

EMPLOYMENT LAW REPORT

Recovering Attorney's Fees And Litigation Costs Incurred During The Prosecution of Employment And Other Civil Rights Cases

By Justin D. Cummins

Introduction

Trial in employment and other civil rights cases has become rare. Nonetheless, plaintiffs still have the opportunity to try cases and, upon prevailing, the right to petition the Court for reimbursement of attorney's fees and litigation costs incurred by the plaintiffs.

Both Federal and State courts have long approved the use of the lodestar approach, which can be enhanced by a multiplier, in calculating and awarding attorneys' fees and litigation costs.¹ Under the lodestar method of calculating attorney's fees, attorney hourly billing rates are multiplied by the number of hours the attorneys have reasonably expended litigating the case.²

Pursuant to well settled law, the lodestar method may be adjusted upward or

downward to account for other factors, such as significant results obtained, the risks undertaken, and the socially beneficial nature of the litigation.³ The Minnesota Supreme Court put it succinctly: "public policy favors providing a fee enhancement as an incentive to private attorneys who bring civil rights lawsuits."⁴

A. Plaintiff Counsel's Request For Attorney's Fees And Litigation Costs Should Be Viewed As Reasonable Under The Lodestar Method

In determining the amount of attorney's fees to award in a given employment or other civil rights case, Federal and State courts consider 12 factors set forth by the United States Supreme Court in *Hensley v. Eckerhard*, 461 U.S. 424, 430 n.3 (1983).

1. The time and labor required in employment and other civil rights cases generally favor a plaintiff's motion for attorney's fees and litigation costs

Due to the difficulty of employment discrimination and similar cases, attorney's fees and litigation costs incurred by plaintiffs are often enormous. The billing records in such cases typically demonstrate extensive factual discovery, legal research, pre-trial motion practice, and trial preparation necessary to pursue the claims successfully. Thus, that the fee/cost petition is large does not make it unreasonable.

2. The nature of employment and other civil rights cases normally favors a plaintiff's motion for attorney's fees and litigation costs

Employment discrimination and other

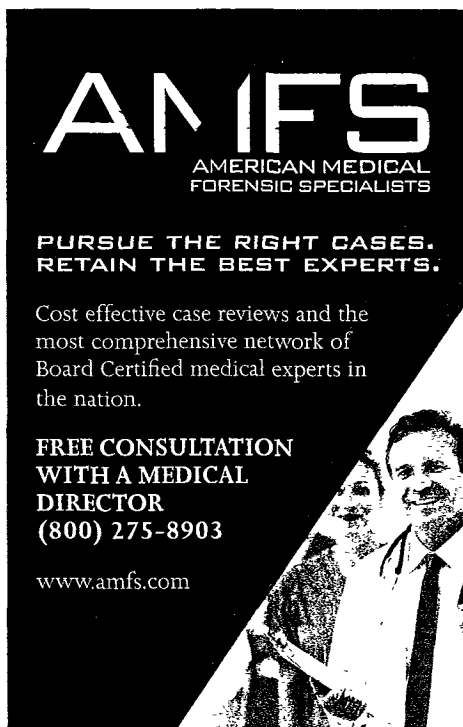
civil rights claims often present difficult issues of proof.⁵ The complexities associated with prosecuting such cases can increase dramatically when the plaintiffs have language or other challenges, which is increasingly the case as the workforce becomes more diverse. Another complication occurs when the defendants make noise about bankruptcy or engage in gamesmanship about the real parties in interest, both of which have become more common tactics as of late. Again, these dynamics make a substantial fee/cost petition appropriate.

3. The skills required to prosecute employment and other civil rights cases usually favor a plaintiff's motion for attorney's fees and litigation costs

Civil rights law is complex and changing, requiring attorneys who specialize in this area to devote significant time and resources to keep abreast of doctrinal developments and nuances.⁶ To maintain a viable practice in this area of law, counsel must be effective both in written and oral advocacy as well as have significant capacity to develop voluminous evidence in light of the evolving law. In other words, seasoned plaintiff counsel should have the requisite skills to justify a full award of attorney's fees in these kinds of cases.

