IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

KRISTIN FOOTE, Plaintiff, vs. ROGER SPIEGEL, et al., Defendants.	ORDER Case No. 2:94-CV-754C

This matter is before the court on the parties' motions for awards of attorneys' fees and costs, plaintiff's motion to amend judgment or order, and plaintiff's motion for sanctions pursuant to Fed.R.Civ.P. Rule 11. Having determined that oral argument would not materially assist in the resolution of the questions presented by the pending motions, pursuant to D. Ut. 202(d), the court will rule on the basis of the affidavits and written memoranda of the parties without the assistance of oral argument. The court now enters the following order based upon the submissions of the parties and the applicable legal authorities.

Background

The facts underlying this lawsuit are set out in sufficient detail in the Order entered on September 1, 1999, and will not be repeated here. In that Order, the court found that: (1) plaintiff is a prevailing party for purposes of a fee award; (2) plaintiff is not entitled to recover for attorneys' fees related to the Americans with Disabilities Act ("ADA") claim; (3) plaintiff is not

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entitled to post-offer costs or attorneys' fees against the State and County defendants; (4) plaintiff must pay post-offer costs of the State and County defendants; and (5) the County defendants are not entitled to attorneys' fees incurred defending against plaintiff's unsuccessful ADA claim. Based upon the Order, plaintiff filed affidavits supporting an award of fees and costs and the State defendants filed an affidavit in support of post-offer costs. Objections to the affidavits and replies to the objections were filed by the parties. Plaintiff also filed a motion to amend judgment or order and a request for ruling on a motion for Rule 11 sanctions.

Discussion

A. Plaintiff's Motion to Amend Order

Plaintiff filed a motion to amend the Order entered on September 1, 1999, claiming the court erred by not awarding additional attorneys' fees to plaintiff for her efforts in pursuing the declaratory relief against Officer Spiegel and the Highway Patrol. Plaintiff objects to the court's holding that plaintiff is entitled only to attorneys' fees incurred prior to the dates the State defendants and the County defendants filed Offers of Judgment pursuant to Fed.R.Civ.P. Rule 68. Plaintiff argues that she is entitled to an award of attorneys' fees incurred after the dates the defendants made their Rule 68 offers because her lawsuit was the catalyst which changed the policies and procedures of the State and County.

In making the comparison required by Rule 68, the court considered the offers and the judgment actually obtained–not other consequences of the suit. (See Order, September 1, 1999, at 9 (quoting Wright & Miller, Federal Practice and Procedure Civ. 2d § 3006.1 (1997)).) The "catalyst test" plaintiff wants the court to use applies only in the absence of a judicial decision on the merits, for example, if a settlement occurred. See Foremaster v. City of St. George, 882 F.2d

1485, 1488 (10th Cir. 1989). This case was not, however, resolved by a settlement or other nonjudicial means. This case was tried to a jury which then rendered its verdict. Because there is a judicial decision on the merits in this case, the catalyst test does not apply. Plaintiff's motion to amend is denied.

B. Plaintiff's Claim Against the State Defendants for Attorneys' Fees

The court held that plaintiff is a prevailing party for purposes of a fee award on her 42 U.S.C. § 1983 claims, but not her ADA claim. (See Order, Sept. 1, 1999). Plaintiff, pursuant to the court's order, filed affidavits outlining the attorneys' fees incurred in bringing the § 1983 action against the State defendants. After the State defendants filed an opposition to some of the charges in the affidavit, plaintiff filed an amended affidavit.

The court finds that the hourly rates claimed for the attorneys involved are reasonable, based on the "'prevailing market rates in [this] community.'" Jane L. v. Bangerter, 61 F.3d 1505, 1510 (10th Cir. 1995) (quoting Blum v. Stenson, 465 U.S. 886, 895 (1984)). The hours expended are also reasonable, with two exceptions. The court deducts from plaintiff's claims the following:

(1) .1 hours billed on March 18, 1995, because it was previously paid by the State; and

(2) .2 hours billed on April 29, 1995, because it was incurred after the State had filed its Rule 68 Offer of Judgment.

The court rejects the State defendants' argument that it should not be required to pay attorneys' fees based on the time records submitted for work done by Jensie Anderson. The State defendants claim that those fees are duplicative because they were previously paid in

conjunction with plaintiff's Fed.R.Civ.P. Rule 37 motion. However, the court is persuaded by plaintiff's evidence, notably the time records submitted for Jensie Anderson's work. The court therefore concludes that Jensie Anderson's fees are not duplicative.

The court rejects the State defendants' argument that additional deductions should be made because some entries on plaintiff's time records were inadequate. Based on the affidavit of plaintiff's counsel and the time records the court has reviewed, the court is satisfied that the attorneys' fees incurred by plaintiff were reasonable and necessary. Thus, the court makes no deduction for inadequate time records.

The State defendants also argue that the fee award should be reduced because had plaintiff accepted the more favorable Rule 68 offer made on April 28, 1995, $2,555.00 in attorneys' fees previously paid in relation to the plaintiff's Rule 37 motion would not have been incurred. The court rejects this argument. The State defendants were ordered to pay attorneys' fees incurred because of their violation of court rules. Plaintiff's award of attorneys' fees is not reduced by the amount the State defendants paid in relation to plaintiff's Rule 37 motion.

Plaintiff's award of attorneys' fees from the State defendants is $14,035.00.[1]

C. Plaintiff's Claim Against State Defendants for Costs

Plaintiff claims that she is entitled to $2,433.90 in costs, exclusive of attorneys' fees, from the State defendants. The State defendants object to three of the costs plaintiff claims:

(1) $95.00 for a M.M.P.I. evaluation and consultation;

(2) $420.00 for Dr. Canady's bill, evaluations and analyses; and

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[1] (80.2 hours X $175) + (6.7 hours X $100) = $14,035.00

(3) a portion of the $489.50 bill for depositions.

Although plaintiff agrees with the defendant that expert witness fees and evaluations are not taxable as costs, plaintiff contends that the fees for the M.M.P.I. should be taxable as costs because the M.M.P.I. was necessary. "Where a sufficient showing of necessity is made, the courts have held that unusual or nonstatutory costs should be granted." U.S. Indus., Inc. v. Touche Ross & Co., 854 F.2d 1223, 1246 n.29 (10th Cir. 1988). The court finds that the M.M.P.I. test was reasonably necessary; during the trial, witnesses referred to the M.M.P.I. test, and its results. See id. at 1246 (stating that in determining whether a cost was necessary, the most direct evidence "is the actual use of materials obtained"). The cost of obtaining the M.M.P.I. is taxable.

The court finds that $420.00 should be deducted from plaintiff's claim because Dr. Canady's fee is for an expert witness consultation, which is not taxable as costs. The fees incurred for the depositions were necessary are reasonable, and thus, are taxable as costs. Accordingly, plaintiff is entitled to $2,013.90 in costs from the State defendants.

D. Plaintiff's Claim Against Davis County for Attorneys' Fees

Plaintiff, pursuant to the court's order, filed affidavits claiming $9,940.00 for attorneys' fees incurred in the §1983 action against Davis County. After Davis County filed an opposition to some of the fees, plaintiff filed an amended affidavit claiming $7,090.00.

The court finds that the hourly rates claimed for the attorneys involved are reasonable, based on prevailing market rates. See Jane L., 61 F.3d at 1510. The hours expended are also reasonable, with one exception. It is undisputed that the description on the time record for the .2 hours billed on February 3, 1998, is inadequate. Therefore, the court deducts .2 hours from

plaintiff's claim.

The court also finds that there is a mathematical error on plaintiff's calculation of fees. Accordingly, plaintiff's award of attorneys' fees from Davis County is $7,070.00.[2]

E. Plaintiff's Claim Against Davis County for Costs

Plaintiff claims that she is entitled to $890.47 in costs, exclusive of attorneys' fees. Davis County objects to plaintiff's claim for costs, claiming the plaintiff should receive nothing in costs. Plaintiff, in reply, contends that she is entitled to all costs listed, with the exception of $250.00 for a doctor's office visit on June 7, 1996.

The court finds that all of the costs claimed by plaintiff were necessary and taxable, with the exception of the doctor's office visit that plaintiff concedes is not taxable. Accordingly, plaintiff's award of costs from Davis County is $640.47.

