IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RENAE EKSTRAND,

Plaintiff,

v.

SCHOOL DISTRICT OF SOMERSET,

Defendant.

ORDER

08-cv-193-bbc

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In this case brought under the Americans with Disabilities Act, 42 U.S.C. § 12112, plaintiff Renae Ekstrand is seeking an award of attorney fees of $404,733.21, together with costs of $21,258.18 not included in the bill of costs previously approved by the court. Plaintiff filed suit in 2008, alleging discrimination under the ADA on the grounds that defendant had failed to provide her a reasonable accommodation for her seasonal affective disorder and had constructively discharged her when she became disabled by severe depression. Defendant moved for summary judgment on both grounds and was successful; plaintiff appealed and won reversal on the accommodation ground. At a September 2010 trial, the jury found in favor of plaintiff and awarded her almost $2,000,000 in damages, $1,750,000 of which was for emotional pain and mental anguish. This amount was reduced

to $100,000 by the statutory cap applicable to discrimination cases, 42 U.S.C. § 1981a(b)(3)(B), because defendant did not employ more than 200 employees in each of 20 or more calendar weeks in the years at issue. Together with the $26,828.59 in back pay and benefits she is due, dkt. #163, and prejudgment interest of $6027.37 on the back pay award, plaintiff obtained a total damage award of $132,855.96.

Defendant has a number of objections to plaintiff's fee request, ranging from the hourly rate charged by Carol Skinner, plaintiff's lead attorney, which defendant says is excessive, to the size of the fee award request in proportion to the results plaintiff achieved. With the exception of a challenge to the lack of specificity of plaintiff's billing records, the remainder of defendant's objections are directed to what it calls unnecessary work, unnecessary expenditures of time and over-staffing.

1. Hourly rate

When plaintiff's counsel began working on plaintiff's case in late 2005, she was charging a rate of $210 an hour. This rate increased over time until January 2010, when she began charging $295.00 an hour. Defendant does not deny that this rate is consistent with the rates charged by experienced lawyers in discrimination cases, but he argues that Ms. Skinner's consultations with outside lawyers and her retention of Peter Reinhardt as co-counsel show that she is not an experienced lawyer. If she were, defendant argues, she would

not have needed to consult so many other counsel and she could have handled the case herself.

Plaintiff's counsel's hourly rate is well within the market rate for work of the type she performed for plaintiff and appropriate for her level of experience. Her consultations with five other lawyers do not support a finding that she is inexperienced. Counsel's written submissions and trial work demonstrated skill and experience, justifying the hourly rate that she charged during this lawsuit.

2. Insufficiently specific billing records and block billing

Defendant alleges that plaintiff's counsel's billing records are too vague to support the hours she is claiming to have worked, do not show the amount of time spent on any particular task and include undivided total amounts of time devoted to a variety of tasks. The records would be more helpful if they included more information about the specific issue discussed or researched, but counsel has identified her work tasks sufficiently to permit review. In response to defendant's objection to plaintiff's counsel's failure to state the amount of time she spent on a particular task, plaintiff has submitted a revised fee request, showing the exact amounts of time sought for each task. As for the undivided amounts of time, the fee request contains few billings that cover more than one task and in most instances, the tasks are clearly compensable.

3. Duplicate billings from co-counsel, over-staffing, unnecessary work, unsuccessful claims and excessive time expended

Defendant objects to many of plaintiff's billings. It starts by asking the court to excise all billings by co-counsel, Peter Reinhardt, characterizing as "extraordinary" the amount of time both of plaintiff's counsel spent reviewing and analyzing the same documents, pleadings, discovery requests, deposition transcripts and medical records. In addition, it says, the billing statement shows more than 100 telephone calls, emails and meetings between the two counsel before trial.

As plaintiff's counsel notes, it is not unusual to have two lawyers representing a plaintiff (or a defendant) in a federal discrimination case. This was a difficult, hard-fought case that involved a relatively complex motion for summary judgment, an appeal to the court of appeals, a second motion for summary judgment after remand and a dispute over the number of employees working for defendant, in addition to a jury trial. There was plenty of work to go around.

This was not a situation like that in Lust v. Sealy, Inc., 2003 WL 23200237 (W.D. Wis.), in which the second lawyer's participation in trial was "to observe the examination of the witnesses." Co-counsel took an active part in the jury trial, questioning witnesses, participating in the jury instruction conferences and sharing responsibility for the opening statements and final arguments in the two phases of the trial.

On the other hand, I do not think it was necessary for two of plaintiff's lawyers to attend depositions. I will excise co-counsel's time spent at the depositions of plaintiff and of plaintiff's psychologist, Randi Erickson, at which counsel was also present.

Defendant objects to the time devoted by paralegals to matters on which plaintiff's counsel and co-counsel were also working, but I am not persuaded that any of the time to which it objects is excessive or unnecessary. Defendant contends that plaintiff's counsel should not charge for 7.1 hours of counsel's time, as well as 4.3 hours of paralegal time, for preparation of a discovery request comprising 19 interrogatories and 32 requests for documents. The request does not seem excessive for an initial discovery request coming at a time when little is known about defendant's knowledge of the underlying facts, the reasons its employees took the actions they did or their responsibility for plaintiff's termination. I agree with defendant, however, that plaintiff has not justified the charge for a paralegal to travel from Menominie to Hudson, Wisconsin, to participate in a June 26, 2008 conference with plaintiff and her counsel. The $618.75 charge for this activity will be deleted.

