

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

THE NORTHEAST OHIO COALITION FOR THE HOMELESS, et al.,	:	Civil Action No. C2-06-896
Plaintiffs,	:	Judge Algenon L. Marbley Chief Magistrate Judge Terrence P. Kemp
vs.	:	
JENNIFER BRUNNER, in her official capacity as Secretary of State of Ohio, et al.,	:	PLAINTIFFS' SUPPLEMENTAL BRIEF ON THE ISSUE OF WHAT CONSTITUTES A REASONABLE FEE AND COSTS AWARD IN LIGHT OF THE COURT'S ORDER DATED SEPTEMBER 30, 2008 (DOC. NO. 108)
Defendants.	:	

I. PRELIMINARY STATEMENT.

On January 4, 2008, Plaintiffs The Northeast Ohio Coalition for The Homeless (“NEOCH”) and Service Employees International Union, Local 1199 (“SEIU”) (collectively “Plaintiffs”) moved this Court under 42 U.S.C § 1988 and 28 U.S.C. §§ 1821 and 1920 for an award of attorneys’ fees and costs expended for the procurement and enforcement of the November 1, 2006 Consent Order (“Consent Order”) and the November 15, 2006 Agreed Enforcement Order (“Agreed Enforcement Order”) in this matter. (*See* Doc. No. 96). In response, on February 27, 2008, Defendant Ohio Secretary of State Jennifer Brunner and Intervenor-Defendant the State of Ohio (collectively, “Defendants”) both opposed Plaintiffs’ motion and moved to dismiss this case in its entirety for lack of subject matter jurisdiction on the ground that the Plaintiffs allegedly lack standing. (*See* Doc. No. 99).

On September 30, 2008, the Court issued an Order (the “Order”) granting Plaintiffs’ motion for attorneys’ fees and costs and granting in part and denying in part Defendants’ motion

to dismiss.¹ (*See* Doc. No. 108). In granting Plaintiffs’ motion for attorneys’ fees, the Court found that Plaintiffs were entitled to “prevailing party” status under 42 U.S.C. § 1988(b) “because the Consent Order and Agreed Enforcement Order worked a material alteration in the legal relationship of the parties.” (Order at 18). The Court found that the Consent Order altered Defendants’ duties under the Voter ID Law, giving Plaintiffs the right to monitor and secure court enforcement of Defendants’ pre-existing duties under that law, a right Plaintiffs exercised to secure the Agreed Enforcement Order. (*Id.* at 18). Moreover, the Agreed Enforcement Order gave rights to election observers that they did not previously have. (*Id.*). The Court found that Plaintiffs’ success was not so technical or de minimis that a reasonable fee award would merely be of a nominal amount. (*Id.* at 19).

Upon making this finding that Plaintiffs were prevailing parties, the Court ordered that a hearing on the reasonableness of fees and costs be scheduled within ninety (90) days of the Order. (Order at 20). The Court further ordered the parties to submit supplemental briefing on what constitutes a reasonable fee and costs award in light of the Court’s ruling in the Order. (*Id.*). Accordingly, Plaintiffs respectfully submit the following on what constitutes a reasonable fee and costs award in light of the September 30, 2008 Order.

¹ The Court granted Defendants’ motion to dismiss as to Counts One, Two, Five, Six, Seven, and Eleven of Plaintiffs’ Complaint for lack of standing. (Order at 14). The Court denied Defendants’ motion to dismiss as to Counts Three, Four, Eight, Nine, Ten, Twelve, and Thirteen of Plaintiffs’ Complaint. (*Id.* at 15).

II. APPLICABLE LAW.

A. The Lodestar Is Presumed To Be The Reasonable Fee Award.

Once a party is determined to be a “prevailing party” under 42 U.S.C. § 1988(b), the court must then determine what fee award is reasonable. *Blum v. Stenson*, 465 U.S. 866, 897 (1984); *Wayne v. Village of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994). “The starting point for determining the amount of a reasonable attorney fee is the ‘lodestar’ amount which is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate.” Order at 19-20 (quoting *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 551 (6th Cir. 2008)); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). “There is a ‘strong presumption that that the lodestar represents the reasonable fee.’” *Libertarian Party of Ohio v. Brunner*, Case No. 2:04-cv-08, 2007 U.S. Dist. LEXIS 88623, at *3 (S.D. Ohio Nov. 20, 2007) (quoting *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992)); see also *Blum v. Stenson*, 465 U.S. 866, 897 (1984). This is because the lodestar calculation provides an objective basis on which to make an estimation of the value of the attorneys’ services. *Hensley*, 461 U.S. at 433.

