

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY ANN WINTERS, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 01-0786  
 )  
 BOARD OF REGENTS AND UNIVERSITY )  
 OF SOUTH FLORIDA, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

ORDER ON FEES

Pursuant to an Order of the Second District Court of Appeals dated November 8, 2002, this matter came on for final hearing on April 5, 2004, by videoconference between Tallahassee and Tampa, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

Petitioner: Mark F. Kelly, Esquire  
Robert F. McKee, Esquire  
Kelly & McKee, P.A.  
1718 East Seventh Avenue, Suite 301  
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Tampa, Florida 33675-0638

Respondent: John W. Campbell, Esquire  
Constagny, Brooks & Smith, LLC  
100 West Kennedy Boulevard, Suite 500  
Post Office Box 1840  
Tampa, Florida 33601-1840

STATEMENT OF THE ISSUE

The amount of attorneys' fees and costs to be awarded to Jerry Ann Winters (Petitioner) based on the Order of the Second District Court of Appeals dated November 8, 2002, and pursuant to Subsection 120.595(5), Florida Statutes (2003).

PRELIMINARY STATEMENT

This matter was the subject of a prior administrative hearing conducted on April 23 through 25, 2001. The issue in that case was whether there was cause for the University of South Florida (USF) to terminate the Petitioner's employment as a basketball coach. The proposed termination was essentially based on allegations that the Petitioner had retaliated against a specific basketball player for filing a claim of racial discrimination against the Petitioner, and that the Petitioner had provided false or misleading information to USF officials during the investigation of the claim. A Recommended Order was entered on July 2, 2001, which found that the allegations related to retaliation had not been established by the evidence presented at the hearing. The Recommended Order further found that the Petitioner had provided misleading information in a written response provided to USF officials during the investigation, but concluded that such information was insufficient to warrant termination of employment.

On September 28, 2001, USF entered a Final Order that rejected the Recommended Order. The Petitioner appealed the Final Order to the District Court of Appeal for the Second District. Following the filing of briefs and oral argument, the district court issued an opinion on November 8, 2002, which reversed the Final Order's rejection of the Findings of Fact set forth in the Recommended Order related to the allegations of retaliation. The district court affirmed the Final Order's rejection of the Recommended Order's conclusion that the misleading information provided by the Petitioner was insufficient to warrant termination of employment. The district court remanded the matter to USF to determine, absent evidence of retaliation, whether the Petitioner's provision of misleading information to USF officials warranted termination of employment.

On February 11, 2002, the Petitioner filed with the district court a Motion for Attorney's Fees seeking an award of fees and costs under the provisions of Subsection 120.595(2), Florida Statutes (2003). By Order dated November 8, 2002, the district court issued an order providing that the "motion for attorney's fees is granted in an amount to be set by the trial court."

On January 23, 2003, the Petitioner filed with the Division of Administrative Hearings a request for hearing on the amount

of fees to be awarded. The case was reopened, and the hearing was scheduled to commence on May 16, 2003. The undersigned Administrative Law Judge subsequently learned that USF had issued a second Final Order pursuant to the remand, and that the second Final Order had been appealed to the District Court of Appeal for the Second District. The May 16, 2003, hearing was cancelled pending resolution of the appeal.

By notice filed on January 29, 2004, the Petitioner advised the undersigned that the appeal had been resolved and provided dates upon which the parties were available for hearing. The hearing was scheduled for April 5, 2004, based on dates of availability provided by the parties.

At the hearing, the Petitioner presented the testimony of three witnesses and had Exhibits numbered 1 and 2 admitted into evidence. USF presented the testimony of one witness. A transcript of the hearing was filed on May 7, 2004. Pursuant to the stipulated schedule of the parties, proposed orders were to be filed on June 2, 2004. USF timely filed a proposed order. The Petitioner's Proposed Order was filed on June 3, 2004. Both proposed orders were duly-considered in the preparation of this Order.

#### FINDINGS OF FACT

1. The Petitioner retained attorneys Mark F. Kelly and Robert F. McKee to represent her in an administrative proceeding

challenging the proposed termination of her employment by USF and in the appeals that followed the issuance of the Final Orders by USF.

2. Petitioner's Exhibit 1 is an invoice dated December 18, 2002, submitted to the Petitioner by her legal counsel. The invoice contains charges billed to the Petitioner for the period between January 17, 2001, and November 22, 2002. The invoice indicates a total of 339.75 hours expended on her behalf. The invoice contains duplicated entries for November 14, 2002. Discounting the duplication reduces the total hours expended to 339.50. The practice of the Petitioner's counsel is to bill in quarter-hour increments and to round up. According to the invoice, the Petitioner was billed at a rate of \$275 per hour.

