IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BRUCE COLE,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	**No. 99-2133-V**
	)	
SGT. TONY LOMAX, individually and in his official capacity as Sergeant of the Shelby County Sheriff's Department,	)	
	)	
Defendant.	)	

ORDER ON MOTION FOR AWARD OF ATTORNEY FEES

Before the court is the plaintiff's August 27, 2001 request for attorney fees and expenses pursuant to 42 U.S.C. § 1988, as the prevailing party in a civil rights violation lawsuit under 42 U.S.C. § 1983. For the reasons that follow, this court finds that a reasonable award of attorney fees is $30,127.44 and a reasonable award of expenses is $3,149.76.

BACKGROUND

The plaintiff, Bruce Cole, filed his original complaint, *pro se*, on February 9, 1999, against Shelby County Mayor Jim Rout, Jail Director Robert Harper, and Sergeant Tony Lomax. In the original complaint, Cole alleged that on September 17, 1998, during a shakedown, he was elbowed, battered, shocked with an electrical

device, stripped of his clothes, videotaped while returning naked to his cell, and left naked for approximately four hours. He also alleged that his personal property was destroyed. The complaint further stated that when Cole's cellmate complained about the destruction of personal property, Captain Kinney, upon hearing these comments, gave the order to breakdown (which means to open a certain cell door) Cell 13 and Cell 14. (Compl. at 3A.) After the order was given, Sgt. Lomax allegedly rushed into Cole's cell and repeatedly shocked him. Finally, the complaint asserted that the shakedown exceeded "the parameters of the policies and procedures governing institutional shakedowns." (Compl. at 1A.) The claims against County Mayor Rout and Jail Director Harper were dismissed by United States District Judge Jon Phipps McCalla on April 15, 1999. At Cole's request, *pro bono* counsel was appointed in December 1999. On August 9, 2000, Cole, by and through his appointed counsel, amended his complaint to clarify his claims against Sgt. Lomax, reassert his claims against Shelby County, and add Captain Kinney as a defendant. (Am. Compl. at 1A.). Cole sought both compensatory and punitive damages plus attorney fees and costs.

The parties consented to a nonjury trial of this matter before the United States Magistrate Judge. Before trial, the court granted partial summary judgment as to defendants Capt. Kinney and

Shelby County on the grounds that the claims against them were time-barred by the statute of limitations.[1] (Order Granting in Part and Den. in Part Defs.' Mot. for Partial Summ. J. at 2, 17.)

A bench trial was held on May 18-19, 2001, in which this court determined that Sgt. Lomax had violated Cole's Fourteenth Amendment rights under 42 U.S.C. § 1983. The court also ruled in Cole's favor on his claims of conversion, assault and battery, and intentional infliction of emotional distress. This court awarded the plaintiff compensatory damages in the amount of ten thousand three hundred and sixty-four dollars ($10,364) and punitive damages in the amount of fifteen thousand dollars ($15,000).

ANALYSIS

Cole seeks an award of attorney fees and expenses in the amount of $38,639.76. In support of his application, Cole has submitted the affidavit of lead counsel, David Wade. In his affidavit, Wade lists each of the employees of his firm who worked on the case, their skill and experience, along with a contemporaneously-kept billing statement, detailing the work performed by them in connection with this case and the hourly rate

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[1] At the time of trial, there was some question as to whether Shelby County remained a defendant by virtue of the official capacity claim pled against Sgt. Lomax. Following the bench trial, the court reaffirmed its order on summary judgment, dismissing any remaining claims against Shelby County as time-barred.

charged. Sgt. Lomax objects to the amount of fees[2] requested on the grounds that the entries lack sufficient detail, excessive time was taken to perform certain tasks, and the fees for work on claims on which Cole did not prevail cannot be recovered.

I. Calculation of Lodestar Amount

According to section 1988 of Title 42, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988; *Crabtree v. Collins*, 900 F.2d 79, 82 (6th Cir. 1990). In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court set forth general standards to follow in making awards of attorney fees under fee-shifting statutes such as section 1988. The facts of *Hensley* specifically involved the applicability of section 1988, the fee-shifting statute at issue in the instant case. *Hensley,* 461 U.S. at 428. The initial concern in awarding fees is the reasonableness of the fee. *Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999). In deciding what is a reasonable fee, the starting point is the determination of the "lodestar" amount. *Hensley*, 461 U.S. at 433; *Reed*, 179 F.3d at 471. The lodestar is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate for legal services rendered. *Hensley*,

[2] Sgt. Lomax does not dispute the amount of expenses.

461 U.S. at 433.

A. <u>The Prisoner Litigation Reform Act</u>

As this action involved a pretrial detainee in confinement, the Prison Litigation Reform Act ("PLRA") applies. 42 U.S.C § 1997e (h). Pursuant to the PLRA, codified in part at 42 U.S.C. § 1997 and at 18 U.S.C. § 3006, no attorney fees may be awarded to a prisoner unless he recovered a monetary judgment that is reasonable and proportionate to the actual civil rights violation proved. Additionally, when a monetary judgment is awarded to a prisoner,

> **...a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.**

42 U.S.C. § 1997e (d)(2). In this case, Cole proved that Sgt. Lomax violated his civil rights, when, *inter alia*, Sgt. Lomax shocked Cole repeatedly with a shock shield device, forced Cole to remain naked for hours in his cell, and destroyed Cole's personal belongings. Cole was awarded compensatory and punitive damages totaling $25,364. In light of the seriousness of the violation against Cole's civil rights, the amount awarded is reasonable and proportionate, thus meeting the standards of the PLRA.

The total amount requested by Cole, $38,639.76, is within the PLRA formula of 150 percent of the judgment, and pursuant to the

PLRA, Sgt. Lomax will be responsible for the excess amount of attorney fees after twenty-five percent of the judgment is used to satisfy the fee request, pursuant to 42 U.S.C. § 1997e (d)(2).

B. <u>A Reasonable Hourly Rate</u>

The first step in determining the lodestar amount in a case involving a prisoner, like any other request for fees, is to determine the reasonable hourly rate. *Hernandez v. Kalinowski*, 146 F.3d 196, 198 (3d Cir. 1998). The PLRA places a ceiling on the hourly rate an attorney may charge in prisoner litigation:

> **(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under § 3006A, Title 18, for payment of court-appointed counsel.**

42 U.S.C. § 1997e (d). At 18 U.S.C. § 3006A, the Code sets forth an hourly rate for court-appointed counsel, setting in-court rates before a magistrate judge at not more than sixty dollars per hour, and out-of-court rates at forty dollars per hour. It leaves discretion, however, to the Judicial Conference, of which the Western District of Tennessee is a member, to set rates at an amount of no more than seventy-five dollars an hour. 18 U.S.C. § 3006A. In a ruling effective January 1, 2000, the Judicial Conference decided that the amount for in-court representation would be seventy dollars per hour and out-of-court representation would be fifty dollars per hour.

Applying the formula set forth in 42 U.S.C. § 1997e (d)(3), the court finds that the rate of sixty dollars per hour, which is the blended rate that Cole's attorneys charged, falls within the parameters of the PLRA. The PLRA formula would allow as much as one hundred and five dollars per hour for in-court and seventy-five dollars for out-of-court representation. Sgt. Lomax does not dispute the reasonableness of the hourly rate amount. As this amount is reasonable under the strict confines of the PLRA and not challenged by Sgt. Lomax, it certainly meets the reasonableness standard used to calculate the lodestar amount.

C. <u>The Number of Hours Reasonably Expended</u>

The other step in calculating the lodestar figure is the determination of the number of hours Cole's attorneys reasonably expended on the case. *Hensley*, 461 U.S. at 433; *Northcross*, 611 F.2d at 636-37. The affidavits of counsel must be taken into consideration but are not conclusive. *Northcross*, 611 F.2d at 636. Attorney fees will not be awarded for hours that are excessive, redundant, or otherwise unnecessary. *Hensley*, 461 U.S. at 434; *Northcross,* 611 F.2d at 636.

