Western New England Law Review

Volume 2 2 (1979-1980)
Issue 2

Article 6

1-1-1979

THE COURTS' DISCRETION IN ASSESSING FEES UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

Linda F. Thome

THE COURTS' DISCRETION IN ASSESSING FEES UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

Linda F Thome*

I. INTRODUCTION

The Civil Rights Attorney s Fees Awards Act of 1976[1] provides for an award of fees to the prevailing party by the court "in its discretion. In order to assess the bounds of this discretion, it is nec essary first to examine the origin of the Act and the context in which it was passed.

The Act was direct congressional reaction to the United States Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society* [2] That decision abruptly ended the federal courts practice of awarding attorney s fees to prevailing parties in civil rights and other public interest cases under the private attor ney general doctrine where there was no express statutory authorization for such awards. It also resulted in an inconsistency in the availability of fee awards in suits brought under the federal civil rights laws because some statutes provided for fees while others did not.[3]

The legislative history of the Act makes clear that its purpose was to remedy anomalous gaps and to achieve consistency in

---

Staff Attorney Lawyers Committee for Civil Rights Under Law· B.A., University of Chicago, 1972; J.D., George Washington University, 1978.

1. 42 U.S.C. § 1988 (1976). The statute provides in relevant part:

> In any action or proceeding to enforce provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging violation of, provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney fee as part of the costs.

Id.

2. 421 U.S. 240 (1975).

3. Among those statutes with provision for fees are: Titles II, and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1976); Title VII of the Civil Rights Act of 1968, *id.* § 3612(c) (1976); the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (1976); and the Voting Rights Act Extension of 1975, 42 U.S.C. § 1973*l*(e) (1976).

our civil rights laws. [4] The provision was to be interpreted in accordance with the existing case law under both the earlier statutory provisions and the judicially fashioned private attorney general doctrine.[5] The courts have recognized this legislative desire to achieve consistency and have generally adopted, as controlling, the principles which were established under the fee provisions of the 1964 Civil Rights Act. Thus, *Newman v. Piggie Park Enterprises*[6] and *Johnson v. Georgia Highway Express, Inc.* [7] and other cases under Title II and Title VII of the 1964 Act, are repeatedly cited by courts seeking standards for fee awards under section 1988. The legislative history also recognizes the compelling need for fee awards in civil rights actions as a part of the overall federal enforcement scheme.[8] The reasoning in the Senate Report echoes that of

---

4. S. REP NO. 1011, 94th Cong., 2d Sess. 1 (1976), *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908.

5. The idea of the private attorney general" is not new one, nor are attorneys fees new remedy. Congress has commonly authorized attorneys fees in laws under which private attorneys general" play significant role in enforcing our policies.

> These fees shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy. Before May 12, 1975, when the Supreme Court handed down its decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); many lower Federal courts throughout the Nation had drawn the obvious analogy between the Reconstruction Civil Rights Acts and these modern civil rights acts, and, following Congressional recognition in the newer statutes of the private attorney general" concept, were exercising their traditional equity powers to award attorneys fees under early civil rights laws as well.
>
> These pre-*Alyeska* decisions remedied gap in the specific statutory provisions and restored an important historic remedy for civil rights violations.

> It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, should ordinarily recover an attorney fee unless special circumstances would render such an award unjust. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (footnotes omitted).

S. REP., *supra* note 4, at 3-4, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5910-12.

6. 390 U.S. 400 (1968).

7. 488 F.2d 714 (5th Cir. 1974).

8. All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have meaningful opportunity to vindicate the important Congressional policies which these laws contain.

the Supreme Court in *Newman*.[9]

The reality of civil rights litigation confirms the importance of private enforcement and the need for adequate fee awards. During the year ending June 30, 1978, over ninety-eight percent of all civil rights actions filed in federal district courts were brought by private plaintiffs.[10] These cases may take years to resolve,[11] with repeated demands upon the time, resources, and skills of plaintiffs counsel. Issues, both legal and factual, are complex, often requiring the testimony of one or more expert witnesses as well as paralegal assistance in preparing for trial.[12] Costs are correspondingly high. Finally even in seemingly clear-cut cases, success cannot be assured as legal standards are constantly reexamined by the courts.[13]

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. REP *supra* note 4, at 2, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5910.

