IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MICHAEL LOVE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 02-2478 Ml/P**
	)	
SHELBY COUNTY SHERIFF'S DEPARTMENT,	)	
	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS INCURRED ON APPEAL

Before the court is plaintiff Michael Love's Motion for Award of Attorney's Fees and Costs Incurred on Appeal, filed August 27, 2007. (D.E. 64). Defendant Shelby County Sheriff's Department ("Shelby County") filed a response in opposition to the motion on September 4, 2007. Love filed his reply on September 10, 2007. The motion was referred to the United States Magistrate Judge.[1] The court proposes the following findings of fact and conclusions of law and recommends that Love be awarded attorney's fees in the amount of $33,475.50 and costs in the amount of $1,193.27.

I. PROPOSED FINDINGS OF FACT

Love filed his amended complaint on January 8, 2003, alleging

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[1]Given the nature of this motion, the undersigned enters a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(C). See Bristol Warren Regional School Committee v. Dasilva, No. CA 04-521, 2007 WL 951570, at *1 n.1 (D.R.I. Mar. 27, 2007) (citing cases).

violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e et seq., on the basis of sex and age discrimination, sexual harassment, quid pro quo, and hostile work environment. On May 26, 2004, the jury returned a verdict in Love's favor. Love was awarded $3,330.00 in lost wages and $300,000.00 in compensatory damages. The court entered a corrected judgment in the amount of $303,330.00 on August 13, 2004. On June 14, 2004, Shelby County filed a motion for judgment as a matter of law, or in the alternative, a motion to reduce the amount of compensatory damages or for a new trial. The court denied the motion on April 29, 2006.

On May 11, 2006, Shelby County filed an appeal of the order denying its motion. The Sixth Circuit dismissed the appeal on the grounds that Shelby County had waived its right to challenge the verdict by failing to renew its motion for judgment as a matter of law at the close of all the evidence, it had failed to preserve any challenge to the court's denial of its Rule 59(a) motion for a new trial, and it had failed to preserve any objection to the court's denial of its motion for remittutur.

Love filed his initial motion for award of attorney's fees and costs incurred at the trial level on July 23, 2004, in the amount of $34,380.00. Shelby County filed its response on August 13, 2004. On April 20, 2006, the court granted the motion and awarded Love $34,005.00 for the hours expended by his attorney, Kathleen L.

Caldwell, from November 21, 2002 to June 30, 2004, plus $480.00 in expenses.

Love now moves for an award of attorney's fees in the amount of $40,380.00 as well as expenses totaling $1,193.27, incurred in successfully defending against Shelby County's appeal to the Sixth Circuit. Love contends, and Shelby County does not dispute, that he was the prevailing party on appeal and that Caldwell's hourly rate of $300.00 is a reasonable rate. Love further asserts that the work performed by Caldwell in defending against Shelby County's appeal was reasonable and necessary.

Shelby County challenges certain portions of Love's request for attorney's fees.[2] Shelby County asserts that certain time entries were unreasonable, excessive, redundant, or unnecessary. Specifically, Shelby County argues that the amount of attorney's fees claimed by Love should be reduced as follows: (1) 0.25 hour[3] should be excluded because the time entry was not prepared contemporaneously with the occurrence of the event; (2) 18.45 hours,[4] consisting of numerous client calls and conferences, were

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[2]Shelby County does not contest the reasonableness of the costs and expenses.

[3]Shelby County states in its response that ".40 hours" should be excluded for this reason, but the time entry is actually for only 0.25 hour.

[4]Shelby County states at various points in its brief that the "unnecessary charges" total 19.30, 20.30, or 20.03 hours. The entries referred to in the Table attached to its response brief, however, total 18.45 hours for "unnecessary charges."

unreasonable and excessive; (3) 4.75 hours were charged at the attorney rate even though the work was performed or should have been performed by Caldwell's staff; (4) 18.25 hours were duplicative; and (5) 5.25 hours were devoted to issues on which Love did not prevail. Further, Shelby County questions the reasonableness of the time incurred by Caldwell in traveling to and from Cincinnati for oral argument, and requests that Love produce copies of Caldwell's airline tickets and an itemization of her travel time. Shelby County also argues that the court should order Love to produce Caldwell's original time card records to prove that her time entries were made contemporaneous to the work performed rather than in preparation for this motion.

Love responds by stating that the time Caldwell spent communicating with him was not excessive and was necessary to keep Love informed of the status of the case and to address his questions and concerns. Love also argues that all of the work charged at Caldwell's rate was performed by Caldwell rather than her legal assistant. Love contends that none of the time claimed is duplicative and that all of Caldwell's time entries represent necessary and reasonable work. Love argues that he is entitled to attorney's fees for time spent on the two legal issues he lost (motion for free copy of trial transcript and motion to waive oral argument before the Sixth Circuit) because he prevailed on all substantive issues on appeal. Finally, Love contends that the

hours spent on Caldwell's travel were necessary due to flight scheduling and hotel accommodation issues as well as winter weather problems, and that Caldwell is entitled to charge for that travel time.[5]

II. PROPOSED CONCLUSIONS OF LAW

Federal courts in the United States follow the "American Rule" regarding attorney's fees. Buckhannon Bd. and Care Home, Inc. v. West Va. Dep't of Health and Human Res., 532 U.S. 598, 602 (2001); Doe v. Hogan, 421 F. Supp. 2d 1051, 1055 (S.D. Ohio 2006). Under this rule, parties are ordinarily required to bear their own attorney's fees, and courts generally do not award attorney's fees to a prevailing party absent explicit statutory authority. Buckhannon, 532 U.S. at 602; Doe, 421 F. Supp. 2d at 1055. Congress has explicitly authorized attorney's fees under Title VII, which provides that "[t]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k). The term "prevailing party" is a legal term of art that the Supreme Court has defined as "one who has been awarded some relief by the court." Buckhannon, 532 U.S. at 603. A prevailing party must achieve a material alteration in his legal relationship with the opposing party that carries some judicial imprimatur. Dillery v.

[5]Love attached a copy of Caldwell's travel itinerary and receipts to his reply brief.

City of Sandusky, 398 F.3d 562, 569 (6th Cir. 2005); Disabled Patriots of Am. v. Taylor Inn Enters., Inc., 424 F. Supp. 2d 962, 964 (E.D. Mich. 2006).

The amount of attorney's fees compensable under § 2000e-5(k) is determined by the "lodestar" method, in which fees are "calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Blanchard v. Bergeron, 489 U.S. 87, 94 (1989) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)); see also Venegas v. Mitchell, 495 U.S. 82, 87 (1990). The court may then adjust this lodestar calculation in light of other factors. Blanchard, 489 U.S. at 94.

The party seeking attorney's fees has the burden of showing that he is entitled to the award. Reed v. Rhodes, 179 F.3d 453, 471 (6th Cir. 1999); see also Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Accordingly, that party also bears the burden of proof on the number of hours expended and the hourly rates claimed. Hensley, 461 U.S. at 433. The court has discretion in determining the amount of the fee award. Id. at 437. Factors the court should consider are (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved

and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Johnson v. Ga. Highway Express, 488 F.2d 714, 720 (5th Cir. 1974). The Supreme Court has recognized these factors as a "useful catalog of the many factors to be considered in assessing the reasonableness of an award of attorney's fees." Blanchard, 489 U.S. at 93-94; see also Hensley, 461 U.S. at 430 n.3 (citing Johnson, 488 F.2d at 717-19).

As a threshold matter, the court submits that Love is a "prevailing party" entitled to attorney's fees under Title VII. 42 U.S.C. § 2000e-5(k). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute . . . [which] may be accomplished by obtaining some relief on the merits through a favorable judgment . . . ." Crabtree v. Collins, 900 F.2d 79, 82 (6th Cir. 1990) (citations and internal quotations omitted); see also Farrar v. Hobby, 506 U.S. 103, 111 (1992) ("[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim.").

Here, Love qualifies as a "prevailing party" on appeal because, after the jury returned a verdict in his favor and awarded him $303,330.00 in damages, Shelby County filed an appeal which was

later dismissed by the Sixth Circuit. A party may be a prevailing party on appeal if he prevailed at the trial level and he succeeds in defending an appeal. JHX Tax, Inc. v. H & R Block E. Tax Servs., Inc., 245 F. Supp. 2d 756, 760 (E.D. Va. 2002) (finding that plaintiff remained a prevailing party on appeal because defendants' liability was affirmed by the Fourth Circuit); see Riley v. Kurtz, 361 F.3d 906, 915-16 (6th Cir. 2004) (holding that under Section 1988 of the Civil Rights Act, "fees are awarded to prevailing parties for work done by attorneys at trial, post-trial, and on appeal"); see also Hensley, 461 U.S. at 433 n.7 (stating that the provision for counsel fees in Section 1988 was patterned upon the attorney's fees provisions contained in Title VII and that the legislative history of Section 1988 indicates that Congress intended that the standards for awarding fees be generally the same as under the fee provision of Title VII); Wolfe v. Perry, 412 F.3d 707, 720 (6th Cir. 2005) (stating that the Sixth Circuit has held that "Congress intended that the standards for awarding fees under [S]ection 1988 should be the same as those under Title VII and other acts allowing awards of attorneys fees"); Virostek v. Liberty Twp. Police Dep't/Trs., 14 Fed. Appx. 493, 510 (6th Cir. 2001) (stating that the standard for awarding attorney's fees is essentially the same under Section 1988 and Section 2000e-5k).

In addition, the court finds that Caldwell's hourly rate of $300.00, which was previously approved by this court in connection

with her first petition for attorney's fees, is reasonable. Thus, having determined that Love is a prevailing party and that $300.00 is a reasonable hourly rate, the court must next determine the amount of attorney's fees and costs that should be awarded.

A. Reasonableness of the Hours Claimed

The court must exclude from its calculation hours that are "excessive, redundant, or otherwise unnecessary." Hensley, 461 U.S. at 434; Northcross v. Bd. of Educ. of Memphis City Sch., 611 F.2d 624, 646 (6th Cir. 1979). The party seeking the fee bears the burden of demonstrating the reasonableness of hours by providing detailed billing records. Blum, 465 U.S. at 897; Hensley, 461 U.S. at 437. The opposing party must "raise objections with specificity, pointing out particular items, rather than making generalized objections to the reasonableness of the bill as a whole." Wooldridge v. Marlene Indus. Corp., 898 F.2d 1169, 1176 n.14 (6th Cir. 1990).

First, Shelby County argues that 0.25 hour should be deducted because the time entry was not prepared contemporaneously with the occurrence of the event. Under the lodestar method of calculating attorney's fees, the court should begin with the attorney's contemporaneous billing records. Bogan v. City of Boston, 489 F.3d 417, 426 (1st Cir. 2007); Am. Fed. Bank, FSB v. United States, 74 Fed. Cl. 208, 220 (Fed. Cl. 2006); Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332, 339 (2d Cir. 2005). A court

should deduct the hours that are not entered as contemporaneous time records. See Hensley, 461 U.S. at 438 n.13 (finding that the district court properly reduced the hours of an attorney to account, in part, for his failure to keep contemporaneous time records). The court finds that Shelby County's argument is well taken, and thus, the court will subtract 0.25 hour from the lodestar calculation for the time entry that was based on Caldwell's recollection of a phone call with the court on August 11 or 12, 2004.

Shelby County also argues that the court should require Caldwell to produce her original time cards to show that her time records were created contemporaneously to the work performed rather than for purposes of this motion. The court finds, however, that the time records provided by Caldwell are adequate. Her records were created in TABS, a computer program for recording billing entries. Most legal practitioners rely on such programs rather than paper records. Therefore, Caldwell need not provide her original paper records in support of this motion.

Second, Shelby County argues that the 18.45 hours spent by Caldwell communicating with her client, either in person, by phone or through correspondence, were unnecessary because "the legal issues presented at the Sixth Circuit were not something [into which] a lay person could have input." (Def.'s Resp. at 2). The court finds that, although it is certainly reasonable and

appropriate for an attorney to keep her client informed of the status of his case on appeal, the amount of time spent by Caldwell discussing appellate matters with her client appears to be excessive and unnecessary. Therefore, the court will reduce the challenged 18.45 attorney hours related to communications between Caldwell and Love by 50%, or 9.20 hours.

In addition, the court notes that all of the time entries reflect at least 0.25 hours of work and many entries reflect 0.25 billing increments, which raises a concern with the court that Caldwell employed a minimum billing increment policy in calculating her hours. As Judge Donald observed in Brack, "[t]he court looks with disfavor on minimum billing increments because they result in padding of time and do not accurately reflect the actual time required to perform a particular service. Padding hours demonstrates lack of billing judgment, and hours may be cut for padding." Brack v. Shoney's, Inc., No. 01-2997 D/V, 2004 WL 2806495, at *5 (W.D. Tenn. July 29, 2004) (quoting Anglo-Danish Fibre Indus., Ltd. v. Columbian Rope Co., No. 01-2133-G/V, 2003 WL 223082, at *8 (W.D. Tenn. Jan. 28, 2003)). In addition, many of the time entries lack detail regarding the work performed, while other entries lump together different tasks into one time entry, making it impossible for the court to accurately determine how much time was spent performing each task. For these reasons, the court will reduce the overall fee award by 10%.

