

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

James E. Carpenter-Taylor,
on behalf of himself and all
others similarly situated,

Plaintiffs,

Civ. No.4-92 /

v.

Henry Cisneros, in his official
capacity as Secretary of the
United States Department of
Housing and Urban Development;
and Thomas T. Feeney, in his
official capacity as Field Office
Manager of the Minneapolis-St. Paul
Office of the United States Department
of Housing and Urban Development.

MEMORANDUM OPINION
AND ORDER

Defendant.

Plaintiff Rebecca McClinton brought this action on behalf of herself and all others similarly situated against defendants the Secretary of the United States Department of Housing and Urban Development's (HUD), Thomas Feeney, Field Manager of the Minneapolis-St. Paul Office for HUD, and Knutson Mortgage Corporation (Knutson). Her complaint sought class certification and declaratory and equitable relief concerning HUD's application of the rules and regulations pertaining to the occupied conveyance program, 24 C.F.R. § 203.670.-.681 (1991). McClinton moved for a temporary restraining order to prevent her mortgage holder, Knutson, from conveying her home to HUD, but withdrew her motion after she and HUD entered a stipulation which resolved her claims against defendants.

HUD then moved to dismiss the case. Legal Aid opposed HUD's

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motion and filed a motion to intervene on behalf of James Carpenter-Taylor and a motion for class certification. On April 28, 1992, Carpenter-Taylor moved for a preliminary injunction preventing Knutson from taking any action to terminate his tenancy or otherwise interfering with his possession of his house. On May 4, 1992, the court granted Carpenter-Taylor's motion for a preliminary injunction. On May 13, 1992, the court denied the government's motion to dismiss, granted Carpenter-Taylor's motion to intervene, and granted the motion for class certification. The claims of plaintiffs were dismissed with prejudice on July 9, 1992, following a stipulation among the parties. The final settlement agreement was approved on November 3, 1992. Plaintiffs now move to recover their attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d).

EAJA provides that a prevailing party in a civil action may recover his attorneys fees unless the position of the United States was substantially justified or special circumstances make an award unjust. 28 U.S.C § 2412(d). EAJA is a waiver of sovereign immunity and must be strictly construed. See Monarch Boat Co. v. NLRB, 708 F.2d 1322, 1326-27 (8th Cir. 1983).

A plaintiff is a prevailing party if he receives some benefit from the litigation on a significant issue. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). 28 U.S.C. § 2142. A plaintiff is a prevailing party in a case resolved through stipulation and settlement if the suit was a necessary and important factor in altering the relationship between the parties

and the government's conduct was legally required. United Handicap Federation v. Andre, 622 F.2d 342, 346 (8th Cir. 1980).

The government concedes that this suit was a factor in allowing McClinton to remain in her home. McClinton should be considered a prevailing party. Both sides present opposing arguments on the issue of whether Carpenter-Taylor and the class of plaintiffs were prevailing parties. The court does not need to address these arguments, however, because the record shows that HUD's position was substantially justified after it settled with McClinton.

The government has the burden of proving that its position was substantially justified. 28 U.S.C. § 2412(d)(1)(A). The government's position includes its litigation position and the agency's actions or failure to act which caused the litigation. 28 U.S.C. § 2412(d)(2)(D). The government's position is substantially justified if it has a reasonable basis in law and fact. Pierce v. Underwood, 487 U.S. 552, 565 (1988). The government can lose the merits of its case and still prevail on the issue of attorney fees. Brouwers v. Bowen, 823 F.2d 273, 275 (8th Cir. 1987).

HUD concedes that it did not apply the amended medical criterion to McClinton when it denied her application in violation of its own effective regulations, but notes that it quickly settled with McClinton to avoid further litigation costs. HUD's failure to follow its own effective regulations was not reasonable and HUD's position was not substantially justified before it settled with McClinton.

After settling with McClinton, HUD opposed the motions to intervene and for class certification brought by plaintiffs. HUD's decision to oppose these motions was well grounded in justiciability law. HUD's position was substantially justified after its initial settlement with McClinton and plaintiffs should not recover fees incurred after the McClinton settlement.

Normally fees awarded under the EAJA:

Shall be based upon prevailing market rates . . . except that . . . attorney fees shall not be awarded in excess of \$75 per hour unless the Court determines that an increase in the cost of living or a special factor . . . justifies a higher fee.

The plaintiffs have requested \$30,882.80 for attorneys fees and costs in this litigation based on hourly rates of \$110 to \$114 for four attorneys involved in this case. A cost of living increase should be measured from October 1981 which was the original effective date of the \$75.00 rate, Johnson v. Sullivan, 919 F.2d 503, 505 (8th Cir. 1990), and the Consumer Price Index is adequate proof of the increase in the cost of living. Kelly v. Bowen, 862 F.2d 1333, 1336 (8th Cir. 1988). The cost of living has increased 51.8% since October 1981 which increases the maximum rate allowed under EAJA to \$114.00 per hour. Thomas Conley requests a rate of \$110.00 per hour which is reasonable for this class action. Timothy Thompson, Lawrence McDonough, and Dorinda Wider all normally charge their clients more than \$114.00 per hour and \$114.00 per hour for their work is appropriate.

The government argues that the plaintiffs have not provided enough information to document their claim and that contemporaneous

time records should have been submitted. Contemporaneous time records are not automatically required, MacDissi v. Valmont Industries, Inc., 856 F.2d 1054, 1061 (8th Cir. 1988), but if the court does not have a reliable basis on which to award fees without contemporaneous records, then it may reduce or eliminate the attorney fees award. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The records submitted by the plaintiffs adequately document the work performed by their attorneys for the purposes of this motion.

HUD has submitted seven categories of objections to a number of hours claimed by each attorney. Plaintiffs respond that they have subtracted hours that they believe were not productive and that the remaining hours were productive. Attorneys are entitled to compensation only for productive time. See id.

HUD contends that plaintiffs should not recover fees for hours spent conferencing with other attorneys and for reviewing another attorney's work. Attorneys normally discuss complex litigation with one another and review one another's work. The attorneys have submitted sworn affidavits that they have deleted hours duplicating the work of others. These hours should be included in the award.

HUD claims that plaintiffs should not recover their fees for time spent drafting Freedom of Information Act requests, monitoring the unlawful detainer action, and conferencing with various people about post conveyance tenancy. Most of the hours HUD objects to on these grounds were billed after the McClinton settlement, but hours

unrelated to this litigation will not be included in the award.

HUD asserts that hours for administrative functions not requiring the services of an attorney have been included, but these hours were billed after the McClinton settlement and will not be included in the award. HUD also contends that all time spent after the McClinton settlement protracted the litigation. As discussed above, the hours billed after the McClinton settlement will not be included in the award.

Finally, HUD argues that the attorneys for plaintiffs spent excessive time researching, drafting court documents, and preparing for court. The hours billed before the McClinton settlement were not excessive and will be included in the award.

Thomas Conley spent 57.1 hours before the McClinton settlement times \$110 for a total of \$6,281.00. Timothy Thompson spent 4.5 hours before the McClinton settlement times \$114 for a total of \$513.00. Dorinda Wider spent 1.0 hour before the McClinton settlement times \$114 for a total of \$114.00. All of the time billed by Lawrence McDonough occurred after the McClinton settlement.

Plaintiffs should also recover fees for the hours their attorney spent preparing the fee application. Kelly v. Bowen, 862 F.2d 1333 (8th Cir. 1988). Thomas Conley spent 12.9 hours preparing this application times \$110 for a total of \$1419.00. Plaintiffs are entitled to attorneys fees of \$8,317.00.

ORDER

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that plaintiff's motion for attorneys fees is granted and plaintiff is entitled to recover from the United States Department of Housing and Urban Development \$8,317.00 attorneys fees and costs.

Date:

5/14/93

Let judgment be entered accordingly

Diana E. Murphy

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Chief Judge