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

MICHAEL T. COLLINS	:	**CIVIL ACTION**
	:	
v.	:	
	:	
JULIO M. ALGARIN, JAMES A. FREY,	:	
EDWIN NEGRON, ALFRED RICCI,	:	
MARK GRIFFITH, FRANK GRIFFITH,	:	
DAVID DOMBROSKI, JOSEPH WALSH &	:	
DELORES MARTIN	:	**NO. 95-4220**

MEMORANDUM and ORDER

Norma L. Shapiro, J. **January 9, 1998**

Plaintiff Michael T. Collins ("Collins") filed a civil rights action against various prison officials. A jury found in favor of Collins and against two of the defendants. Collins filed a petition for attorney's fees under 42 U.S.C. § 1988. Defendants argued the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(d), attorney's fees provisions effective after Collins filed suit, control the amount of fees Collins can recover for work performed after the date of its enactment. Collins argued the PLRA violates the Equal Protection Clause and its application would have an impermissible retroactive effect. The United States, permitted to intervene under 28 U.S.C. § 2403, submitted a legal memorandum supporting the constitutionality of the PLRA. For the reasons stated below, the court finds the PLRA constitutional and applicable to all legal work performed after the date of enactment.

FACTS

Collins, a state prisoner confined at the State Correctional Institute at Camp Hill, Pennsylvania ("Camp Hill"), was transferred to the Montgomery County Correctional Facility ("MCCF") in Eagleville, Pennsylvania, for a Montgomery County court appearance. On July 27, 1995, Collins, alleging violations of his rights under the First, Eighth and Fourteenth Amendments, filed a pro se complaint based on 42 U.S.C. § 1983[1] against twenty-three Montgomery County prison officials.

The court appointed counsel for Collins; counsel filed second and third amended complaints against the Montgomery County Board of Prison Inspectors (the "Prison Board") and nine prison officials (collectively the "defendants"). The complaints alleged the following: 1) on March 3, 1995, prison guards at MCCF beat Collins;[2] 2) on June 28, 1995, MCCF prison guards used

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[1] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

[2] The court severed the March 3, 1995 claim. The parties subsequently stipulated to a dismissal with prejudice of any claims arising out of this incident.

excessive force against Collins and repeatedly "sicced" a police dog on Collins; and 3) the Prison Board and the warden of MCCF approved and implemented an unconstitutional policy allowing the use of a K-9 unit inside MCCF.

The trial on the claims involving the K-9 unit began December 9, 1996. The jury returned a verdict in favor of Collins and against defendants Alfred Ricci ("Ricci") and Edwin Negron ("Negron") on December 16, 1996. The jury awarded Collins $15,000 in compensatory damages against Negron and Ricci, $2,000 in punitive damages against Negron and $3,000 in punitive damages against Ricci. Collins did not prevail on his claim that the Prison Board and the MCCF warden implemented an official policy to use the K-9 unit in an illegal manner. Collins prevailed on one of his three claims against two of the ten defendants in his amended complaints.

Collins filed a petition for attorney's fees under 42 U.S.C. § 1988. Defendants and intervenor the United States argued the PLRA limits the amount of attorney's fees Collins can recover for work performed after its effective date on April 26, 1996.

DISCUSSION

I. Attorney's Fees in Prisoner Litigation

A successful civil rights plaintiff is entitled to recover

reasonable attorney's fees under 42 U.S.C. § 1988.[3] See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Collins was successful against two defendants. Although his success was limited, Collins was a "prevailing party"; Collins "succeeded on [a] significant issue in litigation which achieved some of the benefit [he] sought in bringing suit." Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 7981-92 (1989); see also City of Riverside v. Rivera, 477 U.S. 561, 570 (1986) (plurality).

The PLRA was enacted on April 26, 1996 (the "enactment date"), after Collins filed suit and before his attorneys performed most of their legal work. The PLRA attorney's fees provisions pertain to "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." 42 U.S.C. § 1997e(d)(1). Three provisions of the PLRA

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[3] 42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964, or section 13981 of this title,, [sic] 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

are relevant here.

First, "[w]henever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). This provision requires the court to deduct from the plaintiff's judgment a portion of attorney's fees awarded plaintiff's counsel.

Second, "[i]f the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." Id. This limits the total amount of attorney's fees paid by the defendants to 150 percent of the plaintiff's judgment.