B. Although The Court Has The Discretion To Reduce The Award To Reflect Partial Success, It Should Not Simply Apply A Ratio Of Successful to Unsuccessful Claims; Instead, It Should Determine Whether Those Claims Are Related And Also Consider The Degree Of Success Achieved.

Although there is a strong presumption in favor of the lodestar amount, the district court has the discretion to adjust the lodestar amount in relation to the result Plaintiff obtained. *Warren v. City of Athens*, Case No. 2:02-cv-559, 2005 U.S. Dist LEXIS 23233, at *4 (S.D. Ohio Oct. 11, 2005) (citing *Reed v Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999)). When a plaintiff has achieved success on some, but not all, of its claims, the lodestar amount may be reduced depending on the degree of success the plaintiff achieved. *Hensley*, 461 U.S. at 434.

Notably, the Court should not reduce an award of attorneys' fees based on "a simple ratio of successful claims to claims raised." *DiLaura v. Twp. Of Ann Arbor*, 471 F.3d 666, 672 (6th Cir. 2006); *see also Neme v. Monusko*, Case No. 97-1259, 1998 U.S. App. LEXIS 9539, at *11-14 (6th Cir. May 7, 1998). Instead, in making a determination of whether to reduce the lodestar amount, the court must answer two questions. *Hensley*, 461 U.S. at 434. "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?" *Id.* "Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id.* As explained below, the answer to both questions dictates that Plaintiffs are entitled to recover the lodestar fee award.

C. Where Successful And Unsuccessful Claims Are Interrelated, The Court May Award A Fully Compensable Fee.

In the civil rights context, cases often involve a "common core of facts or [are] based on related legal theories." *Hensley*, 461 U.S. at 435. As such, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* "Litigants in good faith may raise alternative grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds *is not a sufficient reason for reducing a fee.*" *Id.* (emphasis added).

For example, where a lawsuit presents distinctly different claims for relief based on different facts and legal theories, the court can separate the claims on which a plaintiff was successful from those on which it was not. *Id.* In that situation, "no fee may be awarded for services on the unsuccessful claim." *Id.* But where the successful and unsuccessful claims are based on a "common core of facts" or "related legal theories," the Court should not view the lawsuit as a series of discrete claims. *Id.* Instead, the Court is justified in awarding a fully compensatory fee. *Bryant v. Nighbert*, Case No. 03-183, 2005 U.S. Dist. LEXIS 37131, at *16-

18 (E.D. Ky. Sept. 14, 2005); *Cobb v. City of Columbus*, Case No. 2:99-CV-579, 2002 U.S. Dist. LEXIS 11223, at *13-14 (S.D. Ohio Mar. 13, 2002).

D. Where The Prevailing Party Achieved A High Level Of Success, The Court May Award A Fully Compensable Fee.

Another critical factor is “the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.” *Hensley*, 461 U.S. at 435. “Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation.” *Id.* Even when a party has achieved success on only some of its claims, the most critical factor in determining whether to lower the lodestar award is the “degree of success obtained.” *Id.* at 436; *Blum*, 465 U.S. at 897.

For example, if plaintiffs “have prevailed on the principle claim in [the] case, there will be no proportional reduction in the attorneys fees awarded.” *Stahl v. Taft*, Case No. 2:03-cv-597, 2006 U.S. Dist LEXIS 17014, at *9 (S.D. Ohio Feb. 8, 2006). Or, where a plaintiff has vindicated important constitutional rights or obtained relief that benefits the public, a fully compensatory fee may be justified. *Bryant*, 2005 U.S. Dist. LEXIS 37131, at *20-21. Even if the plaintiff succeeds on only one of his claims, he may still have achieved “excellent results” that justify a fully compensatory fee. *Cobb*, 2002 U.S. Dist. LEXIS 11223, at *14.

