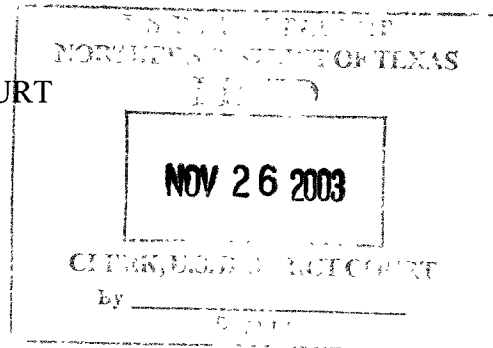


Original

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



OSCAR D. WILLIAMS, JR., et al.,

Plaintiffs,

v.

KAUFMAN COUNTY and KAUFMAN  
COUNTY SHERIFF ROBERT HARRIS,

Defendants.

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Civil Action No. 3:97-CV-0875-L

**ORDER**

Before the court is Plaintiffs' Revised Supplemental Application for Attorney's Fees and Related Expenses, filed August 13, 2003. After consideration of the revised supplemental fee request, responses, record, appendices, and applicable law, the court **grants** as herein modified Plaintiffs' Revised Supplemental Application for Attorney's Fees and Related Expenses.

**I. Background**

In its order of July 30, 2003, the court directed Plaintiffs to submit a revised supplemental application for attorney's fees and related expenses. The court so ordered because it determined that \$184,022.48 for fees and related expenses was excessive. In Plaintiffs' revised supplemental application, they seek a total of \$119,508.60 for attorney's fees and related expenses (\$105,818.75 for attorney's fees and \$13,689.85 in related expenses).<sup>1</sup> Plaintiffs contend that these fees and related expenses were reasonable and necessary to prosecute their fee application.

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<sup>1</sup>Specifically, in the revised supplemental request Plaintiffs seek \$48,357.50 for Gerald Birnberg and \$57,461.25 for William Charles Bundren and his legal assistant in attorney's fees; and they seek \$3,721.26 in related expenses for Mr. Birnberg and \$9,968.59 in such expenses for Mr. Bundren.

Defendants Kaufman County and Sheriff Robert Harris (collectively “Defendants”) contend that the fees requested in the revised supplemental application are excessive.<sup>2</sup> Defendants contend that the revised supplemental application should be denied in its entirety, since the fees sought therein were incurred solely because of the “exorbitant” initial fee request.

## **II. Discussion**

The court recognizes from the outset that the issue here is the number of hours requested. The hourly rates and competence of Gerald M. Birnberg and William Charles Bundren are not a source of dispute. The court has known Messrs. Birnberg and Bundren for over fifteen years, and recognizes both as highly competent attorneys in the area of civil rights litigation. Their competence is not in question. The court simply determines that this case has been overlitigated, and substantially more time than necessary has been expended litigating the fee issue.

As with most cases, and this one is no different, the ultimate resolution of the issue in dispute lies somewhere between the two extremes. In any event, the court is convinced that neither side has taken a reasonable approach to the revised supplemental application. Although Plaintiffs’ reduction of its fees in its revised supplemental application is a step in the right direction, it does not go nearly far enough, and the amount requested is still excessive or exorbitant.<sup>3</sup> Likewise, Defendants’ contention that Plaintiffs should recover nothing as supplemental fees and related expenses is unrealistic. As the parties have provided only a modicum of assistance to the court in resolving the

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<sup>2</sup>Sheriff Harris did not file a response to Plaintiffs’ Revised Supplemental Application for Attorney’s Fees and Related Expenses. Harris did file a response to Plaintiff’s initial fee supplement, and the court assumes that he adopts the same position regarding Plaintiffs’ revised supplement.

<sup>3</sup>In its order of July 30, 2003, the court diplomatically referred to the supplemental request as “excessive,” but in reality it was mind-boggling.

issue of attorney's fees, the court faces the unenviable task of wading into the morass and determining what constitutes reasonable attorney's fees and related expenses with respect to the revised supplemental application.

A prevailing party is entitled to attorney's fees pursuant to 42 U.S.C. § 1988 for the time expended establishing and litigating a fee request.<sup>4</sup> *Cruz v. Hauck*, 762 F.2d 1230, 1233 (5<sup>th</sup> Cir. 1985) (citing *Johnson v. State of Mississippi*, 606 F.2d 635, 637-38 (5<sup>th</sup> Cir. 1979)). A prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). "If the Plaintiffs' 'natural zeal' resulted in their expending more effort than reasonably necessary to establish and defend their fee claim, the district court may reduce the compensable number of hours accordingly." *Cruz*, 762 F.2d at 1234. Finally, "[I]f the attorney's initial claims are exorbitant [or the time spent advancing them unreasonable], the district court should refuse the further compensation." *Alberti v. Klevenhagen*, 896 F.2d 927, 937 (5<sup>th</sup> Cir.), *vacated in part on other grounds*, 903 F.2d 352 (1990) (quoting *Lund v. Affleck*, 587 F.2d 75, 77 (1<sup>st</sup> Cir. 1978)). As the court has determined that both the initial fee request and the initial supplemental fee request were excessive, it could deny any further compensation regarding the revised supplemental fee request. *Id.* The court believes that the language of *Alberti* must be tempered with reason, depending on the circumstances of the case before it. To do otherwise would be fundamentally unfair to Plaintiffs because they did expend some reasonable hours in prosecuting the fee application. The court believes that the better approach

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<sup>4</sup>The court sets forth only the law as applicable for time expended for prosecuting and defending a fee claim. As the court has already set forth the law governing the initial fee request in a prior opinion, restating the law here would be cumulative and unnecessary.

under these circumstances is to adjust the amount requested rather than deny the revised supplemental request outright.

Mr. Birnberg states the 220 hours he actually expended on the prosecution of the fee request is “an unusually high number of hours to be expended by a special fees counsel in connection with a fee application.” Plaintiffs’ Supplemental Appendix (“Supp. App.”), filed August 13, 2003, ¶ 12 at 5. The court agrees.<sup>5</sup> He contends, however, that such time was reasonable and necessary because “defendants resisted every aspect of plaintiffs’ fees claim (other than hourly rates) tenaciously, and asserted a myriad of factual and legal defenses.” *Id.* This argument, of course, begs the question regarding the invalidity of Defendants’ objections. The court previously addressed this argument in its Order of July 30, 2003, at 3, and stated:

Plaintiffs’ Supplemental Application seeks a total of \$184,022.48 as fees and expenses in litigating the fee award. As with Plaintiffs’ original fee request, the amount sought is excessive and needs to be adjusted. Almost \$170,000 of this amount is for attorney’s fees. In an effort to justify their request, Plaintiffs note that Defendants vigorously contested the fee application and made over 635 objections in the initial request, which was for almost one million dollars. Defendants made numerous objections, but many of those objections were well-founded as reflected by the court’s ruling, and, frankly, a number of entries on the original fee application should have never been included in the initial fee request. Had they not been included, no objections would have been necessary. Accordingly, unnecessary time was expended by Plaintiffs in including such entries and thereby responding to Defendants’ objections.

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<sup>5</sup>In addition to the 220 hours initially sought by Mr. Birnberg, Mr. Bundren initially sought compensation for 303.5 hours he expended and 123.5 hours for time expended by his paralegal. In the revised supplemental application, Mr. Birnberg reduced his fee request to 80% of the hours actually expended by him; and Mr. Bundren reduced his request by 50%.

The court's conclusion expressed in its earlier order has not changed: Plaintiffs' over-inclusion of unwarranted entries substantially and unnecessarily increased the time spent by their attorneys on the fee request.

As the court has already concluded, Plaintiffs included many entries in their initial fee request that should not have been included. Plaintiffs thus expended unnecessary time in including these entries and defending their fee claim by responding to Defendants' objections to the inclusion of such entries. The court determines that it should apply the limited success rule to determine the appropriate amount of attorney's fees to be awarded for Plaintiffs establishing and defending their fee claim. When a party has achieved only limited or marginal success on claim(s) asserted, the Supreme Court has observed:

If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for the plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

*Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). In a case where a plaintiff has achieved only limited or partial success, once a court considers the "amount and nature of damages awarded, [it] may lawfully award low fees or no fees without reciting the 12 [*Johnson*] factors bearing on reasonableness," or without computing the lodestar. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). The fee award must be the result of a "measured exercise of discretion" on the court's part. *Id.* at 114. *The court believes that this same principle should be applied to the revised supplemental fee*

*request, as Plaintiffs received only limited success with respect to their initial fee request.* Plaintiffs sought \$979,746.50 in attorney's fees and were awarded \$373,555.45 as reasonable attorney's fees.

The question thus becomes by what amount should the revised fee request be reduced. As the Supreme Court has stated:

There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

*Hensley*, 461 U.S. at 436-37. Since the court has the option of either identifying specific hours that could be eliminated or reducing the award, the court elects to reduce the amount requested with respect to the amount of fees requested for litigating the fee request. As the issue of attorney's fees "should not result in a second major litigation," *Hensley*, 461 U.S. at 437, this court will not spend numerous additional hours painstakingly reviewing each entry with respect to litigation of the fee claim.<sup>6</sup> The court has undertaken such a review with respect to Plaintiffs' initial fee request when it tediously reviewed the initial fee request and subsequently issued its order regarding such fee request.

The court has awarded attorney's fees in civil rights and employment cases, and has dealt with supplemental requests that sought fees for establishing and defending the fee claim. The time requested in the previous supplemental requests have ranged from slightly over 12 hours to approximately 30 hours. This court is well acquainted with the time it takes for an attorney to

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<sup>6</sup>Given the tremendous overkill regarding the fee claim, such a review would be of no assistance, as it is impossible to segregate and eliminate the specific hours that should be eliminated. Doing so would be, at best, an exercise in futility or, at worst, a charade.

establish and defend an attorney's fee claim in a typical civil rights case. The court realizes that this is not the typical civil rights case – there were numerous parties and issues – and it should not be placed in such a category because of the inherent intricacies and complexities that must be factored into such a case when deciding a supplemental fee award. At the same time, the court determines that counsel's zeal has resulted in their expending substantially more hours than reasonably necessary to establish and defend their fee claim.

Based on its experience on civil rights litigation, its knowledge of what has transpired in this case, its earlier rulings, and its experience in setting fees in other civil rights cases, the court exercises its discretion and determines that 64 attorney hours is reasonable and appropriate for Plaintiffs to compile readily available billable information and otherwise defend their attorney's fees claim.<sup>7</sup> This amount reflects just over one and one-half weeks of work (based on an eight-hour day), which is much more in line with what is reasonable, as opposed to the 523.5 hours (over 13 weeks) originally requested by Plaintiffs' counsel, or the revised request for 318.5 hours (166.75 for Mr. Birnberg and 151.75 for Mr. Bundren),<sup>8</sup> which comes to almost eight weeks of work.

Based on the court's determination of 64 hours, the reasonable fee for Plaintiffs' establishing and defending their fee claim is \$21,760. This figure is based on an hourly rate of \$340 per hour,

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<sup>7</sup>In determining that the hours are reasonable and that they adequately compensate Plaintiffs' counsel for the time expended in establishing and defending their fee claim, the court declines to award any fees for services performed by Mr. Bundren's legal assistant. Awarding additional fees beyond this amount would only result in a "windfall," and an award of attorney's fees should not result in a "windfall" to Plaintiffs. Moreover, given the excessive nature of the original and supplemental fee requests, the court is permitted in its discretion to deny such further compensation. *Alberti*, 896 F.2d at 937.

<sup>8</sup>This number does not include the 61.5 hours requested on behalf of Mr. Bundren's legal assistant.

which was used by the court with respect to the initial fee claim.<sup>9</sup> The court finds it unnecessary to apportion the fees between Plaintiffs' counsel, as it is confident that this determination can be made by Plaintiffs and their attorneys.

Finally, with respect to related costs, Plaintiffs seek \$13,689.85 (\$3,721.26 for Mr. Birnberg, and \$9,968.59 for Mr. Bundren). The amount requested for Mr. Bundren represents a 10% reduction of the original supplemental fee request. The amount requested for Mr. Birnberg remains the same.

Defendant Harris objects to \$3,667 in costs because "these have already been addressed by the court." Defendant Robert Harris's Brief in Response to Plaintiffs' Rule 59 Motion at 4. The court cannot ascertain the specific costs entries to which Harris refers. Moreover, Plaintiffs reply that they do not request costs for the same items twice. Although neither side really fleshes out this matter, Defendants fail to show that Plaintiffs are not entitled to the \$3,667 in costs as requested. Other than this reference, Defendants make no specific objections to the amount of related expenses requested, although they do state that the revised supplemental fees and related expenses are exorbitant. In light of the evidence presented by Plaintiffs and the lack of specific objections by Defendants, the court determines that the amount requested in the revised supplemental fee request for related expenses is reasonable, and was necessarily incurred as a result of establishing and defending the fee claim. Plaintiffs are thus entitled to \$13,689.85 for related expenses incurred with respect to their fee claim.

### **III. Conclusion**

For the reasons previously stated, the court **grants as modified herein** Plaintiffs' Revised Supplemental Application for Attorney's Fees and Related Expenses. Accordingly, Plaintiffs are

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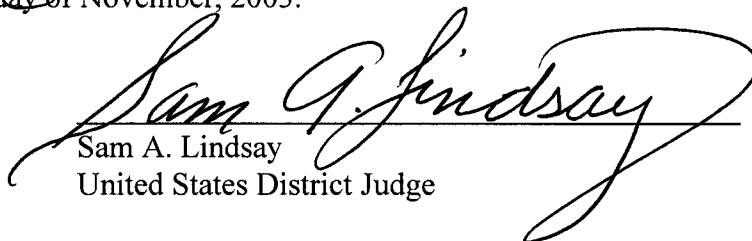
<sup>9</sup>Plaintiffs state that Mr. Birnberg is willing to reduce his current rate of \$375 per hour to \$290 per hour for purposes of the revised supplemental fee request. The court finds this unnecessary because the hourly rate used by the court is \$35 per hour less than Mr. Birnberg's customary hourly rate.



entitled to recover from Defendants Kaufman County and Kaufman County Sheriff Robert Harris, jointly and severally, the amount of \$21,760 as attorney's fees for establishing and defending their fee claim, and shall recover the sum of \$13,689.85 as related expenses with respect to the revised supplemental request. Judgment will issue by separate document as required by Fed. R Civ. P. 58.

As the court has spent extensive time on the issue of attorney's fees and it is convinced that the overall fee award is fair and reasonable, it is not inclined to reconsider or alter this order; its Amended Memorandum Opinion and Order of July 30, 2003; or the subsequent judgment, unless (1) a typographical or clerical error is revealed, and correction of the error is necessary to preserve the rights of a party; or (2) the parties agree to the relief requested. For all other matters, the parties may seek relief at the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

It is so ordered this 26th day of November, 2003.

  
Sam A. Lindsay  
United States District Judge