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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. THE STATE OF CALIFORNIA; KAMALA D. HARRIS, in her official capacity as Attorney General for the State of California; THE CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-25, Defendants and Respondents.	CASE NO. 10CECG02116 **NOTICE OF LODGING FEDERAL AUTHORITIES IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO NOTICE OF MOTION AND MOTION FOR ATTORNEYS FEES** Date: August 31, 2011 Time: 3:30 p.m. Location: Dept. 402 Judge: Hon. Jeffrey Y. Hamilton Action Filed: June 17, 2010

NOTICE IS HEREBY GIVEN that PLAINTIFFS are hereby lodging the following Federal Authorities in Support of Notice of Lodging Federal Authorities in Support of Plaintiffs' Reply to Defendants' Opposition to Notice of Motion and Motion for Attorneys Fees:

1. *Davis v. City and County of San Francisco*, (9th Cir. 1992) 976 F.2d 1536, 1545 ..... Exhibit 1
2. *Ferland v. Conrad Credit Corp.*, (9th Cir. 2001) 244 F.3d 1145, 1151. ..... Exhibit 2
3. *Moore v. Jas. H. Matthews & Co.*, (9th Cir. 1982) 682 F.2d 830, 839 ..... Exhibit 3
4. *Moreno v. City of Sacramento*, (9th Cir. 2008) 534 F.3d 1106, 1112 ..... Exhibit 4
5. *U. Steelwrkrs. v. Phelps Dodge Corp.*, (9th Cir. 1990) 896 F.2d 403, 407 ..... Exhibit 5

Dated: August 24, 2011

Respectfully Submitted,
MICHEL & ASSOCIATES, P.C.

C. D. Michel
Attorney for Plaintiffs

EXHIBIT 1

976 F.2d 1536
United States Court of Appeals,
Ninth Circuit.

Fontaine **DAVIS**; Eric H. Washington; Jerilyn North, Jimmie Braden, Audrey Lee, Early **Davis**, Brandi Swanson, Susan Moorehead, Anne Young, Mary M. Carder, Theresa Rodigou, Kathleen J. Bradshaw, Patricia Murray, International Association of Black Firefighters-**San Francisco** Chapter, et al., Plaintiffs-Appellees,

v.

CITY AND **COUNTY** of **SAN FRANCISCO**, Defendant-Appellant.

No. 91-15113. Argued and Submitted Jan. 16, **1992**. Withdrawn from Submission April 13, **1992**.Resubmitted July 1, **1992**.Decided Oct. 6, **1992**.

After prevailing in employment discrimination action against **city** for use of invalid hiring and promotional procedures in fire department, the United States District Court for the Northern District of California, Marilyn H. Patel, J., established appropriate interest rate on certain back pay awards, 747 F.Supp. 1370, and awarded attorney fees to plaintiffs, 748 F.Supp. 1416. **City** appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) contingency could not be used as basis for multiplying lodestar fee or in setting of billing rates; (2) provision of Civil Rights Act of 1991 providing for expert witness fees in employment discrimination cases applies retroactively; and (3) calculation of interest on back pay was proper.

Affirmed in part, reversed in part and remanded.

West Headnotes (23)

1 **Federal Courts**
Costs, attorney fees and other allowances

Court of Appeals reviews award of attorney fees for abuse of discretion.

1 Cases that cite this headnote

2 **Civil Rights**
Amount and computation

While lodestar figure is presumed to represent appropriate attorney fee, under certain circumstances court may adjust award upward or downward to take into account special factors. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

3 Cases that cite this headnote

3 **Civil Rights**
Time expended; hourly rates

With respect to request for attorney fees under Title VII, court properly permitted plaintiffs' counsel to supplement their time sheets with additional documentation of their efforts; district court properly found plaintiffs' counsel's reconstructed records, which drew on agendas and summaries of meetings and notes and time sheets of counsel, to be extensive. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

8 Cases that cite this headnote

4 **Civil Rights**
Amount and computation

In calculating lodestar amount for purposes of attorney fee award in Title VII action challenging **city** fire department's practice of employment discrimination, district court improperly included time spent by law clerks and legal assistants on matters unrelated to fire department's hiring and promotional practices and issue of racial harassment which formed basis for its permanent injunction and subsequent consent decree. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

10 Cases that cite this headnote

5 **Civil Rights**
Services or activities for which fees may be awarded

Civil rights plaintiffs' counsel were not entitled to attorney fees for performance of clerical matters such as filing of pleadings and travel time associated therewith. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

4 Cases that cite this headnote

6 **Civil Rights**

Services or activities for which fees may be awarded

Prevailing civil rights plaintiffs were entitled to attorney fee award for time spent traveling to cocounsel meetings, as counsel submitted evidence establishing that local attorneys customarily billed their clients for travel time to cocounsel meetings, and defendant produced no contrary evidence. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

21 Cases that cite this headnote

7 **Civil Rights**

Time expended; hourly rates

Touchstone in determining whether certain hours have been properly claimed by prevailing civil rights plaintiffs seeking attorney fee award is reasonableness; assessment of reasonableness is made by reference to standards established in dealings between paying clients and private bar. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

17 Cases that cite this headnote

8 **Civil Rights**

Time expended; hourly rates

Counsel for prevailing civil rights plaintiffs were entitled to fee award for time they spent on fee petition, even though they hired additional lawyer to act as fee counsel; defendant did not claim that time spent by plaintiffs' counsel on fee petition was duplicative of that claimed by fee counsel. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

7 Cases that cite this headnote

9 **Civil Rights**

Time expended; hourly rates

District court did not abuse its discretion by determining that bulk of hours claimed by prevailing civil rights plaintiffs' counsel were reasonably expended, despite defendant's allegation that hours claimed were necessarily duplicative; district court discussed question of overstaffing at some length, and noted, inter alia, that plaintiffs had been divided into five subclasses of litigants because of potential conflicts of interest and that each subclass necessarily had to be represented by different attorney. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

13 Cases that cite this headnote

10 **Civil Rights**

Services or activities for which fees may be awarded

Prevailing civil rights plaintiffs' counsel were entitled to attorney fee award for press conferences and other public relations work which contributed, directly and substantially, to attainment of plaintiffs' litigation goals, as private attorneys do such work and bill their clients. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

19 Cases that cite this headnote

11 **Civil Rights**

Amount and computation

Billing rates used in arriving at lodestar figure for prevailing civil rights plaintiffs' counsel should be established by reference to fees that private attorneys of ability and reputation comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

31 Cases that cite this headnote

12 **Civil Rights**

Amount and computation

In determining billing rates used for arriving at lodestar figure for prevailing civil rights plaintiffs' attorney fee award, court may consider, inter alia, novelty and difficulty of issues involved in case, skill required to litigate those issues, preclusion of other employment, customary fee, relevant time constraints, amount at stake and results obtained, experience, reputation, and ability of

attorneys, nature and length of their professional relationship with client, "undesirability" of case, and awards in similar suits. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

44 Cases that cite this headnote

13 **Civil Rights**

Time expended; hourly rates

Plaintiffs who prevailed on Title VII employment discrimination claims relating to **city's** use of invalid hiring and promotional procedures in fire department were entitled to award of attorney fees incorporating 1988 rates of $110 per hour for 1985 law school graduates to $235 per hour for 1969 law school graduates, in addition to $70 per hour for paralegals. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

3 Cases that cite this headnote

14 **Civil Rights**

Amount and computation

For purposes of awarding attorney fees to plaintiffs who prevailed on Title VII employment discrimination claims, court properly applied uniform rate to legal work performed by each plaintiff's attorney; private practitioners do not generally charge varying rates for different lawyerly tasks they undertake on given case. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

10 Cases that cite this headnote

15 **Civil Rights**

Amount and computation

In awarding attorney fees to plaintiffs who prevailed on Title VII employment discrimination claims, court properly applied 1988 billing rates to each hour claimed by plaintiffs' counsel regardless of year in which work was actually performed. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

22 Cases that cite this headnote

16 **Civil Rights**

Amount and computation

In awarding attorney fees to plaintiffs who prevailed on Title VII employment discrimination claims, court properly approved billing rates which exceeded rates charged by several of plaintiffs' attorneys in their private practices. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

17 **Civil Rights**

Amount and computation

Court improperly enhanced lodestar fee for attorney fee award to plaintiffs who prevailed on Title VII employment discrimination claims on ground that plaintiffs' counsel undertook case on contingent basis, and therefore bore risk of nonpayment in event of failure. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

16 Cases that cite this headnote

18 **Civil Rights**

Amount and computation

In awarding attorney fees to prevailing civil rights plaintiffs, court may not consider contingency as factor relevant to establish reasonable fee, regardless of whether consideration of contingency occurs in deciding to apply multiplier to lodestar fee or in initially calculating lodestar. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

88 Cases that cite this headnote

19 **Civil Rights**

Costs

Except as otherwise specifically provided, Civil Rights Act of 1991, including Act's express authorization of expert fee awards in employment discrimination cases, applies retroactively. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k); Civil Rights Act of 1991, § 1 et seq., 105 stat. 1071.

23 Cases that cite this headnote

20 **Civil Rights**

Services or activities for which fees may be awarded

Attorney fee awards to plaintiffs who prevail on Title VII employment discrimination claims may include reimbursement for out-of-pocket expenses including travel, courier and copying costs. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

10 Cases that cite this headnote

21 **Interest**

What law governs

In awarding interest on back pay to plaintiffs who prevailed on Title VII employment discrimination claims, court properly utilized federal, rather than state, law, as litigation which led to consent decree was brought pursuant to federal statutes, and no state law claims were presented. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

22 **Interest**

Computation of rate in general

Interest

Time from Which Interest Runs in General

Successful employment discrimination plaintiffs were entitled to interest on back pay award from end of calendar year quarter, on amount then due and owing at 90% of average prime rate as obtained from Federal Reserve Bank for year in which quarter occurred; to apply to entire period that back pay was owing to plaintiffs rate of interest that prevailed in past period of lower inflation would not compensate them fully for their loss of use of back pay during that time. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

1 Cases that cite this headnote

23 **Judgment**

Construction and operation of judgment

Terms of Title VII employment discrimination consent decree foreclosed defendant's argument that it should pay interest only on amount equivalent to plaintiffs' back pay award as reduced by their federal income tax liability; decree provided that defendant would pay plaintiffs interest on their backpay award, not on some portion of it. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

Attorneys and Law Firms

1539* George A. Riley, Deputy **City Atty., **San Francisco**, Cal., for defendant-appellant.

Richard M. Pearl, **San Francisco**, Cal., for plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN, FLETCHER and BRUNETTI, Circuit Judges.

Opinion

FLETCHER, Circuit Judge:

On May 20, 1988, the **City** of **San Francisco** (the **City**) and a class of female and minority plaintiffs filed a consent decree in settlement of the plaintiffs' claims that the **San Francisco** Fire Department (SFFD) had long engaged in various acts of employment discrimination. The decree, which received the approval of both the district court and this Court, fully resolved the plaintiffs' challenges to the SFFD's hiring and promotional practices. It left open two questions, however, which form the basis for this appeal.

The decree stated that "[t]he issues of the costs and attorneys' fees due to counsel for the parties to this action shall be heard and resolved by the [district] Court...." The plaintiffs subsequently moved the district court for an award of fees and costs pursuant to 42 U.S.C. § 2000e-5(k) (1982). The **City**, while not contesting the plaintiffs' entitlement to fees, appeals the amount of fees and costs awarded as unreasonable.

The decree also left unresolved the appropriate rate of interest on an award of backpay to six firefighters whom it provided

would be promoted retroactively to the position of lieutenant. The district court subsequently determined that interest was payable by the **City** at a floating rate equivalent to ninety percent of the prime rate for each calendar quarter in which backpay was owing. The **City** appeals this rate as excessive.

I. FACTUAL BACKGROUND

The SFFD has long been subject to suits alleging discrimination in its hiring and promotion of firefighters. In 1970, when only four of the Department's eighteen hundred firefighters were black, the National Association for the Advancement of Colored People filed suit in federal district court challenging the validity of the entry-level hiring test used by the Department. After a series of rulings by the district court that the test and its subsequent modifications by the **City** had an adverse impact on blacks and were not job-related, *see Western Addition Community Org. v. Alioto,* 360 F.Supp. 733, 739 (N.D.Cal.1973) (*WACO III*); *Western Addition Community Org. v. Alioto,* 340 F.Supp. 1351, 1356 (N.D.Cal.1972) (*WACO II*); *Western Addition Community Org. v. Alioto,* 330 F.Supp. 536 (N.D.Cal.1971) (*WACO I*), a consent decree was entered into governing the manner in which various components of a hiring test developed by the SFFD in 1976 were to be used. *WACO V,* No. C-70-1335 WTS, slip op. at 9-10 (N.D.Cal. May 18, 1977). The decree contained no provisions for race-conscious relief and apparently did not eliminate the disparate impact of the Department's hiring procedures. *See United States v. **City** and **County** of **San Francisco,*** 696 F.Supp. 1287, 1293 (N.D.Cal.1988). By its terms the decree expired in 1982.

In 1980, a group of black firefighters filed a complaint with the California Department of Fair Employment and Housing, alleging that an examination instituted ***1540*** by the SFFD in 1978 to determine promotions to the position of lieutenant discriminated on the basis of race in violation of California's Fair Employment and Housing Act, Cal.Gov't.Code §§ 12900 *et seq.* (West 1980). The California Fair Employment and Housing Commission determined that the examination had an adverse impact on blacks and was not job-related. The California Court of Appeals upheld this ruling but deferred any relief pending the outcome of a new round of federal litigation. ***City** and **County** of **San Francisco** v. Fair Employment and Housing Commission,* 191 Cal.App.3d **976**, 236 Cal.Rptr. 716 (1987).

The federal litigation focused on a revised hiring test introduced by the SFFD in 1982 and a new promotional test instituted in 1984. The United States and the present appellees brought separate suits in federal district court in 1984 challenging the validity of those tests under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982), and the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 6701 *et seq.* (repealed 1986). The United States sought relief for black, Asian and Hispanic applicants and firefighters, while the present appellees originally sued on behalf of female and black applicants and firefighters and ultimately came to represent Hispanic and Asian applicants and firefighters as well. While the United States challenged only the validity of the SFFD's hiring and promotional tests, the appellees added claims for racial harassment. Unlike the United States, furthermore, they sought race and gender conscious relief. The two actions were consolidated in 1986.

In October 1986, one week before trial was to commence, the **City** declared that it would no longer defend the validity of the SFFD's employment tests. The district court then entered summary judgment for the United States and the appellees and issued a permanent injunction prohibiting the SFFD's use of tests with an adverse impact on women or minorities where those tests could not be justified by business necessity. The injunction also required the institution of recruitment and training programs for female and minority firefighters and the development of new employment tests by the SFFD that would conform to the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 *et seq.* (1991) (Uniform Guidelines). Finally, the injunction provided that all members of the SFFD enjoying a rank higher than lieutenant would be held personally responsible for the implementation of the SFFD's anti-harassment policy, and mandated the development of new procedures for hearing claims of harassment. *United States v. **City** and **County** of **San Francisco,*** 656 F.Supp. 276, 289-90 (N.D.Cal.1987).

The injunction did not address the present appellees' claim that the SFFD's repeated failure to develop employment tests free of disparate impact warranted race and sex conscious relief. The consent decree entered into between the appellees and the **City**, and opposed by the United States, resolves this issue. The decree establishes long term goals of forty percent minority and ten percent female representation in the SFFD's ranks (the SFFD did not hire its first female firefighter until August of 1987). In order to attain these goals, the decree provides that of the firefighters hired over its seven year lifespan, at least nineteen percent should be Asian, ten percent should be black, and eleven percent should be Hispanic. Altogether, fifty-five percent of the firefighters hired are to be members of a minority group, and ten percent

of the firefighters hired are to be female. The decree envisions that five hundred firefighters will be hired during its lifespan.

The decree provides, furthermore, for specific recruitment efforts to attract females and members of minority groups to the SFFD. It requires that any tests utilized by the SFFD must conform to the Uniform Guidelines. And it states that any failure by the SFFD to meet the female and minority hiring goals it sets forth must be justified to the district court.

The decree also addresses the question of promotions and provides for the retroactive elevation of six named black firefighters to the rank of lieutenant, with backpay awarded from March 9, 1979, the date of **1541* their promotion. The decree further declares that the proportion of minority and female firefighters promoted to officers' positions should come to resemble the proportion of qualified women and minorities applying for such positions. In addition to the named black firefighters, it provides for the elevation of eleven black, eight Hispanic and eight Asian firefighters to the rank of lieutenant within sixty days of the filing of the decree, and declares that twelve of an additional forty-eight individuals to be promoted should be members of minority groups. The decree establishes procedures, finally, for adjudicating claims of harassment and discrimination on the job. The district court approved the decree in an exhaustive opinion, *United States v.* ***City*** *and* ***County*** *of* ***San Francisco,*** 696 F.Supp. 1287 (N.D.Cal.1988), which was affirmed by a panel of this Court. ***Davis*** *v.* ***City*** *and* ***County*** *of* ***San Francisco,*** 890 **F.2d** 1438 (**9th Cir.**1989).

As noted above, the decree left open the issue of attorneys' fees. Subsequent to the filing of the decree, the appellees moved the district court for an award of fees pursuant to 42 U.S.C. § 2000e-5(k), which provides that in Title VII actions "the court, in its discretion, may allow the prevailing party, other than the [EEOC] or the United States, a reasonable attorney's fee...." The **City** did not contest the appellees' status as prevailing parties, but vigorously challenged the amount of fees they requested. It asserted that the number of hours appellees' counsel claimed to have expended on the litigation was unreasonable, that the hourly rates claimed were excessive, that certain costs claimed by the appellees including expert witness fees were not compensable, and that the appellees were not entitled to an enhancement of their fee award based on the contingent nature of the case and the high degree of success obtained.

In a thorough opinion, the district court scrutinized the fee request. It disallowed some of the hours claimed by the appellees, but largely agreed with their contentions concerning costs and an appropriate billing rate. It enhanced appellees' fee award by a factor of two to account for the contingent nature of the compensation arrangement. The court awarded fees and costs in an amount slightly exceeding three and one half million dollars. *United States v.* ***City*** *and* ***County*** *of* ***San Francisco,*** 748 F.Supp. 1416 (N.D.Cal.1990).

The district court also determined the rate of interest to be applied to the backpay awards of the six individuals promoted retroactively to the rank of lieutenant. Adopting the appellees' proposal, it declared that "[i]nterest shall be calculated beginning on March 9, 1979, from the end of each calendar quarter, on the amount then due and owing, at 90% of the average prime rate as obtained from the Federal Reserve Bank for the year in which the calendar quarter occurs." *United States v.* ***City*** *and* ***County*** *of* ***San Francisco,*** 747 F.Supp. 1370, 1373 (N.D.Cal.1990).

We have jurisdiction over the **City's** appeals from these determinations pursuant to 28 U.S.C. § 1291 (1988).

II. ATTORNEYS' FEES

1 **2** We review an award of attorneys' fees for an abuse of discretion. *Bernardi v. Yeutter,* 951 **F.2d** 971, 973 (**9th Cir.**1991); *Merritt v. Mackey,* 932 **F.2d** 1317, 1324 (**9th Cir.**1991). The district court properly recognized that the Supreme Court has adopted a two-pronged approach to the calculation of a "reasonable attorney's fee" under Title VII. A court must first calculate a "lodestar" figure by "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum v. Stenson,* 465 U.S. 886, 888, 104 S.Ct. 1541, 1543, 79 L.Ed.2d 891 (1984); *Cunningham v.* ***County*** *of Los Angeles,* 879 **F.2d** 481, 484 (**9th Cir.**1988), *cert. denied,* 493 U.S. 1035, 110 S.Ct. 757, 107 L.Ed.2d 773 (1990). [1] While this lodestar **1542* figure is presumed to represent an appropriate fee, under certain circumstances a court may adjust the award upward or downward to take into account special factors. *Blum,* 465 U.S. at 897, 104 S.Ct. at 1548.

The **City** contests each step in this analysis as performed by the district court, arguing that the court allowed appellees' counsel to claim an excessive number of hours and to bill those hours at an exorbitant rate, and that it then doubled the resulting lodestar amount even though no special factors existed to justify an enhancement of the award. We consider these arguments in turn.

A. *Reasonable Hours*

(i) Inadequate Documentation

The **City** first complains that appellees' counsel failed to keep adequate records of the time spent on this litigation. The **City** contends that many of appellees' counsel's time sheets are vague and summary in nature, and thus did not provide the district court with an appropriate basis for making its award.

3 The district court, however, properly allowed appellees' counsel to supplement their time sheets with additional documentation of their efforts. "Basing the attorneys' fee award in part on reconstructed records developed by reference to litigation files and other records is not an abuse of discretion." *Bonnette v. California Health and Welfare Agency,* 704 **F.2d** 1465, 1473 (**9th Cir.**1983). The district court found appellees' counsel's reconstructed records, which drew on agendas and summaries of meetings and the notes and time sheets of co-counsel, to be extensive, *United States v. **City** and **County** of **San Francisco,*** 748 F.Supp. 1416, 1420 (N.D.Cal.1990), and we do not find it to have abused its discretion in reaching this conclusion.

The **City** asserts that even the reconstructed records are conclusory and uninformative, but the very example it points to in support of this contention illustrates that it seeks to impose too high a standard of documentation on fee claimants. In *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the Supreme Court noted that "[p]laintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." *Id.* at 437 n. 12, 103 S.Ct. at 1941 n. 12. The example challenged by the **City** as an instance of poor documentation is a time record describing several hours as having been spent at a counsel's meeting that "occurred less than a month before the plaintiff's complaint was filed" and at which a host of issues were discussed in connection with the filing. Contrary to the **City's** characterization of this description as wholly inadequate, it conveys information sufficient to pass muster under the *Hensley* standard. Thus, the district court properly rejected the **City's** challenge to appellees' counsel's documentation of their hours. [2]

(ii) Unrelated Claims

4 In calculating the lodestar amount, the district court did not include time spent by appellees' counsel on matters unrelated to the SFFD's hiring and promotional practices and the issue of racial harassment which formed the basis for its permanent **1543* injunction and the subsequent consent decree. In an apparent oversight, however, the court included time spent by law clerks and legal assistants on such matters. The appellees agree with the **City** that the sixty-four and a half hours so spent should not have been incorporated into the calculation of the lodestar. On remand, therefore, the district court should deduct these hours in redetermining the lodestar amount.

