

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHERYL A. AUMAN,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 99-CV-5445
	:	
MUHLENBERG SCHOOL	:	
DISTRICT, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

R.F. KELLY, J.

MAY 1, 2000

Plaintiff, Cheryl Auman ("Plaintiff" or "Mrs. Auman"), brings this motion for attorney's fees and court costs pursuant to 42 U.S.C. section 1988 ("section 1988") and Federal Rule of Civil Procedure 54.¹ On November 3, 1999, Plaintiff filed a Complaint against the Muhlenberg School District and seven School Board members in their individual and official capacities alleging a violation of her constitutional rights under 42 U.S.C. section 1983 and seeking compensatory damages, punitive damages, and declaratory and injunctive relief. Plaintiff claimed that

¹ Plaintiff's Motion for Attorney's Fees and Other Costs indicates that the motion is brought pursuant to 42 U.S.C. section 1881. (Pl.'s Mot. Att'y Fees and Other Costs at 1.) However, section 1881 is entitled "Award of National Medal of Science." Moreover, in another portion of the Motion, Plaintiff purports to be seeking costs pursuant to 42 U.S.C. section 1998, which does not exist. Id. at 2. However, we assume that the Motion is brought pursuant to 42 U.S.C. section 1988, as Plaintiff's other moving papers repeatedly indicate.

although the School District routinely approved lists of substitute and guest teachers prior to October 13, 1999, the Board members refused to approve such lists at a public meeting on October 13, 1999 as long as Plaintiff's name was on them. Plaintiff alleged that the Board was retaliating against her for having taken "positions on matters of community concern . . . during her sixteen years as a School Director, and during her candidacy for commissioner for Muhlenberg Township."²

In connection with this lawsuit, the parties engaged in limited discovery. Plaintiff served Requests for Production of Documents, Interrogatories, and Requests for Admissions. Defendants claim that Plaintiff was served with, but did not respond to, a Request for Production of Documents and Expert Interrogatories.

On February 3, 2000, counsel for the parties attended a mediation conference before a Court-appointed Mediator. At the conclusion of the conference, the Mediator recommended settlement in the amount of \$10,000.00 including back pay and attorney's

² In footnote 1 on page 1 of her Brief, Plaintiff explains that "[s]pecifically, Mrs. Auman alleged that, while on the Muhlenberg School Board, she took many positions on matters of community concern, such as advocating that the School District avoid an apparent conflict of interest by hiring bond counsel which was different than (sic) the school solicitor, questioning the manner in which the bond underwriter was selected, opposing hiring persons who were not certified or otherwise qualified to hold positions, and advocating that the District hire persons on the basis of qualifications rather than simply residence or other non-job-related criteria." (Pl.'s Mem. Support Mot. Att'y Fees and Other Costs at 1 n.1.)

fees, approval of Plaintiff for the substitute and guest teacher lists, and a letter confirming Plaintiff's qualifications for the positions on the lists.

On February 9, 2000, after a series of further negotiations, the School Board held a public meeting during which it approved Plaintiff's name to be listed on the substitute and guest teacher lists. Thereafter, on February 11, 2000, Defendants served upon Plaintiff's counsel, Jana R. Barnett ("Ms. Barnett") an Offer of Judgment in the amount of \$5,690.00 ("the Offer"). The Offer also provided for the payment of \$4,200.00 in attorney's fees and costs. The Offer was not made contingent upon acceptance of this amount of fees and costs.

By letter dated February 16, 2000, Ms. Barnett advised defense counsel that although Plaintiff accepted the terms of the Offer, Ms. Barnett contested defense counsel's estimation that \$4,200.00 represented her reasonable fees and costs. Rather, Ms. Barnett, a sole practitioner, claimed that at the time of the Offer she had billed 42 hours at an hourly rate of \$150.00, totaling fees of \$6,300.00, and incurred costs of \$378.11, for a total of \$6,678.11 in fees and costs. Ms. Barnett provided Defendants with an Invoice ("the February Invoice") detailing the basis for her claim. Accordingly, Ms. Barnett advised that if she did not receive an offer for that amount, she intended to file a Motion with this Court for those fees and costs.

