

CCASE:
WILFRED BRYANT V. DINGESS MINE SERVICE
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

WILFRED BRYANT,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEVA 85-43-D

v.

DINGESS MINE SERVICE,
WINCHESTER COALS, INC.,
MULLINS COAL COMPANY,
JOE DINGESS AND
JOHNNY DINGESS,
RESPONDENTS

DECISION ON REMAND

Before: Judge Broderick

On September 29, 1988, the Commission reversed my determination that Mullins and Winchester were not liable for the discrimination for the discriminatory discharge of Complainant, but affirmed my determination that the adverse action was terminated when complainant refused reemployment. The proceeding was remanded to me for a redetermination of the award of attorneys' fees to complainants attorneys. 10 FMSHRC 1173 (1988), affirming in part and reversing in part 9 FMSHRC 336, 9 FMSHRC 940 (1987).

Pursuant to my order, Complainant's attorneys submitted a revised statement of attorneys' fees, together with affidavits and other documents in support of their request. They also submitted a legal memorandum arguing that their fee should be increased above the lodestar because of the contingent nature of the case, and that the fee should not be reduced because complainant was unsuccessful in his claim for reinstatement and because his back pay recovery was very limited.

Respondent replied to the attorneys' fee request, and argued that an enhancement of the fee because the case was contingent is inappropriate, and that the fee award should be reduced to reflect the limited success achieved.

REASONABLE HOURLY RATE-HOURS REASONABLY EXPENDED

Complainant's attorneys have submitted a revised statement of fees for their hours expended prior to the appeal of the case to the Commission, and a supplemental statement of fees for the

~251

work performed since that time. Respondents' counsel has not commented either on the hourly rate or on the hours claimed to have been expended. The revised statement claims different hourly rates for court time (\$80 per hour for Sheridan; \$90 per hour for Fleischauer), for consultation with co-counsel (\$40 per hour for each attorney), and for other legal work (\$65 per hour for Sheridan; \$75 per hour for Fleischauer). Although the proposed fee does in part respond to my Supplemental Decision of May 13, 1987, by reducing the fee request for hours expended in consulting with each other, it fails to respond to my concern that each attorney was seeking full compensation for the time they spent jointly in taking depositions and participating in the hearing. Nor does it explain or justify the time spent calling unidentified persons and travelling.

I conclude (1) that \$75 per hour is an appropriate rate for Ms. Fleischauer and \$65 per hour is an appropriate rate for Mr. Sheridan. I do not agree that they each should receive an increased rate for court time. I do agree that they should receive a reduced rate for consultation with each other and for their joint efforts. I have reviewed the statements of counsel and am persuaded that my prior conclusion that 100 hours of Ms. Fleischauer's services and 75 hours of Mr. Sheridan's are properly billable at the full rate was correct. The remaining hours involve consultation with each other, duplication of services, calls to unidentified persons, travel time between Morgantown, West Virginia (Fleischauer's office) and Logan, West Virginia (Sheridan's office), etc. Therefore, I will approve 100 hours of Ms. Fleischauer's time and 75 hours of Mr. Sheridan's time at the regular rates of \$75 and \$65 respectively. I will approve fees for the remainder of the time at the rate of \$40. On this basis Ms. Fleischauer's fee would total \$11,340; Mr. Sheridan's, \$6715.

With respect to services performed since June 1987, counsel request approval of fees of \$75 per hour (Sheridan) and \$100 per hour (Fleischauer) for regular services; \$100 per hour (Sheridan) and \$125 per hour (Fleischauer) for court time and \$50 per hour for consultation with co-counsel. Mr. Sheridan claims 35.15 hours of regular services and 3.4 hours consultation time. Ms. Fleischauer claims 49.85 hours of regular services, 3.4 hours of consultation time and 2.25 hours of court time. Most of this time of course is related to the appeal which was in part successful (Mullins and Winchester were held liable as mine operators). I will approve the fees requested: \$2800 for Sheridan and \$5400 for Fleischauer and I will approve the reimbursement of Fleischauer's expenses of \$254.34.

ENHANCEMENT FOR CONTINGENCY

Counsel did not request an upward adjustment of their fees for contingency at the time their statements were originally submitted. Nor does the Commission's remand direct me to consider such a request. Nevertheless, in order to make a complete record, I will consider their request at this time.

There may be circumstances in which enhancement of a reasonable lodestar to compensate for the contingent nature of the attorney's employment is justified. But these circumstances are rare. See *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. ___, 97 L.Ed. 2d at 603 (concurring opinion of O'Connor, J.). *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984). I previously determined that this case was of average complexity. It did not involve any unique legal theory or factual difficulty. There is no basis for concluding that without an enhancement of the fee because of contingency, competent counsel would not have been available to complainant. Complainant's request for an "upward adjustment" of their fee by 50 percent is DENIED.

RESULTS OBTAINED

Complainant was not successful in his claim for reinstatement. His back pay recovery was limited to nine days, because of the determination that he refused offered reemployment and resigned his position. His recovery therefore is limited to \$1297.48 plus interest after April 24, 1987. In a statute such as the Mine Act, the amount recovered is not the determining factor in fixing a reasonable attorney's fee. But it is one factor. As I stated in my Supplemental Decision "a substantial part of the time for which fees and claimed was "spent litigating issues upon which plaintiff did not ultimately prevail,"' citing *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980). Because of the limited recovery, I will reduce the attorneys' fees by 15 percent. Therefore I will approve a total fee for Ms. Fleischauer in the amount of \$15,229 (\$11,340 á \$5400 less 15%). I will approve a total fee for Mr. Sheridan in the amount of \$8088 (\$6715 á \$2800 less 15%). I will also approve reimbursement of Ms. Fleischauer's expenses.

ORDER

In accordance with the Commission's remand, Respondents are ORDERED to pay within 30 days of the date of this decision the following amounts:

~253

(1) To Barbara Evans Fleischauer, Esq., \$15,229 attorney's fees and \$820.52 as litigation expenses;

(2) To Paul Sheridan, Esq., \$8088 attorney's fees.

James A. Broderick
Administrative Law Judge