F. Post Offer Costs

On September 1, 1999, the court ordered the State defendants and Davis County to file affidavits in support of an award of post-offer costs within thirty days.

The State defendants claim they incurred $1,205.82 in costs after the Rule 68 offer on April 28, 1995. Plaintiff objects only to $52.00 of the cost claimed for subpoenaing LDS hospital records on July 26, 1995, because plaintiff already reimbursed the State for that portion of that cost. Accordingly, the State defendants' award of costs from plaintiff is $1,153.82.

Davis County did not file an affidavit in support of an award of post-offer costs. Accordingly, Davis County does not receive an award of costs from plaintiff.

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[2] (32.4 hours X $175) + (14 hours X $100) = $7,070.00.

G. Plaintiff's Claim Against State Defendants for Attorneys' Fees for Summary Judgment and Appeal

Plaintiff claims that she is entitled to $37,312.50 for attorneys' fees incurred in seeking summary judgment and appeal. However, all attorneys' fees claimed are for the period after the Rule 68 offer was extended. Therefore, the court does not award plaintiff attorneys' fees for the motion for summary judgment and appeal.

H. Fees Related to Motion for Fees and Costs

Plaintiff claims that she is entitled to $11,287.50 for attorneys' fees incurred in bringing the motions for attorneys' fees from all defendants. The State defendants claim that the parties should bear their own attorneys' fees relating to the motions for costs and attorneys' fees. However, the State defendants argue that if the parties are not ordered to bear their own attorneys' fees in the fee litigation, the defendants are also entitled to reasonable attorneys' fees in defending their Rule 68 offers and obtaining costs against plaintiff. The County defendants contend that in determining the amount, the court should reduce the amount of fees to the extent that the plaintiff failed to prevail in the fee litigation.

The court holds that if the plaintiff had accepted the defendants' Rule 68 offers, some fee litigation may have been necessary, but it would have been greatly reduced. The court finds that had the plaintiff accepted the Rule 68 offers, a reasonable amount of time expended by plaintiff in fee litigation would have been ten hours against the State defendants and ten hours against Davis County. Plaintiff's attorney's billing rate of $175.00 per hour is reasonable considering the prevailing market rates in this community. Accordingly, the court finds plaintiff is entitled to $1,750.00 for costs incurred in fee litigation from the State defendants and $1,750.00 for costs

incurred in fee litigation from Davis County.

I. Rule 11 Sanctions

Plaintiff seeks Rule 11 sanctions against Davis County and Catherine Williams for allegedly filing a false and misleading affidavit and supporting document. Plaintiff claims that Davis County's assertion that its strip search policy was not related to plaintiff's legal actions is false. Specifically, plaintiff claims that the sworn statement by Jan Cunningham, that on November 17, 1995 (the date Davis County changed its strip search policy), Davis County was not aware of plaintiff's claim, is false.

The plaintiff has failed to establish that the statement of Jan Cunningham was not "to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . ." Fed.R.Civ.P. 11(b). Accordingly, the court denies plaintiff's motion for Rule 11 sanctions.

Order

In summary, the court finds as follows:

1. Plaintiff's motion to amend is DENIED;
2. Plaintiff is awarded $14,035.00 in attorneys' fees from the State defendants;
3. Plaintiff is awarded $2,013.90 in costs from the State defendants;
4. Plaintiff is awarded $7,070.00 in attorneys' fees from Davis County;
5. Plaintiff is awarded $640.47 in costs from Davis County;
6. The State defendants' are awarded $1,153.82 in costs from plaintiff;
7. Davis County does not receive an award of costs from plaintiff;
8. Plaintiff is not awarded attorneys' fees for the motion for summary judgment and

appeal;

9. Plaintiff is awarded $1,750.00 in attorneys' fees for fee litigation against the State defendants;

10. Plaintiff is awarded $1,750.00 in attorneys' fees for fee litigation against Davis County; and

11. Plaintiff's motion for Rule 11 sanctions is DENIED.

DATED this 16 day of January, 2000.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

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United States District Court
for the
District of Utah
January 11, 2000

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:94-cv-00754

True and correct copies of the attached were mailed by the clerk to the following:

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