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Court Cautions Not 'Cheapening' Fee Petition for Prevailing Plaintiffs

By Jeffrey Campolongo All Articles

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Jeffrey Campolongo

I recently had the pleasure of reading an opinion from the Eastern District of Pennsylvania refusing to "cheapen" an attorney's fee petition, citing the successful plaintiff's award as an "essential part of enforcement of our civil rights laws." The case, *Perkins v. Shinseki*, 2013 U.S. Dist. LEXIS 17833 (E.D. Pa. Feb. 8, 2013), illuminates how some courts in this area consider requests for attorney fees.

In *Perkins*, U.S. District Judge Michael M. Baylson awarded fees at the rate of $500 per hour for summary judgment, trial preparation and trial work, and $400 per hour for the trial attorney's other work, even though the attorney, David Shapiro, of Swick & Shapiro in Washington, D.C., achieved partial success for his client, Tyrone Perkins.

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Perkins, an African-American former employee of the U.S. Department of Veterans Affairs (VA), claimed that he was subject to racial discrimination by VA management, the named defendant being Secretary of Veterans Affairs Eric Shinseki, in violation of federal employment discrimination laws, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. Perkins claimed that due to racial discrimination, he was subject to three adverse actions, the opinion said.

After a trial was held in July 2012, a jury awarded the plaintiff $15,000 in damages. The jury found that discrimination based upon race was not proven, but did find that Perkins was retaliated against for filing EEO complaints. Perkins then filed a post-trial motion seeking additional damages including back pay, reinstatement and attorney fees. The February 8 decision granted the request for back pay and attorney fees but denied the requested equitable relief. Counsel for the plaintiff, Shapiro, submitted a fee petition in excess of $519,000. After thoroughly considering the hourly rates and degree of success, Baylson awarded the plaintiff a total attorney fee award of $244,575. Following the U.S. Supreme Court's seminal case, *Hensley v. Eckerhart*, 461 U.S. 424, 433 (U.S. 1983); accord *McKenna v. City of Philadelphia*, 582 F.3d 447, 455 (3d Cir. 2009), in cases where the plaintiff is both successful and unsuccessful on related claims, district

courts "should reduce the hours claimed by the number of hours spent litigating claims on which the party did not succeed, that were distinct from the claims on which the party did succeed." Here, while Perkins had only limited success in his claims, the individual claims were so factually intertwined such that neither the duration and extent of discovery, nor the testimony at trial would be reduced had only the successful claim been brought. Thus, the court refused to simply reduce the attorney's fee petition by a set percentage based upon the percent of claims that were successful.

One additional concern in addressing the fee petition was the extent and effectiveness of settlement negotiations. While the idea of evaluating settlement discussions for the purpose of awarding fees might seem foreign to many, recall that the U.S. Court of Appeals for the Third Circuit stated in *Lohman v. Duryea Borough*, 574 F.3d 163, 167-69 (3d Cir. 2009), that while evidence of settlement negotiations is only one indicator of the measure of success, it is a permissible indicator. (See this author's September 25, 2009, article in *TheLegal* titled "3rd Circuit Dishes Out Pay Cut to Successful Attorney.") Nevertheless, since the plaintiff was desirous of having a jury verdict and not particularly anxious to settle the case, the court did not believe it would be fair to the plaintiff or to Shapiro to reduce the reasonable hours because of what might be characterized as a "hard-nosed" attitude toward settlement.

Turning to the reasonableness of the hourly rate, Baylson noted that the Third Circuit has approved the use of the Community Legal Services' hourly rate schedule to evaluate reasonableness of attorney hourly rates in the Philadelphia area. In this case, Baylson considered the CLS fee schedule, and perhaps more importantly, also took into consideration an affidavit of noted Philadelphia employment attorney Alice W. Ballard, who opined that the market rates and Shapiro's specific experience substantiated a higher rate.

Baylson found that the relatively high hourly rate of $500 was reasonable in this case because "Mr. Shapiro had particular experience in representing government agency employees in litigation against government agencies," which Baylson considered to be a "unique sub-specialty of employment law." In awarding Shapiro a high hourly rate, the decision made clear that the court took into consideration Shapiro's personal involvement in the case from start to finish. Shapiro was "involved in the 'nitty gritty' of client representation." In the court's opinion, "mastery of all aspects of a case is important for the senior trial lawyer in representing the client, particularly when the case is headed to trial." The court seemed to commend Shapiro for engaging directly in these matters that allowed him to master the case in preparation for trial, despite such tasks being less exciting than being in the courtroom.

The court nonetheless only allowed for a lower rate for Shapiro's partner because the four years' worth of discovery and trial preparation were "routine for an employment case," the opinion said. "For this reason, the court believes that the use of a 'blended' rate for all the other attorney time recorded in this case would be appropriate." A blended rate of $250 was utilized for work by other attorneys.

Identifying a specific specialty certainly contributed to the approval of a high hourly rate in this case. It is obviously very helpful to the court to include some detail as to the attorney's relevant background, which may prove to be key in substantiating the amount of fees being requested. Knowledge of discovery matters and personal involvement with the client obviously serves the trial attorney well, and at least in this case, the detailed billing records showing the senior attorney's involvement proved to the court that the attorney had truly done the work being claimed and was entitled to reimbursement.

Finally, this writer could not resist repeating Baylson's rejection of splitting hairs when fighting over fees: "If a court is too parsimonious in awarding fees, even if a plaintiff prevails on only one of several claims, the court has 'cheapened' legal representation. When an individual with colorable claims, which the court believes is an accurate characterization of plaintiff's claims, desires to sue as allowed by Congress, being fair to the plaintiff regarding his counsel's fees is an essential part of enforcement of our civil rights laws, including the laws against employment discrimination." Perhaps this quote is a reflection of Baylson's research and writing on the "destruction of the trial lawyer" (see footnote 7 of the opinion for further insight), or perhaps it is merely a reflection of the work performed by plaintiffs lawyers acting as private attorneys general in enforcing rights in the public interest. Either way, it is very refreshing to see the court take an active stance in condemning the "cheapening" of our noble profession. •

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.*

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