

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

LINDA M. JOYCE,

Plaintiff,

-vs-

Case No. 5:06-cv-339-Oc-10GRJ

JOHN E. POTTER, POSTMASTER
GENERAL, in his official capacity, and
UNITED STATES POSTAL SERVICE,

Defendants.

ORDER

This case is before the Court for consideration of the Plaintiff's Motion for Correction/Clarification of Court's Order or, in the Alternative, to Amend Judgment (Doc. 33). The Plaintiff's Motion is ripe and is due to be granted. The Plaintiff has also filed a Second Supplemental Application for Attorney's Fees and Expenses Under the Equal Access to Justice Act (Doc. 36). The Plaintiff's application is ripe and is due to be granted in part and denied in part. The Defendants' Motion Under Fed. R. Civ. P. 59 to Alter or Amend Judgment (Doc. 32) is also before the Court. The Defendants' motion is ripe and is due to be denied.

The Plaintiff's Motion for Correction/Clarification

The Plaintiff has filed a Motion for Correction/Clarification (Doc. 33) of the Court's Order (Doc. 31) based on the Court's failure to address her request for a cost of living adjustment to the statutory hourly rate for attorney fees.¹ The Plaintiff's Application (Doc. 23) requested the adjustment of the statutory rate by the Consumer Price Index (CPI) pursuant to 28 U.S.C. § 2412(d)(2)(A). The Plaintiff claims that she is entitled to a CPI-adjustment starting with her initial engagement of counsel: August 2006. In support of the request, the Plaintiff attached David Hendel's affidavit to the Motion (Doc. 23-3),² which contends that his firm's attorney rates are within the range of fees normally charged for attorneys who concentrate their practice on government contract matters and litigation in federal courts.

In response, the Defendants argue that the application for an adjustment is incomplete, because the Plaintiff failed to inform the Court as to the dollar amounts of the 2006 and 2007 rates and the number of hours to which each rate applied. While the Plaintiff's failure to provide this information explains the Court's oversight or omission, the

¹Although the Plaintiff states in her Motion that she seeks correction/clarification pursuant to Fed. R. Civ. P. 60(a), the Defendants argues that the Plaintiff should have sought relief under Fed. R. Civ. P. 59(e). The distinction is important, because if the Plaintiff's Motion was properly categorized as a Rule 59 Motion, the Motion is untimely. Because the Plaintiff requests that the Court clarify/correct its "oversight" in failing to apply the requested CPI-adjustment to the statutory rate, the Court views the Plaintiff's Motion as filed pursuant Fed. R. Civ. P. 60(a), and it is not time-barred.

²According to the affidavit, Mr. Hendel is a member of the law firm of Akerman Senterfitt's lead counsel on this case.

authority cited by the Plaintiff persuades the Court to correct the amount of the award to include the adjustment.

Although the decision to award a cost of living adjustment is within the discretion of the district court, courts in the Eleventh Circuit have noted that the adjustment is 'next to automatic.' United States v. Adkinson, 256 F.Supp. 1297, 1312 (N.D. Fla. 2003) (citing Meyer, 958 F.2d at 1035, n.9.) Indeed, the parties do not have to make a special showing to obtain the adjustment. Adkinson, 256 F.Supp. at 1312; see also Brungardt v. Commissioner of Social Security, No. 06-15681, 2007 WL 1354722 (11th Cir. 2007) (reaffirming that a court is itself an expert on the question of a reasonable hourly rate and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value.)

A two-step process has been recognized for determining the appropriate hourly rate to be applied in calculating attorney's fees under the EAJA. See Meyer v. Sullivan, 958 F.2d 1029, 1033 (11th Cir. 1992). First, the district court must determine the market rate for similar services provided by lawyers of reasonably comparable skills, experience and reputation. Id. The second step, which is needed only if the market rate is greater than \$125.00 per hour, is to determine whether the district court should adjust the hourly fee upward from \$125.00 to take into account an increase in the cost of living. Id. at 1033-1034.

