

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

VANELL SAMPSON, et. al. : CIVIL ACTION
:
v. :
:
EMBASSY SUITES, INC. et. al. : NO. 95-7794

M E M O R A N D U M

WALDMAN, J.

October 16, 1998

This is a discrimination in public accommodations action brought by plaintiffs under 42 U.S.C. §§ 1981, 1982 and 2000a. The parties agreed to an entry of judgment pursuant to an offer made under Fed. R. Civ. P. 68 for "\$5,400 plus costs." Although neither party disputes that "costs" in this instance includes plaintiffs' attorney's fees, they cannot agree on the amount of a reasonable fee. Presently before the court are plaintiffs' Motions for Costs and Attorney's Fees. Plaintiffs seek \$31,757.79 in legal fees and \$6,820 in other costs.

Defendants assert that plaintiffs should be estopped from requesting a fee in excess of \$4,500 because defendants relied upon a statement by plaintiffs' attorney during settlement discussions that his fees were approximately \$4,500. Plaintiffs' attorney denies making the assertion in his brief, however, he has submitted no affidavit. Defense counsel has submitted a sworn declaration that this estimate was given. In any event, plaintiffs are not precluded from seeking an otherwise reasonable

fee because of an estimate given by counsel during prior discussions leading to a rejected settlement offer.

Settlement discussions do not constitute an offer of judgment. Clark v. Sims, 28 F.3d 420, 424 (4th Cir. 1994). If there is any occasion in civil litigation which calls for caution and care by counsel, it is the drafting of a Rule 68 offer. A defendant who fails to state his intentions clearly acts at his peril. Chambers v. Manning, 169 F.R.D. 5, 8 (D. Conn. 1996).

A defendant may make a lump sum Rule 68 offer to settle a civil rights or other claim entitling a prevailing party to attorney's fees. Blumel v. Mylander, 165 F.R.D. 113, 115 (M.D. Fla. 1996). If this is a defendant's intent, however, he must clearly specify that the offer includes attorney's fees. Webb v. James, 172 F.R.D. 31, 314-16 (N.D. Ill. 1997) (counsel's "subjective intent" is not controlling ... "counsel could have specifically stated that the offer included attorney's fees"); Tyler v. Meola, 113 F.R.D. 184, 186 (N.D. Ohio 1986) ("it is incumbent upon the movant under Rule 68 to expressly state that the offer of judgment includes an amount settling any claims for attorney fees"). If defendants were truly intent upon limiting their total liability to \$9,900, they easily could have drafted a Rule 68 offer to that effect rather than stating "\$5,400 plus costs."

A reasonable fee is presumed to be the product of a reasonable hourly rate multiplied by the number of hours reasonably expended on the litigation. Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1035 (3d Cir. 1996). A party seeking fees has the burden of presenting satisfactory evidence, in addition to his own attorney's affidavit, that the requested hourly rate is reasonable given the prevailing market rate for similar services of attorneys of equivalent skill, experience and reputation. Id. at 1035-36. In the absence of such proof, the court has discretion to determine an approximate fee. Id. at 1036.

Plaintiffs request a rate of \$175. Plaintiffs' counsel submitted his own affidavit outlining his experience but has presented no evidence of the prevailing market rate. Plaintiffs' counsel has presented a retainer agreement in which plaintiffs agreed to give him 40% of any recovery or to compensate him from any recovery "at a minimum hourly rate of \$175." He has not averred, however, that he typically receives that amount for the type of work done in this case.

Defendants contest the reasonableness of this rate. They have submitted considerable material casting doubt on plaintiffs' counsel's averment that he has been "unusually successful" in litigating discrimination cases and highlighting certain professional deficiencies in counsel's written

submissions and conduct of this litigation. They nevertheless acknowledge, relying in part on Hopkins v. Denny's, Inc., 1998 WL 372309, *3 (E.D. Pa. June 16, 1998), that \$150 is a reasonable hourly rate for any fees awarded in this case. Given the lack of evidence presented by plaintiffs and defendants' concession, the court finds that \$150 is a reasonable hourly rate for the compensable work performed by counsel in this case.

Plaintiffs seek to recover fees for 174 hours. Counsel submitted a log of billable hours enumerated by task and an affidavit that it was prepared from daily time records. The hours listed, however, total only 166 and of those, 9.3 hours were spent on tasks for which no fee has been requested. An additional 11.0 hours were expended on the fee petition. This leaves a total of 144.7 hours for work on the merits supported by entries in counsel's log.

Defendants challenge the propriety of awarding fees for 27.64 hours expended after the offer of judgment was extended, including 11 hours for work on the preparation of the fee petition. (Log entries 185, 187-206, 209, 210, 214 and 222.) Defendants contend that this work should not be compensated because post-offer work could not have contributed to the relief obtained and costs should be limited to those accrued at the time the offer was received.

The challenged entries reflect work which contributed to the relief obtained. For example, entry 194 is for work done to resist a defense motion to dismiss which was performed between the time defendants' Rule 68 offer was initially rejected and the time it was renewed. Virtually all of the other work was also reasonably performed in response to matters initiated by defendants before the acceptance of their offer. Entry 202 is for work performed in drafting plaintiffs' ultimate acceptance of the offer of judgment, also hardly unrelated to the relief obtained. Work on a fee petition, insofar as it is successful, does contribute to the recovery of a portion of the relief obtained by plaintiffs.

If he wishes to exclude post-offer fees, a Rule 68 offeror must do so specifically and precisely. See Holland v. Roeser, 37 F.3d 501, 504 (9th Cir. 1994) (the question in each case is whether an "offer of judgment clearly and unambiguously limited attorney's fees to those incurred prior to the offer"). See also David v. AM International, 131 F.R.D. 86, 990 (E.D. Pa. 1990) (awarding fees for work on post-offer motions where not expressly excluded in offer); Said v. Virginia Commonwealth University, 130 F.R.D. 60, 64 (E.D. Va. 1990) (disallowing hours spent on fee petition where offer specified "\$5000 together with costs accrued to this date"); Jones v. Federated Dept. Stores, 527 F. Supp. 912, 921 (S.D. Ohio 1981)(disallowing post-offer

fees where offer specified "\$4500 inclusive of interest plus costs accrued through the date of this offer").

Defendants' offer did not expressly and unambiguously exclude post-offer fees. The offer provided for entry of a judgment for "\$5,400 plus costs." It stated that fees and costs incurred to that time were not covered. It specified that "[t]he issue of attorneys' fees and costs shall be resolved in a separate proceeding through a petition to the Court." Thus, the only reference to fees incurred before the offer is a statement that they are not encompassed. There is no express exclusion or qualification regarding the fees and costs to be determined by the court.

The court will, however, disallow 0.2 hours spent on a discovery scheduling matter the same day a letter accepting the offer of judgment was drafted and 0.2 hours reviewing a doctor's billing summary subsequent to the acceptance of the offer. (Log entries 203 and 210).

Defendants correctly suggest that 4.4 hours expended on service and plaintiffs' improvident motion for default were unnecessary as defense counsel had announced defendants' willingness to accept process by mail. (Log entries 41, 47, 48, 50-53 and 56.) Defendants demonstrate convincingly that 30.8 hours spent on work related to rescheduling, motions for continuances and responses to defendants' motions to compel were

needless and resulted from plaintiffs' unreasonable delays in providing discovery and failure to comply with court orders. (Log entries 86, 88, 90, 93-95, 97-99, 101-109, 111, 113, 116-119, 121, 123-126, 131, 132, 134, 136, 139, 144, 156, 158 and 165-167.)

A total of 9.5 hours (Log entries 7-11, 20-33, 35, 37, 39 and 40) are claimed for work on administrative proceedings that were unnecessary and did not contribute to the recovered relief. See Cheney State College Faculty v. Hufstedler, 703 F.2d 732, 737 (3d Cir. 1983) (exhaustion of administrative remedies not required to assert claim under 42 U.S.C. § 1981 or § 2000a).

Defendants identify several other entries related to tasks the need for which is not supported in the record. Plaintiffs have failed to carry their burden with regard to 2.8 hours expended on a "stipulation regarding response to defendants' discovery request dated 9/3/96" and reviewing defendants' motion dated 10/21/96, defendants' objections dated 4/21/97, the amended of certificate from Diane N. Apa dated 7/8/97 and defendants' letter dated 12/16/97 regarding the change of date for Michael Long's deposition. (Entries 57, 64, 112, 162 and 183.) Defendants did not file motions or send letters corresponding to the noted dates. Also unsupported are 2.0 hours billed for the preparation of a package for defense counsel and 0.25 hours for drafting a deposition notice dated 5/21/97,

neither of which were received by defendants. (Entries 97 and 135.) Plaintiff's counsel billed 3.0 hours for letters to Robert Fisher, Ed. D. and for reviewing his reports. (Entries 17-19.) Plaintiffs have neither described these services nor explained their necessity to the litigation.

Plaintiffs request \$1275 in fees for work by "former student clerks" without providing any breakdown by task, date or individual. Such a blanket statement is insufficient to demonstrate the reasonableness of this request.

Defendants contest the time billed for responding to their motion to dismiss as unnecessary. Counsel's work on this matter was reasonably and successfully undertaken to avoid. The 15.97 hours claimed is reasonable and will be allowed.

The remaining entries in the time log are reasonable, including the hour spent inspecting and observing at the defendants' hotel.

This yields an initial lodestar calculation of \$150 per hour times 102.84 hours.

Defendants argue forcefully for a 50% reduction in the lodestar due to plaintiffs' limited success and the costs they forced defendants to incur because of their failure timely to comply with their discovery obligations and court orders.

The relative success of the party seeking attorney's fees is a critical factor in determining the amount to be

awarded. Marek v. Chesny, 473 U.S. 1, 9 (1985). A court should focus on the overall relief obtained in relation to the hours reasonably expended. City of Riverside v. Rivera, 477 U.S. 561, 568 (1986). A reduction of an award is warranted when the success achieved was limited. Farrar v. Hobby, 506 U.S. 103, 114-15 (1992). While the fee award need not be proportional to the damages recovered, a comparison of the amount requested and the amount obtained is an appropriate consideration. Washington, 89 F.3d at 1042.

Plaintiffs' counsel signed an arbitration certification that the value of their claims exceeded \$100,000. In the summary prayer for relief at the conclusion of their complaint, plaintiffs ask for "damages in excess of \$100,000." Later in the litigation, plaintiffs made a settlement demand of \$32,500. The \$5,400 recovered is the cost of the event plaintiffs held at an alternative location. Plaintiffs thus effectively received nothing for the "great emotional distress, mental anguish, pain and suffering and immense loss of enjoyment of life" for which they sought damages.

Plaintiffs also obtained none of the injunctive and declaratory relief they sought in six separate paragraphs of their complaint. Injunctive relief, "though admittedly difficult to quantify, adds considerable value to the 'judgment finally obtained.'" Domanski v. Funtime, Inc., 149 F.R.D. 556, 558 (N.D.

Ohio 1993). Conversely, the failure to obtain injunctive relief sought generally to vindicate the civil rights at issue diminishes the value of the ultimate judgment. See Clark, 28 F.3d at 425 (noting importance of denial of injunctive relief in assessing degree of success and reasonableness of fee award in racial discrimination in accommodations suit against hotel).