(iii) Clerical Matters

5 The **City** points to entries in the time sheets of William McNeill, one of appellees' attorneys, as constituting clear examples of billing abuse. Many of these entries have to do with time billed for clerical matters such as the filing of pleadings and the travel time associated therewith. Appellees' counsel are not entitled, the **City** argues, to attorneys' fees for the performance of such tasks.

We agree with the **City**. In *Missouri v. Jenkins,* 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989), the Supreme Court noted that "purely clerical or secretarial tasks should not be billed at a paralegal [or lawyer's] rate, regardless of who performs them ... '[The] dollar value [of such non-legal work] is not enhanced just because a lawyer does it.' " *Id.* at 288 n. 10, 109 S.Ct. at 2471 n. 10 (quoting *Johnson v. Georgia Highway Express, Inc.,* 488 **F.2d** 714, 717 (5th Cir.1974)). It simply is not reasonable for a lawyer to bill, at her regular hourly rate, for tasks that a non-attorney employed by her could perform at a much lower cost.

The **City** overlooks the fact, however, that the district court took proper account of the clerical time claimed by appellees' counsel in calculating the lodestar amount. The court noted the **City's** contention that appellees' counsel had billed eighty-three hours for chores such as xeroxing and the serving and filing of papers. While questioning the accuracy of the **City's** figure, the court observed that appellees' counsel had reduced the total number of hours claimed by five percent to account for billing errors of this sort. This five percent reduction more than compensated for the time challenged by the **City** as improperly billed, rendering a further reduction in the lodestar amount unnecessary. 748 F.Supp. at 1422-23. [3] Thus, while the **City** correctly argues that time spent on clerical matters should not have been included in the attorneys' fee award, it errs in suggesting that the district court failed to take this principle into account in its calculation of the lodestar amount.

(iv) Travel Time

6 7 The **City** not only challenges the hours claimed by appellees' counsel for travelling in connection with the performance of clerical tasks, but also contends that the district court improperly allowed counsel to bill for time spent travelling to co-counsel meetings. This argument lacks merit. The touchstone in determining whether hours have been properly claimed is reasonableness. The assessment of reasonableness is made by reference to standards established in dealings between paying clients and the private bar. "[The] calculation of fees for prevailing civil rights plaintiffs is to be the same as in traditional fee arrangements and ... all reasonable time spent is to be compensated." *Suzuki v. Yuen,* 678 **F.2d** 761, 764 (**9th Cir.**1982).

The district court allowed appellees' counsel to claim time spent travelling to co-counsel meetings because "counsel have submitted evidence establishing that local attorneys customarily bill their clients for travel time to co-counsel meetings." 748 F.Supp. at 1422. The **City** did not introduce any evidence to the contrary below, and does not point to any on appeal. Its general protestations that travel time should not be compensated for do not suffice in the face of appellees' showing concerning the accepted practice in traditional fee arrangements.

1544* **(v) Time Spent on Fee Petition

8 This Court has repeatedly held that time spent by counsel in establishing the right to a fee award is compensable. *See, e.g., D'Emanuele v. Montgomery Ward & Co.,* 904 **F.2d** 1379, 1387-88 (**9th Cir.**1990); *Clark v. **City** of Los Angeles,* 803 **F.2d** 987, 992 (**9th Cir.**1986); *In Re Nucorp Energy, Inc.,* 764 **F.2d** 655, 659-660 (**9th Cir.**1985). In the face of this precedent, the **City** argues that appellees' counsel should not receive compensation for the time they spent on their fee petition because they hired an additional lawyer to act as fee counsel.

Counsel may certainly solicit the assistance of other lawyers in working on a case, however, and the time spent by all lawyers on a litigation can be billed so long as the hours claimed are not duplicative. Just recently we affirmed a fee award which included compensation for time spent by plaintiffs' regular counsel as well as special fee counsel on a fee petition. "A review of the record indicates that the request for fees and costs for work on the fee petition is reasonable. We therefore award $65,641.50 for fees incurred in litigating the fee petition: $9,370.50 for work performed by class counsel and $56,271.00 for legal services rendered by counsel employed by class counsel." *Bernardi v. Yeutter,* 951 **F.2d** 971, **976** (**9th Cir.**1991). Since the **City** does not claim that the time spent by appellees' counsel on the fee petition was duplicative of that claimed by fee counsel, the district court properly compensated appellees' counsel for such time.

(vi) Duplicative Tasks and Overstaffing

9 The **City** contends that because a number of attorneys and paralegals billed the **City** for time spent on the SFFD litigation, the hours they claimed were necessarily duplicative. The district court discussed this question of overstaffing at some length. It noted that those challenging the SFFD's employment practices had been divided into five subclasses of litigants because of potential conflicts of interest. Each subclass necessarily had to be represented by a different attorney. The appellees also hired additional attorneys with special expertise in employment discrimination litigation who helped develop the overall strategy and legal analysis. The court reviewed the time records of each attorney and determined that, for the most part, the hours claimed " 'reflect[ ] the distinct contribution of each lawyer to the case.' " 748 F.Supp. at 1421 (quoting *Johnson v. University College,* 706 **F.2d** 1205, 1208 (11th Cir.1983)). It disallowed a number of hours, however, which it attributed to unnecessary multiple appearances by counsel and law students at depositions and hearings.

We review for abuse of discretion. The district court's determination that the bulk of the hours claimed by appellees' counsel were reasonably expended was not an abuse of discretion. We have previously recognized that broad-based class litigation often requires the participation of multiple attorneys. "[I]n an important class action litigation such as this, the participation of more than one attorney does not constitute an unnecessary duplication of effort." *Probe v. State Teachers' Retirement System,* 780 **F.2d** 776, 785 (**9th Cir.**1986), *cert. denied,* 476 U.S. 1170, 106 S.Ct. 2891, 90 L.Ed.2d 978 (1986); *see also Kim v. Fujikawa,* 871 **F.2d** 1427, 1435 n. 9 (**9th Cir.**1989). Furthermore, following the lead of the Supreme Court, we have stressed that the familiarity of a district court with the underlying litigation warrants considerable deference to its findings on such matters as whether the hours claimed by prevailing counsel are redundant. *See, e.g., Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983) ("We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters."); *White v.*

City of Richmond, 713 **F.2d** 458, 461 (**9th Cir.**1983) ("We will not assume that the attorneys' efforts were duplicative or unnecessary where the District Court employed such caution.").

The district court scrutinized the hours claimed by appellees' counsel with care. **1545* While the **City** observes that district courts in other multiple representation cases have disallowed hours as redundant, that fact does not cast doubt on the court's finding here that appellees' counsel did not, for the most part, seek compensation for duplicative efforts. The **City's** generalized assertions that appellees' counsel billed excessive hours for time spent in co-counsel meetings similarly fall short of the mark in light of the district court's finding that appellees' counsel presented "comprehensive and persuasive" evidence, "in the form of agendas, meeting summaries and deposition testimony, of the efficient and essential nature of their co-counsel meetings." 748 F.Supp. at 1421.

(vii) Press Conferences and Public Relations

The **City** challenges approximately eleven hours of time billed by appellees' counsel for what it characterizes as talks given to community organizations. The district court rejected this characterization, stating that closer review demonstrated that appellees' counsel spent the eleven hours conferring with their clients and with attorneys involved in similar litigation. 748 F.Supp. at 1423 (N.D.Cal.1990). The **City** points to nothing in the record indicating that the district court erred in reaching this conclusion.

10 The district court also allowed appellees' counsel compensation for time spent in giving press conferences and performing other public relations work. "Attorney work in the political arena," it stated, "where narrowly focused on fostering the litigation goals of their clients, is compensable." 748 F.Supp. at 1423. The district court derived this standard for the compensability of public relations work from the Eighth Circuit's opinion in *Jenkins v. Missouri,* 862 **F.2d** 677 (8th Cir.1988), *aff'd,* 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989).

As we have previously noted, prevailing civil rights counsel are entitled to compensation for the same tasks as a private attorney. Where the giving of press conferences and performance of other lobbying and public relations work is directly and intimately related to the successful representation of a client, private attorneys do such work and bill their clients. Prevailing civil rights plaintiffs may do the same.

The district court determined that appellees' counsel's public relations work represented a valid effort to lobby the **San Francisco** Board of Supervisors, and that "obtaining the support of the Board of Supervisors, whose members are elected by the citizens of the **City** and **County** of **San Francisco,** was as vital to the consent decree as were the negotiations with the **City's** administrative officials." 748 F.Supp. at 1423. The district court's familiarity with the litigation and with the factors that led to the ultimate signing of the consent decree counsel deference to this determination. The **City** suggests, however, that at least some of the public relations activity compensated for cannot be justified according to this reasoning. It points, for example, to television appearances made by appellees' counsel after the signing of the consent decree. On remand, the district court should disallow any hours claimed by appellees' counsel for public relations work which did not contribute, directly and substantially, to the attainment of appellees' litigation goals.

B. *Reasonable Hourly Rate and Enhancement of the Lodestar*

11 The **City** vigorously contests the billing rates used by the district court in arriving at its lodestar figure. Both the Supreme Court and this court have made clear that such rates should be established by reference to the fees that private attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity. In *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), a unanimous Supreme Court declared that "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." *Id.* at 894, 104 S.Ct. at 1546. Reasonable fees are thus "to be **1546* calculated according to the prevailing market rates in the relevant community," *id.* at 895, 104 S.Ct. at 1547, with close attention paid to the fees charged by "lawyers of reasonably comparable skill, experience, and reputation." *Id.* at 895 n. 11, 104 S.Ct. at 1547 n. 11. *See also Jordan v. Multnomah* ***County,*** 815 **F.2d** 1258, 1262 (**9th Cir.**1987) ("The prevailing market rate in the community is indicative of a reasonable hourly rate."); *Chalmers v.* ***City*** *of Los Angeles,* 796 **F.2d** 1205, 1210-1211 (**9th Cir.**1986), *amended,* 808 **F.2d** 1373 (**9th Cir.**1987).

12 In determining an appropriate market rate, a district court may make reference to the factors developed by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.,* 488 **F.2d** 714, 717-19 (5th Cir.1974) and approved by this

Court in *Kerr v. Screen Extras Guild, Inc.*, 526 **F.2d** 67, 69-70 (**9th Cir.**1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). *See United Steelworkers v. Phelps Dodge Corp.*, 896 **F.2d** 403, 406 (**9th Cir.**1990). The *Johnson-Kerr* factors include the novelty and difficulty of the issues involved in a case, the skill required to litigate those issues, the preclusion of other employment, the customary fee, relevant time constraints, the amount at stake and the results obtained, the experience, reputation, and ability of the attorneys, the nature and length of their professional relationship with the client, the "undesirability" of a case, and awards in similar suits. *United Steelworkers,* 896 **F.2d** at 406 n. 3.[4]

13 In determining appropriate billing rates for the appellees' attorneys, the district court discussed at some length those *Johnson-Kerr* factors which it thought relevant to this case. It observed that the case involved difficult issues concerning the validity of the SFFD's employment tests that required considerable skill to litigate, particularly given the **City's** " 'tenacious and uncompromising pretrial litigation in defense of the challenged examinations.' " 748 F.Supp. at 1426 (quoting *United States v.* ***City*** *and* ***County*** *of* ***San Francisco,*** 656 F.Supp. 276, 281 (N.D.Cal.1987)). Representing the interests of class members during the remedial phases of the litigation was also a difficult task. "For example, it was through the efforts of counsel for plaintiff-intervenors that this court was alerted to the **City's** planned budget cuts which would have adversely affected the [consent] decree. As at other junctures in the litigation, counsel for plaintiff-intervenors exhibited critical legal and political skill in opposing the budget cuts." 748 F.Supp. at 1427.

The court further noted that appellees' counsel made a "massive level of commitment" to this case which precluded them from engaging in most other work during its pendency. 748 F.Supp. at 1427. Counsel worked under considerable time pressure, particularly in seeking to prevent the **City** from entering into a consent decree with the United States which would have strictly limited the relief available to the appellees. *Id.*

In addition, counsel obtained "excellent results" for their clients. *Id.* at 1428. While the SFFD had previously entered into consent decrees with minority groups, none involved the dramatic race and gender conscious relief embodied in the present decree. In 1985, the court noted, "minorities comprised only 14.6% of the **city's** firefighting force. As of August 8, 1990 minority composition stood at 24%. In a department which hired no women before 1985 there are now 36, comprising 2.6% of the force. One of the women is a lieutenant. Minority men have registered even broader gains in the officer ranks. In a fire department that had no minority members in the ranks of lieutenant or above in 1985, there are presently 54 lieutenants, **1547* eight captains, five battalion chiefs, one assistant chief and one assistant deputy chief II." *Id.* The court also scrutinized the educational background, career history and community standing of each appellee's attorney and concluded that they possessed a "high level of experience, ability and reputation...." *Id.*

In light of these factors, the court turned to the evidence submitted by the appellees concerning the rates charged by **San Francisco** attorneys for work comparable to that performed in the SFFD litigation. We recently pronounced that declarations of the "prevailing market rate in the relevant community ... [are] sufficient to establish the appropriate [billing] rate for lodestar purposes." *Bouman v. Block,* 940 **F.2d** 1211, 1235 (**9th Cir.**), *cert. denied,* 502 U.S. 1005, 112 S.Ct. 640, 116 L.Ed.2d 658 (1991). Here, the appellees produced numerous affidavits declaring that the fees sought by appellees' counsel, which incorporated 1988 rates of $110 per hour for 1985 law school graduates to $235 per hour for 1969 law school graduates, in addition to $70 per hour for paralegals, were well within the bounds of the "prevailing market rates" that form the basis for a proper fee award. *Blum* at 895, 104 S.Ct. at 1547. The district court referred to several of those affidavits in granting appellees' counsel's requested rates. It pointed to the declaration of a "prominent Title VII class action attorney" in **San Francisco** that attorneys at his firm with credentials similar to those of appellees' counsel would, in 1988, have billed at rates ranging from $110 per hour for 1986 law school graduates to $250 per hour for 1969 graduates, with paralegal time billed at $50 to $85 per hour. It further noted the affidavit of an attorney at McCutchen, Doyle, Brown & Enersen, a well-respected **San Francisco** firm, that lawyers comparable to appellees' counsel at his firm would have billed at 1988 rates ranging from $150 per hour for 1985 graduates to $230 for 1971 graduates. It referred, finally, to an affidavit indicating that a third **San Francisco** firm billed at essentially the same rates. 748 F.Supp. at 1430-1431.

The **City** did not controvert this evidence below. The only evidence it presented concerning billing rates was a survey done of the California legal market as a whole which discussed a wide variety of practice areas. As the Supreme Court made clear in *Blum,* however, the proper reference point in determining an appropriate fee award is the rates charged by private attorneys in the same legal market as

prevailing counsel, **San Francisco** in this instance, for work similar to that performed by such counsel, broad-based complex litigation here. The **City's** survey was properly dismissed by the district court as shedding no light on this matter.

Before this court, the **City** discusses several district court decisions which, in its estimation, establish that the rates claimed by appellees' counsel for work performed in the **San Francisco** market were excessive. In *Bernardi v. Yeutter,* 754 F.Supp. 743 (N.D.Cal.1990), *aff'd in part and rev'd in part,* 951 **F.2d** 971 (**9th Cir**.1991), the district court deemed 1988 rates ranging from $105 per hour to $145 per hour appropriate for several **San Francisco** lawyers who represented the prevailing party in a sex discrimination case. One of those lawyers is also involved in this case. The court pointedly noted, however, that it did not consider "the case to have been complex litigation," 754 F.Supp. at 746, and therefore rejected evidence concerning the much higher rates which **San Francisco** attorneys charge for such litigation. By contrast, there is no claim here that the challenge to the SFFD's hiring and promotion policies did not amount to a complex class suit.

The **City** also points to the district court's decision in *Bucci v. Chromalloy,* 1989 W.L. 222441 (N.D.Cal.1989), *aff'd,* 927 **F.2d** 608 (**9th Cir**.1991) (unpublished memorandum), where fees were awarded based on rates ranging from $175 per hour for an attorney of twenty years experience to $130 per hour for an attorney of nine years experience. While those rates are somewhat lower than the ones utilized by the district court in the present case, the district court in *Bucci* characterized the proceedings before it as having been quite simple. "This **1548* case was a straightforward discrimination action based on a flagrant pattern of abusive and insulting behavior on the part of plaintiff's supervisor. While the action vindicated significant civil rights, it did not involve complex fact patterns or novel and difficult legal questions. Indeed, plaintiff's counsel admitted in his deposition testimony that the case was not complex." *Id.* at *3. The difficulty of a case and the skill required to litigate it are two of the *Johnson-Kerr* factors which a district court may refer to in setting an appropriate billing rate. That the district court here, in what it considered to be a demanding case, utilized higher rates in calculating its fee award than did a court which viewed the case before it to have been open-and-shut does not strike us as an abuse of discretion.

14 The **City** levels several other criticisms at the billing rates approved by the district court. It argues that the district court abused its discretion in applying the same hourly rate to each task performed by appellees' counsel. We noted above our agreement with the **City's** position insofar as it contends that appellees' counsel were not entitled to claim fees for the performance of clerical work. However, we disagree with the **City's** contention that the district court erred in applying a uniform rate to the legal work performed by each appellee's attorney. Private practitioners do not generally charge varying rates for the different lawyerly tasks they undertake on a given case, and we have squarely held that the district courts can act accordingly in their calculation of fee awards. "[T]he use of a single average rate for each attorney is not necessarily an abuse of discretion." *White v. City of Richmond,* 713 **F.2d** 458, 461 (**9th Cir**.1983).

15 The **City** also contends that the district court should not have applied 1988 billing rates to each hour claimed by appellees' counsel regardless of the year in which the work was actually performed. This argument runs counter to a wealth of precedent. In *Missouri v. Jenkins,* 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989), the Supreme Court observed that "[c]learly, compensation received several years after the services were rendered-as it frequently is in complex civil rights litigation-is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings. We agree, therefore, that an appropriate adjustment for delay in payment-whether by the application of current rather than historic hourly rates or otherwise-is [entirely proper]." *Id.* at 283-84, 109 S.Ct. at 2469. We have also approved the use of current billing rates to "compensate for the delay in receiving payment. This adjustment [will] take into account lost interest and inflation." *Bouman v. Block,* 940 **F.2d** 1211, 1235 (**9th Cir**.1991) (citation omitted).

16 The **City** argues, finally, that the billing rates approved by the district court exceeded the rates charged by several of the appellees' attorneys in their private practices and therefore constituted an abuse of discretion. We rejected this argument in *White v. City of Richmond,* 713 **F.2d** 458 (1983). "[W]e take judicial notice of the fact that many civil rights practitioners do not bill their clients at an hourly commercial rate. While evidence of counsel's customary hourly rate may be considered by the District Court, it is not an abuse of discretion in this type of case to use the reasonable community standard that was employed here." *Id.* at 461. *Accord Maldonado v. Lehman,* 811 **F.2d** 1341, 1342 (**9th Cir**.) (quoting *White*), *cert. denied,* 484 U.S. 990, 108 S.Ct. 480, 98 L.Ed.2d 509 (1987).

17 One factor utilized by the district court in its rate determination, the contingent nature of the fee arrangement, requires us to remand to the district court for a redetermination of the fee. In keeping with the law of this circuit at the time it rendered its decision, the district court deemed the fact that appellees' counsel undertook this case on a contingent basis, and therefore bore the risk of nonpayment in the event of failure, to constitute a special circumstance warranting the enhancement of the lodestar fee. However, in its recent decision in **1549* ***City*** *of Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (**1992**), the Supreme Court declared that the typical federal fee-shifting statutes, including 42 U.S.C. § 2000e-5(k), do not allow for upward adjustments to a lodestar fee on the basis that prevailing party's counsel incurred the risk of nonpayment.

18 The district court referred to the factor of contingency at two points in its fee determination. It relied on contingency to apply a multiplier to the lodestar fee; *Dague* requires the elimination of that multiplier. The district court also mentioned contingency as a consideration in listing the *Johnson-Kerr* factors which it thought relevant to establishing appropriate billing rates. 748 F.Supp. at 1427. While the *Dague* Court did not speak directly to this point, we believe that its rejection of contingency as a basis for multiplying a lodestar fee similarly dictates that contingency not be a factor in the setting of billing rates. *Dague* represents an outright rejection of contingency as a factor relevant to the establishment of a reasonable fee; it would seem to be immaterial whether the consideration of contingency occurs in deciding to apply a multiplier to the lodestar fee or in initially calculating the lodestar.

Reading the district court's remarks in context, we do not think it likely that the district court's rate determinations in computing the lodestar took into account at that point the contingent nature of appellee counsel's fee arrangements. Contingency was only one of a host of factors listed by the district court as items to be considered in its setting of billing rates, and was not a factor focused on by the court until it considered whether to apply a multiplier to the lodestar. The court's rate determinations appear to have rested on its assessment of the degree of complexity of the case and the prevailing legal fees in **San Francisco** for work of a like kind and quality as that performed here, and seem well supported in that regard. Nevertheless, we think it appropriate that on remand the district court consider whether it would arrive at the same lodestar figure in this case without taking the factor of contingency into account.

III. COSTS

A. *Expert Fees*

19 The **City** challenges the district court's grant of $12,200 in expert witness fees and $69,516 in general expenses to the appellees as part of the attorneys' fee award. In contesting the award of expert fees, the **City** points to the Supreme Court's decision in *West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991), which was rendered subsequent to the district court's decision in this case. The *Casey* Court held that statutes allowing for the award of a reasonable attorneys' fee do not, by virtue of that authorization alone, provide for the compensation of expert witness expenses.[5] The Court reasoned that because Congress has frequently drafted statutes explicitly authorizing the award of both attorneys' and expert witness fees, a statute which authorizes only the grant of attorneys' fees connotes a Congressional intent that expert costs not be shifted. *Casey,* 499 U.S. at ---- - ----, 111 S.Ct. at 1141-43. At the time that *Casey* was decided, 42 U.S.C. § 2000e-5(k) provided only for the award of a reasonable attorney's fee in Title VII actions. It made no mention of expert witness costs. According to *Casey,* then, the appellees should not have been compensated for those costs by the district court. In the Civil Rights Act of 1991 (the Act), however, Congress rejected the notion that successful litigants should not be granted expert fees in Title VII suits. It amended § 2000e-5(k) to provide explicitly for the award of a "reasonable attorney's fee (including expert fees) as part of the costs...." Pub.L. No. 102-166, Title 1, § 113(b), 105 Stat. 1075, 1079 (1991).[6] We must decide whether Congress intended the provisions of the new Act to **1550* apply to pending cases so as to render the Act's express authorization of expert fee awards, rather than the *Casey* Court's determination that such awards should not be made, controlling here.

The Supreme Court has, on different occasions, set forth seemingly inconsistent presumptions regarding the applicability of new enactments to pending cases (or to litigation concerning pre-enactment events that is commenced post-enactment). In *Bradley v. Richmond School Board,* 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), the Court reviewed the reversal of a district court award of attorney's fees to the prevailing plaintiffs in a school desegregation litigation. The district court had relied on its equitable powers in making the award, but the court of appeals held that statutory authorization was required and

concluded that the district court lacked such authorization at the time it awarded the fees. In the period between the decisions of the district and appellate courts, however, Congress enacted legislation authorizing the award of a reasonable attorney's fee in school desegregation cases. Thus, the Supreme Court had to decide whether the court of appeals should have taken the new statute into account in reaching its decision, and in a unanimous ruling held that it should have done so. "[A] Court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley,* 416 U.S. at 711, 94 S.Ct. at 2016. "[E]ven where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect ... [W]e must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." *Id.* at 715, 94 S.Ct. at 2018.

In *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), the Court made what appears, at least on its face, to be a somewhat different statement concerning the effect of new enactments. The *Bowen* Court had to decide whether the Medicare Act authorizes the Secretary of Health and Human Services to engage in retroactive rulemaking. In the course of resolving this question, the Court declared, without reference to its prior statements in *Bradley,* that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen,* 488 U.S. at 208, 109 S.Ct. at 471.

A year later, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990), the Court noted that the views articulated in *Bradley* and *Bowen* concerning the applicability in time of new enactments are in "apparent tension." *Id.* at 837, 110 S.Ct. at 1591. The *Bonjorno* Court saw no need to resolve this tension, however, in deciding whether a recently enacted statute prescribing a federal rate of postjudgment interest applied to judgments entered before its effective date. "[U]nder either [the *Bradley* or *Bonjorno*] view, where the congressional intent is clear, it governs." *Id.* The Court perceived a clear legislative intent that the postjudgment interest statute be applied only prospectively, and thus deemed it unnecessary to reconcile *Bradley* and *Bonjorno* and the precedents which those cases draw on.

We similarly do not need to choose between the *Bradley* and *Bowen* presumptions regarding retroactivity in deciding whether the Civil Rights Act of 1991 applies to pending cases. Reliance on a presumption is unnecessary, because the language of the Act reveals Congress' clear intention that the majority of the Act's provisions be applied to cases pending at the time of its passage.

Section 402(a) of the new law states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." By itself, this language does not determine whether the Act applies to ongoing cases, though it does give at least "some indication that [Congress] believed that application of [the Act's] provisions was urgent." ***1551** *In re Reynolds,* 726 **F.2d** 1420, 1423 (**9th Cir**.1984) (commenting on essentially identical language in the Omnibus Budget Reconciliation Act of 1981). However, two other sections of the Act reveal Congress' intent that the Act generally apply to pending litigation.

Section 109(c) of the Act states that its extension of Title VII's protections to United States citizens working for American companies overseas "shall not apply with respect to conduct occurring before the date of the enactment of this Act." Section 402(b) declares, furthermore, that "nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." [7]

These directives from Congress that in two specific instances the Act not be applied to cases having to do with pre-Act conduct provide strong evidence of Congress' intent that the courts treat other provisions of the Act as relevant to such cases. " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo,* 472 **F.2d** 720, 722 (5th Cir.1972)).

Indeed, if we construed the entire Act as applying only to post-passage conduct, we would run afoul of what the Supreme Court has repeatedly declared to be the " 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.' " *South Carolina v. Catawba Indian Tribe, Inc.,* 476 U.S. 498, 510 n. 22, 106 S.Ct. 2039, 2046 n. 22, 90 L.Ed.2d 490 (1986)

(quoting *Colautti v. Franklin,* 439 U.S. 379, 392, 99 S.Ct. 675, 684, 58 L.Ed.2d 596 (1979)); *Kungys v. United States,* 485 U.S. 759, 778, 108 S.Ct. 1537, 1550, 99 L.Ed.2d 839 (1988) (plurality opinion of Scalia, J.) (referring to "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 249-50, 105 S.Ct. 2587, 2594-95, 86 L.Ed.2d 168 (1985) (quoting *Colautti*); *United States v. Menasche,* 348 U.S. 528, 538-39, 75 S.Ct. 513, 519-20, 99 L.Ed. 615 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' rather than to emasculate an entire section....") (quoting *Montclair v. Ramsdell,* 107 (17 OHO) U.S. 147, 152, 2 S.Ct. 391, 394, 27 L.Ed. 431 (1883)); *see also Beisler v. Commissioner of Internal Revenue,* 814 **F.2d** 1304, 1307 (**9th Cir**.1987) (en banc) ("We should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress.").

We would rob Sections 109(c) and 402(b) of all purpose were we to hold that the rest of the Act does not apply to pre-Act conduct. There would have been no need for Congress to provide that the Act does not pertain to the pre-passage activities of the Wards Cove Company, *see* Section 402(b), or of American businesses operating overseas, *see* Section 109(c), if it had not viewed the Act as otherwise applying to such conduct. Congress' express declaration that the Act is to operate only with prospective force in two instances thus provides a clear indication of its intent that the rest of the Act, including its expert fees provisions, apply to cases pending at the time of enactment and to prior conduct not barred by the applicable statutes of limitations. [8]

**1552* Additional evidence of Congress' aims is provided by the introductory passages of the Act, in which Congress made no secret of its intent to reverse a number of Supreme Court decisions that it thought construed too narrowly various employment discrimination statutes. In Section 2 of the Act, Congress expressed its "finding" that "the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), has weakened the scope and effectiveness of Federal civil rights protections," and in Section 3 it declared that among its purposes in passing the Act was its desire to "codify the concepts of 'business necessity' and 'job related' enunciated in ... Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)" and to "respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."

Given Congress' sense that the Supreme Court had construed the Nation's civil rights laws so as to afford insufficient redress to those who have suffered job discrimination, it appears likely that Congress intended the courts to apply its new legislation, rather than the Court decisions which predated the Act, for the benefit of the victims of discrimination still before them. Indeed, the facts of this case indicate that to construe Congress' intent otherwise would lead to incongruous results. The district court rendered its award of expert fees at a time when it perceived Title VII as providing it with the authority to do so. The Supreme Court subsequently handed down its decision in *Casey,* the result of which was to render such an award of fees improper. Shortly thereafter, Congress passed, and the President signed into law, a statute which strips *Casey* of any force in the employment discrimination context by explicitly providing that, in actions brought pursuant to Title VII or 42 U.S.C. § 1981, expert fees may be awarded. We must now decide whether to reverse the district court's grant of such fees. It would appear inconsistent with Congress' intent for us to do so on the grounds of a Supreme Court decision predating the Act, the implications of which Congress has explicitly rejected in the employment discrimination arena.

The courts of appeals that have construed the entire Act to apply only to post-Act conduct have either ignored Sections 109(c) and 402(b) or the elementary canon of construction that we should avoid an interpretation of the Act which renders those sections superfluous. In *Vogel v. City of Cincinnati,* 959 **F.2d** 594 (6th Cir.**1992**), the Sixth Circuit declared that neither the language nor the legislative history of the Act provide any guidance as to whether it should be applied retroactively. However, the *Vogel* court did not mention Sections 109(c) and 402(b) in reaching this conclusion. The only language that it discussed was that of Section 402(a) (providing that the Act is to take effect immediately upon enactment), which, as we noted above, is of little assistance in resolving the retroactivity issue. The Seventh Circuit, in *Luddington v. Indiana Bell Telephone Co.,* 966 **F.2d** 225 (7th Cir.**1992**), similarly looked only to Section 402(a) to find the Act's text bereft of guidance.

In another opinion, the Seventh Circuit did acknowledge the existence of Sections 402(b) and 109(c), but rather than according those sections meaning simply treated them as redundant. *Mozee v. American Commercial Marine Serv. Co.,* 963 **F.2d** 929 (7th Cir.**1992**). Without pointing to any support

in the text or the history of the Act for its analysis, the *Mozee* court asserted that Section 402(b) represents "nothing more than a clear assurance that courts would not apply the 1991 Act to the *Wards Cove* litigation," 963 **F.2d** at 933, and that Section 109(c) similarly "can be interpreted as an extra assurance that this Section's provisions will only apply to post-enactment conduct...." *Id.* The Fifth Circuit advanced a similar hypothesis in *Johnson v. Uncle Ben's, Inc.*, 965 **F.2d** 1363 (5th Cir.**1992**). "Congress may have wanted to ensure that certain retroactive applications of the statute were barred without intending to reach any general conclusion about **1553* the statute's general retroactive application." Slip op. at 5917. We decline to join the Fifth and Seventh Circuits in relegating Sections 109(c) and 402(b) to the status of mere surplusage, and in speculating as to reasons why Congress might have incorporated such surplusage into the Act. The Supreme Court has repeatedly declared that the task of discerning Congressional intent is well-served by adherence to the rule that statutes should not be construed in a manner which robs specific provisions of independent effect. We do not find it appropriate to ignore this "cardinal rule" of statutory interpretation. *Kungys,* 485 U.S. at 778, 108 S.Ct. at 1550. Where Congress intended that certain sections of the Act should not be applied retroactively, it made specific pronouncements as to those. We will not render those pronouncements a nullity by holding that the rest of the Act is likewise to have no retroactive effect.

The Eighth Circuit, in *Fray v. Omaha World Herald Co.*, 960 **F.2d** 1370 (8th Cir.**1992**), did not completely ignore Sections 109(c) and 402(b), but did downplay their significance in light of the legislative history of the Act, which it deemed "highly probative." *Id.* at 1377. Because of the emphasis the Eighth Circuit gave to it, we too turn to that legislative history. However, we keep in mind that "[t]he starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' " *Bonjorno,* 494 U.S. at 835, 110 S.Ct. at 1575 (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)); *cf. INS v. Cardoza-Fonseca,* 480 U.S. 421, 452, 107 S.Ct. 1207, 1223, 94 L.Ed.2d 434 (1987) (Scalia, J., concurring) ("[I]f the language of a statute is clear, that language must be given effect-at least in the absence of a patent absurdity."). Further, we agree with the majority of circuits that have considered the issue that the legislative history outside the Act itself provides little indication as to Congress' intent on the subject of retroactivity. [9]

The Act lacks much in the way of a traditional legislative history. No committee or conference reports accompanied its passage. The only commentary on the Act's provisions is contained in the floor statements of various members of Congress and the interpretive memoranda which they inserted into the Congressional Record. Nothing suggests that these statements and memoranda represent the views of anyone other than the members who made or signed onto them. Thus, we agree with Senator Danforth, a principal cosponsor of the Senate Bill that was enacted into law, [10] as to the limited value of these legislative materials:

> It is very common for Members of the Senate to try to affect the way in which a court will interpret a statute by putting things into the Congressional Record. Sometimes statements are made on the floor of the Senate ... Another way to do it is to put interpretive memoranda in the Congressional Record. These memoranda typically are not read on the floor of the Senate. They are just stuck into the Record ... Last Friday, Senator Kennedy made a speech on the floor of the Senate. He stated his views of what the bill does. Senator Hatch has just made a very extensive speech on the floor. He stated his views of what the bill does. My guess, Mr. President, is that if Senator Kennedy would give us his analysis of Senator Hatch's position, he would disagree with it. If Senator Hatch would give us his analysis of Senator **1554* Kennedy's position, Senator Hatch would disagree with Senator Kennedy. I might disagree with both of them. I anticipate that I am going to have an interpretive memorandum which will be put into the Record signed by the other original six Republican cosponsors for the legislation. That will be our interpretation of various provisions, but it may not be the interpretation of Senator Hatch or Senator Kennedy or anyone else ... [W]hatever is said on the floor or the Senate about a bill is the view of a Senator who is saying it ... [A] court would be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us.
>
> 137 Cong.Rec. S15325 (daily ed. Oct. 29, 1991) (statement of Sen. Danforth).

Even if we were to treat the floor statements and interpretive memoranda as providing evidence of the intent of Congress as a whole, we would be able to derive little guidance from them on the subject of retroactivity. A number of members of Congress expressed the view that the Act was not meant to apply retroactively. *See, e.g.,* 137 Cong.Rec. S15472,

S15478 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Dole); 137 Cong.Rec. S15483-15485 (daily ed. Oct. 30, 1991) (statement and interpretive memorandum of Sen. Danforth); 137 Cong.Rec. 15493 (daily ed. Oct. 30, 1991) (statement of Sen. Murkowski); 137 Cong.Rec. S15953 (daily ed. Nov. 5, 1991) (interpretive memorandum submitted by Sen. Dole); 137 Cong.Rec. S15966 (daily ed. Nov. 5, 1991) (statements of Sens. Gorton, Durenberger, and Simpson). Other members expressed exactly the contrary view. *See, e.g.,* 137 Cong.Rec. S15485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy); [11] 137 Cong.Rec. S 15963 (statement of Sen. Kennedy); 137 Cong.Rec. H9530-31 (daily ed. Nov. 7, 1991) (interpretive memorandum submitted by Rep. Edwards); 137 Cong.Rec. H9549 (daily ed. Nov. 7, 1991) (statement of Rep. Fish). Taken as a whole, the floor debates do not convey a strong sense of Congress' intent on the subject of retroactivity, and certainly do little to call into question the strong presumption that each section of the Act should be given meaning in the context of the Act read in its entirety.

In *Fray,* the Eighth Circuit placed much reliance on the fact that the 1990 version of the Civil Rights Act, which President Bush vetoed, contained express provisions for its retroactive application, while the 1991 legislation does not. "When a bill mandating retroactivity fails to pass, and a law omitting that mandate is then enacted, the legislative intent was surely that the new law be prospective only; any other conclusion simply ignores the realities of the legislative process." *Fray,* 960 **F.2d** at 1378. [12] However, as the Seventh Circuit noted in *Mozee,* this reasoning is suspect because it ignores other events of significance in the passage of the Act. *Mozee,* 963 **F.2d** at 933. The fact that the Act as passed does not contain the explicit retroactivity language of the 1990 bill appears no more probative than the fact that it omits language found in the Administration's 1991 bill which would have expressly provided for the Act's prospective application.

The Administration bill, which was introduced in the House of Representatives by House Minority Leader Michel, declared that "[t]his Act and the amendments made by this Act shall take effect upon enactment. The amendments made by this Act shall not apply to any claim arising before the effective date of this Act." [13] The bill was soundly defeated in the House, though the language providing that the Act would take effect upon enactment survived and became Section 402(a). The Administration's **1555* declaration that the Act would apply only prospectively is nowhere to be found in the statute as enacted. According to the Eighth Circuit's own reasoning, then, the omission of this language creates a strong inference that Congress intended the Act to apply retroactively, one sufficient to rebut the opposite inference drawn by the Eighth Circuit from the difference in language between the 1990 and 1991 bills. *See Mozee,* 963 **F.2d** at 933 ("[T]he fact that Congress failed to include this explicit language in the 1991 Civil Rights Act[ ] arguably indicates that Congress intended a prospective application of the 1991 Act. However, this argument is negated by the fact that Congress did not adopt the Bush Administration's proposed bill which, in contrast, contained explicitly prospective language.").

In sum, little of value can be discerned from the legislative history of the Act. The floor debates and events leading to the passage of the Act provide conflicting signals as to whether Congress envisioned that the Act would apply to pre-passage conduct. We do not find in the legislative history evidence sufficient to overcome the weighty presumption that the Act's language, indicating as it does that Congress intended the Act to apply retroactively, is an accurate reflection of the legislative design.

Nor does the fact that the Equal Employment Opportunity Commission (EEOC) has interpreted the Act's damages provisions to apply only to claims arising after the effective date of the Act call into question the clear import of the statutory language. The EEOC's view is expressed in a policy guidance issued soon after the Act was passed. "Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct," EEOC Notice 915.002, *reprinted in* EEOC Compl.Man. ¶ 2096 (CCH) (Dec. 27, 1991) [Guidance]. [14] In the guidance, the EEOC argues that neither the language nor the legislative history of the Act provide a clear sense of Congress' intent on the subject of retroactivity. The EEOC then discusses the *Bradley* and *Bowen* presumptions in favor of and against the retroactive application of statutes, and concludes by applying the *Bowen* presumption against retroactivity to the Act on the grounds that *Bowen* was decided subsequent to *Bradley.*

In *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (ARAMCO), the Supreme Court explained that the EEOC's interpretations of Title VII are not entitled to the same deference as other agency's interpretations of the statutes which they are charged with administering:

> In *General Electric Co. v. Gilbert,* 429 U.S. 125, 140-146, 97 S.Ct. 401, 410-413, 50 L.Ed.2d 343] (1976), we addressed the proper deference to be afforded the EEOC's guidelines. Recognizing that "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations," we held that the level of deference afforded " 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' "

ARAMCO, 499 U.S. at ----, 111 S.Ct. at 1235 (quoting *Gilbert,* 429 U.S. at 141, 142, 97 S.Ct. at 410, 411) (in turn quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944)) (parallel citations omitted); *see also Gilbert,* 429 U.S. at 141, 97 S.Ct. at 410 ("[C]ourts properly may accord less weight to [EEOC] guidelines than to administrative regulations which Congress has declared shall have the force of law, or to regulations which under the enabling statute may themselves supply the basis for imposition of liability....") (citations omitted).

Here, it is doubtful whether the EEOC guidance is entitled to even this limited deference. The EEOC's interpretations of Title VII are properly considered by the courts because the EEOC bears responsibility for enforcing that statute. However, ***1556** the damages provisions of the new Act, which form the subject matter of the policy guidance, do not represent amendments to Title VII, but rather add a new section to the Reconstruction-era civil rights statutes, to be codified at 42 U.S.C. § 1981A. The EEOC is not responsible for administering those statutes. Thus the guidance does not represent the interpretation of a statutory provision with respect to which the EEOC has enforcement responsibilities, and its significance is questionable in light of that fact.

In any event, we find that the guidance lacks the "power to persuade," *ARAMCO,* 499 U.S. at ---- 111 S.Ct. at 1235 (quoting *Skidmore,* 323 U.S. at 134, 65 S.Ct. at 161), as it too quickly concludes that resort to a presumption is necessary to resolve the question of the Act's retroactivity. The guidance notes that Sections 109(c) and 402(b) provide that in certain, limited respects, the Act is to apply only prospectively. However, it goes on to reject any "inference that the remainder of the Act has retroactive effect," asserting only that "it cannot be said that 'the[ ] language [of those sections] requires this result.' " Guidance at 2 (quoting *Bowen,* 488 U.S. at 208, 109 S.Ct. at 471) (alterations in original). The guidance does not elaborate upon this last statement, which we find to be wholly inadequate in the face of the deeply rooted principle of statutory construction that enactments should not be construed in a manner which renders certain of their provisions superfluous. Guided by the plain language of the statute and this cardinal rule of interpretation, we conclude that Congress intended the courts to apply the Civil Rights Act of 1991 to cases pending at the time of its enactment and to pre-Act conduct still open to challenge after that time. Accordingly, we affirm the district court's award of expert witness fees in this case. [15]

B. *Other Expenses*

20 The *Casey* decision did not affect the authority of courts to compensate for expenses other than expert fees as part of an attorneys' fee award. The holding and reasoning of *Casey* were very carefully limited to the question of expert expenses. As noted above, the *Casey* Court determined that because Congress has frequently enacted laws authorizing the award of both attorneys' fees and expert witness fees, a statute authorizing only the former indicates Congress' intent that expert costs not be shifted. This reasoning does not apply to other sorts of costs that Congress is not in the habit of providing specific authorization for and which the courts have long held can be awarded as part of a reasonable attorneys' fee since they are typically charged to paying clients by private attorneys. Thus, in the wake of *Casey,* we have continued to hold that attorneys' fees awards can include reimbursement for out-of-pocket expenses including the travel, courier and copying costs that appellees' attorneys incurred here. In ***Davis** v. Mason **County,*** 927 **F.2d** 1473, 1487-88 (**9th Cir.**), *cert. denied,* 502 U.S. 899, 112 S.Ct. 275, 116 L.Ed.2d 227 (1991), for example, we reversed a grant of expert costs as part of an attorneys' fee award (our decision predated the 1991 Civil Rights Act) while affirming an award of travel expenses on the grounds that "expenses incurred during the course of litigation which are normally billed to fee-paying clients [are taxable] under [the attorneys' fees statutes]."

***1557** The **City** contends, however, that some of the costs claimed by appellees' counsel are simply not of the sort that a private attorney would bill to a paying client, and points to items including a filing cabinet and pizza as examples. We are not at all sure that the **City's** assertions are accurate. In any event, on remand the district court should review the cost bill to ensure that appellees are not compensated for expenses that would not ordinarily be treated as reimbursable in a private attorney-client relationship.

IV. INTEREST ON THE BACKPAY AWARD

The consent decree provided that six black firefighters should be retroactively promoted to the position of lieutenant, with their date of appointment set at March 9, 1979, and awarded "backpay from that date, taking into account the applicable base rates of pay for fire lieutenant and their actual regular earnings (not including overtime) plus interest since that date." *United States v. **City** & **County** of **San Francisco**,* 696 F.Supp. at 1314. While the **City** and the appellees agree on the amount of backpay that is due the six lieutenants, they dispute the interest that the lieutenants should receive on their awards. The district court, utilizing a standard it first developed in *Richardson v. Restaurant Marketing Assocs.*, 527 F.Supp. 690 (N.D.Cal.1981), determined that interest " 'shall be calculated from the end of each calendar quarter, on the amount then due and owing, at 90% of the average prime rate [as obtained from the Federal Reserve Bank] for the year in which the calendar quarter occurs.' " 747 F.Supp. at 1371 (quoting *Richardson,* 527 F.Supp. at 691).

21 The **City** challenges this determination on three grounds. It first argues that the district court should have utilized the rate of interest relied upon by the California Fair Employment and Housing Commission in 1982 when it held that the SFFD's promotion examination was invalid and retroactively appointed the six black firefighters in question here to the position of lieutenant. As discussed above, the California Court of Appeals subsequently vacated this relief pending resolution of the current round of federal litigation. ***City** and **County** of **San Francisco** v. FEHC,* 191 Cal.App.3d **976**, 236 Cal.Rptr. 716, 726-728 (1987). Nonetheless, the **City** argues that since, in diversity actions, "[t]he recognized general rule is that state law determines the rate of prejudgment interest," *Northrop Corp. v. Triad Int'l Marketing,* 842 **F.2d** 1154, 1155 (**9th Cir.**1988), the FEHC interest rate should be applied to the backpay award here since the lieutenants originally brought suit and were awarded relief in a state forum pursuant to state anti-discrimination law.

However, the consent decree which provides for the present award of backpay and interest constitutes the settlement of a federal action. The litigation which led to the decree was brought pursuant to two federal statutes, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982), and the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 6701 *et seq.* (repealed 1986). No state law claims were presented. The district court was thus well within its bounds in applying federal law to interpret the provisions of the consent decree.

22 The **City** next argues that if federal law principles are to govern the calculation of interest in this case, the rate should be set by reference to 28 U.S.C. § 1961 (1982). That statute provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court ... Such [post-judgment] interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment." While section 1961 speaks to the appropriate rate for post-judgment interest, we have held that "the same rate should be applied to pre-judgment interest 'unless the trial judge finds, on substantial evidence, that the equities of a particular case require a different **1558* rate.' " *Ford v. Alfaro,* 785 **F.2d** 835, 842 (**9th Cir.**1986) (quoting *Western Pacific Fisheries, Inc. v. SS President Grant,* 730 **F.2d** 1280, 1289 (**9th Cir.**1984)).

In *Richardson,* which was decided in 1981, the district court deemed the adoption of a floating prime rate standard justified "in light ... of the continued increases in the rate of inflation and rapid fluctuation of the prime rate in recent years...." 527 F.Supp. at 698. The same considerations warrant a departure from the May 1988 Treasury bill rate prescribed by section 1961 here. For much of the period subsequent to March 9, 1979, the date of the lieutenant's retroactive promotion, interest rates greatly exceeded those prevalent in 1988. The late 1970's and early 1980's, in particular, were a period of very high inflation and even higher short term interest rates. To apply to the entire period that backpay was owing to the lieutenants a rate of interest that prevailed in a past period of lower inflation would not compensate them fully for their loss of use of the backpay during that time.

23 The **City** argues, finally, that it should pay interest only on an amount equivalent to the lieutenants' backpay award as reduced by their federal income tax liability. This argument is foreclosed by the terms of the consent decree. The decree provided that the **City** would pay the lieutenants interest on their backpay award, not on some portion of it. The **City** may not use this litigation as a vehicle for modifying what it has previously agreed to do.

CONCLUSION

We remand to the district court to redetermine its attorneys' fees award in light of the following: sixty-four and a half hours of law clerk time attributable to unrelated matters should be deducted from the lodestar; fees for public relations work should be stricken unless each item can be documented as something only a lawyer appropriately should do; billing rates previously set should be reexamined to make sure the fact of contingent representation was not a factor in setting the rate; enhancement of the lodestar fee for contingency should be eliminated. We affirm the court's award of expert witness fees in light of our conclusion that the Civil Rights Act of 1991 applies to pending cases, but the court should reexamine the costs bill to make sure the items allowed would be of a type and in an amount that a paying client would be expected to reimburse. The court's award of interest on back pay is affirmed. In all other respects we affirm.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Parallel Citations

61 Fair Empl.Prac.Cas. (BNA) 440, 60 Empl. Prac. Dec. P 41,810, 61 USLW 2192

Footnotes

1 Both the Supreme Court and this court have held that the standards for determining a reasonable attorney's fee in a Title VII action pursuant to 42 U.S.C. § 2000e-5(k) are identical to those utilized in determining an attorney's fee award pursuant to 42 U.S.C. § 1988, which allows for the award of a reasonable attorney's fee to the prevailing party in actions brought under 42 U.S.C. §§ 1981-1986 and Titles VI and IX of the Civil Rights Act of 1964. *See Hensley v. Eckerhart,* 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 1939 n. 7, 76 L.Ed.2d 40 (1983) ("The standards set forth in this [§ 1988] opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' "); *Fadhl v. **City** and **County** of **San Francisco,*** 859 **F.2d** 649, 650 n. 1 (**9th Cir.**1988). Thus, we will refer to both § 1988 and § 2000e-5(k) cases in assessing the propriety of the district court's fee award here.

2 Related to the **City's** attack on appellees' counsel's recordkeeping is its contention that appellees' counsel claimed, and were awarded, hours exceeding those that can be accounted for by totalling their time sheets. The **City** has not pointed to any instances where the district court erred in its computation of the hours spent by appellees' counsel on this litigation. The district court provided a detailed attorney-by-attorney breakdown of those hours as an appendix to its opinion. *See United States v. **City** and **County** of **San Francisco,*** 748 F.Supp. at 1441-1443.

3 All together, appellees' counsel billed approximately nine thousand hours. The five percent billing judgment reduction thus amounted to about four hundred and fifty hours. The district court's reasoning would have been suspect if it had continually relied upon the five percent reduction to forgive errors in appellees' counsel's billing practices. This it did not do.

4 One other *Johnson-Kerr* factor, the time and labor required to litigate a case, pertains to the reasonableness of the hours claimed by prevailing counsel. *Blum v. Stenson,* 465 U.S. at 898, 104 S.Ct. at 1548 (1984). As we discuss below, the Supreme Court recently deemed irrelevant to the fee calculation a final *Johnson-Kerr* factor, the fixed or contingent nature of the fee. ***City** of Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (**1992**). The *Dague* opinion can also be read as casting doubt on the relevance of a case's "desirability" to the fee calculation. *Id.* 505 U.S. at ---- - ----, 112 S.Ct. at 2641-42.

5 The statute at issue in *Casey* was 42 U.S.C. § 1988.

6 Section 113(a) of the Act amends 42 U.S.C. § 1988 to authorize the award of expert fees in actions brought pursuant to 42 U.S.C. §§ 1981 and 1981A.

7 This latter provision is generally referred to as the *Wards Cove* amendment because its sole effect is to preclude the application of the Act's requirements to pending litigation involving the prevailing party in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), one of the Supreme Court decisions addressed by the new Act.

8 Because the statutes of limitations governing most employment discrimination claims are generally short, *see e.g.,* 42 U.S.C. § 2000e-5(e) (providing that unfair employment practice charges under Title VII must, with certain exceptions related to the processing of charges by State fair employment agencies, be filed within 180 days of the alleged occurrence), this latter category of cases is likely to be quite small.

9 The Eighth Circuit is the only court of appeals to have found guidance in the Act's legislative history. *See Johnson,* 965 **F.2d** at 1373 ("Legislative history ... sheds little light on whether the Act should apply to pre-enactment conduct."); *Luddington,* 966 **F.2d** at 227 ("The floor debates on the 1991 act reveal ... divergent views on these questions [concerning retroactivity]."); *Mozee,* 963 **F.2d** at 934 ("A clear indication of congressional intent cannot be deciphered from the legislative history...."); *Vogel,* 959 **F.2d** at 598 ("The legislative history does not provide any guidance on this question [of retroactivity].").

10 S. 1745, 102d Cong., 1st Sess. (1991) (enacted).

11 Along with Senator Danforth, Senator Kennedy was the principal cosponsor of the Act in the Senate. Representative Edwards was a principal cosponsor of the Act in the House.

12 The Fifth Circuit, while appearing not to find guidance in the Act's legislative history, also made mention of this difference between the language of the 1990 bill and the 1991 Act in its *Johnson* decision. 965 **F.2d** at 1373.

13 H.R. 1375, 102nd Cong., 1st Sess. § 15 (1991).

14 The guidance deals only with the compensatory and damages provisions of the Act, but since its reasoning applies to the Act in general we address it here.

15 Concurring in *ARAMCO,* Justice Scalia questioned the majority's assertion that the EEOC's views are not entitled to the deference typically accorded administrative agencies. Pointing to the Court's decision in *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 108 S.Ct. 1666, 100 L.Ed.2d 96 (1988), Justice Scalia argued that the EEOC's interpretation of ambiguous statutory language should be deferred to as long as it is reasonable. Justice Scalia went on to state, however, that "deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *ARAMCO,* 499 U.S. at ----, 111 S.Ct. at 1237 (Scalia, J., concurring). For the reasons elaborated upon above, we have concluded that the EEOC's interpretation of the Act is not reasonable as it fails to take into account the long-held rule of construction that statutory provisions should not be read to be mere surplusage.

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EXHIBIT 2

244 F.3d 1145
United States Court of Appeals,
Ninth Circuit.

Nancy Lee **FERLAND**, Plaintiff-Appellant,
v.
CONRAD CREDIT CORP., a California corporation; Gregg A. Michel, PH.D., an individual; Does 1-20, Inclusive, Defendants-Appellees.

No. 99-56625. Argued and Submitted Jan. 9, **2001** Filed April 5, **2001**

Following a successful suit for violations of the Fair Debt Collection Practices Act, the United States District Court for the Southern District of California, Rudi M. Brewster, J., approved fees for less than half the number of hours plaintiff's attorney actually expended, and plaintiff appealed the fee award. The Court of Appeals held that remand was required for the district court to give a concise but clear explanation as to why it reduced by more than half the number of attorney hours for which plaintiff could be compensated.

Remanded.

West Headnotes (8)

1 **Federal Courts**
Trial De Novo

Federal Courts
Costs, Attorney Fees and Other Allowances

Federal Courts
Costs and Attorney Fees

Court of Appeals reviews the factual determinations underlying an award of attorney' fees for clear error, and the legal premises a district court uses to determine an award de novo, and if the district court applied the proper legal principles and did not clearly err in any factual determination, then Court of Appeals reviews the award for an abuse of discretion.

10 Cases that cite this headnote

2 **Federal Courts**
Costs, Attorney Fees and Other Allowances

As part of the abuse of discretion review of an attorney fee award, Court of Appeals considers whether the district court met its obligation to articulate the reasons for its findings regarding the propriety of the hours claimed or for any adjustments it makes either to the prevailing party's claimed hours or to the lodestar.

17 Cases that cite this headnote

3 **Antitrust and Trade Regulation**
Attorney Fees

In reducing allowable attorney time, for purposes of attorney fee award, by eliminating time attributed to failed claim against one defendant, in a suit under the Fair Debt Collection Practices Act, the district court erroneously eliminated all hours plaintiff's counsel spent preparing for and taking that defendant's deposition, where that defendant was a witness in plaintiff's case against the remaining defendant. Consumer **Credit** Protection Act, § 701 et seq., as amended, 15 U.S.C.A. § 1691 et seq.

2 Cases that cite this headnote

4 **Federal Civil Procedure**
Amount and Elements

District courts must calculate awards for attorneys' fees using the "lodestar method," under which the 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate, and though in most cases the lodestar figure is presumptively a reasonable fee award, the district court may, if circumstances warrant, adjust the lodestar to account for other factors which are not subsumed within it.

58 Cases that cite this headnote

5 **Federal Courts**
Determination of Damages, Costs or Interest; Remittitur

Remand as to attorney fee award was required for the district court to give a concise but clear explanation as to why it reduced by more than half the number of attorney hours for which plaintiff could be compensated, in a successful action under the Fair Debt Collection Practices

Act, and for an explanation of the particular level of reduction chosen, in a case in which, after discounting the hourly rate because of attorney's inexperience, the court declined to eliminate particular excessive hours on account of the attorney's inefficiency, noting that the inefficiency was already adequately accounted for, but then went on nonetheless to grant a wholesale discount on the total number of hours when computing the lodestar figure. Consumer **Credit** Protection Act, § 701 et seq., as amended, 15 U.S.C.A. § 1691 et seq.

43 Cases that cite this headnote

6 **Federal Civil Procedure**
Attorney Fees

The practice of reducing attorney fees without identifying the hours spent inefficiently or providing any explanation of the particular degree of reduction adopted is no more defensible in relatively straightforward cases than in complex cases.

2 Cases that cite this headnote

7 **Federal Civil Procedure**
Attorney Fees

If the district court decides to reduce the lodestar hours on a pure across-the-board basis, in making an attorney fee award, the Court of Appeals requires an explanation for that choice, and the district court must provide, after an independent perusal of the record, some explanation for the precise reduction chosen, regardless of whether the fee award is relatively small or is large.

8 Cases that cite this headnote

8 **Federal Civil Procedure**
Amount and Elements

Comparison of the hours spent in particular tasks by the attorney for the party seeking fees and by the attorney for the opposing party does not necessarily indicate whether the hours expended by the party seeking fees were excessive.

9 Cases that cite this headnote

Attorneys and Law Firms

**1147* Deborah L. Raymond, Law Offices of Deborah L. Raymond, Solana Beach, California, for the plaintiff-appellant.
Michael E. Ripley, San Diego, California, for the defendant-appellee.

Appeal from the United States District Court for the Southern District of California; Rudi M. Brewster, District Judge, Presiding. D.C. No. CV-97-01908-RMB/CGA.

Before: TROTT, THOMAS and BERZON, Circuit Judges.

Opinion

PER CURIAM:

Following her successful suit against the **Conrad Credit Corp.** ("CCC") for violations of the Fair Debt Collection Practices Act (the "Collection Act"), 15 U.S.C. § 1691 et seq., the district court granted Nancy Lee **Ferland's** request for attorneys' fees. In doing so, however, the court declined to grant fees for certain time **Ferland's** attorney submitted on the case and approved fees for less than half the remaining total number of hours the attorney actually expended. **Ferland** appeals the fee award. We find error in some of the district court's calculations, and conclude that its explanation for the very large cut in the number of hours compensated was not adequate. We therefore remand for correction of the calculation errors and for reconsideration of the across-the-board cut in the number of hours covered by the award.

I. Background

In October 1997, **Ferland** sued CCC and Dr. Gregg A. Michel for violations of the Collection Act. She alleged that CCC employees harassed her while attempting to collect a debt she had formerly owed Michel but had already paid in full. The court dismissed **Ferland's** claim against Michel on summary judgment. The case against CCC was tried to a jury.

Ferland prevailed at trial. The jury's award, however, fell short of what she had requested. The jury found in **Ferland's** favor on only four of eight counts, and rather than the $1000 in statutory damages and $65,000 in compensatory damages she had sought, it awarded $800 and $10,200 respectively.

After the verdict, **Ferland** filed a request for attorneys' fees. She sought compensation for 290 hours at a rate of $195 per hour-a total of $56,550.[1] The district court found this request unreasonably high and reduced **Ferland's** attorney's billing rate to $160 per hour, primarily on the basis that $160 per hour was the appropriate rate for an attorney of her experience level. The court also subtracted from the fee award time it believed was expended solely on the losing claim against Michel. Finally, the district court reduced the compensable hours by over half, to 120, because of the lack of complexity of the case and **Ferland's** attorney's inefficiency and inexperience, resulting in a total award of $19,200. **Ferland** now challenges the adequacy of the district court's award. Although not contesting the rate reduction, she challenges, on several grounds, the large reduction in compensable hours.

II. Analysis

1 2 We review the factual determinations underlying an award of attorneys' **1148* fees for clear error, *Fischer v. SJB-P.D., Inc.,* 214 **F.3d** 1115, 1118 (**9th Cir.**2000), and the legal premises a district court uses to determine an award de novo. *Siegel v. Fed. Home Loan Mortgage* ***Corp.,*** 143 **F.3d** 525, 528 (**9th Cir.**1998). If we conclude that the district court applied the proper legal principles and did not clearly err in any factual determination, then we review the award of attorneys' fees for an abuse of discretion. *Id.* As part of the abuse of discretion review, we consider whether the district court met its obligation "to articulate ... the reasons for its findings regarding the propriety of the hours claimed or for any adjustments it makes either to the prevailing party's claimed hours or to the lodestar." *Gates v. Deukmejian,* 987 F.2d 1392, 1398 (**9th Cir.**1992).

A. Time Attributed to the Michel Claim

Ferland asked to be reimbursed for 290 hours of attorney time. The district court reduced this figure to 261.2 hours by eliminating time that it attributed to **Ferland's** failed claim against Michel.[2] **Ferland** does not challenge the district court's authority to eliminate time spent on the claim against Michel, but does maintain that the district court clearly erred in some of its calculations regarding those claims. We agree.

3 First, the district court discounted time entries for preparation of a response to a Counter Motion for Summary Judgment on October 14, 17, 18 and 19, 1998. Because only CCC filed such a motion, the district court erred when it attributed part of that time to the claim against Michel and reduced the time by half. Second, the district court eliminated all hours **Ferland's** counsel spent preparing for and taking Michel's deposition. Since Michel was a witness in **Ferland's** case against CCC, the district court erred by not allowing attorneys' fees for at least some of that time.

We therefore remand this issue to the district court so that it may recalculate the hours attributable to Michel and CCC. *See Hensley v. Eckerhart,* 461 U.S. 424, 436-37, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

B. Percentage Reduction

Much more consequential in terms of its potential impact on the total fee award is the controversy between the parties concerning the district court's determination that only 120 of the hours **Ferland's** attorney expended on the litigation should be compensated.[3]

The district court first found that **Ferland's** attorney lacked adequate experience to justify her requested hourly rate. It observed that "[a]n experienced attorney commands high hourly rates because he or she is *efficient* at performing the necessary tasks" (emphasis added), and accordingly reduced the hourly rate for **Ferland's** counsel from $195 to $160 per hour. This $160 rate was based in large part on the district court's objective analysis of the prevailing rates of similarly-experienced attorneys in large California law firms. **Ferland** does not challenge the rate reduction.

4 The district court then considered whether to eliminate specific hours from **Ferland's** fee request as excessive, but decided not to do so, stating:

> [T]he court is already reducing Plaintiff's hourly rate request in part because Ms. Raymond's inefficiency indicates such a reduction is appropriate. Therefore, the court will not eliminate specific hours from the fee request related to excessive hours.

To this point, the district court's reasoning was sound. When it finally computed the **1149* lodestar amount,[4] however, the court reversed course and did reduce the attorney's hours-by more than half-because of "the relative lack of complexity of the case, the lack of jury trial experience of counsel, and because of counsel's inefficiency in prioritizing time." In so doing, the district court did not identify any particular excessive hours, nor did it explain in any other fashion how

it decided how many hours to cut, or by what percentage to reduce the documented hours.

Ferland contends that the district court impermissibly "double-counted" her attorney's inefficiency, first by reducing her hourly rates on account of her inexperience, and then by reducing her hourly total for, partially, the same reason. *Cunningham v. County of Los Angeles,* 879 F.2d 481, 489 (**9th Cir**.1988) (noting that in "ordinary cases ... double counting is impermissible"). The district court's reductions, however, were not *necessarily* duplicative. The district court reduced the hourly rate awarded to **Ferland's** counsel because it found that she was inexperienced, but the court could also reasonably have decided that even taking into account her inexperience, some of her hours were excessive as compared to what one would expect of a similarly inexperienced attorney.

5 That is not, however, how the district court seems to have reached its result. Instead, after discounting the hourly rate, the court *declined* to eliminate particular excessive hours on account of the attorney's inefficiency, noting that the inefficiency was already adequately accounted for. Then, the district court went on nonetheless to grant a wholesale discount on the total number of hours when computing the lodestar figure. The district court did not explain the apparent internal contradiction in its reasoning. That omission in itself is sufficient to require a remand for a "concise but *clear* explanation of its reasons for the fee award." *Hensley,* 461 U.S. at 437, 103 S.Ct. 1933 (emphasis added).

Quite aside from the apparent contradiction, the district court's method of reducing the hours for which fees are available is one that, under our cases, requires further explanation. The district court simply announced a bottom-line number of compensable hours, with no attempt to calibrate the number chosen to demonstrable inefficiency in carrying out particular tasks. We held in *Gates v. Deukmejian* that such a " 'meat-axe approach' " to reducing fees is acceptable in some circumstances. *Gates,* 987 F.2d at 1399. The method is controversial, however, *id.,* and does not discharge the district court from "its responsibility to set forth a 'concise but clear' explanation of its reasons for choosing a given percentage reduction nor from its duty to independently review the applicant's fee request." *Id.* at 1400 (quoting *Hensley,* 461 U.S. at 437, 103 S.Ct. 1933).

For example, in *Gates,* the defendants in a complex civil rights class action suit challenged the district court's across-the-board ten percent cut of an attorneys' fee award, contending that the reduction did not cut deep enough and that a more particularized review would have gone further. This court held that "decisions ... employing percentages in cases involving large fee requests are subject to heightened scrutiny." *Id.*[5] We then went on to vacate the ***1150** district court's determination of the appropriate lodestar for reassessment, stating:

> The lack of even a brief explanation of how and why [the district judge] selected ten percent and the fact that the record not only fails to illuminate the court's reasoning but casts doubt on the very existence of such a rationale, leads us to the ineluctable conclusion that the district court, faced with an admittedly voluminous paper record, threw up its hands and relied on [an] ... arbitrary, ten percent figure without itself reviewing the record.
>
> *Id.* at 1401; *see also id.* at 1399 (holding that a district court may not "slash[ ] broad categories of activity by arbitrary percentages 'on the basis of his inarticulable and unsubstantiated dissatisfaction with lawyers' efforts to economize,' rather than by disallowing specific items of unreasonable activity and providing examples of excessive time spent on legal research" (quoting *In re Continental Illinois,* 962 F.2d 566, 570 (7th Cir.1992))).

6 We have, since *Gates,* approved a percentage or across-the-board approach in cases where much smaller fee awards were at stake,[6] but only when the district court provides a reasonable explanation for the cut. *See Schwarz v. Sec'y of Health & Human Servs.,* 73 **F.3d** 895, 906 (**9th Cir**.1995) (upholding across-the-board reduction of $300,000 fee award); *Harris v. Marhoefer,* 24 **F.3d** 16, 19 (**9th Cir**.1994) (upholding fifty-percent reduction of a $70,000 fee award for lack of success).[7] Indeed, the practice of reducing fees without identifying the hours spent inefficiently *or* providing any explanation of the particular degree of reduction adopted is no more defensible in relatively straightforward cases such as this one than in complex cases such as *Gates,* for several reasons.

7 First, where the underlying case is complex, the billing records are likely to be voluminous, and the judicial time expended in detailing excessive hours can therefore be similarly great. Where, however, the underlying case was not a complicated one, the district court that presided over the litigation should be able, after briefing by the parties, to look over the billing records for specific inefficiencies without expending a great deal of judicial time doing so. At least, the district court should be able to "sample" the records to

show that there is a pattern of demonstrable inefficiency. *See Gates,* 987 F.2d at 1399. If the district court nonetheless decides to reduce the lodestar hours on a pure across-the-board basis, then we need an explanation for that choice if we are meaningfully to review the fee award for abuse of discretion. *Id.* at 1400.

Second, the number of hours expended in cases that are relatively straightforward may often seem high if considered in the aggregate, without perusing in detail the actual billing entries. The Federal Rules of Civil Procedure and the implementing rules of individual district courts, perhaps unfortunately, take a one-size-fits-all approach, and do not provide for procedural **1151* short cuts for relatively simple litigation. Compliance with procedural requirements such as meet and confer sessions between counsel, Fed.R.Civ.P. 16(b), 26(f), early neutral evaluation conferences, S.D. Cal. Civ. L.R. 16.1(c), scheduling conferences, Fed.R.Civ.P. 16(b), automatic disclosure requirements, Fed.R.Civ.P. 26(a), written discovery plans, Fed.R.Civ.P. 26(f), several-step processes for resolution of discovery disputes, Fed.R.Civ.P. 37(a), pretrial conferences, Fed.R.Civ.P. 16(a), proposed pretrial orders, S.D. Cal. Civ. L.R. 16.1(f)(7), case management conferences, S.D. Cal. Civ. L.R. 16.1(d), and expert witness reports, Fed.R.Civ.P. 26(a)(2), can result in attorneys' fees for relatively simple cases that seem unreasonably high after a first-or even second or third-glance at the bottom line. Some systematic perusal of the actual billing entries will often confirm that the reason for the seemingly high fee was not inefficiency, but careful compliance with the attorneys' responsibilities.

8 Third, in less complex cases there may be a tendency to assume-as the district court may have assumed here-that the time spent by an opposing counsel experienced in the subject matter is a good measure of the time reasonably expended. But in small cases as well as large ones, opposing parties do not always have the same responsibilities under the applicable rules, nor are they necessarily similarly situated with respect to their access to necessary facts, the need to do original legal research to make out their case, and so on. Comparison of the hours spent in particular tasks by the attorney for the party seeking fees and by the attorney for the opposing party, therefore, does not necessarily indicate whether the hours expended by the party seeking fees were excessive. *See Johnson v. Univ. College of the Univ. of Ala. in Birmingham,* 706 F.2d 1205, 1208 (11th Cir.1983). Rather, any such comparison must carefully control for factors such as those mentioned, as well as for the possibility that the prevailing party's attorney-who, after all, did prevail-spent more time because she did better work.

Finally, even where the district court does explain adequately the decision to cut the lodestar hours compensated by the across-the-board method, there is still the need for the district court to provide, after an independent perusal of the record, some explanation for the precise reduction chosen. *Gates* ' concern that a district court's "cursory statement affords us no explanation as to how the court arrived at ... the correct reduction and thus, it does not allow for us meaningfully to assess its determination," 987 F.2d at 1400, applies equally when the fee award is relatively small as when it is large. In either case, "[a]bsent some indication of how the district court exercised its discretion, we are unable to assess whether the court abused that discretion." *Id.*

Here, the district court did not explain except at the most general level why it reduced by more than half the number of attorney hours for which **Ferland** could be compensated, [8] and did not explain at all the particular level of reduction-from 261.2 to 120 hours-chosen. Because we cannot determine the basis for the district court's decision to so substantially reduce the hours for which it permitted fees, we vacate the fee award and remand for reassessment in accord with the principles discussed above. *McGrath v. County of Nevada,* 67 **F.3d** 248, 253 (**9th Cir.**1995) ("If the district court fails to provide a clear indication of how it exercised its discretion, we will remand the fee award for the court to provide an explanation."); *Bernardi v. Yeutter,* 951 F.2d 971, 974 (**9th Cir.**1991) (requiring the district court to provide "some explanation as to how [it] arrived at its figures" (quoting *Domingo v. New England Fish Co.,* 727 F.2d 1429, 1447 (**9th Cir.**), *modified, *1152* 742 F.2d 520 (**9th Cir.**1984))); *Cunningham,* 879 F.2d at 485 (same).

III. Conclusion

For the foregoing reasons, we REMAND this matter to the district court for further proceedings consistent with this order.

Parallel Citations

01 Cal. Daily Op. Serv. 2755

Footnotes

1 The attorney's affidavit listed 294.5 total hours she expended on the case, which she then reduced by 4.5 hours to reflect time spent solely on issues related to Michel.

2 To be precise, the district court identified 32.7 hours it attributed to **Ferland's** claim against Michel. Although it makes no difference to our decision in this matter, it is not clear to us how the district court, after so concluding, arrived at 261.2 hours as the time attributable to the claim against CCC.

3 There is no suggestion that **Ferland's** attorney did not actually spend the amount of time on this case reflected in her billing records.

4 District courts must calculate awards for attorneys' fees using the "lodestar" method. *See Caudle v. Bristow Optical Co., Inc.*, 224 **F.3d** 1014, 1028 (**9th Cir**.2000); *Morales v. City of San Rafael*, 96 **F.3d** 359, 363 (**9th Cir**.1996). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 **F.3d** at 363. Although in most cases, the lodestar figure is presumptively a reasonable fee award, the district court may, if circumstances warrant, adjust the lodestar to account for other factors which are not subsumed within it. *See, e.g., Van Gerwen v. Guarantee Mut. Life Co.*, 214 **F.3d** 1041, 1046 (**9th Cir**.2000); *see also Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (**9th Cir**.1975) (enumerating factors district courts may consider in determining fee awards).

5 The *Gates* critique of across-the-board cuts in hours expended is no less applicable where, as here, the district court reduction is expressed as an absolute number of hours rather than as a percentage. Obviously, the same reduction can be expressed either way. The pertinent consideration is not the mathematical rubric used but whether the reduction is across-the-board or calibrated in some way to the actual entries in the billing records.

6 The fee award at issue in *Gates* was for more than $5 million.

7 *Gates* held that district courts have the authority to make across-the-board cuts "when faced with a massive fee application." *Id.* at 1399. There is, however, more general language in *Gates* as well. *See id.*, at 1400 ("[P]ercentages ... are acceptable, and perhaps necessary, tools for district courts fashioning reasonable fee awards."). Although *Gates* quoted language from another circuit's cases indicating that there might be *more* tolerance for "meat-axe" approaches to hours reduction in less complex cases, *Gates* did not address directly the degree of appellate scrutiny accorded smaller fee awards when the district court adopts an across-the-board approach, because no such award was before the court. As noted in the text, we have, in later cases, applied the *Gates* approach without regard to the size of the award.

8 As noted, that general explanation is itself puzzling, as it appears to contradict the district court's earlier observation that the reduction in the hourly rate adequately accounted for the inefficiency observed.

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EXHIBIT 3

682 F.2d 830
United States Court of Appeals,
Ninth Circuit.

Arie Mack **MOORE**, Evanell E. **Moore**, Alfred L. Paulson and Mary E. Paulson, doing business as Eugene Granite & Marble Works, Plaintiffs-Appellees and Cross-Appellants,
v.
JAS. H. **MATTHEWS** & CO., et al., Defendants,
and
Rest Haven Memorial Association, West Lawn Memorial Park, Lane Memorial Gardens and Fir Grove Cemeteries Co., Defendants-Appellants and Cross-Appellees.

Nos. 80-3180, 80-3217. Argued and Submitted Dec. 14, 1981. Decided July 29, **1982**.

Grave marker retailer and installer brought private antitrust action against cemeteries. Following remands, 473 **F.2d** 328, and 550 **F.2d** 1207, the United States District Court for the District of Oregon, Robert C. Belloni, J., granted plaintiff judgment on one of its tying claims but held for cemeteries on the other tying claim, and awarded plaintiff costs and attorney fees, and cross appeals were taken. The Court of Appeals, Boochever, **Circuit** Judge, held that: (1) district court's decision for cemeteries on one of the plaintiff's tying claims was contrary to the law of the case; (2) evidence supported district court's award of damages reflecting the per marker decrease in average selling price plaintiff obtained for the markers it sold for placement in defendant cemeteries; (3) district court erred in reducing by 50% plaintiff's damages reflecting the profit plaintiff allegedly lost from being shut out from representative share of the grave marker market in defendant cemeteries; and (4) there was inadequate evidentiary basis for district court's award of attorney fees.

Reversed and remanded.

West Headnotes (16)

1 **Courts**
Decisions of Same Court or Co-Ordinate Court
Courts
Decisions of Higher Court or Court of Last Resort

The "law of the case" rule ordinarily precludes a court from reexamining an issue previously decided by the same court, or a higher appellate court, in the same case.

22 Cases that cite this headnote

2 **Courts**
Previous Decisions as Controlling or as Precedents

The law of the case principle is analogous to, but less absolute a bar than, res judicata.

9 Cases that cite this headnote

3 **Courts**
Previous Decisions as Controlling or as Precedents

Although the law of the case rule does not bind a court as absolutely as res judicata, and it should not be applied woodenly when doing so would be inconsistent with considerations of substantial justice, the discretion of court to review earlier decisions should be exercised sparingly so as not to undermine the salutory policy of finality that underlies the rule.

16 Cases that cite this headnote

4 **Antitrust and Trade Regulation**
Tying Agreements
Antitrust and Trade Regulation
Separate or Distinct Products
Antitrust and Trade Regulation
Economic Power

Three criteria must be satisfied to demonstrate an illegal tying arrangement: there must in fact be a tying arrangement between two distinct products or services; defendant must have sufficient economic power in tying market to impose significant restrictions in the tied product market; and the amount of commerce in tied product must not be insubstantial. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

2 Cases that cite this headnote

5 **Antitrust and Trade Regulation**
Economic Power

Market power in the tying product may be shown by product uniqueness or desirability. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

6 **Antitrust and Trade Regulation**
Tying Agreements

To establish that the amount of commerce in tied product is not insubstantial, the challenged restraint must implicate more than a de minimis amount of interstate commerce in the tied product or service. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

2 Cases that cite this headnote

7 **Federal Courts**
Powers, Duties and Proceedings of Lower Court After Remand

On remand of private antitrust action brought by retailer and installer of grave markers against cemeteries, district court erred in relitigating tying issues and determining that cemeteries' requirement that grave markers be installed only by cemetery where the lot and marker were purchased was not an illegal tie, since Court of Appeals had ruled that separate products and services were involved in tying arrangements and that the district court "erred as a matter of law" in upholding cemeteries' quality control justification for the tie, and none of exceptions to the law of the case rule was applicable. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

7 Cases that cite this headnote

8 **Antitrust and Trade Regulation**
Certainty

Antitrust plaintiff is obligated only to provide trier of fact with some basis from which to estimate reasonably, and without undue speculation, damages flowing from antitrust violations. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

9 Cases that cite this headnote

9 **Antitrust and Trade Regulation**
Particular Items or Elements

In private antitrust action brought by grave marker retailer and installer against cemeteries challenging cemeteries' requirement that grave markers be installed only by cemetery where the lot and marker were purchased, sufficient evidence supported award to plaintiff of damages reflecting the per marker decrease in the average selling price plaintiff obtained for the markers it sold for placement in defendant cemeteries, and cemeteries, which repeatedly refused to assist court in arriving at fair calculation of damages, were in no position to argue that the damage calculations were fatally speculative.

2 Cases that cite this headnote

10 **Antitrust and Trade Regulation**
Damages and Other Relief

In private antitrust action brought by grave marker retailer and installer against cemeteries challenging cemeteries' requirement that grave marker be installed only by the cemetery where lot and marker were purchased, trial court erred in reducing by 50% the damages awarded to plaintiff based on profits plaintiff allegedly lost from being shut out from a representative share of the marker market in defendant cemeteries, since reduction was based on trial court's opinion of plaintiff's manager's personality and ability, but manager did not make the calculations or supply critical data upon which calculations were based. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

1 Cases that cite this headnote

11 **Federal Courts**
Costs, Attorney Fees and Other Allowances

Court of Appeals will not disturb district court's award of attorney fees absent an abuse of discretion.

12 **Antitrust and Trade Regulation**
Costs and Attorney Fees

In private antitrust action brought by grave marker retailer and installer against cemeteries, trial court abused its discretion in failing to allow parties to develop adequate evidentiary basis for attorney fee award.

7 Cases that cite this headnote

13 **Federal Civil Procedure**
Amount and Elements

Among factors that should be considered in awarding attorney fees are: time and labor required, novelty and difficulty of questions involved, skill necessary to perform legal services properly, preclusion of other employment by attorney due to acceptance of the case, customary fee, whether fee is fixed or contingent, time limitations imposed by client or circumstances, amount involved and results obtained, the experience, reputation and ability of attorneys, the undesirability of the case, the nature and length of professional relations with client, and awards in similar cases.

20 Cases that cite this headnote

14 **Antitrust and Trade Regulation**
Amount of Fees

In determining award of attorney fees in private antitrust suit, district court abused its discretion in reducing attorneys' hours by half and allowing less than one half of their normal billing rate solely because court thought they produced some "less than useful material," since the attorneys, in handling the case on a contingency basis for over 11 years through three trials, had taken an enormous risk, and all attorneys had distinguished backgrounds and extensive experience in antitrust work.

8 Cases that cite this headnote

15 **Antitrust and Trade Regulation**
Costs and Attorney Fees

Time spent on appeal may be included in attorney fee award under Clayton Act. Clayton Act, § 4, 15 U.S.C.A. § 15.

5 Cases that cite this headnote

16 **Federal Civil Procedure**
Amount and Elements

Court of Appeals approved of district courts' practice in calculating attorney fee award of using the lodestar analysis as a procedure for ordering the examination of the 12 factors which are to be considered in awarding attorney fees.

35 Cases that cite this headnote

Attorneys and Law Firms

**832* Laurence Hummer, Latham & Watkins, Los Angeles, Cal., for American cemetery.
George L. Wagner, Portland, Or., argued, for Rest Haven Memorial; Spears, Lubersky, Campbell & Bledsoe, Portland, Or., on brief.
Jonathan T. Howe, Chicago, Ill., for amicus curiae Monument Bldg.
Edward R. Fechtel, Husband, Johnson, Fechtel & Goff, Eugene, Or., Roger G. Tilbury, Portland, Or., for **Moore**.

Appeal from the United States District Court for the District of Oregon.

Before PREGERSON and BOOCHEVER, **Circuit** Judges, and HALBERT,* Senior District Judge.

Opinion

BOOCHEVER, **Circuit** Judge:

This is the third time this private antitrust action involving the sale and installation of grave markers has come before this court. We conclude that the district court's decision on the installation tying claim is contrary to the law of the case and that the awards for damages and attorney fees were based on improper considerations without support in the record. Accordingly, for the third time, we reverse and remand for further proceedings.

I

Background

The action began in 1969 when Eugene Granite & Marble Works (EGM), Oregon's oldest retailer and installer of grave markers (a/k/a memorials and monuments), sued eight large "endowment care" cemeteries [1] in Lane County, Oregon and **Jas**. H. **Matthews** & Son, a national manufacturer of grave markers. EGM alleged that the defendants violated sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act by monopolization, attempted monopolization, refusal to deal, conspiracy, and two tie-ins. The tying claims stemmed from the cemeteries' requirements that a purchaser of a cemetery lot buy a grave marker only from the cemetery where the lot is purchased (sales tie), and that the marker be installed only by the cemetery where the lot and marker are purchased (installation tie). [2]

833* The district court granted defendants summary judgment on all counts. This court reversed and remanded the case for trial. **Moore v. **Jas**. H. **Matthews** & Co., 473 **F.2d** 328 (**9th Cir**. 1973) ("**Moore** I ").

At the conclusion of the liability portion of the bench trial, the district court again entered judgment for all defendants on all counts. This court affirmed the district court's judgment on the monopolization, attempted monopolization, refusal to deal, and conspiracy counts, and as to the dismissal of defendant **Jas**. H. **Matthews** & Co., but again reversed the district court on both of EGM's tie-in claims. **Moore** v. **Jas**. H. **Matthews** & Co., 550 **F.2d** 1207 (**9th Cir**. 1977) ("**Moore** II "). We concluded that "separate products and services are involved in each of the tying arrangements" and that the district court "erred as a matter of law" in upholding the cemeteries' quality control justification for the ties. 550 **F.2d** at 1215, 1218. We vacated the judgment on EGM's tie-in claims and remanded for further proceedings.

Following **Moore** II, three of the eight cemeteries settled with EGM and thereafter allowed EGM to sell and install markers on their properties. EGM and the remaining five cemeteries again went to trial on the tie-in claims.

The district court granted EGM judgment on the sales tying claim, but again held for the cemeteries on the installation claim. The district court found that the exclusive installation requirement was not an illegal tie because only a single product or service was involved. Having determined that installation was a part of a single product or service, the district court reasoned that the cemeteries' "justification defense" need not be discussed. Nevertheless, "for purposes of clarity," the court went on to state that the cemeteries' justification defense was meritorious because "installation guidelines simply would not work under the circumstances of this case."

The district court initially awarded EGM $31,128 in untrebled damages, but no costs or fees, and permanently enjoined defendants from engaging in the marker-sales tying practice. Both sides then moved to amend the judgment. The district court reopened proceedings, heard additional evidence, and issued a second decision awarding costs, trebled damages of $196,437, and attorney fees of $231,450.

Four of the five cemeteries affected by the judgment appeal, contending that the damage award was not supported by substantial evidence and that the award for attorney fees constituted an abuse of discretion because it was made without an adequate evidentiary record. EGM cross-appeals, claiming that the district court erred by rejecting the installation tying claim and that the awards for damages and fees were inadequate.

II

Law of the Case

1 **2** **3** The "law of the case" rule ordinarily precludes a court from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case. See IB **Moore's** Federal Practice, 0.404(1), at 404-09 (2d ed. 1980). See also In re Staff Mortgage & Investment Corp., 625 **F.2d** 281, 282-83 (**9th Cir**. 1980); Adamian v. Lombardi, 608 **F.2d** 1224, 1228 (**9th Cir**. 1979), cert. denied, 446 U.S. 938, 100 S.Ct. 2158, 64 L.Ed.2d 791 (1980). The law of the case principle is analogous to, but less absolute a bar than, res judicata. **Moore's** Federal Practice, supra, at 404-09. Although the law of the case rule does not bind a court as absolutely as res judicata, and should not be applied "woodenly" when doing so would be inconsistent with "considerations **834* of substantial justice," [3] the discretion of a court to review earlier decisions should be exercised sparingly so as not to undermine the salutory policy of finality that underlies the rule. See Lathan v. Brinegar, 506 **F.2d** 677, 691 (**9th Cir**. 1974) (en banc); United States v.

Fullard-Leo, 156 **F.2d** 756, 757 (**9th Cir**. 1946). The Fifth **Circuit** has aptly summarized the rule as follows:

> While the "law of the case" doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice. White v. Murtha, 377 **F.2d** 428, 431-32 (5th **Cir**. 1967).

In **Moore** II, we vacated the judgment against EGM on the tie-in claims, and originally remanded the case "for further proceedings consistent with this opinion." In denying the cemeteries' petition for rehearing and rehearing en banc, however, the court amended the remand language to read: "the case is remanded for further proceedings and factual determinations consistent with the standards articulated in this opinion." 550 **F.2d** at 1220. (Emphasized language was added by the amendment.)

The district court believed that prior to being amended, **Moore** II "left only the amount of damages and some sort of injunctive relief" for determination on remand. It evidently considered, however, that the amendment to **Moore** II somehow expanded the scope of remand to require having all the tying issues fully relitigated.

The district court's interpretation of our remand was erroneous and its disposition of the installation tying claim was directly contrary to **Moore** II. Review of the eight-page discussion of tying in **Moore** II indicates that the district court's alternative grounds for rejecting the installation tying claim were not among the "matters left open by the mandate of this court." Quern v. Jordan, 440 U.S. 332, 347, 99 S.Ct. 1139, 1148, 59 L.Ed.2d 358 n. 18 (1979). The only issues left for determination by **Moore** II were on damages, attorney fees, and, as indicated in note 4, infra, the ties' effect on interstate commerce in the tied market. We believe that it was with these issues in mind that the court amended its remand.

4 **5** **6** We commenced our discussion of tying in **Moore** II by noting that both the sales and the installation tying claims were under consideration and that all four cemeteries involved in the present (third) appeal engaged in both practices. 550 **F.2d** at 1212. The court noted that the first question under tying analysis[4] is whether there **835* are "separate and distinct products or services tied into a single package." Id. at 1214. After a lengthy analysis of the applicable case law, we concluded that:

> An application of the factors in (Fortner Enterprises, Inc. v. United Steel Corp., 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969)) Fortner I and our consideration of the "function of the aggregation" leads inescapably to the conclusion that separate products and services are involved in each of the tying arrangements before us.
> Id. at 1215 (emphasis added).

7 We later noted that, "(i)n addition to their contention that only a single product is involved here, (the cemeteries) offer (two) justifications for the tying arrangements." Id. at 1217. The first justification was a "goodwill and quality control argument," and the second justification was a "regulated industry (state action) defense." Id. at 1217, 1218. The court expressly rejected both justifications, noting, in regard to the first justification, that the cemeteries' legitimate concerns about quality and customer goodwill could be adequately maintained by specifications. 550 **F.2d** at 1217. Any doubt about our holding on the justification issue should have ended with our statement that the district court "erred as a matter of law in recognizing the reasonableness of the tie-in restrictions." Id. at 1218.

The district court nevertheless rejected EGM's installation claim because it thought that separate products and services were not involved and that, even if they were, the cemeteries' installation practices were justified by quality control concerns. The amended remand cannot be construed to erase this court's unequivocal conclusion that "separate products and services are involved in each of the tying arrangements" and that the district court "erred as a matter of law" in upholding the cemeteries' quality control justification. 550 **F.2d** at 1215, 1218.

Moreover, none of the limited exceptions to the law of the case rule is applicable here. See United States v. Imperial Irrigation District, 559 **F.2d** at 520; White v. Murtha, 377 **F.2d** at 431-32. The evidence developed on remand offered even stronger support than this court had available in **Moore** II for holding that marker installation is a separate service, and the cemeteries point to no contrary controlling authority or considerations of substantial justice that warrant reconsidering the law of this case.

III

Damages

The trial court prefaced its discussion of the damage issue by criticizing the cemeteries for not being as helpful as EGM in supplying a theory for calculating damages from the sales tie. The court noted that "(i)n spite of the principal ruling of the Court of Appeals, (the cemeteries) continue to insist simply that there were no damages." The court then proceeded to discuss EGM's proof, which the court characterized as the only "reasonable theory for calculating damages." EGM's proof consisted primarily of the testimony and reports of Dr. Reinmuth, Dean of the Business School at the University of Oregon. Dr. Reinmuth based his testimony and reports on evidence in the record, including both sides' business records and interment data supplied by the State of Oregon. Dr. Reinmuth divided EGM's alleged damages from the sales tying claim into three categories (termed "Types 1-3" by the parties and trial court). **836* Because EGM does not contest the district court's rejection of Type 3 damages as overly speculative, we do not discuss them.

