Briel v. Bd. of Educ.

Superior Court of New Jersey, Appellate Division

October 4, 2011, Argued; February 14, 2012, Decided

DOCKET NO. A-1739-10T4

Reporter
2012 N.J. Super. Unpub. LEXIS 298 *; 2012 WL 443999

JOAN M. BRIEL, Plaintiff-Respondent/Cross-Appellant, v. BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MADISON SCHOOL DISTRICT, RICHARD B. NOONAN, Individually and in his capacity as Superintendent of Defendant Board of Education and CHARLES R. MILEWSKI, Individually and in his capacity for Defendant Board of Education, Defendant-Appellants/Cross-Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-0115-08.

Core Terms

enhancement, lodestar, counsel fees, percent, written opinion, billing, entries

Counsel: Walter F. Kawalec, III, argued the cause for appellants/cross-respondents (Marshall, Den-nehey, Warner, Coleman & Goggin, attorneys; Victoria A. Cabalar and Mr. Kawalec, on the brief).

Christopher W. Hager argued the cause for respondent/cross-appellant (Niedweske Barber Hager, attorneys; Linda J. Niedweske, Kevin E. Barber and Mr. Hager, of counsel and on the brief).

Judges: Before Judges Carchman, Fisher and Nugent.

Opinion

PER CURIAM

Following a settlement of plaintiff's claims, which were based on the Law Against Discrimination (LAD), *N.J.S.A. 10:5-1 to -49*, plaintiff moved for and obtained an award of counsel fees in the total amount of $874,731.85; that award included a twenty-five percent contingent fee enhancement. In this appeal, defendants argue that the trial judge erred both in ascertaining the proper lodestar amount and in imposing an enhancement. We find no merit in these arguments and affirm substantially for the reasons set forth by Judge Kathryn A. Brock in her written opinion of September 14, 2010, and her later oral opinion of November 16, 2010.

Plaintiff, who was diagnosed in 2002 with **[*2]** multiple sclerosis, commenced this action on January 14, 2008, against her employer, the Board of Education of the Borough of Madison, as well as the school district, its superintendent, and the school business administrator/board secretary. In her complaint, plaintiff alleged, among other

things, that defendants discriminated against her due to her illness and created a hostile work environment. After an extensive period of discovery and numerous discovery motions, defendants moved for summary judgment, which was denied by another judge, shortly before the scheduled trial date. Once the summary judgment motion was denied, the parties negotiated and reached a settlement, with plaintiff agreeing to accept $412,500 in settlement, reserving only her claim for counsel fees and costs for future disposition by the court. The parties agreed that plaintiff could be viewed as the prevailing party in moving for counsel fees.

Plaintiff thereafter moved for an award of $1,467,430.60 in counsel fees; this amount was based on the hours expended and expenses, together with a proposed enhancement of fifty percent. The motion was supported by certifications of those who worked on the case, and other **[*3]** appropriate information. Defendants opposed the application, relying on the certification of their attorney and a California attorney that challenged the reasonableness of plaintiff's request.[1]

On September 14, 2010, Judge Brock filed a sixty-five page written opinion, which thoroughly discussed her findings and conclusions; appended to the opinion was a five-page ledger outlining the awards the judge had made regarding each major event in the case. Pursuant to the conclusions reached, Judge Brock awarded plaintiff $877,303.72 in fees and expenses. The ledger appended to the written opinion summarized the judge's decision to reduce the $948,660 lodestar amount plaintiff sought by $281,970, leaving what the judge found to be a reasonable lodestar amount of $666,690. The judge then enhanced that by twenty-five percent ($166,672), for a total award of $877,303.72.

Defendants timely moved for reconsideration. Judge Brock granted the motion in part and denied it in part; she also awarded plaintiff counsel **[*4]** fees for the time expended in responding to the reconsideration motion. The net result was the entry of a judgment, on November 16, 2010, in favor of plaintiff for counsel fees and costs in the amount of $874,731.85.

Defendants appealed, arguing:

I. JUDGE BROCK'S DETERMINATION OF THE LODESTAR CONSTITUTED REVERSIBLE ERROR.

A. Judge Brock Erred In Failing To Delete Or Reduce All Entries Which Were Block Billed Or Vague.

B. Judge Brock's Failure To Comprehensively Review Each Billing Entry Had The Improper Effect Of Imposing On The Defendant The Burden Of Establishing That Particular Entries Were Unreasonable.

II. JUDGE BROCK COMMITTED REVERSIBLE ERROR IN GRANTING A FEE ENHANCEMENT [].

A. It Was Error To Have Awarded The Fee Enhancement.

B. Judge Brock's Decision To Award A 25% Fee Enhancement Was Error.[2]

We reject these arguments.[3] Indeed, we affirm substantially for the reasons set forth by Judge Brock in her thoughtful and comprehensive opinions. We add only the following few

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[1] The California attorney owns what the judge described as a litigation management and consulting firm in California. He conducted an audit of the billing records of plaintiff's attorneys.

[2] We have renumbered the points; defendants' first point addresses only the applicable standard of review.

[3] Plaintiff filed a cross-appeal but did not argue in her brief for a modification of the orders under review; **[*5]** instead, she argued in her brief that we should affirm. Because the cross-appeal has not been supported with legal argument, it will be dismissed.

comments.

In Point I, defendants argue that the judge erroneously saddled them with the burden of establishing that entries in plaintiff's fee submission were unreasonable. In other words, defendants argue that the judge was required to closely examine even those time entries to which defendants did not object and should not have assumed that an entry was reasonable if there was no objection. We reject the premise of this argument because we are satisfied that Judge Brock thoroughly examined all aspects of the application and defendants' opposition.

In its most recent opinion on the subject, *Walker v. Guiffre, N.J. , , 2012 N.J. LEXIS 15, *16-17 (2012)*, the Court iterated its holding in *Rendine v. Pantzer, 141 N.J. 292, 335, 661 A.2d 1202 (1995)*, which admonished trial courts not to "accept passively" the submissions and raw data provided by a fee applicant. Instead, courts must "carefully and closely examine the lodestar-fee request to verify that the attorney's hours were reasonably expended." *Walker, supra, N.J. at , 2012 N.J. LEXIS 15 at *17* (quoting *Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 366, 661 A.2d 1232 (1995)*). **[*6]** Judge Brock was hardly passive in examining the application; her close scrutiny of the record, which was extensively discussed in her written opinion, resulted in a reduction of the lodestar by more than $280,000.[4] That significant reduction hardly bespeaks a passive acceptance of plaintiff's claim.

We also reject the arguments in Point II. The enhancement was appropriately awarded not only because counsel agreed to represent plaintiff by way of a contingency fee agreement but also for the other reasons given by the judge. Much of defendants' **[*7]** argument stems from their apparent belief that the principles underlying our Supreme Court's *Rendine* decision were undermined when the Supreme Court of the United States held in *Perdue v. Kenny A., U.S. , , 130 S. Ct. 1662, 1669, 176 L. Ed. 2d 494, 501 (2010)*, that fee enhancements are reserved for "extraordinary circumstances." Indeed, a panel of this court, in *Walker v. Giuffre,*[5] *415 N.J. Super. 597, 608-10, 2 A.3d 1165 (App. Div. 2010)*, and another panel in an unreported decision, accepted the argument defendants make here, that *Perdue* altered the legal landscape for deciding fee applications pursuant to New Jersey fee shifting statutes. Last month, however, our Supreme Court rejected this notion and explained that *Perdue* does not change the principles adopted by the Court in *Rendine*. *Walker, supra, N.J. at , 2012 N.J. LEXIS 15 at *34* (holding that "nothing in [*Perdue*] . . . causes us to vary from the approach we have previously adopted . . . [and] [t]o the extent that the two panels of the Appellate Division held . . . that our trial courts should instead apply the federal model for fee calculations, the panels erred").

In addition, in adhering to *Rendine*, the Court in *Walker* iterated that "the ordinary range for a contingency enhancement [is] between five and fifty percent and . . . the typical range [is] between twenty and thirty-five percent of the lodestar." *N.J. at , 2012 N.J. LEXIS 15 at*

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[4] Interestingly, defendants argue that the judge should have reduced by a particular percentage the entire lodestar amount because of what they have referred to as "block billing," i.e., the lumping together of various tasks on a given day into a single billing entry. We agree with Judge Brock's rejection of such an approach; applying an across-the-board reduction would have run counter to *Rendine*, which, again, requires a close analysis of all aspects of the fee application. To adopt a blanket rule because of some lack of specificity in the timekeepers' entries would be just as inappropriate as accepting passively the fee application on its face.

[5] Defendant's name in *Walker* is spelled "Giuffre" in the Appellate **[*8]** Division's opinion and "Guiffre" in the Supreme Court's opinion.

*30 (citing Rendine, supra, 141 N.J. at 343). Judge Brock deemed it appropriate to impose in this case a twenty-five percent contingency enhancement, which is in the lower half of "the typical range." *Ibid*. We find no abuse of discretion in this determination and, again, affirm the judge's holding substantially for the reasons set forth in her written opinion.

The orders under review by way of defendants' appeal are affirmed. Plaintiff's cross-appeal is dismissed.

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