Third, "[n]o award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel." 42 U.S.C. § 1997e(d)(3). This provision places an upper limit on the attorney's hourly billing rate upon which the court bases an award of fees. The issue is what effect these provisions have on actions pending on the date of enactment, April 26, 1996.[4]

[4] The only attorney's fees at issue in this case are those billed after April 26, 1996. The defendants have paid the costs and fees billed on or before that date.

II. Application of the PLRA to Actions Pending on the Date of Enactment

Application of the PLRA attorney's fees provisions to actions pending on the date of enactment raises the issue of retroactivity. The Due Process Clause "protects the interest in fair notice and repose that may be compromised by retroactive legislation." Landgraf v. USI Film Products, 511 U.S. 244, 266 (1994). Retroactive legislation deserves judicial attention because it may involve the legislature's "sweep[ing] away settled expectations suddenly and without individualized consideration" or responding "to political pressures [to act] against unpopular groups or individuals." Id.

Landgraf established a two-part test for analyzing legislation having a potential retroactive effect: 1) examine "whether Congress has expressly prescribed the statute's proper reach"; and 2) when "the statute contains no such express command, the court must determine whether the new statute would have retroactive effect." Id. at 280.

A. Congressional Intent

Congress did not expressly state if the PLRA attorney's fees provisions apply to actions pending on the enactment date. The PLRA is comprised of ten sections; the attorney's fees provisions, codified at 42 U.S.C. § 1997e(d), are contained in § 803. Only § 802, dealing with injunctions, consent decrees and other prospective relief in prison litigation, codified at 18

U.S.C. § 3626, expressly applies to pending actions.[5] Collins argues that Congress did not intend the attorney's fees provisions of § 803 to apply to pending actions; he relies on Lindh v. Murphy, 117 S. Ct. 2059 (1997). In Lindh, the Court considered whether the Antiterrorism and Effective Death Penalty Act's ("AEDPA") amendments to chapter 153 of Title 28 applied to actions pending on the date of enactment. Congress was silent on the issue, but had explicitly provided the AEDPA's amendments to chapter 154 of Title 28 "shall apply to cases pending on or after the date of enactment of this Act." AEDPA, Pub. L. No. 104-132, § 107(c), 110 Stat. 1214, 1226 (1996).

The Court focused on the effects of the two provisions. The amendments to chapter 153 established new standards for review of habeas corpus petitions filed by state prisoners; the amendments to chapter 154 provided for review of habeas corpus petitions filed by state prisoners under capital sentences. See Lindh, 117 S. Ct. at 2063-64. The Court found it "significant" that both provisions "govern[ed] standards affecting entitlement to relief," and "everything we have just observed about [the effects of] chapter 154 is true of changes made to chapter 153." Id. at

[5] Section 802 provided: "Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." PLRA, Pub. L. No. 104-134, § 802(b)(1), 110 Stat. 1321, 1321-70 (1996).

2064. Because the two provisions of the AEDPA were so similar in their effects, the Court determined Congress must have intentionally omitted language prescribing application of the chapter 153 amendments to pending actions. See id. at 2064-65.

Both AEDPA chapters considered in Lindh established the standard of review for habeas corpus petitions filed by state prisoners. No such similarity exists between §§ 802 and 803 of the PLRA. When enacting § 802, dealing with prospective relief, Congress had on record numerous injunctions and consent decrees retaining continuing jurisdiction over state and local prisons. Congress specifically addressed the application of § 802 to pending actions to make clear it intended the prospective relief provisions of the PLRA to apply to all prospective relief, whether such relief was granted or approved before or after the date of enactment. See Salahuddin v. Mead, No. 95-8581, 1997 WL 357980 (S.D.N.Y. Jun. 26, 1997) (Congress included this language in § 802 "in order to emphasize the unusually far-reaching consequences of this retroactivity provision.").

Section 803 provides limitations on attorney's fees and is not so similar to § 802 to permit an inference of intent from Congressional silence in § 803 compared to § 802. The failure of Congress to include language in § 803 specifically dealing with pending cases is not a case where "Congress' silence in this regard can be likened to the dog that did not bark." Chisom v.

Roemer, 501 U.S. 380, 396 n.23 (1991); see also Harrison v. PPG Industries, Inc., 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting). Congress did not expressly provide that the PLRA attorney's fees provisions apply to pending actions.