4. The opportunity cost of taking employment and other civil rights cases typically favors a plaintiff's motion for attorney's fees and litigation costs

As outlined above, the prosecution of employment claims consistently involves a year or more of heavy and expensive litigation. These cases demand an enduring commitment of resources and,



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accordingly, substantial risk for plaintiff firms that often have only a few attorneys on staff. In short, the significant commitment of resources to one civil rights case self-evidently precludes plaintiff counsel from accepting other cases during the pendency of the litigation.⁷

5. The customary nature of the petitioning counsel's rate favors a plaintiff's motion for attorney's fees

To address this issue, plaintiff counsel should obtain affidavits from other practitioners in the field as to their respective fee rates and the propriety of the petitioning attorneys' rates. The central inquiry is whether the rates charged by the petitioning attorneys are reasonable for the area of practice in the relevant jurisdiction. For a civil rights attorney in Minnesota with 15 years of experience or more, a rate of at least \$400 per hour should be deemed reasonable.

6. The nature of the representation arrangement in employment and other civil rights cases generally favors a plaintiff's motion for attorney's fees and litigation costs

Counsel for the plaintiffs in civil rights cases typically represent their clients via a contingent-fee arrangement. Such representation often also requires plaintiff counsel to incur the attorney's fees and litigation costs on behalf of the plaintiffs (including extensive expert fees and, increasingly these days, interpreter costs and consultation fees with bankruptcy counsel) until a recovery occurs – if one occurs.

In sum, plaintiff counsel take substantial risk in prosecuting such cases. As the United States Supreme Court has long

recognized, "Courts . . . must . . . take account of the time value of money and the fact that attorneys can never be 100% certain that they will win even the best case."⁸ Therefore, both reasonable litigation costs and attorney's fees should be reimbursed in full in employment and other civil rights cases.⁹

7. The applicable time limitations in employment and other civil rights cases normally favors a plaintiff's motion for attorney's fees and litigation costs

The Federal Rules of Civil Procedure and the Minnesota Rules of Civil Procedure prescribe specific time limits to which an attorney must adhere in litigating civil rights claims. To prosecute such claims successfully – and therefore to be in the position of petitioning for attorney's fees and litigation costs – requires diligence and commitment by plaintiff counsel in this legal environment. Thus, this factor should not be an impediment to obtaining attorney's fees and litigation costs.

8. The results obtained in employment and other civil rights cases usually favor a plaintiff's motion for attorney's fees and litigation costs

It is well settled that meaningful results justify the granting of a fee/cost petition in full even when the plaintiff does not prevail on all claims.¹⁰ Given the doctrinal and evidentiary obstacles to prevailing in civil rights cases, this factor also should not militate against the award of reasonable attorney's fees and litigation costs.

9. The experience, reputation, and ability of plaintiff counsel in employment and other civil rights cases typically favor a plaintiff's



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motion for attorney's fees and litigation costs

The analysis as to this point largely resembles the inquiry concerning the third factor. It is important for plaintiff counsel to demonstrate their leadership in the profession through affidavits, from third-parties if possible, and the citation

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to representative cases.

10. The desirability of employment and other civil rights cases typically favors a plaintiff's motion for attorney's fees and litigation costs

The United States Supreme Court has emphatically recognized the importance of civil rights statutes and, by implication, the private lawsuits brought to enforce them: "Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices."¹¹ Consequently, this factor should further support the award

of all reasonable attorney's fees and litigation costs.

11. The nature and length of the professional relationship between plaintiffs and their counsel in employment and other civil rights cases normally favor a plaintiff's motion for attorney's fees and litigation costs

As set forth more fully above, litigation of these kinds of claims often last for years – especially in multi-plaintiff and class cases. To succeed in such litigation, plaintiff counsel necessarily has a good working relationship with the plaintiffs and dedicates tremendous time and resources to advancing the plaintiffs' interests through discovery, pre-trial motions, trial and, ultimately, succeeding on the merits. This factor should not be an impediment to a petition filed by plaintiff counsel in any case.

12. The awards in similar cases typically favor a plaintiff's motion for attorney's fees and litigation costs in employment and other civil rights cases

The award of at least one-third of the gross recovery as attorney's fees is within the mainstream of results obtained in class actions. Indeed, Minnesota's Federal District Court recently observed as follows: "courts in this circuit and this district have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in other class actions."¹² Counsel for the plaintiffs should be successful with a petition when they keep those benchmarks in mind for class cases. In individual and multi-plaintiff cases, plaintiff counsel should be able to recover substantially more when, for example, the damages are small and the work required to prove the claims was extensive.

B. The Lodestar Should Not Be Reduced When A Plaintiff Has Prevailed On Only Some Of His Or Her Claims

Courts may reduce the lodestar amount when the plaintiff has obtained only limited success on the merits.¹³ The United States Supreme Court has long established, however, that the lodestar amount will not necessarily be reduced in cases where a plaintiff has not prevailed on all claims:

Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.¹⁴

In response to defense counsel's efforts to reduce the award of attorney's fees, plaintiff counsel should make clear to the Court that plaintiff counsel did not employ excessive staff on the case and did not bill for duplicative or unnecessary work. Counsel for the plaintiffs may also consider asking for defense counsel to produce their billing statements in the case to show the reasonableness of plaintiff counsel's petition.

C. The Lodestar Amount Can Be Augmented To Account For, Among Other Considerations, The Risks Associated With The Litigation, The Quality Of Representation Provided, And The Results Obtained

Under both Federal and State law, courts will increase the fee award in "exceptional cases" based on the novelty and complexity of the issues, the skill of the plaintiff's counsel, the quality of representation, the delayed payment of monies, and the results obtained.¹⁵ Accordingly, it is appropriate for plaintiff counsel to seek a multiplier in compelling cases.¹⁶

Conclusion

Pursuing employment and civil rights claims in an organized and thorough fashion not only enhances the likelihood of success on the merits, it also is a pre-

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requisite to maximizing the recovery of attorney's fees and litigation costs upon prevailing at trial. In other words, plaintiff counsel should bear in mind the legal framework and analysis discussed in this article from the outset of the case and continuing through the trial verdict to be well positioned for the fee/cost petition.

¹ See, e.g., Hensley v. Eckerhard, 461 U.S. 424, 433 (1983); Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 628 (Minn. 1998).

² *Id.*

³ Hensley, 461 U.S. at 434; see also SCSC Corp. v. Allied Mutual Ins. Co., 536 N.W.2d 305, 318-19 (Minn. 1995).

⁴ SCSC Corp., 536 N.W.2d at 318-19.

⁵ See, e.g., McDonnell Douglas v. Green, 411 U.S. 792 (1973); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993); Texas Dep't. of Comm. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

⁶ See generally Desert Palace v. Costa, 539 U.S. 90 (2003) (altering the evidentiary standards for proving employment discrimination under Title VII).

⁷ See generally St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (reflecting the time-intensive nature of pursuing employment discrimination claims).

⁸ Hensley, 461 U.S. at 447.

⁹ See, e.g., 42 U.S.C. § 2000e-5(k); Minn. Stat. § 363A.33, Subd. 7; see also Neufeld v. Searle Labs., 884 F.2d 335, 342 (8th Cir. 1989) (reversing the denial of the plaintiff's petition for an award of litigation costs).

¹⁰ See, e.g., Hensley, 461 U.S. at 435.

¹¹ Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974).

¹² In re Xcel Energy, Inc., 364 F. Supp. 2d 980, 998 (D. Minn. 2005); Carlson v. C.H. Robinson Worldwide, Inc., 2006 WL 2671105, *8 (D. Minn. Sept. 18, 2006) (awarding 35.5% of the common fund in a Title VII case); see also In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005) (reaffirming that "[t]he percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for

success and penalizes it for failure.'"); Erie County Retirees Assoc. v. County of Erie, Pennsylvania, 192 F. Supp. 2d 369, 382-83 (W.D. Pa. 2002) (awarding 38% of common fund in an Age Discrimination in Employment Act case); Ingram v. Madison Square Garden Ctr., Inc., 535 F.Supp. 1082, 1095-96 (S.D.N.Y. 1982) (awarding 33 1/3% plus augmentation of 25% in a Title VII case).

¹³ See, e.g., Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 789 (1989) (citation omitted) (observing that "the most critical factor is the degree of success obtained.").

¹⁴ Hensley, 461 U.S. at 440; see also Jenkins v. Missouri, 838 F.2d 260, 264-65 (8th Cir. 1988) (citation omitted) (reaffirming that the plaintiff should be com-

pensated for the time "so closely inter-related to [the successful] claims that it could not be separated or reduced. . . .").

¹⁵ Delaware Valley Citizens' Council, 478 U.S. at 565; see also generally Perdue v. Kenny A. ex. rel. Winn, 130 S.Ct. 1662 (2010).

¹⁶ See, e.g., Jorstad v. IDS Realty Trust, 643 F.2d 1305, 1314-15 (8th Cir. 1981) (upholding the enhancement of the lodestar amount based on the risks attached to contingent-fee representation and on the quality of the work performed); Schmidt v. Apple Valley Health Care Ctr., Inc., 460 N.W.2d 349, 354-55 (Minn. Ct. App. 1990) (affirming the increase of the lodestar amount based on the results achieved).



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