UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples, Charging Party, v. Michael P. Kelly and John T. Kelly Respondents.

HUDALJ 05-90-0879-1
Decided: September 21, 1995

Robert G. Kelly, Esquire
For the Respondents

Frederick M. Morgan, Jr., Esquire
For the Intervenor

Kathleen M. Pennington, Esquire
For Charging Party

Before: Thomas C. Heinz
Administrative Law Judge

INITIAL DECISION AND ORDER ON APPLICATIONS FOR ATTORNEY'S FEES

Background

On August 26, 1992, I issued a decision in this case concluding that Respondents violated sections 804(a), (b), and (c) of the Fair Housing Act as amended (42 U.S.C. §§ 3604(a), (b), and (c))("the Act"). The decision included an award of damages to Complainant-Intervenor Dionne Staples and an injunction. *HUD v. Kelly*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,034, 25,363 (HUD A.L.J. Aug. 26, 1992). Respondents appealed the decision to the United States Court of Appeals for the Sixth Circuit, which affirmed the liability findings and the injunction but vacated the damages award to Complainant-Intervenor so that HUD could again attempt to conciliate the damages issue. *Kelly v. HUD*, 3 F.3d 951 (6th Cir. 1993). After HUD's conciliation efforts failed for the second time, I reconsidered the damages award pursuant to the Circuit Court's order, and on December 1, 1994, issued an Initial Decision on Remand that reduced the original award of damages by $1 to $10,429.76 plus interest. Respondents appealed that decision in a petition that is currently pending before the Circuit Court.

Complainant-Intervenor has filed an application for an interim award of her attorney's fees and expenses in the amount of $35,362.46 to cover litigation costs from May 6, 1992, through January 12, 1995. Respondents oppose the application and request an award of attorney's fees and costs in their own behalf in the amount of $46,432.69 for their legal expenses from March 11, 1992, through January 23, 1995.

Discussion

Section 812(p) of the Act provides that a prevailing party (other than HUD) in an administrative proceeding under the Act may recover attorney's fees and costs. (42 U.S.C. § 3612(p)) Section 104.940(b) of the regulations also provides that

> To the extent that an intervenor is a prevailing party, the respondent will be liable for reasonable attorney's fees unless special circumstances make the recovery of such fees and costs unjust.

A prevailing party is any party that succeeds on any significant issue in litigation that achieves some of the benefit the party sought in bringing suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). *See also Busche v. Burkee*, 649 F.2d 509, 521 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981); *Dixon v. City of Chicago*, 948 F.2d 355, 357-58 (7th Cir. 1991). A plaintiff has prevailed when she has "established the legal liability of the opposing party...." *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980). Inasmuch as Respondents were found to have violated the Act as charged by Complainant-Intervenor, and were ordered to pay damages to Complainant-Intervenor, Complainant-Intervenor is a

prevailing party. Respondents, on the other hand, are not prevailing parties because they have not succeeded in obtaining the only thing they have sought in this litigation--dismissal of the case. Furthermore, to receive attorney's fees under the Equal Access to Justice Act, Respondents would also have to demonstrate that the position of the Charging Party was not "substantially justified," an impossible task inasmuch as the Charging Party prevailed in the case.[1]

An Interim Award Is Appropriate

Although the Circuit Court has yet to rule finally on some of the issues presented by this case, an interim award of attorney's fees is nevertheless appropriate. In *Hanrahan v. Hampton*, the Supreme Court held that a plaintiff is entitled to an interim attorney's fee award upon demonstrating "entitlement to some relief on the merits of [her] claims." 446 U.S. at 758. *See also Texas State Teachers Ass'n. v. Garland Independent School District*, 489 U.S. 782, 791-92 (1989); *Brunet v. City of Columbus*, 642 F. Supp. 1214, 1254 (S.D. Ohio 1986)(interim fees awarded in Title VII case based upon favorable liability ruling and interlocutory injunctions); *King v. Palmer*, 641 F. Supp. 186, 189-90 (D.D.C. 1986)(interim fee award based upon favorable liability ruling in Title VII case). The Sixth Circuit Court has affirmed Respondents' legal liability as well as Ms. Staples' entitlement to damages. She is therefore entitled to her attorney's fees, if reasonable.

