UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:01CV-374-H

KENTUCKY RESTAURANT CONCEPTS, INC.,
d/b/a P.T.'s SHOWCLUB, et al. PLAINTIFFS

TAYLOR BLVD. THEATER, INC., et al. INTERVENING PLAINTIFFS

V.

CITY OF LOUISVILLE, et al. DEFENDANTS

MEMORANDUM OPINION

Almost a year ago, this Court issued a thirty-page opinion which enjoined enforcement of an adult entertainment regulatory scheme enacted by the City of Louisville (the "Ordinance"). *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F.Supp.2d 672 (W.D. Ky. 2002). Pursuant to 42 U.S.C. § 1988, Plaintiffs have moved now for attorney's fees and expenses in the amount of $254,859.54. Because Defendants have objected to the amount of the request, the Court will now resolve the differences.

Title 42 U.S.C. § 1988 provides that in a federal civil rights action, "the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs." *Id.* The standard for determining a "prevailing party" is well-established within the Sixth Circuit. *See Berger v. City of Mayfield Heights*, 265 F.3d 399, 406 (6th Cir. 2001). "To be a 'prevailing party,' a party must '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 (1983) (*quoting Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st

Cir. 1978)). "A plaintiff is benefitted by 'monetary damages, injunctive relief, or a voluntary change in a defendant's conduct.'" *Owner-Operator Independent Drivers Ass'n, Inc. v. Bissell*, 210 F.3d 595, 597 (6th Cir. 2000) (*quoting Woolridge v. Marlene Indus*., 898 F.2d 1169, 1173 (6th Cir. 1990). "In short, 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." *Farrar v. Hobby,* 506 U.S. 103, 111 (1992). Under this "generous" definition, no one disputes that Plaintiffs were prevailing parties to this litigation.

The trial court's initial point of departure, when calculating a "reasonable" attorney fee, should be the determination of the fee applicant's "lodestar," which is the proven number of hours reasonably expended on the case by an attorney, multiplied by his court-ascertained reasonable hourly rate. *Hensley*, 461 U.S. at 433. The trial judge may then, within limits, adjust the "lodestar" to reflect relevant considerations peculiar to the subject litigation. *See Reed v. Rhodes*, 179 F.3d 453, 471-72 (6th Cir. 1999). The factors which the district court may consider, either in determining the basic lodestar fee and/or adjustments thereto, include the twelve listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974).[1] *See Hensley*, 461 U.S. at 434 n. 9.

The appropriate time and labor required in a case is the most important initial

[1]"These factors are: (1) the time and labor required by a given case; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Reed*, 179 F.3d at 471-72 n.3 (*citing Johnson*, 488 F.2d at 717-19).

measurement. The Court has carefully reviewed the billing records which form the basis for Plaintiffs' fee request. The Court will award the attorneys their full requested hourly rates due to their expertise and work quality. Though the time of no one attorney seems excessive, the overall amount of attorney's fees seems quite large where the case itself was active for less than a year and required only a modest degree of discovery. True, this case did involve numerous complex issues. Even an attorney of Mr. Shafer's experience would require many hours of research to prepare the best arguments. However, multiple attorneys spent considerable time doing very similar work. To that extent the Court finds the amount of overall attorney time to be excessive. Plaintiffs are not entitled to have any number of well-qualified attorneys reimbursed for their efforts, when fewer attorneys could have accomplished the job. The Court finds that Plaintiffs could have achieved the same result by relying primarily on only any two of these fine law firms. Consequently, the Court will reduce the overall attorneys fees by a modest amount, 10%.

The Court will not allow any recovery for time listed as lobbying prior to enactment of the Ordinance. *See, e.g., Webb v. Board of Educ. of Dyer County, Tenn.*, 471 U.S. 234, 244 (1985) ("The District Court's decision to deny any fees for time spent pursuing optional administrative remedies was well within the range of reasonable discretion."); *Watkins v. Fordice*, 7 F.3d 453, 458 (5th Cir. 1993) ("[T]ime spent lobbying a state legislature before filing a lawsuit is not time 'reasonably expended on the litigation.'"); *United Nuclear Corp. v. Cannon*, 564 F.Supp. 581, 585 (D.C.R.I. 1983) ("With the statute not yet adopted and the shape both of the perceived harm and of the eventual instrument thereof entropic at best, none of this time properly should be recompensed under § 1988.") Consequently, the following hours are disallowed:

Shafer, 38 hours; Rubin, 16 hours; Mascagni, 7.8 hours; and Gold, 12.1 hours. These hours equal $17,272 in fees. As a consequence, the lodestar amount for fees equals $186,645.60. In addition, the Court will also disallow expert witness fees. Allowance of expert fees under § 1988 is limited to claims brought pursuant to §§ 1981 or 1981a. *See* 42 U.S.C. § 1988(c).

