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Case D 2018

Supreme Court Appellate Division, 4th Department
New York

Chuck Maze on behalf of 15 Minors
Petitioners
v.

City of Albany, New York, Respondents

Facts of the Case:

During the 2017 New York State Y&G conference held at the Capital in Albany, fifteen minors became trapped on a City elevator for approximately two hours. During that time their advisors could communicate with them and they had plenty of sugar snacks and coffee since none of them had slept the night before. The City quickly dispatched two state police officers, who suffered the verbal abuse of several Youth Advisors while they waited for an elevator repair technician to arrive and open the doors. As a result, all fifteen student-attorneys were late for their run-throughs, which could have been detrimental to their respective law firms. Waiting at the door when it opened was Chief Legal Advisor Joe DePadilla who advised the students to quit whining and to "get to your courtrooms because you are late!" Every student was on time to complete their tasks.

Katie Boardman, who volunteered at the conference, had just opened her own firm after clerking for two years and she smelled her first class action suit with a big contingent fee payout. She contacted the parents of the fifteen students and interviewed all of them concerning the pain and suffering they endured from being trapped in the elevator with only the caffeine laden drinks and snacks they had at the time. None of the students seemed that traumatized and Katie was disappointed. Katie went home and discussed what happened with her husband, Jeremy. Jeremy had just started working as her paralegal after the Democrats shut down Standard and Poors for giving the United States a bad credit rating. Jeremy told Katie she was asking the wrong questions—she should have asked the students if they were traumatized because they were late for a requirement enforced by Joe DePadilla, who Jeremy found intimidating in the past. Jeremy suggested they interview every student who had worked in the legal program in Y&G since 1996. Since Katie had no other clients, the two of them spent all their time doing just that. They found that the fifteen students did suffer a lot of anxiety in dealing with Joe, especially after the elevator incident. They also interviewed 2000 former students including Molly Warren and Jane Henderson, who stated they had lived in fear of Joe for years and they easily imagine the psychological damage the students would have suffered from being late. The vast majority of students though Joe was no big deal and one student, Michael Cousins, actually liked him.

Katie and Jeremy filed suit against the City of Albany after two years of research. Pre-trial

deposition, motions, and other matters took another year. The case went to trial for two fiercely litigated weeks with twenty witnesses. The Boardman's won on all counts. This was the first plaintiffs victory ever under the theory that a third party could cause pain and suffering from an industrial accident. The jury awarded each of the students a year's supply of Red Bull and Snickers bars. The Boardmans then submitted their costs and fees. They provided two spreadsheets documenting every interview, all of the legal research, motions practice, and trial time which added up to 2.5 million dollars. Judge Robin Kheleher, who presided over the litigation, also reviewed the fee request. She decided to apply the Lodestar method. She set the hourly rate for Katie at $300.00 (which was the American Bar Associations reasonable rate for class actions by experienced attorneys in Albany), and Jeremy at $150.00 (as a paralegal) for hours out of trial and double that for his time in trial. She then calculated the hours for the interviews to be 1000 hours, motion practice as 200 hours, interrogatories as 1000 hours, and trial time as 80 hours. Jeremy was only billed for ½ of the interviews and Katie for the rest, which yielded a sum of $633,000.00. (The judge's calculation of the hours was derived by the spreadsheets submitted by the Boardmans, the Judge reduced the reported hours by 30% in all categories, besides trial from the original hours). Judge Kheleher then reduced the amount by $50,000 because it was Katie's first case, increased the amount by $100,000 because it was Katie's only case, increased it $50,000 because it was novel, decreased it $25,000 because of the amount recovered on behalf of each student (approximately $46.22) for a final total of $708,000.

The Boardmans and the City of Albany now appeal the Judges' determination of fees. The City claims the amount should be less because the judge did not fully research the reported hours, over counted the interview hours because so few witnesses were for the plaintiffs (everyone knows Joe is universally loved by Judicial participants), over calculated the hourly rate, and did not reduce the fee enough because the students basically recovered a six pack of coke and two snickers bars. The Boardmans claim the amount should be more because the judge arbitrarily reduced the number of hours they spent, did not take into account the novelty of the suit (making Joe into a bad guy is very hard to do because he is universally loved by Judicial participants), and did not take into account that they won on all claims.

Note: you must use your team numbers on all submissions to the Court.

Team _____ represents the Boardmans.

The following cases are the only cases you may use in your brief. If other cases are cited in the supplied cases you may cite them but only for the paragraphs from the original cases. Note the Lodestar test is in the Rahmey case and you should probably start there.

Matakov v. Kel Tech, 924 N.Y.S.2d 344 (1st Dept. 2011).
Fleming v. Barnwell, 865 N.Y.S.2d 706, (3rd Dept. 2008).
Lunday v. City of Albany, 42 F.3d 131 (2nd Cir. 1994).
Rahmey v. Blum, 466 N.Y.S.2d 350 (2nd Dept. 350).

Vadym Matakov, et al., Plaintiffs-Respondents, v Kel-Tech Construction Inc., Defendant-Appellant, Iannelli Construction Co., Inc., et al., Defendants.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Cite As: Matakov v. Kel-Tech Construction Inc., 84 A.D.3d 677 (N.Y. 2011)

May 31, 2011, Decided
May 31, 2011, Entered

OPINION

[**677] Order, Supreme Court, New York County (Jane S. Solomon, J.), entered April 1, 2010, which granted the motion of plaintiffs' class counsel for approval of attorneys' fees in the amount of $200,000, modified, on the law and the facts, to the extent of remanding the matter to Supreme Court for an evidentiary hearing to determine an appropriate award of attorneys' fees, and otherwise affirmed, without costs.

The subject motion seeks attorneys' fees incurred in connection with the settlement of two related class actions. Plaintiffs brought the actions alleging, inter alia, breach of contract and violation of the New York Labor Law, to obtain prevailing wages for work they had performed at New York City public schools pursuant to public contracts. Following more than five years of litigation, the parties entered into a Stipulation of Class Action Settlement (Stipulation), pursuant to which defendant-appellant was to pay [**678] the difference between the wages paid to class members and prevailing wages, provided that the total settlement amount not exceed $600,000. Also pursuant to the Stipulation, defendant agreed to pay class counsel's attorneys' fees, provided such fees were reasonable and did not exceed $200,000. Pursuant to procedures outlined in the Stipulation, plaintiffs' total recovery was determined to be $116,648.66.

