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United States District Court, N.D. California.

SAN FRANCISCO NAACP, et al., Plaintiffs,
v.
SAN FRANCISCO UNIFIED SCHOOL DISTRICT, et al., Defendants.
Brian HO, by his parent and next friend, Carl Ho, et al., Plaintiff,
v.
SAN FRANCISCO UNIFIED SCHOOL DISTRICT, et al., Defendants.

Nos. C–78–1445 WHO, C–94–2418 WHO. | Sept. 1, 2000.

Opinion

MEMORANDUM DECISION AND ORDER

ORRICK, J.

***1** In this class action, the *Ho* plaintiffs challenged the constitutionality of the race-based student assignment plan set forth in paragraph 13 of the Consent Decree that this Court approved in 1983 to end segregation in the San Francisco Unified School District ("SFUSD"). In an Opinion and Order filed July 2, 1999, the Court granted final approval to a settlement of the *Ho* action. On September 28, 1999, The Court awarded the *Ho* plaintiffs their attorneys' fees and costs, pursuant to 42 U.S.C. § 1988. Currently before the Court is the San Francisco NAACP's ("NAACP") motion for attorneys' fees and costs incurred in defending against the *Ho* action. For the reasons set forth hereinafter, the NAACP's motion is denied.

I.

A.

In 1978, the NAACP filed a class action in this Court ("the *NAACP* action"), seeking desegregation of the SFUSD. In 1983, the Court approved a Consent Decree to resolve the *NAACP* action. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.,* 576 F.Supp. 34 (N.D.Cal.1983). Paragraph 13 of the Consent Decree set forth racial and ethnic guidelines for the assignment of San Francisco schoolchildren to the schools of the SFUSD. Paragraph 12 of the Consent Decree identifies nine racial/ethnic groups for the purpose of defining the racial/ethnic composition of the SFUSD and of each school.

In 1994, several schoolchildren of Chinese descent filed this action ("the *Ho* action"), alleging that paragraph 13's student assignment plan constituted unconstitutional race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The *Ho* plaintiffs filed their lawsuit against the SFUSD, its Board Members, and its Superintendent (collectively the "Local Defendants"), and the California State Board of Education, the State Superintendent of Public Instruction, and the State Department of Education (collectively the "State Defendants"). In January 1995, the *Ho* plaintiffs filed a first amended complaint adding the NAACP as a defendant.

In the first amended complaint, the *Ho* plaintiffs sought an end to the SFUSD's classification and assignment of students by race according to paragraphs 12 and 13 of the Consent Decree. As the litigation progressed, the *Ho* plaintiffs also argued that the alleged unconstitutionality of paragraph 13 required the dissolution of the entire Consent Decree.

On the morning of trial, February 16, 1999, the parties reached a settlement. Under the terms of that settlement, which was approved by the Court on July 2, 1999, the parties agreed, subject to order of the Court, to modify the Consent Decree so that:

1. The Consent Decree would terminate no later than December 31, 2002, subject to Court approval;

2. Paragraph 13 would be modified so that race and ethnicity would not be the primary or predominant consideration in determining student admission criteria, and the SFUSD would not assign or admit any student to a particular school, class or program on the basis of the race or ethnicity of that student, except as related to the language needs of the student or otherwise to assure compliance with controlling federal or state law;

***2** 3. Paragraph 12 of the Consent Decree would be modified to provide that the SFUSD may request, but not require, that parents and/or students identify themselves by race or ethnicity at the time of actual enrollment, and that any request for racial or ethnic data will be optional, except as required by state or federal statute or regulation, and shall contain a "decline to state" provision.

On September 28, 1999, the Court granted the *Ho*

plaintiffs' motion for attorneys' fees and costs in the amount of $1,229,784.53. By stipulation of the parties, that fee award was paid entirely by the State and Local Defendants, with the NAACP bearing no responsibility for the *Ho* plaintiffs' fee award.

B.

The NAACP now moves for an award of $846,358.65 in attorneys' fees and $105,264.22 in costs, pursuant to 42 U.S.C. § 1988, to be paid by the State and Local Defendants.[1] The State and Local Defendants have already paid the fees and costs incurred by the *Ho* plaintiffs, pursuant to an earlier award by the Court.