3. Mark F. Kelly graduated from Vanderbilt Law School in 1976. Since then he has practiced labor and employment law in Florida before state and federal agencies and has a substantial appellate practice. He was previously awarded fees in the range of \$250 approximately four years ago.

4. Robert F. McKee graduated from Stetson University College of Law in 1979. He received a Master of Laws degree in Labor and Employment Law from Georgetown University Law Center in 1981. Since then he has practiced labor and employment law in Tampa, Florida. He was previously awarded fees in the range of \$250 approximately four years ago.

5. At the hearing, the Petitioner presented the testimony of Steven Greg Wenzel. Mr. Wenzel has practiced law in Florida for more than 30 years and is board-certified in Labor and Employment Law. He has extensive trial experience. He has previously provided expert testimony related to the reasonableness of attorneys' fees in approximately 12 cases. Mr. Wenzel is familiar with the fees charged by attorneys representing employees in employment-related cases in central Florida.

6. Mr. Wenzel's testimony related to the experience, reputation, and ability of Petitioner's attorneys. It also indicated that they have substantial experience in the area of labor and employment law and are well-regarded by their peers. No credible evidence to the contrary was presented during the hearing.

7. Mr. Wenzel's testimony adequately addressed the applicable factors set forth in Rule 4-1.5(b)1 of the Florida Bar's Rules of Professional Conduct to be considered in determining the reasonableness of fees. Mr. Wenzel opined that based on their knowledge and experience, the type and complexity of the case, and the aggressive nature of the litigation; a reasonable hourly rate was \$290 ranging to \$310. Mr. Wenzel's testimony in this regard is credited. The invoiced rate of \$275 per hour is reasonable.

8. Mr. Wenzel also opined that the quarter-hour billing practice was reasonable and, in fact, conservative related to other practices with which he was aware. Mr. Wenzel's testimony in this regard is credited.

9. At the same time that the Petitioner was challenging the proposed employment termination, a civil case involving the Petitioner, a number of the basketball players, and USF was proceeding. In that case, different legal counsel represented the Petitioner. Review of Petitioner's Exhibit 1 indicates that the invoice includes charges related to persons and activities involved in the civil case.

10. Neither Mr. Kelly nor Mr. McKee had any official involvement in the civil case. Mr. Kelly participated apparently unofficially in mediation efforts to resolve the pending disputes.

11. The invoice contains daily total charges for billed activity. On some days, activity was recorded for both the administrative case and the civil case. Charges related to the civil case are not reimbursable in this proceeding.

12. Because the invoice precludes an accurate separation of time spent on the administrative case from the civil case, all billings for dates upon which charges were incurred related to the civil case have been excluded from consideration in this Order.

13. The charges related to conversations with John Goldsmith, who represented the Petitioner in the civil case, are excluded. These charges occurred on March 14, 2001; April 2, 2001; April 6, 2001; September 21, 2001; October 19, 2001; and May 13, 2002, and total 8.25 hours.

14. The charges related to conversations with Jonathon Alpert, who represented the basketball players in the civil case, are excluded. The charges occurred on April 10, 2001, and April 11, 2001, and total 6.75 hours.

15. The charge related to a conversation with Tom Gonzalez, who represented USF in the civil case, is excluded. This charge occurred on April 23, 2002, for .50 hours.

16. The charges related to conversations with Mary Lau, who was a mediator assigned to the civil case, are excluded. These charges occurred on April 24, 2002, and May 8, 2002, and totaled 1.25 hours.

17. The invoice includes a charge for May 15, 2002, related to a telephone conference with "Judge Scriven" regarding settlement. Judge Scriven is otherwise unidentified. The charge, for .25 hours, is excluded.

18. The invoice includes a charge for Mr. McKee's attendance at mediation on May 16, 2002, related to the civil case, for 2.5 hours. This charge is excluded.

19. The sum of the excluded time set forth above is 19.50 hours. Deduction of the 19.50 hours from the properly invoiced total of 339.50 results in a total of 320 hours.

20. Based on Mr. Wenzel's testimony that the invoiced hours were reasonable given the nature and complexity of this case, it is found that the reduced level of 320 hours set forth in the invoice and directly applicable to the administrative case is a reasonable expenditure of time.

21. The invoice also sets forth costs that were billed to the Petitioner. The invoice includes numerous routine office expenses (postage, copying, telephone, and facsimile costs) that are not properly recoverable costs in this proceeding. Other billed costs are set forth without sufficient information to determine the relationship of the cost to the administrative proceeding. A filing fee with the District Court of Appeal was billed on January 15, 2001, preceding the administrative hearing in this case. Further the billed charges include witness fees for several witnesses, only one of which testified in the administrative hearing. The invoice also includes service fees for subpoenas that appear to have been charged subsequent to the completion of the administrative hearing.

