

U.S. Department of Labor

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Issue date: 21Nov2001

Case No.: 1990-ERA-0030

ARB Nos.: 98-166
98-169

In the Matter of:

MARVIN B. HOBBY,
Complainant,

v.

GEORGIA POWER COMPANY,
Respondent,

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
GRANTING ATTORNEY FEES

In 1990, Complainant Marvin B. Hobby filed a complaint with the Department of Labor. Mr. Hobby alleged that Respondent Georgia Power Company violated the employee protection provisions of the Energy Reorganization Act, 42 U.S.C. §5851, when it terminated his employment as General Manager of Georgia Power's Nuclear Contract Administration. In 1995, the Secretary of Labor found in Mr. Hobby's favor, ordering reinstatement and remanding to an Administrative Law Judge ("ALJ") for a calculation of damages. The ALJ reiterated the reinstatement order and awarded Mr. Hobby back pay, perquisites, costs, and compensatory damages. Both parties appealed the award to the Administrative Review Board (the "ARB"). On February 9, 2001, the ARB reaffirmed the Secretary's reinstatement award and adopted the ALJ's damage award with minor modifications. Specifically, the ARB ordered Respondent to pay Mr. Hobby's attorney fees and costs. On April 11, 2001, Mr. Hobby and his counsel (collectively "Complainant") submitted Complainant's Petition for Attorney's Fees and Costs (the "Petition") to this court pursuant to the ARB's order. On July 12, 2001, Respondent submitted Respondent's Response and Objections to Complainant's Petition For Costs and Attorneys Fees (the "Response").

Complainant has requested \$1,768,870.90 in attorney fees, \$41,799.72 in costs to the Kohn firm, and \$23,727.48 for Mr. Hobby's expenses. Respondent requests that the Petition be denied and that

\$487,654 in requested attorney fees be disallowed. After considering the evidence supporting the hours worked and the rate claimed, this court disallows \$365,116.50 in requested attorney fees. All requested costs are allowed.

MERITS OF THE PETITION

The Energy Reorganization Act provides that if the Complainant prevails, the Respondent shall be assessed “a sum equal to the aggregate amount of all costs and expenses (including attorney’s and expert witness fees) reasonably incurred. . . for, or in connection with, the bringing of the complaint. . . 42 U.S.C. § 5851(b)(2)(B). A party has prevailed once a court has entered a final decision and order concerning damages. *See Doyle v. Hydro Nuclear Services*, 1989-ERA-22 (ALJ Nov. 15, 1999). The ARB entered a Final Decision and Order on Damages in favor of the Complainant. The Complainant, therefore, has prevailed within the meaning of the statute. In determining what costs and expenses should be assessed to Respondent, the court will address the merits of the Petition.

I. Attorney Fees

The “lodestar” method is the proper method of determining an attorney fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Gaballa v. The Atlantic Group*, 94-ERA-9 (Sec’y Dec. 7, 1995) (interim order). The determination begins by multiplying hours reasonably expended by a reasonable hourly rate. *See Hensley*, 461 U.S. at 433; *Lederhaus v. Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec’y Jan. 13, 1993). Complainant must submit evidence supporting the hours worked and the rate claimed. *See Hensley*, 461 U.S. at 433. Hours may be excluded if not “reasonably expended” or if the documentation is inadequate. *Id.* at 433-34.

Complainant has requested a total of \$1,768,870.90 in attorney fees, broken down as:

<u>Attorney</u>	<u>Hours</u>	<u>Rate</u>	<u>Total Fee</u>
Michael Kohn	3414.2	\$335	\$1,143,770.00
Stephen Kohn	915.05	\$335	\$306,541.75
David Colapinto	381.33	\$335	\$127,745.55
Mary Jane Wilmoth	318.06	\$250	\$79,515.00
Law Clerks	1059	\$90	\$95,319.00
Jason Garber	77.95	\$205	\$15,979.75

TOTAL: \$1,768,870.90

A. Hourly Rate

The hourly rates requested by Complainant are reasonable. Attorneys must prove “that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). In determining whether a fee is reasonable courts have often considered the “Johnson factors:”

1. The time and labor involved;
2. The novelty and difficulty of the questions involved;
3. The skill required to properly perform the legal service;
4. Preclusion of other employment by the attorney as a result of accepting the case;
5. The customary fee;
6. Whether the fee is fixed or contingent;
7. Time limitations imposed by the client or the circumstances;
8. The amounts involved and the results obtained;
9. The experience, reputation and ability of the attorney;
10. The “undesirability” of the case;
11. The nature and length of the professional relationship with the client;
12. Awards in similar cases.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir., 1974), overruled on other grounds, *Blanchard v. Bergeron*, 489 U.S. 87 (1989); *See Doyle v. Hydro Nuclear Services*, 1989-ERA-22 (ALJ Nov. 15, 1999).

Based on these factors, the requested rates are reasonable. This case involved many complex legal and factual questions. *See* Petition, Exhibits 1-8. The Kohn firm accepted the case on a contingency basis. *See* Petition, Exhibit 1. Because of the demands of the case, the firm was precluded from accepting regularly billed clients willing to pay its customary fee of \$335.00 per hour. *See* Petition, Exhibit 1, 4-6. At all stages, Complainant faced an aggressive and well litigated defense. *See* Petition, Exhibits 1-3. Representation consumed a large amount of time and resources, involving extensive discovery and preparation for hearings. *See* Petition, Exhibit 1. Complainant was successful on nearly every issue. *See Hobby v. Georgia Power, FD&O* (Feb. 9, 2001).

The court acknowledges that some of the requested rates exceed those in the *Laffey Matrix*. *See* Petition, Exhibit 7. The requested rates would be among the highest awarded for this type of case. Stephen Kohn, Michael Kohn, and David Calapinto, nevertheless, are among the most experienced and skilled attorneys practicing in the specialty of whistleblower litigation. *See* Petition, Exhibit 2, 4-6. Associate Mary Jane Wolwoth also brought significant specialized knowledge to the case. *See* Petition, Exhibit 8. Given the

skill and experience of counsel, and the uniquely complex and demanding nature of this case, the court finds that the requested rates are reasonable.

Work to be Billed at Lower Rates

Respondent contends that certain work performed by Stephen Kohn, Michael Kohn, and David Colapinto should have been billed at lower rates. In addressing this issue, courts have taken two different approaches. Some courts have suggested that work which requires lesser skill should be compensated at a lesser rate. *See e.g., Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717, 719 (5th Cir. 1974) ("Such nonlegal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it."). Other courts have reduced the number of hours awarded by examining whether the work could have been performed by a person with less expertise. *See e.g., Doyle v. Hydro Nuclear Services*, 1989-ERA-22 (ALJ Nov. 15, 1999).

Many of Complainant's hours should be billed at lower rates. For example, work such as compiling documents, reviewing exhibits, drafting letters, and issuing subpoenas should be billed at the rate of a junior attorney. Work such as filing pleadings, telephoning travel agents, and faxing documents should be billed at the rate of a paralegal or a law clerk. After its own review of the Complainant's activity records, the court finds that 595.04 hours billed at \$335 per hour should have been billed at a lower rate.¹ Accordingly, the court will reduce by half the award for these hours, thereby disallowing 297.5 hours from the Petition.

A. Hours Expended

Complainant requests a total of 6165.59 hours. The court finds that some requested hours were not reasonably expended and therefore must be disallowed.

Prosecution and Appeal of Enforcement Action

Complainant seeks compensation for hours expended for the prosecution and appeal of the enforcement action. These hours were not reasonably expended and are disallowed.

In 1996, Complainant sought enforcement in district court of a reinstatement order by the Secretary of Labor. The district court ruled that the Secretary's order did not constitute a final order and was therefore unenforceable. *Hobby v. Georgia Power Co.*, No. 1:96-cv-0180-ODE (N.D.Ga. 1996), *aff'd*, No. 96-8549 (11th Cir. 1997). Complainant unsuccessfully appealed this ruling. *See id.* Complainant argues that compensation for this litigation is warranted because the ARB eventually cited this litigation in its discussion of mitigation of damages.

¹Given the voluminous supporting documentation for these hours, the court need not provide an hour by hour analysis. *See Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994).

Generally, fees may be awarded for related claims even if they prove unsuccessful. *See e.g. Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1187 (11th Cir. 1983). Fees may be awarded for such a claim raised in another forum if crucial to the vindication of the party's rights. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560-61. It is well settled, however, that parties must exhaust their administrative remedies before seeking judicial relief. *See McKart v. United States*, 395 U.S. 185, 193 (1969) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)); *In re Willy*, 831 F.2d 545, 546 (5th Cir. 1987).

Complainant's prosecution and appeal of the enforcement action was not a related claim crucial to vindicate Mr. Hobby's rights, but rather an attempt to circumvent the administrative process. First, in *Delaware Valley*, the claim involved a successful effort to keep a state agency from modifying a previously entered consent decree. 478 U.S. at 560-61. In contrast, Complainant's district court claim was neither successful nor designed to preserve a prior final ruling. Second, having failed to exhaust his administrative remedies, the Complainant's claim was improperly before the district court. Litigating a claim in the wrong forum cannot be considered crucial to the success of that claim in the right forum. Third, the mere fact that the ARB's opinion mentions the district court litigation does not render it crucial to its decision. The ARB only briefly notes the litigation during a lengthy discussion of Mr. Hobby's job search efforts. *See Hobby v. Georgia Power, FD&O*, p. 26-31 (Feb. 9, 2001). That discussion, moreover, was not crucial to its findings on mitigation since the ARB declined to apply the standard that would have made such a showing necessary. *See id.* at 26 ("[W]e do not find the ['reasonable efforts to obtain work'] standard articulated in *Weaver* to be controlling in this case."). As a consequence, fees should not be awarded for the Complainant's prosecution and appeal of the enforcement action. The court accordingly disallows 546.90 hours from the Petition.

Work Performed by Multiple Lawyers

Complainant seeks compensation for hours expended by more than one attorney. These hours were reasonably expended and are allowed.

A fee award may be allowed for hours spent by two or more attorneys. It is well settled that "[t]here is nothing inherently unreasonable about a client having multiple attorneys." *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988). An award for the hours of multiple attorneys is proper "as long as it reflects the distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation." *Johnson v. University College of University of Alabama in Birmingham* 706 F.2d 1205, 1208 (11th Cir. 1983), *cert. denied*, 464 U.S. 994 (1983) (citing *Ward v. Kelly*, 515 F.2d 908, 912 n.11 (5th Cir. 1975)); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1188 (11th Cir. 1983). A reduction of hours "is warranted only if the attorneys are unreasonably doing the same work." *American Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 432 (11th Cir. 1999).

This case involved complex and demanding litigation. Depositions and hearings often involved the examination of high level managers and expert witnesses. Notably, Respondent regularly used at least two attorneys during the proceedings. The court, therefore, finds that the hours expended by multiple attorneys are reasonable.

Telephone Calls

Complainant seeks compensation for hours expended making telephone calls. Some hours were not reasonably expended and a portion is disallowed.

Complainant must properly document the hours and rate claimed. *See Hensley v Eckerhart*, 461 U.S. 424, 433 (1983). Attorney's submitting fees bear "the burden of establishing entitlement and of documenting the appropriate hours and hourly rates." *Coastal Fuels Marketing, Inc., v. Florida Exp. Shipping Co., Inc.*, 207 F.3d 1247, 1252 (11th Cir. 2000) (citing *Norman v. Housing Authority of the City of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988)). Where the petition is lacking "the court may make the award on its own experience." *See Coastal Fuels*, 207 F.3d at 1252. Similarly, where a fee petition and supporting documentation are voluminous the court need not undergo an hour by hour analysis. Instead, the court need only provide a "concise but clear explanation of its reasons for the reduction." *Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994).

Complainant claims a total of 200 hours for telephone calls. The Petition provides telephone records documenting the 100 hours of calls made between 1996 and 2001. Upon examination of the records, only half of the hours claimed are substantiated. The court accordingly disallows 50 hours for telephone calls made between 1996 and 2001.

Claimant does not provide records for the 100 hours of calls made between 1990 and 1995. Given the discrepancy of the hours with records, the court must assume that the hours without records are erroneous by the same factor. The court accordingly disallows another 50 hours for phone calls made between 1990 and 1995. The court disallows, therefore, a total of 100 hours for telephone calls.

Travel Time

Complainant requests compensation for hours spent traveling. A portion of these hours is disallowed.

A court may reduce its award for travel time. *See Johnson v. University College of University of Alabama in Birmingham* 706 F.2d 1205, 1208 (11th Cir. 1983), *cert. denied*, 464 U.S. 994 (1983) (reducing hourly rate); *Wabasha v. Solem*, 580 F.Supp 448, 461 (1984) (allowing full rate but reducing hours); *In re Agent Orange Products Liability Litigation*, 611 F. Supp. 1296, 1320, 1349 (E.D.N.Y. 1985) (reducing rate by 50 percent).

Complainant requests 188 hours for travel, billed at the full hourly rate. The court acknowledges the opportunity cost of traveling and that this case required an extensive amount of travel. Complainant's hourly rate of \$335, however, is based on counsel's specialized skill and experience. Such an hourly rate cannot be justified for time spent merely in transit. Accordingly, the court reduces by half the hours awarded for travel. The court thereby disallows 94 hours from the petition.

Meetings over meals

Complainant requests compensation for hours spent conferencing over meals. These hours were not reasonably expended and are disallowed.

A court must closely scrutinize hours claimed for consultation between senior counsel. *See Blum v. Witco Chem. Corp.*, 829 F.2d 367, 379 (3rd Cir. 1987). Special attention should be given to hours spent in meetings, moreover, where more than one attorney submits fees. *See Doyle v. Hydro Nuclear Services*, 1989-ERA-22 (ALJ Nov. 15, 1999).

Meals are not billable time simply because the case was discussed. These hours would not reasonably be billed to a client and neither should they be assessed to Respondent. Accordingly, the court disallows the 51.5 hours spent conferencing over meals.

Hours Preparing Fee Petition

Complainant requests compensation for hours spent preparing the Petition. These hours were reasonably expended and are allowed.

Attorney's fees may be awarded for time reasonably spent in preparing a fee claim. *See Coulter v. State of Tenn.*, 805 F.2d 146, 151 (6th Cir. 1986), *cert denied*, 482 U.S. 914 (1987); *Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 239 (8th Cir. 1982); *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y May 19, 1992).

Complainant's hours spent preparing the Petition are reasonable. The hours requested are appropriate given the length and complexity of the case. Supporting documentation, moreover, includes numerous affidavits and records covering over a decade of work. Hours spent preparing the Petition, therefore, are allowed.

Conclusion

The court disallows a total of 1089.90 hours. Multiplying these hours by the requested rate of \$335 per hour, Complainant is denied \$365,116.50 in requested fees. The court, therefore, awards the remaining fees for a total attorney fee award of \$1,404,754.40.

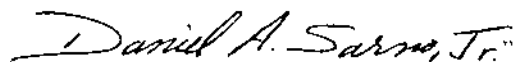
B. Costs

A fee award should include reasonable expenses "with the exception of routine office overhead normally absorbed by the practicing attorney." *Dowdell v. City of Apopka*, 689 F.2d 1181, 1192 (11th Cir. 1983). This may include such items as travel, telephone, and postage expenses. *See id.* A fee award may include transportation, lodging, and meals while attending hearings. *See Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996). Nevertheless, a court may disallow excessive expenses. *See United States v. Bailey*, 175 F.3d 966, 969 (11th Cir. 1999) (upholding district court's refusal to reimburse unnecessary and extravagant travel and meals).

Respondent does not object to the costs requested in the Petition. Upon review of Complainant's records, the court finds the requested costs to be reasonable. Accordingly, the court awards \$41,799.72 in costs to the Kohn firm, and \$23,727.48 for Mr. Hobby's expenses.

ORDER

It is ORDERED that Georgia Power Company pay to Complainant's attorney \$1,403,754.40 as a fee for representation of the Complainant, and to Complainant's attorneys \$41,799.72 in costs, and to Complainant \$23,727.48 in expenses.



Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/dmj
Newport News, Virginia