Type 1 damages reflect the per-marker decrease in the average selling price EGM obtained for the few markers it sold for placement in the defendant cemeteries (effect on price). Type 2 damages were the profits EGM allegedly lost from being shut out from a representative share of the marker market in the defendant cemeteries (effect on market). Dr. Reinmuth based his calculation of Type 2 damages on the assumption that, but for the illegal sales tie, EGM would have sold the same percentage (50%) of markers in the defendant cemeteries as it did in other local cemeteries, including the three cemeteries that settled following **Moore** II.

The trial court reduced Dr. Reinmuth's Type 2 estimate of damages by fifty percent because the trial judge had a low opinion of EGM's manager, Arie Mack **Moore**. In the trial judge's words:

> I have observed Arie Mack **Moore** throughout these proceedings. He is given to gross overstatements. I believe that on an average he has exaggerated his loss data by one hundred percent. Furthermore, the evidence has shown that his marker installations have been done in a less than workmanlike manner. His sales techniques have been poor. He is often arrogant. His personality is such that his sales would not be as high as a more reasonable dealer. For these factors, I reduce the expert's estimated lost sales figures by fifty percent.

The cemeteries contend that the district court erred in awarding any Type 1 and 2 damages. EGM contends that the judge erred in reducing the Type 2 damages solely because of his adverse impression of EGM's manager, but does not contest the amount of Type 1 damages awarded.

8 The well-settled rules applicable to proving antitrust damages were summarized in Knutson v. Daily Review, Inc., 548 **F.2d** 795, 811-12 (**9th Cir**. 1976), cert. denied, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977), where this court stated:

> The Supreme Court has also established a relaxed standard for proving the amount of damages in an antitrust case once the fact of damage has been shown.... "It will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." (citations omitted)
>
> A study of the adjudicated cases in this area readily dispels any impression that this question of damages is governed by an application of the common law rule of reasonable certainty. The cases have long since departed from this rule in antitrust litigation.

Accord, Greyhound Computer Corp. v. IBM, 559 **F.2d** 488, 505-07 (**9th Cir**. 1977), cert. denied, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978). In other words, an antitrust plaintiff is only obligated to provide the trier-of-fact with some basis from which to estimate reasonably, and without undue speculation, the damages flowing from the antitrust violations. See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946).

9 In light of the liberal proof-of-damages rule in antitrust cases, the cemeteries' continued insistance that EGM is entitled to no damages is meritless. Although EGM's proof may have lacked exactness, it was certainly within the liberal bounds permitted in antitrust cases.

There was ample evidence to support the assumptions underlying Dr. Reinmuth's calculations. For instance, there was evidence that the cemeteries' restrictive policies compelled EGM to charge less for the few markers it sold for placement in the defendants' cemeteries than it otherwise would have (Type 1 damages). There was also evidence that, but for the tying restraints, EGM would have sold approximately 50% of the markers sold in defendants' cemeteries (Type 2 damages).[5] Given the cemeteries' **837* repeated refusal to assist the district court in arriving at a fair

calculation of damages, they are in no position to argue that Dr. Reinmuth's use of inexact figures rendered his damage calculations fatally speculative.

10 The district court's rationale for reducing EGM's Type 2 damages is meritless. Although Dr. Reinmuth relied to a limited extent on business records and other information supplied by **Moore**, the bulk of his damage calculations were based on independent data in the record. The district court's opinion of **Moore's** personality and ability were improper reasons for reducing damages because **Moore** did not make the calculations or supply the critical data upon which the calculations were based. Even assuming that the district court's assertions about **Moore** were accurate, those factors would have adversely affected the past sales in the unrestricted cemeteries that Dr. Reinmuth used as the basis for his damage projections. Thus, if **Moore's** business abilities had been greater, EGM would theoretically have made an even greater percentage of the sales in unrestricted cemeteries which, in turn, would have actually increased Dr. Reinmuth's estimate of Type 2 damages. In short, neither the district court nor the cemeteries have offered a sound reason why EGM's Type 2 damages should have been arbitrarily reduced by fifty percent.

Accordingly, we affirm the award of Type 1 damages, order the award of Type 2 damages to be doubled to the full amount proven by EGM, and remand for the district court to determine and award additional damages attributable to the illegal installation tie. [6]

IV

Attorney Fees

On May 22, 1979, EGM filed a request for fees supported by affidavits. The parties entered a stipulated order on June 4, 1979, providing that no discovery or hearing would be held on attorney fees pending the court's reconsideration of the damage issue.

On February 4, 1980, the district court issued its amended decision. In addition to awarding EGM the damages discussed above, the court awarded attorney fees of $231,450 pursuant to Section 4 of the Clayton Act, 15 U.S.C. s 15 (mandating the award of "a reasonable attorney's fee" to prevailing antitrust plaintiffs).

In its one-paragraph discussion of attorney fees, the trial court stated that it reduced the number of hours requested by two of EGM's three principal attorneys by fifty percent because they "were ... inclined to produce a large volume of less than useful material." The court then multiplied the approved number of hours by fifty dollars per hour. The court felt fifty dollars per hour was "reasonable compensation for each attorney."

The cemeteries argue that the district court abused its discretion by awarding attorney fees without an adequate evidentiary basis. [7] The cemeteries contend that the **838* district court's handling of the matter unfairly deprived them of an opportunity to show that some of the hours requested by EGM's attorneys were spent on matters they were not entitled to be reimbursed for. Specifically, the cemeteries contend that they would have demonstrated that EGM sought fees for time spent prosecuting the non-tying claims that EGM did not prevail on, as well as for time devoted to prosecuting claims against those defendants that settled or were dismissed from the case.

EGM also claims that the fee award constituted an abuse of discretion. EGM argues that: (1) it was unreasonable for the district court to reduce the number of hours claimed by the two EGM attorneys by fifty percent, without reference to any legal standards, solely because the court thought they produced some "less than useful material;" and (2) the multiplier of $50 per hour was unreasonably low for experienced antitrust lawyers handling such a major and protracted litigation on a contingency fee basis.

11 Both sides are correct. The district court's failure to allow the parties to develop an adequate evidentiary basis for a fee award and to follow proper standards in awarding fees was inconsistent with the sound exercise of discretion. [8]

12 Given the stipulated order, the paucity of information available to the district court on the issue, and the substantial amount of money involved, the district court should not have awarded fees on such an inadequate evidentiary basis. Although a hearing on fees may be unnecessary when the affidavits and briefs submitted by the parties are sufficiently detailed to provide a basis for the award, see Manhart v. City of Los Angeles, Department of Water and Power, 652 **F.2d** 904, 908 (**9th Cir.** 1981); Williams v. Alioto, 625 **F.2d** 845, 849 (**9th Cir.** 1980), cert. denied, 450 U.S. 1012, 101 S.Ct. 1723, 68 L.Ed.2d 213 (1981), the district court clearly lacked an adequate evidentiary basis here for awarding fees. Had the district court been properly guided by the standards

discussed below for setting attorney fees, the need to obtain more information on which to base a fee award would have been apparent. See Perkins v. Standard Oil Co., 399 U.S. 222, 223, 90 S.Ct. 1989, 1990, 26 L.Ed.2d 534 (1970); Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 **F.2d** 161, 169 (3d **Cir.** 1973).

13 Among the factors that should be considered in awarding fees are: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill necessary to perform the legal services 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 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 relations with the client, and (12) awards in similar cases. Johnson v. Georgia Highway Express, Inc., 488 **F.2d** 714 (5th **Cir.** 1974), adopted by this **circuit** in Kerr v. Screen Extras Guild Inc., 526 **F.2d** at 69-70.

This court has repeatedly held that it is an abuse of discretion for a district court to award fees without considering these guidelines (known as the "Kerr guidelines"). See, e.g., Higgins v. Harden, 644 **F.2d** 1348, 1352 (**9th Cir.** 1981); Ellis v. Cassidy, 625 **F.2d** 227, 231 (**9th Cir.** 1980). Although not all twelve Kerr guidelines need be considered in every case, see Manhart, 652 **F.2d** at 907; Kessler v. Associates Financial Services Co., 639 **F.2d** 498, 500 n.1 (**9th Cir.** 1981), the need for meaningful review requires remand where, as here, the record on ***839*** appeal fails to indicate which, if any, of the Kerr guidelines were considered. Harmon v. San Diego County, 664 **F.2d** 770 at 772 (**9th Cir. 1982**) (as amended); Fountila v. Carter, 571 **F.2d** 487, 496-97 (**9th Cir.** 1978).

14 The rationale underlying the district court's award is clearly inadequate. Three attorneys have handled the bulk of EGM's work during the eleven years this case has been litigated. These attorneys documented having spent approximately seven-thousand hours working on the case.[9] All three attorneys have distinguished backgrounds and extensive experience in antitrust work. In handling this case on a contingency basis for over eleven years, through three trials, and now three appeals, EGM's attorneys have taken an enormous risk. For the district court to reduce the attorneys' hours by half and allow less than one-half of their normal billing rate solely because it thought they produced some less than useful material[10] was an abuse of discretion.

15 While we do not infer that there should be either an increase or decrease in fees, we remand the question with directions that the court gather additional evidence, make a new award, and substantiate its award consistent with this opinion. In calculating the new award, the district court should consider the time EGM's attorneys spent in successfully prosecuting the three appeals.[11]

To minimize the possibility of misunderstanding, we offer the following additional guidance on remand. First, the district court should examine the merits of the cemeteries' contention that EGM's attorneys are not entitled to reimbursement for time they spent working on unsuccessful claims and matters pertaining to defendants that settled or were dismissed from the case in light of our recent decision in Twin City Sportservice v. Charles O. Finley & Co., 676 **F.2d** 1291 at 1312-1314 (**9th Cir. 1982**). See also Rivera v. City of Riverside, 679 **F.2d** 795 at 796-797 (**9th Cir. 1982**); Thornberry v. Delta Air Lines, Inc., 676 **F.2d** 1240 at 1243 (**9th Cir. 1982**). We articulated the following test in Twin City for determining when an antitrust plaintiff is entitled to fees for work related to the pursuit of both successful and unsuccessful claims:

> (A) prevailing antitrust plaintiff is entitled to recover a reasonable attorney's fee for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit of a successful recovery of anti-trust damages.

676 **F.2d** at 1313

Second, our decision should not be construed as mandating inflexible application of the Kerr criteria. Courts and commentators alike have criticized rigid application of the Kerr guidelines. See, e.g., Copeland v. Marshall, 641 **F.2d** 880, 890 (D.C.Cir.1980) (en banc); In Re Capital Underwriters, Inc. Securities Litigation, 519 F.Supp. 92, 99 (N.D.Cal.1981); Stanford Daily, Inc. v. Zurcher, 64 F.R.D. 680 at **682**; Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U.Pa.L.Rev. 281, 286-87 (1977). This criticism is directed principally at the redundancy among the guidelines[12] ***840*** and the fact that they lack a practical framework for application.[13]

An alternative approach to calculating fee awards, termed "lodestar" analysis, involves the calculation of a "lodestar" figure based on multiplying the number of hours expended by

counsel times the prevailing billing rate for comparable legal services in the community. Unless counsel is working outside his or her normal area of practice, the billing-rate multiplier is, for practical reasons, usually counsel's normal billing rate. Billing rates usually reflect, in at least a general way, counsel's reputation and status (i.e., as partner, associate, or law clerk). The relatively objective lodestar figure is then adjusted based on the quality and risk involved in counsel's efforts.

Lodestar analysis was originally articulated by the Third **Circuit** in Lindy Bros., 487 **F.2d** at 167-69, and, following remand, 540 **F.2d** 102, 112-18 (3d **Cir**. 1976), and has since been adopted and refined in a number of other **circuits**. [14] This court has adhered to the Kerr guidelines and has yet to directly approve the use of straight lodestar analysis. [15] Like the Kerr guidelines, lodestar analysis has been subject to criticism. Its critics contend that lodestar's emphasis on hours and billable rates woodenly inflates awards. See, e.g., In re Capital Underwriters, Inc. Securities Litigation, 519 F.Supp. at 99; Stanford Daily v. Zurcher, 64 F.R.D. at **682**.

16 We note with approval that district courts in this **circuit** have increasingly responded to the perceived flaws in the Kerr and lodestar approaches by blending the best features of the two approaches. See, e.g., In re Capital Underwriters, Inc. Securities Litigation, 519 F.Supp. at 100; Keith v. Volpe, 86 F.R.D. 565, 573-77 (C.D.Cal.1980); Donnarumma v. Barracuda Tanker Corp., 79 F.R.D. 455 (C.D.Cal.1978); Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co., 406 F.Supp. 828 (N.D.Cal.1976); Stanford Daily v. Zurcher, 64 F.R.D. at **682**. This court recently upheld a fee award calculated with a blend of lodestar and Kerr analysis. Thornberry v. Delta Air Lines, Inc., at 1242-1243. Although-consistent with the broad discretion accorded district courts in awarding fees-the "blended" approach taken in each of these cases differs slightly in response to the particular facts at issue, the common characteristic is the use of lodestar analysis as "a procedure for ordering the examination of (the) factors listed in (Kerr)." In re Capital, 519 F.Supp. at 100 and Knutson, 479 F.Supp. at 1270 n.10, quoting with approval, Zurcher, 64 F.R.D. at **682**. As noted in In re Capital, the courts utilizing a blended approach:

> generally begin by equating the first factor in the lodestar approach, "hours spent," with the "time and labor required" element of (Kerr) ..., then consider other (Kerr) factors in setting the hourly rate and determining whether to **841* augment or decrease the award based on quality or contingency considerations.

519 F.Supp. at 100. [16]

We believe that the blended approach is well suited to the facts of this case, and commend it to the district court for use in calculating the fee award on remand.

V

Conclusion

The district court's decision on the installation tying claim is reversed. In regard to damages, we affirm the award of Type 1 damages, order the award of Type 2 damages doubled, and remand for the additional award of damages attributable to the illegal installation tie. Finally, we vacate the district court's award of attorney fees and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Parallel Citations

1982-2 Trade Cases P 64,876

Footnotes

* Honorable Sherrill Halbert, Senior United States District Judge for the Eastern District of California, sitting by designation.

1 The distinguishing feature of an endowment care cemetery is that part of the purchase price of each cemetery lot is placed into a permanent trust to be used for the perpetual management and maintenance of the cemetery and any grave markers erected there. See Ore.Rev.Stat. ss 97.810(1) and (7).

2 Briefly summarized, tying involves a seller's use of a dominant position in one product market to enhance its position in a separate product market by tying products from the two markets together for sale as a single unit at a single price. Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S.Ct. 514, 518-519, 2 L.Ed.2d 545 (1958). Tying offends antitrust values because it denies competitors free access to the tied product market as well as limiting buyers' choices in the tied product market. This occurs not because the seller imposing the arrangement is offering a superior product, but solely due to the leverage exerted by the tying product. Siegel v. Chicken Delight, Inc., 448 **F.2d** 43, 47 (**9th Cir**. 1971), cert. denied, 405 U.S. 955, 92 S.Ct. 1172, 31 L.Ed.2d 232 (1972).

3 United States v. Imperial Irrigation District, 559 **F.2d** 509, 520 (**9th Cir**. 1977), modified on other grounds, 595 **F.2d** 524, reversed in part, vacated in part, both on other grounds, sub nom. Bryant v. Yellen, 447 U.S. 352, 100 S.Ct. 2232, 65 L.Ed.2d 184 (1980).

4 Three criteria must be satisfied to demonstrate an illegal tying arrangement:

> First, there must in fact be a tying arrangement between two distinct products or services. Second, the defendant must have sufficient economic power in the tying market to impose significant restrictions in the tied product market. Third, the amount of commerce in the tied product must not be insubstantial.

Moore II, 550 **F.2d** at 1212 (citations omitted). The second and third criteria-neither of which was a basis for the district court's rejection of the installation tying claim-merit brief consideration. Neither factor supports the cemeteries' contentions or warrants a remand.

The second criteria-market power in the tying product-may be shown by product uniqueness or desirability, a requirement we found satisfied in **Moore** II. 550 **F.2d** at 1215. On remand, the district court also found that the cemeteries possessed the requisite degree of market power in the tying market of grave lots. Although this finding was made in regard to the sales tying claim, it is equally applicable to the installation claim, and is supported by substantial evidence.

To satisfy the third criteria-proof of an effect on interstate commerce in the tied market-the challenged restraint must implicate more than a de minimis amount of interstate commerce in the tied product or service. **Moore** II, 550 **F.2d** at 1216. Although neither **Moore** II nor the district court's decision can be construed as having directly decided the issue, our review of the record indicates that it would be unfair to all concerned to remand the tying claims a third time on this issue. The effect-on-commerce criteria was clearly satisfied in regard to the sales tie. The cemeteries sold over 2 million dollars worth of markers between 1965 and 1978, virtually all of which originated from outside Oregon. Although admittedly a closer question, the record also demonstrates that sufficient lumber, nails, concrete, and other construction materials originating from outside Oregon were used in the hundreds of marker installations at issue in this case to satisfy the criteria as a matter of law.

5 Although EGM sold only about 4% of the markers placed in the defendant cemeteries, the company sold and installed approximately 50% of the markers placed in those Lane County cemeteries that lacked restrictive practices. The cemeteries vigorously argued that the other cemeteries, none of which were endowment care cemeteries like the defendants, were inaccurate comparables. The defendants offered no explanation, however, for why EGM's sales increased to almost 50% at each of the three settling endowment care cemeteries following their discontinuation of the challenged exclusivity requirements.

6 We note that the calculation of installation damages can be made from the evidence already in the record. Because EGM's damage evidence was offered before the district court ruled on the tying claims, it necessarily included damages attributable to both ties. Indeed, proceeding on the assumption that both the sales and the installation restraints had been held illegal in **Moore** II, Dr. Reinmuth originally made no attempt to compute separately the damages from the two ties. It was not until after the district court upheld the installation tie and agreed to reopen proceedings to hear additional evidence on damages that Dr. Reinmuth separated the two charges. This was done, as the district court requested, using the information already in evidence.

7 The district court denied the cemeteries' motion to reopen the amended decision in regard to damages and attorney fees. The judge observed that the "award of damages that I would have made except for that mandate from the Court of Appeals (**Moore** II) would have been zero," and that "one reason the attorney's fees was low is that the amount of the (damage) award is too high."

8 This court will not disturb a district court's award of attorney fees absent an abuse of discretion. See, e.g., O'Neil v. City of Lake Oswego, 642 **F.2d** 367, 370 (**9th Cir.** 1980); Kerr v. Screen Extras Guild, Inc., 526 **F.2d** 67, 69 (**9th Cir.** 1975), cert. denied sub nom., 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976).

9 Given that this case has generated three appeals, the staggering number of claimed attorney hours is not, on its face, out of line with claims made in other complex antitrust cases. See generally Comment, Attorneys' Fees in Individual and Class Action Antitrust Litigation, 60 Cal.L.Rev. 1656, 1679-82 (1972) (Appendix-Table of fee awards in antitrust cases).

10 Our review of the voluminous record discloses no evidence to support the district court's finding that only half of the work by EGM's attorneys was sufficiently "useful" to warrant reimbursement. Much of the work that we might otherwise consider marginally useful was a necessary response to the numerous motions and defenses made by the cemeteries.

11 Time spent on appeal may be included in a fee award under section 4 of the Clayton Act. Perkins v. Standard Oil Co. of California, 474 **F.2d** 549, 553 (**9th Cir.**), cert. denied, 412 U.S. 940, 93 S.Ct. 2778, 37 L.Ed.2d 400 (1973); Knutson v. Daily Review, Inc., 479 F.Supp. 1263, 1273 (N.D.Cal.1979).

12 For example, consideration of the "difficulty of the questions" should be subsumed under "time and labor required," while factors concerning the level of skill required for the services, the fixed or contingent nature of the fee, time limitations, the amount to be obtained, the reputation of counsel, and the undesirability of the case, are all elements to be considered in setting the customary hourly fee. Copeland v. Marshall, 641 **F.2d** at 890.

13 Kerr 's laundry-list of factors "offers no guidance on the relative importance of each factor, whether they are to be applied differently in different contexts, or indeed, how they are to be applied at all." Berger, supra, at 286-87.

14 See, e.g., Copeland v. Marshall, 641 **F.2d** at 890-94; Furtado v. Bishop, 635 **F.2d** 915, 919-20 (1st **Cir.** 1980); Detroit v. Grinnell Corp., 560 **F.2d** 1093 (2d **Cir.** 1977); Grunin v. International House of Pancakes, 513 **F.2d** 114, 128-29 (8th **Cir.**), cert. denied, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975).

15 But see Brandenburger v. Thompson, 494 **F.2d** 885, 890 n. 7 (**9th Cir.** 1974), a pre-Kerr decision, in which we remanded a civil rights action for an award of attorney fees in light of Johnson v. Georgia Highway Express, Inc., supra, Kerr 's Fifth **Circuit** predecessor, and Lindy I, the Third **Circuit's** origination of lodestar analysis.

16 The "contingency considerations" referred to in the above quote are three-fold:

1. Analysis of plaintiff's burden-considering the legal and factual complexity of the case, the probability of defendant's liability, whether damages would be difficult or easy to prove;

2. Risks assumed in developing the case-number of hours and out-of-pocket expenses risked without guaranteed compensation; and

3. Delay in receipt of payment for services rendered.

Knutson, 479 **F.2d** at 1277, paraphrasing Lindy, 540 **F.2d** at 117. The second contingency consideration-the risks assumed-is similar to the sixth Kerr guideline, requiring inquiry into the fixed or contingent nature of the fee. Particularily in cases not involving a potential for substantial monetary recovery, an enhanced fee due to its contingent nature may be justified. Awards should not automatically be increased, however, merely because there are risks associated with contingent fee arrangements. In fee-generating cases where a large damage recovery is likely, the contingent fee arrangement, by its very nature, helps compensate the attorneys for the risks involved. This can be especially true in antitrust cases where treble damages are available. The fee, based on a percentage of the total recovery, may be generous, yet the plaintiff in such situations may recover even more than actual damages after paying such fee. Further, the deterrent effect on the defendant should adequately be accomplished by assessing treble damages plus a normal attorney's fee without enhancement for its contingency under those circumstances.

