In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 00-475C
(Filed October 2, 2006)

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TECOM, INC.,	*
Plaintiff,	*
v.	*
THE UNITED STATES,	*
Defendant.	*

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MEMORANDUM OPINION AND ORDER

I. BACKGROUND

On May 4, 2006, the Court sanctioned defendant, requiring it to pay the attorneys' fees and other expenses plaintiff incurred in responding to defendant's misrepresentation that Mr. John McCowen was an employee eligible to serve in the capacity of party representative. *See* Order of May 4, 2006 ("Sanctions Order") (detailing the facts leading to the misrepresentation and the sanction). The Court ordered plaintiff to submit a memorandum of costs and allowed the defendant to file objections to any of the items of fees and expenses. After plaintiff filed its memorandum and the government responded, the Court provided plaintiff with the opportunity to file a reply in support of the memorandum of costs. *See* Order (June 13, 2006). Having carefully reviewed the papers submitted by the parties, for the reasons stated below, the Court hereby **ORDERS** defendant to pay plaintiff **$17,847** in attorneys' fees and **$2,101.30** in other expenses.

II. DISCUSSION

A. Plaintiff's Memorandum of Costs

Plaintiff initially requested attorneys' fees of $16,154 and expenses of $2,101.30. *See* Pl.'s Mem. of Costs at 3, 7; *see also id.* Exs. 1-2 (law firm time sheets and legal research database expenses). These amounts were derived from the work of four individuals: Karl J.

Nelson, a partner and attorney of record; Jason M. St. John, an associate; Robin D. Leone, a law clerk whose bar admission was then pending; and Indira K. Balram, a law student. *Id.* at 7. The bulk of these expenses were incurred in the research for and drafting of plaintiff's eighteen-page response to the government's initial brief regarding the McCowen misrepresentation. *See id.* Ex. 1. While the government's brief regarding FRE 615 was but eleven pages long, it raised several issues pertaining to Mr. McCowen's presence during the testimony of other witnesses. These included: an additional factual misrepresentation -- that the government "identified [Mr. McCowen's] status when making [its] designation," Def.'s Resp. to Ct.'s Req. for Brfg. re FRE 615 ("Def.'s FRE 615 Br.") at 5; the legal argument, subsequently withdrawn, that plaintiff waived its right to exclude Mr. McCowen, *id.* at 6; *see also* Def.'s Resp. to Show Cause Order at 5 n.2 (withdrawing waiver argument); the arguments that a retired service member remains an employee of the Air Force or is converted into one by virtue of a contractual relationship, Def.'s FRE 615 Br. at 7; and the argument that Mr. McCowen's presence during testimony could be excused because he might have qualified as a person "essential to the presentation" of defendant's cause, under FRE 615(3). *See id.* at 8-10. The remaining expenses related to the research for and drafting of plaintiff's opposition to the government's response to the order to show cause why sanctions should not be imposed. *See* Order (Oct. 26, 2005); *see also* Tr. (Oct. 24, 2005) at 644-47.

In its reply, plaintiff requested an award of an additional $2,232.50 in attorneys' fees, reflecting the time spent by Messrs. Nelson and St. John in preparing the Memorandum of Costs. *See* Pl.'s Reply at 8-9 & Ex. 2 (law firm time sheets).[1]

B. Defendant's Objections

Defendant accepted the Court's invitation to submit objections to plaintiff's memorandum of costs. Most of defendant's filing was dedicated to a motion for reconsideration,[2] but it briefly addressed the merits of plaintiff's requested fees and costs. *See* Def.'s Mot. for Recon. & Resp. to Mem. of Costs ("Def.'s Resp.") at 8-12. The government appears to base its contention that the amount of fees requested are unreasonable on five separate grounds, which the Court will consider in turn.

As sanctions are being imposed under RCFC 11, the government appropriately begins its discussion by citing the RCFC 11(c)(2) requirement that sanctions "be limited to what is sufficient to deter repetition of such conduct." *See id.* at 9. It then quotes various statements from the Supreme Court's opinion in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), as well as other authorities, concerning overstaffing, excessive or redundant hours, lack of specificity in

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[1] In the Memorandum of Costs, plaintiff estimated that these fees totaled $2,115. *See* Pl.'s Mem. of Costs at 3 n.5; *see also id.* at 7.

[2] The motion for reconsideration was denied in a separate order. *See* Order (Sept. 26, 2006).

describing the tasks performed, and the like. *Id.* at 10-11. But its application of these principles to the fees request at issue displays the cavalier approach to the facts and the law that regrettably has brought us to this point in the first place.

It is hard to see how two of the grounds advanced by defendant could be argued in good faith by any attorney who had actually read plaintiff's Memorandum of Costs. The government states that the "fee request should be further reduced because we do not know, based upon the documentation provided, exactly which person performed which tasks." Def.'s Resp. at 11-12. It follows this statement with the assertion: "Given the relatively short time frame the parties had to respond to the motions associated with the status issue, it is unlikely that there were 79 discreet [sic] hours spent in responding to the status issue." *Id.* at 12. But the "documentation provided" includes time sheets that identify each of the four individuals by their initials and describe in detail the tasks each performed. *See* Ex. 1 to Pl.'s Mem. of Costs. And these tasks, performed over ten separate days, did indeed add up to 79.6 hours. *See id.* Even a brief glance at the documentation provided reveals facts that cannot be reconciled with the defendant's two arguments, quoted above. Given these proceedings, it is disappointing that counsel for the defendant has not yet developed an appreciation of RCFC 11's requirement of a reasonable inquiry into factual contentions contained in signed and filed papers.

Defendant also argues that the work performed by a law clerk whose bar admission was pending and by a law student employed by plaintiff's counsel should not be included in any award of fees and expenses. Def.'s Resp. at 11. According to the government, because RCFC 83.1(a) requires that each attorney appearing before the Court of Federal Claims must be a member of the Court's bar, "[i]t necessarily follows that only members of the bar who comply with RCFC 83.1 can be eligible for attorney fees." *Id.* But the Court fails to see any connection whatsoever between this rule and the imposition of a sanction for a Rule11 violation ordering payment of "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." RCFC 11(c)(2). Certainly no language of Rule 83.1 even suggests a limitation on fees and expenses imposed under Rule 11.

Nor is there any case law to support the government's argument concerning non-lawyer expenses. The one citation it appends to the back of this argument -- a reference to the opinion in *Environmental Defense Fund, Inc. v. Reilly*, 1 F.3d 1254 (D.C. Cir. 1993) -- is described (parenthetically) as standing for the unrelated proposition "that a court could deny in its entirety an outrageously unreasonable fee request or impose a lesser sanction of reducing the fee amount in cases of less egregious overbilling." Def.'s Resp. at 11 (citing *Reilly*, 1 F.3d at 1258). To make matters worse, that particular opinion *upholds* the portion of an attorneys' fee award that includes the costs of "a recent law school graduate," *Reilly*, 1 F. 3d at 1258, who apparently had not yet been admitted to a bar -- and is thus contrary to the point the government is attempting to make. *See id.* at 1259-60 (reducing the award for work performed by two of the attorneys, but not that of the recent law school graduate).

Moreover, even a cursory review of the case law would have revealed that provisions authorizing the award of attorneys' fees and expenses are uniformly interpreted to include the

expenses used to employ non-lawyers, such as paralegals and law clerks. In the context of 42 U.S.C. section 1988, for instance, the Supreme Court has held that it is "self-evident" that such expenses are included:

> Clearly, a "reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. The parties have suggested no reason why the work of paralegals should not be similarly compensated, nor can we think of any. We thus take as our starting point the self-evident proposition that the "reasonable attorney's fee" provided for by statute should compensate the work of paralegals, as well as that of attorneys.

Missouri v. Jenkins, 491 U.S. 274, 285 (1989).

Our Court has frequently allowed recovery for non-attorney time as part of an award of attorneys' fees and expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. *See, e.g.*, *Carmichael v. United States*, 70 Fed. Cl. 81, 86 (2006) (noting that "[i]n general, paralegal expenses are recoverable under the EAJA" (*citing R.C. Const. Co. v. United States*, 42 Fed. Cl. 57, 64 (1998)); *Filtration Dev. Co. v. United States*, 63 Fed. Cl. 612, 626 (2005) (awarding attorney and paralegal fees in a post-award bid protest); *California Marine Cleaning, Inc. v. United States*, 43 Fed. Cl. 724, 731-32 (1999) (allowing reasonable attorney and paralegal fees); *Griffin & Dickson v. United States*, 21 Cl. Ct. 1, 14 (1990) (allowing plaintiff to recover for attorney fees, as well as clerical work and research assistance).

The government offers no reason why the sanction of payment of "all of the reasonable attorneys' fees and other expenses incurred" for a violation of RCFC 11 should be interpreted differently from these other fees and expenses provisions.[3] The Court concludes that inclusion of such non-attorney expenses is necessary "to deter repetition of such conduct or comparable conduct by others similarly situated," RCFC 11(c)(2), by making the government bear the costs its misrepresentation imposed on the plaintiff. The government's proposal would seemingly (and strangely) limit attorneys' fees to only those charged for work by lawyers who are members of our Court's bar, and would have the effect of *increasing* the costs of government sanctions --

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[3] Indeed, as plaintiff points out, Pl.'s Reply at 14-15, the matrix prepared by the U.S. Attorney's Office for the District of Columbia, "to be used in cases in which a 'fee-shifting' statute permits the prevailing party to recover 'reasonable' attorney's fees," contains reimbursement rates for paralegals and law clerks. *See* Ex. 4 to Pl.'s Reply at 1 (document found at http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_5.html, visited June 27, 2006).

by providing members of our bar with the incentive to perform tasks that could be more efficiently performed by non-lawyers. The proposal is baseless as a matter of law and senseless as a matter of policy. *Cf. Griffin & Dickson*, 21 Cl. Ct. at 11 & n.17 (reducing an EAJA award by eliminating hours of work performed by an attorney "which paralegals, secretaries, or law clerks could have completed").

The fourth argument of defendant is that the fees request is unreasonable due to plaintiff having described six different issues to which the work corresponded, some of which did not deal specifically with FRE 615(2). Def.'s Resp. at 12. But five of the issues were raised by the government in its initial briefing concerning whether Mr. McCowen should be excluded under FRE 615, and the sixth was raised by the government in its brief responding to the order to show cause.[4] All six issues were the direct result of the government's misrepresentation that Mr. McCowen was an employee of the government eligible to serve in the capacity of party representative. In particular, defendant singles out the issue of whether Mr. McCowen could fall under the FRE 615(3) exception to the exclusion of fact witnesses. *Id.* The government argues that since it might have been able to show that Mr. McCowen's presence was essential to the presentation of its cause, *see* FRE 615(3), this "argument was not meritless" and should not, therefore, contribute to the fees and expenses determination. *See* Def.'s Resp. at 12. But FRE 615, once invoked, would require the exclusion of a witness until a party makes a showing that the presence of the witness is essential. This showing is supposed to occur *before* the witness may be present during the trial. *See* Sanctions Order at 4; *see also* Tr. (Oct. 24, 2005) at 637. The government cannot use FRE 615(3) as an ex post facto rationalization for the presence of a witness under false pretenses. The government's failure to raise this exception at the appropriate time, before the trial began, and its injection of the argument in the mid-trial briefing, disrupted plaintiff's trial preparation and imposed added costs on plaintiff -- all as a consequence of the misrepresentation of Mr. McCowen's status. If the government feels that the plaintiff should not have responded to the FRE 615(3) argument, it should have omitted the argument from its papers.

