

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

KEVIN LEWIS, : CIVIL ACTION
Plaintiff, :
 :
V. :
 :
BRUCE BABBITT, Secretary, :
Department of the Interior, :
Defendant. : NO. 97-CV-7576

MEMORANDUM & ORDER

J.M. KELLY, J.

JUNE 10, 1999

Plaintiff, Kevin Lewis ("Lewis"), prevailed at trial on his claim of retaliation for exercising his Title VII rights and was awarded \$85,000.00 by a jury. Lewis now requests an award of reasonable attorney's fees and equitable relief to make him whole. The Court held oral argument and an evidentiary hearing on Plaintiff's Motions.

I. BACKGROUND

Defendant, Bruce Babbitt, was sued in his official capacity as Secretary of the Interior. The National Park Service ("Park Service") is part of the Department of the Interior. Lewis was hired as a law enforcement Park Ranger in March 1992. Lewis works at Independence National Historical Park ("INHP") in Philadelphia. Lewis had filed EEO complaints, based upon his race, in which he alleged that he had been denied training and a promotion.

On May 24, 1995, Lewis was working on the midnight shift with his supervisor, Michael Dumene("Dumene"), and an

altercation took place between them. Lewis followed up with a report on the Assistant Chief Ranger's desk the next morning. Lewis expressed concern for his personal safety and commented that both he and Dumene were armed during the confrontation. The complaint was forwarded to Dumene. Lewis proceeded up his chain of command with his complaint against Dumene, but received no change in his assignment. Lewis attempted to learn from the Department of the Interior what additional steps were available to him, but he received no additional information. Lewis then filed an EEO complaint.

Immediately thereafter, Patrick Bowman removed Lewis' weapon and credentials and Lewis was assigned to administrative duty. Lewis was removed from his position as fitness coordinator.

On August 10, 1995, Lewis went before a Board of Review that recommended his law enforcement commission be suspended for two years and he be transferred to another division. On October 15, 1995, Lewis' law enforcement commission was suspended permanently and he was transferred to Historical Division, Interpretation. In the Interpretation division, Lewis continues to serve as a Ranger, but is no longer involved in law enforcement.

II. DISCUSSION

Title VII prohibits an employer from discriminating

against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation . . . under this subchapter." 42 U.S.C. § 2000e-3(a) (1994). As a prevailing party in this litigation, Lewis is entitled to his reasonable attorney's fees and costs. Id. § 2000e-5(k). Lewis has petitioned for 188.5 hours at \$250.00 per hour for his attorney, Faye Riva Cohen ("Cohen") and 83.5 hours at \$80.00 per hour for law clerk Thomas Carney Jr. ("Carney") . The total request is \$53,805.00 in fees and \$1,591.11 in expenses.

Reasonable Attorneys' Fees and Costs

A. Attorneys' Fees

"The party seeking attorneys' fees has the burden to prove that its request . . . is reasonable." Rode v. Dellaciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). The opposing party must challenge the requested fee with specificity. Bell v. United Princeton Properties, 884 F.2d 713, 719-20 (3d Cir. 1989). The court may not reduce the fee amount sua sponte. Id. Once the party opposing the fee request objects, however, the court "has a great deal of discretion to adjust the fee award in light of those objections." Rode, 892 F.2d at 1183 (citing Bell, 884 F.2d at 721).

"The most useful starting point for determining the

amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley, 461 U.S. at 433. The result, known as the "lodestar," is presumed to represent a reasonable award of attorney's fees. *id.*

1. Hourly Rates

"[A] reasonable hourly rate is calculated according to the prevailing market rates in the community." Smith v. Philadelphia Hous. Auth., 107 F.3d 223, 225 (3d Cir. 1997). Defendants' counsel submitted affidavits in which she and non-party attorneys attested that the rates submitted are consistent with market rates in the Philadelphia area. The Government objects to the claimed hourly rates as being representative of the rates billed by the leading employment discrimination attorneys in the market, a level to which the Government is not prepared to elevate Cohen. Cohen has demonstrated significant legal experience both in and out of the civil rights field. The Court is not prepared to penalize Cohen in this Fee Petition because she chose a career path that diverges from what was once considered the traditional legal career. In this case, she has achieved a near remarkable result in that evidence of pecuniary damages was limited and Lewis was awarded in excess of the evidence of lost wages presented at trial. Accordingly, \$250.00

per hour is a reasonable rate in this case for Cohen's legal services performed at a high level of litigation.

