1999 WL 33208662
Only the Westlaw citation is currently available.
United States District Court, D. Montana.

In the Matter of LITIGATION RELATING TO CONDITIONS OF CONFINEMENT AT MONTANA STATE PRISON,
Terry LANGFORD, James Ball, James Peterschick, Jeff Delaphiano, Trueman Conrad, Anthel Brown, Dan Mason, and Rudy Meissner, on behalf of themselves and all others presently incarcerated or who will in the future be incarcerated at the Montana State Penitentiary,
Plaintiffs,
v.
Marc RACICOT, in his official capacity as Governor of the State of Montana; Rick Day, in his official capacity as Director, Department of Corrections and Human Services; James "Mickey" Gamble, in his official capacity as the Administrator of the Corrections Division of the Montana Department of Corrections and Human Services; Mike Mahoney, in his official capacity as Deputy Warden, Montana State Prison; and the Department of Corrections and Human Services,
Defendants.

No. CV 93–46–H–LBE. | Sept. 30, 1999.

Opinion

ORDER

ERICKSON, Magistrate J.

***1** This matter is before the Court on Plaintiffs' Second Supplemental Motion for Reasonable Attorney's Fees and Costs. The Court being informed now enters the following:

ORDER

1. Plaintiffs' Second Supplemental Motion for Reasonable Attorney's Fees and Costs is granted;

2. Plaintiffs shall submit a fee request delineating, in accordance with this Order, the sum total of requested fees that are solely subject to award under 42 U.S.C. § 1988 and those that are subject to award under 42 U.S.C. § 1997e.

3. On or before October 15, 1999 Defendants shall specifically identify all fees requested by Plaintiffs which Defendants believe are inadequately documented or otherwise improper. Plaintiffs shall have 10 days thereafter to respond. Absent the parties then agreeing on the fees, the Court will set a date for hearing on those claims still in dispute.

I. INTRODUCTION

Presently before the Court is Plaintiffs' Second Supplemental Motion for Reasonable Attorney's Fees and Costs [hereinafter Plaintiffs' Second Motion]. In their motion, Plaintiffs seek reimbursement for fees and costs incurred since April 1, 1996 that are associated with monitoring Defendants' compliance with actions required by the parties' Settlement Agreement. (*See* Pls.' Second Mot. at 1–2.) Plaintiffs currently seek the following fees and costs:

1.	Counsel for National Prison Project:	$177,272.90
2.	Edmund Sheehy	$ 1,035.97
3.	Scott Wurster	$ 70,774.54
	Total Request:	$249,083.41

This Court is prepared to rule on the merits of Plaintiffs' motion but not as to the amount due at this time.

II. BACKGROUND

Pursuant to 42 U.S.C. § 1988, this Court had previously awarded Plaintiffs attorney's fees and costs associated with monitoring Defendants' compliance with activities required by the parties' Settlement Agreement. (*See* Order dated November 8, 1995.) Since that time, however, Congress has enacted the Prison Litigation Reform Act (PLRA), codified as amended at 42 U.S.C. § 1997. Consequently, the Court must now consider language in both 42 U.S.C. § 1988 and 42 U.S.C. § 1997e(d) in addressing Plaintiffs' request for attorney fees.

The threshold question is whether any of Plaintiffs' requested fees are subject to the provisions of 42 U.S.C. § 1997e(d). The United States Supreme Court recently decided *Martin v. Hadix,* 527 U.S. 343, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999). As recognized by the Ninth Circuit Court of Appeals in *Madrid v. Gomez,* 1999 WL 669063, (9th Cir.1999), *Martin* is controlling in cases such as this where services were performed both before and after the PLRA's enactment. *Martin* dictates that any fees for services performed by the Plaintiffs prior to the PLRA's enactment are not subject to the provisions found in 42 U.S.C. § 1997e(d). *See* ___ U.S. ___, 119 S.Ct. 2001, ___ L.Ed.2d ___ (1999). Any fees for services performed after the PLRA's enactment, however, are subject to 42 U.S.C. § 1997e(d). *See id.*

***2** Because Plaintiffs have requested fees for services performed on April 26, 1996, the day the PLRA was enacted, the Court must consider whether those fees are subject to the PLRA. (*See* Decl. of Eric Balaban in Supp. of Second Supplemental Fees Mot., Ex. A, at 5.) *Martin* did not address the question of whether fees for services performed on April 26, 1996 were subject to the PLRA. However, based on the reasoning and language of *Martin,* this Court concludes that services performed by Plaintiffs on April 26, 1996 are not subject to the provisions of 42 U.S.C. § 1997e(d). In *Martin,* the Supreme Court arrived at its decision by applying "a common sense, functional judgment" that was guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." ___ U.S. at ___, 119 S.Ct. at 2006, 144 L.Ed.2d at ___. Practically, Plaintiffs would not likely have received notice of the PLRA's passage until the day after its enactment, April 27, 1996. Therefore, until that time it cannot reasonably be said that Plaintiffs had "fair" notice of the PLRA's limitations, nor that they would have expected their fees to be subject to the PLRA.

As for fees accrued subsequent to April 26, 1996, they clearly are subject to the limitations in the PLRA, it being the general rule that statutes become effective the date they are enacted. *See Lyons v. Ohio Adult Parole Auth.,* 105 F.3d 1063, 1066 (6th Cir.1997) (statutes become effective when enacted absent indication to contrary)"). *See Wright v. Morris,* 111 F.3d 414, 417 (6th Cir.1997) ("The new law [PLRA] was signed by the President on April 26, 1996, and went into effect that same day.

Having determined which of Plaintiffs' requested fees are subject to the PLRA and which are not, this court will address three questions raised by the parties:

1) Does the plain language of the PLRA prohibit Plaintiffs from recovering any post-PLRA fees?

2) If the plain language of the PLRA does not prohibit Plaintiffs from recovering post-PLRA fees, what is the maximum rate at which the Plaintiffs may be compensated under the PLRA?

3) Should some of Plaintiffs' requested attorney fees be reduced because of inadequate documentation?

III. DISCUSSION

A. Does the plain language of the PLRA prohibit Plaintiffs from recovering any post-PLRA fees?

Before a plaintiff can recover post-PLRA fees, the PLRA's plain language requires a plaintiff prove:

> the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights ... and ... is proportionately related to the court ordered relief ... or ... was directly and reasonably incurred in enforcing the relief ordered before fees can be awarded.[1]

42 U.S.C. § 1997e(d)(1).

Defendants contend that Plaintiffs are not entitled to any fees under the PLRA because Plaintiffs "have failed to prove that their rights have been violated" as they believe is required by the statute's plain language. (Defs.' Mem. Opposing Pls.' Second Supplemental Mot. for Att'y Fees [hereinafter Defs.' Opposing Mot.] at 2. *See also* Defs.' Resp. to Pls.' Notice of Supplemental Authority at 4.) Plaintiffs, citing the facts of *Martin* and *Hadix v. Johnson,*

143 F.3d 246 (6th Cir.1998), counter that they are entitled to fees under the PLRA even though they have not actually proven a violation of their rights. (*See* Notice of Supplemental Authority in Supp. of Pls.' Second Supplemental Mot. for Reasonable Att'y Fees and Expenses at 2–5.)

***3** The Parties have not pointed to any case law that directly addresses the issue of whether attorney fees may be recovered under the PLRA when a plaintiff has not actually proven his rights have been violated. However, a review of decisions addressing attorney fees under the PLRA suggest a plaintiff need not actually prove his rights have been violated to recover fees under the PLRA. In *Martin,* the Supreme Court was aware the parties in *Hadix* had entered into a consent decree to settle plaintiffs claims, yet the Court made no mention of this being a possible bar to recovery under the PLRA. *See* ___ U.S. at ___, 119 S.Ct. at 2002, 144 L.Ed.2d at ___. Nor did the Sixth Circuit raise this issue in deciding to award attorney fees to the plaintiffs in *Hadix. See* 143 F.3d 246. Additionally, in *Weaver v. Clarke,* 933 F.Supp. 831, 836 (D.Neb.1996), the District Court opined that evidence merely leading to a presumptive violation of a plaintiff's rights would be enough to satisfy the requirements of 42 U.S.C. § 1997e(d)(1).

Because the aforementioned cases only lead to the implication that settlement favorable to Plaintiffs is adequate for an award of fees, without directly addressing the issue, it is appropriate to also consider case law under the PLRA's companion statute, 42 U.S.C. § 1988, for further guidance. It has long been the rule under 42 U.S .C. § 1988 that attorney fees may properly be awarded to a prevailing party even if a dispute was settled prior to adjudication on the merits. *See, e.g., Maher v. Gagne,* 448 U.S. 122, 129, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653, 661 (1980) ("The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees.") Of particular note to the instant case is the holding under 42 U.S.C. § 1988 that post-judgment monitoring of activities under consent decrees, which often result from parties' settlement agreements, "is a compensable activity for which counsel is entitled to a reasonable fee." *Pennsylvania v. Delaware Valley Citizens Council for Clean Air,* 478 U.S. 546, 559, 106 S.Ct. 3088, 3095, 92 L.Ed.2d 439, 452 (1986) (citations omitted). In *Maher,* the United States Supreme Court explained the rationale behind allowing attorney fees under 42 U.S.C. § 1988 when parties choose to settle their dispute prior to adjudication on the merits:

> Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. S Rep No. 94–1011, p 5 (1976).

448 U.S. 122, 129, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653, 661.

Plaintiffs were previously deemed a prevailing party by this Court and have received attorney fees pursuant to 42 U.S.C. § 1988. (*See* Order dated June 15, 1995; Order dated November 8, 1995.) Plaintiffs now seek fees for additional services, namely those related to post-judgment monitoring. The rationale behind the rule in allowing attorney fees under 42 U.S.C. § 1988 when parties choose to settle their dispute rather than seek adjudication on the merits suggests such fees should also be allowed under the PLRA.

***4** First, like 42 U.S.C. § 1988, the PLRA makes no mention of requiring full litigation or a judicial determination before attorney fees may be awarded. Like the Supreme Court in *Maher,* this Court is reluctant to read into 42 U.S.C. § 1997e(d) such a condition, especially when Plaintiffs have already received fees pursuant to 42 U.S.C. § 1988.

Second, while neither party pointed to any PLRA legislative history expressly discussing consent judgements or informal relief similar to that mentioned in *Maher* to support its argument, Plaintiffs did cite noteworthy legislative history regarding the purpose behind enacting the PLRA. (*See* Reply Br. in Support of Pls.' Second Supplemental Mot. for Reasonable Att'y Fees and Expenses [hereinafter Pls.' Supplemental Reply Br.] at 7.) Congress enacted the PLRA "with the principal purpose of deterring frivolous prisoner litigation by instituting economic costs for prisoners wishing to file civil claims," not for the purpose of deterring meritorious claims. *Hernandez v. Kalinowski,* 146 F.3d 196 (3rd Cir.1998) (citing *Lyon v. Krol,* 127 F.3d 763, 764 (8th Cir.1997); 141 Cong. Rec. S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham)). In the instant case Plaintiffs and Defendants entered into a Settlement Agreement whereby Defendants agreed to institute numerous substantive changes at the Montana State Prison. (*See* Settlement Agreement.) It is unlikely Defendants would have agreed to do so if they truly believed Plaintiffs' claims were frivolous. Thus, Plaintiffs' claims are deemed to have had merit.

Finally, both the judicial system itself and public policy have long encouraged parties to settle their disputes. *See, e.g., McDermott, Inc. v. AmClyde,* 511 U.S. 202, 215, 114 S.Ct. 1461, 1468, 128 L.Ed.2d 148, 160 (1994) ("public policy wisely encourages settlements"); *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40, 53 (1983) ("A request for attorney's fees should not result in a second major litigation. Ideally, of

course, litigants will settle the amount of a fee."); (emphasis supplied) *Marek v. Chesny,* 473 U.S. 1, 2, 105 S.Ct. 3012, 3013, 87 L.Ed.2d 1, 8 (Fed.R.Civ.P. 68 "encourages settlement"). Denying a plaintiff's post-PLRA fees because it chose to settle its dispute rather than seek an adjudication on the merits would only serve to undermine the long-standing principle of encouraging party settlements.

For the reasons cited above, this Court finds the PLRA allows Plaintiffs in this case to recover post-PLRA attorney fees.

B. What is the maximum rate at which Plaintiffs may be compensated under the PLRA?

Having determined the PLRA allows Plaintiffs to recover post-PLRA fees, it is necessary to determine the maximum rate at which Plaintiffs may be compensated under the PLRA. From the outset it is important to note that the PLRA limits the *maximum* rate at which Plaintiffs may be compensated under the PLRA. If, in actually calculating Plaintiffs' fee award the Court finds the *reasonable* rate is less than the maximum rate, the Plaintiffs will be paid the reasonable rate. *See generally Alexander S. v. Boyd,* 113 F.3d 1373, 1388 (4th Cir.1997)

***5** Section 1997e(d)(3) of United States Code Title 42 states: "No award of attorney's fees ... shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 ... [Civil Justice Reform Act (CJRA)]." Section 3006A states that attorney compensation rates are "$40 per hour for time reasonably expended out of court," although both parties recognize that CJRA attorneys in the District of Montana are currently paid $45 per hour for out-of-court time. (*See* Pls.' Supplemental Reply Br. at 14; Defs.' Opposing Mem at 8.) Both parties also recognize that the Judicial Conference has approved an increase in the hourly CJRA compensation rate to $75 per hour for the District of Montana, but that hourly rate has never been implemented. (*See* Pls.' Supplemental Reply Br. at 15; Defs.' Opposing Mem. at 8.) As pointed out by Plaintiffs, the approved and implemented CJRA rate for attorneys in the District of Columbia is $75 per hour for out-of-court time.

Plaintiffs argue that because the Judicial Conference has approved an hourly rate of $75 per hour for the District of Montana, all their attorney fees should be compensated at $112.50 per hour ($75/hr x 150%). (*See* Pls.' Supplemental Reply Br. at 14–16.) In the alternative, they argue that at the very least the National Prison Project (NPP) attorneys should be compensated at $112.50 because the District of Columbia is the relevant community for determining the appropriate hourly rate for those attorneys. (*See* Pls.' Supplemental Reply Br. at 16–19.) Defendants argue that because an hourly rate of $75 per hour has only been approved, but not implemented, for the District of Montana, Plaintiffs attorneys should be compensated at only $67.50 per hour ($45/hr x 150%). (*See* Defs.' Opposing Mem. at 8–9.)

Given Plaintiffs' alternative arguments, the Court will address the appropriate compensation rate for Plaintiffs' Montana-based attorneys and NPP attorneys separately.

1. Montana-based Attorneys

Case law dealing directly with fee compensation rates under the PLRA where the Judicial Conference has approved an increased rate, but the rate has not been implemented, is sparse. Like Defendants, this Court has uncovered only one published decision discussing the subject: *Hernandez v. Kalinowski,* 146 F.3d 196 (3rd Cir.1998). In *Hernandez,* the Third Circuit Court of Appeals concluded the appropriate compensation base rate under 42 U.S.C. § 1997e(d)(3) for the Eastern District of Pennsylvania was the implemented rate of $45 per hour, not the Judicial Conference's approved rate of $75 per hour. *See* 146 F.3d at 201.

The requirement under the PLRA that the "established" rate be used to calculate the maximum compensation rate lends credence to the Third Circuit Court's decision. Webster's Dictionary defines "established" as to "bring about" or to "gain full recognition of." Webster's Ninth New Collegiate Dictionary 425 (Merriam–Webster, Inc.1986). Because the approved rate of $75 per hour for the District of Montana has never been implemented, it cannot be said that it has been "brought about" or has gained full recognition as the appropriate base rate to use in computing attorney fees under the PLRA. Further, to this Court's knowledge, there are no current plans to implement the approved rate of $75 per hour in the District of Montana, which would lead to its establishment.

***6** Therefore, this Court concludes the appropriate base rate for calculating the maximum fee allowed under the PLRA for Plaintiffs' Montana-based attorneys is $45 per hour. Accordingly, those attorneys are to be compensated for post-PLRA out-of-court time at no greater than $67.50 per hour.

2. NPP Attorneys

This Court previously determined that the relevant market for determining the hourly rate for attorney fees granted under 42 U.S.C. § 1988 was the place where Plaintiffs' NPP attorneys are sited. (*See* Order dated November 8, 1995, at 12.) This Court finds no precedent indicating that consideration of the market should differ for fees granted

under the PLRA. Therefore, for the reasons set forth in its Order dated November 8, 1995, this Court finds the appropriate base rate for calculating the maximum fee under the PLRA for the Plaintiffs' NPP attorneys is that currently implemented in the District of Columbia—$75 per hour. Accordingly, those attorneys are to be compensated under the PLRA for out-of-court time at no greater than $112.50 per hour.

C. Should some of Plaintiffs' requested attorney fees be reduced because of inadequate documentation?

Defendants contend many of Plaintiffs requested fees are inadequately documented and cite several examples to support their argument. (*See* Defs.' Opposing Mem. at 5–6.) They thus request Plaintiffs' fees be reduced by proportionate amounts, based on their cited examples. (*See id.* at 6.) Plaintiffs contend all their requested fees have been adequately documented and no reduction is appropriate. (*See* Pls.' Supplemental Reply Br. at 8–14.)

This Court will not summarily grant Defendants' request for bulk reductions of Plaintiffs' requested fees. However, it will grant Defendants an opportunity to detail specifically which of Plaintiffs' fees it alleges are inadequately documented and the basis for its allegations. Likewise, it will grant Plaintiffs an opportunity to rebut Defendants' arguments.

In light of the suggestion contained in *Marek v. Chesny,* supra, the Court anticipates that the parties will thereafter meet and attempt to settle the attorneys fees issues in accord with the provisions of this Order. To the extent some items remain unresolved, then upon motion of either party the Court will conduct a hearing to address those items.

Footnotes

1 It is important to note that a plaintiff may only recover fees under the PLRA if he proves both that he is eligible for fees under 42 U.S.C. § 1988 and that he meets the requirements of 42 U.S.C. § 1997e(d)(1). *See Alexander S. v. Boyd,* 113 F.3d 1373, 1388 (4th Cir.1997); *Clark v. Phillips,* 965 F.Supp. 331, 333 (N.D.N .Y.1997).