1994 WL 86690
Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

ALLIANCE TO END REPRESSION, et al., Plaintiffs,
v.
CITY OF CHICAGO, et al., Defendants.

No. 74 C 3268. | March 15, 1994.

Opinion

MEMORANDUM OPINION AND ORDER

ANN CLAIRE WILLIAMS, District Judge.

***1** This matter is before the court on plaintiffs' motion for an award of attorney's fees under the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988 ("§ 1988") against defendant City of Chicago ("City"). Specifically, *Alliance* and *ACLU* plaintiffs seek compensation for counsel's time spent monitoring the City's compliance with the Agreed Order, Judgment and Decree ("Judgment") entered in this case on April 21, 1981. This motion was referred to Magistrate Judge Joan Lefkow, and she issued her Report and Recommendation ("R & R") granting the motion with a few exceptions. For the reasons explained below, the court adopts Magistrate Judge Lefkow's report and recommendation as modified.

Background

This attorney's fee dispute arises out of two civil rights class action suits brought by a coalition of individuals, churches, political groups, and civil liberties organizations against numerous federal and local governmental defendants including the City.[1] Plaintiffs claimed that defendants unlawfully conducted surveillance and gathered information about plaintiffs' lawful political activities, in violation of their constitutional rights, 42 U.S.C. § 1983, and federal privacy statutes. After being litigated for several years, both cases were settled.[2]

The consent decree with the City is memorialized in the Judgment. The Judgment established numerous procedures governing Police Department investigations, and also provided that the Police Board shall "audit, monitor and evaluate compliance with this Judgment, and with administrative regulations adopted pursuant to the Judgment, and ... report to the Mayor, the Superintendent of Police and the public concerning its findings." (Judgment, Art. I., § 5.1.1). To that end, the Police Board was required to hire an independent national public accounting firm to conduct management audits of the City's implementation of and compliance with the Judgment. (Judgment, Art. I., § 5.2). These audits were to be conducted in 1982, 1984 and every five years thereafter. (*Id.*)

In 1982 and 1984, an accounting firm conducted audits and made recommendations. The parties responded to the recommendations, resolved as many disputed recommendations as they could, and submitted the remaining disputed issues to the court for resolution. The City voluntarily compensated plaintiffs' counsel for the time devoted to this review process. However, sometime after the 1984 audit, the Police Board determined that it could no longer carry out its monitoring and oversight responsibilities. After counsel refused to seek relief from the court, the Police Board wrote the court of its "incapacity to be responsible monitors of compliance with the terms of the Judgment Order," and asked to be relieved of this responsibility. (March 24, 1988 Letter, ACLU Plaintiffs' Reply Memorandum in Support of Petition for Attorney's Fees, Ex. 4).

The court referred this matter to Magistrate Judge Lefkow to assist the parties in resolving this monitoring problem. The parties then met several times privately, and with the Magistrate Judge, to try to formulate a plan that would comply with the Judgment. Also, from April 1988 through the first few months of 1989, plaintiffs conducted discovery to investigate the issues which the Police Board raised in its March 24, 1988 letter. Although plaintiffs concluded that the Police Board's default in monitoring and compliance was inexcusable, they researched appointing a master as a replacement for the Police Board.

***2** In December 1988, plaintiffs informed the City of their findings and stated that (1) the parties could agree to an independent, jointly selected monitor to replace the Police Board, or (2) plaintiffs would petition the court for appointment of a master. After conferring with the Mayor, the City chose the former option. However, plaintiffs continued contingency preparations to petition for a master, and researched the enforceability of the Judgment and the requirements for appointment of a master.

In April 1989, the parties agreed upon a Compliance Agreement ("Agreement") which provided for an independent monitor, jointly appointed by the Mayor and

plaintiffs, to take over the Police Board's responsibilities under the Judgment. On April 18, 1988, the Agreement was approved by the Magistrate Judge and executed by Mayor Sawyer and Corporation Counsel, but still awaiting approval by the City Council.

