IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EDWARD J. FRAMI, JOHN P. CLARK,
MICHAEL W. SCHULTZ and CALVIN
J. ZASTRO,

Plaintiffs,

v.

STEVEN V. PONTO, in his official
capacity as Chairman of the Wisconsin
State Elections Board,

Defendant.

OPINION and
ORDER

02-C-515-C

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This civil action is before the court on plaintiffs' motion for an award of attorney fees and costs pursuant to 42 U.S.C. § 1988. The case involves plaintiffs' challenge to certain Wisconsin statutory provisions setting forth requirements for persons wishing to circulate nomination papers on behalf of candidates for political office. In an opinion and order entered April 9, 2003, I granted plaintiffs' motion for judgment on the pleadings because I concluded that the challenged provisions are unconstitutional. Plaintiffs were awarded declaratory relief and I permanently enjoined defendant from enforcing the unconstitutional provisions. Plaintiffs now seek an award of $36,866.01 in attorney fees and costs. For the

reasons stated below, plaintiffs' motion for an award of attorney fees and costs will be granted in part and denied in part and defendant will be required to pay plaintiff $28,132.76 in fees and costs.

In an action brought pursuant to 42 U.S.C. § 1983, a district court "may allow the prevailing party . . . a reasonable attorney's fee." 42 U.S.C. § 1988(b). Defendant acknowledges that plaintiffs prevailed within the meaning of the statute and that they are entitled to their reasonable attorney fees. However, defendant maintains that the amount of plaintiffs' fee request is unreasonable. In determining a reasonable fee award, the "'lodestar' method — reasonable hourly rates multiplied by hours reasonably expended — is the most appropriate starting point." People Who Care v. Rockford Board of Education, 90 F.3d 1307, 1310 (7th Cir. 1996). As the fee applicants, plaintiffs "bear[] the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). Reasonable hourly rates are to be determined on the basis of market rates for services rendered. A lawyer's actual billing rate for comparable work is presumptively appropriate to use as the market rate. See People Who Care, 90 F.3d at 1310. Absent evidence of the lawyer's actual billing rate, "the court should look to the next best evidence — the rate charged by lawyers in the community of 'reasonably comparable skill, experience and reputation.'" Id. Once the lodestar is calculated, the court may adjust the award in light of the 12 factors identified in Hensley,

to the extent the factors are not subsumed in the lodestar calculation. Id. at 1310-11 (describing Hensley factors).

Plaintiffs are represented by a two-lawyer firm composed of partner Robert G. Bernhoft and his associate, Christopher J. Ertl. The firm also employs a paralegal. Plaintiffs' lawyers have submitted a statement of work performed in this case through April 11, 2003, from which they have calculated their $36,866.01 fee request using the lodestar method. See Bernhoft Aff., dkt. # 27, at Ex. A.

A. Hours Expended

Defendant's first objection to plaintiffs' fee request involves the number of hours that plaintiffs' lawyers billed. Specifically, defendant maintains it was unreasonable for two lawyers to work on this case because of its simplicity. Therefore, defendant argues, the hours billed by Ertl should not be included in the fee award. Defendant points out that this case involved no factual disputes and therefore no time consuming or expensive discovery or trial preparation. Defendant argues also that he "repeatedly advised [plaintiffs'] attorneys that he would not seriously contest the case, but would submit only a token defense to avoid confessing error on the constitutionality of a statute." To the extent that defendant is suggesting that he asserted a frivolous defense in response to a perceived need to save face, it is problematic. However, I understand defendant to mean that as chair of the state

Elections Board he was obliged to defend the state's election laws, even though the weight of authority on the issue strongly favored plaintiffs' position. I agree with defendant that the legal issues in this case were not particularly complex, but that does not mean that plaintiffs' decision to assign a second attorney to the case amounted to overstaffing. The state, represented by the attorney general, chose to defend the challenged statutory provisions. Cf. Wisconsin Realtors Association v. Ponto, 229 F. Supp. 2d 889, 891 (W.D. Wis. 2002) (noting attorney general's refusal to defend new state campaign finance law on ground it was unconstitutional). Having made this choice, it is unpersuasive for defendant to assert that it was unreasonable for plaintiffs to employ two lawyers to work on their behalf.

Defendant argues also that plaintiffs cannot recover attorney fees for work on a preliminary injunction motion because they did not prevail on that particular motion, in the sense that the injunction did not result in their placement on the November 2002 general election ballot. In response to plaintiffs' preliminary injunction motion, I ordered defendant to review the disputed ballot petitions and count all the signatures gathered by Wisconsin residents (rather than just those signatures gathered by residents of the political subdivisions where plaintiffs Clark and Schultz were running for office). I denied plaintiffs' motion to the extent it sought to force defendant to count signatures collected by residents of states other than Wisconsin, although plaintiffs eventually prevailed on that point as well on their

motion for judgment on the pleadings. Under the revised count, Schultz and Clark still did not qualify for the ballot. Therefore, defendant argues that plaintiffs did not prevail within the meaning of § 1988 on their preliminary injunction motion. See Farrar v. Hobby, 506 U.S. 103, 111-12 (1992) ("[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."). However, the fact that a party does not prevail on every individual motion it files during the course of litigation is not dispositive for purposes of awarding fees under § 1988. Indeed, a "court's focus should not be limited to the success/failure of each of the attorney's actions. Rather it should be upon whether those actions were reasonable." People Who Care, 90 F.3d at 1314. Given the fact that plaintiffs succeeded eventually in obtaining all the relief they sought in this case, the motion for a preliminary injunction was entirely reasonable. Moreover, defendant's assertion that plaintiffs did not prevail on their preliminary injunction motion flatly contradicts his statement that "[t]his case was essentially over before it had barely begun since the court effectively ruled for the plaintiffs on the merits in deciding their motion for a preliminary injunction." Dft.'s Resp. to Plts.' Mot. for Att'y Fees, dkt. #30, at 4.

Next, defendant argues that plaintiffs unreasonably expended 23.3 hours on drafting their reply brief in support of their motion for judgment on the pleadings. (Bernhoft billed 6.6 hours for this task, while Ertl and the paralegal billed 7.2 and 9.5 hours respectively).

I agree. Plaintiffs' reply brief, which is only seven pages long, replied to defendant's response brief, which was itself a mere six pages. Two lawyers and a paralegal should not have required nearly 24 hours to draft the reply brief. See Hensley, 461 U.S. at 434 (noting that billing judgment is important component in fee setting). Accordingly, the hours billed for this task by the lawyers and the paralegal will be reduced by 50 percent.

Defendant also challenges a series of specific tasks billed by Bernhoft, most of which involve either media-related activities or conferences with Ertl. I will not award plaintiffs attorney fees for the two hours Bernhoft spent reviewing press releases and talking to reporters. See Jenkins v. Missouri, 131 F.3d 716, 721 (8th Cir. 1997) (in absence of explanation why media activities were necessary to litigation, such activities are not recoverable under § 1988); Watkins v. Fordice, 7 F.3d 453, 458 (5th Cir. 1993) (district court did not abuse discretion in denying attorney fees for press activities in absence of evidence regarding efficacy of such activities in attaining litigation goals). Plaintiffs offer no explanation as to how their media activities advanced this litigation. As to the conferences Bernhoft held with Ertl that defendant has identified as objectionable, I find nothing unusual about them. They consumed fewer than eight hours over an eight month period. There is nothing extraordinary about a partner and an associate meeting periodically to discuss a case on which they are collaborating.

B. Hourly Rates

Defendant argues that the hourly rates charged by plaintiffs' lawyers are unreasonable. Bernhoft seeks to be paid at the hourly rate of $250 while Ertl's requested hourly rate is $190. Defendant maintains that Bernhoft and Ertl have failed to demonstrate that these are the rates they actually charge for comparable work or that the rates are comparable to those charged by lawyers of similar ability and experience in this district. As noted earlier, the lodestar figure is determined by multiplying the reasonable number of hours a lawyer worked by the market rate for the services in question and a lawyer's actual billing rate for similar work is presumptively appropriate to use as the market rate. See Uphoff v. Elegant Bath, Ltd., 176 F.3d 399, 407 (7th Cir. 1999). In seeking a fee award under § 1988, a lawyer must "do more than merely request an hourly rate; he must present evidence that the requested rate is his actual billing rate." People Who Care, 90 F.3d at 1311. Such evidence may be obtained from a variety of sources, including a small sample of the hours the lawyer has billed other clients or fee awards received in similar cases. Id. at 1312. However, an "attorney's self-serving affidavit alone cannot satisfy a plaintiff's burden of establishing market value for that attorney's services." Uphoff, 176 F.3d at 408.

The only evidence Bernhoft and Ertl have submitted to establish the market rates for their services are their own affidavits attesting to the fact that $250 and $190 are their

respective actual hourly billing rates. Standing alone, these affidavits are insufficient to demonstrate that the rates they seek to be paid are reasonable. Defendant points out that in a civil rights case in this court in 2000, I noted that the hourly rates charged by litigation partners in this district range from $185 to $275 and that the hourly rate charged by litigation associates range from $135 to $175. See Johnson v. Daley, 117 F. Supp. 2d 889, 903-04 (W.D. Wis. 2000). Defendant has also submitted evidence of the hourly rate charged by lawyers in more recent civil rights cases in this court, which plaintiffs do not dispute. See Dft.'s Resp. to Plts.' Mot. for Att'y Fees, dkt. #30, at Ex. 3 (noting that "prevailing billing rate for legal services involving constitutional claims in the Madison/Milwaukee area is $225 - $340 per hour for experienced lawyers"); see also id. at Ex. 4 (noting experienced civil rights lawyer's regular hourly rate is $250 and relatively junior associate's rate is $175).

Bernhoft and Ertl do not yet have a tremendous amount of experience under their belts. Bernhoft graduated from law school in 2000 and Ertl graduated in 1999. Ertl's $190 hourly rate appears high for an associate, particularly in the absence of any evidence that he has significant experience in civil rights litigation. Bernhoft's rate is a bit high as well, also because of his limited experience. See People Who Care, 90 F.3d at 1310-11 n.1 (experience and reputation of lawyer is consideration usually subsumed within lodestar calculation). Accordingly, I conclude that a slight reduction in the hourly rates requested by Bernhoft and

Ertl is appropriate. Reasonable hourly rates for Bernhoft and Ertl are $200 and $150, respectively.

C. Conclusion

As discussed earlier, I will reduce the number of hours billed by Bernhoft for his work on plaintiff's reply brief by 3.3 hours and will deduct an additional 2 hours for the time he spent on media activities. Therefore, Bernhoft will be reimbursed for 61.7 hours of work, rather than 67 hours. Ertl billed 7.2 hours for the reply brief, which will be reduced to 3.6 hours, so the fee award will reflect 79.7 hours billed by Ertl, rather than 83.3 hours. Similarly, the paralegal billed 9.5 hours on the reply brief, which will be reduced to 4.75, which in turn reduces the total hours billed by the paralegal to 33.15 hours. Thus, the fee award will reflect (1) $12,340.00 for work billed by Bernhoft (61.7 hours multiplied by $200); (2) $11,955.00 for work billed by Ertl (79.7 hours multiplied by $150); (3) $3,149.25 for work billed by the paralegal (33.15 hours multiplied by $95); and (4) $988.95 in costs. Finally, I note that in their motion, plaintiffs seek $36,866.01 in fees and costs but the billing records they have submitted set their total fees and costs at $37,166.45. There is no explanation for this $300.44 discrepancy, so I will deduct that amount from the final total. Accordingly, plaintiffs are entitled to an award of attorney fees and costs pursuant to 42 U.S.C. § 1988 in the amount of $28,132.76 ($12,340.00 + $11,955.00 + $3,149.25

+ $988.95 - $300.44).

ORDER

IT IS ORDERED that the motion of plaintiffs Edward J. Frami, John P. Clark, Michael W. Schultz and Calvin J. Zastro for an award of attorney fees and costs is GRANTED in part and DENIED in part; plaintiffs are awarded $28,132.76 in attorney fees and costs.

Entered this 7th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge