance, is the monitoring period, which GD & C asserts, and DOCS does not dispute, began in "early" 1996. (Pl.Decl.¶ 4). The PLRA became effective on April 26, 1996. On October 26, 1996, GD & C began proactive methods of enforcement with the sending of a letter to DOCS indicating that the number of NOI inmates had increased and that additional chaplains should be hired. (Pl.Decl.Ex. B). Accordingly, GD & C engaged in monitoring efforts both before and after the PLRA's enactment.

Although the critical period for purposes of defendants' current argument is the monitoring period, the retroactivity analysis is colored by the fact that GD & C

has been involved in this action since June 17, 1993, well before the PLRA's effective date. This fact is all the more important because even though defendants, at this stage, only raise the PLRA's provisions with respect to the request for monitoring costs, a decision to apply the provisions retroactively would also require retroactive application of the other provisions discussed in some detail in *Blissett. See* 1998 WL 337260, at *1 & *3. If the PLRA's attorneys' fees provision applies to this proceeding, it does not apply in a piecemeal fashion, and all of its provisions must be given retroactive effect. As a result, it is also appropriate to consider, in addition to the monitoring period, the overall period of time which GD & C has represented plaintiffs.

From the outset, plaintiffs and GD & C have operated under the reasonable assumption that section 1988 would afford attorneys' fees for successful litigation efforts. This expectation continued through to the time when GD & C began active monitoring of DOCS' compliance with the Order, prior to the PLRA's effective date. For reasons similar to those adopted by the Court in *Blissett,* I find that it would result in a "serious injustice" to adopt a rule of partial retroactivity in this case, *i.e.,* to apply the PLRA to work performed after the PLRA's effective date, but not to work performed prior to the effective date. *Compare Williams,* 122 F.3d at 1094 (adopting a partial retroactivity standard). At the same time, however, I need not determine whether the PLRA can ever be applied to pre-PLRA work. *See Hadix,* 143 F.3d 246, 1998 WL 177343, at *6 (holding that the PLRA does not apply if an attorney filed an appearance prior to the PLRA's effective date).

***9** For present purposes, as the fourth category of alternatives discussed by the Court of Appeals in *Blissett* outlines, it is enough that GD & C began representing plaintiff on June 17, 1993, long before the PLRA's effective date, and, accordingly, reasonably relied for a considerable period of time—nearly three years—on the fee provisions in effect prior to adoption of the PLRA. Monitoring efforts also began prior to the effective date in reliance upon this reasonable expectation. Furthermore, the Order which gave rise to the need for monitoring, and which formed the subject of the motion to enforce and this motion for attorneys' fees, was entered on January 5, 1995, prior to the PLRA's effective date. Finally, plaintiffs' expectations began back in February and July 1994 when this action was enlarged to include the current plaintiffs. As a result, it would be a "serious injustice" to apply the PLRA retroactively for work performed either prior to or after the PLRA's effective date.

CONCLUSION

For the reasons set forth above, plaintiffs are prevailing parties under 42 U.S.C. § 1988 and they are entitled to an award of attorneys' fees for their monitoring efforts and for their motion to enforce the Order.

Counsel shall confer as to the amount of fees that is appropriate and shall report by letter as to the status of those discussions on or before August 3, 1998.

SO ORDERED

Footnotes

1 Both the city and state defendants moved to dismiss the RFRA claims on the ground that the RFRA was unconstitutional. I did not reach the constitutional question at trial for two reasons: (1) the State withdrew its constitutional challenge and entered into the Order; and (2) I found that the City did not violate the RFRA, whether constitutional or not. Subsequently, in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the Supreme Court struck down the RFRA as unconstitutional.

2 However, DOC did not settle, and I found that it did not violate the constitutional or statutory rights claimed. *See Muhammad v. City of New York Dept. of Corrections,* 904 F.Supp. 161 (S.D.N.Y.1995). Muhammad appealed only my denial of prospective injunctive relief, and the Court of Appeals dismissed this appeal as moot. *See Muhammad v. City of New York Dept. of Corrections,* 126 F.3d 119, 124 (2d Cir.1997).

3 Paragraph 9 of the Order provides:

> Consistent with DOCS practices regarding other religious groups, at such time as the number of inmates whose religious affiliation is recorded as "Nation of Islam" exceeds 200, Defendant will hire a part time (20 percent) minister from the Nation of Islam to provide for the spiritual needs of Nation of Islam members. Defendant will make further decisions regarding increased hiring of a minister from the Nation of Islam in accord with the considerations given to hiring religious leaders of similarly situated groups.

Pl. Decl. Ex. A.

4 Although counsel's time records are not before me, I suspect that a substantial amount of attorney time on both sides, including the hearing, could have been avoided had DOCS informed plaintiffs' counsel that it was considering hiring additional ministers at some time earlier than a week before the hearing.

5 The applicable provision provides, in relevant part, as follows:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that ... (B)(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

42 U.S.C. § 1997e(d). This provision also provides other, more explicit, limitations on recovery. *See Blissett v. Casey,* No. 1126, 1998 WL 337260, at *1 & *3 (2d Cir. June 25, 1998) (discussing these limitations).

6 The original plaintiff in this action was released from prison while the appeal in this matter was pending. *See Muhammad,* 126 F.3d at 122. The current individually named plaintiffs were joined as parties by the filing of the first amended complaint on February 18, 1994. The second amended complaint, filed on July 8, 1994, sought certification of the class.