The NAACP argues that the State and Local defendants should be required to pay its fees and costs, in addition to paying the *Ho* plaintiffs' fees and costs, for four reasons: (1) paragraph 10 of the Consent Decree required the parties to defend the Consent Decree from collateral attack; (2) the Court ordered the NAACP to be joined as a party to the *Ho* action; (3) the NAACP is a prevailing party in the *Ho* action; and (4) the law supports an award of attorneys' fees for defending consent decrees against collateral attacks. None of these arguments justifies an award of fees and costs for the NAACP's work defending against the *Ho* action.

1.

Paragraph 10 of the Consent Decree provides: "In the event objections or challenges are raised to the lawfulness or appropriateness of this Consent Decree, or any provision hereof, or proceedings hereto, the parties shall defend the lawfulness and appropriateness of the matter challenged." (Consent Decree ¶ 10.) The Consent Decree makes no provision for payment of legal fees and costs incurred by the parties in defending the Consent Decree from subsequent legal challenges. Accordingly, the Consent Decree provides no basis for the NAACP's motion for fees and costs.

2.

At a hearing on January 12, 1995, the Court found that the NAACP was a necessary party to the *Ho* action. The NAACP's claim that they are entitled to fees merely because the Court ordered the NAACP to be joined as a party to the *Ho* action is completely unsupported by citation to any legal precedent. The Court is unaware of any authority providing that a party who is joined as a necessary party to an action is entitled to have their legal fees paid by the other parties to the action.

Moreover, the NAACP was not added as a defendant against its will. On December 21, 1994, the NAACP sought leave to file an *amicus* brief in support of the State and Local defendants' motion to dismiss. The NAACP argued that it had a right to be heard and that it would take all necessary actions to protect the interests of the plaintiff class in the *NAACP* action. The Court immediately granted the NAACP's motion for leave to file an *amicus* brief. The NAACP appeared and presented argument at the January 12, 1995 hearing on defendants' motion to dismiss, at which the parties and the Court discussed whether the NAACP should be added as a necessary party. The NAACP never expressed any objection to being added as a necessary party. Accordingly, the NAACP's argument that its fees should be paid by the State and Local defendants because it was dragged unwillingly into the action is unsupported by law or fact.

3.

***3** The Court now turns to the NAACP's argument that it should be awarded fees and costs, pursuant to 42 U.S.C. § 1988, because it was a prevailing party in the *Ho* action. In a civil rights action brought pursuant to 42 U.S.C. § 1983, the Court, "in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs[.]" 42 U.S.C. § 1988(b).

Plaintiffs prevail, within the meaning of § 1988, "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (quoting *Nadeau v. Helgemoe,* 581 F.2d 275, 278–79 (1st Cir.1978)). Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. *Farrar v. Hobby,* 506 U.S. 103, 111, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. *Id.* (citations omitted). A plaintiff prevails "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.*

Where the plaintiff has achieved excellent results, the attorney should recover a fully compensatory fee, even if certain legal theories were rejected or not reached by the Court. *Hensley,* 461 U.S. at 435. When a plaintiff has

achieved only partial or limited success, the Court should award fees based on the degree of success achieved. *Id.* at 436. In reducing a fee award due to limited success, the Court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. *Id.* at 436–37.

A different test applies in determining whether to award fees to a prevailing *defendant.* "[A] district court may in its discretion award attorney's fees to a prevailing defendant ... upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective had faith." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (interpreting Title VII); *Hughes v. Rowe,* 449 U.S. 5, 14–15, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (*per curiam*) (applying *Christiansburg* standard to fee requests brought pursuant to § 1988); *Hensley,* 461 U.S. at 429 n. 2 (interpreting § 1988).

In the *Ho* action, the NAACP was unquestionably aligned as a defendant. The *Ho* plaintiffs challenged the constitutionality of paragraph 13 of the Consent Decree, and the NAACP defended it. Accordingly, even if the NAACP had prevailed in the *Ho* action, it would be entitled to an award of fees only if the *Ho* plaintiffs' claims were frivolous, unreasonable, or without foundation. As the *Ho* plaintiffs obtained nearly everything they sought by bringing the lawsuit, their claims were not frivolous, unreasonable, or without foundation.