Third, Shelby County argues that 4.75 hours were charged at $300.00 per hour even though the work was performed or should have been performed by Caldwell's office staff. Specifically, Shelby County points to a time entry for 4.5 hours on August 21, 2006, which states "Completed and mailed Appellee's Proof Brief, including designations of record" and "Request to Sixth Circuit to waive oral argument and research," and a time entry for 0.25 hour on August 21, 2007, which states "File Motion for Fees." (D.E. 64-4). The court finds that 1.75 hours reasonably reflect work that should have been performed by a paralegal or office staff, and thus should be calculated at a reduced rate of $100.00 per hour instead of the attorney rate of $300.00 per hour. The court finds, however, that completing an appellate brief, making record designations, and conducting legal research are tasks properly performed by an attorney, particularly where, as here, the attorney is a solo practitioner.

Fourth, Shelby County asserts that 18.25 hours represent duplicative work performed by Caldwell. Shelby County argues that the time entry for 7.50 hours on August 2, 2006, "Organized notes on trial transcript and second reading of transcript," is a duplication of the work performed for 5.50 hours on July 30, 2006, "First reading of trial transcript; indexed." (D.E. 64-4). The court disagrees. It is reasonable for an attorney, in preparing an appellate matter, to review a trial transcript more than once.

Shelby County also argues that a time entry of 4.75 hours on August 16, 2006, entered as "Second draft Brief - Revisions" and 1.50 hours entered as "Office conference with client" is duplicative of previous entries on July 22, 2006, and August 11, 2006, of 4.75 hours billed as "Review Appellant's Proof Brief; research her cases" and 6.00 hours entered as "Research case law; first draft of Appellee's Brief." (D.E. 64-4). Again, the court does not find these entries to be duplicative, as it is reasonable for an attorney to spend several hours conducting legal research and drafting and revising a brief. As explained in Love's reply brief, the appellate brief went through three drafts and a final revision, which the court finds is not excessive or duplicative. (Pl.'s Reply at 5). Next, Shelby County argues that an entry of 4.50 hours on August 21, 2006, "Completed and mailed Appellee's Proof Brief, including designations of record," is duplicative of two other time entries on August 19 and 20, 2006, for 3.00 and 2.30 hours, respectively, billed as "Insert all record excerpts; review all citations to cases" and "Proof Appellee's Brief - final version." (D.E. 64-4). Again, the court finds that it is not duplicative or excessive to revise and proof-read an appellate brief several times before submitting it. Therefore, the court will not deduct any time from these entries.

Shelby County next contends that 5.25 hours were devoted to issues on which Love did not ultimately prevail. Since fees may

only be awarded to prevailing parties, "hours devoted to unsuccessful claims should be subtracted from the number of hours reasonably expended on the case as a whole." Hensley, 461 U.S. at 435. However, "[t]he 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. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed." Brack, 2004 WL 2806495, at *4 (quoting Wooldridge, 898 F.2d at 1177). In this case, the court finds that it was reasonable for Caldwell to believe that her efforts in attempting to obtain a free copy of the trial transcript and attempting to obtain a waiver of oral argument on appeal was time reasonably spent relating to Love's appeal, particularly since both motions were filed for the purpose of minimizing litigation costs. Thus, the court will not deduct any attorney hours for work performed in relation to these unsuccessful motions.

Finally, with respect to Caldwell's travel time, Love sufficiently justified the circumstances surrounding counsel's travel in his reply brief. Therefore, the court will not deduct any travel time from the fee award. See Bridgeport Music, Inc. v. Lorenzo, 255 F. Supp. 2d 795, 800 n.4 (M.D. Tenn. 2003).

B. Lodestar Calculation

Based on the above analysis, the court calculates Love's award

of attorney's fees as follows: (1) Caldwell's 134.60 attorney hours should be reduced by 0.25 hour, 9.20 hours, and 1.75 hours, for a total of 123.40 attorney hours billed at $300.00 per hour ($37,020.00); (2) 1.75 hours should be added back in at the reduced $100.00 paralegal rate ($175.00); and (3) the overall award should be reduced by 10%, which results in a total fee award of $33,475.50. In addition, Love should be awarded $1,193.27 in expenses.

Finally, the court submits that this is not a rare or exceptional case that would merit any upward or downward adjustment of the fee award. "Once the Court determines the lodestar figure, it may, in limited circumstances, consider other factors and adjust the award upward or downward to achieve a reasonable result." Brack, 2004 WL 2806495, at *6. This court submits that the factors identified in Johnson are properly and fairly reflected in the court's determination of the hourly rate and number of hours reasonably expended by Love's attorney. Johnson, 488 F.2d at 719.

III. RECOMMENDATION

For the above reasons, the court recommends that Love be awarded attorney's fees in the amount of $33,475.50 and expenses in the amount of $1,193.27.

Respectfully submitted,

s/ Tu M. Pham

TU M. PHAM

United States Magistrate Judge

December 10, 2007

Date

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.