> 9. When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as means of securing broad compliance with the law. A Title II suit is thus private in form only When plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as private attorney general, vindicating policy that Congress considered of the highest priority If successful plaintiffs were routinely forced to bear their own attorney fees, few aggrieved parties would be in position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

390 U.S. at 401-02 (footnote omitted).

10. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR A-16, table C.2 (1978).

11. For example, an employment discrimination class action was brought under Title VII of the 1964 Civil Rights Act; suit was filed in 1966, trial was held in 1974, and, in 1977 plaintiffs moved for an award of interim attorneys fees; the case is not yet resolved. James v. Stockham Valve & Fitting Co., 559 F.2d 310 (5th Cir. 1977).

12. In one title VII case tried in 1979, trial lasted 3 weeks and required the testimony, for plaintiffs, of computer programmer, statistician, and an industrial psychologist. Exhibit preparation required the assistance of 11 temporary employees, who worked over period of several months to analyze over 40,000 documents. The case has been pending since 1972. Pegues Mississippi State Employment Serv., No. 72-4-8 (N.D. Miss. 1979) (under advisement July 27 1979).

13. The Burger Court has made number of inroads into established" judicial

The result of these factors is that many plaintiffs and attorneys are reluctant to start down the uncertain path of litigation. While many civil rights cases may be resolved quickly and with little expense, it may be difficult to distinguish, in advance, the simple case from the one which will require multiple appeals and years to close. Because few civil rights plaintiffs can afford to pay their attorneys as well as the costs of litigation as the proceedings continue, most attorneys must wait until the final resolution of the case to get their fee and to recover their own disbursements. Even then, of course, fees and costs will be awarded only if the plaintiff prevails. To add to this uncertainty by limiting the circumstances under which fees are to be awarded or by limiting the award itself would undermine the intent of the Act. It would, indeed, undermine the entire legislative civil rights mandate, which the Congress has made dependent upon private litigation.

The Senate Report recognized that in a practical sense, the expectation that the civil rights laws will be enforced by private litigants relies upon the ability of those litigants to attract competent counsel.[14] The adversary system itself is based on the assumption that both parties to litigation will be represented by attorneys capable of presenting their clients positions in the most favorable posture. The guiding principle in determining fee awards must be to place the services of a plaintiffs civil rights lawyer on a par with those of counsel in comparably difficult areas of law [15]

II. Determining Whether to Award Attorneys Fees

The Supreme Court's decision in *Newman* limited the Court's discretion in deciding whether to award fees to prevailing plaintiffs in cases brought under Title II of the 1964 Civil Rights Act.[16] One who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney s fee unless special circum-

---

principles in the civil rights area. *See, e.g.*, International Bhd. of Teamsters v. U.S., 431 U.S. 324 (1977).

14. S. Rep *supra* note 4, at 6, *reprinted in* [1976] 5 U.S. Code Cong. & Ad. News 5908, 5913.

15. It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by fee-paying client, "for all time reasonably expended on matter.

Id. (citations omitted).

16. 390 U.S. at 402.

stances would render such an award unjust."[17] This holding was extended by the Court to fee awards under title VII in *Albermarle Paper Co. v. Moody* [18] and to awards under section 718 of the Emergency School Aid Act of 1972[19] in *Northcross v. Board of Education*.[20] The Senate Report cites *Newman* and states that this principle should also apply under section 1988.[21]

Accordingly most of the controversy in the lower courts has arisen with regard to the definition of the special circumstances which would render such an award unjust. In addition, some courts have held that a fee award is inappropriate where the plaintiff has sought only damages rather than injunctive relief. Finally others have confronted the problem of whether federally funded legal services groups are entitled to an award.

Some courts have found such a special circumstance where the defendant has relied upon a state law or agency ruling in maintaining the policy which the plaintiff has successfully challenged. This situation typically occurs in sex discrimination actions concerning retirement plans or female protective laws.[22] The Ninth Circuit, however, rejected this rationale in *Rosenfeld v. Southern Pacific Co* [23]

Under unique circumstances in *Sprogis v. United Air Lines*[24] fees were denied. There, the Seventh Circuit upheld the district court's denial of fees when it found that the real party in interest in the suit was not the named plaintiff but rather her union, which had retained counsel and borne all the expenses of the litigation.

---

17 *Id.*

18. 422 U.S. 405 (1975).

19. 20 U.S.C. § 1617 (1976).