With respect to the first step, the Court did not determine in its initial analysis whether the market rate was higher than the \$125.00 statutory cap under 28 U.S.C. § 2412(d). However, the Court recognized that the market rate for purposes of the bad faith determination made pursuant to 28 U.S.C. § 2412(b) exceeded \$125.00. (See the Court's July 16, 2007 Order (Doc. 31) applying \$323.12 as the market rate for hours billed during October 10, 2006 through November 1, 2006).³ The Court finds that it would be inconsistent to recognize that the market rate is greater than \$125.00 under one subsection of the statute, but not the other.

The Court, therefore, is authorized to adjust the statutory ceiling to take into account an increase in the cost of living. The Plaintiff requests that the Court adjust the statutory ceiling rate to \$161.85 for 2006, and \$165.15 for 2007.⁴ The Defendants recognize that these are the correct adjusted rates for the respective years. (Doc. 35). Accordingly, the Court finds it appropriate to award \$42,744.58 in attorney's fees for 2006 under 28 U.S.C. § 2412(d) (264.10 hours⁵ x \$161.85 (which does not include 21.05 hours for the period that the Court determined the Government acted in bad faith), and \$14,021.23 for 2007 under 28 U.S.C. § 2412(d) (84.9 hours x \$165.15).

³The Court determined that the market rate was \$323.12 for the limited period of time of October - November 2006. The Plaintiff contends that she is entitled to the adjustment starting in August 2006. The Court recognizes that the market rate has not deflated from 2006 to 2007.

⁴The Plaintiff utilized <http://www.bls.gov/cpi> to locate the CPI-U tables to determine the appropriate increase.

⁵The Plaintiff states in her Motion that she overstated the hours submitted to the Court by 16.03. Accordingly, the calculation is adjusted to take the error into account.

The Defendant's Motion to Alter or Amend Judgment

The Defendants' Motion to Alter or Amend Judgment (Doc. 32) is due to be denied. The Defendant asks the Court to eliminate any finding or legal conclusion that Defendants engaged in bad faith by transmitting the October 20, 2006 settlement proposal to the Plaintiff, thereby continuing the proceedings. However, as stated in the Court's July 16, 2007 Order (Doc. 31), the Court finds, and continues to find, that the Defendants' conduct rises to the level of bad faith under 28 U.S.C. § 2412(b). The Defendants argue that the contents of Plaintiff's Counsel's billing records show that Plaintiff's Counsel did not interpret the October 20, 2006 e-mail as a bad faith act. Even if the records somehow reflect counsel's thought process, his interpretation of the Government's offer is irrelevant.

It is clear from the plain language of the Government's e-mail to Plaintiff's Counsel that the Government had already determined that the Plaintiff was not a security risk, and there was no security-related reason to withhold clearance. Despite the determination, the Government offered to return the Plaintiff to work, with restoration of security clearance, only if she would dismiss the case and waive her right to attorney's fees. The Government could, and should, have restored the Plaintiff's security clearance at that time and provided a stipulation regarding appropriate arrangements to clear her name. Pressuring the Plaintiff to waive her rights and unnecessarily continuing the proceedings was not justified by any remaining supportable position in the litigation.

Further, Defendants argue that the Court's Order sets a new and dangerous precedent that will discourage useful settlements. The Court recognizes that public policy encourages the settlements of disputes. However, while the Court advocates that parties engage in good faith settlement negotiation, it will not condone the Government's attempt to coerce plaintiffs to waive their right to seek attorney's fees in bad faith under the guise of public policy.

Accordingly, upon due consideration, the Court finds it appropriate to award attorneys fees at a market rate for hours billed between the date the Plaintiff received the initial offer of reinstatement and the date the Plaintiff received actual notification of reinstatement - October 20, 2006 through November 1, 2006. During that time period, the counsel for the Plaintiff billed a total of 21.05 hours at varying hourly rates not exceeding \$350.00 per hour, for total attorney fees of \$6,801.68 (an average hourly rate of \$323.12 per hour).⁶ Although the Court finds that the Defendants acted in bad faith for a limited period of time during the litigation of this case, there is no evidence before the Court concerning individual responsibility for that conduct. The Court does not specifically find, therefore, that the Government's attorneys engaged in misconduct.

The Plaintiff's Second Supplemental Application for Fees and Expenses

According to the Second Supplemental Application (Doc. 36), the Plaintiff seeks fees

⁶Although the Court's Order (Doc. 31) stated that the total was \$6,478.50, upon further review, this figure was derived at by mathematical error. The correct figure is 21.05 @ \$323.12 per hour, which equals \$6,801.68. The Court hereby corrects its mistake pursuant to Fed. R. Civ. P. 60(a).

for: (1) time expended preparing and filing the Plaintiff's Motion for clarification/correction; (2) time expended in responding to the Defendants' Rule 59 Motion; (3) time expended preparing and filing the Second Amended Application; and (4) post-judgment interest.

With respect to the Plaintiff's request for attorney's fees for time spent preparing and filing her Motion for Clarification/Correction, the Plaintiff's request is denied. The Plaintiff sought clarification/correction regarding the Court's alleged "oversight" which was caused, in part, by the paucity of the Plaintiff's Motion. While the Court has taken into consideration the Plaintiff's Rule 60(a) argument regarding the Court's July 16, 2007 Order, any error the Court may have made does not obligate the Defendants to pay attorney's fees for the filing of the Motion. Rule 60(a) of the Federal Rules of Civil Procedure provides a plaintiff with recourse when the plaintiff contends that a court made a clerical mistake or a mistake arising from an oversight. To award such fees would punish a party for a court's error.

With respect to the Plaintiff's request for fees associated with her response to the Government's Motion to Alter or Amend (Doc. 34), the Plaintiff incurred additional attorney's fees in preparing her response and objections to the Government's arguments. The Court rejected the Government's request to eliminate its bad faith determination. Upon due consideration, the Plaintiff is entitled to attorney's fees for the time spent responding to the Government's Rule 59 Motion. Counsel spent 39.07 hours at varying hourly rates not exceeding \$350.00, for a total amount in attorney's fees of \$12,287.50.

The Plaintiff, however, is not entitled to attorney's fees for the time spent preparing and filing her Second Supplemental Application for Fees and Costs (Doc. 36). The Plaintiff could have submitted requests for attorney's fees and costs within her Motion for Correction/Clarification and Response to the Defendants' Motion to Alter or Amend respectively. The Court will not make the Defendants pay for the Plaintiff's decision to submit a second supplemental application to make such requests.

Moreover, the Plaintiff's request for post-judgment interest pursuant to 28 U.S.C. § 2412(f) is denied. Section 2412(f) provides that, "if the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid in the amount of the award as affirmed." Here, although the Government filed a Motion to Alter or Amend Judgment and the Court has hereby denied the Motion, the Government did not "appeal" the judgment for purposes of the statute. As such, the Plaintiff is not entitled to post-judgment interest.

Accordingly, upon due consideration, it is hereby ORDERED and ADJUDGED that:

- (1) the Plaintiff's Motion for Correction/Clarification of Court's Order or, in the Alternative, to Amend Judgment (Doc. 33), is GRANTED; and
- (2) The Defendant's Motion Under Fed. R. Civ. P. 59 to Alter or Amend Judgment (Doc. 32) is DENIED; and
- (3) The Plaintiff's Second Supplemental Application for Attorney's Fees

and Expenses Under the Equal Access to Justice Act (Doc. 36) is GRANTED IN PART to the extent the Plaintiff is entitled to attorney's fees for responding to the Defendant's Motion to Alter or Amend (Doc. 34). The Plaintiff's request for fees associated with the Motion for Correction/Clarification, preparation of the Second Supplemental Application, and for post-judgment interest (Doc. 36) is DENIED.

(4) The Plaintiff is awarded \$78,709.63, which includes EAJA fees of \$56,765.81 pursuant to 28 U.S.C. § 2412(d); EAJA attorney's fees of \$6,801.68; \$12,287.50 in fees for preparing the Response to the Defendant's Motion to Alter or Amend; and costs of \$2,854.64.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida this 2nd day of April, 2008.



UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record