An interim fee award may be made immediately payable to alleviate economic hardship to plaintiff's counsel. *See, e.g., Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 633 (5th Cir. 1983)(affirming award of interim fees "in order to prevent extreme cash-flow problems of the plaintiffs and attorneys"); *Ramos v. Lamm*, 632 F. Supp. 376, 389 n.10 (D. Colo. 1986)(awarding interim fees in case that lasted several years); *Palmer v. City of Chicago*, 596 F. Supp. 1060, 1062 (N.D. Ill. 1984)(awarding interim fees where counsel "have spent hundreds of hours on the case without pay"), *rev'd*

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[1]Subsection 2412(d) of the Equal Access to Justice Act (28 U.S.C. § 2412) provides in pertinent part:

> (A)Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review or agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

See also 5 U.S.C. § 504.

on other grounds, 806 F.2d 1316 (7th Cir. 1986), *cert. denied,* 481 U.S. 1049 (1987); *Smiddy v. Varney,* 574 F. Supp. 710, 714 (C.D. Cal. 1983)(immediate payment of interim fees ordered to avoid "substantial hardship" to attorneys who had worked on case for six years).

In the instant case, Mr. Morgan, counsel for Complainant-Intervenor, has devoted more than 200 hours to this case since May 1992 without receiving payment of any fees or expenses. He has been a sole practitioner since March 1993, and a large part of his practice consists of contingent-fee, civil rights litigation. This case represents a substantial fraction of his uncompensated work. Application, Exhibit 1. These circumstances support issuance of an interim award of attorney's fees.

Summary of Respondents' Complaints

The Supreme Court in *Hensley* stated that 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." 461 U.S. at 433. Respondents have not contested the claim by Complainant-Intervenor's counsel that his current billing rate of $150 per hour is reasonable. Rather, they complain that special circumstances require denial of the application for fees and costs filed by Complainant-Intervenor; that with regard to the first phase of litigation, counsel "wants 20% interest on a fee application that he submitted on behalf of a law firm with which he is no longer associated"; that counsel engaged in noncompensable activities on behalf of his client; and finally, that even when engaged in compensable activities he often took too much time to accomplish the tasks. Respondents' brief, p. 8.

"Special Circumstances" Do Not Exist

"[T]he Supreme Court has held that although it is within the district court's discretion to award attorney's fees under [civil-rights fee-shifting statutes], `in the absence of special circumstances a district court not merely `may' but *must* award fees to the prevailing plaintiff....'" *Morscott v. City of Cleveland,* 936 F.2d 271, 272 (6th Cir. 1991), *quoting Independent Federation of Flight Attendants v. Zipes,* 491 U.S. 754, 761 (1989)(emphasis in original). The Supreme Court has also held that a "court's discretion to deny a fee award to a prevailing plaintiff is narrow." *New York Gaslight Club v. Carey,* 447 U.S. 54, 68 (1980). Moreover, a defendant who claims "special circumstances" has the burden to demonstrate them, "and the defendant's showing must be a strong one." *Herrington v. County of Sonoma,* 883 F.2d 739, 744 (9th Cir. 1989), *citing J&J Anderson, Inc. v. Town of Erie,* 767 F.2d 1469, 1474 (10th Cir. 1985). Respondents have failed to meet that burden.

The only "special" circumstances Respondents cite are the conclusions by the Sixth

Circuit Court of Appeals that the Secretary impermissibly delayed processing Ms. Staples' complaint and did not provide Respondents with objectively reasonable conciliation before issuing the Charge of Discrimination. The Secretary was responsible for those procedural errors, not Ms. Staples or her counsel. Respondents cite no authority and none has been found for the proposition that respondents found guilty of housing discrimination should be relieved of their duty to pay attorney's fees to a prevailing complainant-intervenor because the Secretary committed procedural error while processing the case. In short, there is no support in fact or law for Respondents' argument that "special circumstances" require denial of Complainant-Intervenor's application for an award of attorney's fees and costs.

Furthermore, no statute, regulation, or case supports Respondents' suggestion that the Secretary rather than Respondents should pay Ms. Staples' attorney's fees. The only case cited by Respondents to support their suggestion, *Huderson v. U.S. Dept. of Housing and Urban Development,* 737 F. Supp. 20 (E.D.Pa. 1989), is inapposite. Unlike the instant case, the Department did not prevail in *Huderson* and was required under the Equal Access to Justice Act to pay attorney's fees to the plaintiff who did.

Details of Respondents' Complaints

During the first phase of the instant litigation, counsel for Complainant-Intervenor charged $120 per hour in civil rights cases. He now requests an attorney's fee award at the rate of $150 per hour for all of his time spent on the case up to January 1995. Respondents object. In *Missouri v. Jenkins,* 491 U.S. 274 (1989), the Supreme Court held that a fee award should fully compensate a prevailing plaintiff's counsel through "an appropriate adjustment for delay in payment--whether by the application of current rather than historic hourly rates or otherwise[.]" *Id.* at 284. The Court in *Jenkins* affirmed an award reflecting counsel's current $275-per-hour rate for all of the time expended on the case over 15 years. The principle announced in *Jenkins* has been reaffirmed in recent cases in the Southern District of Ohio. In *White v. Morris,* 863 F. Supp. 607, 611 (S.D. Ohio 1994), the court held that "district courts should award reasonable attorney's fees according to the current market rates in the relevant community." *See also James v. Runyon,* 868 F. Supp. 911 (S.D. Ohio 1994). Because the case law supports an award based on current rather than historical rates, there is no merit to Respondents' complaint regarding the hourly rate of compensation for the first phase of this litigation.

Respondents also complain that counsel seeks compensation for time spent on activities that do not appear to have directly benefited his client, such as time spent addressing the issue of witness fees for witnesses who did not appear at trial, and time spent preparing a notice of appeal that was later withdrawn. These complaints have no merit. During the ordinary course of litigation, attorneys almost always find that they

have chosen a line of inquiry or a course of action that must be abandoned. As long as the choice was reasonable at the outset and success is finally achieved, the attorney cannot be faulted simply because a particular activity later proves a "dead end." The mere fact that time was spent in this case on an appeal that was later withdrawn or in dealing with potential witnesses who did not appear at trial does not prove that it was unreasonable for counsel to have pursued those activities at the outset.

Respondents also complain that counsel spent time consulting with Ms. Staples' previous counsel, the Government's investigator, the Secretary's counsel, and non-parties. These complaints are also meritless.

Substitution counsel necessarily will have to spend time with previous counsel, or the client, or both, to become familiar with the history of the litigation. Respondents have not demonstrated that the amount of time Mr. Morgan spent consulting with Ms. Staples' previous counsel was unreasonable under the circumstances.

Respondents fall wide of the mark with their complaint that Mr. Morgan and the Secretary's counsel jointly prepared their witnesses for trial. In many respects the interests of the two parties were identical, and it was necessary and proper for counsel to prepare witnesses jointly in order to preclude unnecessary duplication at trial. Counsel for Complainant-Intervenor did not unnecessarily duplicate the work of counsel for the Secretary in this case.

It was appropriate for Complainant-Intervenor's counsel to consult with the Government's investigator who testified in this case, just as it is appropriate for counsel to consult with any witness in any case. This is particularly true when, as here, the conduct of the witness had become the subject of appellate litigation.

The non-parties about whom Respondents complain apparently were either amici or potential amici in the appellate litigation. Such consultations are common to appellate litigation, and nothing in the record shows that Mr. Morgan's amici consultations were untoward in any respect.

On May 18, 1994, after analyzing the original decision and damages award, counsel for Complainant-Intervenor sent a letter to the Secretary's counsel containing a settlement demand. Mr. Morgan requests compensation for 3.10 hours expended on these activities. According to Respondents, it should not have taken 3.10 hours to accomplish these tasks. Although some attorneys may have been able to complete these tasks in less time, nothing in the record shows that Mr. Morgan's request is outside the range of the reasonable. The same can be said for Respondents' complaint that it should not have taken 13.70 hours to

respond to this court's August 1994 briefing order.

Respondents argue that Mr. Morgan is guilty of padding his bill. To support their argument they cite several minor charges, such as a .50 hour charge concerning a conference call on July 13, 1992, an alleged duplication of charges on September 25 and 26, 1993, and telephone calls in February 1994 to people at HUD and the Department of Justice regarding conciliation and a mediation plan.

Respondents mischaracterize the July 13, 1992, charge as "a charge of .50 hours for a set up of call to the Court." (Brief, p. 7) Mr. Morgan's invoice of October 23, 1992, shows that the .50 hour charge includes the time spent on the conference call itself. It is not a charge for doing nothing.