20. 412 U.S. 427 (1973).

21. S. REP *supra*, note 4, at 4, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5912.

22. Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976); Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974).

23. 519 F.2d 527 (9th Cir. 1975).

> Reading § 713(b) to bar allowance of attorneys fees whenever good faith reliance could be shown would deter private suits challenging suspect EEOC interpretations of Title VII. At best, such suits are unattractive to private litigants. The issues are often complex; the deference accorded the agency interpretation of its governing statute makes success unlikely Yet it is particularly important that private litigants submit such issues to the courts for determination, for the agency itself will not do so. The agency declined to proceed in this case, for example, but this private litigation resulted in highly significant contribution to the effective enforcement of the Act.

Id. at 529-30.

24. 517 F.2d 387 (7th Cir. 1975).

Further the action was found to be a circumvention of a settlement agreement which the union and the defendant had reached shortly before filing a test case designed in conjunction with other litigation involving the same substantive issues. Because the defendant had not known of the union s position and might have had a different strategy if it had, the court held it to be unfair to assess fees against it. The court found three additional factors militating against a fee award:

> 1. The case was not typical of the civil rights claims usually brought by public interest organizations;
> 2. the attorneys fees claim was not related to the damages recovered; and
> 3. in light of the other litigation pending, the decision in the case had little precedential value.[25]

The latter two considerations are more commonly factors which courts examine in determining the amount of a fee award. Interestingly the Seventh Circuit's evaluation of the precedential value of the case has proved to be incorrect. *Sprogis* is frequently cited and is a leading sex discrimination case under title VII.

A second issue arising in the use of the *Newman* standard is whether the *Newman* mandate applies only to cases in which an injunction, rather than monetary relief alone, has been achieved. At least three circuits have answered this question in the affirmative and have approved the denial of fees, reasoning that no public interest has been served or that the plaintiff's monetary recovery would be sufficient to pay his attorney [26] In *Parham v. Southwestern Bell Telephone Co.* [27] the Eighth Circuit recognized that this reasoning might be myopic. Although no injunction had issued, the court found that the lawsuit acted as a catalyst, leading the defendant to comply voluntarily Therefore, the plaintiff was entitled to a fee award.

The Seventh Circuit's mistaken prediction of the precedential value of *Sprogis* is instructive in this regard. It may be difficult for a court or for the parties to judge the impact of a given case, either as precedent or in its effect upon the defendant's future actions.

---

25. *Id.* at 391.

26. Buxton Patel, 595 F.2d 1182 (9th Cir. 1979) (42 U.S.C. § 1988 (1976)); Zarcone Perry, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (§ 1988); Reid Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975) (title VII).

27. 433 F.2d 421, 429-30 (8th Cir. 1970) (title VII).

28. 595 F.2d 1182 (9th Cir. 1979) (42 U.S.C. § 1988 (1976)).

For example, in *Buxton v. Patel*,[28] a fair housing case, the court found that the discrimination suffered by the plaintiffs was an isolated incident, with no indication of broader violations generally affecting the public. There was no consideration of the effect that case might have in preventing future isolated incidents regarding the same defendant, or more pervasive discrimination by other landlords who might hear about the lawsuit. Indeed, the award of monetary relief in a civil rights case may often have a much greater impact on the public interest than the issuance of an injunction, by deterring conduct similar to the defendant's by others who wish to protect their pocketbooks.

In *Sargeant v. Sharp* [29] the First Circuit squarely rejected the contention that the plaintiff's ability to pay his attorney s fee out of an award of damages should be a factor in the decision to award or not to award a fee. Ability to pay is a factor which may be considered only in setting the amount of the fee or in making the award to the plaintiff rather than to the attorney

Finally it should be noted that in adopting the *Newman* standard, the Senate Report omitted all reference to any requirement that the plaintiff obtain an injunction in order to trigger the presumption of entitlement to a fee award. Instead, it refers only to the necessity of success in seeking to enforce the rights protected by the statutes covered."[30]

A third issue relating to the award of fees was spawned by the statute s preclusion of fee awards to the federal government. Because many legal services and civil rights groups are at least par tially federally funded, it is argued that they too, must be denied fees. The Second Circuit resolved this question in *Equal Employment Opportunity Commission v Steamfitters Local 638*,[31] where it upheld the trial court's fee award to the National Employment Law Project (NELP). Although NELP received money from the Equal Employment Opportunity Commission (EEOC), the court reasoned that NELP was not the federal government. Moreover it could not be known how long the organization s federal funding would continue,[32] or whether Congress might not have intended that such groups become self-sustaining through recovery of attor

29. Sargeant Sharp, 579 F.2d 645 (1st Cir. 1978) (42 U.S.C. § 1988 (1976)).

30. S. REP *supra* note 4, at 4, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5912.

31. 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977).