B. Retroactivity

The court must decide whether application of the provisions to Collins would have an impermissible retroactive effect. See Landgraf, 511 U.S. at 280.

"Retroactivity is not favored in the law...." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). However, courts generally are to apply the law in effect at the time they render their decision, "even though that law was enacted after the events that gave rise to the suit." Landgraf, 511 U.S. at 273. "[E]ven where the intervening law does not expressly recite that it is to be applied to pending cases, it is to be given recognition and effect." Bradley v. School Bd. of Richmond, 416 U.S. 696, 715 (1974) (citing Thorpe v. Housing Auth. of City of Durham, 393 U.S. 268, 282 (1969); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801)).

Applying a statute to pending actions will have an impermissible retroactive effect only if it "attaches new legal consequences to events completed before its enactment." Landgraf, 511 U.S. at 270. To be impermissible, application of the statute must do more than "upset[] expectations based in

prior law." Id. at 269. The "potential unfairness of retroactive civil legislation is not a sufficient reason for a court" to refrain from applying it to pending cases. Id. at 267.

There is an impermissible retroactive effect if application of the statute to a pending action amounts to an "injustice." Bradley, 416 U.S. at 717; see Lindh, 117 S. Ct. at 2063 (intervening statute changed "standards of proof and persuasion in a way favorable to [the] state"). If the new statute causes a "change in the substantive obligation of the parties," application of the statute may be impermissible. Bradley, 416 U.S. at 721. New statutes cannot be applied to pending actions if they would "infringe upon or deprive a person of a right that had matured or become unconditional." Id. at 720.

"No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." New York Central R.R. Co. v. White, 243 U.S. 188, 198 (1917). "'If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.'" Landgraf, 511 U.S. at 270 n.24 (citation omitted).

Attorney's fees determinations "'are collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'" Landgraf, 511 U.S. at 277 (quoting White v. New Hampshire Dept. of Employment Security, 455 U.S.

445, 451-52 (1982)). Application of new statutory provisions regarding attorney's fees provisions to pending civil actions does not "'impose an additional or unforeseeable obligation'" upon the parties. Id. at 278 (quoting Bradley, 416 U.S. at 721)); see Morgan Guaranty Trust Co. v. Republic of Palau, 971 F.2d 917, 922-23 (2d Cir. 1992); Simmons v. Lockhart, 931 F.2d 1226, 1229-31 (8th Cir. 1991).

No Third Circuit decision addresses application of the PLRA attorney's fees provisions to actions pending on April 26, 1996, but two other courts of appeals have determined the provisions apply to legal fees earned in actions pending on the date of enactment. See Williams v. Brimeyer, 122 F.3d 1093, 1094 (8th Cir. 1997); Alexander S. v. Boyd, 113 F.3d 1373, 1388 (4th Cir. 1997). In Williams, the court simply stated § 1997e(d) "applies to all hours worked in this case after the date of the passage of the Act. This is not a 'retroactive' application of the new law." Williams, 122 F.3d at 1094.

The Alexander S. court focused on the "secondary" nature of attorney's fees and held the PLRA's attorney's fees provisions did not disrupt any matured rights of the parties. See Alexander S., 113 F.3d at 1387-88. The court determined "a statute has a retroactive effect under Landgraf only when it negatively impacts a party's expectations or rights." Id. at 1387 n.12. The PLRA fee provisions only "upset the expectations of Plaintiff's

counsel," but that was not enough to create an impermissible retroactive effect. Id. The court determined the PLRA fee provision did not "attach new legal consequences to completed events," id. at 1388; nor were the provisions "so fundamentally unfair as to result in manifest injustice." Id.[6]

District courts addressing the application of the PLRA fee provisions to pending cases are divided. Some courts have held the provisions apply to all work performed after the enactment date, see Hadix v. Johnson, 947 F. Supp. 1113, 1115 (E.D. Mich. 1996) ["Hadix I"], but others have held application of the PLRA fee provisions to pending cases, even for work performed after the enactment date, would be impermissible. See Campbell v. McGruder, Nos. 71-1462, 75-1668, slip op. at 3-6 (D.D.C. October 28, 1997); Blisset v. Casey, 969 F. Supp. 118, 129 (N.D.N.Y. 1997); Hadix v. Johnson, 965 F. Supp. 996, 1001 (W.D. Mich. 1997) (citing cases) ["Hadix II"].