III. PLAINTIFFS SHOULD RECOVER THE FULL LODESTAR AMOUNT.

A. For The Reasons Stated In Plaintiffs' Concurrently-Filed Motion For Reconsideration, Plaintiffs Had Standing To Assert Counts One And Two And So Should Obtain A Fully Compensable Fee.

Concurrently with this brief, Plaintiffs are filing a motion for reconsideration seeking to reverse this Court's decision to dismiss Counts One and Two of Plaintiffs' Complaint based on lack of standing. Briefly, Plaintiffs request that the Court reconsider its ruling because: (1) NEOCH sought to ensure the uniform and equal application of the Voter ID laws on behalf of its homeless members who had one of the required forms of identification and intended to vote in the November 2006 election, whether by absentee ballot or on Election Day, (2) NEOCH identified such members, and (3) every Ohio voter who had one of the required forms of identification faced an imminent and concrete threat of harm in the November 2006 election due to the inconsistent and non-uniform application of the Voter ID Laws by different Boards of Elections. Unlike the scenario in *Sandusky County*, where the challenged errors only affected some voters, all Ohio voters with identification were threatened with harm by the unequal application of the Voter ID laws across the state—including members of NEOCH.

For these reasons, NEOCH respectfully requests that the Court reconsider its ruling and conclude that it had standing to seek relief on behalf of its homeless members who had one of the required forms of identification and voted in the November 2006 election.

B. Even If This Court Does Not Reconsider Its Decision On Standing, Plaintiffs Should Recover The Full Lodestar Amount.

1. Plaintiffs' claims are so interrelated that work performed for one claim cannot be separated from work performed for another claim.

The Consent Order and Agreed Enforcement Order addressed Plaintiffs' allegations that Ohio's Boards of Elections were applying the Voter ID laws and the Provisional Ballot laws in an unequal, non-uniform and unconstitutional manner. As explained below, the claims on which

Plaintiffs had standing (i.e., their challenge to the Provisional Ballot laws) are so interrelated with the claims that this Court dismissed for lack of standing (i.e., their challenge to the Voter ID laws) that its counsel should be awarded a fully compensable fee notwithstanding this Court's dismissal of the latter claims.

Specifically, these claims are interrelated in two ways: (1) they both sought to achieve the same purpose, namely, to ensure that the votes cast by Plaintiffs' members would be counted, and (2) they were based on related legal theories.

The purpose of Plaintiffs' motion for preliminary injunction filed in October 2006 was to enforce their members' right to vote and have their votes be counted. To that end, Plaintiffs sought to remedy the non-uniform and unequal application of the Voter ID laws and the Provisional Ballot laws. Both challenges were necessary to vindicate the right to vote. Plaintiffs sought a uniform application of the Voter ID laws to ensure consistent rules for determining who must cast a provisional ballot. Plaintiffs sought a uniform application of the Provisional Ballot laws to ensure fair, equal and consistent treatment of those ballots. The purpose of Plaintiffs' motion was to protect their members' important constitutional right to have their votes be counted on equal terms with all other Ohio voters.

To that end, Plaintiffs based their challenges to these two laws on the same legal theories, namely, the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. The legal theories that underlay the Voter ID claims and the Provisional Ballot claims were not just related, they were identical.

In sum, Plaintiffs' claims were so interrelated that the Court should not separate the work Plaintiffs did on the "successful" claims from the "unsuccessful" claims. This situation fits exactly into the common situation described in *Hensley*—Plaintiffs asserted a number of claims

in this action based on related legal theories and with the same common goal: to secure their members' right to vote and have their votes be counted. All of the hours at issue in this fee petition were spent in furtherance of this common goal for the November 2006 election.

Therefore, because the successful and unsuccessful claims were intertwined and interrelated, the lodestar should not be reduced.

2. Plaintiffs achieved such a high degree of success that the lodestar is the appropriate fee award.

In obtaining the Consent Order and Agreed Enforcement Order, Plaintiffs obtained the primary relief they had sought regarding the November 2006 election—the fair and equal application of the challenged Voter ID and Provisional Ballot laws. Specifically, the Consent Order corrected erroneous interpretations of the Voter ID laws, by both Boards of Education and the Secretary of State, and laid out a uniform set of rules that had previously been lacking. The Consent Order also provided a uniform set of rules for Boards of Elections to follow when applying and interpreting the Provisional Ballot laws. By obtaining this Consent Order, Plaintiffs vindicated the important constitutional right that they filed suit to protect—namely, the right to vote—and in so doing they achieved the success they sought in their motion for preliminary injunction. This is undoubtedly the definition of an “excellent result.”

