IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TRACEY LUST,

ORDER

Plaintiff,

02-C-50-C

v.

SEALY, INC.,

Defendant.

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This is a sex discrimination case brought pursuant to Title VII of the Civil Rights of 1964 and the Equal Pay Act. I granted defendant Sealy Inc.'s motion for summary judgment with respect to plaintiff's EPA claim, but denied it with respect to her Title VII claim. At trial, the jury found that defendant had denied plaintiff a promotion because of her sex. In and order and opinion dated August 19, 2003, I denied defendant's motions for judgment as a matter of law and for a new trial. Now before the court is plaintiff's motion for attorney fees and costs pursuant to 42 U.S.C. § 2000e-5(k). She seeks an award of $88,810 in attorney fees and $6,953.39 in costs. (Although defendant suggests that plaintiff miscalculated these totals by approximately $12, it does not identify where it believes the error lies. Therefore, I will use the figures provided by plaintiff as the starting point.)

Defendant objects to the requested amount on several grounds. First, defendant points out that plaintiff erred by failing to deduct the fees and costs for pursuing her unsuccessful claim under the EPA. Second, defendant objects to the amount claimed by Robert Kasieta, who acted as co-counsel with Gingras, Cates & Luebke, S.C. Third, defendant argues that many of plaintiff's entries are not explained or justified sufficiently and should therefore be denied. For the reasons discussed below, plaintiff's motion for attorney fees and costs will be granted in part and denied in part.

Failure to Deduct Work Done on Equal Pay Act Claim

Plaintiff does not deny that her requested amount includes the fees and costs expended in prosecuting plaintiff's unsuccessful claim under the Equal Pay Act. However, she argues that she is entitled to recover these fees and costs because the EPA claim was "closely tied" to the Title VII claim and because plaintiff obtained an "excellent result" with respect to the Title VII claim.

Just because plaintiff was the prevailing party on her Title VII claim does not mean that she may recoup her fees and costs on any claim that was included in her complaint. The Supreme Court has held that "unrelated claims [must] be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." Hensley v. Eckerhart, 461 U.S. 424, 435 (1983); see also Fine v. Ryan International

Airlines, 305 F.3d 746 (7th Cir. 2002) (upholding 10% reduction of fees for unsuccessful discrimination claim even though plaintiff was successful on retaliation claim). However, if all the claims involve "a common core of facts," a fee reduction may not be appropriate even if some of the claims ultimately failed. Hensley, 461 U.S. at 435; but see Merriweather v. Family Dollar Stores of Indiana, 103 F.3d 576, 583 (7th Cir. 1996) (upholding 10% reduction for unsuccessful discrimination claim even though district court had concluded discrimination claim was related to successful retaliation claim).

I disagree with plaintiff that her EPA claim was closely related to her Title VII claim. Although both were premised on a theory of sex discrimination, the relevant facts did not overlap significantly, if at all. Plaintiff's Title VII claim concerned a one-time decision to deny plaintiff a promotion while her EPA claim involved allegations that, since 1998, she had been performing the same work as numerous male employees but had been paid less. To prevail on her Title VII claim, plaintiff did not rely on evidence that she had been paid less than men who did equivalent work. At most, plaintiff could argue that both the alleged unequal pay and the promotion decision resulted from the same animus against women. However, this one commonality is not sufficient to consider the claims to be related. The Court's concern in Hensley was that some claims would be so intertwined that it would be too difficult to accurately separate the work performed on each claim. That is not the case here. Plaintiff could have investigated the alleged pay discrepancy apart from the promotion

decision.

However, I agree with plaintiff that the EPA claim constituted "a very small part of this case overall." Plt.'s Reply Br., dkt. # 119, at 2. The claim was not included in plaintiff's original complaint; it was added less than four months before the deadline for filing dispositive motions. Further, in opposing defendant's motion for summary judgment, plaintiff adduced almost no evidence to support her EPA claim, relying instead on conclusory allegations. This suggests that the effort expended in pursuing this claim was minimal. Therefore, although I agree with defendant that the time spent on the EPA should be deducted, I conclude that a 5% reduction in the awards for both fees ($4440.50) and costs ($347.67) is sufficient to take the EPA claim into account.