Collins relies heavily on Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996), Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996), and Weaver v. Clarke, 933 F. Supp. 831 (D. Neb. 1996), aff'd, 120 F.3d 852 (8th Cir. 1997), cert. filed, 66 U.S.L.W. 3298 (Oct. 8, 1997), but these cases are distinguishable. In Jensen, the court

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[6] The court also held the PLRA provisions had to be applied to all legal work in pending cases performed prior to the date of enactment. See Alexander S., 113 F.3d at 1377. That is not at issue in the present case.

determined the PLRA fee provisions could not be applied to a pending action because the PLRA "was not in effect when the plaintiffs' attorneys accepted this appointment, when liability and fee determinations were made, or even when we remanded this case to the District Court." Jensen, 94 F.3d at 1202. Here, the PLRA was enacted well before the liability and attorneys' fee determinations. In Williams, the court of appeals specifically limited the Jensen holding to situations where the work was performed prior to the enactment date. See Williams, 122 F.3d at 1094. Collins has recovered attorney's fees for work performed prior to the enactment date.[7]

The Cooper court refused to apply the PLRA fee provisions to a pending action because it would interfere with "completed conduct, namely the services rendered by the plaintiffs' counsel in advance of the passage of the [PLRA]." Cooper, 97 F.3d at 921. In Weaver, "all of the action that triggered entitlement to an attorney's fee award took place prior to the date of enactment of the PLRA." Weaver, 933 F. Supp. at 835. Here, the PLRA was enacted well before the liability and attorney's fee determinations. Collins is attempting to obtain attorney's fees for work performed after the enactment date, so these cases are inapposite.

After April 26, 1996, Collins' attorneys had notice of the

[7] See Order dated November 4, 1997.

PLRA and its potential effect on any attorney's fees award to which they might be entitled. Plaintiff's counsel may have had an expectation of receiving fees if plaintiff ultimately was successful, but there was never an entitlement in any particular fee amount. "Even after a victory on the merits or a declaration of entitlement to fees an attorney has no right to a specific fee under § 1988 until the actual fees are awarded." Alexander S., 113 F.3d at 1392 (Motz, J., concurring). Applying the PLRA fee provisions to Collins will not "impair rights [he] possessed when he acted, increase [his] liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf, 511 U.S. at 280. Limiting prisoners' attorneys' fees to 150 percent of the amount allowed for court-appointed counsel is not "so fundamentally unfair as to result in manifest injustice." Hadix I, 947 F. Supp. at 1115. Therefore, the court finds application of the PLRA fee provisions will not create an impermissible retroactive effect.

III. Equal Protection

Collins also argues that, even if the PLRA fee provisions do not have an improper retroactive effect, they violate the principal of equal protection under the law.[8] Collins argues the

[8] The Fifth Amendment provides: "No person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. art. V. This clause encompasses equal protection of law. See Mathews v. Castro, 429 U.S. 181, 181 n.1 (1976).

fee provisions place "prisoners in a different class than all other civil rights litigants for purposes of attorneys' fees under 42 U.S.C. § 1988." Pltff.'s Supp. Mem. Supp. of Att. Fees at 9 ["Pltff.'s Supp. Mem."]. Collins argues: 1) these provisions burden a fundamental right and fail under strict scrutiny analysis; and 2) even if rational basis review applies, the provisions are irrational.

A. Strict Scrutiny

When legislation classifies by certain suspect categories or "impinge[s] upon personal rights protected by the Constitution," a heightened level of scrutiny applies. Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). The government must "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." Plyler v. Doe, 457 U.S. 202, 217 (1982); see Cleburne, 473 U.S. at 440 ("suitably tailored to serve a compelling state interest"). Collins concedes prisoners do not form a suspect class requiring strict scrutiny of the legislation; he bases his argument on the alleged interference with his fundamental right of access to the courts.

Federal courts "must take cognizance of the valid constitutional claims of prison inmates." Turner v. Safley, 482 U.S. 78, 84 (1987). "Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right,

because preservative of all rights.'" McCarthy v. Madigan, 503 U.S. 140, 153 (1992) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

Collins argues the "PLRA attorneys' fees provisions combine to increase substantially the risk of nonpayment of fees and to decrease the amount of payment, making prison litigation much less feasible and attractive to private counsel." Pltff.'s Supp. Mem. at 14. Because private counsel will be less willing to assume pro bono representation of indigent prison inmates, the PLRA fee provisions place a burden on the a prisoner's ability to conduct litigation.

The PLRA fee provisions do not hamper an inmate's ability to file or prosecute a lawsuit; they merely make it more difficult to obtain pro bono representation by private firms. The Supreme Court has not recognized that burdens of this limited nature violate the fundamental right of court access. In McCarthy, the Court found filing deadlines imposed by the Federal Bureau of Prisons "a likely trap for the inexperienced and unwary inmate." McCarthy, 503 U.S. at 153. This "trap" effectively cut off prisoners' access to the courts because their claims would be dismissed for technical, procedural infirmities which many prisoners would fail to understand.

Not every regulation remotely affecting a prisoner's ability to conduct litigation constitutes an infringement of the

fundamental right of court access. "To the contrary, reasonable regulations that do not significantly interfere with [the fundamental right] may legitimately be imposed." Zablocki v. Redhail, 434 U.S. 374, 386 (1978). The right of court access includes the ability to prepare and file legal documents and to avoid filing fees in certain situations. See Lewis v. Casey, 116 S. Ct. 2174, 2179 (1996) (citing Johnson v. Avery, 393 U.S. 483, 484, 489-90 (1969); Burns v. Ohio, 360 U.S. 252, 258 (1959); Ex parte Hull, 312 U.S. 546, 547-49 (1941)).

The right of access does not include the right to counsel in civil cases, even those involving constitutional issues. See Lassiter v. Department of Social Servs., 452 U.S. 18, 25-27 (1981). Since a prisoner has no right to counsel in civil actions, the right to court access has not been violated because the PLRA fee provisions make it more difficult to obtain counsel.

The PLRA fee provisions do not restrict the ability of an inmate to initiate and conduct litigation. A prisoner may benefit from having counsel in civil actions, but has no right to demand representation. The Constitution "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." Lewis, 116 S. Ct. at 2182. The PLRA fee provisions do not impermissibly burden the right of court access; strict scrutiny is not appropriate.

B. Rational Basis Review

If "a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relationship to some legitimate end." Romer v. Evans, 116 S. Ct. 1620, 1627 (1996). The "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Cleburne, 473 U.S. at 440. "[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" Heller v. Doe, 509 U.S. 312, 319 (1993) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)).

The PLRA legislative history does not reveal the Congressional purpose in enacting the attorney's fees provisions, but a general purpose of the PLRA was "to discourage the filing of frivolous suits and appeals by prisoners." McGann v. Commissioner of Social Sec. Admin., 96 F.3d 28, 31 (2d Cir. 1996).[9] Collins argues the PLRA fee provisions are irrational

[9] The fact that Congress did not enunciate its purposes is irrelevant, because "a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.'" Heller, 509 U.S. at 320 (quoting Nordlinger v. Hahn, 505 U.S. 1, 15 (1992)). The statute "may be based on rational speculation unsupported by evidence or empirical data." Beach Communications, 508 U.S. at 315.

because they do not further that goal.

The PLRA fee provisions require that successful prisoners pay a portion of their attorney's fees. See 42 U.S.C. § 1997e(d)(2). Requiring prisoners to contribute to their attorney's fees may create a disincentive to filing lawsuits in general and frivolous lawsuits in particular. The provision limiting attorney's fees hourly rates to 150 percent of the amount allowed for court-appointed counsel, see 42 U.S.C. § 1997e(d)(3), may have been an attempt to bring the fees earned by prisoners' lawyers in civil actions more in line with those earned by court-appointed attorneys in criminal actions. There is no question most criminal counsel are effective despite the lower fees.

Collins argues the fee provisions are both too narrow, because they do not reach frivolous lawsuits filed by prisoners proceeding pro se, and too broad, because they do reach non-frivolous lawsuits filed by successful prisoners. But the court must uphold the legislation "'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Heller, 509 U.S. at 320 (quoting Beach Communications, 508 U.S. at 313). A court cannot overturn legislation merely because "there is an imperfect fit between means and ends." Heller, 509 U.S. at 321. "The problems of government are practical ones and may justify, if they do not

require, rough accommodations-- illogical, it may be, and unscientific." Metropolis Theater Co. v. Chicago, 228 U.S. 61, 69-70 (1913).