22. Based on review of the invoice, properly recoverable costs of \$307 are found. This sum includes the following items: witness fee and mileage for Paul Griffin (\$7) dated April 5,

2001; service fee for subpoena for Paul Griffin (\$50) dated April 11, 2001; and filing fee-clerk, District Court of Appeal (\$250) dated October 5, 2001.

23. Petitioner's Exhibit 2 is a "Retainer and Fee Agreement" executed by the Petitioner and her counsel which provides as follows:

Partial contingency fee. Client will pay for services rendered at the reduced rate of \$110 per hour. To compensate attorney for this reduced rate and the risk involved in undertaking a case on these terms, in addition to the \$110 hourly rate, attorney will be entitled to 25% of any settlement money or judgment. In the event attorney's fees are awarded to the client by any court or tribunal and collected, attorney will be entitled to such fee (less any amount paid by client, which will be reimbursed pro rata) or the partial contingency fee, whichever is greater.

Attorney requires a retainer deposit from client in the amount of \$2,500, to be replenished from time-to-time as required to cover outstanding fees and costs.

24. The Retainer and Fee Agreement is dated December 2, 2002, and the Order of the District Court of Appeal for the Second District, which granted the Petitioner's Motion for fees and costs, is dated November 8, 2002. It is unclear whether a written agreement between the Petitioner and legal counsel existed prior to the December 2, 2002, agreement.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of the proceeding. § 120.57, Fla. Stat. (2003).

26. Subsection 120.595(5), Florida Statutes (2003), provides as follows:

APPEALS.--When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding. (emphasis supplied)

27. On February 11, 2002, the Petitioner filed a Motion for Attorney's Fees with the District Court of Appeals for the Second District seeking an award of fees and costs under the provisions of Subsection 120.595(5), Florida Statutes (2003). By Order dated November 8, 2002, the district court stated that the "motion for attorney's fees is granted in an amount to be set by the trial court."

28. The method for determining reasonable attorney's fees, which is founded on the federal "lodestar approach," is well established in Florida. The Supreme Court of Florida, in

Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1151-1152 (Fla. 1985), summarized the process of computing attorney's fees as follows:

In summary, in computing an attorney fee, the trial judge should (1) determine the number of hours reasonably expended on the litigation; (2) determine the reasonable hourly rate for this type of litigation; (3) multiply the result of (1) and (2); and, when appropriate, (4) adjust the fee on the basis of the contingent nature of the litigation or the failure to prevail on a claim or claims.

29. The Petitioner seeks to establish an amount of reasonable attorneys' fees to be awarded, and thus bears the burden to demonstrate by a preponderance of the evidence as to what the amount of reasonable attorneys' fees should be. See Department of Transportation v. JWC Company, 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

30. The evidence presented at hearing, as set forth in the preceding Findings of Fact, establishes that the invoiced 320 hours directly applicable to the administrative case and resulting appeal were a reasonable expenditure of time expended in preparation for the administrative proceeding and in pursuing the appeal of the first Final Order entered by USF.

31. Further, the evidence presented at hearing establishes that the invoiced hourly rate of \$275 is reasonable given the

nature of the case and the skill and experience of legal counsel representing the Petitioner. Accordingly, the Petitioner is entitled to recover attorneys' fees of \$88,000.

32. The Respondent asserts that the fee award should be reduced to zero because the Petitioner was ultimately unsuccessful in challenging the termination of her employment by USF. The award of fees in this case is based on the Respondent's improper rejection of Findings of Fact set forth in the Recommended Order entered on July 2, 2001. Pursuant to Subsection 120.595(5), Florida Statutes (2003), the award of reasonable attorney's fees and costs is mandated.

33. The Petitioner asserts that the fee award should be increased by a multiplier of between 2 and 2.5 due to the nature of the case and the experience and skill of the legal representation provided. The evidence fails to establish that the fee award should be increased beyond that set forth herein. The Petitioner was ultimately unsuccessful in challenging the termination of her employment by the Respondent.

34. As set forth in the preceding Findings of Fact, the evidence establishes that the Petitioner is entitled to recover costs in the amount of \$307. Normal office expenses of counsel are not recoverable as costs. Bolton v. Bolton, 412 So. 2d 72, (Fla. 5th DCA 1982).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby found that the Petitioner is entitled to recover attorneys' fees in the amount of \$88,000 and to recover costs of \$307.

DONE AND ORDERED this 25th day of June, 2004, in Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

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Filed with the Clerk of the  
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this 25th day of June, 2004.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.