

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

LOUISE HOPKINS, ET. AL. : CIVIL ACTION  
v. :  
DENNY'S, INC. : NO. 96-7660

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

June 15, 1998

Plaintiffs, three African-American women, filed this race discrimination action against Denny's, Inc. The case settled on the eve of trial. Plaintiffs now have filed a petition for attorney's fees. Defendants oppose the petition as excessive. The court will grant the petition in a reduced amount.

BACKGROUND

Plaintiffs, three African-American women, were among a group returning on a tour bus from Foxwoods Casino when they made a rest stop in Fairfield, Connecticut. Plaintiffs, claiming they were denied service by Denny's restaurant employees because of their race, filed a civil rights discrimination action against Denny's, Inc. pursuant to 42 U.S.C. Section 1981, 42 U.S.C. Section 2000(a) et seq., the 14th Amendment, and the Commerce Clause. The constitutional claims were dismissed, but the statutory claims remained for trial. Plaintiffs originally sought damages, injunctive relief, and declaratory relief; they

demanded settlement in the amount of \$150,000. The case settled the day before trial for \$15,000.

Following settlement, plaintiffs filed a petition for award of attorney's fees in the amount of \$17,750. Defendant opposed the petition on three grounds:

1) Counsel's hourly rate was excessive in light of his experience.

2) The hours spent on discovery were unreasonable. Over a year after the filing of the complaint, plaintiffs discovered that they had made an error as to the actual date of the incident and had deposed employees who were not working on the day of the incident. This error resulted in a summary judgment motion by defendant. Defendant also claims an in-person deposition of one employee was unnecessary.

3) Plaintiffs achieved only limited success in the action.

## **DISCUSSION**

### **I. Prevailing Party**

In determining attorney's fees under 42 U.S.C. Section 1981, Section 1988 provides: "In any action or proceeding to enforce a provision of section 1981,... 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 Section 1988(b).

42 U.S.C. Section 2000e-5(k) contains virtually the same language when referring to an action under Section 2000: "In any action or proceeding under [Section 2000] the court, in its discretion, may allow the prevailing party... a reasonable attorney's fee... as part of the costs..." 42 U.S.C. Section 2000e-5(k). The standard for determining attorney's fees is the same under Section 1988 as it is under Section 2000e-5(k). See Brown v. Borough of Chambersburg, 903 F.2d 274, 277 n.1 (3d Cir. 1990).

"Courts have broadly defined a 'prevailing party' for purposes of triggering a fee shifting statute." Public Interest Group of N.J., Inc. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995). "The test... to determine prevailing party status is 'whether plaintiff achieved some of the benefit sought by the party bringing suit.'" Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh, 964 F.2d 244, 250 (3d Cir. 1992) (citation omitted); see Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 791 (1989); Ashley v. Atlantic Richfield Company, 794 F.2d 128, 134 (3d Cir. 1986).

A civil rights plaintiff need not judicial relief to be a prevailing party:

It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under Section 1988. A lawsuit sometimes produces voluntary action

by the defendant that affords the plaintiff all or some of the relief he sought through a judgment-- e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Hewitt v. Helms, 482 U.S. 755, 760-761 (1987).

A plaintiff who has not obtained a court judgment is entitled to attorney's fees as a prevailing party if: 1) the plaintiff obtained some of the relief sought in the Complaint; and 2) the lawsuit was a "catalyst" for the relief obtained. See Baumgartner v. Harrisburg Housing Authority, 21 F.3d 541, 545 (3d Cir. 1994).

Plaintiffs are prevailing parties. They "achieved some of the benefit sought" by filing the action and obtaining damages in settlement. The complaint was a "catalyst" for the relief obtained; plaintiffs would never have received the \$15,000 but for the bringing of the claim.

The concept of a "prevailing party" is "a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what is 'reasonable.'" Hensley v. Eckerhart, 461 U.S. 424, 433.

## **II. Lodestar**

"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

v. Eckerhart, 461 U.S. 424, 433 (1988). "The result of this computation is called the lodestar. The lodestar is strongly presumed to yield a reasonable fee." Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1035 (3d Cir. 1996).

"Plaintiffs must submit evidence supporting the hours worked and the rates claimed." Id. at 433. "The party opposing the fee award then has the burden to challenge, by affidavit or brief with sufficient specificity to give applicants notice, the reasonableness of the requested fee." Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990).

The lodestar has two components: the reasonable hourly fee and the number of hours reasonably expended. Each must be determined before attorney's fees can be assessed.

## **II. Reasonable Hourly Rate**

The hourly rate must be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum v. Stetson, 465 U.S. 886, 896 n11 (1984). The market rate for similar services is usually deemed to be reasonable. "[T]he prevailing market rate can often be calculated based on a firm's normal billing rate because, in most cases, billing rates reflect market rates, and they provide an efficient and fair shortcut for determining the market rate." Gulfstream III Association, Inc. v. Gulfstream Aerospace Corporation, 995 F.2d 414, 422 (3d Cir.

1993).

Plaintiffs' counsel seeks an hourly rate of \$200.00. Defendant argues that this figure is too high and should be reduced because:

1) Counsel has very limited experience in public accommodations cases such as this so his fee for handling this case should be less than a lawyer who has such experience and competence.

Plaintiffs are correct that this is essentially an action for discrimination, not an assertion of common law rights of public accommodation. The Denny's employees allegedly refused to serve plaintiffs because of their race, in violation of plaintiffs' civil rights. Counsel has handled at least ten such actions, and he has represented clients in other discrimination matters in approximately 300 cases. Counsel has never filed a discrimination action involving public accommodations, but that makes little, if any, practical difference.

2) Counsel has only been in practice for nine years. It is correct that plaintiffs' counsel has been admitted to the bar of the courts in the Commonwealth of Pennsylvania for less than ten years.

The prevailing market rate for similarly-experienced attorneys must be considered to determine a reasonable rate. Plaintiffs' counsel submitted a fee schedule for attorneys

employed by Community Legal Services, Inc. stating that attorneys with 6-10 years' experience should command \$150-\$200 per hour. (Pl.'s Reply, Ex. B at 2.) In selecting a figure within that range, the court will apply the lesser figure of \$150 rather than the \$200 claimed rate.

Counsel has offered no evidence that his usual hourly rate is \$200 per hour. There was no affidavit, nor could he state at oral argument any case in which he actually charged \$200 per hour or was awarded fees at that rate by any court. Since there was no evidence that \$200 was his "normal billing rate," that hourly rate need not be applied.

The briefs, motions, letters, and other documents that counsel has submitted have been replete with spelling, grammatical, and punctuation errors. This reflects on the attorney's competence and the hourly rate to which he is entitled.

A \$200 rate is commanded by only the most respected and competent lawyers with comparable experience. His inferior written work and trial preparation errors demonstrate that counsel's "skill" is not "in line with [those attorneys] prevailing in the community" who charge \$200 per hour. Counsel will be awarded \$150 per hour, at the lower end of the rate range for an attorney with his experience.

### **III. Hours Reasonably Expended**

"Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." Hensley, 461 U.S. at 434.

Defendant argues that the 88.5 hours submitted as time expended is excessive and the number of hours should be reduced for two reasons:

1) After over a year of discovery, plaintiffs became aware that they had been asserting that the actionable incident occurred on the wrong date. Plaintiffs averred it occurred on November 14, 1994, when it occurred on October 14, 1994. Defendant seeks to be excused from paying all discovery costs before January 1998, the date the error was corrected.

Defendant claims plaintiff is not entitled to recover for any hours expended prior to correction of plaintiffs' mistake as to the date. The mistaken allegation as to the date of the incident, easily ascertained from the client, the casino, the tour operator, or the bus company, was egregious. It led defendant to find and offer for deposition the manager and employees working on the date of the incident originally alleged. When they had no knowledge of the events, defendant reasonably filed a summary judgment motion, resulting in plaintiffs' correcting the date. The time spent on unnecessary discovery

must be deducted, but not all the hours expended prior to the date correction and of no benefit to plaintiffs.

