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

Willie WILLIAMS, etc., Plaintiff,
v.
Michael P. LANE, et al., Defendants.

No. 81 C 355. | Sept. 21, 1989.

Opinion

MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.

***1** Willie Williams ("Williams") brought this class action against a number of Illinois prison administrators under 42 U.S.C. § 1983 ("Section 1983"), alleging constitutional violations arising out of living conditions and institutional programs provided to prisoners in protective custody at Stateville Correctional Center ("Stateville"). After an extended trial this Court issued lengthy findings of fact and conclusions of law (in the "Opinion," 646 F.Supp. 1379 (N.D.Ill.1986)), ruling in plaintiffs' favor on almost all their claims and concluding they were entitled to an award of costs, including reasonable attorney's fees, under 42 U.S.C. § 1988 ("Section 1988") (*id.* at 1410).[1]

Plaintiffs have now filed their petition for such an award. Defendants do not dispute plaintiffs' Section 1988 entitlement as such,[2] instead raising a number of objections as to its quantification. For the reasons stated in this memorandum opinion and order:

1. Several of defendants' objections are rejected.

2. Other objections will be referred to a special master under Fed.R.Civ.P. ("Rule") 53 to make findings of fact and conclusions of law necessary to a determination of (a) appropriate hourly rates and chargeable hours (and hence a reasonable award of fees) and (b) awardable expenses.

Facts[3]

Opinion at 1406–09 concluded defendants had violated and were continuing to violate plaintiffs' constitutional rights in several respects, and Opinion at 1409 concluded defendants had also violated plaintiffs' rights under Illinois state law. Plaintiffs failed to prevail only on their claim that defendants had subjected them to cruel and unusual punishment in violation of their Eighth Amendment rights (Opinion at 1407–08).[4]

Contentions of the Parties

Plaintiffs' petition seeks an award of $1,212,208.32, comprising (1) attorney's fees through December 31, 1988 in the principal sum of $790,992, (2) accrued interest of $203,258.66 on those fees, (3) expenses of $167,715.44 incurred in that same time period and (4) accrued interest of $50,242.22 on those expenses. In support of their petition plaintiffs submit extensive tables as appendices:

1. describing the nature of each task and tabulating them by month and by attorney (Apps. 2 and 3);

2. tabulating non-attorney time and expenses on a monthly basis (Apps. 4 and 5); and

3. listing fees and expenses for which compensation is *not* being sought (Apps. 5–7).

Defendants object to the requested award on several grounds:

1. Excessive hourly rates are being sought for attorneys, law clerks and support staff.

2. Excessive numbers of hours have been charged by the attorneys because:

(a) the itemization of their tasks is too vague;

(b) unmerited time was spent on certain tasks; and

(c) many tasks were needless or needlessly repeated.

3. Excessive numbers of hours have also been charged for non-attorneys, not only for the already-listed reasons but also because non-attorney time is not compensable under Section 1988.

***2** 4. Excessive interest has been charged because the prime rate is not the proper measure of the cost of delay in payment.

This opinion deals with those objections in turn.

Hourly Rates

Plaintiffs Mem. 5 seeks to recover, as the attorneys' hourly rates, "the historic rates counsel charged fee-paying clients during the period in which the services were rendered to plaintiffs." Defendants Mem. 4 responds that the proper rates are instead those "charged by attorneys of like skill and experience for similar services in the area" (citing *Blum v. Stenson,* 465 U.S. 886, 892–96 (1984); *Kirchoff v. Flynn,* 786 F.2d 320, 326 (7th Cir.1986)). As defendants construe that proposition, it requires this Court to look to rates charged by other civil rights attorneys in the Chicago area.

Both sides are off the mark. Although this Court's opinion in *Strama v. Peterson,* 561 F.Supp. 997, 998 (N.D.Ill.1983) (emphasis in original) antedated *Blum* and *Kirchoff,* it remains an accurate statement of the legal principle involved:

[T]he proper Section 1988 test is not what the plaintiff's lawyer has charged *in fact,* but rather what the reasonable value of the lawyer's services is.

Neither side's contention meets the "reasonable value" standard.

Without seeking to be exhaustive, this Court can quickly tick off several reasons why "reasonable value" does not necessarily equate to the rates plaintiffs' appointed counsel charge to their firm's paying clients:

1. Plaintiffs have offered no showing of comparability of their fee-paid litigation to the current litigation in general terms.

2. It is also clear that plaintiffs' counsel do not normally engage in this type of litigation. At least in part, the rates charged to the law firm's fee-paying clients is likely to reflect counsels' perceived expertise in other areas of the law that may be lacking in this area.