Plaintiffs' claims were squarely predicated on an allegation that they were quoted a higher rate for the same services than was Sidney Goldstein, a white citizen. It appears from Mr. Goldstein's deposition that had plaintiffs investigated the facts more thoroughly as contemplated by Fed. R. Civ. P. 11(b)(3), there may well have been no lawsuit at all. It is difficult to escape the conclusion that defendants are truthful in stating they offered a relatively nominal sum in an effort to save substantially more money required to defend in a marginal suit in which costs were increasing because of plaintiffs' inordinate delay in providing discovery and complying with court orders.

The lodestar will be reduced by 50% for limited success.

Defendants contend that any fee award should be further reduced by \$1,500, the amount paid to counsel as a retainer by plaintiffs at the time they engaged him. A fee award is for the benefit of a plaintiff, not his attorney. Venegas v. Mitchell,

495 U.S. 82, 87-88 (1990). An attorney may not responsibly withhold a contingent fee and retain a fee award. See Wheatley v. Ford, 679 F.2d 1037, 1041 (2d Cir. 1982). In this case, plaintiffs' counsel secured a rather remarkable fee agreement. It permits him to retain from any recovery either 40% of the gross amount or a fee calculated by the hours expended, at counsel's election. Based on a literal reading of the fee agreement and counsel's claim for 174 hours, he could elect to take an hourly fee and seek to retain the entire \$5,400 as well as the statutory fee award. This would be unconscionable.

The fee as calculated by the court exceeds 40% of the recovery and represents a reasonable hourly rate for the time reasonably expended by counsel. It would not be appropriate for counsel in these circumstances to seek more from his clients. That plaintiffs may be entitled to a \$1,500 refund or credit, however, does not mean that defendants are entitled to a \$1,500 reduction.

A separate lodestar calculation is required for the fee petition itself. Rode v. Dellarciprete, 892 F.2d 1177, 1192 (3d Cir. 1990). The same hourly rate of \$150 per hour applies. Plaintiffs request fees for 11 hours spent preparing the petition. Time spent on a fee petition is compensable to the extent it results in a recovery of fees. See Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897, 924 (3d

Cir. 1985). A reduction in the lodestar is appropriate, however, because plaintiffs have achieved only partial success in their fee petition. See Durett v. Cohen, 790 F.2d 360, 363 (3d Cir. 1986); Institutionalized Juveniles, 758 F.2d at 924. The lodestar for the fee petition will be reduced by 50%.

Plaintiffs request \$2,900 for Robert Fisher, Ed. D. without furnishing a description of his services or their necessity to the litigation. As such, they have not established the reasonableness of this expense and it will be disallowed.

Plaintiffs will be allowed \$2,102 for deposition transcripts of four witnesses. Defendants correctly note that plaintiffs have not provided invoices for these transcripts. Defendants, however, have not challenged the log entries documenting the review of deposition transcripts of the four witnesses totaling 1,141 pages.

The requested telephone and postage costs will be disallowed as they are estimates without supporting documentation or justification.

Plaintiffs' request for \$78 for unspecified supplies will be disallowed. See Cleveland Area Bd. of Realtors v. City of Euclid, 965 F. Supp. 1017, 1023 (N.D. Ohio 1997).

The \$600 requested for photocopying expenses appears reasonable and is recoverable. See Abrams v. Lightolier Inc., 50 F.2d 1204, 1225 (3d. Cir 1995).

The request for the \$120 filing fee will be allowed.

Consistent with the foregoing, an order will be entered awarding plaintiffs \$8,538 for attorney's fees and \$2,822 for costs.

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O R D E R

AND NOW, this day of October, 1998, upon consideration of plaintiffs' Motions for Costs and Attorney's Fees (Doc. #41, Parts 1 & 2), defendants' response, plaintiffs' reply and defendants' surreply, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motions are **GRANTED** in part in that plaintiffs are awarded \$7,713 for attorney's fees in the underlying litigation plus \$825 for fees incurred in the preparation of the fee petition plus costs of \$2,822, for a total amount of \$11,360, and said Motion insofar as it seeks additional fees and costs is otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.