Moreover, by using the Consent Order to subsequently obtain the Agreed Enforcement Order, Plaintiffs further prevailed as to a core purpose of the litigation and further vindicated the important constitutional right to vote. Specifically, the Agreed Enforcement Order required Boards of Elections to provide observers with a list of proposed rejected provisional ballots and the reason for each proposed rejection. This relief further achieved the Plaintiffs' goal of having the Provisional Ballot laws be uniformly and fairly applied. The Court must determine the degree of Plaintiffs' success in relation to the services expended on the litigation as a whole.

Based on the foregoing, it is clear that Plaintiffs' high degree of success on its overall suit dictates that they recover the lodestar amount. Because the degree of success is the main factor to be considered, the Court should find that the lodestar fee award is appropriate.

3. This Court's later dismissal of some of the claims that led to the Consent Order does not reduce the benefit obtained or success achieved in that Order, and so should not reduce the lodestar.

Although the Court found that Plaintiffs did not have standing to assert its challenges to the non-uniform application of the Voter ID laws, the Plaintiffs nonetheless achieved a high degree of success on those claims in the Consent Order. Specifically, the Consent Order suspended the application of these challenged laws to absentee voters, many of whom had already cast their ballots, and set forth uniform rules for voters who cast their votes on Election Day. That relief vindicated important constitutional rights and conferred an enormous public benefit on all Ohio voters who otherwise would have been subjected to non-uniform, unequal and unconstitutional standards by different Boards of Elections.

Significantly, this Court's later decision that Plaintiffs lacked standing to bring some of the claims that led to the Consent Order did not have any impact on that Order. By its terms, the Consent Order expired at the conclusion of the November 2006 election. The relief obtained by that Order was in no sense "undone" by this Court's later dismissal of some of the claims in the Plaintiffs' Complaint.² During the entire time that the Consent Order was in effect, the Plaintiffs received the full benefit that they had sought. This Court's recent decision on standing did not take any part of that benefit away.

² Therefore, the Supreme Court's recent decision in *Sole v. Wyner* does not apply. 551 U.S. 74, 127 S. Ct. 2188 (2007) (holding that a party who obtains a preliminary injunction is not a "prevailing party" if that initial success is ultimately "reversed, dissolved, or otherwise undone by the final decision in the same case.").

C. The Hourly Billing Rates Of Plaintiff's Counsel Are Consistent With The Prevailing Market Rate In The Community, And The Award Should Be Based On Counsel's Current Rates.

In addition to determining that Plaintiffs are entitled to recover the lodestar amount, the Court should find that the hourly rates charged by Plaintiffs' counsel are consistent with the prevailing market rate in Ohio. "In calculating a reasonable hourly rate, the court should consider the prevailing market rate in the relevant community. The prevailing market rate is the rate which lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Warren*, 2005 U.S. Dist LEXIS 23233, at *4 (citing *Adcock-Ladd v. Secretary of Treasury*, 227 F.3d 343, 351 (6th Cir. 2000)). In determining an appropriate fee award, the district courts' discretion is "constrained only by their duty ... to make an award of fees which is 'adequate to attract competent counsel, but which does not produce windfalls to attorneys.'" *Gonter ex rel. United States v. Hunt Valve Co., Inc.*, 510 F.3d 610, 617 (6th Cir. 2007) (quoting *Louisville Black Police Officers Org., Inc. v. Louisville*, 700 F.2d 268, 278 (6th Cir. 1983)).

Additionally, because of the two-and-a-half-year delay between the time when Plaintiffs' counsel's services were rendered and the time when they will be awarded their fees, counsel should recover at their current rate rather than their historical rate. In setting reasonable billing rates for prevailing parties' counsel, courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value. See *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989); *Sierra Club v. EPA*, 769 F.2d 796, 809-810 (D.C. Cir. 1985). In fact, the Supreme Court has expressly stated that "[a]n adjustment for delay in payment is, we hold, an appropriate factor in the determination of what constitutes a reasonable attorney's fee under § 1988." *Jenkins*, 491 U.S. at 283. This is because compensation received several years after the services were rendered is not worth as much as it

would have been worth if received promptly after billing. *Id.* Notably, this Court has not hesitated to award current rates instead of historical rates in similar civil rights cases. *See Warren*, 2005 U.S. Dist LEXIS 23233, at *12 (litigation pending for over three years represents a substantial delay in payment such that counsel could recover fees at current rates).

Given that this Court has approved rates of \$300 for other civil rights cases as far back as 2005, all of Plaintiffs' counsel's requested rates are within the prevailing market rate for counsel with substantial federal court litigation experience. *Warren*, 2005 U.S. Dist LEXIS 23233, at *12-13 (approving a \$300/hr rate); *Libertarian Party of Ohio*, 2007 U.S. Dist. LEXIS 88623, at *11 (same); *Stahl*, 2006 U.S. Dist LEXIS 17014, at *9 (same).

As established in the declaration of Caroline H. Gentry that is being filed concurrently with this Supplemental Brief, the current rates for Porter Wright Morris & Arthur LLP are at or under \$280 an hour. These rates are at or under the prevailing rate in the community for counsel in comparable election cases. Under the foregoing authorities, these current hourly rates are reasonable and should be awarded.

In addition, as established in the declaration of H. Ritchey Hollenbaugh that is being filed concurrently with this Supplemental Brief, the current rates for Carlile Patchen & Murphy LLP are at or under \$375 an hour. These rates are at or under the prevailing rate in the community for counsel with comparable federal court litigation experience. Under the foregoing authorities, these current hourly rates are reasonable and should be awarded.

Finally, as established in the declaration of Subodh Chandra being filed in support of Plaintiffs' Second Motion for Attorneys' Fees, Mr. Chandra's current rate is \$395 an hour and is justified by his substantial experience in Section 1983 and public-law litigation. Under the foregoing authorities, these current hourly rates are reasonable and should be awarded.

D. All Of The Hours Submitted By Plaintiffs' Counsel Were Reasonably Expended On The Instant Litigation.

The submitted declarations constitute sworn evidence that the Plaintiffs' attorneys actually expended the time for which compensation is sought. "Sworn testimony that, in fact, it took the time claimed is evidence of considerable weight on the issue of the time required in the usual case." *Perkins v. Mobile Housing Bd.*, 847 F.2d 735, 738 (11th Cir 1988). To deny or reduce compensation, it must appear that the time claimed is obviously and convincingly excessive under the circumstances." *Id.*

Although Plaintiffs were represented by several attorneys, it is not unreasonable for more than one lawyer to appear in a case and fees may not be denied or discounted merely on that basis. *Warren*, 2005 U.S. Dist LEXIS 23233; *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137 (8th Cir. 1982). This case is extremely complex and detailed and required the use of multiple lawyers given the time constraints and expedited nature of the litigation.

E. Plaintiffs Are Entitled To Recover Expenses And Costs Reasonably Incurred.

Pursuant to 28 U.S.C. 1821 and 1920, Plaintiffs also seek to recover their expenses and costs incurred in this action. Although such expenses are not considered as traditional "attorneys' fees," such costs are nonetheless recoverable in federal litigation. *See Stahl*, 2006 U.S. Dist LEXIS 17014, at *4; *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000). Reasonable attorneys' fees recoverable under the fee-shifting statutes include expenses incurred by the attorneys which are normally charged to a fee-paying client. *Warren*, 2005 U.S. Dist LEXIS 23233 (citing *Northcross v. Bd. Of Ed. Of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979)). Photocopying charges, fees of process servers, fax and telephone costs, travel, postage, and secretarial costs have been expressly held to be compensable under the fee-shifting statutes. *Id.* These expenses and costs were reasonable and should be awarded.

IV. CONCLUSION.

For all the foregoing reasons, Plaintiffs respectfully request that this Court grant them a full lodestar fee award at the rates and hours set forth in the declarations of counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 20th, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the counsel of record in this case.

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