The final argument of defendant appears to be that its failure to have properly identified Mr. McCowen's status as a retired service member with a consulting contract should be excused, since its interpretation of the application of FRE 615(2) to retired service members is so novel that no reported cases address this interpretation. *See* Def.'s Resp. at 12 (stating that "plaintiff

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[4] Plaintiff responded to the following issues raised by the government: that Mr. McCowen was qualified as an "employee" of the government for purposes of FRE 615(2); that his "unspecified 'consulting services'" qualified him as a government employee for purposes of FRE 615(2); that these "unspecified 'consulting services'" made his presence "essential" to the government's trial preparation under FRE 615(3); that Mr. McCowen could be considered an employee of the government for the purposes of FRE 615(2) due to Air Force Instruction 51-301; that Plaintiff waived the right to enforce exclusion of Mr. McCowen under FRE 615; and that bad faith was a prerequisite for the imposition of Rule 11 sanctions. *See* Pl.'s Mem. of Costs at 3-6.

did not cite one case in support of its contention that a retired service member cannot serve as a party representative" and contending that the issue "is an unsettled area of jurisprudence in this circuit"). In this regard, it is important to remember that the government did not initially base its FRE 615(2) designation of Mr. McCowen upon his *retired* status. When Mr. McCowen's retired status came to light during the first day of the trial, the defendant's counsel justified Mr. McCowen's presence by arguing that "as far as I can determine at this quick just first blush, that the Agency has a *discretion to nominate anyone* whom they feel is to represent them in Court . . . ." Tr. (Oct. 17, 2005) at 139 (emphasis added). The government immediately added that Mr. McCowen was a percipient fact witness, who was now "under a contract," *id.*, and then argued that FRE 615 was "not binding on this Court." *See id.* at 141 (mistakenly referring to the Federal Rules of *Procedure*); *but see* 28 U.S.C. § 2503(b) (2000) (requiring our Court's proceedings to be "in accordance with the Federal Rules of Evidence"). Government counsel as an afterthought included the argument that "a retired soldier or airman is still part of the Air Force." Tr. (Oct. 17, 2005) at 144.

Thus, it appears that the government failed to first consult FRE 615(2) before designating Mr. McCowen as its party representative, and only later grasped at the retired status justification. In any event, this underscores the importance of raising such issues before the trial begins. Had Mr. McCowen been properly identified as retired and under contract before the government sought to designate him as its FRE 615(2) party representative, plaintiff would have moved to exclude him before the trial began, and the government's novel theory could have been explored at a more opportune time. But by misrepresenting this fact, and failing to raise the "retired service member" theory pre-trial, the government required plaintiff's response to be crafted in the midst of the trial, after Mr. McCowen had already observed a portion of the testimony of one of plaintiff's witnesses. The plaintiff's failure to doubt the government's representation of Mr. McCowen's status, and to anticipate the government's unprecedented theory, is no cause to reduce the size of the attorneys' fees and expenses payable to plaintiff.

C. The Reasonableness of Plaintiff's Fee Amount

Having rejected the defendant's arguments concerning the reasonableness of the hours expended by plaintiff's counsel, and after carefully reviewing the time sheets submitted by plaintiff, *see* Pl.'s Mem. of Costs Ex. 1; Pl.'s Reply Ex. 2, the Court concludes that the hours expended were reasonable for the tasks performed. As the fee applicant, plaintiff has the responsibility to prove that its rates are in line with the prevailing rates in the community for similar services performed by lawyers of comparable skill and reputation. *See View Eng'g, Inc. v. Robotic Vision Systems, Inc.*, 208 F.3d 981, 987 (Fed. Cir. 2000). To support the rates its lawyers charged, plaintiff enclosed a copy of local fee guidelines published by the United States District Court for the District of Maryland -- the district in which plaintiff's attorneys are located. *See* Pl.'s Reply Ex. 3. The suggested rates are based on an informal survey of rates charged for certain categories of cases, and provide "practical guidance" for judges to use in determining fee awards. *See id*. Ex. 3 n.5.

Plaintiff seeks fees for work performed by four individuals. The hourly rate charged for Mr. Nelson's time, at a special, reduced rate, *see* Pl.'s Reply Ex. 1 ¶ 5, was $235 per hour, well within the guidelines for someone of his experience. Mister St. John's hourly rate was $210 per hour for his work related to the two papers filed in 2005, which was also within the guidelines for an attorney with five years' experience. By the time he worked on preparing the Memorandum of Costs, his hourly rate appears to have risen to $235. *See* Pl.'s Reply at 9 & Ex. 2. While this rate exceeds by $10 the upper range of the guidelines rates for attorneys with five to eight years' experience, the Court notes that the guidelines are dated August 16, 2004. The Court also takes notice that the matrix prepared by the United States Attorney's Office for the District of Columbia to calculate reasonable attorneys' fees increased its suggested rate for attorneys with four to seven years' experience by $10 for the year starting June 1, 2005, over the previous year's rate. *See* Ex. 4 to Pl.'s Reply at 1 (a copy of the government document found at http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_5.html, visited June 27, 2006). This adjustment was based on a cost of living increase "measured by the Consumer Price Index for All Urban Consumers (CPI-U) for Washington-Baltimore, DC-MD-VA-WV, as announced by the Bureau of Labor Statistics for May of each year," and results in a rate of $235. *Id.* A comparable adjustment to the guidelines rates would place the current hourly rate of Mr. St. John at the upper bound of the guidelines range, which the Court finds supported and reasonable.

The rates charged for the work of the other two individuals, however, exceeds the guidelines rates. The hourly rate of Ms. Leone, a law clerk whose bar application was pending at the time she performed the work, was $175 per hour, *see* Pl.'s Mem. of Costs at 7 & Ex. 1, and that of Ms. Balram, a law student, was $160 per hour. *Id.* The Maryland guidelines suggest a rate of $90 per hour for paralegals and law clerks, and the D.C. U.S. Attorney's Office Matrix suggests a rate of $115 per hour for paralegals and law clerks. Considering Ms. Leone's status as a law school graduate on the verge of being admitted to the bar at the time her work was performed, the Court finds it reasonable for plaintiff to pay an hourly rate comparable to that earned by first-year associates in the relevant community. The guidelines range as of August, 2004, was $135 to $170 per hour. *See* Ex. 3 to Pl.'s Reply. If that range is adjusted by the $10 cost of living increase for the D.C.-Baltimore area adopted by the D.C. U.S. Attorney's Office, for attorneys with one to three years' experience, *see* Ex. 4 to *id.*, then the rate charged for Ms. Leone's work falls within the adjusted guidelines range. Accordingly, the Court finds it to be reasonable.[5]

Concerning the rate at which Ms. Balram's work was billed, the Court cannot conclude that it is justified given the guidelines and the matrix. Adjusting the guidelines rate of $90 per hour by the annual increase of $5 for paralegal and law clerk work, adopted by the D.C. U.S. Attorney's Office, results in a rate of $95 per hour, which the Court finds reasonable under the

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[5] The Court also notes that Ms. Leone's rate is $20 less than the D.C. U.S. Attorney's Office Matrix rate for lawyers who are within three years of law school graduation. *See* Ex. 4 to Pl.'s Reply.

circumstances. As a consequence, the Court will adjust downwards the fees corresponding to Ms. Balram's work by $65 for each hour billed. Since she worked 8.3 hours, *see* Pl.'s Mem. of Costs at 7 & Ex. 1, the fees request is thus reduced by $539.50.

The Court thus concludes that the appropriate sanction imposed upon defendant is as follows: $15,614.50 for billable work relating to the plaintiff's responses to the brief regarding FRE 615 and to the brief responding to the order to show cause; $2,101.30 in legal research database expenses relating to these two responses, *see* Pl.'s Mem. of Costs Ex. 2, which the Court finds reasonable; and $2,232.50 for billable work relating to the preparation of the Memorandum of Costs. Thus, the total amount payable to plaintiff, as a sanction for the misrepresentation of Mr. McCowen's status, is $19,948.30.

III. CONCLUSION

Defendant's misrepresentation, in violation of RCFC 11, caused a tangible injury. Plaintiff was forced to expend time and money to respond to the misrepresentation, at an inopportune time in the midst of trial. The purpose of the imposition of a monetary sanction is to "deter repetition of such conduct or comparable conduct by others similarly situated," RCFC 11(c)(2), and the Court finds that a symmetrical reimbursement of the reasonable fees and expenses incurred as a result of the misrepresentation provides the appropriate deterrent. Thus, the defendant shall pay to plaintiff the sum of $19,948.30, to compensate for the reasonable attorneys' fees and expenses caused by the government's violation of RCFC 11.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge