1996 WL 662866
Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

Akil AL–JUNDI, a/k/a Herbert Scott Deane; Big Black, a/k/a Frank Smith; Elizabeth Durham, Mother and Legal Representative of Allen Durham, deceased; Litho Lundy, Mother and Legal Representative of Charles Lundy, deceased; Theresa Hicks, Widow and Legal Representative of Thomas Hicks, deceased; Alice McNeil, Mother and Legal Representative of Lorenzo McNeil, deceased; Maria Santos, Mother and Legal Representative of Santiago Santos, deceased; Laverne Barkley, Mother and Legal Representative of L.D. Barkley, deceased; Jomo Joka Omowale, a/k/a Eric Thompson; Vernon Lafranque; Alfred Plummer; Herbert X. Blyden; Joseph Little; Robin Palmer; George "Che" Nieves; James B. "Red" Murphy; Thomas Louk; Peter Butler; Charles "Flip" Crowley; William Maynard, Jr.; Calvin Hudson; Kimanthi Mpingo, a/k/a Edward Dingle; Kendu Haiku, a/k/a Willie Stokes; Ooji Kwesi Sekou, a/k/a Chris Reed; Phillip "Wald" Shields; Jerome Rosenberg; Alphonso Ross; Frank Lott; Gary Richard Haynes; Raymond Sumpter; Omar Sekou Toure a/k/a Otis McGaughey; Dacajeweiah, a/k/a John Hill; and Johnnie Barnes, as the Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,
Plaintiffs,
v.
Kurt G. OSWALD, as Administrator of the Estate of Russell G. Oswald; John S. Keller, as the Administrator of the Estate of John Monahan; Vincent Mancusi; and Karl Pfeil, Defendants.

No. 75–CV–0132E(M).
|
Nov. 7, 1996.

Attorneys and Law Firms

Elizabeth M. Fink, Brooklyn, NY, Michael E. Deutsch, Chicago, IL, Joseph Heath, Jamesville, NY, Dennis Cunningham, San Francisco, CA, Daniel Meyers, New York City, for plaintiffs.

John H. Stenger, Buffalo, NY, for Oswald.

Joshua J. Effron, Delmar, NY, for Keller.

Richard E. Moot, Buffalo, NY, for Mancusi.

Mitchell J. Banas, Buffalo, NY, for Pfeil.

MEMORANDUM and ORDER

ELFVIN, District Judge.

***1** In this action brought under 42 U.S.C. § 1983, violations of the Eighth and Fourteenth Amendments to the United States Constitution are alleged to have occurred following the September 1971 inmate uprising which took place at the Attica Correctional Facility. Presently before this Court is the plaintiffs' motion seeking an interim award of attorney's fees. Such will be denied.

42 U.S.C. § 1988(b) pertinently, albeit in part, provides "[i]n any action or proceeding to enforce a provision of * * * [section] 1983 * * *, the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs." In order to be classified as a "prevailing party" and thereby qualify for an award of attorney's fees under section 1988, a plaintiff must have succeeded on a significant issue in the litigation and achieved at least some of the benefit sought in the suit. *Farrar v. Hobby,* 506 U.S. 103, 109 (1992). Interim allowances may be granted in proper circumstances. The focus of the inquiry is whether the legal relationship between the disputants has been materially altered. In sum, to qualify as a partially prevailing party and thus be entitled to interim or partial attorney's fees, a civil rights plaintiff must obtain at least some actual relief on the merits of his claim which materially alters the legal relationship between the parties. Most pertinently, where the recovery of pecuniary relief is the purpose of litigation primary consideration is normally to be given to the amount of damages, if any, actually awarded as compared to the amount sought. *Id.,* at 114. In this case, there has been no determination of the quantum of any damages to which the plaintiffs, or any of them, may be entitled.

Interim fees bottomed on section 1988 are also

appropriate in civil rights actions in circumstances where a party has demonstrated entitlement to some relief on the merits of his claims by establishing the liability of the opposing party on an important matter or where he has received a favorable determination regarding substantial rights. *Hanrahan v. Hampton,* 446 U.S. 754, 757–758 (1980).

In this litigation, four defendants are being sued for their respective involvements in events allegedly violative of the constitutional rights of the plaintiff class which has been certified as those 1,281 inmates who were occupying the institution's "D–Yard" on the morning of Monday, September 13, 1971. Three defendants were sued for alleged unconstitutional deprivations by way of "reprisals" which allegedly occurred after the retaking and prior to the inmates having been "recelled" and, separately, reprisals which allegedly occurred after such recelling. The jury found that there were constitutional deprivations during both of such post-retaking sequences and that one of the three defendants—Pfeil—was responsible therefor.[1] To date the sequential trials to determine the quanta of monetary damages to compensate individual plaintiffs have not been held; however, the fastening of responsibility therefor upon one defendant was a significant achievement.

***2** Another cause of action involved the responsibility of one of the four defendants for allegedly having, in violation of the Constitution of the United States, deprived the inmates of medical attention. The jury found that there had been such a deprivation of constitutional dimensions but that the defendant charged therewith by the plaintiffs had not been responsible therefor.

The fourth constitutional deprivation targeted one defendant for his role in the planning and the carrying out of the retaking itself. The trial jury had been unable to reach unaminity as to such cause of action and the same is scheduled to be retried beginning March 31, 1997.

Thereafter, there will be myriad damage trials and this Court has set aside all of the months of April, May, June and July to accommodate them.

Where important and substantial goals—but fewer or less than all—have been achieved in a civil rights litigation, the plaintiffs are entitled to an "interim" award for which the "yardstick" is what has been achieved. The fastening of reprisal liability upon one defendant represents the attainment of an important goal for which or on the basis of which interim fees should be awarded. However, $150,000 in interim fees has already been paid to the plaintiffs' attorney following the liability verdict and on the basis of having attained that quantum of success. Stipulation and Order, filed September 10, 1993. The work for which fees are now requested exclusively encompasses activities engaged in by plaintiffs' counsel after said verdict and without there having been as yet the establishment of any other or further liability for a constitutional violation or of any quantum of monetary damages. This Court accordingly finds that interim fees have already been paid to the extent warranted and that the plaintiffs have not prevailed on any further or other significant issue in this litigation since such payment of interim fees.

In reaching this conclusion, this Court fully and frankly acknowledges the inequities of the situation that have existed and continue to exist in this gargantuan litigation. If the plaintiffs had timely taken their pleas to New York's Court of Claims—as some as yet undetermined number did—a showing of negligence on the part of a particular defendant might have afforded them relief.[2] From and after the institution of the present case counsel for the respective defendants have quite obviously been compensated for their time and out-of-pocket expenses. Plaintiffs' counsel has had to be carried along by her inherent and energetic zeal, pocketing only the aforementioned interim fee.

Much more time must be expended by plaintiffs' counsel before there can be a meaningful further payment to her for her legal efforts.[3] Probably and with justification she will appeal to the United States Court of Appeals for this Circuit from this Order, again spending her own time therefor. Further, Pfeil—the one defendant against whom liability has been determined—has hinted strongly that he plans to appeal to such higher court from the jury's determination of damages on a claimed basis that the "yardstick" utilized by this Court on the reprisals liability trial was incorrect.[4] All of such must have a stifling effect upon the plaintiffs' abilities to carry on this litigation.

***3** Nevertheless and in accordance with what this Court perceives the law to be, it is hereby *ORDERED* that plaintiffs' motion requesting an award of further interim attorney's fees is denied.

All Citations

Not Reported in F.Supp., 1996 WL 662866

Footnotes

[1] The jury was unable to reach unanimity as to the liability of either or both of the other two "reprisal" defendants.

[2] Some did. For example, one Gilberto Gonzalez was the beneficiary of a Court of Claims judgment in the amount of $143,313, Willie Fuller's estate $73,702, Donald McCoy $96,720, Peter C. Tarallo's estate $165,596, Paul K. Kerber's estate $69,445, Melvin DuVall Gray's estate $822,307, Willie West, Jr.'s estate $1,021,987, James Miles's estate $104,364. There is reliable information to the effect that others of the plaintiff class—and even some of the representative plaintiffs—took their causes to the state court.

[3] It is pertinent to observe, however, that the bulk of the preparatory work for the retrial of the retaking facet of the case has been done and need not be duplicated. The issues were tried once, albeit to a hung-jury mistrial, and the evidence should be repetitive. This is not to minimize the time needed to put all the minutiae back on an organized schedule but much less preparatory time should be needed. The trial itself should be of shorter duration than was the earlier full trial although, admittedly, it must consume three or four weeks.

As for the trials for reprisal damages—which will follow if the new jury should find for the defendant—plaintiffs' counsel was prepared to go to trial this past June on behalf of twelve individual members of the class. Again, the bulk of the preparatory work need not be repeated.

If the new jury finds that there were constitutional transgressions in the planning and/or carrying out of the retaking, the earlier-contemplated twelve reprisal-damage trials will be aborted and this court and the attorneys for the responsible defendants will have to go forward on a sequence of myriad trials of individuals' damages. In that context, however, there will be a justification for another award of interim fees and in a substantial amount. At that point, if reached, the plaintiffs would have achieved another and more significant interim goal—*i.e.,* the establishment of responsibility for damages inflicted by the retaking.

[4] This Court has indicated that it probably would act favorably on a motion by Pfeil for an interim certification but such has not been brought; the expectancy is that an appeal will be taken after a jury or juries have reached decisions as to individuals' damages.