However, in April 1990, the new City administration concluded that the Agreement was void because it had not been approved by the City Council, and found that the cost of funding a monitor was not justified. The City also represented that the new Police Board "could and would devote the necessary resources to monitoring compliance with the 1981 Consent Judgment." Yet, after four years of default, plaintiffs were reluctant to revert back to Police Board monitoring. Nevertheless, plaintiffs decided to negotiate further with the City and reserve court action while the Police Board conducted the new audit.

The City allowed plaintiffs' counsel to be extensively involved in the formulation of the new audit process. In addition, the scope of the audit was expanded because plaintiffs persuaded the City that its "primary focus" interpretation of the Judgment's constraints on investigative activity was wrong.[3]

At issue here is plaintiffs' petition for attorney fees for counsel in the *Alliance* and the *ACLU* cases for their (1) post-judgment monitoring of the Judgment, (2) research regarding the enforceability of the consent decree and appointment of a master, and (3) time spent negotiating the Agreement. In general, the City argues that fees should not be awarded to plaintiffs for their voluntary decision to "monitor" compliance with the Judgment.

Discussion

In general, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, permits the court to award reasonable attorney's fees to the prevailing party in actions brought under § 1983 and other civil rights statutes. In addition, the Supreme Court's decision in *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air,* 478 U.S. 546, 559 (1986), sanctions the award of a reasonable attorney's fee under § 1988 for certain post-judgment monitoring of consent decrees. *See also Bond v. Stanton,* 630 F.2d 1231 (7th Cir.1980); *Miller v. Carson,* 628 F.2d 346 (5th Cir.1980); *Northcross v. Board of Educ.,* 611 F.2d 624 (6th Cir.1979).

***3** In *Delaware Valley,* the plaintiff citizen's organization and the United States filed suit in 1977 to compel the Commonwealth of Pennsylvania ("the Commonwealth") to implement a vehicle emission inspection and maintenance ("I/M") program as required by the Clean Air Act, 42 U.S.C. § 7401, *et seq.* In 1978, the court approved a consent decree which provided, *inter alia,* (1) the Commonwealth would establish an I/M program for ten counties by August 1980, and (2) the Pennsylvania Department of Transportation ("PennDOT") would propose legislation instituting a franchise I/M system with private garages, or promulgate regulations permitting the state to certify private garages to perform the inspections if the legislature rejected the franchise system. *Delaware Valley,* 478 U.S. at 549.

The legislature refused to enact a franchise system, and PennDOT did not publish the required regulations until Delaware Valley moved for contempt. After the regulations were published, Delaware Valley continued to monitor the Commonwealth's performance under the consent decree, and submitted comments on the regulations. *Id.* at 550. The implementation of the I/M program did not go smoothly. First, implementation was delayed several times by agreement. Later, the court found that the Commonwealth violated the consent decree. *Id.* Then, the Pennsylvania General Assembly enacted legislation prohibiting the expenditure of state funds for the I/M program. Finally, a new implementation schedule was approved and the contempt vacated, after the Pennsylvania General Assembly passed legislation in May 1983, authorizing the Commonwealth to proceed with the I/M program. *Id.* at 551.

Delaware Valley then sought attorney's fees and costs under the Clean Air Act for all of the work it performed after issuance of the consent decree. This fee petition included the time spent monitoring the Commonwealth's compliance under the consent decree, and spent in hearings before the Environmental Protection Agency.[4] Significantly, the Court affirmed the district court's award of these attorney's fees, emphasizing that numerous courts had permitted monitoring fees under § 1988. *Id.* at 559. Moreover, the Court reasoned that the fees were appropriately awarded because in that case, "measures necessary to enforce the remedy ordered by the District Court [could not] be divorced from the matters upon which Delaware Valley prevailed in securing the consent decree." *Id.* However, the Court emphasized that such work is compensable as a reasonable attorney's fee only if it is " 'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." *Id.* at 561 (quoting *Webb v. Board of Ed. of Dyer County,* 471 U.S. 234 (1985)).