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EXHIBIT 4

534 F.3d 1106
United States Court of Appeals,
Ninth Circuit.

Mario R. **MORENO**, Plaintiff–Appellant,
v.
CITY OF **SACRAMENTO**; Max Fernandez; Joshua Pino; John Vanella, Defendants–Appellees,
and
Voluntary Dispute Resolution Neutral, Defendant.

No. 06–15021. Argued & Submitted Dec. 5, 2007. Submission Deferred Dec. 5, 2007.Submitted July 28, **2008**.Filed July 28, **2008**.

Synopsis

Background: After owner prevailed in § 1983 suit against **city** on claims of inverse condemnation, substantive due process, unreasonable search and seizure, and procedural due process violations, in connection with **city's** demolishing of owner's building, owner requested award of attorney fees. The United States District Court for the Eastern District of California, David F. Levi, J., awarded fees but reduced jury award to 40% lower than requested. Appeal was taken.

Holdings: The Court of Appeals, Kozinski, Chief Judge, held that:
1 25% reduction in requested hours for legal research lacked clear explanation;
2 50% reduction in trial preparation hours lacked clear explanation;
3 33% reduction in appeal preparation hours lacked clear explanation;
4 50% reduction for hours spent interviewing and investigating lacked clear explanation;
5 $50 per hour reduction in hourly rate was based on impermissible considerations; and
6 reduction in hourly rate was impermissibly double counted.

Vacated and remanded.

West Headnotes (32)

1 **Civil Rights**
Amount and Computation

Because attorney fee awards are not negotiated at arm's length, there is a risk of overcompensation for successful plaintiffs in a civil rights action, and thus, a district court awards only the fee deemed reasonable. 42 U.S.C.A. § 1988.

2 **Civil Rights**
Time Expended; Hourly Rates

In awarding attorney fees to a prevailing plaintiff in a civil rights action, the district court must strike a balance between granting sufficient fees to attract qualified counsel to civil rights cases and avoiding a windfall to counsel, by compensating counsel at the prevailing rate in the community for similar work, but no more and no less. 42 U.S.C.A. § 1988.

6 Cases that cite this headnote

3 **Civil Rights**
Amount and Computation

Under the "lodestar method" of calculating an attorney fee award, for a prevailing plaintiff in a civil rights action, a district court must start by determining how many hours were reasonably expended on the litigation, and then multiply those hours by the prevailing local rate for an attorney of the skill required to perform the litigation; the district court may then adjust upward or downward based on a variety of factors. 42 U.S.C.A. § 1988.

5 Cases that cite this headnote

4 **Civil Rights**
Time Expended; Hourly Rates

Under the lodestar method of calculating an attorney fee award, for a prevailing plaintiff in a civil rights action, the number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client. 42 U.S.C.A. § 1988.

5 Cases that cite this headnote

5 **Federal Courts**
Costs, Attorney Fees and Other Allowances

Court of Appeals reviews for abuse of discretion the district court's calculation of the reasonable hours and hourly rate for award of attorney fees to prevailing plaintiff in a civil rights action. 42 U.S.C.A. § 1988.

5 Cases that cite this headnote

6 **Civil Rights**
Taxation

When the district court awards attorney fees to a prevailing plaintiff in a civil rights action, the court must explain how it came up with the amount; the explanation need not be elaborate, but it must be comprehensible, or in other words, the explanation must be concise but clear. 42 U.S.C.A. § 1988.

5 Cases that cite this headnote

7 **Civil Rights**
Taxation

Where the difference between the lawyer's request for attorney fees, after prevailing in a civil rights action, and the district court's award is relatively small, a somewhat cursory explanation by the court will suffice; but where the disparity is larger, a more specific articulation of the court's reasoning is expected. 42 U.S.C.A. § 1988.

2 Cases that cite this headnote

8 **Federal Courts**
Trial De Novo

Court of Appeals reviews de novo the legal principles underlying the attorney fee award to a prevailing plaintiff in a civil rights action. 42 U.S.C.A. § 1988.

9 **Civil Rights**
Taxation

District court's explanation of attorney fee award to prevailing plaintiff in civil rights action that reduced requested hours for legal research by 25%, on grounds that work was duplicative due to substantial time spent preparing motions and briefs dealing with similar issues, provided insufficient reasoning to sustain substantial 25% reduction, which required specific and clear explanation as to which fees were duplicative or why; counsel had already cut her fees by 9%, so additional cut of 25% would amount to almost one-third of requested fees, and previous appeal of district court's grant of summary judgment would have added to delay and rendered research stale. 42 U.S.C.A. § 1988.

8 Cases that cite this headnote

10 **Civil Rights**
Time Expended; Hourly Rates

The district court may reduce the number of hours awarded to prevailing plaintiff in civil rights action because the lawyer performed unnecessarily duplicative work. 42 U.S.C.A. § 1988.

11 Cases that cite this headnote

11 **Civil Rights**
Services or Activities for Which Fees May Be Awarded

A lawyer's time spent getting up to speed with previously performed research due to stale work product from litigation that has gone on for many years is duplication of work, but necessary duplication, when considering award of attorney fees for prevailing plaintiff in civil rights action. 42 U.S.C.A. § 1988.

6 Cases that cite this headnote

12 **Civil Rights**
Time Expended; Hourly Rates

Generally, for award of attorney fees, the district court should defer to the winning lawyer's professional judgment as to how much time he was required to spend to prevail in a civil rights action. 42 U.S.C.A. § 1988.

7 Cases that cite this headnote

13 **Civil Rights**
Amount and Computation

Civil Rights

Taxation

For award of attorney fees to prevailing plaintiff in a civil rights action, the district court can impose a small reduction, no greater than a 10 percent "haircut" based on its exercise of discretion and without a more specific explanation. 42 U.S.C.A. § 1988.

7 Cases that cite this headnote

14 **Civil Rights**

Taxation

District court's sole opaque explanation as "excessive," to support 50% reduction in requested hours for counsel's preparation for first two trial dates, while not reducing requested hours for third trial date, in awarding attorney fees to prevailing plaintiff in civil rights action, was insufficiently clear reasoning to sustain substantial 50% reduction; reduction of 50% amounted to 20% of total fees billed for trial, counsel had already cut her fees by 9%, and time spent preparing for first trial would have been of relatively little use by time case was actually presented to jury three years later. 42 U.S.C.A. § 1988.

5 Cases that cite this headnote

15 **Civil Rights**

Time Expended; Hourly Rates

In calculating an attorney fee award for prevailing plaintiff in civil rights action, necessary duplication of attorney hours, based on the vicissitudes of the litigation process, cannot be a legitimate basis for a fee reduction; it is only where the lawyer does unnecessarily duplicative work that the district court may legitimately cut the hours. 42 U.S.C.A. § 1988.

7 Cases that cite this headnote

16 **Civil Rights**

Costs and Fees on Appeal

District court's explanation for 33% reduction in requested hours for counsel's preparation for first appeal, on grounds that counsel spent twice as long on appeal than on summary judgment, was insufficiently clear reasoning to sustain substantial 33% reduction in awarding attorney fees to prevailing plaintiff in civil rights action; plaintiff lost summary judgment, but ultimately won on appeal, and counsel had already cut her fees by 9%. 42 U.S.C.A. § 1988.

1 Cases that cite this headnote

17 **Civil Rights**

Costs and Fees on Appeal

Federal Courts

Costs and Attorney Fees

Court of Appeals looks more closely at fee awards involving appeals in civil rights actions. 42 U.S.C.A. § 1988.

18 **Civil Rights**

Taxation

If the district court believes the overall attorney fee award to a prevailing plaintiff in a civil rights action is too high, the court needs to say so and explain why, rather than making summary cuts in various components of the award. 42 U.S.C.A. § 1988.

2 Cases that cite this headnote

19 **Federal Courts**

Costs and Attorney Fees

While the Court of Appeals accords deference to the district court's explanation of why a requested attorney fee is excessive, in reducing requested fees for a prevailing plaintiff in a civil rights action, deference is required only if the district court provides an explanation that can be meaningfully reviewed. 42 U.S.C.A. § 1988.

2 Cases that cite this headnote

20 **Civil Rights**

Taxation

Findings of duplicative work should not become a shortcut for reducing an award of attorney fees to prevailing plaintiff in a civil rights action

without identifying just why the requested fee was excessive and by how much. 42 U.S.C.A. § 1988.

2 Cases that cite this headnote

21 **Civil Rights**
Taxation

District court's conclusory explanation for 50% reduction in requested hours for counsel's time spent performing interviews and investigation, on grounds that counsel spent unreasonable amount of time engaged in such activities, despite finding that activities were appropriate, was insufficiently clear reasoning to sustain substantial 33% reduction, in awarding attorney fees to prevailing plaintiff in civil rights action. 42 U.S.C.A. § 1988.

4 Cases that cite this headnote

22 **Federal Courts**
Reasons for Decision

While hour-by-hour explanations are not required from the district court, in awarding attorney fees to prevailing plaintiffs in civil rights actions, conclusory findings do not allow for meaningful appellate review. 42 U.S.C.A. § 1988.

23 **Civil Rights**
Time Expended; Hourly Rates

The hourly rate for successful civil rights attorneys is to be calculated by considering certain factors, including the novelty and difficulty of the issues, the skill required to try the case, whether or not the fee is contingent, the experience held by counsel, and fee awards in similar cases. 42 U.S.C.A. § 1988.

3 Cases that cite this headnote

24 **Civil Rights**
Time Expended; Hourly Rates
Civil Rights
Taxation

District court's speculation that other law firms would have used less skilled attorney rather than lead counsel to perform document review was impermissible consideration for reducing successful counsel's rate by $50 dollars, from $300 to $250 per hour, based on improper policy of awarding such rate to prevailing plaintiffs in civil rights actions. 42 U.S.C.A. § 1988.

3 Cases that cite this headnote

25 **Civil Rights**
Time Expended; Hourly Rates
Civil Rights
Taxation

While it is appropriate to consider the skill required to perform a task, in awarding attorney fees to prevailing plaintiff in civil rights action the district court may not set the attorney's fee based on speculation as to how other firms would have staffed the case. 42 U.S.C.A. § 1988.

3 Cases that cite this headnote

26 **Civil Rights**
Amount and Computation

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, the district court's inquiry must be limited to determining whether the fees requested by the particular legal team are justified for the particular work performed and the results achieved in that particular case. 42 U.S.C.A. § 1988.

1 Cases that cite this headnote

27 **Civil Rights**
Time Expended; Hourly Rates
Civil Rights
Taxation

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, the district court may permissibly look to the hourly rates charged by comparable attorneys for similar work, but may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests. 42 U.S.C.A. § 1988.

5 Cases that cite this headnote

28 **Civil Rights**
Time Expended; Hourly Rates

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, the difficulty and skill level of the work performed, and the result achieved, not whether it would have been cheaper to delegate the work to other attorneys, must drive the district court's decision. 42 U.S.C.A. § 1988.

1 Cases that cite this headnote

29 **Civil Rights**
Time Expended; Hourly Rates

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, district judges can consider the fees awarded by other judges in the same locality in similar cases, but adopting a court-wide policy, even an informal one, of "holding the line" on fees at a certain level goes well beyond the discretion of the district court. 42 U.S.C.A. § 1988.

1 Cases that cite this headnote

30 **Civil Rights**
Time Expended; Hourly Rates

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, if the lodestar leads to an hourly rate that is higher than past practice, the district court must award that rate without regard to any contrary practice. 42 U.S.C.A. § 1988.

31 **Civil Rights**
Time Expended; Hourly Rates

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, double counting of reductions of the hourly rate for some tasks is impermissible. 42 U.S.C.A. § 1988.

32 **Civil Rights**
Time Expended; Hourly Rates

District court's double counting of reduction in hourly rate of attorney fees for summarizing depositions was impermissible in granting fee award to prevailing plaintiff in civil rights action. 42 U.S.C.A. § 1988.

Attorneys and Law Firms

1110* Andrea M. Miller, Nageley, Meredith & Miller, Inc., **Sacramento, CA, for the appellant.
Thomas A. Cregger, Randolph Cregger & Chalfant LLP, **Sacramento**, CA, for the appellees.

Appeal from the United States District Court for the Eastern District of California; David F. Levi, District Judge, Presiding. D.C. No. CV–01–00725–DFL/DAD.

Before: ALEX KOZINSKI, Chief Judge, ROBERT E. COWEN * and HAWKINS, Circuit Judges.

Opinion

KOZINSKI, Chief Judge:

We consider various issues pertaining to the district court's award of attorneys' fees under 42 U.S.C. § 1988.

Facts

Moreno sued the **City** of **Sacramento** and several other defendants, alleging that they violated his civil rights by seizing and destroying his property without due process. After lengthy pre-trial proceedings and a previous appeal, a jury awarded **Moreno** $717,000 in compensatory and punitive damages. **Moreno's** principal trial counsel, Andrea Miller, sought an award of attorneys' fees under 42 U.S.C. § 1988. Miller requested $704,858.07 for herself and her staff, including compensation for 1,973.6 hours of her own time, at a rate of $300 per hour. This request excluded around 9 percent of the total hours actually spent on the case.

The district court reduced the hours further, concluding that around a quarter to a third of the time spent on research, appeal and trial preparation and half the time spent on investigation was unnecessary. **1111* The district court also reduced Miller's hourly rate to that of a paralegal for the time she spent summarizing depositions. Finally, the district court

reduced Miller's hourly rate from $300 to $250 an hour. The resulting award was $428,053.00, around 40 percent lower than requested.

Analysis

1 Lawyers must eat, so they generally won't take cases without a reasonable prospect of getting paid. Congress thus recognized that private enforcement of civil rights legislation relies on the availability of fee awards: "If private citizens are to be able to assert their civil rights, and if those who violate the Nation['s] 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. No. 94–1011, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910. [1] At the same time, fee awards are not negotiated at arm's length, so there is a risk of overcompensation. A district court thus awards only the fee that it deems reasonable. *See Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The client is free to make up any difference, but few do. As a practical matter, what the district court awards is what the lawyer gets.

2 In making the award, the district court must strike a balance between granting sufficient fees to attract qualified counsel to civil rights cases, ***City** of Riverside v. Rivera,* 477 U.S. 561, 579–80, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986), and avoiding a windfall to counsel, *see Blum v. Stenson,* 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (quoting S.Rep. No. 94–1011, at 6 (1976)). The way to do so is to compensate counsel at the prevailing rate in the community for similar work; no more, no less.

3 4 5 In this case, the district court used the lodestar method to calculate fees. Under this method, a district court must start by determining how many hours were reasonably expended on the litigation, and then multiply those hours by the prevailing local rate for an attorney of the skill required to perform the litigation. *See Blum,* 465 U.S. at 895, 104 S.Ct. 1541. The district court may then adjust upward or downward based on a variety of factors. *Hensley,* 461 U.S. at 434, 103 S.Ct. 1933. The number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client. *Id.* We review the district court's calculation of the reasonable hours and hourly rate for abuse of discretion. *See Camacho v. Bridgeport Fin., Inc.,* 523 **F.3d** 973, 977–78 (**9th Cir.2008**).

6 7 8 When the district court makes its award, it must explain how it came up with the amount. The explanation need not be elaborate, but it must be comprehensible. As *Hensley* described it, the explanation must be "concise but *clear.*" 461 U.S. at 437, 103 S.Ct. 1933 (emphasis added). Where the difference between the lawyer's request and the court's award is relatively small, a somewhat cursory explanation will suffice. But where the disparity is larger, a more specific articulation of the court's reasoning is expected. *See Bogan v. **City** of Boston,* 489 **F.3d** 417, 430 (1st Cir.2007). We review the legal principles underlying the fee award de novo. *Ferland v. Conrad* ***1112** *Credit Corp.,* 244 **F.3d** 1145, 1148 (**9th Cir**.2001).

9 **1. Reduction for Duplicative Work:** Plaintiff requested fees for 227.9 hours of research, and the district court awarded fees for 171 hours. The district court found the hours requested to be excessive, suggesting that some of the research was duplicative because counsel spent substantial time preparing motions and briefs dealing with similar issues.

10 11 The court may reduce the number of hours awarded because the lawyer performed unnecessarily duplicative work, but determining whether work is unnecessarily duplicative is no easy task. When a case goes on for many years, a lot of legal work product will grow stale; a competent lawyer won't rely entirely on last year's, or even last month's, research: Cases are decided; statutes are enacted; regulations are promulgated and amended. A lawyer also needs to get up to speed with the research previously performed. All this is duplication, of course, but it's *necessary* duplication; it is inherent in the process of litigating over time. Here, there was a previous appeal (of the district court's grant of summary judgment) which would have added to the delay and rendered much of the research stale. One certainly expects *some* degree of duplication as an inherent part of the process. There is no reason why the lawyer should perform this necessary work for free.

12 It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning. By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.

13 The district court has a greater familiarity with the case than we do, but even the district court cannot tell by a cursory examination which hours are unnecessarily duplicative. Nevertheless, the district court can impose a small reduction, no greater than 10 percent—a "haircut"—based on its exercise of discretion and without a more specific explanation. Here, however, the district court cut the number of hours by 25 percent, and gave no specific explanation as to which fees it thought were duplicative, or why. While we don't require the explanation to be elaborate, it must be clear, and this one isn't. Plaintiff's counsel had already cut her fees by 9 percent, so an additional 25 percent cut would amount to almost one third. The court has discretion to make such an adjustment, but we cannot sustain a cut that substantial unless the district court articulates its reasoning with more specificity. We therefore conclude that the district court's explanation is insufficient to sustain a 25 percent cut based on duplication.

14 Plaintiff also requested fees for 266.6 hours of preparation for the first two trial dates, July 2002 and February 2005, without indicating how much time was spent preparing for each date. Plaintiff requested fees for 340.7 hours for the third trial date, May 2005. The district court awarded the full hours for the third trial date, but reduced the hours for the first two dates by half, to 133.3. As with the research hours, the cut here is substantial, amounting to 20 percent of the total fees billed for trial, in addition to the 9 percent already cut by plaintiff's counsel.

15 The district court did not explain the necessity or degree of the cut, other than to say that the amount of time plaintiff's **1113* counsel spent was "excessive." We also find it curious—and somewhat arbitrary—that the district court simply cut the costs of preparation for the first two trials by 50 percent. The first two trial dates were three years apart; the time spent preparing for the first trial would be of relatively little use by the time the case was actually presented to the jury, so it is difficult to understand how a cut of those fees would be justified, much less a cut of a full 50 percent. The second and third trial dates were only about three months apart, so it is possible there was some duplication. After all, duplication always happens when a task is started, stopped and then taken up again later. But necessary duplication—based on the vicissitudes of the litigation process—cannot be a legitimate basis for a fee reduction. It is only where the lawyer does *unnecessarily* duplicative work that the court may legitimately cut the hours. Of course, the court might have some specific reason for believing that work is excessive or duplicative, but it must explain why. We cannot sustain a 50 percent cut, over and above the 9 percent cut plaintiff's counsel already imposed on herself, without a clear explanation that we can review. The opaque explanation provided here is an insufficient basis for the district court's Draconian cut.

16 17 The district court awarded fees for 180 hours of time spent preparing the earlier appeal. Plaintiff requested 269.3 hours. We "look more closely" at fee awards involving appeals, *Suzuki v. Yuen,* 678 F.2d 761, 762–63 (**9th Cir.**1982), and can find no justification for a cut of 33 percent, on top of plaintiff's counsel's own cut. The district court noted that plaintiff's counsel spent twice as long on the appeal than on the summary judgment, but this does not mean the additional time spent on appeal was unjustified; after all, plaintiff lost claims at summary judgment that he won on appeal. More fundamentally, preparing summary judgment motions and appeals are not commensurate tasks, though they have some elements in common. What matters is whether spending more time winning on appeal than losing on summary judgment was an imprudent use of hours. The district court points to nothing to support the conclusion that it was.

18 19 20 Cutting fees for "duplication of effort" appears to have been an easy way for the district court to reduce an award it may have felt was too high. But if the court believes the overall award is too high, it needs to say so and explain why, rather than making summary cuts in various components of the award. While we accord deference to the district court's explanation of why a requested fee is excessive, we can only do so if the district court provides an explanation that we can meaningfully review. Findings of duplicative work should not become a shortcut for reducing an award without identifying just why the requested fee was excessive and by how much. As the reduction passes well beyond the safety zone of a haircut, which plaintiff's counsel seems to have given herself already, the district court's justification for the cuts must be weightier and more specific.

21 22 **2. Interviews and Investigation:** For many of the same reasons, the district court failed to adequately justify its reduction of the time spent performing interviews and investigation, from 137.3 hours to 68.7 hours. This 50 percent reduction is not supported by the district court's cursory explanation. The district court apparently rejected defendant's argument for the cut—that the interviews and investigation

were unnecessary because much of the information was not used at trial—and held that the work was "appropriate." But the court then **1114* concluded that counsel "spent an unreasonable amount of time engaged in this activity," and that "[t]his time should be reduced by 50%," without further explaining this dramatic reduction. *See Gates v. Deukmejian,* 987 F.2d 1392, 1400 (**9th Cir.**1993) (as amended) ("the use of percentages" does not "discharge[ ] the district court from its responsibility to set forth a 'concise but clear' explanation of its reason for choosing a given percentage reduction"). While we do not require hour-by-hour explanations from the district court, the conclusory finding of the court here does not allow for meaningful appellate review.

23 **24** **3. Impermissible Methodologies:** The hourly rate for successful civil rights attorneys is to be calculated by considering certain factors, including the novelty and difficulty of the issues, the skill required to try the case, whether or not the fee is contingent, the experience held by counsel and fee awards in similar cases. *See Hensley,* 461 U.S. at 430 n. 3, 103 S.Ct. 1933 (citing *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir.1974)). Here, the district court properly considered the difficulty of trying the case, the rates charged by other attorneys in similar lawsuits, the skill of plaintiff's counsel, that plaintiff obtained excellent results and that counsel was to be compensated only if the lawsuit was successful. The district court suggested that an appropriate rate in light of these factors would be $300 an hour. So far, so good.

25 But the district court went on to consider impermissible factors. The district court reduced the hourly rate from $300 an hour to $250 an hour, in part because it thought that other firms could have staffed the case differently. The court speculated that other firms would have used a less skilled attorney, rather than the lead counsel, to perform document review. While it is appropriate to consider the skill required to perform a task, *Hensley,* 461 U.S. at 430 n. 3, 103 S.Ct. 1933, the district court may not set the fee based on speculation as to how other firms would have staffed the case.

The cost effectiveness of various law firm models is an open question,[2] and it is by no means clear whether a larger law firm would have billed more or less for the entire case. The district court may have **1115* been right that a larger firm would employ junior associates who bill at a lower rate than plaintiff's counsel, but a larger firm would also employ a partner—likely billing at a higher rate than plaintiff's counsel—to supervise them. And the partner in charge would still have had to familiarize himself with the documents, a step that plaintiff's counsel avoided by reviewing the documents herself. Moreover, lead counsel can doubtless complete the job more quickly, being better informed as to which documents are likely to be irrelevant, and which need to be examined closely. Modeling law firm economics drifts far afield of the *Hensley* calculus and the statutory goal of sufficiently compensating counsel in order to attract qualified attorneys to do civil rights work.

26 **27** **28** The district court's inquiry must be limited to determining whether the fees requested by this particular legal team are justified for the particular work performed and the results achieved in this particular case. The court may permissibly look to the hourly rates charged by comparable attorneys for similar work, but may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests. The difficulty and skill level of the work performed, and the result achieved—not whether it would have been cheaper to delegate the work to other attorneys—must drive the district court's decision.

The court also erred by applying what appears to be a de facto policy of awarding a rate of $250 an hour to civil rights cases. At the fees hearing, the district court noted that "300 an hour is a fairly big step for me, and I think for the court generally" and that "the court has pretty much held the line at 250 [an hour] for the past ten years." While the district court's final fee order does not reiterate this reasoning, an effort to adhere to this de facto policy probably influenced the final rate awarded, which was $250 an hour. Nothing else supports the $50 an hour reduction.

29 **30** District judges can certainly consider the fees awarded by other judges in the same locality in similar cases. But adopting a court-wide policy—even an informal one—of "holding the line" on fees at a certain level goes well beyond the discretion of the district court. One problem with any such policy is that it becomes difficult to revise over time, as economic conditions change; here the rate apparently hadn't changed for 10 years, and even a $50 increase in the hourly rate was considered a "big step ... for the court generally." Unless carefully administered and updated, any such policy becomes a strait-jacket. More fundamentally, such a policy —no matter how well intentioned or administered—is inconsistent with the methodology for awarding fees that the Supreme Court and our court has adopted. The district court's function is to award fees that reflect economic conditions in the district; it is not to "hold the line" at a particular rate, or to resist a rate because it would be a "big step." If the lodestar

leads to an hourly rate that is higher than past practice, the court must award that rate without regard to any contrary practice.

31 **32** The district further erred by double counting the reduction in hourly rate for some tasks; such double counting is impermissible. *See Cunningham v. County of Los Angeles,* 879 F.2d 481, 489 (**9th Cir.**1988). It is possible, of course, for a district court to reduce both the hours and hourly rate awarded for some tasks. But the district court must exercise extreme care in making such reductions to avoid double counting. Here, the district court reduced the reasonable hourly rate from $300 to $75 an hour, the paralegal **1116* rate, for 275.2 hours spent summarizing depositions, based on its conclusion that summarizing depositions was simple enough for a paralegal to perform. But the district court then used the simplicity of summarizing depositions to justify its reduction in the reasonable hourly rate for the remainder of the case from $300 to $250 an hour. Thus, the district court double counted its reduction for summarizing depositions: Each hour spent summarizing depositions was already reduced to $75 an hour, so there was no reason to reduce the overall rate. The district court may properly use the simplicity of a given task as justification for a reduction in the rate for the hours spent performing that task or as justification for a reduction in the overall rate, but not both.

* * *

The district court has discretion to determine the appropriate fee award, because its familiarity with the case allows it to distinguish reasonable from excessive fee requests. But gut feelings are not enough; if the district court is going to make substantial cuts to a winning lawyer's fee request, it needs to explain why with sufficient specificity that the lawyer can meaningfully object and we can meaningfully review the objection. We can't defer to reasoning that we can't review; if all the district court offers is a conclusory statement that a fee request is too high, then we can't tell if the court is applying its superior knowledge to trim an excessive request or if it is randomly lopping off chunks of the winning lawyer's reasonably billed fees.

We are well aware that awarding attorneys' fees to prevailing parties in civil rights cases is a tedious business. And it may be difficult for the district court to identify the precise spot where a fee request is excessive. But the burden of producing a sufficiently cogent explanation can mostly be placed on the shoulders of the losing parties, who not only have the incentive, but also the knowledge of the case to point out such things as excessive or duplicative billing practices. If opposing counsel cannot come up with specific reasons for reducing the fee request that the district court finds persuasive, it should normally grant the award in full, or with no more than a haircut.

The district court's fee award is vacated and the case is remanded with instructions that the court enter a new fee award consistent with this opinion.

VACATED AND REMANDED.

Parallel Citations

08 Cal. Daily Op. Serv. 9624

Footnotes

* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

1 Congress emphasized the importance of attorneys' fees in cases seeking injunctive relief, where there is no monetary light at the end of the litigation tunnel: "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts." S.Rep. No. 94-1011, at 3 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

2 Several courts have struggled with this issue. Some have opined that "[n]o rule of court should force a trial attorney to assign the duties of assembling documents and files for trial to an underling upon pain of not being paid for the work," *M.S.R. Imports, Inc. v. R.E. Greenspan Co., Inc.,* 574 F.Supp. 31, 34 (E.D.Pa.1983), or noted that litigation staffed only by senior attorneys might reduce costs, *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo,* 574 F.Supp. 994, 999 (E.D.N.Y.1983), *vacated on other grounds,* 737 F.2d 1253 (2d Cir.1984); *see also United States v. **City** & County of San Francisco,* 748 F.Supp. 1416, 1432 (N.D.Cal.1990) (noting that the "the efficacy of the pyramidal staffing pattern is a matter of some debate"), *remanded in part on other grounds by Davis v. **City** & County of San Francisco,* 976 F.2d 1536, 1548 (**9th Cir.**1992).

Other courts have adhered more to the pyramid structure in measuring fee awards. *See, e.g., Loughner v. Univ. of Pittsburgh,* 260 **F.3d** 173, 180 (3d Cir.2001) ("A claim by a lawyer for maximum rates for telephone calls with a client, legal research, a letter concerning a discovery request, the drafting of a brief, and trial time in court is neither fair nor reasonable. Many of these tasks are effectively performed by administrative assistants, paralegals, or secretaries."); *Bee v. Greaves,* 669 F.Supp. 372, 377 (D.Utah

1987), *rev'd in part on other grounds,* 910 F.2d 686 (10th Cir.1990) (reducing overall rate awarded because less experienced attorneys could have performed much of the work); *Mautner v. Hirsch,* 831 F.Supp. 1058, 1076 (S.D.N.Y.1993), *rev'd in part on other grounds,* 32 **F.3d** 37 (2d Cir.1994) (reducing lodestar for using senior attorneys when junior attorneys and paralegals were available).

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EXHIBIT 5

896 F.2d 403
United States Court of Appeals,
Ninth Circuit.

UNITED STEELWORKERS OF AMERICA; United Steelworkers of America, Local No. 4776; International Association of Machinists and Aerospace Workers, Lodge No. 1357; International Brotherhood of Electrical Workers, Local 523; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 741; International Union of Operating Engineers, Local 428; United Transportation Union, Local 807; Ronald Rhoads, William Hunter, William Puffer, Diana Pino Vega, Shea Burkhead (Olaiz), Amado Gonzales, Art Galvez, Antonio Santiago, David Williams, Jose Ortiz, Richard Olea, Jerry Wohlgamuth, Natalie Munoz (Clark) and Soila Bon, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

PHELPS DODGE CORPORATION, a New York corporation; Arizona Department of Public Safety; County of Pima, a political subdivision of Arizona; James Sheets; Dan Ludwiczak; Ron Lee; John Doe Jett; John Gilmartin; Clarence Dupnik, individually and as Pima County Sheriff; and David Allen, individually and in official capacity, Defendants-Appellees.

No. 88-2517. Argued and Submitted June 7, 1989. Decided Feb. 16, **1990**.

Unions brought civil rights action against employer and local law enforcement officials for conspiracy to deprive striking employees of constitutional rights. The District Court granted summary judgment for employer, and unions appealed. After affirming, 833 **F.2d** 804, the Court of Appeals decided to rehear en banc, 846 **F.2d** 1246. On rehearing, the Court of Appeals, 865 **F.2d** 1539, reversed. After trial in which the plaintiffs won a jury verdict against several defendants, the plaintiffs moved for an award of attorney fees. The United States District Court for the District of Arizona, Alfredo C. Marquez, J., awarded plaintiffs $150,000 in attorney fees, and plaintiffs appealed. The Court of Appeals, Canby, Circuit Judge, held that: (1) district court abused its discretion in award of attorney fees when it failed to adequately document reasons for wholesale reduction in number of hours from over 3,500 to 1,500 and its reduction of requested hourly rates of $130 and $150 to $100 per hour; (2) out-of-pocket litigation expenses were reimbursable as part of attorneys' fees; (3) time reasonably spent by law clerks and paralegals was compensable; and (4) plaintiffs were entitled to fees for time spent on appeal.

Reversed and remanded.

West Headnotes (6)

1 **Civil Rights**
Time Expended; Hourly Rates

District court abused its discretion in making award of attorney fees for 1,500 hours to victorious civil rights plaintiffs who had requested fees for over 3,500 hours and had submitted supporting documentation; court's concerns about billing for hours which were unnecessary or not properly related to claims did not justify its wholesale reductions in hours without adequate documentation of reasons for reductions. 42 U.S.C.A. §§ 1983, 1988.

12 Cases that cite this headnote

2 **Civil Rights**
Time Expended; Hourly Rates

In determining attorney fee award for victorious civil rights plaintiffs, hours actually expended in litigation were not to be disallowed without a supporting rationale. 42 U.S.C.A. § 1988.

20 Cases that cite this headnote

3 **Civil Rights**
Time Expended; Hourly Rates

Requested hourly rates of $130 and $150 per hour for attorneys who represented victorious civil rights plaintiffs were reasonable hourly rates in line with prevailing community rates; all evidence produced by plaintiffs supported market rate between $125 and $160 per hour, defendants failed to support their disagreement with the rates with any affidavits or evidence of their own regarding legal rates in the community, and there was no determination that lawyers performed

below level of expertise that would command those rates. 42 U.S.C.A. § 1988.

71 Cases that cite this headnote

4 **Civil Rights**
Services or Activities for Which Fees May Be Awarded

Reasonable out-of-pocket litigation expenses were reimbursable to victorious civil rights plaintiff as part of attorney fee award, distinct from costs already awarded to plaintiffs under separate provision. 42 U.S.C.A. § 1988; 28 U.S.C.A. § 1920.

20 Cases that cite this headnote

5 **Civil Rights**
Services or Activities for Which Fees May Be Awarded

Civil Rights
Time Expended; Hourly Rates

Time reasonably spent by law clerks and paralegals was compensable to victorious civil rights plaintiffs under attorney fee provision; requested rate of $15 per hour for law clerks and paralegals was adequately supported by record as being in line with prevailing community rates. 42 U.S.C.A. § 1988.

53 Cases that cite this headnote

6 **Civil Rights**
Costs and Fees on Appeal

Successful civil rights plaintiffs who successfully challenged amount of attorney fees awarded by district court were entitled to fees for time spent on appeal. U.S.Ct. of App. 9th Cir.Rule 39-1.6, 28 U.S.C.A.

3 Cases that cite this headnote

Attorneys and Law Firms

**405* Michael H. Gottesman, Bredhoff and Kaiser, Washington, D.C., for plaintiffs-appellants.

Lyle Aldridge Jones, Edwards, Smith and Kofron, Tucson, Ariz., for defendants-appellees.

Appeal from the United States District Court for the District of Arizona.

Before TANG, CANBY, and O'SCANNLAIN, Circuit Judges.

Opinion

CANBY, Circuit Judge:

United Steelworkers of America and other plaintiffs appeal the district court's order awarding them attorneys' fees under 42 U.S.C. § 1988 in an amount significantly less than they requested. There is no dispute that plaintiffs meet the prerequisites for an award of fees under section 1988. The only issue on appeal is the amount of the fee awarded. We review the district court's award for an abuse of discretion. *Quesada v. Thomason,* 850 **F.2d** 537, 538 (**9th Cir.**1988). Finding such an abuse, we reverse and remand for recalculation of the fee.

BACKGROUND AND PROCEDURAL HISTORY

Six unions and fifteen individuals, the plaintiffs here, filed suit against Pima County, various officials and employees of the county, the Arizona Department of Public Safety, and the **Phelps Dodge** Corporation for violations of the plaintiffs' civil rights under 42 U.S.C. § 1983. The events triggering the lawsuit stem from a strike at the **Phelps Dodge** copper mining operations in Ajo, Arizona.

The plaintiffs won a jury verdict against Pima County, the Pima County Sheriff's office, and the Sheriff and several deputy sheriffs named individually as defendants. Other defendants had been dismissed prior to trial, or had won summary judgment on immunity grounds.[1] **Phelps Dodge** was granted summary judgment prior to trial, but that decision was later appealed and reversed by this court. *United Steelworkers of Am. v.* ***Phelps Dodge Corp.,*** 865 **F.2d** 1539 (**9th Cir.**1989) (en banc).

The plaintiffs subsequently filed an application, under 42 U.S.C. § 1988, for attorneys' fees. They sought compensation for 3,656.40 hours, which were billed at three different rates, for the three attorneys who worked on the case. Michael McCrory, the lead counsel, billed 2,424.95 hours at $130 per hour. Gerald Pollock billed 317.50 hours at $150 per hour, and Sherry Teachnor billed 913.95 hours at $100 per hour. In

addition, the application requested $20,309.25 for time billed by law students working as law clerks and by paralegals, and $29,790.91 for out-of-pocket litigation expenses. The plaintiffs had already been awarded $31,612.40 for costs under 28 U.S.C. § 1920.

The application for fees also disclosed that one of the union plaintiffs, United Steelworkers of America, had entered into a fee agreement with plaintiffs' attorneys. The agreement provided that United Steelworkers would pay hourly attorneys' fees and out-of-pocket expenses during the course of the litigation, but would be reimbursed *406 for those fees and expenses out of any statutory fee award.

The district court, in an order dated January 29, 1988, awarded plaintiffs $150,000 in attorneys' fees, and did not award any litigation expenses. The court did not specify the number of hours it deemed reasonable, or the hourly rate at which the court compensated the attorneys. The plaintiffs filed a motion to reconsider and clarify the award. The district court filed an order May 10, 1988, which stated that it had used an hourly fee of $100 per hour, and had determined that 1,500 hours could reasonably have been expended on the litigation. Plaintiffs filed a notice of appeal on April 5, 1988. [2]

DISCUSSION

A prevailing party in a section 1983 action is entitled to a reasonable attorneys' fee under section 1988 absent exceptional circumstances. *See Hensley v. Eckerhart,* 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983). To determine what fee should be awarded, the court must first determine the "lodestar," which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Id.* at 433, 103 S.Ct. at 1939; *Chalmers v. City of Los Angeles,* 796 **F.2d** 1205, 1210 (**9th Cir.**1986), *opinion amended,* 808 **F.2d** 1373 (**9th Cir.**1987). The *Kerr* factors are used in this preliminary determination of the lodestar. [3] *See Chalmers,* 796 **F.2d** at 1211. After the lodestar is determined, the court may make adjustments, depending on the circumstances of the case. *Blum v. Stenson,* 465 U.S. 886, 897, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). Factors subsumed in the original determination of reasonable hours and rates, however, should not be used to adjust the lodestar figure. *Id.* at 898-99, 104 S.Ct. at 1548-49; *Jordan v. Multnomah County,* 815 **F.2d** 1258, 1262 (**9th Cir.**1987). Calculating the lodestar is the critical inquiry, therefore, because there is a strong presumption that it is a reasonable fee. *Jordan,* 815 **F.2d** at 1262.

The district court must provide a concise but clear explanation of its reasons for the fee award. *Hensley,* 461 U.S. at 437, 103 S.Ct. at 1941. Explicit mathematical calculations are not required, but without a clear explanation of what the district court did, this court cannot review the award in a meaningful manner. *Chalmers,* 796 **F.2d** at 1213. Where the fee award differs significantly from that offered and documented by counsel, some explanation as to how the district court arrived at its figures is necessary. *Domingo v. New England Fish Co.,* 727 **F.2d** 1429, 1447, *modified,* 742 **F.2d** 520 (**9th Cir.**1984).

1. *Reasonable Hours*

1 In this case, the district court awarded fees for 1,500 hours of work. The plaintiffs had requested, and supported in their documentation, fees for 3,656.40 hours. Without an indication from the district *407 court of how it arrived at 1,500 hours, we find ourselves unable to review the district court's determination of the number of hours reasonably expended on the litigation. The number of hours was significantly reduced, with inadequate documentation of the reasons for the wholesale reductions in hours. The district court apparently had some concerns about hours billed that may not have been necessary or properly related to the claims, but there is no indication of the number of hours deducted for these reasons. In addition, the district court apparently disallowed hours spent on a moot court trial run, and on consultations regarding a jury project related to the case. We see no reason why these hours cannot be included in a fee award as long as the number of hours spent was reasonable.

2 Although we conclude that the district court abused its discretion in fixing the hours to be compensated, we are unable to determine the proper number of hours that should be compensated. The district court is in a better position to determine the reasonableness of the hours requested, and should initially exercise that discretion. We therefore remand to the district court to recalculate the number of hours that should be compensated, and to provide explanations of how it arrived at the final number of hours it awards. We emphasize that hours actually expended in the litigation are not to be disallowed without a supporting rationale.

2. *Reasonable Rate*

3 We agree with the plaintiffs that the district court abused its discretion in determining that $100 was the appropriate rate at which to award fees. The rate to be used for fees under section 1988 is the prevailing market rate in the relevant community. *Blum v. Stenson,* 465 U.S. 886, 895, 104

S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984). Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate. *See Chalmers,* 796 **F.2d** at 1214. All the evidence produced by the plaintiffs supported a market rate between $125 and $160 per hour. Although the defendants disagreed with this evidence, they did not support their arguments with any affidavits or evidence of their own regarding legal rates in the community. The court did not determine that the lawyers performed below the level of expertise that would command those rates, *Jordan,* 815 **F.2d** at 1262-63, and apparently billed all three attorneys at the same rate, although different rates were requested.[4] On this record, therefore, attorneys McCrory's and Pollock's requested fees of $130 and $150 per hour, respectively, were established as being in line with prevailing community rates. On remand, the court must presume those requested rates are reasonable. *See Jordan,* 815 **F.2d** at 1263; *In re Hill,* 775 **F.2d** 1037, 1040 (**9th Cir.**1985) (abuse of discretion when record contains no evidence upon which district court could have based fee decision).

3. *Out-of-Pocket Expenses*

4 Out-of-pocket litigation expenses are reimbursable as part of the attorneys' fee, distinct from the costs already awarded to plaintiffs under 28 U.S.C. § 1920. *Chalmers,* 796 **F.2d** at 1216 n. 7. The district court's reliance on *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987), in prohibiting an award of expenses is misplaced. Reasonable expenses are allowed as part of the fee. On this record, the expenses would appear to be reasonable. If the district court finds any of these expenses to be unreasonable, it should state its reasons and deduct expenses from the total.

4. *Law Clerks and Paralegals*

5 Similarly, time reasonably spent by law clerks and paralegals is compensable under section 1988. ***408** *Cameo Convalescent Center v. Senn,* 738 **F.2d** 836, 846 (**9th Cir.**1984), *cert. denied,* 469 U.S. 1106, 105 S.Ct. 780, 83 L.Ed.2d 775 (1985). The record adequately supports the requested rate of $15 per hour for law clerks and paralegals as being in line with prevailing community rates; there is no substantial evidence to the contrary. On remand, the district court should determine the number of hours reasonably expended by the law clerks and paralegals. The court should begin with the hours actually expended; any hours the district court finds unreasonable it should exclude with an explanation of its reasoning. Once reasonable hours are determined, they should be allowed at the rate of $15 per hour.

5. *Fees on Appeal*

6 Plaintiffs also request fees for the time spent on this appeal. They are entitled to them. *Southeast Legal Defense Group v. Adams,* 657 **F.2d** 1118, 1126 (**9th Cir.**1981). They should make their request for attorneys' fees on appeal in accordance with **Ninth Circuit** Rule 39-1.6.

CONCLUSION

The order of the district court is REVERSED, and the matter is REMANDED for recalculation of the attorneys' fee, and expenses in a manner consistent with this opinion.

Parallel Citations

133 L.R.R.M. (BNA) 2636, 114 Lab.Cas. P 56,173

Footnotes

1 These defendants included the justice of the peace, several named county attorneys, and the Arizona Department of Public Safety.

2 The defendants filed a motion to dismiss this case on the ground that we lack subject matter jurisdiction because of an untimely notice of appeal. Plaintiffs had relied on an extension of time granted by the district court in which to file a motion, under Rule 59, to reconsider the January order awarding fees. Defendants are correct that the district court did not have the power to extend the deadline in which to file a motion for new trial under Rule 59. *See* Fed.R.Civ.P. 6(b). A motions panel of this court, however, determined that we had subject matter jurisdiction under the doctrine of unique circumstances, which excuses an untimely filing of a notice of appeal when the party has, in good faith, relied on the court's extension of time. *See United Artists Corp. v. La Cage Aux Folles, Inc.,* 771 **F.2d** 1265, 1267-70 (**9th Cir.**1985). We agree with that determination and thus reach the merits of this appeal.

3 Several factors are outlined in *Kerr v. Screen Extras Guild,* 526 **F.2d** 67, 70 (**9th Cir.**1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976), to provide guidance in arriving at a reasonable attorney's fee. They include: 1) the time and labor required, 2) the novelty and difficulty of the questions involved, 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.

4 Plaintiffs do not appeal the hourly rate for attorney Teachnor because they requested a rate of $100 for her services.

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PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF FRESNO

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On August 24, 2011, I served the foregoing document(s) described as

NOTICE OF LODGING FEDERAL AUTHORITIES IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO NOTICE OF MOTION AND MOTION FOR ATTORNEYS FEES

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Kamala D. Harris
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General
1300 I Street, Suite 125
Sacramento, CA 94244-2550

___ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on August 24, 2011, at Long Beach, California.

___ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on August 24, 2011, at Long Beach, California.

_X_ (VIA OVERNIGHT MAIL As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on August 24, 2011, at Long Beach, California.

_X_ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

CLAUDIA AYALA