Amount Assigned to Kasieta

In support of the petition for fees and costs, plaintiff submitted the affidavit of Robert J. Kasieta, an attorney with Kasieta Legal Group, LLC. He claims a total of $4,991 in attorney fees and $55.63 in costs for several meetings with counsel from Gingras, Cates & Luebke regarding plaintiff's case and his review of documents prepared by both plaintiff and defendant. (Kasieta's fees and costs are included in the total amount requested by plaintiff.) Defendant objects to any award for Kasieta's services because plaintiff failed to explain why she needed to obtain help from an outside law firm. In her reply brief, plaintiff explains that

Kasieta replaced Robert J. Gingras while Gingras's wife was fighting cancer.

It does appear that the services provided by Kasieta were similar to much of what Gingras did in earlier stages of the case. Further, Gingras claimed very little time during the period that Kasieta was involved in the suit. Therefore, I will not excise Kasieta's fees fully.

However, in addition to arguing that Kasieta's fees were unnecessary, defendant challenges several entries recorded by him. First, defendant observes that the time claimed by Kasieta for a meeting with attorney Paul Kinne conflicts with Gingras's own record. Kasieta claimed 2 hours for the January 7, 2003 meeting while Gingras claimed 1 ½ hours. Plaintiff does not address this discrepancy in its reply brief. Accordingly, I conclude that ½ hour should be deducted from plaintiff's award of attorney fees. Because Kasieta's rate is $250 an hour, this requires a reduction of $125. Second, defendant points out that Kasieta billed for cellular phone and facsimile charges, yet his time entries do not reflect that he used either during the specified period. Again, plaintiff does not respond to this objection. Thus, I will deduct both of these charges for a total of $33.50 in costs. Finally, defendant objects to the entry for Kasieta's "attendance at trial to observe examination of witnesses." Plaintiff agrees that this entry is inappropriate. Therefore, I will deduct $1,125 for the 4 ½ hours Kasieta spent at trial.

Unexplained Fees and Costs

Defendant objects to a number of entries that it believes are inadequately justified. First, it points to an entry for three hours spent on the case by "BTS" at a rate of $120 an hour. Gingras's affidavit does not explain who "BTS" is or why $120 an hour is an appropriate rate. In her reply brief, plaintiff explains that "BTS" is Brian Smestad, an attorney with Gingras, Cates & Luebke, who represented plaintiff at two depositions. Because I do not believe that $120 an hour is an excessive rate even for a novice attorney, I will allow this entry to remain.

Second, defendant objects to an expert fee of $568 because plaintiff did not rely on or even identify this expert during litigation. Plaintiff's only response to this objection is that defendant does not cite any authority prohibiting reimbursement for an expert who did not testify at trial. However, it is plaintiff, not defendant, that must justify her fees. Hensley, 461 U.S. at 437. Plaintiff does not even attempt to explain why the expert was consulted or why this fee is reasonable. I will deduct $568 from plaintiff's fee award.

Third, defendant challenges plaintiff's claim of 12,200 copies as unreasonable. In addition, defendant observes that there appear to be duplicate entries for several of the letters drafted by plaintiff. In response to these concerns, plaintiff writes only that she "stands by her submission that these hours were reasonably and necessarily incurred." This is insufficient. I will reduce the number of copies allowed by 400 for a reduction of $80 in

costs. I will also deduct the time for all of the letters that defendant has identified as duplicative for a reduction of $257.50 in fees (Oct. 24, 2000 letter to ERD, .3 hours at $125 an hour =$37.50; Aug. 2, 2001 letter to EEOC, .2 hours at $300 an hour =$60; June 5, 2002 letter to client at .2 hours at $200 an hour = $40; July 30, 2002 letter to Kasieta, .2 hours at $200 an hour = $40; August 21, 2002 letter to Morris, .2 hours at $200 an hour = $40; Feb. 5, 2003 review of letter from Morris, .2 hours at $200 an hour = $40).

Finally, defendant argues that Gingras incorrectly billed 20 hours on the last day of trial. Plaintiff responds that this was a typographical error and the correct entry should be 10 hours. Because Gingras's hourly rate was $300, I will reduce the fee award by $3,000.

ORDER

IT IS ORDERED that plaintiff Tracey Lust's motion for attorney fees and costs is GRANTED IN PART and DENIED IN PART. Plaintiff is awarded $79, 294 in attorney fees and $6492.22 in costs.

Entered this 21st day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge