IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PRISON LEGAL NEWS, et al.,	)	
	)	
Plaintiffs,	)	CV 98-1344-MA
	)	
	)	OPINION AND ORDER
v.	)	
	)	
DAVID S. COOK, et al.,	)	
	)	
Defendants.	)	

This action is before the court on plaintiffs' motion for attorney fees (#57). Defendants raise a number of objections to plaintiffs' application for fees. For the reasons that follow, plaintiffs' motion for attorney fees (#57) is granted insofar as plaintiffs may recover $58,059.47 in fees and expenses.

BACKGROUND

Plaintiffs filed this action challenging the refusal of the Oregon prison system to deliver subscription non-profit organization standard mail to inmates. Plaintiffs prevailed upon appeal in

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Prison Legal News v. Cook, 238 F.3d 1145 (9th Cir. 2001), and now move pursuant to 42 U.S.C. § 1988 for attorney fees and expenses in the amount of $60,946.97. The Ninth Circuit found defendants' ban on standard rate mail unconstitutional as applied to subscription non-profit organization mail, and held that such mail must be afforded the same procedural protections as first class and periodicals mail under Department regulations. In addition, the Ninth Circuit granted plaintiffs' request for reasonable attorney fees, to be fixed by this court, pursuant to 42 U.S.C. § 1988.

DISCUSSION

Defendants object to plaintiffs' motion for attorney fees, and make the following arguments: (1) the lodestar should not be enhanced, but adjusted downward; (2) plaintiffs should be awarded local rates, as opposed to non-local rates; (3) plaintiffs should be awarded current rates, as opposed to historic rates; and (4) plaintiffs' award is limited by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d) (PLRA).

A. Adjustment to the Lodestar

To arrive at a reasonable fee award, the court must engage in a two step process. Fischer v. SJB-P.D. Inc., 214 F.3d 1115, 1119 (9th Cir. 2000). First, the court should calculate the "lodestar figure" by taking the number of hours reasonably expended on the litigation and multiplying it by a reasonable hourly rate. Id. Second, the court must decide whether to enhance or reduce the lodestar figure based on an evaluation of the factors set forth in Kerr v. Screen Extras Guild, 526 F.2d 67 (9th Cir. 1975), that are not subsumed in the initial lodestar calculation. Fischer, 214 F.3d at 1119.

Plaintiffs' attorneys have submitted records in support of their claim of expending 454.2 hours on this litigation, a reasonable number of hours. Plaintiffs' attorneys further seek varying per hour rates for the work expended on the litigation for each attorney. While plaintiffs have submitted the

affidavits of their attorneys in support of their requested fees, the record does not include affidavit or other evidence which would indicate standard rates in the community for an action such as this. Therefore, the court is required to turn to the experience of other cases when the attorney fees issue was raised and fully addressed. In so doing, I find the standard rate to be $175 per hour. In this case, being aware of Mr. Blackman's skill, I find a reasonable rate for his time to be $200 per hour. Not having such information with respect to Ms. Hardy, I find a reasonable rate for her time to be $175 per hour. This is not to say a higher rate has not been awarded, but this is the rate that appears most reasonable. The remaining requested rates of $175 per hour or less for Mr. Stiltner and Ms. Stanton are reasonable. Considering the Kerr factors relevant to this case and multiplying the numbers as submitted and discussed herein, including costs and expenses, I arrive at a lodestar figure of $58,059.47.

Plaintiffs have not sought an enhancement to the lodestar figure, so defendants need not fear an enhancement. Defendants suggest reduction of the lodestar figure on the grounds that this action is not novel, plaintiffs enjoyed limited success, and Ms. Hardy reconstructed her hours.

1. Novelty

Defendants argue that because this case was similar to Miniken v. Walter, 978 F.Supp. 1356 (E.D.Wash. 1997), it lacked novelty, and thus the lodestar figure should be adjusted downward. The novelty and difficulty of the questions involved should be considered in arriving at an appropriate award. Quesada v. Thomason, 850 F.2d 537, 539, fn 1 (9th Cir. 1988). However, the simplicity of the issues may not be used to decrease a fee award below the amount calculated by the court as a reasonable lodestar fee. Id. The Supreme Court has emphasized that the lodestar fee is to be presumed reasonable absent some exceptional circumstance to justify deviation. Id. Moreover, the

Supreme Court has explained that the novelty and complexity of issues are reflected in the number of billable hours recorded by counsel, and thus a fee based on reasonable hours multiplied by reasonable hourly rates does not warrant an adjustment. Id. Accordingly, while I recognize the similarities between the current action and Miniken, I decline to adjust the lodestar downward as a result.

2. Extent of Success

Defendants ask the court to exclude hours spent on unsuccessful claims, arguing that defendants should not be responsible for fees for those claims that were abandoned in plaintiffs' appeal. Plaintiffs respond that they prevailed upon both of the only two claims originally raised in their complaint.

The congressional intent to limit awards to prevailing parties requires that unrelated claims be treated as if they had been raised in separate cases, and thus it is improper to award fees for services on any unsuccessful claims. Hensley v. Eckerhart, 461 U.S. 424, 435 (1983). When much of counsel's time is devoted generally to the litigation as a whole, it is difficult to divide the hours expended on a claim-by-claim basis. Id. Such a case cannot be viewed as a series of discrete claims. Id.

In their complaint, plaintiffs alleged two causes of action, the first a violation of the First Amendment, and the second a due process violation. The Ninth Circuit found for plaintiffs on both of these claims in holding that the ban was unconstitutional and that such mail must be afforded the same procedural protections as first class and periodicals mail under Department regulations. While the Ninth Circuit considered Le Hung's specific claim regarding the International Prison Ministry to have been abandoned, the courts' holding that the Department's ban on standard rate mail is

unconstitutional is the relief sought by all original plaintiffs. Even if Le Hung abandoned his particular argument, the time the attorneys spent working toward the relief sought and obtained in this action is not divisible among the separate plaintiffs. Accordingly, I decline to reduce plaintiffs' attorney fee award based on the extent of their success.

3. Reconstructed Hours

Defendants argue that reducing Ms. Hardy's fee award is appropriate, as she reconstructed her hours. Fee requests may be challenged for inadequate documentation, or inappropriately claimed hours or rates. Fischer, 214 F.3d at 1121. However, basing an attorney fee award in part on reconstructed records developed by reference to litigation files and other records is possible. Id.

Ms. Hardy testified that she reconstructed her hours from her files to arrive at a total of 115.5 hours spent on this litigation. Her reconstruction appears reasonable, and is based on reference to her files. Accordingly, Ms. Hardy's fee award shall not be discounted on the basis that it was reconstructed.

4. Differing Rates for Attorneys

Defendants argue a single average rate should be established for each attorney, rather than a separate rate for each attorney, and cite to Sorenson v. Mink, 239 F.3d 1140 (9th Cir. 2001) in support of their argument. Sorenson does not stand for the proposition that a district court should apply a single average rate for each attorney, as opposed to a separate rate for each attorney. Accordingly, this court finds that the separate rates are justified on the basis of experience and responsibility, rather than applying a single average rate for all attorneys.

B. Local v. Non-local rates

The parties do not dispute that the appropriate rate for an attorney fee award is the market rate prevailing in the forum in which this court sits. Here, the highest per hour fee sought by any of plaintiffs' counsel is $200 per hour. Both Mr. Blackman, a Portland, Oregon attorney, and Ms. Hardy, currently a Mill Valley, California attorney, seek fees for services as Portland, Oregon attorneys, based on their rates while practicing in the locality. It does not appear that any of plaintiffs' attorneys have requested fees higher than the local rate for their services.

C. Current rates v. Historic rates

Defendants raise the issue of whether current rates or historic rates should be awarded, given that courts sometimes award current rates to account for inflation and delay in payment. However, plaintiffs have not requested current rates. To the contrary, each attorney has testified that the rate they are requesting was their rate at the time of the litigation.

D. PLRA limits

42 U.S.C. § 1997e(d) limits attorney fee awards in "any action brought by a prisoner." The issue is whether this case is an action "brought by a prisoner" within the meaning of § 1997e. In Montcalm Publishing Corp. v. Commonwealth of Virginia, 199 F.3d 168 (4th Cir. 1999), the court held that once a suit is filed by prisoners, the fact that a non-prisoner intervenes at a later date does not change the character of the case, and the intervenor is therefore bound by § 1997e(d)'s limitation on attorney fees. However, as discussed by the court in Turner v. Wilkinson, 92 F.Supp.2d 697, 704 (S.D.Ohio 1999), Montcalm makes sense in a case where the nature of the case is known at the time the intervenor's petition is filed, and where the intervenor is therefore on notice that there will be a cap on attorney fees if the intervenor is successful on his or her claims. In Turner, as in the present

action, the case was originally filed by both a prisoner and a non-prisoner. The Turner court held that since not all of the original plaintiffs were prisoners, the case is not properly characterized as a suit "brought by a prisoner." Moreover, in Turner, the court found that even if the action could be characterized as having been brought by a prisoner, there was no logical way to separate the attorney fees expended on behalf of the two plaintiffs, as the work done on the case was intended to address a single remedy benefitting both, and thus the cap did not apply. The current action is very similar. Accordingly, the cap does not apply, and the PLRA will not limit an award of fees in this action.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for attorney fees (#57) is GRANTED insofar as plaintiffs may recover a total of $58,059.47 in attorney fees and expenses.

IT IS SO ORDERED.

Dated this 6 day of August, 2001.

Malcolm F. Marsh
Malcolm F. Marsh
UNITED STATES DISTRICT JUDGE