Cohen, however, has handled most of this case as a solo practitioner. Upon reviewing the services performed by Cohen, it appears that there are instances where tasks billed could be reasonably billed at a lower rate. A reasonable rate for these services would be \$150.00, the hourly rate of a mid-level associate in the market, or the approximate rate billed by Community Legal Services, Inc. for a fifth or sixth year attorney. The Court finds that the following hours are properly billed at a mid level associate rate: 7.8 hours to draft and serve a complaint; 1.5 hours to index an investigative file; 2.0 hours to research information for subpoenas; 8.0 hours related to preparation of the pre-trial memorandum; 3.0 hours for preparation and filing of a sealed request for attorney fees; 9.0 hours for responding to a motion for summary judgment; 6.0 hours for preparing exhibits for trial and 18.0 hours for preparation of a fee petition. Accordingly, 55.3 of Cohen's hours are reasonably billed at \$150.00 per hour.

2. Hours Expended

A party is entitled to compensation for work that is "useful and of a type ordinarily necessary to secure the final result obtained." Pennsylvania v. Delaware Valley Citizens'

Council, 478 U.S. 546, 561 (1986) . "Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)

Defendant has not challenged the number of hours claimed by Lewis except for the number of hours claimed to prepare the fee petition. Lewis claims 39.0 hours for the fee petition, including 20.0 hours for Cohen and 19.0 hours for Carney. The number of hours requested for the fee petition seems excessive to the Court. The fee petition relies upon well settled law and the main exhibit, the record of hours spent, has been prepared on an ongoing basis by Lewis' attorney. Given the need to prepare the Motion, Memorandum of Law and affidavit, as well as contact attorneys for affidavits supporting her hourly rate, the Court believes that 2.0 partner hours, 8.0 associate hours and 19.0 law clerk hours are reasonable for preparation of the fee petition. The Court is otherwise impressed by the reasonableness of the number of hours claimed. Accordingly, the Court accepts the number of hours expended as claimed by Lewis, less ten hours for the fee petition.

The Government has not challenged the expenses claimed by Lewis, therefore \$1,591.11 is awarded to Lewis. Lewis is awarded \$40,095.00 for time expended by Cohen: 133.2 hours at \$250.00 per hour and 45.3 hours at \$150.00 per hour. Lewis is also awarded \$6,680.00 for time expended by Carney: 83.5 hours at

\$80.00 per hour. The total award of fees and costs is \$48,366.11.

Equitable Relief

Lewis requests that the Court exercise its equitable power and reinstate Lewis to his law enforcement position. Reinstatement is a preferred remedy for a discharged employee. Airline Pilots Assoc. v. Continental Airlines, 125 F.3d 120, 135 (3d Cir. 1997), cert. denied sub nom, LLP Claimants v. Continental Airlines, 118 S. Ct. 1049, and cert. denied sub nom, Former Eastern Pilots Granted Right to Substitute Counsel v. Continental Airlines, 118 S. Ct. 1049 (1998). Unlike a discharge, Lewis' transfer to the Interpretation Division allowed him to maintain his government salary and benefits throughout the course of this litigation. This case presents a limited loss of front pay if Lewis is maintained in his present position.

Rather, Lewis is faced with a changed career path without continuing as a law enforcement officer. Accordingly, the Court finds that the factors supporting reinstatement are not nearly as strong in a case where the Plaintiff has maintained a similar job situation as the purpose of reinstatement is to restore employee to an economic status quo. Franks v. Bowman Transp. Co., 424 U.S. 747, 766 (1976). where the relationship between the parties is irreparably damaged, reinstatement would be impracticable and an alternative remedy should be found.

Sauires v. Bonser, 54 F.3d 168, 172 (3d Cir. 1995). Among the factors to be considered in this determination are hostility in the workplace and an employer's genuine dissatisfaction with an employee's job performance. Hudson v. Reno, 130 F.3d 1193, 1202 (6th Cir. 1997), cert. denied, 119 S. Ct. 64 (1998). Here, Defendant could legitimately find that Lewis abused his position as a law enforcement officer in two off duty incidents. The incident with Dumene and the subsequent references that both men carried guns could legitimately cause Defendant to believe that there was a problem with Lewis that needed to be addressed. Since Lewis violated Park Service policy by refusing to undergo a psychological evaluation, Defendant followed a clear policy in not placing Lewis back in a law enforcement position.' As a result, the Court believes that it is appropriate in this case to design alternative relief to make Lewis whole.

At the hearing on these Motions, Lewis testified that he received a law enforcement differential in his salary, much like combat pay. Lewis was not able to quantify this differential, nor could he provide a source for such a differential. The Court

It is not inconsistent for the jury to have found that Defendant retaliated and for the Court to find that there were legitimate concerns about Lewis' position as a law enforcement officer. The jury may well have believed that the incident with Dumene, which set the revocation of Lewis, law enforcement commission in action, was retaliatory. Retaliation need only be a determinative factor in the adverse employment decision to the plaintiff. Woodson v. Scott Paper Co., 109 F.2d 913, 932 (3d Cir.), cert. denied, 118 S. Ct. 299 (1997).

is not convinced that such a differential exists and shall not consider this a factor in equitable relief. In law enforcement, Lewis was required to work forced overtime. The Government provided evidence that last year at INHP, annual law enforcement overtime ranged from \$700 to \$2,000. Lewis' current pay level is GS9-5, with an annual salary of \$38,289. The Government suggests and the Court agrees that promotion of Lewis to GS9-8, with an annual salary of \$41,668 would compensate Lewis for his lost annual overtime upon leaving law enforcement. This adjustment should be made effective in the first pay period following the date of judgment in this matter, October 29, 1998. Lewis claims that in law enforcement, he always worked on Sunday and received a 25% Sunday pay differential. Lewis admitted, however, that in Interpretation, he also received a Sunday differential. Lewis does not work all Sundays in Interpretation because there is a pooled selection process. The Court will not further adjust Lewis, salary to compensate for lost Sunday pay differential. To the extent that he is not required to work all Sundays, he receives the intangible benefits of those days off.

Lewis believes that he has lost other benefits in his transfer to Interpretation. Lewis testified that a law enforcement pension would allow him to retire at the end of twenty years, rather than thirty as under his present retirement

plan. It was undisputed that law enforcement retirement took a greater percentage of Lewis' income. It was also clear that when Lewis would hypothetically reach twenty years of law enforcement service, he would not be old enough to retire under the twenty year retirement program. Lewis is now 32 years old and cannot retire with twenty years of law enforcement service until he is 50 years old. Lewis was not able to adequately explain why he would receive credit for work in the Air Force and for the Veteran's Administration in law enforcement, but not in Interpretation. Accordingly, Lewis did not prove that he lost a retirement benefit. Lewis also suggested that if he remained in law enforcement, he would have received a promotion. This is pure speculation and shall not be grounds for further equitable relief. Finally, Lewis argued for reimbursement for time lost to pursue this action. Evidence of his lost time was before the jury and the Court is convinced that such lost pay entered into their calculation of damages.

III. CONCLUSION

Lewis has demonstrated that he is entitled to \$48,366.11 in attorney fees and costs. In order to make Lewis whole, he shall be promoted to the level of GS9-8.

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O R D E R

AND NOW, this 10th day of June, 1999, upon consideration of the Motion for Attorney Fees, Costs and Expenses (Doc. No. 24) and the Motion for Equitable Relief (Doc. No. 24) of Plaintiff, Kevin Lewis, the Responses thereto of Defendant, Bruce Babbitt, and after oral argument and an evidentiary hearing, it is ORDERED:

1. The Motion for Attorney Fees, Costs and Expenses is GRANTED. Judgment is ENTERED in favor of Plaintiff, Kevin Lewis, and against Defendant, Bruce Babbitt in the amount of \$48,366.11.

2. The Motion for Equitable Relief is GRANTED IN PART. Defendant, Bruce Babbitt shall promote Plaintiff, Kevin Lewis, to pay level GS9-8, effective the first pay period following October 29, 1998.

3. The Motion for Equitable Relief is DENIED IN PART. Lewis shall not be reinstated to a law enforcement position.

BY THE COURT:

JAMES MCGIRR KELLY, J.