After determining the basic "lodestar" amount the "most critical factor in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar,* 506 U.S. at 114. Incomplete success is a common basis for a downward adjustment of the lodestar. A court should exclude time spent on unsuccessful claims that are unrelated to a plaintiff's successful claims--that is, the unsuccessful claims that are based on "different facts and legal theories" than the successful claims. *See Hensley,* 461 U.S. at 440. When, however, the unsuccessful claims are related to the successful ones, then the court must ask "did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id.* A plaintiff who has won substantial relief should not have its attorney's fees reduced simply because the district court did not adopt each contention raised by the plaintiff in its action. *Id.* But if the plaintiff achieved only limited success, the court should reduce the award accordingly. *See id.*

Plaintiffs argue that they succeeded in obtaining a permanent injunction against Defendant from enforcing the Ordinance, which represents complete success*, i.e,* an "excellent" result. In this circumstance, as in every case, one must look behind the face of the Order to determine the degree of success. While Plaintiffs did end up with a permanent injunction in their favor, the Court's ruling represents less than a complete victory. Plaintiffs attacked not only various procedural aspects of the Ordinance, but also the very essence of its substance. These

were two very distinct issues which sought distinctly different remedies; rather than different issues aimed at the same remedy. The Court ultimately upheld the Ordinance's substantive provisions, but found that the Ordinance was procedurally unconstitutional in respect to various inspection and licensing requirements. The Court then determined that it could not sever the substantively constitutional portion of the statute from the defective procedural portions.[2]

On its face the Court's ultimate Order might appear to represent a complete victory. It was not. Plaintiffs achieved far less than complete and total success on the merits. Had the Court determined that the Ordinance was also substantively unconstitutional, much greater obstacles would have deterred the enactment of any future ordinance with the same or similar buffer zone requirements. The injunction as entered, however, only prohibited the City from enforcing the substantive portions of the Ordinance while they were coupled with the unconstitutional procedural aspects of the Ordinance. Had the city revised or amended the Ordinance to comport procedurally with the Court's Order, it could have re-enacted and begun enforcing an identical substantive buffer zone requirement.[3]

Courts confronting similar partial successes have adjusted attorney's fees downward. For example, in *Winter v. Cerro Gordo Country Conservation Bd.*, 925 F.2d 1069 (8th Cir. 1991), the plaintiff, a discharged park ranger foreman, brought a civil rights action against the county conservation board alleging that the board unlawfully discharged him for exercising his First Amendment rights, and failed to afford him adequate procedural due process before his

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[2]Recently, the Sixth Circuit decided *Deja Vu of Cincinnati v. The Union Township Board*, 2003 Fed.App. 0122P (6th Cir. April 24, 2003). This opinion does not appear to be contrary to this Court's decision as to various similar procedural issues.

[3]The Court must speak in the hypothetical because effective January 2003, the City of Louisville merged with Jefferson County and ceased to exist as a separate legal entity.

termination. The jury returned a favorable verdict only to the due process count. The trial court adjusted the attorney's fees downward. The Eighth Circuit affirmed the trial court's downward adjustment of the lodestar: "Winter's counsel did not prevail on the first amendment issue. Winter was only successful on the denial of the due process claim. . . . In view of Winter's success only on the second claim, we find that the court did not abuse its discretion in determining the award and affirm." *Id.* at 1074.

Recently, the Sixth Circuit also affirmed a downward adjustment in a civil rights case where the plaintiffs received substantially less than they were seeking on the ground that the success achieved was less than "excellent." *See Granzeier v. Middletown*, 173 F.3d 568 (6th Cir. 1999). In that case, the plaintiffs sought injunctive relief against the closing of county and state courts and offices on Good Friday. The district court granted partial summary judgment for each party. Its order enjoined Defendants from posting overtly religious signs announcing the closing but permitted Defendants to continue closing the building and office on the Friday before Easter for a "Spring Holiday." The district court awarded the plaintiffs far less in attorney's fees than they requested because it believed the plaintiffs' success was limited in relation to the ultimate goal they were seeking. The Sixth Circuit affirmed the reduction noting that "plaintiffs here achieved very limited success--they secured an injunction against religious signs, but not against closing the Courthouse on Good Friday." *Id.* at 578.

These cases are far more analogous to the present situation than, *Northcross v. Board of Educ. of Memphis City*, 611 F.2d 624 (6th Cir. 1980), relied upon extensively by Plaintiffs.[4] In *Northcross*, the district court concluded that it should reduce the attorney's fees awarded to the

[4]It should not be overlooked that *Northcross* predates *Hensley*.

plaintiffs in a civil rights desegregation case because the plaintiffs had not prevailed on some issues or parts of issues. The Sixth Circuit reversed finding that although the lawyers advocated a desegregation plan broader in scope and faster in pace than was ultimately adopted, the ultimate result was successful--the Memphis school system was desegregated. *See id.* at 636. Had *Northcross* been decided after *Hensley*, it would have no doubt fallen into the category of cases in which the result obtained is "excellent." In such cases, complete attorney's fees are reasonable even though the plaintiff may not have prevailed on every single issue or parts of issues.

Unlike the *Northcross* plaintiffs, the actual relief secured by Plaintiffs was quite different and less comprehensive than the relief Plaintiffs pursued throughout this litigation. That Defendants theoretically could enforce the substantive portions of the Ordinance against Plaintiffs, renders the outcome of this suit less than a complete victory. The Court concludes that Plaintiffs received a "good," but not an "excellent" result. As such, the Court concludes that some downward adjustment from the lodestar is appropriate.

The Court recognizes that there is no precise rule or formula for reducing attorney's fees to account for the limited success of a party. *See Hensley*, 461 U.S. at 436. "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." *Id.* The nature of this litigation and the manner in which counsel recorded their time makes it exceedingly difficult, if not altogether impossible, to identify particular hours that should be eliminated from the lodestar calculation. As such, the Court has elected to reduce the total amount of the award to reflect Plaintiffs' less than complete success and, therefore, to make the attorney's fees reasonable. For instance, Plaintiffs' counsel

spent considerable time on quite distinct substantive issues upon which they did not prevail. Perhaps more than 50% of the attorneys' time and effort concerned these substantive issues, though an accurate measure is not possible. Nevertheless, Plaintiffs' procedural victory should not be trivialized. It is important in its own right and Plaintiffs should be compensated accordingly. And, prevailing on the due process issue required considerable skill and effort. Keeping the importance of their partial success as well as the complex nature of the legal issues involved in the cases in mind, the Court concludes that counsel is entitled to 65% of the basic lodestar to account for the significant but partial success.

This reduction is the product of careful thought and reason. The Court considered the other *Johnson* factors in relation to the facts and circumstances of this particular suit. However, none were a decisive factor. For instance, the issues were difficult but not novel. The lawyers performed at a high level. For these lawyers, the case was highly desirable and will probably further enhance their reputations. Therefore, leaving aside the result factor, the other *Johnson* factors neither add nor subtract from the fee.

During oral argument, Plaintiffs contended that any adjustment would undermine the purpose of § 1988 by constraining attorneys' willingness to bring these types of actions. The Court does not believe that its failure to award the entire amount of fees requested by counsel in every case will necessarily defeat the congressional purposes behind § 1988. The sum ultimately awarded by this Court is far from paltry, and at least in the Court's mind is reasonable. The ultimate award represents a significant amount of money and fairly compensates Plaintiffs for the time and expense they incurred in prosecuting the majority of this action. In relation to the success achieved by Plaintiffs, the Court believes that the award is entirely reasonable. Had

Plaintiffs failed to prevail on a single issue, they would not have been eligible for attorney's fees under § 1988 in the first instance despite the fact that counsel presented good faith arguments before the Court. The Court believes its ultimate award strikes the proper balance by reasonably compensating Plaintiffs for their success.

The Court will enter an order consistent with this Memorandum Opinion.

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JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

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ORDER

Plaintiffs have moved for attorney's fees. After careful review, in accordance with the accompanying Memorandum Opinion, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs are awarded $121,319.64 for attorney's fees and $23,254 for expenses.

This is a final order.

This _____ day of May, 2003.

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JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record