UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANETTE BROWN,
Plaintiff

V. CIVIL ACTION NO. 83-1512-MA

ARLINGTON HOUSING AUTHORITY,
Defendant

JUDGMENT

MAZZONE, D.J.

In accordance with the Court's allowance of plaintiff's motion to voluntarily dismiss all claims except for attorney's fees and the Court's memorandum and order dated June 19, 1984 awarding attorney's fees to the plaintiff pursuant to 42, United States Code §1988, it is hereby ORDERED

> Judgment for the plaintiff, Danette Brown, against the defendant Arlington Housing Authority for attorneys fees in the amount of Two Thousand Four Hundred Dollars ($2,400.00). All other claims are hereby dismissed.

By the Court,

June 21, 1984

Deputy Clerk

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PLAINTIFFS

BROWN, Danette

DEFENDANTS

Topic 6

ARLINGTON HOUSING AUTHORITY

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

to prevent unlawful termination of Section 8 Housing benefits

ATTORNEYS

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANETTE BROWN, Plaintiff

Civil Action
83-1512-MA

Vs.

ARLINGTON HOUSING AUTHORITY, Defendant

MEMORANDUM AND ORDER

Mazzone, D.J.

June 19, 1984

The plaintiff brought suit to prevent termination of her Section 8 federal housing benefit, seeking injunctive and declaratory relief, damages and attorney's fees. This Court allowed the plaintiff's ex parte motion for a temporary restraining order (TRO) the day the suit was filed. The next day, the defendant gave the plaintiff the relief she sought by injunction. On May 4, 1984, this Court denied the plaintiff's motion for attorney's fees because no judgment had been entered in this case. The plaintiff now files a notice of voluntary dismissal of her claims for injunctive and declaratory relief and damages, along with a motion for reconsideration of her prior motion for attorney's fees. The parties have filed memoranda in support of their respective positions. This Court has jurisdiction pursuant to 28 U.S.C. §§1331, 1343(3) and (4).

The relevant factual background is as follows: In January 1983, the plaintiff's landlord informed her that he would not renew her lease which expired May 31, 1983. Around March 1, 1983, the plaintiff found another apartment for which she submitted a request for lease approval with the defendant. On March 17, 1983, the defendant informed the plaintiff that she was ineligible for the program and would be

terminated as of May 31, 1983 because "A tenant who is asked to vacate on grounds of behavior by a second owner is ineligible for the program." The plaintiff brought suit May 26, 1983, alleging that the defendant had unlawfully terminated her Section 8 federal housing benefit. That same day, this Court granted the plaintiff's ex parte motion for a TRO to prevent the defendant from refusing to continue the plaintiff's participation in the program pending determination of the plaintiff's motion for preliminary injunction. The next day, the defendant reinstated the plaintiff to the Section 8 program and processed her request for lease approval. The physical layout of that particular apartment, however, violated program regulations. By its attorney's letter of August 12, 1983, the defendant indicated its willingness to resolve the plaintiffs situation and to reinspect the current apartment or any other apartment she might find. The plaintiff's financial situation subsequently improved, and she elected to stay without subsidy in the apartment for which she had submitted a request for lease approval. The plaintiff currently wishes to pursue only her request for attorney's fees.

The relevant statute authorizing an award of attorney's fees, 42 U.S.C. §1988, provides in pertinent part: "In 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."

The standard of awarding attorney's fees applicable to this case is specified in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). In Nadeau, the plaintiff sought attorney's fees under two separate theories. First, the plaintiffs were partially successful on appeal and

therefore sought an award proportional to their effort on that issue. Second, the plaintiffs argued that achievements formalized in a consent decree, allegedly due in significant part to their efforts, should also be considered sufficiently "prevailing" to support an award of fees. 581 F.2d at 278.

In the instant case, the plaintiff's theory supporting an award of fees appears to be a combination of the two theories presented in Nadeau. The plaintiff states that the TRO "took effect immediately and compelled defendant to provide all the relief that plaintiff sought by way of injunction....Defendant A.H.A. did not move to dissolve this Court's Order. Instead, defendant reinstated plaintiff to the Section Eight Program and processed her request for leave approval. Furthermore defendant offered to process requests for lease approval for any other apartment plaintiff might locate....It is difficult to imagine how plaintiff could have prevailed more completely." Thus, the plaintiff apparently argues that the defendant "complied" with the TRO by reinstating the plaintiff. At the same time, the plaintiff apparently argues that the defendant's capitulation was equivalent to a settlement, achieved in substantial part due to the plaintiff's suit.

A plaintiff who is partially successful in achieving the relief sought may still receive an award as a "prevailing party" if they "succeed on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit." 581 F.2d at 278-79 (emphasis added). The plaintiff's success in securing a TRO here, however, is not success on a significant issue in litigation. The TRO was issued merely to preserve the status quo and avoid irreparable injury pending determination of the plaintiff's motion for a preliminary

injunction. Pursuant to Fed.R.Civ.P. 65(b), the TRO expired ten days after entry. No preliminary injunction was ever sought or issued. The TRO itself compelled the defendant to do nothing more than maintain the plaintiff in the program pending determination of the motion for preliminary injunction. The TRO entitled the plaintiff to nothing more than participation in the program pending determination of the motion for preliminary injunction. The issuance of the TRO was a procedural matter that cannot be compared to success on an issue in litigation. Under Rule 65(b), the defendant upon two days notice to the plaintiff could have moved to dissolve or modify the TRO. The defendant's failure to do so, however, indicated no admission as to the strength of the underlying claims. Similarly, this Court's issuance of the TRO was made without comment on the merits of the plaintiff's claims. The plaintiff obtained the benefit she sought, full reinstatement and cooperation from the defendant, not because the TRO so mandated, but because the defendant chose to do so. Accordingly, an award of fees is not warranted under the partially prevailing plaintiff theory discussed in Nadeau. Compare Coalition for Basic Human Needs v. King, 691 F.2d 597, 601 (1st Cir. 1982) (Plaintiff "established its 'entitlement to some relief on the merits...on appeal' by obtaining an injunction pending appeal that effectively determined the parties' rights.").

When a plaintiff's lawsuit acts as a "catalyst" in prompting the defendant to meet the plaintiff's claims, attorney's fees may be justified despite the lack of judicial involvement in the result. 581 F.2d at 279 (citations omitted). The inquiry is twofold. First, a factual determination: "if...the plaintiffs' suit and their attorney's efforts were a necessary and important factor in achieving the

improvements...plaintiffs should be held to have overcome their first hurdle toward their goal of receiving some attorney fees." 581 F.2d at 281 (original emphasis). Second, a legal determination: if the plaintiff's action could be considered "frivolous, unreasonable, or groundless," attorney's fees should be denied regardless of the impact of the suit on the defendants' willingness to meet the plaintiff's claims. 581 F.2d at 281, quoting Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422 (1978).

Initially, then, I must make the factual determination whether the suit was a "necessary and important" factor in the defendant's decision to reinstate the plaintiff. The defendant's asserted good faith in reinstating the plaintiff is irrelevant, because attorney's fees are not designed merely to penalize the defendants, but to encourage injured individuals to seek judicial relief. 581 F.2d at 280. Essentially, the only factual record before the Court is the affidavit of the plaintiff's attorney who originally brought suit. The attorney states that she first spoke to the defendant's Section B program director on or about May 19, 1983. The director allegedly was adamant that the plaintiff was terminated from the program. The next day, the attorney and the director met and reviewed the plaintiff's program file for over two hours. The attorney informed the director that, in her opinion, the defendant was unlawfully terminating the plaintiff, and unless the defendant reversed its termination decision, the attorney would file suit. The director stated that the defendant refused to reverse its decision. Between May 19, and May 26, 1983, the attorney made an unspecified number of attempts to contact the general director of the defendant, but was always informed that the general director was

unavailable and messages left with a receptionist were never returned. Suit was brought May 26, 1983, and the TRO was granted that same day. The next day, the defendant reinstated the plaintiff.

The First Circuit in Nadeau stated: "We should also note that we consider the chronological sequence of events to be an important, although clearly not definitive factor, in determining whether or not defendant can be reasonably inferred to have guided his actions in response to plaintiff's lawsuit. This is particularly true where the evidence relevant to the causes of defendant's behavior is under defendant's control and not easily available to plaintiff." 581 F.2d at 281. Here, the defendant has proferred no reasons other than good faith to explain why it reinstated the plaintiff the day after suit was brought. Thus, like the courts in Nadeau, we must consider the chronological sequence of events. For the week prior to filing suit, the plaintiff tried but failed to obtain reconsideration of the decision to terminate her benefit. Immediately following initiation of this suit, the defendant, for unknown reasons, so reinstated the plaintiff. No other reasons having been offered, this Court must conclude that the bringing of this suit was a necessary and important factor in achieving the relief obtained.

Next, I must determine whether the plaintiff's action could be considered "frivolous, unreasonable, or groundless." This standard was adopted by the First Circuit to obviate the need to decide whether the plaintiff's rights were violated under traditional standards of analysis. In Nadeau, the court wrote: "[O]ne might argue that the district court cannot meaningfully decide the legal requirements that govern defendants' conduct without conducting the very trial the consent

decree was signed to avoid. However, we believe the court has had sufficient exposure to the facts and law of this case to determine whether if plaintiffs had continued to press their claims under traditional constitutional theory, their action could be considered 'frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" 581 F.2d at 281. Here, the record contains sufficient material relating to the facts and the law for this Court to make the minimal finding that, had the plaintiff continued to press this action, it could not be found "frivolous, unreasonable, or groundless."

The defendant argues that damages under §1988 should not be allowed because federal constitutional issues were not reached. The defendant claims that the foundation for relief in the complaint was contained in 42 U.S.C. §1437(f)(d)(i)(A)(B)(i) and (ii), and not in 42 U.S.C. §1983. The drafters of §1988, however, noted that in a situation where a party joins federal and state claims and prevails only on the state claim, attorney's fees may be awarded if: (1) the federal claim is substantial, and (2) the state claim arises out of a "common nucleus of operative fact." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n.7 (1976); see Lund v. Afflect, 287 F.2d 75 (1st Cir. 1978) (applying same two-part standard where plaintiffs did not prevail under federal Civil Rights Act but upon a pendent nonconstitutional statutory claim). I find that the plaintiff's §1983 claim was substantial, as it rested on a federal statutory violation and not solely on an asserted violation of 14th Amendment rights. See Maine v. Thiboutot, 448 U.S. 1, 4-8 (1980). Clearly, the §1983 claim arose out of a "common nucleus of operative fact." As noted by the First Circuit in Lund: "Indeed, since courts

often by-pass constitutional issues when a case can be disposed of on statutory grounds, it could well be unfair to attach controlling weight to the particular claim upon which relief is granted." 587 F.2d at 77.

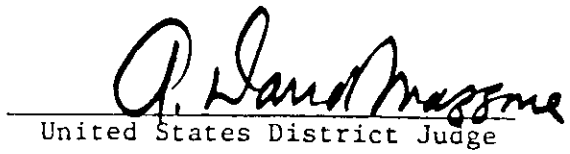
The defendant cites Smith v. Cumberland School Committee, 703 F.2d 4 (1st Cir. 1983) for the proposition that, where a comprehensive act specifically provides substantive and procedural rights, the absence of a fee provision in the more specific statute limits the fees provisions of more general statutes. This Court, however, does not find the United States Housing Act of 1937 involved here significantly comprehensive so as to be comparable to the Education of the Handicapped Act involved in Smith, which provided substantive and procedural rights for handicapped children denied appropriate public education. Moreover, I note that dissenting Justice Powell in Maine v. Thiboutot, supra at 16, listed the Housing Act as one of the statutes which could give rise to a §1983 action under the Supreme Court's decision "that the §1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." 448 U.S. at 4.

Accordingly, the plaintiff is entitled to some degree of attorney's fees. First, she is entitled to recover for time spent in bringing suit and securing the TRO. This Court, however. rejects the plaintiff's contention that she is entitled to recover for time spent "overseeing" the "implementation" of the TRO. Plaintiff states: "At various times, Defendant exhibited recalcitrance in fully implementing the TRO (which involved several steps to process plaintiff's request for lease approval) requiring plaintiff's counsel to prod defendant along." This Court must again point out that the TRO compelled the defendant to do no more than to retain the plaintiff in the program for a period not more

than ten days, pending hearing on the preliminary injunction. The day after the TRO was issued, the defendant voluntarily reinstated the plaintiff into the program. Time spent by the plaintiff's counsel to "prod Defendant along" was in the nature of implementing the quasi-settlement reached and, as such, is not recoverable. The plaintiff is entitled to recover fees for the time spent establishing her right to fees through the current motion. The plaintiff is not, however, entitled to recover for time spent in connection with her original request for fees, which was denied by this Court because judgment had not entered.

Since its decision in Furtado v. Bishop, 635 F.2d at 915, 919-20 (1st Cir. 1980), cert. denied, 444 U.S. 1035 (1980), the First Circuit has used the "lodestar" approach of determining the number of hours reasonably expended multiplied by a reasonable hourly rate. Having examined the affidavits and accompanying documentation, along with the related discussions in the parties' memoranda, I determine that the number of hours reasonably expended total ten (10) hours attributed to Attorney Borofsky and twenty (20) hours attributed to Attorney Kann. I further determine that the reasonable hourly rate for Attorney Borofsky is $90 and the reasonable hourly rate for Attorney Kann is $75. Therefore, a total of $2,400 is awarded as attorneys' fees pursuant to 42 U.S.C. §1988.

SO ORDERED.



United States District Judge