3. Though plaintiffs' law firm's rates by definition reflect the market in one sense (the amount paid by willing buyers of the firm's legal services to the law firm as a willing seller), it is highly unlikely that those rates meet the *Blum* test. It cannot be ignored that Kirkland & Ellis are reported as earning by far the highest per-partner annual profits of any law firm in the Chicago area. That would independently appear to negate any notion that the Kirkland firm rates are generally those "charged by attorneys of like skill and experience for similar services in the area."

There may be more, but those factors are surely enough to mandate further inquiry into the appropriate-rate question.

Defendants, on the other hand, advance too narrow a reading of the "similar services" requirement. For instance, there is no reason to limit the search for a reasonable rate to civil rights litigators. *Blum,* 465 U.S. at 896 n. 11 teaches a court should look to "similar services by lawyers of reasonably comparable skill, experience, and reputation." And *Blum, id.* at 893 (quoting S.Rep. No. 94–1011, p. 6 (1976)) cites as an example that antitrust cases and Section 1983 cases are "equally complex Federal litigation." It is of course entirely possible that the ultimate result here will be to look to lawyers who regularly practice in the civil rights area—*if* the other relevant criteria are met. But it would be improper to restrict the search to that segment of practitioners alone. Once again there may well be other factors entering into the final determination that call for further evaluation, but certainly defendants' approach is overly simplistic.

***3** Thus neither side has adequately addressed the question of reasonable rates. Any complete analysis will require consideration of all the factors found relevant by the cases under Section 1988 and other fee-shifting provisions.

Number of Hours

Hensley v. Eckerhart, 461 U.S. 424, 435 (1983) teaches:

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.

Plaintiffs have submitted extensive documentation of hours spent, including $76,593.50 in attorneys' and law clerks' fees for which no compensation is sought. Defendants nonetheless insist that the remainder of the time is still excessive and unreasonable.

In at least one important respect it does not lie in the mouth of defendants to cavil at the enormous expenditure of time reflected in the request: In large part the scope of that expenditure was forced by the intransigence of defendants themselves, who fought tooth and nail every step of the way. They bitterly resisted every aspect of plaintiffs' claims, constantly beating the drums of "institutional security" in a disingenuous way instead of acknowledging, facing up to and seeking to cure constitutional violations once they were brought to defendants' attention. They also sought appellate stays, reviews and reconsiderations at every level. That of course was their right, but both this Court in the Opinion and the Court of Appeals in its affirmance (as to the latter, see—in addition to the majority opinion's consistent rejection of the excuses defendants had advanced for the

constitutional deprivations they imposed on plaintiffs—Judge Flaum's concurrence, 851 F.2d at 885–86) found defendants' stonewalling efforts to be a major factor in the outcome of the case. Defendants cannot be heard to argue that time plaintiffs were *forced* to spend in responding to their litigation tactics is not compensable.

But that aside, defendants urge with some force that the fee petition is excessive because:

1. Plaintiffs' documentation is grossly inadequate.

2. Hours spent on certain tasks were excessive, unnecessary and unreasonable.

This opinion will not seek to resolve the issues in that respect, which necessitate both a budgeting of the reasonable requirements of this massive litigation and a parsing of the voluminous time records spanning over seven years. For reasons given at the end of this opinion, that task is best suited in the first instance to a special master to be appointed for that purpose. Three comments are in order now as to the excessiveness issue, however,

First, D.Mem. 14 n. 8 argues that plaintiffs' time expended on the failed Eighth Amendment claim is noncompensable. But *Hensley,* 461 U.S. at 434–36 scotches any notion that a plaintiff must prevail on every claim (*id.* at 435) (citation omitted)):

***4** [T]he fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.... Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Here plaintiffs' Eighth Amendment claim clearly "involved a common core of facts" with the rest of the case, and therefore counsel's time was "devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis" (*id.* at 435). Given the extent of plaintiffs' striking success in the face of a difficult legal burden (they had to and did overcome the strong presumptive effect of the broad discretion vested in prison authorities), this Court is well within *its* discretion to award attorneys' fees for all litigated claims.

Second, the force of defendants' argument that plaintiffs' counsel performed repetitive tasks and expended excessive time must necessarily be tempered by the nature of the resistance plaintiffs encountered. Although care must of course be taken to avoid the chicken-and-egg problem (which side's overkill efforts forced like expenditures of time on the other side?), the appointed special master may well find it profitable to obtain input as to how much time defendants' counsel expended on corresponding briefs or tasks. That information has not yet been provided.

