

ATTORNEY FEES IN CIVIL RIGHTS LITIGATION

I. BACKGROUND

Newman v. Piggy Park Enterprises, 390 U.S. 400, 88 S.Ct. 964 (1968). Attorneys bringing civil rights actions play the part of private attorneys general and should be compensated.

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612 (1975) No attorney fees may be awarded unless authorized by statute. Exceptions: bad faith, common fund, and willful violation of court order.

THE FAIR HOUSING ACT (1988 Amend.), 42 U.S.C. §3613(c)(1) provides for award of fee to prevailing. Same standard as § 1988 and Title VII.

THE CIVIL RIGHTS ATTORNEY FEE ACT OF 1976, 42 U.S.C. § 1988. Provides for award of fee to prevailing party in actions under §§ 1981, 1982, 1983, 1985, Title VI, IX, XX.

"Civil Rights Attorney's Fee Awards Act of 1976" Source book: Legislative History. Texts, and Other Documents. U.S. Govt. Printing Office, Wash, D.C. 20402 \$2.95 S/N 052-070-03911-7

II. PREVAILING PARTY

Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566 (1992). Plaintiff who obtains only nominal damages is prevailing party but usually will recover no fee.

Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933 (1983). "Prevailing Party" is a plaintiff that succeeds on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." When plaintiff did not prevail on claim unrelated to successful claim, hours spent on unsuccessful claim should be excluded. Where suit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced because court did not adopt each claim raised. Mathematical comparison of issue successful vs. issue raised was rejected.

Texas State Teachers v. Garland Indep. School Dist., 489 U.S. 782, 109 S.Ct. 1486 (1989). Plaintiffs are prevailing party when they "succeed on any significant issue in the litigation which achieves some of the benefit sought in bringing the suit." Need not be the central issue.

Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502 (1980) § 1988 applies to lawsuits brought in state courts under §1983.

Maher v. Gagne, 448 U.S. 122, 100 S.Ct. 2570 (1980). Fact that plaintiff in § 1983 prevailed through settlement rather than litigation did not prevent award of fee under § 1988 as prevailing party.

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 100 S.Ct. 2024 (1980) Suit may be brought under Title VII for legal services performed in state and local proceedings. District Court does not have discretion to deny fee to prevailing plaintiff in absence of special circumstances.

Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565 (1978) 11th Amendment does not prevent attorney fees against the state.

North Carolina Dept. of Transp. v. Crest Street, 479 U.S. 27, 107 S.Ct. 336 (1986). Fees may not be awarded under § 1988 where litigation only for attorney fees. May still award fees for time in administrative proceedings to enforce civil rights laws and even if not one to enforce, the portion that was necessary and useful can be part of award.

Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099 (1985) Suit against gvt. official in personal capacity only cannot lead to fee award against governmental entity. Liability on merits and responsibility for fee go hand in hand.

Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457 (1984) EHA is the exclusive avenue for processing due process claims. Cannot use § 1983 or § 504 to get fees.

Hewitt v. Helms, 482 U.S. 755, 107 S.Ct. 2672 (1987). Inmate not prevailing party where catalyst for change but no personal benefit.

Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566 (1992). Plaintiff who wins nominal damages is a prevailing party but when fails to prove essential element of claim for monetary relief is usually entitled to no fee.

Independent Fed. of Flight Attendants v. Zipes, 491 U.S. 754, 109 S.Ct. 2732 (1989). May award fees against losing intervenor only when his action was frivolous, unreasonable or without foundation.

Sole v. Wyner, 551 U.S. 74 (2007), When plaintiff wins preliminary injunction but loses on the merits he is not entitled to any fee.

McQueary v Conway, ___ F3d ___ (6th Cir. 2010), When plaintiff wins preliminary injunction and nothing more there are no fees. There are exception that are fact intensive and trial court is best qualified to determine whether fees.

Lavin v Husted, ___ F3d ___ (6th Cir. 2014). Fees should not be reduced because of the wealth of plaintiff or because the taxpayer will ultimately bear the cost

Déjà vu of Nashville v. Nashville Metro Gvt., 421 F.3d 417 (6th Cir. 2005). Change in the law after judgment on the merits is final is not a special circumstance to justify denial of attorney fees.

Riddell v. National Democratic Party, 624 F.2d 539 (5th Cir. 1980) The fact that defendant state officials enforced the statute in good faith or because the fee ultimately comes from the state does not constitute "special circumstances" to deny fee.

Othen v. Ann Arbor School Board, 699 F.2d 309 (6th Cir. 1983). Plaintiff is a prevailing party if the lawsuit serves as a catalyst prompting defendant to provide a substantial benefit to the plaintiff

Davis v. Bd. of School Com'rs of Mobile Cy., 600 F.2d 470 (5th Cir. 1979) Individual plaintiff may be entitled to fees despite his failure to prove own claim when he proved class claim.

Johnston v. Jago, 691 F.2d 283 (6th Cir. 1982) Court adopted test for determining prevailing plaintiff where case is settled. (1) must demonstrate that the lawsuit was causally related to receiving the relief obtained (2) establish some minimum basis in law for the relief.

III. DETERMINING THE AMOUNT

City of Burlington v. Dague, 505 U.S. 557, 112 S.Ct. 2638 (1992). Multipliers for risk of losing are not allowed.

Venegas v. Mitchell, 495 U.S. 82, 110 S.Ct. 1679 (1990) plaintiffs attorney was entitled to his 40% share of the damage award as provided in the contingent fee contract. The statutory award under § 1988 does not set a ceiling on what an attorney may charge his client.

Blanchard v. Bergeron, 489 U.S. 87, 109 S.Ct. 939 (1989). Fee agreement with client does not act as cap on fee court can award.

Missouri v. Jenkins by Agyei, 491 U.S. 274, 109 S.Ct. 2463 (1989). May compensate paralegals, law clerks, and recent law school graduates at prevailing rates.

City of Riverside v. Rivera, 477 U.S. 561, 106 S.Ct. 2686 (1986). Award is not required to be proportionate to amount of damages.

Webb v. County Bd. of Ed., 471 U.S. 234, 105 S.Ct. 1923 (1985). Atty fee not automatic for state administrative hearings not part of § 1983 litigation but may be awarded for discrete portion that was useful.

Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1982). Full compensatory fee should follow achievement of excellent results. Start with determination of reasonable hours expended multiplied by a reasonable hourly rate. "Exceptional success" will support an enhanced award. Hours should be carefully recorded and listed using "billing judgment." Standards are the same where Congress authorized fee to "prevailing party." n.7.

Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541 (1984) Fees to non-profit organizations awarded on same basis as those to private attorneys. Upward adjustment of fee if exceptional success achieved but not award for factors used to increase hourly rate.

Thurman v. Yellow Freight Sys. Inc., 90 F.3d 1160 (6th Cir. 1996). Court should not reduce fee on simple ratio of success to total award of damages. Common core must focus on significance of overall relief obtained.

Wayne v. Village of Sebring, 36 F.3d 517 (6th Cir. 1994). Plaintiff sued city and city officials. Error to reduce fee because plaintiff did not prevail against official where the same core and claims were successful against the city. May compensate for time in mediation, settlement discussions and travel.

Northcross v. Bd. of Ed. of Memphis Schools, 611 F.2d 624, (6th Cir. 1979), cert. denied 447 U.S. 911 (1980). p.642. Following the 12 factors led to inconsistent results. Get "lodestar" figure by multiplying hourly rate by hours of service. May apply a multiplier to lodestar figure to compensate for risk.

Wooldridge v. Marlene Industries Corp., 898 F.2d 1169 (6th Cir. 1990). Question is not whether a party prevailed on a particular motion or whether in hindsight the time expenditure was strictly necessary to obtain the relief achieved. Standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success when the work was performed.

Glass v. Secy. HH&S., 822 F.2d 19 (6th Cir. 1987). SSI case. Court not always required to hold hearing. Trial judge need not decide the fee. Must articulate findings of fact and conclusions of law. If reject hours, must indicate reason and identify hours.

Kelley v. Metropolitan County Bd. of Educ., 773 F.2d 677, 683 (6th Cir. 1985)(en banc), cert. denied, 474 U.S. 1083 (1986). Attorney's normal billing rate should be the "key focal point" in rate determination and utilized the attorney's customary rate as the minimum, a "reasonable point of departure" in determining market-value rate.

Prince v. Pilka, 690 F.2d 98 (6th Cir 1982) When defendant violates both § 1982 and the Fair Housing Act, the more liberal § 1988 is applied. Attorney fees are to be awarded to the attorney even when the plaintiff is guilty of perjury.

Kinney v. Rothchild, 678 F.2d 658, (6th Cir. 1982) Amount of damages not "special circumstance" justifying departure from Northcross. Fee should be sufficient to attract competent counsel.

Johnson v. Snyder, 470 F.S. 972 (N.D. Ohio 1979), 639 F.2d 316 (6th Cir. 1981). \$8600 fee where jury awarded \$1.00 damages.