Mr. Morgan's invoice shows that on September 25, 1993, he spent .30 hours to "R&R BKelly's petition for rehearing." On the next day he spent 1.10 hours to "Receive and review Kelly's petition for rehearing." These two entries simply show that counsel spent a total of 1.4 hours to accomplish a single task, not that he charged his client twice for the same work.

Similarly meritless are Respondents' protests that counsel cannot charge for telephone calls regarding conciliation and mediation in February 1994 because HUD had made no conciliation efforts and Respondents were not notified of any mediation plan in February 1994. Mr. Morgan explains that the purpose of his telephone calls was to determine when mediation efforts would begin and to try to move the case along. Reply brief, p. 12.

Respondents also protest Mr. Morgan's request to be compensated for time spent preparing a request for rehearing filed in the Circuit Court of Appeals, preparing fee applications, and helping Ms. Staples secure a loan. Unlike their other complaints, these protests are well-founded.

Between August 28, 1993, and October 2, 1993, Mr. Morgan spent 27.8 hours on this case, of which 14.6 hours were devoted to preparing and filing a petition for rehearing and suggestion for rehearing en banc. The petition appears to have been rejected by the Circuit Court because it was untimely filed. In the absence of an explanation and justification for this apparent violation of court rules, compensation for time spent preparing and filing the petition must be denied. The remainder of the time claimed for this period is compensable because it was spent consulting with amici and counsel for the parties, responding to Respondents' litigation initiatives, and researching issues that arose later in the litigation.

Counsel's request to be compensated for 22.4 hours spent preparing fee applications

(nearly 10 percent of the total claim) is excessive on its face. Much of that time was unnecessarily spent preparing legal arguments with which Respondents have had no quarrel. An application for fees need include no more than a summary of the black-letter law, along with an affidavit and itemized invoices. One full day (eight hours) should have sufficed to complete the appropriate level of research and prepare the applications and supporting documents, particularly for an attorney who is claiming expertise in housing discrimination litigation. The fee award will be reduced accordingly.

Securing a loan for a client is not within the normal duties of counsel in a housing discrimination case and is therefore not compensable.

Respondents argue that it was unreasonable for Complainant-Intervenor's counsel to spend 234 hours on this case. That argument is unpersuasive in light of the claim by Respondents' counsel that he had spent 377.25 hours on the case as of January 1995. After reducing Mr. Morgan's fee application for the reasons discussed above, Complainant-Intervenor will be compensated for fees covering 202.6 hours. In hourly terms, that amount constitutes approximately 54 percent of Respondents' claim. Assuming that the amount of time Respondents' counsel spent on the case was reasonable and justifiable, it necessarily follows that it was not unreasonable for Complainant-Intervenor's counsel, one of two attorneys opposing Respondents' counsel, to spend approximately half that amount of time on the case.[2]

[2]Besides filing briefs, counsel for Complainant-Intervenor conducted the principal direct examination of Ms. Staples (TR. 290-327) and the principal cross-examinations of Respondents (TR. 487-565; 582-91; 635-52) and other witnesses. His work materially aided the court in resolving the issues presented by the case.

Conclusions

Complainant-Intervenor has prevailed in this case and is therefore entitled to an award of attorney's fees. Respondents have not prevailed and therefore are not entitled to an award of attorney's fees. Excepting the elements addressed above, Complainant-Intervenor's application for an interim award of attorney's fees and costs appears reasonable.[3] Although some issues raised in this case are currently before the Circuit Court of Appeals, an interim award of attorney's fees is appropriate under the circumstances.

ORDER

It is hereby ORDERED that:

1. Complainant-Intervenor's application for an award of interim attorney's fees and costs is granted;

2. Within 30 days of the date of this Order, Respondents shall pay Complainant-Intervenor a total of $30,652.46, consisting of attorney's fees covering 202.6 hours at $150 per hour, plus $262.46 for costs; and

3. Respondents' application for attorney's fees is denied.

/s/

THOMAS C. HEINZ
Administrative Law Judge

Dated: September 21, 1995.

[3]Those arguments of the Respondents not expressly addressed herein are argumentative, frivolous, or niggling, and are therefore meritless. In *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988), *cert. denied*, 488 U.S. 926 (1989), the court condemned complaints about charges for very short periods of attorney time as "[n]iggling objections" that "simply increase the ultimate bill and waste judicial time." *Id.* at 777.