Third, what has been said to this point should not obscure the obvious truth that "[a] claim for legal services presented by the prevailing party pursuant to Section 1988 presents quite a different situation from a bill that a lawyer presents to his own client" (*Hensley,* 461 U.S. at 441 (Burger, C.J., concurring)). "Cases may be overstaffed, and the skill and experience of lawyers vary widely" (*id.,* opinion of the Court, at 434). And large law firms, having undertaken what is initially viewed as pro bono litigation,[5] may well—with the best of will and in perfect good faith—perceive the matter as in part a training ground for young litigators.[6] Again resolution of all these matters is best handled in the first instance by obtaining the analysis and report from a special master.

Non–Attorneys' Fees and Costs

Plaintiffs seek fees for 18 non-attorney support staffers, including legal assistants (paralegals), special investigators, "project assistants," "clerical aides," librarians and "technical consultants." Defendants have contended those amounts should be treated as non-compensable overhead.

In part that debate has been overtaken by the decision (after completion of the parties' submissions) in *Missouri v. Jenkins by Agyei,* 109 S.Ct. 2463, 2469–72 (1989), holding that paralegal fees were compensable at market rates under Section 1988. *Jenkins, id.* at 2470, reasoned that for Section 1988 purposes:

***5** Clearly, a "reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. The parties have suggested no reason why the work of paralegals should not be similarly compensated, nor can we think of any.

Jenkins, id. at 2471 went on to conclude that paralegal work should be compensable at market rates and not necessarily at the cost to the attorneys. Accordingly, if it is established that the prevailing market practice is to bill paralegal time separately (that is, if the reasonable hourly rates determined for lawyers here do *not* take account of

paralegals' work as overhead items comparable to the expenses itemized in the *Jenkins* quotation), Section 1988 would permit compensation at those rates.[7]

As can be seen from the *Jenkins* quotation, most of the other categories sought here as a source of separate compensation by plaintiffs' appointed counsel clearly fall into the areas of overhead included within the hourly rates charged by the attorneys (and within the rates charged for paralegals, if *their* time is properly chargeable at a market rate other than cost).[8] There may be *some* separately chargeable items that would properly fall within the area compensable under Section 1988, but the parties have not addressed that question.[9] That too must be left for future determination.

Defendants also contend (as with the lawyers' time) that the rates charged are too high and the number of hours is excessive. Finally, they also challenge the appropriateness of the "expenses" portion of the petition.[10] Again the report of the special master should be invaluable in resolving the disputed areas.

Interest

Plaintiffs seek a total of $253,500.88 in interest, calculated by using prime rates compounded monthly. Defendants respond that the proper rate should be that of 52–week United States Treasury bills, as provided for *post*-judgment interest by 28 U.S.C. § 1961. Once more defendants' argument is preempted by a post-submission appellate decision confirming the approach this Court has consistently espoused in the past.

Gorenstein Enterprises, Inc. v. Quality Care–USA, Inc., 874 F.2d 431, 436 (7th Cir.1989) has this to say on the subject:

For the future, we suggest that district judges use the prime rate for fixing prejudgment interest where there is no statutory interest rate. That is a readily ascertainable figure which provides a reasonable although rough estimate of the interest rate necessary to compensate plaintiffs not only for the loss of the use of their money but also for the risk of default.

***6** That approach inherently rejects the T-bill rate as too low in view of the lack of default risk in such securities (*id.* at 436–37). And *Gorenstein, id.* at 437 also specifically approves of the compounding of interest. Throughout the *Gorenstein* discussion the Court of Appeals applies the same loss-of-the-use-of-money analysis that has informed this Court in such earlier decisions as *Lippo v. Mobil Oil Co.,* 692 F.Supp. 826, 838–43 (N.D.Ill.1988).

Gorenstein 's rationale applies equally well to a situation where it is plaintiffs' law firm that has lost the use of its money (or the economic equivalent, the use of its time) and has borne the risk of default. It should, however, be borne in mind that the reasonable hourly rates for lawyers' and other chargeable time must be selected so as not to take into consideration the risks of nonpayment, else double counting would be involved. Once that factor is excluded the award of interest at the prime rate, determined and compounded monthly, is appropriate (see *Lippo,* 692 F.Supp. at 839–43).

Special Master's Appointment

As has already been indicated at a number of places in this opinion, this Court has determined this dispute calls for the appointment of a special master under Rule 53. To be sure, for at least three decades it has been crystal-clear that Rule 53(b) means what it says when it prescribes that "[a] reference to a master shall be the exception rather than the rule" (see *LaBuy v. Howes Leather Co.,* 352 U.S. 249, 258 (1957)). Indeed, in just over nine years on the bench, this Court recalls no other instance than this case in which it has appointed a special master for *substantive* purposes (see the August 31, 1987 post-Opinion order of this Court and the Court of Appeals' affirmance commenting on such appointment here, 851 F.2d at 883–85).[11]

But as n. 11 reflects, Rule 53(b) also prescribes its own exceptions to the "exceptional condition" precondition to a reference:

[I]n actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

This case presents a paradigmatic example of both those exceptions. At its core the petition here is a complex accounting matter, and given the need to review and evaluate a massive amount of billing and the establishment of reasonable hourly rates, the resolution of the issues is the equivalent of a "difficult computation of damages." In such circumstances *LaBuy* itself (352 U.S. at 259) acknowledges the propriety of a reference.

This Court contemplates, at the next status hearing now set for September 22, 1989 at 8:45 a.m., the appointment of a special master to make findings of fact and conclusions of law necessary for this Court's determination of appropriate hourly rates and chargeable hours (and hence a reasonable award of fees) and awardable expenses. Both sides are invited, if they have

time to do so before that status hearing, to submit to this Court and to each other their suggestions as to the proper scope and form of the order of reference under Rule 53(c).

Footnotes

1 This opinion employs "attorney's" rather than "attorneys' " to conform to Section 1988's usage of the former term. That singular possessive usage is like a voice out of the past, when one-lawyer-per-side lawsuits were the norm rather than the rare exception. Here of course there were many lawyers involved on plaintiffs' side—indeed, that is one of defendants' complaints about the size of the fee petition (defendants' troops were fewer in number).

2 This Court's Opinion was affirmed on appeal, 851 F.2d 867 (7th Cir.1988). Although the Court of Appeals did not speak directly to the allowability of attorneys' fees, defendants would now be barred by claim-preclusion or law-of-the-case principles from challenging plaintiffs' entitlement to fees. Even were that not the case, however, plaintiffs are unquestionably "prevailing parties" under Section 1988 (*Texas State Teachers Ass'n v. Garland Independent School Dist.,* 109 S.Ct. 1486, 1492–93 (1989)) and thus entitled to the requested award in substantive (though not in quantitative) terms.

3 No effort will be made here to deal with the facts set out in so much detail in the Opinion. All further citations to the Opinion will take the form "Opinion at—," listing the Federal Supplement page number but omitting the volume number.

4 As always, this opinion adheres to the conventional and convenient (though technically imprecise) practice of referring to the Eighth Amendment's underlying Bill of Rights provision (which of course imposes limitations only on the federal government) rather than to the Fourteenth Amendment (which applies to state actors and has been construed to embody such Bill of Rights guaranties).

5 This lawsuit had to be viewed as an uphill battle at the outset, with no meaningful prospect of a Section 1988 reward in the offing.

6 Anyone familiar with the litigation process knows how few opportunities exist for first chairing (or even being on the firing line in) various aspects of meaningful lawsuits. Those opportunities are even fewer in larger law firms, which are less likely to take on the one-lawyer-per-side litigation referred to in n. 1. And there is always the pressure of being required to turn in at least x number of billable hours—for which purpose pro bono litigation may serve a junior lawyer as well as time spent on paying matters. This is not to suggest that makework or busywork is the order of the day, but an informed scrutiny by a knowledgeable special master will afford insights into reasonableness that the raw gross numbers in plaintiffs' petition do not.

7 *Jenkins, id.* at 2472 & n. 11 noted that separate billing for paralegals "appears to be the practice in most communities today."

8 If Kirkland & Ellis in fact charges clients for such overhead items that should normally be viewed as part of overhead, that is just an indirect way of increasing the lawyers' hourly rates above what they appear to be in surface terms. It is a phenomenon no different from that encountered some years ago when New York real estate management firms invaded the Chicago market and brought with them the practice of including in the square footage charged to office tenants such areas as the space to the center of the inner office walls and the outside of the outer office walls (rather than using inside measurements), elevator space and so on—hiking the actual square footage rental rate in terms of useable space by 10% or more without changing the nominal rate at all. And if the law firm does follow that practice in general, that would pro tanto contribute to its reported profits. But there is no reason to shift that burden to defendants.

9 This is not intended to fault them in that respect: *Jenkins* postdated their submissions.

10 Case law under Section 1988 consistently includes appropriate out-of-pocket expenses in the award without limiting the compensable items to those fitting the statutory definition of "costs" in 28 U.S.C. § 1920, which marks the bounds of judicial discretion in most litigation (*Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 445 (1987)).

11 In fact, this Court has followed the special-master route in only a very few instances—perhaps two or three—even in complex accounting situations, where Rule 52(b) tells us there is no need to show "exceptional circumstances requir[ing]" a reference.