The burden is on Collins "to negate every conceivable basis which might support" the legislation. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973). As long as the PLRA fee provisions "find some footing in the realities of the subject addressed by the legislation," see Heller, 509 U.S. at 321, the court must uphold them, even if they seem "unwise" or work "to the disadvantage of a particular group, or if the rationale ... seems tenuous." Romer, 116 S. Ct. at 1627. Collins has not met that burden; the PLRA attorney's fees provisions are constitutionally applied to cases pending on its enactment date.

IV. Attorney's Fees Calculation

The PLRA requires that attorney's fees are awarded at an hourly rate no more than 150 percent of the hourly rate established under 18 U.S.C. § 3006A for payment of court-appointed counsel. See 42 U.S.C. § 1997e(d)(3). Section 3006A[10]

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[10] 18 U.S.C. § 3006A(d)(1) states:

> Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $60 per hour for time expended in court or before a United States magistrate and $40 per hour for time reasonably expended out of court, unless the Judicial Conference determines that a higher rate of

currently provides that court-appointed attorneys are paid $60 per hour for time spent in court and $40 per hour for time spent out of court unless the Judicial Conference determines a higher rate is justified in a district. In this district, the hourly rates are $65 for time spent in court and $45 for time spent out of court. Under the PLRA, the maximum hourly rates are $97.50 for time spent in court and $67.50 per hour for time spent out of court.

Collins' attorney, Stephen G. Harvey ("Harvey"), skillfully represented Collins and is entitled to the full amount authorized by statute ($97.50 per hour). The court will award fees for time reasonably spent by associate counsel Michelle H. Yeary ("Yeary"). Yeary is billed by the firm at $95 per hour, so that is her maximum hourly rate for time spent in court. Likewise, the limited time spent by plaintiff's counsels' supervising partner, Philip J. Katauskas ("Katauskas"), was reasonable and meant to ensure the quality of representation. The court will also award fees for the reasonable time he spent out of court. The court will award each of them the full amount permitted under the statute ($67.50 per hour) for their time spent out of court. The total amount of fees since the effective date will be no more

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> not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a United States magistrate and for time expended out of court....

than 150 percent of the judgment. See 42 U.S.C. § 1997e(d)(2).

Under the PLRA, the court must deduct from the full attorney's fee award a portion (up to 25 percent) to be paid by the plaintiff. See id. The PLRA does not impose any minimum percentage that must be applied toward the fees. Plaintiffs engaging an attorney on a contingent-fee basis commonly pay one-third or even two-fifths of their recovery to their attorneys; there is nothing abhorrent in requiring a successful prisoner-plaintiff to pay a portion of the attorney's fees. A plaintiff filing an action prior to the enactment of the PLRA may have had an expectation (although not a "matured right") of keeping 100 percent of his judgment under § 1988 at the time he filed suit, an expectation that may have influenced his request for counsel, the court may take this into account in determining the percentage (up to 25 percent) to be deducted from his judgment toward the attorney's fees award. This is not unfair to defendants who understood when the action was filed that they would pay attorney's fees in their entirety if they did not settle the case or prevail at trial.

It is not possible to calculate the appropriate fee from the materials presented. Plaintiff's attorneys shall resubmit their fee petition allocating the time between that in court and not in court. Court time shall be calculated at $97.50 for Harvey and $95.00 for Yeary, and out-of-court time shall be calculated at $67.50 for both of them as well as for Katauskas.

The total amount will be substantially less than that claimed by plaintiff's attorneys, but it may not be substantially less than the amount awarded by the court prior to enactment of the restrictions imposed by the PLRA. The quality of representation was exceptional. However, plaintiff brought suit against twenty-three, later ten, defendants for three incidents allegedly violating his constitutional rights; he ultimately prevailed against two defendants on one of his three claims. The fees claimed were approximately four times the jury's award of damages and might well have been reduced pre-PLRA under Hensley.

An appropriate Order follows.

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DAVID DOMBROSKI, JOSEPH WALSH &	:	
DELORES MARTIN	:	**NO. 95-4220**

ORDER

AND NOW, this 5th day of January, 1998, upon consideration of plaintiff Michael T. Collins' ("Collins") petition for attorney's fees, the responses by defendants and intervenor the United States, after a hearing in which counsel for all parties were heard, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Collins' attorneys shall be awarded reasonable attorney's fees in accordance with the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), for time expended after April 26, 1996.

2. Collins' attorneys shall submit a revised fee petition within ten (10) days allocating their time between in court and out of court time after April 26, 1996.

Norma L. Shapiro, J.