The only entries Sgt. Lomax specifically identifies as excessive or lacking sufficient detail are three entries for time spent drafting interrogatories and request for production of

documents to the defendants.[3] Sgt. Lomax objects generally to all fees requested by Cole for work involving his claims against Shelby County and Capt. Kinney. Though the claims against both the County and Capt. Kinney were dismissed,[4] Shelby County and Capt. Kinney clearly had relevant and discoverable information regarding the incident giving rise to the lawsuit, and Cole was justified in seeking discovery from both.[5] Assuming, *arguendo*, that Captain Kinney and the County had not been parties, the plaintiff still would have been able to obtain most if not all of the discovery he sought. *See* Fed. R. Civ. P. 45. Obviously, the County would be

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[3] The specific time entries identified by the defendants are:

> 7/14/00 (HLB)(6.25 hrs.) "Research law re: statute of limitations for Section 1983 action and whether or not the statute of limitations for added parties relates back to the filing of the complaint. Revise Amended Complaint to add Captain Kinney; Meeting with David Wade re: statute of limitations issue; Prepare interrogatories."
>
> 7/18/00 (HLB)(3.5 hrs.). "Meeting with Robert Brown re: researching statute of limitations for adding Shelby County and Captain Kinney; Prepare Interrogatories, Requests and Production of Documents."
>
> 8/2/00 (HLB)(2.5 hrs.). "Prepare and Revise Interrogatory Requests and Requests for Production of Documents for Shelby County."

[4] See discussion at pp. 2-3, *supra*.

[5] These entries, however, involved more than discovery, and will be addressed in the section that follows on other grounds raised by the defendants.

the best source of information regarding the policies and procedures within its own jail. As Capt. Kinney was present at time of the incident, he was an important source of testimony as an eye witness. For these reasons, the hours worked and time entries for the discovery propounded to Captain Kinney and Shelby County will be allowed.

Applying the formula enunciated in *Hensley*, and echoed by the Sixth Circuit, that is, multiplying the reasonable hourly rate by the reasonable hours worked, the court finds the lodestar amount to be $35,145.00.[6]

II. Adjustment of the Lodestar Amount

After determining the lodestar amount, the court in its discretion may adjust the award upward or downward to assess a reasonable award. *Hensley*, 461 U.S. at 434. The most important factor is the "results obtained." *Id.* *See also Johnson*, 433 F.2d at 718. It is proper for a court to reduce fees in cases of limited success. *Shore v. Federal Express Corp.*, 42 F.3d 373, 381 (6th Cir. 1994)(citing *Wooldridge v. Marlene Industries Corp.*, 898 F.2d. 1169, 1173-77 (6th Cir. 1990)(reducing fees because of 50% success rate and poor performance by plaintiff's attorney)). *See also Farrar v. Hobby*, 506 U.S. 103, 115 (1984); *Hensley,* 461 U.S.

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[6] This amount was calculated by multiplying $60 per hour with 585.75 total hours billed.

at 433; *Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1169 (6th Cir. 1996); *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 910 (6th Cir. 1991). To determine whether this downward adjustment is necessary, it is crucial to examine the relationship between the extent of overall success and the amount of the award requested. *Hensley*, 461 U.S. at 434.

The Supreme Court in *Hensley* established two questions that must be asked when the court is contemplating a downward adjustment based on limited success. *Id.* First, was the plaintiff unsuccessful on claims that were unrelated to the claims on which he succeeded? *Id.* Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award? *Id.* If the claims are distinctly different and unrelated (i.e., claims based on different facts or legal theories), they are treated as separate lawsuits and the plaintiff cannot be reimbursed for fees incurred in pursuing the unsuccessful claims. *Id.* However, if the claims arise from a common core of facts or are based on related legal theories, there is not an immediate reduction. *Id.* The Supreme Court, however, made it clear that the discretion in reduction or enhancement of the amount lies with the district court. *Hensley*, 461 U.S. at 434, 437.

_____In this case, Cole's claims were all based on the same

incident involving Sgt. Lomax's actions during the shakedown at the Shelby County Jail on September 17, 1998. Cole sought relief from all defendants for the same illegal conduct, although Cole's state claims against the County were also based on vicarious liability, a separate legal theory. (*See* Order Grant. in Pt. and Deny. in Pt. Def.'s Mtn. for Sum. Jmt., p. 15).

When the successful and unsuccessful claims are related, it is crucial to compare the overall success to the time expended. *Hensley,* 461 U.S. at 434-35. Excellent results should lead to full compensation. *Wayne v. Village of Sebring*, 36 F.3d 517, 532 (6th Cir. 1994). However, if the success is limited or partial, a downward adjustment may be necessary even if the claims are interrelated. *Hensley*, 461 U.S. at 436.

Several federal courts, including the Sixth Circuit, have addressed situations where a plaintiff was successful overall, but not against all defendants. In one such case, some of the defendants in the lawsuit were dismissed on the basis of qualified immunity. *Wayne v. Village of Sebring*, 36 F.2d 517, 530 (6th Cir. 1994). In *Wayne*, the court allowed the plaintiffs to recover attorney fees for hours billed pursuing unsuccessful claims against dismissed defendants. There are several factors, however, that the Sixth Circuit contemplated in *Wayne* that set it apart from the request for fees presently before this court. First, the court

noted that the hourly billing was indivisible with respect to issues and defendants and was documented more as "litigation as a whole." *Wayne*, 36 F.3d at 532 (citing *Hensley*, 461 U.S. at 435). Second, the defendants were dismissed at an early stage of the litigation on the basis of qualified immunity. *Id.* at 531. While the claims in the present case, like *Wayne,* all arose out of the same set of facts, the distinguishing factors set forth above are important in determining if a downward adjustment is appropriate.

Here, this court found that Sgt. Lomax violated the plaintiff's civil rights. In his amended complaint, the plaintiff stated that he sought damages in excess of $100,000 from the three named defendants. The court awarded compensatory and punitive damages in the amount of $25,364, only against Sgt. Lomax. Cole was not successful in his claims against Capt. Kinney and the County, but the hours spent in pursuit of relief against the two dismissed parties are easily ascertainable from the billing record. In addition, unlike *Wayne*, the partial summary judgment in favor of the County and Capt. Kinney was not granted until almost three months before trial. Substantial time was devoted to the unsuccessful claims, and overall success was limited. Based on these dissimilar facts, this case can be distinguished from *Wayne*.

If the court is persuaded that the hours would have been substantially less had Cole not included the defendants against

whom he did not prevail, then it is within the court's discretion to reduce the total number of hours. *See generally* Pastre v. Weber, 800 F.Supp. 1120, 1127 (S.D.N.Y. 1991). Because the total time normally is very difficult to divide by claim, time expended can be considered part of "general" litigation. *Hensley*, 461 U.S. at 436; *Wayne*, 36 F.3d at 532 (6th Cir. 1994); *Ustrak v. Fairman*, 851 F.2d 983, 988 (7th Cir. 1988). There is no precise formula or rule for determining the amount of an adjustment if one is found to be necessary. *Hensley*, 461 U.S. at 436. The court may attempt to identify specific hours to eliminate or, when hours are not easily allocated, to reduce to an amount reasonable in relation to the results or merits. *Id.* at 437; *Winter v. Cerro Gordo County Conservation Board*, 925 F.2d 1069, 1074 (8th Cir. 1991). The court also has the discretion to reduce the award amount if it finds that it was unreasonable, frivolous or in bad faith to bring the claims against the defendants. *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1281 (7th Cir. 1983).

