

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

SOL Docket No. 09-0177

Charles McDonald,

Complainant

v.

Tom Vilsack, Secretary,  
United States Department of Agriculture,

Respondent

**MISCELLANEOUS OPINION AND ORDER**  
**UPON MOTION FOR RECONSIDERATION**  
**AS TO THE APPLICATION FOR ATTORNEY FEES and COSTS OF**  
**BENJAMIN WHALEY LE CLERCQ & THE LE CLERCQ LAW FIRM**

This matter is again before the Administrative Law Judge upon a Motion for Reconsideration of the Miscellaneous Opinion and Order entered on October 13, 2010 concerning the application for attorney fees and costs originally sought in the amount of \$312,085.22 by Benjamin Whaley Le Clercq and the Le Clercq Law Firm for services provided by Mr. Le Clercq as attorney, the services of his law clerk and paralegal and for costs and expenses incurred.

The Agency has entered their opposition to the Motion, arguing that consistent with my Opinion and Order of October 13, 2010 any supplemental documentation was filed in an untimely manner and maintaining the concerns expressed in their earlier Response filed on September 23, 2010 concerning the insufficient support for the proposed hourly rate, lack of sufficient documentation to support the number of hours

billed, redundancy in the work billed, lack of support for expenses, and unreasonable fee-on-fee request.

The Decision and Order in this case awarding relief to Charles McDonald was entered on July 8, 2010 and became final on August 12, 2010. The Le Clercq Fee Application which was filed on August 19, 2010 was timely filed.<sup>1</sup> Responses by the Agency to Fee Applications have been discouraged in some forums so when it appeared that an Agency Response was not likely to be forthcoming in this action, on September 3, 2010 I ordered a Response be filed and allowed the Agency twenty days in which to do so.<sup>2</sup> (The Motion for Reconsideration incorrectly states that opposing counsel was given thirty-six days to respond to the Petition.)

On October 13, 2010, I entered a Miscellaneous Opinion and Order as to the Le Clercq Fee Application, reducing the number of hours allowable to be billed from 612.50 to 300 hours and applied the maximum allowable attorney fee rate of \$125.00 per hour consistent with existing USDA precedent. For the reasons set forth in the Opinion and Order, I disallowed the law clerk and paralegal charges and expenses other than photocopying.

Reconsideration will start with the cogent observation appearing in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) that a request for attorney's fees should not result in a second major litigation. "Ideally, of course, litigants will settle the amount of a fee."<sup>3</sup> Where settlement is not possible, the fee applicant bears the burden of establishing

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<sup>1</sup> See, 7 C.F.R. §15f.25. The application as filed failed to provide receipts or other documentation of the expenses claimed and otherwise fell short in justifying the enhanced fee sought.

<sup>2</sup> Given the general admonition in Fee Petition cases that the Agency should not add to litigation with comment, it was not mandatory that the Agency file a response until ordered to do so. See, 7 C.F.R. §1.195.

<sup>3</sup> Co-counsel Beasley was able to come to an agreement and fee stipulation with the Agency. The Agency appears to have made irenic and reasonable efforts to reach a generous fee settlement with Mr. Le Clercq as well, however, for reasons which are not clear, no agreement was ultimately reached.

entitlement to an award and documenting the appropriate hours expended and hourly rates.” *Id.* at 437.

The Motion for Reconsideration suggests that any deficiencies in the initial Fee Application should be excused for the reason that despite the 16.1 hours claimed as expended in preparing his fee application, Mr. Le Clercq “simply did not have sufficient time to devote to the Fee Petition, the work to compile expense documentation, and subsequent negotiations with opposing counsel.” Motion for Reconsideration, p.1. While a significant number of years have passed since I engaged in the private practice of law, the discipline and effort of keeping accurate time records and transmitting those records to my staff as the work was being performed (even for work for which no bill would be submitted on a monthly basis) remains fresh in my mind and is a practice which I would heartily commend to counsel. Similar discipline was also required for keeping track of expenses or expenditures undertaken on behalf of clients, with copies of all receipts or disbursement records kept in appropriate files and available for itemization and retrieval as necessary. Marshalling of documentation and assembly functions are by their nature clerical in nature and should require only the minimal attorney time needed for the final review for the purpose of editing and the exercise of billing judgment.<sup>4</sup>

My earlier opinion suggested that the traditional starting point for determining the amount of a reasonable fee was an examination of the number of hours reasonably expended multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, *supra*, at 433. The prerequisite of reasonableness is to be applied in both to the number of hours billed

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<sup>4</sup> The Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) reduced the fee awarded to one of the attorneys by 30% for his inexperience and failure to keep contemporaneous records. *Id.* at 429. The Court also discussed the exclusion of hours that are “excessive, redundant, or otherwise unnecessary” and the concept of “billing judgment” in *Hensley*. *Id.* at 434.

and to the rate sought. Parties seeking an award “should submit evidence supporting the hours worked and the rates claimed.” *Id.* at 433, 437. My earlier discussion however failed to discuss the recent Supreme Court decision in *Perdue, Governor of Georgia, et al. v. Kenny A., by his next friend Linda Winn, et al.*, 559 U.S. \_\_\_\_\_ (2010). That decision involving a fee application under 42 U.S.C. §1988 presented the question of whether the calculation of an attorney fee, under federal fee shifting statutes, based upon the “lodestar,” *i.e.* the number of hours worked multiplied by the prevailing hourly rates, may be increased for superior performance and results. The majority opinion written by Justice Alioto rejected any contention that a fee determined by the lodestar method may not be enhanced in any circumstance,<sup>5</sup> but concluded that in the case before it that the District Court had not provided proper justification for the large enhancement that it had awarded and remanded the case.<sup>6</sup>

In reaching its decision in *Perdue*, the Court discussed in considerable detail the appropriate methodology for determining the reasonable fee provided for in federal fee shifting statutes.<sup>7</sup> The Court’s discussion of the development of fee computation methodology started with the 12 factors set out in *Johnson v. Georgia Highway Express, Inc.* 488 F. 2d 714, 717-719 (5<sup>th</sup> Cir. 1974),<sup>8</sup> but suggested that approach “gave very little actual guidance to district courts” and setting attorney’s fees by a reference to a series of

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<sup>5</sup> *Perdue*, Slip Opinion at p 9.

<sup>6</sup> *Id.*, Slip Opinion at 12, 15.

<sup>7</sup> Many of the federal fee shifting statutes have virtually identical language. *See, Burlington v. Dague*, 505 U.S. 557, 562 (1992).

<sup>8</sup> When Congress enacted the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. §1988, both the House and Senate Reports made reference to the *Johnson* case. The 12 factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F. 2d 717-719.

sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results. *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546, 563 (1986) (*Delaware Valley I*).

The lodestar method, described as “guiding light,” was crafted by the Third Circuit in *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3<sup>rd</sup> Cir. 1973), appeal after remand, 540 F.2d 102 (1976). After the Court’s decision in *Hensley*, the method “achieved dominance in federal courts” in the area of fee shifting jurisprudence. *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002); *Burlington v. Dague*, *supra* at 562. The advantages of the lodestar approach were extolled as the lodestar calculation is readily administrable and “objective,” cabins the discretion of trial judges, permits meaningful review, and produces reasonably predictable results. *Perdue*, Slip Opinion at 7.

Six rules have emerged from that the Court’s prior decisions in interpreting fee shifting statutes. *Perdue*, Slip Opinion at 7-9. First, a “reasonable” fee is a fee that is sufficient to induce a capable attorney to undertake the representation, but does not produce windfalls to attorneys. *Delaware Valley I*, *supra*, at 565. Second, the lodestar method yields a fee that is presumably sufficient to achieve this objective. *Dague*, *supra*, at 562; *Delaware Valley I*, *supra*, at 565; *Blum v. Stevenson*, 465 U.S. 886, 897 (1984); *Gisbrecht*, *supra*, at 801-802. Third, although the Court has never sustained an enhancement of a lodestar amount for performance, enhancements may be awarded in “rare” and “exceptional” circumstances. *Delaware Valley I*, *supra*, at 565; *Blum*, *supra*, at 897; *Hensley*, *supra*, at 435. Fourth, the lodestar figure includes most, if not all, of the relevant factors constituting a “reasonable” attorney’s fee and enhancement may not be

awarded based on a factor that is subsumed in the lodestar calculation. *Dague, supra*, at 562; *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 483 U.S. 711, 726-727 (1987) (*Delaware II*); *Blum, supra*, at 898. Fifth, the burden of proving that an enhancement is necessary must be borne by the fee applicant. *Dague, supra*, at 561; *Blum, supra*, at 901-902. Finally, a fee applicant seeking an enhancement must produce "specific evidence" that supports an award. *Id.* at 899, 901.

Where the fees and costs are being paid pursuant to the Equal Access to Justice Act (EAJA) (*See*, 7 C.F.R. §15f.25), three issues must be decided: whether the Complainant is a prevailing party, whether the Secretary's position was substantially justified, and exactly what fees and costs submitted by the Complainant are allowable. Determination of the three issues is sequential as a calculation step is reached only if the first issue is resolved affirmatively and the second at least partially adversely to the Secretary. My earlier opinion found that consistent with the framework set forth in *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.*, 532 U.S. 598 (2001) ("*Buckhannon*"), the requirement to be a prevailing party was met by the Complainant. *See, Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1<sup>st</sup> Cir. 1978). In addressing the second issue, I concluded that although significant relief was awarded the Complainant, the Secretary had nonetheless been substantially justified as to a number of issues raised during the trial and the post trial pleadings. The opinion noted that identification of the specific allegations of discrimination reachable under Section 741 which were made during the pertinent time frame and which the Agency accepted for examination and investigation record was discernable, but that the issues presented by the Complainant at trial were not so confined. As hours devoted to extraneous issues or

unsuccessful claims should not be compensated, I accordingly reduced the number of hours upon which the hourly rate would be applied.<sup>9</sup> *Davis v. County of Los Angeles*, 8 E.P. D. at 5049 (CD Cal. 1974); *See also*, S.R. No. 94-1011, p. 6 (1976)