***4** In addition, the NAACP cannot be considered to be even a partly prevailing party. The *Ho* plaintiffs sought the end to the race-based student assignment plan set forth in paragraph 13 of the Consent Decree, and the NAACP fought for its retention. The settlement eliminated paragraph 13's race-based assignment plan. The *Ho* plaintiffs also sought an end to mandatory racial self-identification under paragraph 12 of the Consent Decree, and the NAACP defended it. The settlement made racial self-identification optional. Finally, the *Ho* plaintiffs argued, although it was never part of their complaint, that the Consent Decree should be terminated because the race-based assignment plan was no longer constitutional. Although the Court questioned whether the *Ho* plaintiffs could succeed on this argument, the settlement nonetheless provided for an end to the Consent Decree by the end of 2002, subject to Court approval. The NAACP nonetheless argues that it prevailed because it preserved the Consent Decree. The NAACP's agreement to termination of the Consent Decree in 2002, subject to the approval of the Court, hardly constitutes preservation of the Consent Decree. *See, e.g., Wilson v. Mayor & Board of Alderman of St. Francisville, LA,* 135 F.3d 996, 999 (5th Cir.1998) (party opposing modification to consent decree was not prevailing party where its opposition did not cause any material change in the legal relationship of the parties to his benefit).

Accordingly, as the NAACP did not prevail in the *Ho* action, and as the *Ho* plaintiffs' claims were not frivolous, unreasonable, or without foundation, the NAACP is not entitled to an award of fees as a prevailing defendant in the *Ho* action.

4.

The NAACP's final argument is that because they were the prevailing party in the *NAACP* action, they are entitled to fees incurred in monitoring and defending the Consent Decree from collateral attack in the *Ho* action.

It is undisputed that the NAACP prevailed in the *NAACP* action. It is settled law in the Ninth Circuit that the district court has the discretion to award fees and costs to a prevailing party in consent decree litigation for work reasonably spent to monitor and enforce compliance with the decree, even as to matters in which it did not prevail. *Keith v. Volpe,* 833 F.2d 850, 855–57 (9th Cir.1987). The Court has regularly awarded the NAACP its fees for such monitoring activities. It is not entirely clear, at least in this Circuit, whether a prevailing party in consent decree litigation may also be awarded fees incurred in unsuccessfully defending the decree against a collateral attack in a separate action.

The NAACP relies upon *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air,* 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986), in which the Supreme Court approved an award of fees for work done to protect a federal consent decree from challenges in a state court action and a federal regulatory proceeding. In that action, the Delaware Valley Citizen's Council for Clean Air ("Council") obtained a consent decree against the state of Pennsylvania as a result of federal court litigation under the Clean Air Act. (*Id.* at 549.) State legislators later filed a state court action challenging the authority of state officials to enter into the consent decree. (*Id* . at 533 n. 1.) The Council submitted an *amicus* brief in the state court action supporting the state's authority to enter into the consent decree. (*Id.*) The Council also opposed the state's attempt to obtain approval from the Environmental Protection Agency for a program encompassing a smaller geographical area than was contemplated by the consent decree. (*Id.* at 552–53.) The Council ultimately prevailed in both proceedings, and sought attorneys' fees and costs in federal court for its work defending the consent decree in the state court and federal regulatory proceedings. *Id.* at 553.[2]

***5** The Supreme Court held that the district court could

properly award fees to the Council's lawyers for work done in these other proceedings because it "was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success in obtaining the consent decree." *Id.* at 558. Accordingly, "compensation for these activities was entirely proper and well within the 'zone of discretion' afforded the District Court." *Id.* at 561 (citation omitted). Nothing in the *Delaware Valley* case requires the district court to award fees for defending a consent decree from collateral attack, however. *Bullfrog Films, Inc. v. Wick,* 959 F.2d 782, 786 (9th Cir.1992).

The NAACP also relies upon the Fourth Circuit's decision in *Plyler v. Evatt,* 902 F.2d 273 (4th Cir.1990). *Plyler* involved a consent decree relating to prison conditions. *Id.* at 276. The state defendant moved to modify the consent decree, and ultimately prevailed. *Id.* The district court nonetheless awarded fees to the plaintiffs for unsuccessfully litigating the state's motion to modify the consent decree. *Id.* at 277. The Fourth Circuit affirmed, holding that the district court had not abused its discretion in ruling that the state's motion to modify the consent decree was so inextricably intermingled with the original claims in the lawsuit that led to the consent decree that a separate prevailing party analysis of the state's motion to modify the consent decree was not warranted. *Id.* at 280. Thus, the Fourth Circuit found the district court did not abuse its discretion in awarding fees to the plaintiffs for unsuccessfully defending against the state's motion. *Id.* at 281.

The *Ho* plaintiffs and the State Defendants oppose the NAACP's motion, relying largely on *International Federation of Flight Attendants v. Zipes,* 491 U.S. 754, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989), and the Eighth Circuit's interpretation of *Zipes* in *Jenkins v. Missouri,* 967 F.2d 1248 (8th Cir.1992).

In *Zipes,* a union intervened in a sex discrimination lawsuit to challenge a settlement between the original parties to the action. *Id.* at 756–57. The Court rejected the union's attack against the settlement, and the prevailing plaintiffs sought an award of fees from the union, pursuant to 42 U.S.C. § 2000e–5(k). *Id.* at 757–58.[3] After discussing *Christiansburg,* the Court applied that standard to the case before it, and concluded that district courts should award fees against losing intervenors only where the intervenors' action was frivolous, unreasonable, or without foundation. *Id.* at 761. The Court reasoned that the union could have challenged the settlement in a separate lawsuit, "in which suit the original Title VII plaintiff defending the decree would have no basis for claiming attorney's fees." *Id.* at 762 (citing *Martin v. Wilks,* 490 U.S. 755, 762–63, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989)).[4] Thus, the Court treated the plaintiffs as if they had been defendants in a separate suit collaterally attacking the settlement, and found that they were not entitled to fees against the union unless the union's claims were frivolous, unreasonable or without foundation. *Id.* at 766.

***6** In *Jenkins,* the plaintiff class in a school desegregation case successfully defended a consent decree against four attacks, one of which was brought as a separate suit, the *Rivarde* action. 967 F.2d at 1249. The Eighth Circuit held that the plaintiff could not obtain fees from the state defendants for defending against the *Rivarde* action. *Id.* at 1250. The court interpreted *Zipes* to preclude an award of fees for defending the separate lawsuit because "[p]art of the *Zipes* majority's reasoning was that plaintiffs should not be awarded fees against intervenors, since they would not be entitled to fees had the intervenors chosen to bring suit in a collateral attack." *Id.* at 1252 (citing *Zipes,* 491 U.S. at 762). The court later explained that "[t]he primary basis for denying the fee award for *Rivarde* was simply that *Rivarde* was a separate lawsuit and the Supreme Court had disapproved of awarding fees in one case for services rendered in another." *Jenkins v. Missouri,* 73 F.3d 201, 203 (8th Cir.1996). *See also Arvinger v. Mayor & City Council of Baltimore,* 31 F.3d 196 (4th Cir.1994) (plaintiff was not entitled to fees for unsuccessfully litigating separate action seeking enforcement of a settlement he had obtained in a previous civil rights suit); *Gilbert v. Monsanto Co.,* 216 F.3d 695, 702 (8th Cir.2000) (*"Arvinger* stands for the proposition that a prevailing civil rights plaintiff cannot simply carry over prevailing party status to an enforcement action in which the plaintiff did not prevail and be awarded attorney's fees by virtue of success in the first suit.").

Each of these cases grapple with how to apply *Hensley* and *Christiansburg* in various nonstandard situations. At the heart of each of these cases is an effort to determine whether the various parts of the litigation should be considered as one case for purposes of awarding attorneys' fees, or as separate and distinct actions. Once the separate parts of the litigation have been characterized, the Court then determines, under *Hensley* and *Christiansburg,* who is the prevailing party for each part that the Court has conceptualized. Accordingly, the key issue is whether the *Ho* and *NAACP* actions should be considered one case, for purposes of attorneys' fees, or as two separate actions.

A Fourth Circuit case interpreting *Plyler* has explained when subsequent litigation over a consent decree may be considered to be inextricably intermingled with the issues in the original action:

> [W]hen subsequent litigation seeks to enforce or interpret a settlement agreement or consent decree, involving facts and principles

> different from those considered in the underlying litigation, the second is not considered 'inextricably intermingled' with the first. On the other hand, a subsequent litigation initiated against the successful party to modify or 'replay' the issues of the first litigation may be so intermingled. *Plyler* applies to carry forward prevailing party status only in this latter circumstance, and only then when the plaintiffs are forced to litigate to preserve the relief originally obtained.

***7** *Arvinger,* 31 F.3d at 202. *See also Thorne v. City of El Segundo,* 802 F.2d 1131, 1141 (9th Cir.1986) (quoting *Mary Belle G. v. City of Chicago,* 723 F.2d 1263, 1279 (7th Cir.1983) (Test for relatedness is "whether the relief sought on the unsuccessful claim 'is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised." ').

The NAACP argues that it should be awarded fees for its work defending the Consent Decree in the *Ho* action because the issues raised in the *Ho* action were inextricably intermingled with the issues raised in the *NAACP* action. The Court disagrees. The *NAACP* action, in which the consent decree was adopted seventeen years ago, was filed to redress allegedly unconstitutional racial segregation in the SFUSD. The *Ho* action was filed eleven years after the Consent Decree was adopted to determine whether the race-based remedies of the Consent Decree were unconstitutional in light of changed conditions in the SFUSD. The *Ho* action is thus concerned with an entirely different set of facts relating largely to current conditions in the SFUSD—in particular, whether the SFUSD had implemented the Consent Decree in good faith since 1983, whether vestiges of the original segregation remained to be remedied, and whether the race-based assignment plan was narrowly tailored to address those vestiges. The *Ho* action also required an entirely different legal analysis focusing on the constitutionality of the remedy imposed by the Consent Decree in light of new case law issued since the Consent Decree was adopted, rather than on the constitutionality of the allegedly segregatory acts by the SFUSD prior to 1983. The constitutionality of the student assignment remedy of the Consent Decree after 1994 presents issues that are both factually and legally separable from the constitutionality of the SFUSD's conduct in 1983 and earlier. Accordingly, the Court finds that the *Ho* action and the *NAACP* action should be treated as separate actions for purposes of awarding attorneys' fees.

Because the NAACP was a defendant in the *Ho* action, it is entitled to fees only if it was a prevailing party and the *Ho* plaintiffs' claims were frivolous, unreasonable, or without foundation. As explained above, the NAACP was not a prevailing party. In addition, as the *Ho* plaintiffs achieved nearly everything they sought in filing their lawsuit, their claims were not frivolous, unreasonable or without foundation. Accordingly, the NAACP is not entitled to fees for defending against the *Ho* action.

Finally, fees and costs are awarded under § 1988 to a prevailing party only in the Court's discretion. 42 U.S.C. § 1988. Even if the NAACP could be considered to be a partly prevailing party, and the *Ho* action were considered together with the *NAACP* action for purposes of awarding fees, the Court would still have the discretion whether to award fees to the NAACP for its work in the *Ho* action. The Court declines to exercise its discretion to award the NAACP fees.

***8** The NAACP achieved very little, if any, benefit from its years of litigating the *Ho* action. It lost all of the parts of the Consent Decree that it fought to defend, and agreed, for the first time, to a termination date for the entire Consent Decree. In light of the NAACP's lack of success, the Court finds that it would be patently unfair to require the State and Local defendants to pay both the *Ho* plaintiffs' fees and the NAACP's fees and, thus, finance all sides of the litigation.

III.

Accordingly,

IT IS HEREBY ORDERED that the NAACP's motion for attorneys' fees and costs incurred in defending against the *Ho* action is DENIED.

Footnotes

1 The NAACP has informed the Court that it has reached a tentative settlement with the Local Defendants, but not with the State Defendants. As the NAACP has not withdrawn its motion for fees with respect to the Local Defendants, and has not informed the Court that the tentative settlement has been finalized, the Court will rule on the motion with respect to all defendants.

2 Although the Council sought fees under § 304(d) of the Clean Air Act, the Supreme Court noted that "the purposes between both §

304(d) and [42 U.S.C.] § 1988 are nearly identical, which lends credence to the idea that they should be interpreted in a similar manner." *Pennsylvania v. Delaware Valley Citizen's Counsel for Clean Air,* 478 U.S. at 559.

3 Although the Court was interpreting the propriety of fees under § 2000e–5(k), it noted that the language of that statute was substantially the same as that of 42 U.S.C. § 1988. *International Federation of Flight Attendants v. Zipes,* 491 U.S. at 758 n. 2.

4 The NAACP argues erroneously that this portion of *Zipes* is no longer good law because Congress overruled *Martin* when it enacted the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e–2(n). That section merely changed the circumstances in which a collateral attack could be brought against a Title VII consent decree, and says nothing about awarding fees when a collateral attack is properly brought.