In this case, the descriptions of hours billed are so precise that it is possible to ascertain how much time was spent on each of the dismissed defendants. Out of the 585.75 total hours spent on the case, approximately 84 hours[7] were spent solely on the claims

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[7] ***See*** **n.8, *infra*, for reference to the court's calculation method.**

against Capt. Kinney and the County. This amount can be subtracted from the overall hours billed without difficulty.

Finally, though Cole's claims against the County and Capt. Kinney were not frivolous or in bad faith, the claims may not have been in the best interest of Cole's case. Even such a "tactical mistake" can be reason to reduce the amount of the attorney fee request, given the slim probability of success on the issue with respect to the prevailing law in the Sixth Circuit on statute of limitations and on relating back to the original complaint. *See* Neal v. Berman, 576 F.Supp. 1250, 1253 (E.D. Mich. 1983) (explaining that the time allotted to pursuing other legal avenues had little effect on the overall outcome of the case and therefore should not be compensated). The Tenth Circuit agrees with this proposition, explaining that a magistrate judge did not abuse his discretion in his award of attorney fees and noting,

> "[a]lthough we have found in the past that *Hensley* holds there should be no reduction in attorney's fees where the plaintiff has prevailed and achieved substantial success . . . the Magistrate Judge in the instant case was compelled to recognize the reasonableness of the time spent on [the] claims."

Branch-Hines v. Herbert, 939 F.2d 1311, 1322 (10th Cir. 1991). Because the amount of hours billed on behalf of the unsuccessful claims is clearly discernable and the time spent quite lengthy, and in light of the other pertinent facts set forth above, the lodestar

amount will be adjusted downward for the time spent on claims against the County and Capt. Kinney. Cole's attorneys expended a total of 83.626 hours related to amending the complaint to include the two additional defendants and to defend against summary judgment.[8] Cole did not prevail against either party.

CONCLUSION

In accordance with the caselaw and facts discussed above, the court will reduce the hours billed by 83.626 hours and the overall lodestar by $5,017.56. The total lodestar amount after reduction equals $30,127.44, and the reasonable amount of expenses equals $3,149.76, for a total of $33,277.20, which complies with the standards of the PLRA. After applying twenty-five percent of the

[8] The time entries affected and the total amount of time for each entry are: 6/19/00 (CLK)(5.0 hrs.); 7/5/00 (HLB)(4.75 hrs.); 7/6/00 (HLB)(6.5 hrs.); 7/7/00 (HLB)(6.0 hrs.); 7/8/00 (HLB) (1.0 hrs.); 7/13/00 (HLB)(3.0 hrs.); 7/14/00 (HLB)(6.25 hrs.); 7/18/00 (HLB)(3.5 hrs.)(reduced); 8/01/00 (HLB)(4.0 hrs.); 8/3/00 (HLB)(4.5 hrs.)(reduced); 8/4/00 (HLB)(2.5 hrs.); 1/3/01 (HLB)(6.5 hrs.)(reduced); 01/12/01 (HLB)(5.5 hrs.)(reduced); 2/5/01 (HLB)(6.5 hrs.); 2/6/01 (HLB)(5.25 hrs.); 2/7/01 (HLB)(3.0 hrs.); 2/11/01 (HLB)(6.0 hrs.); 2/12/01 (HLB)(5.5 hrs.); 2/13/01 (HLB)(3.75 hrs.); 2/16/01 (HLB)(6.25 hrs.)(reduced); 2/21/01 (HLB)(5.75 hrs.). Reductions were calculated by dividing the time listed for each entry equally between the tasks listed and reducing the amount proportionally according to which defendants the task involved. The total amount of time after reduction is 83.626 hours. The total amount of time reported for these entries is 112.25 hours.

judgment to satisfy the attorney fees,[9] as set forth in the PLRA, the remaining plaintiff's attorney fees, costs, and expenses totaling $26,936.20 is awarded against Sgt. Lomax.

IT IS SO ORDERED this 26th day of September, 2001.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

[9] Twenty-five percent of $25,364 (the amount of the judgment) equals $6,341.