At pp. 11-15 of its brief, dkt. #242, defendant identifies a few matters that it believes were the subject of excessive billing. With the corrections that plaintiff has noted at pp. 7-9 of her responsive brief, dkt. #252, only one of these activities seems problematic. I believe that 83 hours was excessive for plaintiff's brief in opposition to defendant's first motion for summary judgment and that 50 hours would be more appropriate, but I disagree with

defendant that plaintiff's counsel spent too much time on plaintiff's appellate brief.

Defendant would like some time deducted to represent the time spent addressing the issues of constructive discharge and the interactive process, two issues on which plaintiff was unsuccessful. The general rule is that unsuccessful claims that are unrelated to the successful ones are to "be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded." Hensley v. Eckerhart, 461 U.S. 424, 434-35 (1982). In this case, it is not so easy to separate the successful from the unsuccessful claims. Plaintiff argued that her treatment by defendant was both discriminatory *and* the cause of her leaving the school district. The court of appeals found that the treatment "'was not so intolerable that her resignation qualified as a fitting response,'" Ekstrand v. School Dist. of Somerset, 583 F.3d 972, 977 (7th Cir. 2009) (quoting Rooney v. Koch Air, LLC, 410 F.3d 376, 382-83 (7th Cir. 2005)), but the court of appeals' response does not mean that the two claims concerned entirely different courses of conduct. Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1279 (7th Cir. 1983) ("an unsuccessful claim will be *un*related to a successful claim when the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised"). Rather than excise all work related to plaintiff's constructive discharge claim, I will reduce by half the request for compensation for time spent on that claim, which plaintiff has billed at $3,657.50.

I will take the same approach on plaintiff's Equal Rights Division work, which plaintiff has charged at $7,178.74. At these hearings, she raised claims of both a failure to accommodate and constructive discharge. I will reduce the fee amount to $4,178.74, to account for the unsuccessful claim. Defendant objects to any fees for this work, but it was necessary for plaintiff to exhaust her administrative remedies before she could sue under the ADA.

Plaintiff's counsel concedes that no attorney fee award is due for her work on the unsuccessful post trial work on the issues of the employee count and prejudgment interest on a portion of the compensatory damages award. Therefore, I will deduct the $33,516.66 that had been billed for this work.

I would not award plaintiff fees for her counsel's work in appealing a decision by the WEA Trust that plaintiff was not disabled, were it not for the fact that a failure to appeal would have left plaintiff vulnerable to a defense at trial by defendant that she was not disabled and never had been. Plaintiff is entitled to all the fees sought for this work.

Defendant objects to plaintiff's request for fees for $411.26 for counsel's conferences with Tom Findlay, a vocational expert who never testified or submitted reports used in the lawsuit. Plaintiff denies that the time spent was unnecessary because counsel used Findlay's work in her damage calculations. This time need not be excised.

Plaintiff is claiming $2,131.25 for time that counsel spent reviewing records prepared

by Dr. Brockman, plaintiff's treating psychiatrist. The records were not used at trial and Brockman was not called as a witness, but plaintiff's counsel had good reason to explore his opinions and his treatment of plaintiff. This case concerned a mental and emotional disability; a treating psychiatrist's opinions are always relevant, if only for defensive purposes. Defendant's objection to this work is denied.

Plaintiff's counsel maintains that none of the tasks that defendant has characterized as wholly clerical fall into that category, but rather are tasks done by college graduates, involving the exercise of discretion and judgment. Some of them were reviews of documents, interviews with potential witnesses, preparing digests of depositions and undertaking computer assisted research. I see no reason that these tasks should not be included in the fee request.

Finally, defendant argues that the fee award that plaintiff is seeking should be reduced to reflect the relatively small money judgment that plaintiff received. It is true that proportionality is a fair criterion to use in assessing the propriety of a fee award, but it is not a major consideration in this case. The jury awarded plaintiff almost $2,000,000. Although this award was reduced by statute, the size of the verdict indicated the jury's view that defendant's treatment of plaintiff was particularly serious, if not reprehensible.

Plaintiff's success cannot be minimized simply because the statutory cap reduced the actual dollar value of the judgment. Succeeding on her unusual ADA claim required

considerable research, consultation, imagination, a strong trial strategy and perseverance. Plaintiff's fee request is not out of proportion to her success.

In summary, defendant's objections to plaintiff's claim are denied with the following exceptions. I will deduct $50,734.16 from plaintiff's fee request of $404,733.21 as follows:

1. Co-counsel Reinhardt's time at depositions of plaintiff and Randi Erickson: $2,695.00;

2. Paralegal Tylee's participation in June 26, 2008 conference: $618.75;

3. Thirty-three hours spent on brief in opposition to defendant's first motion for summary judgment: $9075.00

4. One-half of time billed for time spent on constructive discharge claim: $1828.75;

5. Reduction in time claimed for ERD work involving constructive discharge: $3000.00; and

6. Reduction for time spent on issue of post trial issues of prejudgment interest and employee count: $33,516.66.

The resulting fee award is $353,999.05. Defendant has not objected to plaintiff's request for costs in the amount of $21,258.18. Plaintiff will be awarded costs in the amount requested.

ORDER

IT IS ORDERED that plaintiff Renae Ekstrand is awarded attorney fees in the amount of $353,999.05 and costs in the amount of $21,258.18.

Entered this 2d day of June, 2011.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge