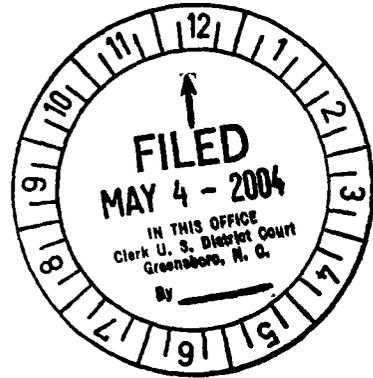


164.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SHEPARD JONES,)
)
 Plaintiff,)
)
 v.)
)
 WAYNE BRYANT, SHERIFF,)
 Individually and in his)
 official capacity as Sheriff)
 of Scotland County,)
)
 Defendant.)

CIVIL NO. 1:01CV00936



MEMORANDUM OPINION

BULLOCK, District Judge

On July 11, 2003, following a three-day trial, the jury returned a verdict in Plaintiff's favor on his Title VII racial discrimination claim and awarded him \$25,000.00 in compensatory damages. The jury ruled for Defendant on Plaintiff's First Amendment claim, his claim for back pay and benefits, and his claim for punitive damages. Thereafter, Plaintiff moved for costs and attorney's fees of \$237,620.00 pursuant to 42 U.S.C. § 2000e-5(k), which provides that "the court, in its discretion, may allow the prevailing party . . . reasonable attorney's fees . . . as part of costs in an action under Title VII of the Civil Rights Act." On September 25, 2003, Defendant filed detailed objections to Plaintiff's motion for attorney's fees, asking the court to deny Plaintiff's request in its entirety, and

identifying numerous date and time entries where Plaintiff sought substantial compensation for allegedly excessive time spent on correspondence, preparing and reviewing pleadings and orders of the court, intra-office conferences, and work allegedly performed by a paralegal and investigator. Defendant also pointed out that Plaintiff prevailed on less than half the issues raised in his complaint, failed to exclude time attributable to unsuccessful claims, obtained only a relatively small verdict, and had previously received substantial compensation from Defendant in settling the case of a co-plaintiff arising out of similar operative facts.

On October 23, 2003, the court held a hearing on Plaintiff's motion for attorney's fees and other issues. Prior to the hearing, the court made an extensive review of the Plaintiff's fee petition. At the hearing the court, citing examples of many unrealistic time entries, advised the parties that the court found the fee petition to be unmanageable and unreasonable, and gave Plaintiff's counsel an opportunity to file a revised petition. On November 18, 2003, Plaintiff filed a revised motion for fees, reducing the amount sought to \$154,030.00.

A fee applicant must maintain billing records in a manner which will enable a reviewing court to identify distinct claims. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). The applicant must make every effort to submit time records which specifically

allocate the time spent on each claim. The petition should attempt to describe specifically the work allocated to unsuccessful claims, although courts recognize that some claims of some co-plaintiffs may have a common core of facts and legal theories making it difficult to make a precise allocation to a separate plaintiff or to a separate theory. Regardless, contemporaneous, accurate time records are required with a sufficient description of the nature of the services allegedly performed to enable the court to determine the reasonableness of the time and fee claimed.

The court has once again made a painstaking review of the Plaintiff's fee petition. It is obvious that Plaintiff's counsel did not keep accurate contemporaneous time records. Some of the services allegedly performed on a particular date, even if necessary, could not have been performed on the date claimed because they were allegedly performed in response to events which had not yet occurred or to pleadings which had not yet been filed. Furthermore, the petition is replete with time entries which are so excessive as to be unreasonable and unreliable on their face. To cite only a fraction of the number of such entries, counsel claims one hour of time on several occasions for preparing a motion for extension of time; to be exempt from mediation; for permission to file a separate summary judgment motion; for preparing a motion to exceed the twenty-page

limitation for briefs; and for other, similar boilerplate motions. Counsel also typically claims one-half hour time for doing such simple things as reviewing one-sentence orders from the magistrate judge and for reading letters of one page or less from opposing counsel. Furthermore, large blocks of time are listed with few details for conferences with counsel's paralegal and/or investigator. Included are such things as "research Title VII remedies," "prepare analysis of magistrate's order," "analyze defendant's objections," "analyze defendant's defenses," "analyze First Amendment," and even "analyze a successful mediation." Compensation for the paralegal and investigator at \$75.00 an hour is sought, including numerous hours for the investigator to "analyze" Title VII, the First Amendment, and defenses raised in Defendant's answer. Such alleged "analysis" is well beyond the job description and training of an investigator.

The examples above are typical of the brevity, generality, and duplicative nature of counsel's records. Despite having been given a second opportunity, counsel has once again presented to the court a fee petition that is so lacking in accuracy and detail that it is of no aid to the court in determining a reasonable fee. The court cannot make any meaningful review of a fee petition which contains clearly erroneous dates for the performance of services, duplicative services performed on

different dates, excessive time claimed for many of the services which are reasonably described, and fails to make an effort to account for time attributable to unsuccessful claims.