Miller v. Apartments and Homes, 646 F.2d 101 (3d Cir 1981), Fee should not be reduced by amount of punitive damages.

Planned Parenthood of K.C. v. Ashcroft, 655 F.2d 848 (8th Cir. 1981) May award fee for second attorney on complex case. Fee for travel time at full rate.

Hadix v. Johnson, 398 F.3d 863 (6th Cir. 2005). Attorney fees under the Prison Litigation Reform Act (PLRA) should be awarded at 150% of the amount authorized by the Judicial counsel and not 150% amount budgeted or paid to court appointed counsel.

Imwalle v Reliance Medical Products, 515 /f.3d 531 (6th Cir. 2008), Discusses how detailed attorney hours must be.

Richlin Security Service Co. v. Chertoff, ___US___, 128 S.Ct. 2007(2008). Paralegals may be billed at the customary rate billed to clients including the government.

IV. MULTIPLIERS

Perdue v Kenny, ___U.S.__(2010). The calculation of an attorney's fee based on the lodestar may be increased due to superior performance, but only in extraordinary circumstances.

City of Burlington v. Dague, 505 U.S. 557, 112 S.Ct. 2638 (1992). Enhancement for contingency is not permitted.

Missouri v. Jenkins by Agyei, 491 U.S. 274, 109 S.Ct. 2463 (1989), Eleventh Amendment does not prohibit enhancement of fee for delay in payment.

Pennsylvania v. Delaware Valley Citizen Counsel, (Delaware Valley I) 477 U.S. 546, 106 S.Ct. 3088 (1986). Clean Air Act. No enhancement for superior quality unless show lodestar not provide reasonable fee.

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005). 1.75 multiplier was appropriate due to novelty and difficulty of question, immense skill required to conduct case properly, extraordinary result achieved, and highly controversial nature of case.

V. PREVAILING DEFENDANT

Christiansburg Garment v. EEOC, 434 U.S. 412, 98 S.Ct. 694 (1978) Dual standard. Prevailing plaintiff should be awarded fee as matter of course since vindicating act of Congress. No fee to prevailing defendant unless action frivolous, unreasonable or groundless or continue to litigate after clearly became so.

Smith v. Smythe-Cramer, 754 F.2d 180 (6th Cir. 1985) Awards to defendant will depend on factual circumstances of each case. Mere fact that allegations prove legally insufficient to require a trial does not render complaint groundless.

Balmer v. HCA, Inc, 423 F.3d 606 (6th Cir. 2005). Presence of non-frivolous claims in employee's Title VII and Equal Pay Act suit against employer, i.e. sex-based wage discrimination and retaliation, precluded attorney fee award to prevailing employer, even though federal district court determined that employee's class action allegations, sexual harassment claim, and failure-to-promote claim were frivolous.

Colucci v. New York Times, 533 F.S. 1011 (S.D.NY 1982) Factors in awarding fee to defendant. Earning capacity and ability to pay of plaintiff, relative financial status.

Durrett v. Jenkins Brickyard, 678 F.2d 911 (11th Cir. 1982) Court may award fee against plaintiffs attorney.

VI. WHEN TO FILE

White v. New Hampshire Dept. of Employee Services, 455 U.S. 445, 102 S.Ct. 1162 (1982). Not required to file motion for attorney fees within 10 days of judgment. District courts may control with local rules.

Multimore Sales, Inc. v. International Rectifier Inc., 412 F.3d 685 (6th Cir. 2005). Fee motion must be filed within 14 days of the decision on Rule 59(e) motion. Sixth Circuit recommends a local rule of 30 days.

Federal Rule of Civil Procedure: Rule 54 (d)(2.)(B) *Timing and Contents of the Motion*. December 1, 2009. Unless a statute or a court order provides otherwise, the motion must:

- (i) be filed no later than 14 days after the entry of judgment;
- (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;
- (iii) state the amount sought or provide a fair estimate of it; and
- (iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

S.D. Ohio Local Rule 54.2. Motions for attorney fees under Fed. R. Civ. P. 54 must be filed not later than forty-five (45) days after the entry of judgment. December 1, 2009.

Terket v. Lund, 623 F.2d 29 (7th Cir. 1980). District court should proceed with attorney fee motion even after an appeal from the judgment on the merits has been taken.

VII. COSTS

West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 111 S.Ct. 1138 (1991). Costs under § 1988 do not include expert witness fees. (But see 42 U.S.C. § 2000e-4(k) and 42 U.S.C. § 1988(c)).

Evans v. Jeff D., 475 U.S. 717, 106 S.Ct. 1531 (1986). May settle class action with waiver of fee.

Library of Congress v. Shaw, 478 U.S. 310, 106 S.Ct. 2957 (1986). No interest against government in attorney fee award.

Northcross v. Bd of Ed. Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), cert. denied 447 U.S. 911 (1980). Costs under § 1988 includes out of pocket expenses normally charged to fee paying clients such as copying, paralegals, travel, and phone.

Bowe v. Colgate-Palmolive, 24 F.E.P. Cases 970 (S.D. Ind. 1977). Fee allowed for mathematician and computer scientist whose services were engaged by attorney.

White & White v. Hospital Supply Corp., 786 F.2d 728 (6th Cir. 1986). Rule 54(d) creates a presumption in favor of awarding costs, but allows denial at the discretion of the trial court. Court may consider the chilling effect of awarding fees against a losing civil rights plaintiff.

VIII. RULE 68

Marek v. Chesney, 473 U.S. 1, 105 S.Ct. 3012 (1985). Defendant is not liable for plaintiff's fees and costs after offer of judgment under Rule 68 when judgment plus fees to date of offer is less than offer. Plaintiff is liable for defendant's costs after the date of the offer.

Fulps v City of Springfield, Tenn., 715 F.2d 1088 (6th Cir. 1983). Rule 68 offer of costs includes attorney fees. May combine offer of damages and fees in single offer.

Delta Airlines, Inc. v. August, 450 U.S. 346, 101 S.Ct. 1146 (1981). Rule 68 does not apply when plaintiff loses (dicta).

Fegley v. Higgins, 19 F.3d 1126 (6th Cir. 1994). Rule 68 does not apply to attorney fees in FLSA case where statutory fees are in addition to costs instead of "as costs."

EEOC v. Baily Ford, 26 F.3d 570 (5th Cir. 1994). Rule 68 does not apply when defendant wins.

Johnson v. Penrod Drilling Co., 803 F.2d 867 (5th Cir. 1986). Where two defendants make a joint Rule 68 offer without apportioning damages and one defendant settles and plaintiff wins judgment, Rule 68 does not apply. Defendant should make a new offer to the remaining defendant.

Mallory v. Eyrick, 922 F.2d 1273 (6th Cir. 1991). Rule 68 is mandatory, court has no discretion to modify the offer. Where there is a dispute over the intent of the offer contract principles apply.

Sharpe v Cureton, 319 F.3d (6th Cir. 2003). Individual offers to each plaintiff with promotion plus back pay and fees is not vague and offer is valid. If lump sum had been offered to be shared by all employees it probably would not be valid.

McCain v. Detroit II Auto Furnace, 378 F.3d 561 (6th Cir. 2004). Offer of “\$3000 as to all claims and causes of action” includes attorney fees

XI. APPEAL

Budinich v. Becton Dickinson and Co., 486 U.S. 196, 108 S.Ct. 1717 (1988). A decision on the merits is a final decision for appeal purposes whether or not there remains an attorney fee issue.

Evans v. Jeff D., 475 U.S. 717, 106 S.Ct. 1531, 1545 (1986), *Blum*, 104 S.Ct. at 1547 (1984). Proper standard of review of fee award is abuse of discretion. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941 (1983)

Scales v. J.C. Bradford Co., 925 F.2d 901 (6th Cir. 1991). Standard of review is abuse of discretion.

Simmons v. Allstate Life Ins., 65 F.3d 526 (6th Cir. 1995). Court may award double costs and attorney fees under FRAP 38 for frivolous appeals.

Wooldridge v. Marlene Industries Corp., 898 F.2d 1169 (6th Cir. 1990). Three-tier standard of review. Clearly erroneous on whether hours really worked. Court of Appeals determines whether trial court erred when reviewing legal questions. Did trial court misapply reasonable practices of profession when determining whether hours should be billed.

Kinney v. Rothchild, 678 F.2d 658 (6th Cir. 1982). Remand for award of additional fee for appeal.

Weisenberger v. Huecker, 593 F.2d 49 (6th Cir. 1979). Time spent pursuing fee is allowed.

IX. MISCELLANEOUS

Hensley v. Eckerhart, 461 U.S. 424, 433 n.7, 103 S.Ct. 1933 (1982). Standards are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing' party.

Rosenfeld v. Southern Pacific Co., 519 F.2d 527 (9th Cir. 1975). Time spent collecting attorney fees is compensable.

Balark v. Curtin, 655 F.2d 799 (7th 1981). Attorney fee may be awarded for time spent collecting judgment.

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