32. In fact, it terminated in 1978.

neys fees.[33] The court of appeals, however did approve the lower court's reduction of the fees to be awarded to NELP The question of the amount of fee awards to federally and privately funded or ganizations is a live one.

The trial courts discretion, then, in determining whether to award fees, has been substantially limited. The courts of appeals have not hesitated to reverse and remand the denial of fees where there was insufficient justification for it.[34]

III. Determining the Amount of the Fee Award

The courts have much greater discretion in determining the amount of a fee award then in deciding whether to make an award at all. The legislative history of the Act, nevertheless, makes it clear that there are certain considerations which must be taken into account. First, the provision for fee awards was intended to act as an incentive to attract competent counsel to civil rights litigation. Fee awards are to be governed by the same standards prevailing in other complex federal litigation.[35] Second, the Senate Report cited *Johnson*[36] as setting forth the proper standards[37] and stated that these standards had been correctly applied in *Stanford Daily*

---

33. *See also* Hoitt v. Vitek, 495 F.2d 219, 220 (1st Cir. 1974) (private attorney general doctrine) (held no abuse of discretion to deny fees to federally funded Legal Aid Society where private counsel was also associated and received an award). If no private counsel had been involved, however, the First Circuit stated that award to the Legal Aid group would have been required. *Id.* at 221.

34. *See, e.g.*, Bunn v. Central Realty of La., 592 F.2d 891 (5th Cir. 1979) (trial court must consider 42 U.S.C. § 1988 (1976)); Gore v. Turner, 563 F.2d 159 (5th Cir. 1977) (award not to be denied because no proof of value of services presented at trial or because no proof of plaintiffs ability to pay); Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977) (award not to be denied because conduct was negligent rather than intentional).

35. S. Rep *supra* note 4, at 6, *reprinted in* [1976] 5 U.S. Code Cong. & Ad. News 5908, 5913.

36. 488 F.2d at 714.

37 488 F.2d at 717-19. *Johnson*, title VII case, set forth the following twelve factors to be considered:

> (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 other employment by the attorney due to acceptance of the case; (5) 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.

Id.

v. Zurcher [38] *Van Davis v. County of Los Angeles* [39] and *Swann v Charlotte-Mecklenburg Board of Education.*[40]

In *Stanford Daily* the court awarded a fee of $50 per hour for 750 hours and added a bonus of $10,000 because of the contingency of success and because the case involved novel issues which were well presented by counsel.[41] The total award was $47,500.[42] It rejected arguments that the award should have been reduced because the plaintiffs did not succeed in obtaining all of the relief they sought. Determining that fees should be awarded for all time reasonably computed to promote their clients interests, the court reasoned that it should not require attorneys to foresee "the exact parameters of the courts willingness to grant relief. [43]

The *Van Davis*[44] court also awarded a bonus, attributed to the excellent results and difficulty of the case as well as the conduct of the plaintiffs attorneys. It refused to reduce the award because the plaintiffs did not prevail on all issues, adopting the position that fees should be awarded for all time reasonably expended. [45] Nor was the fee reduced because two of the attorneys worked for a non-profit public interest law firm. The total award was reduced slightly by $1,000 because of duplication of effort and by 25 hours or $875 because of poor record-keeping by one lawyer The total award of $60,000 included $9,670 for paralegal and law clerk time at $10 per hour $3,268.68 for expenses, and $7 193.32 for a result charge or bonus. Attorneys were awarded $35 to $60 per hour [46]

In *Swann*, the total award exclusive of expenses was $175,000 for more than 2,700 hours of attorney time.[47] The court found it ir relevant that the plaintiffs had no contractual obligation to pay their attorneys and that the NAACP Legal Defense Fund had contributed expenses and nominal fees to the litigation.[48]

In addition to the *Johnson* guidelines, some courts have followed antitrust cases in which fee awards have been made under

38. 64 F.R.D. 680 (N.D. Cal. 1974).
39. 8 Empl. Prac. Dec. ¶ 9444, at 5047 (C.D. Cal. 1974).
40. 66 F.R.D. 483 (W.D. N.C. 1975).
41. 64 F.R.D. at 688.
42. *Id.*
43. *Id.* at 684.
44. 8 Empl. Prac. Dec. at ¶ 9444, at 5047
45. *Id.* at 5049.
46. *Id.* at 5048.
47 66 F.R.D. at 486.
48. *Id.*

the equitable fund doctrine[49] for guidance in determining the amount of a fee award in a civil rights action. The leading case is *Lindy Bros. Builders of Philadelphia v. American Radiator & Standard Sanitary Corp.*[50] In *Lindy* I, the Third Circuit held that in computing the amount of attorneys fees under the equitable fund doctrine, the number of hours spent should be multiplied by some hourly rate reflecting the complexity and novelty of the issues, the quality of the work, and the amount of the recovery obtained.[51] The Third Circuit applied *Lindy* II to an award of fees under section 1988 in *Hughes v. Repko* [52] holding that the first step in amount determination was to establish a "lodestar The calculation of the lodestar includes a determination of the services to be recognized, that is, how much time should be included, as well as the appropriate hourly rate. Considerations of the complexity or difficulty of the litigation and of the extent to which the party prevailed are included in calculating the lodestar Further adjustments are made in accordance with the purposes of the Act and the standards set forth in *Johnson* and *Evans v. Sheraton Park Hotel.*[53]

Finally other courts have adopted the award standards set forth in the ABA s Code of Professional Responsibility [54] which are not appreciably different from the standards suggested in *Johnson.*

The U.S. Court of Appeals for the District of Columbia Circuit has developed a novel approach to setting the amount of fee awards in cases against the federal government which is a step removed from the *Johnson* and the ABA standards. In *Copeland v. Marshall,*[55] a panel of that court held that, rather than beginning with an hourly rate and number of hours worked on the case, the inquiry should begin with an examination of the firm s overhead costs and reasonable profit margins. The panel was particularly concerned about the relationship between the fee award and the plaintiff's or class s back pay recovery

---

49. The equitable fund doctrine provides for compensation to those who have undertaken an action which has resulted in benefit to others. The others benefited are accordingly required to contribute to the plaintiffs attorney fees.

50. 487 F.2d 161 (3d Cir. 1973) (Lindy I), *appeal from remand,* 540 F.2d 102 (3d Cir. 1976) (Lindy II).

51. *Id.* at 168.

52. 578 F.2d 483 (3d Cir. 1978).

53. 503 F.2d 177 (D.C. Cir. 1974).

54. *See* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974).

55. 18 Fair Empl. Cas. 468 (D.C. Cir. 1978) (rehearing en banc scheduled Oct. 21, 1979).

With the exception of the *Copeland* decision with respect to fee awards against the federal government, there is general agreement as to the factors which should be considered. There is considerable variation, however, in the extent to which the appellate courts will inject themselves into the process itself. Nearly every court recites its acknowledgement that the amount of the award is within the trial court's discretion.[56] Yet some courts have taken a much more active role than others in reviewing the methods by which the trial judge sets the award. The Second Circuit, for example, requires that a hearing be held and that the claim be fully documented.[57] The First,[58] Third,[59] and Fifth[60] Circuits require findings or some statement of the reasons for the award. In contrast, both the Fourth[61] and Ninth[62] Circuits have upheld lower court fee determinations which were challenged because no findings or reasons were issued. Close appellate review of course, is dependent upon the existence of a record below

The appellate courts vary widely in their treatment of fee awards which have been challenged by one of the parties. In *Allen v. Amalgamated Transit Union*,[63] the district court awarded a fee of $300 or $4.54 per hour The Eighth Circuit reversed, calling the award grossly inadequate, and recommending to the trial court the standards set out in *Johnson*. This example, of course, is an extreme one. The district court apparently simply chose a dollar amount with little reference to any of the *Johnson* factors.