2) Plaintiffs should not be allowed to recover six hours for deposing witness Mark Krauchick. Defendant claims that Mr. Krauchick, a former Denny's employee, had very little knowledge of this incident and the deposition should have been by telephone or by video conference rather than in person.

Defendant argues that counsel unreasonably insisted on a deposition of that employee in Connecticut. Counsel had the right to depose the witness in person. An in-person deposition is more helpful because of the personal interaction; defendant cannot dictate how plaintiff conducts discovery. Counsel will be compensated for the deposition time.

These hours were unnecessary and will not be compensated:

a) 1.5 hours for a meeting with NAACP personnel; there was no explanation of why or how this aided the prosecution of this action.

b) 1.75 hours for filing an amended complaint to delete the frivolous Commerce Clause claim.

c) 2.0 hours for the preparation of a pretrial memorandum because of its deficient quality.

d) 4.0 hours for the deposition of Dale Ruff. Ms. Ruff was the manager on duty the day plaintiffs originally asserted the

incident occurred. Plaintiffs' counsel should not be compensated for this mistake. Ms. Ruff would not have been deposed if counsel had properly investigated the facts before filing the complaint. He had no plan to depose all Denny employees, regardless of whether they were on duty the day of the incident, to demonstrate a pattern of discrimination.

e) 4.5 hours for reviewing defendant's motion for summary judgment. This motion was filed because plaintiffs alleged the incident occurred on a date when it did not, so understandably no defense witnesses remembered the incident. Plaintiffs' counsel should not be compensated for time that would not have been expended but for his error.

f) 1.5 hours for the final pretrial memorandum because of its deficient quality.

Deducting these 15.25 hours from the total number of documented hours results in 73.5 compensable hours.

The lodestar, 73.5 hours times \$150 per hour, is \$11,025.

### **III. SUCCESS**

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" Hensley, 461 U.S. at 434. Attorney's fees "should only be awarded to the extent that the litigant was successful."

Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1042 (3d Cir. 1996). "Because such terms [as 'success' and 'results obtained'] are unavoidably ambiguous, the Supreme Court left the application of these somewhat elusive terms to the trial courts, which are more familiar with the facts of a particular case." Davis v. Southeastern Pennsylvania Transportation Authority, 924 F.2d 51, 55 (3d Cir. 1991).

Defendant argues that the case settled for only \$15,000 after a settlement demand of \$150,000, so the attorney's fees should be reduced by plaintiffs' limited success in the action.

In City of Riverside v. Rivera, 477 U.S. 561, 574, the plurality opinion stated that money damages in civil rights cases are often a less accurate measure of compensation than are damages in other cases. "[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefitting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." Id.

"It is impermissible for a trial judge to make a reduction in the attorney's fee solely on the basis of proportionality to the damage award." Davis, 924 F.2d at 55. "[A] court may not diminish fees... to maintain some ratio between the fees and the

damages awarded." Washington, 89 F.3d at 1041.

Plaintiffs argue that their objective in filing such suit was not financially motivated, but to expose the discriminatory practices of defendant. However, the amount of damages may be a factor in determining attorney's fees if it reflects the extent to which the plaintiffs were successful on the merits of their claims. "The reason why the damage amount is relevant is not because of some ratio that the court ought to maintain between damages and counsel fees. Rather, the reason has to do with the settled principle ... that counsel fees should only be awarded to the extent that the litigant was successful. The amount of damages awarded, when compared with the amount of damages requested, may be one measure of how successful plaintiff was in his or her action, and therefore may be taken into account when awarding attorneys' fees to a civil rights plaintiff."

Washington at 1042.

A low settlement figure alone does not require a reduction in attorney's fees, but if that low figure is significantly reduced from an original demand, it may be considered as reflective of relative success on the merits. Also, the unreasonable demand may have prevented an earlier settlement.

Plaintiffs amended their complaint to withdraw one constitutional claim and the other was dismissed. They also sought punitive damages, injunctive relief, and a declaratory

judgment; none of these were obtained by settlement. The fee award should be reduced slightly based on their limited success. The \$11,025 lodestar will be reduced by 10% (\$1,102.50). Reasonable attorney's fees will be awarded in the amount of \$9922.50. An appropriate order follows.