The court properly applied the lodestar method to calculate plaintiffs' class counsel's fee rather than the percentage method (*see Nager v Teachers' Retirement Sys. of City of N.Y., 57 AD3d 389 [2008]*). However, the record demonstrates that class counsel failed to establish through competent evidence that its fees were consistent with "customary fee[s] charged for similar services by lawyers in the community with like experience and of comparable reputation," or were reasonable (*Friedman v Miale, 69 AD3d 789, 791-792 [2010]*). Class counsel also failed to submit evidence reflecting the training, background, experience and skill of some individual attorneys who performed work in connection with the class actions (*see Matter of Rahmey v Blum, 95 AD2d 294, 302 [1983]*). The record reflects that a great deal of expense on all sides could have been avoided had plaintiffs' claims been appropriately investigated before a lawsuit was filed; concomitantly the number of hours

expended was apparently excessive. In our view, the court should have undertaken an analysis as to whether all 1,256 hours expended by class counsel's attorneys, and the 433 hours worked by its paralegals, were useful and reasonable (*see Lunday v City of Albany, 42 F3d 131, 134 [2d Cir 1994]).*

Notwithstanding the motion court's observations that the litigation was "contentious," "heated" and "hard-fought," in light of the fact that the fee far exceeded plaintiffs' recovery, we remand the matter to Supreme Court for an evidentiary hearing to determine an appropriate amount of reasonable attorneys' fees to be awarded (*see Friar v Vanguard Holding Corp., 125 AD2d 444, 447, 509 N.Y.S.2d 374 [1986]).*

All concur except Mazzarelli, J.P. and Manzanet-Daniels, J. who dissent in part in a memorandum by Mazzarelli, J.P. as follows:

DISSENT BY: MAZZARELLI (In Part)

DISSENT

MAZZARELLI, J.P. (dissenting in part)

I agree with the majority that the motion court properly applied the lodestar method in ascertaining the appropriate fee due to class counsel. However, the record reflects that the court, which was intimately familiar with the contentious nature of a litigation that was aggressively [**679] litigated by both sides, gave appropriate consideration to each of the lodestar factors, including the quality of class counsel's representation. Accordingly, a hearing on the application would be a poor allocation of judicial resources.

It is well established that a trial court's fee award in a class action is entitled to broad deference, "and will not be overturned absent an abuse of discretion, such as a mistake of law or a clearly erroneous factual finding" (*Goldberger v Integrated Resources, Inc., 209 F3d 43, 47 [2d Cir 2000]).* This is because the trial court "is intimately familiar with the nuances of [a] case, [and] is in a far better position to [rule on a fee application] than is an appellate court, which must work from a cold record" (*In re Bolar Pharm. Co., Inc., Sec. Litig., 966 F2d 731, 732 [2d Cir 1992]).*

Disregarding these principles, the majority would remand this matter, and direct the court to engage in "an analysis as to whether all 1,256 hours expended by class counsel's attorneys, and the 433 hours worked by its paralegals, were useful and reasonable." This, the majority maintains, is necessary because the court did not account for expenses which "could have been avoided had plaintiffs' claims been appropriately investigated before a lawsuit was filed." However, the majority ignores several facts. First, the court has already analyzed the six lodestar factors, one of which is the quality of the representation provided. In addition, as the court expressly noted, the fee awarded to class counsel is 49% less than the amount actually billed. This reduction, it is reasonable to assume, more than embraces any work related to plaintiff's unsuccessful attempt to have subclasses certified in connection with certain projects.

Further, it is unfair for the majority to characterize the amount of fees billed as primarily owing to strategic choices made by class counsel. After all, defendants also litigated the matter aggressively, making strategic choices which drove up class counsel's fees. In retrospect, some of these choices could be seen as ill-advised, such as prosecuting two unsuccessful appeals to this Court.

The case which the majority relies on in suggesting that a more detailed analysis of the billings is necessary, *Lunday v City of Albany (42 F3d 131, 134 [2d Cir. 1994]),* is readily distinguishable. In that case, a district judge presided over the merits of the litigation, and

the fee application was decided by a magistrate [**680] judge. Here, of course the same court that oversaw the a matter, which it described as "hard-fought," considered the fee request. Thus, it was in a far better position to assess an appropriate fee.

Furthermore, *Lunday* was decided under a unique set of facts. As in this case, the defendants raised questions about the reasonableness of amount of time expended by counsel, and the Second Circuit properly stated that there was no requirement "that the court set forth item-by-item findings concerning what may be countless objections to individual billing items" (*id*.). Indeed, the court observed that, while the bills submitted by the plaintiff's counsel were "in certain respects eyebrow-raising . . . we cannot conclude that the review conducted by the Magistrate Judge was erroneous, or lacking in care" (*id*.). However, the *sole* reason why the court remanded the fee application in *Lunday* was because of the District Court's comment that to engage in a detailed review of the submitted billing would be "to demean counsel's stature as officers of the court (*id*.)." The Second Circuit, while noting that none of the objections raised by the defendants appeared to be meritorious, remanded to ensure that the magistrate judge's comment did not reflect a level of undue deference afforded the fee request.

Here, there is no indication that the motion court may have improperly abdicated its obligation to review the fee application. Accordingly, it is appropriate to defer to the court's determination that the fees awarded were commensurate with the legal work, in light of all of the circumstances.

I further disagree with the majority that class counsel failed to establish that its fees were consistent with "customary fees charged for similar services by lawyers in the community with like experience and of comparable reputation." The supervising partner swore in his affirmation in support of the application that his hourly rate of $375, reduced to $350 for this matter, is consistent "with the hourly rates charged by attorneys of reasonably comparable skill, experience and reputation in New York." In *Friedman v Miale (69 AD3d 789, 892 N.Y.S.2d 545 [2010], lv denied 16 N.Y.3d 706, 944 N.E.2d 1152, 919 N.Y.S.2d 512 [2011]),* the case cited by the majority, the record was "devoid" of such proof (*69 AD3d at 791*). It is noted that, in opposing the fee application, defendant did not question the reasonableness of class counsel's hourly rates, raising that objection for the first time on this appeal. Nor, did defendant challenge below the billings by the firm's associates on the basis that they failed to establish their "training, background, experience and skill." In any event, the supervising partner's description of the associates' [**681] years of experience as attorneys and the fact that they had assisted him in "numerous" wage-and-hour law cases were certainly sufficient bases for the court to weigh the reasonableness of the relevant portions of the fee request.

Based on the foregoing, it is clear that the motion court acted within its broad discretion. Accordingly, I would leave undisturbed the court's award of fees to plaintiffs.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 31, 2011

JON FLEMMING, Individually and as the Administrator of the Estate of ELIZABETH LAGAI, Deceased, on Behalf of Himself and All Others Similarly Situated, Respondent, v BARNWELL NURSING HOME AND HEALTH FACILITIES, INC., Defendant. CAROLINE AHLFORS MOURIS, Appellant; PAUL MACARI, Respondent.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

Cite As: Flemming v. Barnwell Nursing Home, 56 A.D.3d 162 (N.Y. 2008)

October 16, 2008, Decided
October 16, 2008, Entered

OPINION

[**163] Kane, J.

Appeal from an order of the Supreme Court (Donohue, J.), entered September 26, 2007 in Columbia County, which granted plaintiff's motion for judicial approval of the terms of a class action settlement.

Plaintiff's decedent was a resident of defendant's skilled nursing facility when she developed septic shock and passed away. [**164] Following her death, the Department of Health (hereinafter DOH) investigated the conditions at defendant's facility and found numerous violations of DOH rules and regulations. After plaintiff commenced this action against defendant and decedent's physician alleging medical malpractice, negligence and wrongful death, plaintiff moved to amend his complaint to add a cause of action pursuant to *Public Health Law § 2801-d* which provides a private right of action for nursing home residents to recover for the deprivation of certain rights and for class action certification of the claims based on that section and in negligence. Supreme Court (Connor, J.) permitted plaintiff to amend his complaint but denied the other requested relief. On appeal, this Court modified Supreme Court's order by permitting class certification of plaintiff's *Public Health Law § 2801-d* claim *(309 AD2d 1132, 1133-1134, 766 N.Y.S.2d 241 [2003])*.

Thereafter, Supreme Court defined the applicable class and severed plaintiff's private claims, which he later settled for $ 45,000. Plaintiff moved pursuant to *CPLR 907, 908* and *909* for an order approving the proposed settlement of this class action on behalf of the 242 class members for $ 950,000, which was to be used to compensate class members and to pay for counsel fees and expenses, notifying class members, administering the settlement, and providing an incentive award to plaintiff. Caroline Ahlfors Mouris, the executor of one class member's estate, did not challenge the total settlement amount or the formula for distributing proceeds to class members, but opposed the terms of the settlement concerning fees and expenses and cross-moved for an order awarding her counsel fees related to preparing and presenting her objections.

The Supreme Court denied Mouris's objections, approved the proposed amount of the settlement and directed that the money be

distributed as follows: $ 448,483 to class counsel for counsel fees and expenses; $ 35,000 to plaintiff as an incentive award; $ 40,000 to Paul Macari, the class action settlement administrator, for past and future services; and the balance to the class members in accordance with the distribution formula. Mouris now appeals.

The award of counsel fees and expenses should be reduced to $ 425,000, the amount originally requested by class counsel. Where a favorable settlement has been obtained on behalf of a class, "the court in its discretion may award [counsel] fees to the representatives of the class based on the reasonable value of legal services rendered" (*CPLR 909*). The party seeking the fee [**165] bears the burden of showing the reasonableness of the fee by providing definite information regarding the way in which time was spent and the experience of the attorneys performing each task (*see Klein v Robert's Am. Gourmet Food, Inc., 28 AD3d 63, 75 [2006]*).

While the "determination as to the proper amount of an award of [counsel] fees lies largely within the discretion of the court, the discretion is not unlimited" (*Matter of Rahmey v Blum, 95 AD2d 294, 299-300 [1983]*). When reviewing a fee application in a class action, the court acts as a fiduciary and must protect the rights of absent class members (*see Silberblatt v Morgan Stanley, 524 F Supp 2d 425, 433 [SD NY 2007]*). Although no single method of determining fees is mandated (*see Bear Stearns Cos. v Jardine Strategic Holding, Ltd.*, NYLJ, Aug. 7, 1991, at 22, col 3 [Sup Ct, New York County]), two acceptable options are the percentage approach and the lodestar method, the latter having originated in class action litigation (*see Goldberger v Integrated Resources, Inc., 209 F3d 43, 50 [2d Cir 2000]*). Under the lodestar method, the court determines the reasonable hourly rate and multiplies it by the reasonable number of hours expended, then adjusts the fee based upon certain subjective criteria (*see Ciura v Muto, 24 AD3d 1209, 1210, [2005]*). Here, Supreme Court used the lodestar method, resulting in a fee to class counsel greater than the amount requested.

Class counsel met their burden of proving that the value of their services, including expenses totaling $ 53,630.94, entitled them to an award of $ 425,000, as they requested. In addition to the hearing transcript that contains explanations regarding the fees and expenses, the record contains three affidavits from the lead class counsel explaining the fees and expenses in detail, the resumes of attorneys who worked on the case, verification of expenses, and detailed time sheets regarding the work performed and hours billed. The record reveals that the amount of counsel [**166] fees was caused in part by the novelty of the case, the difficulty involved in proving the class claim, and defendant's tenacious fight against plaintiff on every issue. This was a complex case that required approximately 1,900 hours of legal services over the course of six years and involved an area of law without much case law to lend guidance (*compare Becker v Empire of Am. Fed. Sav. Bank, 177 AD2d 958, 958 [1991]*). Review of the record and Supreme Court's decision reveals that the court adequately considered the alleged overcharges in expenses and hours, some of which were conceded, in determining the reasonable value of the legal services rendered. Counsel requested a fee amount greater than a one-third percentage but approximately $ 23,000 less than the amount determined under the lodestar method. Awarding class counsel the fee they requested would result in a reasonable fee for their services, which is equitable to members of the class and accommodates any errors in calculation (*see Matter of Rahmey v Blum, 95 AD2d at 303-304*).

New York law does not authorize incentive awards for named plaintiffs in class actions. Federal courts grant incentive awards where there are special circumstances, such as personal risk incurred by the plaintiff, exceptional time and effort expended in assisting class counsel, advancement of litigation expenses and acceptance of the risk of loss, or other similar burdens (*see Frank v Eastman Kodak Co., 228 FRD at 187*). Such awards make named plaintiffs whole by compensating them for their extraordinary efforts or expenditures on behalf of the class, and encourage others to act as private attorneys general to promote important public and individual rights (*see Roberts v Texaco, Inc., 979 F Supp at 200-201*).

On the other hand, there are policy arguments against incentive awards. Class representatives may be tempted to accept suboptimal settlements at the expense of the remaining class members in exchange for special awards in addition to their [**167] share of the recovery, thus undermining their effectiveness as fiduciaries of the class (*see Roberts v Texaco, Inc., 979 F Supp at 200-201*). Some individuals may commence spurious class actions with the expectation of settlements leading to compensation in the form of incentive awards. New York courts generally only allow plaintiffs to recover for their injuries, not for their time or efforts in bringing lawsuits from which they will be compensated (*see Masholie v Salvator, 182 Misc 523, 525-526 [1944], mod on other grounds 269 A.D. 846 [1945]*). The Legislature did not statutorily provide for incentive awards when enacting *CPLR article 9*, and we decline to create new law, leaving that policy determination within the purview of the Legislature (*cf. Bear Stearns Cos. v Jardine Strategic Holding, Ltd.*, NYLJ, Aug. 7, 1991, *supra*; *but see Mark Fabrics, Inc. v GMAC Commercial Credit LLC*, NYLJ, Dec. 22, 2005, *supra*; *compare CPLR 909* [altering the American Rule and allowing for counsel fees in class actions]).

Supreme Court abused its discretion in approving a $ 40,000 award to the settlement fund administrator because the amount is arbitrary and not supported by the record. Unquestionably, the court had the authority to provide for this element of allowable expenses. But neither class counsel nor the settlement administrator provided any evidence to support the proposed amount or permit a proper valuation of the administrator's services, such as his hourly rates, time expended and estimated to be expended, and expenses incurred and expected, etc. (*compare Genden v Merrill Lynch, Pierce, Fenner & Smith, Inc., 741 F Supp 84, 87-88 [SD NY 1990]*). The record indicates that approximately $ 6,300 has been incurred in administration expenses and forecasts future expenses, but no evidence was offered to support those figures. Given his legal experience, the settlement administrator is in the best position to provide the court with a report of expenses and fees already incurred and to forecast his future expenditures and fees (*see e.g. id. at 87-88*). Although $ 40,000 may not be excessive, that fee amount is not supported by this record. As such, the issue must be remitted for the parties to submit proof from which Supreme Court can determine the reasonable value of the settlement administrator's services and expenses.

Finally, Supreme Court properly declined to award fees and expenses to Mouris's counsel. The American Rule provides that, unless a shifting of counsel fees is provided for by statute or contract, each party is responsible for its own counsel fees [**168] (*see Alyeska Pipeline Serv. Co. v Wilderness Socy., 421 U.S. 240, 247 [1975]*). While the Legislature has provided for the payment of counsel fees to class representatives in class actions, either from the judgment or settlement fund or directly from the defendant, the statute does not

provide for the payment of counsel fees to any other party or individual (*see CPLR 909*; *compare SCPA 2302 [6]* [permitting counsel fees to any party in a will construction proceeding]; *Fed Rules Civ Pro rule 23 [h]*; Advisory Comm Note to 2003 Amends of *Fed Rules Civ Pro rule 23* [noting that *rule 23* allows the court to award fees to any attorney, not just class counsel]). As counsel fees are not statutorily permitted for anyone but class counsel, the court could not award fees to Mouris's counsel.

Mercure, J.P., Peters, Rose and Lahtinen, JJ., concur.

ORDERED that the order is modified, on the law and the facts, without costs, by reducing the award of counsel fees and expenses to the class counsel from $ 448,483 to $ 425,000, eliminating the $ 35,000 incentive award to the named plaintiff, and reversing the $ 40,000 fee award to the settlement administrator; matter remitted to the Supreme Court for further proceedings to determine the settlement administrator's fees and expenses; and, as so modified, affirmed.

JAMES F. LUNDAY, Plaintiff-Appellee, v. THE CITY OF ALBANY, Defendant-Appellant, Albany Police Officers KENNETH SUTTON, JOHN TANCHAK, THOMAS SCHILLINGER and THIA SIDOTI, Individually and as Agents, Servants, and/or Employees of the Albany Police Department, and various other Agents, Servants, and/or Employees of the Albany Police Department whose actual names are presently unknown, Defendants.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

***Cite As: Lunday v. City of Albany, 42 F.3d 131* (2nd Cir. 1994)**

February 24, 1994, Argued
December 8, 1994, Decided

OPINION

[*133] *Per Curiam*:

The City of Albany appeals from an order entered by Magistrate Judge Ralph W. Smith, Jr., in the Northern District of New York, awarding plaintiff-appellee James F. Lunday attorney's fees under *42 U.S.C. § 1988*. The City claims that the lower court erred by failing to sustain the City's objections to certain items in the bills submitted by Lunday's counsel, and by refusing to reduce the lodestar amount of fees by some percentage to reflect that Lunday achieved only partial success at trial. We agree with the Magistrate Judge that Lunday's partial success at trial does not require a reduction in the lodestar amount of fees; but we remand for reconsideration of the City's specific fee objections because the memorandum decision and order expresses reluctance "to second guess experienced counsel" and to "demean counsel's stature" by a more detailed review--a deference that is not compatible with the court's fee-setting obligation.

The merits of Lunday's claim were tried to a jury, with Senior United States District Judge Lee P. Gagliardi presiding. Lunday contended that he was deprived of his right to be free of excessive force when he was arrested on May 13, 1989, and was held in police custody thereafter; that he was deprived of his liberty without due process of law; and that he was subjected to malicious prosecution. Lunday named as defendants the City and four of its police officers. Two of his claims invoked *42 U.S.C. § 1983, et seq.*, and the six others were pleaded under state law.

The jury returned a verdict against defendant Sutton alone, and only on the excessive force claim (one of Lunday's *§ 1983* claims). The jury awarded Lunday damages in the sum of $ 35,000, of which $ 20,000 was designated as compensatory and $ 15,000 as punitive. The jury exonerated the City and the other individual defendants. The judgment has been satisfied by the City.

Lunday applied for an award of attorneys fees pursuant to *42 U.S.C. § 1988*. Without objection, that application was referred by Judge Gagliardi to the Magistrate Judge. After receiving affidavits, memoranda and other supporting documents, and after hearing oral

argument, Magistrate Judge Smith issued a Memorandum Decision and Order dated August 20, 1993 from which this appeal emanates. The court awarded attorney's fees in the amount of $ 115,425, together with $ 3,487.08 in expenses, for a total of $ 118,912.08. This award represents the full amount of Lunday's fee request, except that the fees requested for the preparation and argument of the fee application itself were found to be excessive and were reduced from $ 21,915 to $ 10,000.

On appeal, the City first contests the lower court's denial of its objections to certain items in Lunday's counsel's bills. Specifically, the City challenges the time spent in preparing particular documents (such as 11.5 hours preparing an amended complaint that substituted three names for John Does; and two days for preparing interrogatories to new defendants that differed from an earlier set only by the substitution of names); the reasonableness of time reported solely as legal research; the time spent in attorney strategy meetings; the time devoted to expert witnesses (none of whom testified), and time spent on several other matters deemed questionable by the City.

In *Hensley v. Eckerhart, 461 U.S. 424 (1983)*, the Supreme Court instructed that, in reviewing fee applications under *Section 1988*, the district court should exclude hours that were not "reasonably expended." *Id. at 434*. Counsel for the prevailing party must exercise "billing judgment"; that is, he must act as he would under the ethical and market restraints that constrain a private sector attorney's behavior in billing his own clients. Id.; *DiFilippo v. Morizio, 759 F.2d 231, 235 (2d Cir. 1985)*. The task of [*134] ensuring that attorneys meet these standards primarily lies with the district court; we review a lower court's award of attorney's fees for an abuse of discretion. *Pierce v. Underwood, 487 U.S. 552, 571 (1988)*; *Ruggiero v. Krzeminski, 928 F.2d 558, 564 (2d Cir. 1991)*.

The memorandum decision and order fixing the amount of attorney's fees due Lunday recites:

> As to the number of hours expended by counsel, this court has carefully reviewed the submissions by plaintiff and finds no reason to reject any of those hours claimed for the period from counsel's first meeting with plaintiff[] through the trial and for research following the trial as to the potential for filing post-verdict motions. This court declines to second guess experienced counsel in deciding whether the hours devoted to research, drafting, interviewing, and consulting were necessary. To engage in such detailed hour by hour review is to demean counsel's stature as officers of the court and I have no intention of substituting my after-the-fact judgment for that of counsel who engaged in whatever research and other activities they felt necessary. Suffice it to say that the court after careful examination of counsel's meticulous and detailed time records is not to any degree shocked and finds the amount claimed to be a reasonable attorney's fee.

(Emphasis added). The City argues that the emphasized comments reflect an improper abdication of the court's responsibility to review attorney's fees applications, and that the court should have addressed the City's

objections to individual items in the submitted bills.

We do not require that the court set forth item-by-item findings concerning what may be countless objections to individual billing items. The billing records submitted by Lunday's counsel are in certain respects eyebrow-raising; but we cannot conclude that the review conducted by the Magistrate Judge was erroneous, or lacking in care. However, the level of deference expressed in the order leaves us in doubt as to whether all was done that should have been done.

Since all counsel ordinarily will be officers of the court, that status cannot justify deference. The task of determining a fair fee requires a conscientious and detailed inquiry into the validity of the representations that a certain number of hours were usefully and reasonably expended. The only circumstance in the record that raises an issue as to whether that was done is the expressed view that the process is too demeaning to be appropriate. Few lawyers relish detailed scrutiny of their bills; in these circumstances, however, that process is an assumed risk. We remand this case for reconsideration consistent with this opinion because the recitation of reasons for accepting all of counsel's pre-verdict requests for fees suggests that the Magistrate Judge may have failed to critically examine these requests. Nothing in the record indicates to us that any particular challenge to the fees is meritorious, although we note that the fees for post-trial work--the only portion of the fees as to which the Magistrate Judge is likely to have personal knowledge--were cut more than 50 percent.

The City also argues that the lower court should have reduced the requested lodestar amount by a "certain percentage" to reflect Lunday's "very limited success" at trial. There is a "strong presumption" that the lodestar amount represents a reasonable fee under *Section 1988*. *Grant v. Martinez, 973 F.2d 96, 101 (2d Cir. 1992)* (quoting *City of Burlington v. Dague, 120 L. Ed. 2d 449 (1992))*, cert. denied, *113 S. Ct. 978 (1993)*. So long as the plaintiff's unsuccessful claims are not "wholly unrelated" to the plaintiff's successful claims, hours spent on the unsuccessful claims need not be excluded from the lodestar amount. *Grant, 973 F.2d at 101*. While the degree of the plaintiff's success is the "'most critical factor' in determining the reasonableness of a fee award," *Farrar v. Hobby, 121 L. Ed. 2d 494 (1992)*, we consistently have resisted a strict proportionality [*135] requirement in civil rights cases. *Cowan v. Prudential Ins. Co. of America, 935 F.2d 522, 525-28 (2d Cir. 1991)*. Moreover, the determination of whether such a lodestar adjustment need be made is left largely to the discretion of the trial court. *Grant, 973 F.2d at 101*.

While it is true that Lunday did not prevail on all of his claims against all the defendants, Lunday was awarded $ 35,000 in compensatory and punitive damages against defendant Sutton. The City concedes that all of Lunday's claims arose from a common core of facts. Therefore, the court was not required to adjust the lodestar to reflect the failure to succeed across the board.

The magistrate judge found that Lunday's recovery was a "substantial success" in a suit of this type, and we cannot say that this finding was an abuse of discretion. While the amount awarded in damages fell short of the $ 7,130,000 Lunday demanded, the relief transcended the mere "technical victory" that the Court in Farrar ruled merited no award of fees. Cf. *Farrar, 113 S. Ct. at 574*.

Accordingly, we vacate the award of attorney's fees and costs and remand for reconsideration consistent with this opinion.

In the Matter of Nathan Rahmey, Appellant, v. Barbara Blum, as Commissioner of the New York State Department of Social Services, et al., Respondents

Supreme Court of New York, Appellate Division, Second Department

***Cite As: Rahmey v. Blum, 95 A.D.2d 294* (N.Y. 1983)**

August 29, 1983

OPINION

[*295] OPINION OF THE COURT

This appeal brings up for review the issue of awards of attorney's fees under *section 1988 of title 42 of the United States Code*.

Petitioner, a recipient of food stamps, commenced this proceeding pursuant to *CPLR article 78* to set aside a determination of the State Commissioner of the Department of Social Services, dated September 19, 1980, made after a statutory fair hearing, which affirmed the Westchester County Department of Social Services (hereinafter agency's) decision to discontinue petitioner's food stamp authorization. In this proceeding, petitioner claimed that the discontinuance of his food stamp authorization was violative of *section 1983 of title 42 of the United States Code* in that the manner in which he was purportedly notified of the discontinuance deprived him of due process of law (U.S. Const, 14th Amdt) and, additionally, the accounting method employed by the agency to calculate his self-employment income for the purpose of periodically reviewing his eligibility to receive food stamps failed to comply with the applicable Federal and New York State regulations. Petitioner had computed his net self-employment income using the method prescribed by the Internal Revenue Service for calculating the profit or loss from a business or profession, which, unlike the method employed by the agency, took into account a decrease in inventory. According to petitioner's calculations, an application of the accounting method prescribed by the Internal Revenue Service would render petitioner eligible for food stamps. Special Term concluded that the agency erred in failing to employ the method prescribed by the Internal Revenue Service when calculating petitioner's net self-employment income, since both the Federal and New York State regulations with respect to determining an applicant's eligibility [**354] for food stamps make constant reference to the rules of the Internal Revenue Service. By judgment entered July 24, 1981, Special Term annulled respondents' determination to discontinue petitioner's food stamp authorization and remitted the matter to the agency to recompute the petitioner's net self-employment for the period in question by [*296] applying the method prescribed by the Internal Revenue Service. Special Term denied petitioner's request for attorney's fees on the authority of this court's determination in *Matter of Brennin v Kirby (79 AD2d 396*), which upheld a denial of an award of counsel fees to a litigant who may well have prevailed on a claim for which an award of counsel fees is authorized by *section 1988 of title 42 of the United States Code*, solely on the ground that

the litigant was represented on a nonfee basis by a legal services organization.

On appeal, petitioner contends that, as the prevailing party in a *section 1983* action, he was eligible to receive a reasonable attorney's fee under the Civil Rights Attorney's Fees Awards Act of 1976 (*U.S. Code, tit 42, § 1988*), and it was error to deny an award on the ground he was represented on a nonfee basis by a publicly funded legal services organization.

Section 1988 of title 42 of the United States Code provides in pertinent part: "In *any* action or proceeding to enforce a provision of sections * * * 1983 * * * of this title, * * * the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" (emphasis supplied).

At the outset we note that attorney's fees may be recovered pursuant to the Civil Rights Attorney's Fees Awards Act as part of the costs of a proceeding instituted in a State court to enforce a provision of *section 1983* (*Maine v Thiboutot, 448 U.S. 1, 11*).

Although *section 1988 of title 42 of the United States Code* notes that the decision whether to grant an award of attorney's fees is a matter of judicial discretion, the area in which such discretion may properly be exercised has been circumscribed by the rule that, in an appropriate case, a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." (*Newman v Piggie Park Enterprises, 390 U.S. 400, 402* [*297].)

Recently, the Court of Appeals in *Matter of Johnson v Blum (supra*) has held that *section 1988* should be broadly construed to require that the burden of proof rests upon respondents to establish that special circumstances exist which militate against awarding a fee to a successful litigant and that burden is not met solely by submitting evidence that petitioner's counsel is a publicly funded legal services organization (see *Washington v Seattle School Dist. No. 1, 458 U.S. 457*). Consequently, to the extent this court concluded in *Matter of Brennin v Kirby (supra*) and its progeny that representation on a nonfee basis by a publicly funded legal services organization qualified as a special circumstance, this holding has been impliedly overruled and the denial of an award solely on this ground constitutes an abuse of discretion.

Before attorney's fees may be awarded under *section 1988*, there must be an affirmative finding as to whether the petitioner was a prevailing party in a proceeding embraced within *section 1983 of title 42 of the United States Code*.

Section 1983 provides: "Every person who, under color of any statute, ordinance, *regulation, custom, or usage*, of any State or Territory * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the *Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress" (emphasis supplied).

Section 1983 has been broadly construed by the United States Supreme Court to encompass claims based solely on a violation by the State of a right created by a Federal [*298] statute, and is not limited to a Federal constitutional violation or a violation of a Federal statute providing for the protection of civil or equal rights (*Maine v Thiboutot, 448 U.S. 1, supra*). In *Maine v Thiboutot (supra*) the majority of the court further concluded that an award of attorney's fees pursuant to *section 1988* was available in every type of *section 1983* action, including actions predicated solely on Federal statutory violations.

Consequently, in order to be eligible for an award of attorney's fees, petitioner at bar must have prevailed upon a bona fide claim that the agency's discontinuance of his food stamp authorization violated a right secured by the Food Stamp Act of 1964 or the Federal regulations[1] promulgated thereunder (see *Matter of Holley v Blum, 75 AD2d 998*).

Pursuant to *section 2014 of title 7 of the United States Code* (the Food Stamp Act of 1964), the Department of Agriculture was authorized to enact regulations which would establish uniform national standards of eligibility for participation by households in the food stamp program. Accordingly, the Department of Agriculture enacted regulations for determining an applicant's monthly income from self employment (see *7 CFR 273.11 [a] [1], [2], [4]*). The State Commissioner, who is authorized to implement the food stamp program and to calculate an individual household's eligibility, enacted identical regulations (see New York State Food Stamp Certification Manual, § X, e[3]).

Special Term adopted petitioner's construction of the applicable Federal and State regulations as requiring the application of the accounting method prescribed by the Internal Revenue Service for calculating an applicant's net self-employment income in order to determine a household's food stamp budget. Respondents conceded that the accounting practice employed by the agency, which did not take into account a decrease in inventory when calculating self-employment income, was inconsistent with the accounting [*299] method prescribed by the Internal Revenue Service, which did consider this factor.

Although Special Term's determination did not construe respondents' regulations to be inconsistent with the Federal regulations, the court necessarily found that the accounting practice of the agency and its approval by the State Commissioner, as evidenced by her affirmance of the agency's determination to discontinue petitioner's food stamp authorization, constituted a State usage in violation of not only the State regulations but also the Federal regulations applicable to calculating an applicant's self-employment income.[2] Moreover, the application of a different accounting method by respondents would result in nonuniform standards for determining a household's eligibility to participate in the food stamp program, in violation of the Federal statutory mandate to have uniform national standards of eligibility (see *U.S. Code, tit 7, § 2014*). Under these circumstances, we find that petitioner had presented and prevailed on a claim within *section 1983 of title 42 of the United States Code*.

The two issues, whether a litigant has prevailed on a Federal claim for which an award of counsel fees is authorized by *section 1988*, and, whether special circumstances exist which militate against awarding attorney's fees, are threshold questions to be determined by Special Term. However, in the instant case, this court can answer both questions from a review of the record on this appeal.

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[1] It is well settled that validly issued administrative regulations have the force and effect of law. (*Rodway v United States Dept. of Agric., 514 F2d 809, 814*)

[2] We note that fees may be awarded even though relief is awarded on State grounds if petitioner seeks relief on both State and Federal grounds. Where petitioner prevails on the nonfee claim, he is entitled to a determination on the claim encompassed under one of the Federal Statutes covered by the Fees Act, if nonconstitutional, for purposes of awarding fees (*Matter of Johnson v Blum, 58 NY2d 454, 458, n 2, supra*).

Since petitioner was the prevailing party in a proceeding to enforce a provision of *section 1983 of title 42 of the United States Code*, and respondents have not established a special circumstance warranting the denial of an award of attorney's fees pursuant to *section 1988* of said title, petitioner's request for attorney's fees is granted and the matter is remitted to the Supreme Court, Westchester County, to determine a reasonable attorney's fee.

Although a determination as to the proper amount of an award of attorney's fees lies largely within the discretion of [*300] the court (*Cohen v West Haven Bd. of Police Comrs., 638 F2d 496, 505*), the discretion is not unlimited. There are many parameters that affect the value of legal services and which, therefore, must be considered by the court in evaluating a fee request.

In formulating varying guidelines to aid the courts in fulfilling the Federal statutory mandate to award reasonable attorney's fees, the Federal circuit courts have highlighted the significant factors which must be taken into consideration. Since we are of the opinion that merely listing these factors would not provide meaningful guidance, the following analytical framework for their application has been set forth to aid the courts in computing a reasonable attorney's fee.

A. HOURS REASONABLY EXPENDED

In assessing fees under *section 1988*, the court should first ascertain the nature and extent of the services supplied by the attorney from a contemporaneous time sheet indicating the date, number of hours worked, an explanation of how the hours were spent (*New York State Assn. for Retarded Children v Carey, 711 F2d 1136*) and identifying the specific claim to which the hours pertain (see *Hensley v Eckerhart, 461 U.S.)*. Counsel for the prevailing party should exercise "billing judgment" when submitting a fee request. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority" (*Copeland v Marshall, 641 F2d 880, 891)*. The hours claimed need not be automatically accepted and if inadequately documented, should be disallowed (*Hensley v Eckerhar, 461 U.S. , supra*). The Judge should weigh the hours claimed against his own knowledge, experience and expertise as to the time required to complete similar activities (*Johnson v Georgia Highway Express, 488 F2d 714*). Hours which reflect duplication of services (see *Gagne v Maher, supra, p 345)*, or inefficiency (*Seigal v Merrick, 619 F2d 160, 164, n 9* [*301]*)* or padding, i.e., hours that are excessive or otherwise unnecessary, are to be disallowed (*Hensley v Eckerhart, supra*). If a Judge decides to eliminate hours of service adequately documented by the attorneys, he must identify those hours and articulate his reasons for their elimination (*Northcross v Board of Educ., 611 F2d 624, 637*, cert den *447 U.S. 911*).

Furthermore, "[it] is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it" (*Johnson v Georgia Highway Express, supra, p 717*). As to legal work, it is appropriate to differentiate between time expended for in-court services and the time expended for out-of-court services (see *Northcross v Board of Educ., supra, p 638)*.

Hours reasonably spent by counsel in preparing the fee application and in litigating a

fee award are also compensable (see *Gagne v Maher, 594 F2d 336, 343-344, supra)*. However, if the fee claims are exorbitant or the time devoted to presenting them is unnecessarily high, the Judge may refuse further compensation or grant it sparingly (*Gagne v Maher, supra, p 344*; *Lund v Affleck, supra, p 77*).

B. REASONABLE HOURLY RATE

The next step in determining an award of attorney's fees is to arrive at a reasonable hourly charge for each category of service rendered (see *Cohen v West Haven Bd. of Police Comrs., 638 F2d 496, supra).*

[*302] As a general proposition, the reasonable hourly rate should be based on the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented (see *Johnson v Georgia Highway Express, supra*). Experience includes not only the number of years of practice but also the nature of the practice engaged in (*Equal Employment Opportunity Comm. v Sage Realty Corp., supra, p 269*). "In most communities, the marketplace has set a value for the services of attorneys, and the hourly rate charged by an attorney for his or her services will normally reflect the training, background, experience and skill of the individual attorney. For those attorneys who have no private practice, the rates customarily charged in the community for similar services can be looked to for guidance" (*Northcross v Board of Educ., supra, p 638*).

Since attorney's fees awards are to be measured by the market value of the services performed, awards to nonprofit law offices should be calculated at billing rates of private attorneys of comparable skill and experience (*Copeland v Marshall, 641 F2d 880, 889, supra),* as modified by certain differentials which exist between private attorneys and nonprofit law offices. Because billing rates employed by private attorneys contain three components (the billing attorney's compensation, a share of the firm's overhead, and some profit for the firm), an award to nonprofit lawyers based upon billing rates charges by profit-making lawyers inevitably produces a windfall. The profit component is a questionable ingredient in a reasonable fee for a nonprofit law firm and the two remaining components of a private firm's billing rate often reflect much higher expenses than those incurred by a nonprofit office. Consequently, in order to avoid windfalls to nonprofit law offices, the market value rate is to be subjected to a ceiling known as the break point rate. The break point rate is the market value rate above which private billing rates include a profit component and an [*303] overhead cost so significantly above that of nonprofit law offices that use of such rate would produce a windfall for nonprofit offices (see *New York State Assn. for Retarded Children v Carey, 711 F2d 1136, supra*). Nonprofit law offices should not receive fees calculated at rates above the selected break point.

C. COMPUTATION OF LODESTAR FEE

The third step is to multiply the number of hours reasonably expended on the litigation by the reasonable hourly rate (see *Hensley v Eckerhart, supra,* p 4554). The basic fee generated by this computation is known as the lodestar fee (*Cohen v West Haven Bd. of Police Comrs., supra*). This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services (*Hensley v Eckerhart, supra*).

D. ADJUSTMENTS TO LODESTAR FEE

The product of reasonable hours times a reasonable rate does not end the inquiry. As the final step in the computation of a reasonable

fee award, the initial estimate, predicated essentially on objective factors, may be augmented or reduced by the courts, to take into account the following subjective factors (see *Hensley v Eckerhart, supra,*), first suggested by the United States Court of Appeals for the Fifth Circuit in its oft-cited decision *Johnson v Georgia Highway Express (488 F2d 714, supra*): (1) the novelty and difficulty of the questions presented; (2) the skill requisite to perform the legal services properly; (3) the preclusion of other employment by the attorney due to acceptance of the case; (4) whether the fee is fixed or contingent; (5) time limitations imposed by the client or [*304] the circumstances; (6) the nature and length of the professional relationship with the client; (7) *the amount involved and the results obtained*; (8) the undesirability of the case; and (9) awards in similar cases. It should be noted that many of these factors may have been subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate (*Hensley v Eckerhart, supra*).

In connection with the fixation of fees, a problem may arise where the prevailing party is not successful on all the claims asserted in the litigation. The United States Supreme Court recently held in *Hensley v Eckerhart (supra*) that the extent of a prevailing party's success is a "crucial factor" in determining the proper amount of an award of attorney's fees under *section 1988 of title 42 of the United States Code*. "Where the [party seeking a fee award] has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a [prevailing party] who has won substantial relief should not have his attorney's fee reduced simply because the * * * court did not adopt each contention raised. But where the [prevailing party] achieved only limited success, the * * * court should award only that amount of fees that is reasonable in relation to the results obtained" (*Hensley v Eckerhart, supra*).

Another factor to be considered is the attorney's risk of litigation. The contingency adjustment is a percentage increase in the lodestar fee to reflect the risk that the lawsuit would be unsuccessful and that no fee at all would be obtained. However, it is not a percentage increase based on the amount of recovery (*Northcross v Board of Educ., supra*).

[*305] Although a contingency adjustment may be appropriate in some cases to entice private firms to undertake difficult cases in which victory is uncertain, we believe that the promise of such rewards is not needed to induce nonprofit organizations, like petitioner's representative, which have been created and are paid for performing those very services. Therefore, in fee awards for nonprofit law offices, an increase in the lodestar fee should not include any increment for the uncertain risk of achieving success in the litigation (*New York State Assn. for Retarded Children v Carey, supra).*

Whenever the court augments or reduces the lodestar fee, it must state its reasons for doing so as specifically as possible (see *Hensley v Eckerhart, supra*). In the absence of such a statement, it will be difficult, if not impossible, for the reviewing court to determine whether the award was within the proper exercise of the court's discretion (*Cohen v West Haven Bd. of Police Comrs., supra*).

As a caveat to applying the guidelines contained herein, we reiterate that the courts must keep in mind that the purpose of the Civil Rights Attorney's Fees Awards Act is to attract qualified and competent attorneys without affording any windfall to those who undertake

such representation (*Northcross v Board of Educ., supra, p 638*).

In conclusion, since petitioner prevailed on a claim for which an award of counsel fees is authorized by *section 1988 of title 42 of the United States Code* and since the fact petitioner was represented by a publicly funded legal services organization does not qualify as a special circumstance militating against an award of attorney's fees, the matter is remitted to the Supreme Court, Westchester County, for a hearing and the entry of an order fixing a reasonable fee which reflects the factors set forth in this opinion. Additionally, since petitioner is the prevailing party on this appeal, we award him fees for his endeavors here, in an amount to be determined by Special Term [*306] (*Cohen v West Haven Bd. of Police Comrs., supra, p 506*).

Judgment of the Supreme Court, Westchester County, entered July 24, 1981, reversed insofar as appealed from, on the law, with one bill of costs payable by the respondents to the appellant, and matter remitted to the Supreme Court, Westchester County, for further proceedings consistent herewith.