In another Eighth Circuit case, *Brown v. Bathke* [64] the trial

---

56. *See, e.g.*, King New Hampshire Dep't of Resources and Economic Dev., 562 F.2d 80 (1st Cir. 1977) (district court is clearly the best judge of what constitutes reasonable fee"); Waters Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974) (analysis which encompasses consideration of ABA standards well within bounds of discretion); Brito Zia, Inc., 478 F.2d 1200 (10th Cir. 1973) (hours not the sole basis for determining fees, the court using its discretion sets reasonable fee); Schaeffer San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972) ("large discretion in trial judge recognized); Lea v. Cone Mills, 467 F.2d 277 (4th Cir. 1972) (appellate court will not overrule unless clearly wrong"); Culpepper v. Reynolds Metals, 442 F.2d 1078 (5th Cir. 1971) (reasonableness left to the sound discretion of the trial judge).

57. Beazer New York City Transit Auth., 558 F.2d 97 (2d Cir. 1977), *rev d on other grounds*, 99 S. Ct. 1355 (1979).

58. Sargeant Sharp, 579 F.2d 645 (1st Cir. 1978).

59. Hughes v. Repko, 578 F.2d at 488-89.

60. Morrow Dillard, 580 F.2d 1284 (5th Cir. 1978).

61. Lea Cone Mills, 467 F.2d 277 (4th Cir. 1972).

62. Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002 (9th Cir. 1972).

63. 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977).

64. 588 F.2d 634 (8th Cir. 1978).

court had awarded fees only for the time expended on the issue on which the plaintiff had prevailed. This policy of mechanically dividing time spent on interrelated issues was rejected by the court of appeals as inconsistent with the liberal purposes of the Act. Although the extent to which the plaintiff prevailed was a relevant factor, its consideration was to be in accord with the principles of *Van Davis*[65] as adopted by the Senate Report,[66] that attorneys fees should not be denied solely because the claim did not provide the precise basis for the relief granted.[67]

The Second Circuit, in *Beazer v. New York City Transit Authority* [68] upheld a fee award of $310,000, but reversed a premium of $50,710. Because the trial court had met all of the requirements of a hearing and full documentation of the claim, the fee award itself was upheld. The premium, however, was held to be an abuse of discretion. Although the factual issues were complex, the legal issues were fairly simple and the benefits to the class were not concrete. The court was candidly concerned about the size of the total award and adverted to an earlier pronouncement that fees should be scrutinized with an eye to moderation.

In *King v. Greenblatt* [69] the First Circuit upheld the trial court's award of $50 per hour or $4,000. In doing so, the appellate court reversed an earlier case in which it had held that the Criminal Justice Act rates of $30 for in-court and $20 for out-of-court time were appropriate for awards in civil rights cases.[70] The authority for this position was the legislative history of section 1988, which had been passed in the interim.[71]

---

65. 8 Empl. Prac. Dec. at ¶ 9444, at 5047

66. S. REP *supra* note 4, at 6, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5913.

67 588 F.2d at 637.

68. Beazer New York City Transit Auth., 558 F.2d 97 (2d Cir. 1977), *rev d on other grounds*, 99 S. Ct. 1355 (1979).

69. 560 F.2d 1024 (1st Cir. 1977).

70. Souza Travisono, 512 F.2d 1137 (1st Cir.), *vacated*, 423 U.S. 809 (1975) (citing 18 U.S.C. § 3006A(d)(1) (1976)).

71. Not only has Congress now provided for attorney fees awards in civil rights cases, the Act' legislative history leaves no doubt that Congress intended not only that the fees be adequate enough to attract competent counsel" but "that the amount [would] be governed by the same standards which prevail in other types of equally complex Federal litigation such as antitrust cases. Mechanical application of the Criminal Justice Act fee scale obviously does not meet these criteria, and we shall therefore no longer require adherence to *Souza*.

560 F.2d at 1026 (quoting S. REP *supra* note 4, at 6, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5913).

After the district court concluded that the hours expanded by counsel were excessive and thereby reduced the award from 231 to 150 hours, the plaintiffs in *Norwood v. Harrison*[72] appealed. The Fifth Circuit upheld the award because the *Johnson* factors had been fully considered in its determination.

The problems of calculating a fee award vary with every case. The court must determine whether the time spent was excessive, to what extent and in what way the final result should affect the award, and at what rate the attorney s time should be valued. Each of these considerations depends upon the unique circumstances of each case. As long as these circumstances are evaluated within the *Johnson* framework, mechanical formulae for allocating time among issues are avoided, and a reasonable rate is set. The balancing of the factors is then generally left to the court's discretion.

---

72. 581 F.2d 518 (5th Cir. 1978).