In the instant case, Magistrate Judge Lefkow applied the "reasonable and necessary" standard articulated in *Delaware Valley* in her evaluation of plaintiffs' petition. After reviewing the relevant law, plaintiffs' briefs and the City's objections, the Magistrate Judge recommended that

> ***4** the petition of Futterman & Howard and the petition of *Alliance*

> plaintiffs on behalf of Richard A. Gutman for attorney's fees be granted in all respects with the following exceptions: (1) the amount of time compensated for research concerning enforceability of the consent decree should be reduced by 25 percent; and (2) the billing rate for Mr. Gutman and Mr. Howard should be set at $225 per hour for work performed in 1991 and $250 per hour for work performed in 1992. The objections of the defendant City of Chicago should in all other respects be overruled.

(R & R at 24–25).

The City agrees that the time counsel spent investigating and responding to the Police Board's March 24, 1988 letter is compensable. The City also acknowledges that, to the extent that counsel's efforts in negotiating the Agreement were reasonable and necessary to obtaining certain relief such as the resolution of the "primary focus" language, this time is also compensable.[5] However, the City has numerous objections to the Magistrate Judge's recommendation.[6] The court will discuss each in turn.

The City's Objections

In general, the City contends that (1) plaintiffs' monitoring of the Judgment is not compensable because that duty is assigned to the Police Board with limited exceptions, (2) the compensable time devoted to negotiating the Compliance Agreement should be significantly decreased due to the limited success achieved, and (3) the time spent researching the enforceability of the Judgment is not compensable.

A. Fees for Monitoring the City's Compliance

As an initial matter, the court rejects the City's contention that "[t]he Magistrate Judge simply assumed that describing activity as 'monitoring,' without more, justified the award of fees under 42 U.S.C. § 1988.' " (Objections at 2).[7] Magistrate Judge Lefkow never held that monitoring "in and of itself" is compensable. Instead, she made clear that the governing standard for the award of post-judgment monitoring is the reasonable and necessary standard discussed in *Delaware Valley.*[8] (R & R at 14, 17). The Magistrate Judge then evaluated the disputed work in light of this standard. (R & R at 17, 19–21). Ultimately, the Magistrate Judge concluded that the majority of plaintiffs' services were compensable because they were "reasonable and necessary to secure enforcement of the Judgment." (R & R at 19). Thus, this objection is meritless.

The City also makes much of the fact that the Judgment requires the Police Board to "audit, monitor, and evaluate compliance." In addition, the City emphasizes that plaintiffs need only be consulted if the Police Department changes its regulations implementing the terms of the consent decree. (Objections at 3). This objection is rejected.

Although the Judgment charges the Police Board with monitoring duties, this fact alone, does not preclude a fee award for plaintiffs' reasonable monitoring activities. In fact, fees have been awarded in several cases where the consent decree imposes monitoring duties on another entity. *See e.g., Keith v. Volpe,* 833 F.2d 850, 858 (9th Cir.1987) (finding that the consent decree's creation of other monitoring entities did not preclude an award of attorney's fees because counsel's services were not duplicative); *Brewster v. Dukakis,* 786 F.2d 16, 18–19 (1st Cir.1986) (although the consent decree created a defendant-funded monitor, fees were allowed because the reduced fees seemed reasonable, counsel's activities were not duplicative, and defendants had no authority supporting their position that fees were unavailable).

***5** This court is certainly mindful of the fact that plaintiffs should not be reimbursed for general oversight and monitoring of the Judgment, especially when the decree provides for a monitor. However, as the Magistrate Judge noted, there is no need to place a time limit on plaintiffs' oversight because the court will deny fees if plaintiffs are doing unnecessary work. Moreover, the court will not award fees where plaintiffs' efforts just duplicate the work of the Police Board. Of course, the City cannot argue that plaintiff's work was duplicative here because the very reason that plaintiffs became actively engaged in such monitoring was because the Police Board informed them that it could not perform its auditing and monitoring duties.[9]

B. Downward Adjustment Based on Limited Success

The City also suggests that under *Farrar v. Hobby,* 113 S.Ct. 566, 574 (1992), the total amount of attorney's fees awarded must be decreased because of the limited degree of success achieved. Specifically, defendant points out that (1) there was never a judicial finding that the Police Board actually failed to comply, and (2) the Compliance Agreement, which would have modified the Judgment, was never adopted. (Objections Memo at 4, 11–13).[10]

The court does not agree that the principles articulated in *Farrar* should be applied to the instant case. In *Farrar,*

the Supreme Court was asked to decide whether a plaintiff who wins only nominal damages is a "prevailing party" within the meaning of § 1988. The Court answered "yes," but noted that a plaintiff's overall success is the most critical factor in determining the "reasonableness" of the fee award. *Id.* at 574. In that case, the plaintiffs requested declaratory relief and $17 million in damages against several defendants for alleged violations of 42 U.S.C. §§ 1983 and 1985. The jury determined that one defendant violated the plaintiffs' civil rights, but only awarded them one dollar. Thus, the Court addressed the reasonableness of fees under circumstances where the plaintiffs had technically "prevailed," but only achieved a very limited degree of success on the merits. Such is not the case here.

In this case, plaintiffs are undoubtably "prevailing parties" because the Judgment provisions make it clear that they obtained significant relief on the merits. *See Hewitt v. Helms,* 482 U.S. 755, 760–61 (1987) (noting that relief on the merits can be obtained through settlement or a consent decree). Moreover, such relief was causally linked to their lawsuit, and defendants did not act wholly gratuitously.[11] *See Harrington v. DeVito,* 656 F.2d 264, 266–68 (7th Cir.1981) (discussing requirements for "prevailing party" status in cases which settle or result in a consent decree). Furthermore, the City has failed to provide, and this court's research has not uncovered, authority indicating that *Farrar* is applicable under these circumstances.

In contrast, *Delaware Valley* clearly holds that reasonable fees are compensable in this case if the services were "useful" and "ordinarily necessary" to ensure compliance or protect and enforce rights awarded to the prevailing party under the consent decree. *Delaware Valley,* 478 U.S. at 561. There is simply no requirement that a prevailing party prove that all of the work performed was "successful." Rather, it is generally appropriate to award fees in these cases if the disputed work was "reasonably related to the claims upon which plaintiffs were definitely successful." *Miller v. Carson,* 628 F.2d 346, 349 (5th Cir.1980). *See also Garrity v. Sununu,* 752 F.2d 727, 739 (1st Cir.1984) (allowing attorney's fees associated with unsuccessful claims because they were related to the successful claims).

***6** In *Miller,* the Fifth Circuit specifically rejected the notion that an attorney's fee award for post-judgment services must be evaluated in terms of the outcome of each issue standing alone. *Miller,* 628 F.2d at 348. Likewise, in *Garrity,* the First Circuit affirmed an award of monitoring fees despite the defendant's argument that such work "was not related to any matter on which plaintiffs 'may be said to have prevailed.' " *Garrity,* 752 F.2d at 738. In rejecting defendant's claim, the First Circuit explained that the district court "was entitled to believe that relief would occur more speedily and reliably if the monitoring referred to occurred, and that [the monitoring] was a necessary aspect of plaintiffs' 'prevailing' in this case." *Id.* at 738–39. Similarly, in *Bond v. Stanton,* 630 F.2d 1231, 1233 (7th Cir.1980), the Seventh Circuit affirmed an award of post-summary judgment attorney's fees because "plaintiffs' diligent efforts to secure compliance with the district court's order were effectively catalytic to the state's eventual submission of an acceptable ... plan."

Lastly, the Ninth Circuit has expressly rejected the notion that the § 1988 prevailing party requirement bars attorney's fees for monitoring activities. In *Keith,* 833 F.2d at 855, individuals living in the path of a proposed freeway and several civil rights groups brought suit against the Federal Highway Administration and various government officials. After seven years of study and negotiation, the parties reached a settlement permitting the freeway project to proceed. *Id.* at 852. As implementation began, the parties agreed on an amendment to the decree and various supplemental attorney's fee petitions. *Id.* at 853. After construction of the freeway and relocation of displaced residents began, the plaintiffs filed another supplemental attorney's fee petition. The majority of the petition was granted, and the defendants appealed. *Id.*

On appeal, the defendants argued, among other things, that the plaintiffs were not "prevailing parties" in matters for which supplemental fees were awarded, and that a finding of contempt or obstruction was a prerequisite to an award of fees. *Id.* at 855. The Ninth Circuit rejected both arguments. In so doing, the court reasoned that plaintiffs had been "productively" involved in several activities, and that the "prevailing party" requirement must be interpreted "in a practical, not formal, manner." *Id.* at 857. In addition, the court determined that "a finding of contempt or obstruction of implementation is not a prerequisite to an award of attorney fees for reasonable post-judgment monitoring of a consent decree." *Id.*

Based upon the law and the facts of this case, the court rejects defendant's argument that the fee award must be decreased because of the "limited success" achieved. Rather, such fees are proper if they were reasonable and necessary. Here, the monitoring fees are proper because: (1) plaintiffs needed to take action after the Police Board admitted that it was not fulfilling its obligations, (2) the work on finding an alternative monitor was a reasonable and necessary response to the Police Board's admission, (3) the negotiations leading to the Compliance Agreement were a productive and reasonable way to enforce the rights guaranteed under the Judgment, and (4) plaintiffs' participation in the new Police Board's 1984 audit resulted in the City rejecting its incorrect "primary focus" analysis. (*See* R & R at 17–19).

C. Fees for Research on the Enforceability of the Judgment

***7** The City argues that it should not have to compensate plaintiffs for their decision to research the enforceability of consent decrees. In particular, the City emphasizes that *ACLU* counsel spent over 178 hours researching the enforceability of consent decrees based upon dicta in *Alliance to End Repression v. City of Chicago,* 820 F.2d 873, 877 (7th Cir.1987) which questioned whether the Consent Decree was binding on future City administrations.[12] In short, the City contends that this research was not reasonable and necessary to secure the Judgment.

Magistrate Judge Lefkow determined that it was necessary for plaintiffs to research the Judgment's enforceability after they received the Police Board's letter in March 1988. However, she questioned whether it was reasonable for an associate to devote 70 hours to this question in August 1987. The Magistrate Judge also correctly noted that, without looking at the work product, it was impossible to determine whether certain work was duplicative or misdirected. (R & R at 20). Consequently, the Magistrate Judge resolved her doubts by reducing this portion of the fee petition by 25 percent. (*Id.*)

This court has scrutinized plaintiffs' fee petition, and agrees with Magistrate Judge Lefkow's reasoned recommendations. However, the court is also troubled by the fact that *ACLU* plaintiffs seek to charge the City with 178 hours of time devoted to researching the enforceability of the Judgment. Since the City did not question the enforceability of the Judgment, it would appear that only the most cursory research was necessary to look into this issue and determine whether plaintiffs should proceed with their plan to obtain a court-appointed monitor. Moreover, the court does not believe that the City should be charged for *any* research expended on this issue *before* the Police Board's letter was received. Therefore, the court imposes a 50% reduction on this portion of the petition. The remainder of the Magistrate Judge's recommendation is adopted.

Conclusion

For the foregoing reasons, the Magistrate Judge's Report and Recommendation is adopted as amended. Pursuant to *Alliance* counsel's December 15, 1993, attorney's fee calculation, Counsel Richard Gutman, is awarded $39,718.82. Counsel for *ACLU* should prepare a draft order setting out the fees payable pursuant to this court's opinion by March 25, 1994.[13] Such order will be entered forthwith.

Footnotes

1 *Alliance to End Repression, et al. v. City of Chicago, et al.,* No. 74 C 3268, was filed as a class action on November 13, 1974. *American Civil Liberties Union, et al. v. City of Chicago, et al.,* No. 75 C 3295, was filed as a class action on October 3, 1975.

2 Former Judge Susan Getzendanner approved settlement agreements with the federal defendants (excluding the Department of Defense defendants) on August 11, 1981. *See Alliance to End Repression v. City of Chicago,* 91 F.R.D. 182, 186 (N.D.Ill.1981). On April 21, 1981, she approved plaintiffs' later settlement agreements with the City defendants and the Department of Defense defendants. *See Alliance to End Repression v. City of Chicago,* 561 F.Supp. 537, 544 (N.D.Ill.1982).

3 In the 1984 audit report, the auditors and the Police Department interpreted the Judgment so that the Judgment's constraints on the City's investigative activity would apply only if the "primary focus" of the investigative activity was on non-criminal First Amendment conduct. (*See* R & R at 8–10). Plaintiffs eventually convinced the City that this interpretation was unduly narrow.

4 "[T]he Commonwealth unsuccessfully sought [the EPA's] approval of an I/M program covering a smaller geographical area." *Id.* at 553.

5 The court also notes that plaintiffs are entitled to compensation for the "time spent litigating their claim for fees." *Bond,* 630 F.2d at 1235.

6 Richard Gutman, counsel in *Alliance,* objects to the hourly rate recommended by the Magistrate Judge. Counsel contends that he should be paid an hourly rate of $250 for 1991, $275 for 1992, and that he should not be awarded the same $225 hourly rate for 1990 and 1991. After considering the Magistrate Judge's report, the National Law Journal's surveys of attorneys' fees and plaintiffs' objection, the court finds that Magistrate Judge Lefkow's recommendation for $225 per hour for 1991, and $250 per hour for 1992, is entirely appropriate. Counsel's objection is rejected.

7 City of Chicago's Objections to the Report and Recommendation of the Magistrate Judge (Objections).

8 In fact, the Magistrate Judge expressly noted that future fees for monitoring should be denied if the court concludes that plaintiffs are doing unnecessary work. (R & R at 18).

9 The court also notes that monitoring activities may be necessary in a case such as this because the consent decree "imposed extensive ongoing and future obligations" on the City. (ACLU Response at 3). *See also In re Burlington Northern, Inc.,* 832 F.2d 422 (7th Cir.1987). In *Burlington Northern,* the Seventh Circuit found that the defendant should not have to pay for post-judgment monitoring work because the consent decree just required it to create a it to create a $10,000,000 settlement fund and "drop out of the picture." *Id.* at 425–27. In denying fees under these circumstances, the court distinguished *Brewster v. Dukakis,* 786 F.2d 16 (1st Cir.1986), where the consent decree "bestowed various responsibilities on the parties." *Id.* at 127 (quoting *Brewster,* 786 F.2d at 17).

10 Defendants' Memorandum in Support of Their Objections to the Report and Recommendation of the Magistrate Judge Concerning Attorneys' Fees ("Objections Memo").

11 For a detailed discussion of plaintiffs' settlement with the City, see Former Judge Getzendanner's opinion approving the settlement in *Alliance,* 561 F.Supp. at 548.

12 In *Alliance,* the court held that there was no "prevailing party" entitled to attorney's fees because there was no justiciable controversy. *Id.* at 878.

13 *ACLU* counsel's December 17, 1993 attorney's fee calculation should be amended to clearly reflect this court's order concerning the 50% reduction in fees relating to the enforcement research, and the appropriate interest calculation.