Judgment was paid on March 2, 2000. Thereafter, Defendants offered to pay Ms. Barnett \$5,000.00, representing reasonable fees, and \$150.00 representing the cost of filing the action. Defendants arrived at this figure because they contested 17.4 hours that Ms. Barnett claimed to have billed, and therefore had computed those hours at 50% of her hourly rate. By letter dated March 9, 2000, Ms. Barnett rejected this offer, based upon her assumption that defense counsel's fees had exceeded \$5,000.00 and that defense counsel's hourly rate was greater than \$150.00. On March 14, 2000, defense counsel responded by letter indicating that his fees did not exceed \$5,000.00 and that his hourly rate was \$115.00. Ms. Barnett did not respond to this letter. Rather, on March 22, 2000, Ms. Barnett filed the instant Motion for Attorney's Fees and Other Costs.

In the Motion, Ms. Barnett seeks \$10,560.00 in fees for 52.8 hours at an hourly rate of \$200.00 along with a ten-percent enhancement of these fees, and \$461.21 in costs, for a total of \$12,077.21.³ This amount is \$5,399.10 higher than the amount Ms.

³ In Plaintiff's Reply Brief, filed without leave of this Court, Ms. Barnett now seeks to recover an additional \$714.39, making a total of \$12,791.60 in attorney's fees and costs sought, explaining that the increase is for filing the Reply Brief and for "additional costs which were incurred prior to filing the motion but which were unknown at that time." (Pl.'s Reply Br. at 4.) The attached Invoice reveals that the bulk of the new expenses, \$693.00, was spent in filing the Reply Brief. The other expenses, totaling \$21.39, were for Lexis/Nexis research and long distance telephone calls incurred prior to filing the motion but not yet billed, and photocopying. However, as the United States District Court for the Eastern District of

Barnett claimed she was entitled to in her February 16, 2000 letter and attached Invoice to defense counsel, which listed her hourly rate as \$150.00. Ms. Barnett attached an Invoice (the "March Invoice") to her Affidavit in support of her present claim. Notably, many of the expenses incurred in this case after February 16, 2000, according to the March Invoice, relate to negotiations over Ms. Barnett's reasonable fees and costs, which culminated in this Motion.

DISCUSSION.

I. Attorney's Fees.

The pertinent portion of section 1988 provides

(b) Attorney's fees

In 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.

42 U.S.C. § 1988(b). Defendants do not dispute Plaintiff's status as a prevailing party.

The starting point for determining the amount of

Pennsylvania explained in Teamsters Pension Trust Fund of Philadelphia v. Littlejohn, in denying the defendant costs of photocopying and supplemental fees for time spent working on a reply brief to the Plaintiff's opposition to Defendant's motion for fees and costs, "such reply briefs are not permitted under the governing rules, and leave of court was not granted to file the reply brief." Teamsters, No.Civ.A. 95-7556, 1997 WL 602848, at *3 (E.D.Pa. Sept. 22, 1997). Accordingly, Ms. Barnett's request for supplemental fees and costs is denied.

reasonable attorney's fees is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," or the "lodestar." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). The party seeking attorney's fees has the burden of proving that its request is reasonable. Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). The opposing party has the burden to challenge the reasonableness of the fees requested with specificity sufficient to give the fee applicant notice that he or she must defend the contested portion of the fee petition. Id.; Bell v. United Princeton Properties, Inc., 884 F.2d 713 (3d Cir. 1989). Once objections are raised, a court "has a great deal of discretion to adjust the fee award in light of those objections." Rode, 892 F.2d at 1183. The district court should exclude hours that are not reasonably expended. Hensley, 461 U.S. at 434; Rode, 683 F.2d at 1183. Hours are not reasonably expended if they are excessive, redundant or unnecessary. Id.

In the instant case, Defendants do not argue that Ms. Barnett should not be awarded reasonable attorney's fees and costs. Rather, Defendants contest the reasonableness of the hours Ms. Barnett purports to have spent on this case, specifically the necessity and appropriateness of the tasks she claims to have performed. Defendants also take exception to Ms. Barnett's present representation of her hourly rate as \$200.00. Defendants argue that Ms. Barnett seeks an excessive amount of

compensation for a relatively uncomplicated case which involved limited discovery, and which resulted in an Offer of Judgment within a little more than three months of its inception.

We first consider the reasonableness of Ms. Barnett's request for computation of fees at an hourly rate of \$200.00. A reasonable attorney's fee is "one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys." James v. SEPTA, No.Civ.A. 93-CV-5538, 1997 WL 698035, at *2 (E.D.Pa. Nov. 4, 1997). A fee applicant must show that "[t]he hourly rate charged by the attorney [is] reasonable in comparison with rates actually billed and paid in the marketplace for similar services rendered by lawyers of comparable skill, experience and reputation." Id. (quoting Kraemer v. Franklin & Marshall College, 1997 WL 89122, at *3 (E.D.Pa. Mar. 3, 1997)).

In the instant case, Ms. Barnett has failed to meet her burden of establishing that \$200 is a reasonable hourly rate. Ms. Barnett has provided this Court with no indication of her historical rates. Further, in support of her assertion, Ms. Barnett provided the affidavits of three attorneys who collectively attest that they believe that a reasonable hourly rate for handling civil rights cases in Berks County Pennsylvania ranges from \$160.00 to \$220.00.⁴ However, Ms. Barnett has

⁴ We have noted, although are not required to consider, the affidavit attached to Ms. Barnett's Reply Brief of G. Thompson

merely established what three attorneys who have handled civil rights cases in Berks County believe is a reasonable hourly rate for a civil rights lawsuit in federal court, not that such rates are reasonable compared to those rates actually paid in civil rights cases in Berks County. See James, 1997 WL 698035, at *2 (where attorney submitted affidavits from colleagues attesting to the reasonableness of attorney's hourly rate, "an affidavit from a client who actually paid this rate would be far more persuasive.") As such, the affidavits provided by Ms. Barnett do not by themselves establish that an hourly rate of \$200.00 is reasonable. Moreover, we find that the hourly rate of \$150.00 is reasonable, particularly in light of the fact that according to the February Invoice, Ms. Barnett was willing to have her fee computed based upon this rate up until the time she filed the present Motion. Therefore, at most, Ms. Barnett's fees for 52.8 hours at a rate of \$150.00 total a potential maximum unadjusted fee of \$7,920.00.

This established, we now consider the reasonableness of the hours expended by Ms. Barnett. This Court has carefully scrutinized the March Invoice, which reveals that a significant amount of Ms. Barnett's claims for fees are unreasonable, and that Plaintiff seeks to recover \$12,077.21 in Ms. Barnett's fees

Bell, which adds nothing to bolster Ms. Barnett's claim other than to state that Mr. Bell believes the reasonable range of relevant hourly rates reaches \$240.00.

and costs in a four-month lawsuit in which a substantial amount of the services performed by Ms. Barnett were telephone calls to Plaintiff. For example, Ms. Barnett seeks compensation for the following, numerous phone calls to Plaintiff, on the following dates: 10/30(four calls); 10/31 (two calls); 11/1; 11/8; 11/9; 11/15 (two calls); 11/25; 11/30 (two calls); 1/6; 1/9 (four calls); 1/10; 1/13; 1/19; 1/20; 1/27; 2/2 (three calls); 2/3 (3 calls); 2/4; 2/5; 2/7; 2/9 (two calls); 2/10; 2/14; 2/16; 2/23; 2/24; 3/4; 3/5; and 3/9, totaling approximately 43 telephone calls. We find this number of telephone communications, many of which occurred on consecutive days when no other apparent activity was taking place, to be excessive and unnecessary in this relatively uncomplicated matter which had hardly even begun before it was resolved less than four months after its genesis. Rather, less than half that number of telephone calls would have been more than reasonable to keep Plaintiff informed of the status of the case. As such, we will exclude the fee for the following telephone communications with Plaintiff totaling 3.5 hours at the \$150.00 hourly rate: 11/8; 11/9; 11/25; 11/30 (2 calls); 1/6; 1/9 (4 calls); 1/13; 1/19; 1/20; 1/27; 2/5; 2/9 (2 calls); 2/24; and 3/5.⁵ Therefore, we reduce Ms. Barnett's fee by \$525.00.

⁵ All of these dates refer to telephone calls which constitute the only service for which Ms. Barnett billed Plaintiff on that particular day.

Moreover, Ms. Barnett's fees for services performed on October 30, 1999 and October 31, 1999 are unreasonable as well. On October 30, 1999, she billed for 3.1 hours, during which she "[b]egan researching issues and drafting Complaint. Telephone calls with Mrs. Auman (4)." (Pl.'s Ex. 3, March Invoice, at 1.) On October 31, 1999, Ms. Barnett billed for 4.6 hours, during which she conducted "[t]elephone calls with Mrs. Auman and Attorney Boyer. Revised Complaint. Prepared letter to Clerk, and completed accompanying forms." Id. In sum, Ms. Barnett seeks fees for 7.7 hours for drafting and filing a Complaint involving one plaintiff, and one claim in an area of law with which she is well familiar.⁶ Given the nature of the case, we find this amount of time unreasonable in light of Ms. Barnett's expertise. Accordingly, we reduce Ms. Barnett's fee with regard to these dates to 4 hours total, representing a reasonable amount of time to draft and file such a Complaint. Ms. Barnett's fee is therefore reduced by \$555.00.

Ms. Barnett's fees for 12/27/99 and 12/28/99 are similarly unreasonable. On 12/27/99, Ms. Barnett billed for 3.4 hours, during which she "[c]onsolidated research regarding liability into memorandum. Performed Lexis/Nexis research regarding damages." (Pl.'s Ex. 3, March Invoice, at 3.) On

⁶ Ms. Barnett, according to her own affidavit, is experienced counsel in employment law and civil rights law, which she describes as the bulk of her practice. (Barnett Aff. at ¶ 3.) She has been practicing law for twenty-three years. Id.

12/28/99, Ms. Barnett billed for 1.7 hours, during which she "[r]eviewed Lexis/Nexis research regarding damages, and prepared memorandum regarding damages." Id. We find that a total of 5.1 hours for performing research on basic elements of an action such as liability and damages is excessive given Ms. Barnett's familiarity with civil rights litigation. Further, it is unreasonable for counsel to have billed for review of her own research performed one day before. Accordingly, as we find that these services could reasonably have been performed in 3 hours, we reduce Ms. Barnett's fees for these dates by \$315.00.

Ms. Barnett's billing on 12/29/99⁷ of .6 hours for reviewing this Court's one-page standard Scheduling Order and my biography, and drafting a letter to Plaintiff is unreasonable and, to the extent that all of those tasks were even necessary, could have been accomplished in .3 hours. See id. Accordingly, Ms. Barnett's fee for 12/29/99 is reduced by \$45.00.

On 2/12/00, Ms. Barnett billed for 1.3 hours, during which she "[r]eviewed letter from Mr. Freund and offer of judgment. Performed research regarding offers of judgment. Drafted letter to Mrs. Auman." Id. at 6. We find that billing for 1.3 hours for review of a letter, drafting a letter, and research of a relatively uncomplicated topic specifically

⁷ Ms. Barnett's March Invoice mistakenly lists these services as having been performed on 1/29/99, an error which is apparent from the fact that the Invoice is arranged chronologically.

provided for in a Federal Rule of Civil Procedure is excessive, and that such services could reasonably have been performed in .3 hours. Accordingly, Ms. Barnett's fee is reduced by \$150.00

Moreover, after summarily rejecting defense counsel's March 8, 2000 offer to pay fees and costs and unilaterally curtailing negotiations, Ms. Barnett billed \$1,050.00 for 7 hours from March 14, 2000 through March 21, 2000, which were devoted entirely to producing the instant fee petition. We find that billing an additional \$1,050.00 in a case in which an offer to pay attorney's fees has been made, and where negotiations are proceeding, constitutes unnecessary protraction of litigation and increase of costs. Accordingly, we reduce Ms. Barnett's fees by five hours, totaling \$750.00. As such, Ms. Barnett is entitled to \$5,580.00 in attorney's fees.

II. Enhancement.

Ms. Barnett also argues, without citation to any authority, that her fee should be adjusted upward by ten-percent due to the fact that "Plaintiff's counsel worked on a contingency fee basis and has not been paid anything for her time and expenses, the number of defendants (eight (8)), and the difficulty of proving the Defendants' motive in taking the action which they took, particularly in light of the secrecy with which the Defendants acted and the absence of documentation concerning their motives." (Pl.'s Mem. Support Pl.'s Mot. Att'y Fees and

Other Costs at 7.) Ms. Barnett further asserts that

Plaintiff does not believe that this was an unusually difficult case from a strictly legal standpoint, however; although counsel to the School District was present when the Defendants refused to approve the lists which bore Mrs. Auman's name, although counsel was present when the Defendants removed Mrs. Auman's name from the lists, and although the School District's counsel apparently failed to recognize that the Defendants were violating Mrs. Auman's constitutional rights, Plaintiff believes that the violation was obvious and that no special consideration should be given to her attorney for recognizing the constitutional violation.

Id.

There are three bases upon which an upward adjustment may be applied to attorney's fees. However, in all cases the party seeking adjustment has the burden of proving that an adjustment is necessary. Rode, 892 F.2d at 1183. First, the Supreme Court of the United States has held that section 1988 contemplates, in certain circumstances, an appropriate adjustment of attorney's fees for delay in payment. Missouri v. Jenkins, 491 U.S. 274, 284 (1989).

When Plaintiff's entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting it

Jenkins, at 282 (quoting Pennsylvania v. Delaware Valley Citizens' Counsel, 483 U.S. 711 (1987)).

Underlying the Jenkins decision to allow upward

adjustment of attorney's fees under section 1988 where there has been a delay in payment was the concern that "[c]learly compensation received several years after the services were rendered - as it frequently is in complex civil rights litigation - is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings." Jenkins, 491 U.S. at 283.

However, this concern is not implicated in the present case. While Ms. Barnett asserts she has not been compensated as yet for her services, this litigation endured only a little more than four months, although it was extended by Ms. Barnett in filing the present Motion. Therefore, there is no concern that so much time passed during this litigation that Ms. Barnett's current rates diverge substantially from her historical rates. We cannot conclude that four months of litigation without being paid is the sort of delay the Jenkins court meant to protect against, and certainly does not warrant the upward adjustment of \$1,056.00 which Ms. Barnett seeks.

The second basis for adjustment is due to the necessity of attracting competent counsel. This adjustment is called a contingency multiplier and "is to be granted only in rare cases." Rode, 892 F.2d at 1184 (citations omitted). "The purpose of the contingency multiplier is to compensate counsel for the riskiness of undertaking the litigation." Id. However, contingency

multipliers are not available when fee shifting is authorized by federal statute, including section 1988. Burlington v. Dague, 505 U.S. 557, 562 (1992); Warren v. Reading Sch. Dist., No.Civ.A. 97-4064, 2000 WL 122353, at *2 (E.D.Pa. Jan.31, 2000).

The third basis upon which an upward adjustment may be granted is for quality of representation. Rode, 892 F.2d at 1184 (citations omitted). However, an adjustment is made "only in very rare circumstances where the attorney's work is so superior and outstanding that it far exceeds the expectations of clients and normal levels of competence." Id. (citation omitted). However, Plaintiff does not argue that Ms. Barnett's representation was so superior as to justify the adjustment on that basis. Rather, Plaintiff asserts that no special consideration is due to Ms. Barnett for recognizing the obvious constitutional violation in this case. (Pl.'s Mem Support Mot. Att'y Fees and Other Costs at 7.) Accordingly, Ms. Barnett's request for a ten-percent enhancement of her fees is denied.

III. Costs.

Ms. Barnett seeks compensation for \$461.21 in expenses, broken down as follows: \$204.53 for Lexis/Nexis research; \$3.98 for long distance telephone calls and facsimiles; \$51.30 for photocopying; \$17.60 for unusual postage; \$150.00 for the filing fee; \$20.80 for mileage; and \$13.00 for parking. Under section 1988, the types of expenses available as part of a reasonable

attorney's fee are limited to "only those litigation expenses that are incurred in order for the attorney to be able to render his or her legal services." Abrams v. Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir. 1995). The following expenses are generally recoverable as part of an attorney's fee when it is the custom of attorneys in the local community to bill clients separately for them: (1) reproduction expenses; (2) telephone expenses of the attorney; (3) travel time and expenses of the attorney; and (4) postage. Id. (citations omitted).

Plaintiff has submitted the affidavits of three local attorneys who attest that in their community expenses are billed in addition to the hourly rate. The costs relating to Ms. Barnett's photocopying, travel, postage and telephone expenses fit within those expenses which are recoverable under section 1988. Therefore, Ms. Barnett is awarded \$256.68, the sum of those expenses.

With regard to the Lexis/Nexis research, however, we find that Ms. Barnett has already billed for these services as part of her hourly rate on the following dates: 10/30/99, 10/31/99, 12/27/99, and 2/12/00. Therefore, we will allow Plaintiff to recover only for the following Lexis/Nexis expenses for which Ms. Barnett did not already bill as part of her hourly rate according to the March Invoice: \$29.05 (10/29/99); \$62.12 (12/29/99); and \$5.08 (2/9/00), totaling \$96.25. See Abrams

(holding where attorney's fees award included some of the claimed expenses as overhead, resulting in double compensation for the expenses, district court had discretion to determine for which out-of-pocket expenses party had already been compensated).

Accordingly, Plaintiff is awarded \$5,932.93 representing reasonable attorney's fees and costs.

An appropriate Order follows.