Although the burden is not on the district court to identify which hours in a fee applicant's records are compensable, Fair Housing Council v. Landow, 999 F.2d 92, 98 (4th Cir. 1993), the court endeavored to assume this burden anyway. However, in addition to the unreliability of counsel's records, the petition suffers from a more fundamental defect: the amount sought to be recovered is so outrageously excessive as to shock the conscience of the court. The Fourth Circuit Court of Appeals has held that a district court, when faced with a petition seeking to recover an amount that is so outrageously excessive as to shock the conscience of the court, may deny any fee award in its entirety. See Landow, supra. In the years since 1982, the court has reviewed numerous fee petitions, and awarded fees in a variety of cases. Presented with a reasonable fee petition supported by reliable time records, the court would in its discretion award the Plaintiff in this case, who prevailed in part, a reasonable fee. However, the court finds this almost impossible to do without having been provided the assistance necessary to make such a determination. Therefore, the court could, consistent with circuit precedent, deny Plaintiff's request for fees in its entirety on two independent grounds: (1) the amount of

attorney's fees which the Plaintiff seeks to recover is so outrageously excessive as to shock the conscience of the court and justifies a complete denial of any fee award; and (2) the petition, even after counsel's revision, is so unreliable and is so lacking in detail that it falls woefully short of what is necessary to provide some guidance to the court in determining a reasonable fee consistent with the twelve factors first identified in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974).

Despite the solid basis for denying Plaintiff's fee petition in its entirety, the court could still in its discretion award Plaintiff some fee if the court could make the specific findings required to support any fee award. The unreliability and inaccuracy of the fee petition essentially forecloses this option. Furthermore, such an approach is specifically discouraged by the courts. See Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980) (a district court does not have to determine a reasonable fee "when an outrageously unreasonable one has been asked for"). Nevertheless, in the interests of fairness and justice, the court will still consider a fee award. Because it tried the case, the court has independent knowledge that counsel reasonably devoted some amount of time to the partially successful prosecution of the Plaintiff's claims. Therefore, the court will, in its discretion, award counsel fees for the amount

of time the court can determine was unquestionably and reasonably devoted to the Plaintiff's case, i.e., time spent in actual trial before this court, plus some additional amount of time that could reasonably have been devoted to actual trial preparation prior to jury selection.

The trial of this case lasted just under 3-1/2 days. Recognizing that some additional preparation is necessary before and after the actual in-court hours on trial days, the court will approve compensation for thirty-five (35) hours for Plaintiff's counsel on those days. Also, because the court required counsel to be present for a pre-trial and settlement conference on June 23, 2003, the court will allow five (5) hours of additional compensation for such appearance. The court can also determine that some time on some days was spent in preparing a trial brief and proposed jury instructions, and presumably otherwise preparing for trial, and the court will include an additional forty (40) hours of counsel time for such activities. Additional compensation for paralegal and investigator services will be disallowed because the time entries and services allegedly performed are unreasonable both as to the amount of time and nature of activity.

The court is aware that fashioning a fee award in such a way may be repugnant to Fourth Circuit precedent not to encourage fee requests which could be characterized as nothing more than an

"opening bid" and "gamesmanship," Landow, 999 F.2d at 98, and that any award may be in jeopardy upon appeal. Nevertheless, the court believes that the exercise of its discretion in this manner is in the interests of justice and fair to both sides in this case. The court will award counsel fees of \$16,000.00 to the Plaintiff at 2003 rates of \$200.00 an hour as a prevailing party in this action.

Plaintiff has also sought his entire costs in this matter, including travel and subsistence for Plaintiff and his attorney, witness fees for two witnesses who did not testify, clerical expense, and expenses for computerized research. Although Defendant contends that Rule 54(d), Federal Rules of Civil Procedure, limits the type of costs that can be recovered, Plaintiff, as a prevailing (partially) party under Title VII, 42 U.S.C. § 2000e-5(k), is not limited by Rule 54(d). See Daly v. Hill, 790 F.2d 1071, 1083-84 (4th Cir. 1986) (noting that district court should review prevailing civil rights plaintiffs expense requests under 42 U.S.C. § 1988, which contemplates reimbursement for reasonable litigation expenses, instead of Federal Rule of Civil Procedure 54(d)); see also Trimper v. City of Norfolk, Virginia, 58 F.3d 68, 75 (4th Cir. 1995); Spell v. McDaniel, 852 F.2d 762, 771 (4th Cir. 1988).

The issue of cost is one for the sound discretion of the court. In cases in which each party has prevailed in part,

courts in their discretion have often apportioned costs, providing that each party shall bear their own costs. Such a procedure could be justified under the facts of this case. However, because Plaintiff obtained an enforceable judgment, the court will treat Plaintiff as the prevailing party. Therefore, the court will award Plaintiff all reasonable litigation expenses incurred in connection with this lawsuit, without offset, in addition to those reasonably allowed under Rule 54(d). This includes travel and subsistence, witness fees for the two witnesses who did not testify, and copying expenses. The court will exclude paralegal expenses and costs for computerized research because such amounts, to the extent documented, were considered by the court when determining amounts recoverable as reasonable attorney's fees. The court will therefore allow recoverable costs to the Plaintiff in the amount of:

\$ 150.00 for the filing fee to the Clerk
\$ 65.00 for service of summons and subpoenas
\$4,099.30 in fees for the court reporter and transcripts
\$ 399.02 copying costs
\$ 600.00 for witness fees
\$1,439.91 for travel and subsistence

totaling \$6,753.23.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

May 4, 2004


United States District Judge