University of Arkansas at Little Rock Law Review

Volume 7 | Issue 2 Article 4

1984

Civil Rights—The Civil Rights Attorney's Fees Awards Act of 1976—The Amount of Success Determines the Award

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CIVIL RIGHTS—THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976—THE AMOUNT OF SUCCESS DETERMINES THE AWARD. *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983).

Patients involuntarily confined at the Forensic Unit of the Fulton State Hospital in Fulton, Missouri, filed suit against officials of the Forensic Unit and members of the Missouri Mental Health Commission alleging that these persons violated the patients' constitutional right to treatment.[1] The district court held that an involuntarily committed patient had a constitutional right to minimally adequate treatment[2] and found constitutional violations in five of six general areas. However, the court found staffing, the sixth general area, to be minimally adequate.

The plaintiffs then filed a request for attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976[3] seeking payment for 2,295 hours at rates from forty to sixty-five dollars per hour. They also requested that the fee be enhanced, by using a factor of thirty to fifty percent, for a total award of between $195,000 and $225,000.

The district court held that the plaintiffs were prevailing parties under section 1988 of title 42 of the United States Code even though they succeeded on only five of the six general claims. The court refused to eliminate from the award of attorney's fees the hours spent on the unsuccessful claim, holding that the plaintiffs obtained significant overall relief. The court, however, did reduce the award by eliminating a number of hours claimed by an inexperienced attorney who failed to keep accurate records and by refusing to adopt the enhancement factor to increase the award.[4]

The Eighth Circuit Court of Appeals affirmed[5] in an unpublished decision, and the United States Supreme Court granted certiorari.

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1. 103 S. Ct. 1933, 1936 (1983). Patients alleged constitutional violations in the areas of physical environment; individual treatment plans; least restrictive environment; visitation, telephone, and mail privileges; seclusion and restraint; and staffing. The lawsuit was originally filed as a three-count complaint challenging constitutionality of treatment and conditions, placement in maximum security without procedural due process, and non-payment of patients performing institution-maintaining labor. The second charge was resolved by a consent decree and the third charge was mooted when patients were paid for their labor pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 (1938). The lawsuit was subsequently dismissed and refiled as a two-count complaint which was later amended to the present one-count complaint.

2. Eckerhart v. Hensley, 475 F. Supp. 908 (W.D. Mo. 1979).

3. 42 U.S.C. § 1988 (1976).

4. 475 F. Supp. 908.

5. Eckerhart v. Hensley, 664 F.2d 294 (8th Cir. 1981).

Hensley v. Eckerhart, 103 S. Ct. 1933 (1983).

Prevailing parties have historically been awarded costs by statute. Early French, Roman, and Swedish law provided for attorney's fees awards to the prevailing party as an item of compensatory damage or cost necessary to a full and just recovery.[6] In England, the philosophy developed that the unsuccessful party should pay the expenses incurred by the victorious party.[7] This theory led in 1278 to the passage of the Statute of Gloucester[8] which provided for all reasonable legal expenditures of the prevailing plaintiff to be paid by the defendant, including his attorney's fees. By 1607, similar costs were granted to prevailing defendants,[9] so that by the time of the American Revolution, English courts were awarding costs, including attorney's fees, to the prevailing party.

Due to a distrust of lawyers in colonial America, early colonists did not choose to promote the economic health of the profession by allowing courts to award attorney's fees to a prevailing party.[10] Following the American Revolution, a conscious effort was made to purge the American legal system of English traditions, thus American courts did not adopt the English theory of full compensation for the wronged party, and fees never became part of the costs awarded.[11]

This "American Rule" was established as early as 1796 when the Supreme Court held that fees were not recoverable without statutory authorization.[12] When the withholding of attorney's fees proved unjust, the federal courts, as an exercise of their equitable powers, created exceptions to the rule that each party must pay his expenses of litigation.[13]

One such judge-created exception to the American Rule was the "Common Fund Doctrine."[14] Where a plaintiff successfully maintained a suit that benefited a group in the same manner as himself, he was awarded attorney's fees,[15] since allowing members of the group to obtain full benefit from the plaintiff's efforts without contributing equally

6. Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 639 (1974).

7. *Id.* at 639.

8. 6 Edw. 1, ch. 1 (1275).

9. 4 Jac. 1, ch. 3 (1607).

10. Comment, *supra* note 6, at 641.

11. *Id.*

12. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

13. Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) (explaining that the power to award fees is part of the original authority of the chancellor to do equity in a particular situation).

14. Trustees v. Greenough, 105 U.S. 527 (1882).

15. Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970).

to the litigation expenses enriched them unjustly at the plaintiff's expense.[16] Because the plaintiff's success allowed others in his class to recover from the same defendant, the others were forced to contribute to the costs of the suit by an order reimbursing the plaintiff from the defendant's assets out of which their recoveries would have to come.[17]

Another exception which allowed an award of attorney's fees to a successful party occurred when a suit was brought in bad faith, vexatiously, wantonly, or for oppressive reasons.[18] The underlying rationale of fee shifting in these cases was punitive and the essential element in triggering the award of fees was bad faith on the part of the unsuccessful litigant.[19]

A final exception created by the courts to allow fee awards was the "private attorney general" theory.[20] In a 1943 case,[21] Judge Jerome Frank coined the phrase "private attorney general" to describe the plaintiff who by vindicating his civil rights benefited the entire community.[22] Private attorney general cases were brought under the reconstruction era Civil Rights Act[23] which did not specifically provide for an award of fees, but courts permitted recovery through analogy to modern civil rights statutes which expressly authorized awards of attorney's fees.[24] Since congressional policy encouraged private enforcement of personal rights, federal courts allowed an award of attorney's fees to civil rights plaintiffs gaining a judgment which benefited the public in general, even though no award may have been authorized by Congress.

This practice of awarding attorney's fees without congressional authority in cases brought under earlier civil rights acts was rejected in *Alyeska Pipeline Service Co. v. Wilderness Society.*[25] After ruling for the plaintiff, the Court disallowed the requested award of attorney's fees since it did not fall within any of the exceptions to the general

16. *Id.* at 392.

17. *Id.* at 393.

18. F.D. Rich Co. v. United States *ex. rel.* Indus. Lumber Co., 417 U.S. 116, 129 (1974); Vaughan v. Atkinson, 369 U.S. 527 (1962).

19. Hall v. Cole, 412 U.S. 1, 5 (1973).

20. Witt, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 13 URB. LAW 589 (1981).

21. Associated Indus., Inc. v. Ickes, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

22. *Id.* at 704; Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 658 (1974).

23. 42 U.S.C. §§ 1981-1983, 1985-1986 (1970).

24. Fioretti & Convery, *Attorney's Fees Under The Civil Rights Act—A Time for Change*, 16 J. MAR. L. REV. 261 (1983).

25. 421 U.S. 240 (1975).

"American Rule."[26] The court found no bad faith or common benefit[27] and rejected the "private attorney general" theory as an invasion of the legislature's province.[28] This rejection of the inherent equitable power of the courts to award fees when the plaintiffs were acting as "private attorney generals" and the placement of authorization to make fee awards in Congress, directly led to the passage of the Civil Rights Attorney's Fees Awards Act of 1976.[29]

The text of the Civil Rights Attorney's Fees Awards Act of 1976[30] is brief and straightforward,[31] as is the purpose of the Act: to provide attorney's fees as part of the remedy to prevailing parties seeking to enforce their civil rights through acts passed by Congress since 1866.[32] Drawing on the fee award provisions of the civil rights law,[33] Congress formulated the Civil Rights Attorney's Fees Awards Act to award fees to those individuals successfully vindicating their civil rights.[34] Although this Congressional action seemed to be a clear mandate to award prevailing parties reasonable fees, much confusion existed following the passage of the Fees Awards Act as to the meaning of "prevailing party" and "reasonable fee."[35]

Congress clearly left the determination of the prevailing party to the discretion of the district court;[36] however, district courts applied varying standards in making that determination. District courts in the Third[37] and Fifth[38] Circuits required the plaintiff to be successful on the central issue and acquire the primary relief sought to be considered

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26. *Id.* at 245.

27. *Id.* at 246.

28. *Id.* at 271.

29. Witt, *supra* note 20.

30. 42 U.S.C. §1988 (1976).

31. The Act states: "In any action or proceeding to enforce . . . [civil rights] . . . 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." *Id.*

32. S. REP. No. 94-1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908.

33. Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c); the Emergency School Aid Act of 1972, 20 U.S.C. § 1617; the Equal Employment Amendments of 1972, 42 U.S.C. § 2000e-16(b); and the Voting Rights Act Extension of 1975, 42 U.S.C. § 1973l(e).

34. *See supra* note 32.

35. Note, *Awards of Attorney's Fees in the Federal Courts*, 56 ST. JOHN'S L. REV. 277, 292 (1982).

36. 42 U.S.C. § 1988 (1976).

37. Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

38. Espino v. Besteiro, 708 F.2d 1002 (5th Cir. 1983); Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981).

the prevailing party. However, district courts in the Ninth[39] and First[40] Circuits found a prevailing party to be one who succeeded on any significant issue which achieved some of the benefit the parties sought in bringing the suit.

Some courts considered a party to have prevailed even when a consent decree was entered,[41] a settlement was made,[42] or the issue was mooted.[43] A party might even have been said to have prevailed although he did not gain substantial relief if his lawsuit were a catalyst to reform or eliminate offensive practices.[44]

Besides the uncertainty as to who was a prevailing party, the determination of a reasonable fee was also unclear. The 1968 case of *Newman v. Piggie Park Enterprises*[45] set the basic standard to be used when determining the amount of fees to be awarded to a prevailing party. This case held that one obtaining relief under the Civil Rights Acts should generally recover attorney's fees unless special circumstances would render such an award unjust.[46] *Newman* was coupled with the later case of *Northcross v. Board of Education of Memphis City Schools*[47] to create the *Newman/Northcross* doctrine.[48] This doctrine interpreted Congressional intent as allowing an award of fees for all time reasonably expended on a case, including hours expended on unsuccessful research or litigation, unless the positions asserted were frivolous or in bad faith.[49]

Two cases gave explicit instructions as to how to calculate attorney's fees. *Johnson v. Georgia Highway Express, Inc.*[50] listed twelve

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39. Bartholomew v. Watson, 665 F.2d 910 (9th Cir. 1982).

40. Nadeau v. Helgemoe, 582 F.2d 275 (1st Cir. 1978).

41. Hanrahan v. Hampton, 446 U.S. 754 (1980); Johnson v. University College of the University of Alabama in Birmingham, 706 F.2d 1205 (11th Cir. 1983).

42. Maher v. Gagne, 448 U.S. 122 (1980); Fulps v. City of Springfield, Tenn., 715 F.2d 1088 (6th Cir. 1983); Iranian Students Ass'n v. Edwards, 604 F.2d 352 (5th Cir. 1979).

43. Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981); Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979).

44. Fields v. City of Tarpon Springs, Fla., 721 F.2d 318 (11th Cir. 1983); Othen v. Ann Arbor School Bd., 699 F.2d 309 (6th Cir. 1983); Ross v. Horn, 598 F.2d 1312 (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

45. 390 U.S. 400 (1968).

46. *Id.* at 402.

47. 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

48. These cases were coupled because they interpreted identical attorney's fees provisions in similar civil rights statutes: Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-20000a-3 (1976) and Emergency School Aid Act, 20 U.S.C. § 1617 (1976) (repealed 1979).

49. 611 F.2d 624, 636 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

50. 488 F.2d 714 (5th Cir. 1974). *Johnson* lists the following factors to use as guidelines to determine the amount of attorney's fees to award:

considerations to be used as guidelines for determining a reasonable fee, while *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*[51] used a four step procedure to calculate a fee award.[52] While formulas for awarding fees seemed to simplify the award process, the district courts still had to determine not only the number of hours actually devoted to the successful claims, but also whether it was reasonably necessary to spend those hours in order to perform the legal services.[53]

Because of varying applications of the Civil Rights Attorney's Fees Awards Act, some parties were receiving fees when they prevailed to a lesser extent than those who were denied fees. A district court in California sought to clarify the relationship among prevailing parties, reasonable fees, and amount of success required in *Stanford Daily v. Zurcher*.[54] In this decision, the court explained that attorneys must explore fully every aspect of the case including issues that are ultimately rejected by a court, and the mere fact that the litigants did not succeed in obtaining a judgment on all of the claims asserted did not mean that time spent pursuing those claims should be automatically disallowed.[55] A court should consider the relationship of the claims that resulted in the judgment to the claims that were rejected and the degree to which

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1. The time and labor required.
2. The novelty and difficulty of the questions.
3. The skill requisite to perform the legal service properly.
4. The preclusion of other employment by the attorney due to acceptance of 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 amount involved and the results obtained.
9. The experience, reputation, and ability of the attorneys.
10. The undesirability of the case.
11. The nature and length of the professional relationship with the client.
12. Awards in similar cases.

S. REP. NO. 94-1011, 94th Cong., 2d Sess. 2 (1976) relied on these twelve factors when considering the calculation of attorney's fees.

51. 487 F.2d 161 (3d Cir. 1973).

52. *Id.* at 167. *Lindy* uses the following four step procedure to determine the amount of a fee award:

1. Ascertain the hours spent and the manner in which they were spent.
2. Assess the value of the service.
3. Consider the contingent nature of success.
4. Evaluate the quality of the work performed.

53. Hughes v. Repko, 578 F.2d 483, 487 (3d Cir. 1978).

54. 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978).

55. *Id.* at 684.

an investigation of all issues contributed to the case as a whole.[56]

Since confusion surrounded the proper application of the Civil Rights Attorney's Fees Awards Act, the United States Supreme Court in *Hensley v. Eckerhart*[57] sought to clarify when a partially prevailing plaintiff could recover an attorney's fee for legal services on unsuccessful claims[58] by providing a formula for the calculation of the fee. The Court held that the award allowed the prevailing party was to be based on a calculation of the number of hours reasonably expended multiplied by a reasonable hourly rate. This base fee was then subject to adjustment upward or downward according to the results obtained.[59] The Court considered the extent of the plaintiff's success to be the crucial factor in determining the proper amount of an award of attorney's fees,[60] and established a two-pronged test.

First, if the suit contained unrelated claims, no attorney's fees would be awarded for any unsuccessful claim.[61] The Court followed the reasoning of *Davis v. County of Los Angeles*[62] which held that work on an unsuccessful claim could not be deemed to have been expended in pursuit of the ultimate result achieved.[63] Since Congress intended to limit awards to only prevailing parties, the Court required that any unrelated claim be treated as if it were raised in a separate lawsuit and, if unsuccessful, receive no fee award.[64]

Second, even when the claims were related, if only limited success was achieved, the attorney's fees would be reduced to be reasonable according to the results obtained.[65] In a case involving related claims, the Court focused on the significance of the overall relief obtained when awarding attorney's fees.[66] If a plaintiff obtained excellent results, the Court suggested that an enhanced award could be justified;

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56. Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc), *cert. dismissed*, 453 U.S. 950 (1981).

57. 103 S. Ct. 1933 (1983).

58. *Id.* at 1935.

59. *Id.* at 1940.

60. *Id.* at 1941.

61. *Id.* at 1940. *See also* Smith v. Robinson, 104 S. Ct. 3457 (1984); Sisco v. J.S. Alberici Constr. Co., Inc., 733 F.2d 55 (8th Cir. 1984); Citizens Council of Delaware County v. Brinegar, 741 F.2d 584 (3d Cir. 1984).

62. Davis v. County of Los Angeles, 8 E.P.D. § 9444 at 5049 (C.D. Cal. 1974).

63. *Id.*

64. 103 S. Ct. 1933, 1940 (1983). *See also* Blum v. Stenson, 104 S. Ct. 1541 (1984).

65. *Id.* at 1940. *See also* Carmichael v. Birmingham Saw Works, 738 F.2d 1126 (11th Cir. 1984); Trevant v. City of Tampa, 741 F.2d 336 (11th Cir. 1984); New York City Unemployed and Welfare Council v. Brezenoff, 742 F.2d 718 (2d Cir. 1984).

66. *Id. See also* Rosenbrough Monument Co. v. Memorial Par Cemetary, 736 F.2d 441 (8th Cir. 1984).

however, if a plaintiff achieved only partial success, the basic computation of hours multiplied by rate might be excessive.[67] The Court reduced the attorney's fees awarded in this situation even when the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith.[68]

Because of the district court's superior understanding of the litigation, the Court placed in the district court the discretion to determine the amount of the fee award but required the district court to provide a clear explanation of its determination of a fee award based on the results obtained in the case.[69] Because the district court in *Hensley v. Eckerhart* did not properly consider the relationship between the extent of success and the amount of the fee award, the case was remanded.[70]

Justice Brennan, in his dissent,[71] pointed out several potential problems with the ruling. Attorneys in civil rights cases often advance a number of related legal claims in order to give the plaintiff the best possible chance of achieving substantial relief.[72] Because legal claims are often intertwined, he found it virtually impossible to determine how much time was spent on individual claims.[73]

Justice Brennan also argued that, besides the results obtained, the time-value of money and the contingency of payment for civil rights litigation must be considered.[74] Hours multiplied by rate, then product against result was not an adequate evaluation.[75]

Justice Brennan's strongest argument against the decision was that it merely continued litigation in a case in which the merits were decided years ago.[76] Because the district court determined that the plaintiffs had prevailed to an extent justifying fees for all hours reasonably spent, Justice Brennan saw the remand as frustrating the policies of section 1988 by preventing the timely payment of attorney's fees.[77] Apprehension concerning the delay and expense caused by appellate litigation of attorney's fees was likely to discourage civil rights suits, an anomalous result of a statute designed to attract competent counsel to civil rights cases.[78]

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67. *Id.* at 1941.
68. *Id.*
69. *Id.*
70. *Id.* at 1943.
71. *Id.* (Brennan, J., dissenting).
72. *Id.* at 1947.
73. *Id.*
74. *Id.*
75. *Id.* at 1947-48.
76. *Id.* at 1950.
77. *Id.* at 1951.
78. *Id.*

Hensley v. Eckerhart does achieve the Court's purpose of clarifying exactly how successful a party must be to receive attorney's fees. The two-pronged test established to allow fees based on success gives the basic framework by which courts may award or deny attorney's fees on a consistent basis. This strict requirement of success in order to receive attorney's fees will cause attorneys to scrutinize potential civil rights cases for valid claims worthy of litigation. Issues will be narrowed in future cases and weak claims eliminated since success will be the standard by which the issues are judged. Though *Hensley* provides a framework for district courts to use when exercising their discretion to award fees, the case also produces several problems.

One problem raised by *Hensley* is how the Court should evaluate time reasonably expended on a losing issue. Congressional intent was to award fees for all time reasonably spent on a case, yet *Hensley* holds that fees may not be awarded for time reasonably spent on an unrelated issue if that issue is not successful. It seems that, following *Hensley*, district courts no longer have the power to do equity which they so long possessed because losing issues are automatically rejected when figuring the amount of fees to be awarded.

The most disturbing outcome of *Hensley v. Eckerhart* may be its deterrance effect. The Civil Rights Attorney's Fees Awards Act was passed to enable litigants to obtain competent counsel. Prevailing parties were assured attorney's fees, thereby encouraging attorneys to accept civil rights cases. The action of the Court in *Hensley* may discourage attorneys from accepting civil rights cases which seem risky because limited success will mean limited remuneration.[79] In addition, the prospect of prolonged litigation concerning the amount of attorney's fees to be awarded, carried on long after the completion of the principal case, may deter attorney's from engaging in civil rights litigation. If this occurs, congressional intent will be thwarted and those parties too poor to pay counsel will not be able to litigate their civil rights claims.

Attorneys evaluating potential civil rights cases should examine the issues and weigh the potential for success in the litigation, for, under *Hensley v. Eckerhart*, the amount of success will determine the award of fees.

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79. *See* Fast v. School Dist. of City of Ladue, 728 F.2d 1030 (8th Cir. 1984) (plaintiff may be a prevailing party and still not receive full compensation for all the expense invested in a case).