Having decided the two preliminary threshold issues, the question of exactly what fees and costs submitted by the Complainant are allowable can be reached. In both his initial application and in the Motion for Reconsideration, Mr. Le Clercq requested an hourly rate” of \$410.00 per hour based upon the Laffey matrix adopted by the Civil Division of the United States Attorney’s Office for the District of Columbia. Under EAJA, the fees available to a prevailing party are “those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are those customarily charged to the client where the case is tried.” *Oliveira v. United States*, 827 F. 2d 735,744 (Fed. Cir. 1987). While I noted that enhanced hourly rates may be frequently awarded by Article III Courts, I concluded that despite any personal inclination to award a fee at an enhanced rate, I was and remain bound by the Department’s well established position which currently allows a maximum hourly attorney fee rate of \$125.00 per hour. I accordingly awarded Mr. Le Clercq a fee of \$37,500.00. *In re: Sanford Skarsten and Carol Skarsten*, 59 Agric. Dec. 133 (2000); *Pet. for Reconsid. and Correction granted*, 59 Agric. Dec. 144 (2000); *In re: Dwight L. Lane*, 59 Agric. Dec. 148 (2000) (applying the then applicable rate of \$75/ hour); *In re: Sun Mountain Logging, LLC, Sherman G. Anderson, and Bonnie Anderson*, 66 Agric.

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<sup>9</sup> The Court in *Hensley* noted that while fee awards should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit, where a plaintiff has achieved only partial or limited success, the product of hours reasonable expended times a reasonable hourly rate may be an excessive amount. The example provided of prevailing on only one of six general claims was said to be clearly excessive. *Hensley, supra*, at 435-436. In the instant case, the Complainant prevailed on three or arguably four of the thirteen general claims.

Dec. 1127 (2007). Upon reconsideration, applying the fifth and sixth *Perdue* rules, I reaffirm the earlier award without modification.

Although the Agency withdrew its initial objection to the requested charges for law clerk and paralegal services, the application for such expenses was both deficient in that it failed to set forth the “costs” expended by setting forth the hourly rate at which those employees are paid (rather than billed) by the law firm and that it contained inadequate detail to determine redundancy by identifying the specific work performed in order that a comparison could be made of the tasks performed by the law clerks/paralegals (also identified by Mr. Le Clercq as timekeepers) and those performed by Mr. Le Clercq. Mr. Le Clercq has since clarified the cost issue, however, I still find the information supplied to have still fallen short of allowing any comparison and will affirm my prior disallowance.

Last, the initial application requested \$4,345.22 for costs and expenses enumerated as incurred during the litigation, but failed to have documentation for such expenses. I previously allowed photocopy expenses which were submitted (without requiring a by date enumeration of the number of copies) in the amount of \$1,701.73. In the Motion for Reconsideration, Mr. Le Clercq increased the amount of requested expense reimbursement to \$5,448.22 and reasonably argued that much of the expenses relate to travel costs incurred as a result of opposing counsel’s request for the second phase of the trial to be held in Washington. As that accommodation was in fact made at the request of the Agency, on reconsideration I will waive the requirement to have timely supplied documentation and will award documented expenses in the amount originally claimed only, but in passing will note that the actual receipts (rather than a charge card

billing) should have been submitted and that such proof would be required by most tribunals.

Being sufficient advised, on reconsideration, it is **ORDERED** as follows:

1. Attorney fees in the amount of \$37,500.00 are awarded to Benjamin Whaley Le Clercq, Esquire for his representation of Charles McDonald in the above styled case.
2. Consistent with the earlier Opinion and Order, no amount is awarded for law clerk or paralegal services.
3. The sum for costs and expenses is increased from \$1,701.73 to \$4,345.22.

Copies of this Order will be served upon the parties by the Hearing Clerk.

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Peter M. Davenport  
Chief Administrative Law Judge

November 10, 2010

Copies to: Ben Whaley Le Clercq, Esquire  
Michael W. Beasley, Esquire  
Stephanie R. Moore, Esquire  
Stephanie E. Masker, Esquire

Hearing Clerk's Office  
U.S. Department of Agriculture  
1400 Independence Avenue SW  
Room 1031, South Building  
Washington, D.C. 20250-9203  
202-720-4443  
Fax: 202-720-9776