

STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED

2004 FEB 12 A 9:06

NATHANIEL SESSIONS,)
Plaintiff,)
v.)
STATE OF VERMONT, et al.,)
Defendants.)

Washington Superior Court
Docket No. 39-1-99 Wncv

SUPERIOR COURT
WASHINGTON COUNTY

Entry Order: Plaintiff's Motion for Award of Attorneys' Fees, filed September 8, 2003, and supplemented December 22, 2003

On August 25, 2003, the jury in this case awarded, inter alia, damages totaling \$65,000 from the State, based on a violation of the Fair Employment Practice Act (FEPA). Plaintiff seeks an award of attorneys' fees based on 21 V.S.A. § 495b. The court is asked to determine how much of plaintiff's attorneys' fees were reasonably related to the FEPA claim.

Plaintiff initially filed his motion on September 8, 2003, and the parties briefed the issues. On November 26, 2003, the court issued an Entry Order setting forth the legal framework, denying Plaintiff's "all or nothing" approach seeking all fees without differentiation, giving Plaintiff additional time to present a claim based on a more careful delineation of pertinent factors, and denying the State's requests to defer the decision until after appeal and to obtain discovery. Plaintiff filed his supplemental motion on December 22, 2003, and the parties have provided further briefing.

The trial in this case concluded on August 25, 2003. The claims were that Plaintiff was sexually abused by Defendant Donald Lyons from the summer of 1989, when he was 13 years old, through September 1991. Donald Lyons was the Director of Travel and Tourism for the State of Vermont. Many incidents of sexual abuse took place at locations unrelated to State property. Others took place at Lyons' office and a warehouse used by the Department. Lyons hired Plaintiff to be a model for a photo shoot for purposes of promoting Vermont tourism, and paid him with State funds for the one day session, which took place at various attractive locations around Vermont and involved Plaintiff and a friend being filmed while engaging in recreational activities. During this session, Lyons attempted sexual activity with Plaintiff. The trial resulted in a jury verdict as follows:

Against Donald Lyons for assault, battery, and intentional infliction of emotional distress:	
Compensatory damages	115,000
Punitive damages	300,000
Against State of Vermont for violation of Fair Employment Practices Act:	
Compensatory damages	5,000
Punitive damages	<u>65,000</u>
Total	\$480,000

In his original motion, Plaintiff sought attorneys fees and expenses of \$133,361.33. This sum represented the total fees and expenses incurred in the case against both defendants, and Plaintiff sought this total sum from the State of Vermont. In response to the court's Entry Order, Plaintiff's attorneys reviewed their billing records and reduced the amount of the fees claimed to a sum they submit is related to the successful FEPA claim against the State. The claim is now:

Attorneys' fees, Attorney Halpert and his firm	58,981.00
Attorneys' fees, Attorney Ritvo and his firm	54,128.50
Investigator fees	4,316.00
Costs, Attorney Halpert and his firm	3,534.42
Costs, Attorney Ritvo and his firm	<u>1,985.30</u>
Total	\$122,945.22

While Plaintiff's attorneys eliminated some of the entries in their billing records as described in their memos, they argue that most of their work is properly attributable to the FEPA claim for a variety of reasons. First, they argue that the core facts of the claims against both defendants are the same: nearly all of the evidence needed for the claims against Lyons was also needed for the FEPA claim against the State. This is valid to some extent, both in relation to liability, to supply context for the State incident, and in relation to damages, to show the effect on Plaintiff of being sexually abused by a powerful State official. Plaintiff points out that the nature of the case, which involved a large number of secret encounters for sexual activity, called for extensive investigation and discovery. In addition, the State filed an early, pre-discovery Motion for Summary Judgment which was initially granted. Plaintiff appealed, and the decision was reversed by the Vermont Supreme Court. The Plaintiff necessarily had to engage in substantial legal work in order to preserve and pursue the FEPA claim, and this work was ultimately successful. Furthermore, the State filed a second post-discovery Motion for Summary Judgment seeking dismissal of all claims against the State, calling for further extensive legal work on the part of the Plaintiff, which was ultimately successful, as the FEPA claim and two others were not dismissed. Plaintiff argues that for all of these reasons, the present claim for fees and expenses, while only moderately reduced from the original claim, is justified.

The State suggests that the court should award only a small percentage of the total attorneys fees on the grounds that the compensatory award against the State (\$5,000) was only 4.3% of the award against Lyons (\$115,000), and the punitive damages award against the State (\$60,000) was only 20% of the award against Lyons (\$300,000). The court declines to base the outcome on percentages, as such percentages do not bear a direct relationship to the effort necessary to have pursued the successful FEPA claim in this case. 21 V.S.A. § 495b sets forth a public policy that enforcement of FEPA is of such importance that a successful claimant is entitled to reasonable attorneys fees for having to pursue the claim. Such support for the pursuit of legitimate claims is undermined if a claimant only gets a fraction of fees reasonably incurred when it makes sense to join the claim with related claims against other defendants based on the same core facts. For example, in this case, if the court were to award attorneys fees of 4.3% of the original amount requested of \$133,361.33, the award would be \$5,735.00. The true cost of pursuing the FEPA claim against the

State, without Lyons or any other claims against the State, would be far greater than \$5,735, particularly in view of the two rounds of summary judgment motions in addition to the appeal to the Supreme Court.

The State also claims that Plaintiff has failed to carefully document the exact time spent on the FEPA claim, and should not be entitled to an award for fees it cannot prove with specificity as being related to the FEPA claim only. The State's counsel argues that it is the responsibility of a plaintiff bringing such a claim to be prepared to support its claim for fees with clear documentation. It would certainly be good practice for a plaintiff to do so, but for the court to deny all fees for lack of careful documentation would be an overreaction where there is overlapping evidence, and contrary to the public policy of supporting private enforcement of FEPA claims. By not keeping careful records, the Plaintiff risks not being able to prove his claim for fees to the extent he may wish, but he is not necessarily precluded from an award for fees which are reasonably supported by consideration of all pertinent factors.

The State does raise several valid points. One is that while there is overlap between the facts and damages related to the claims against the two Defendants, the overlap is not complete, and the evidence related to Lyons' sustained pattern of sexual encounters with Plaintiff over an extended period is more extensive than the evidence of the one day of employment upon which the FEPA claim is based. In addition, the Plaintiff originally described eight separate causes of action against the State. The result of the second round of summary judgment motions was that five of the eight counts against the State were dismissed. Thus, a considerable degree of effort was put toward pursuing claims that were not sustainable as a matter of law, many of them barred by sovereign immunity. The State also objects to paying several attorneys for duplicative work. While it is true that the State also had multiple attorneys present at court events, and the court does not find it unreasonable that more than one attorney would be present for court events, nor was it unreasonable to have one attorney work on legal research and drafting while others were engaged in litigation activities, the point is a valid one that two or three attorneys for the Plaintiff did not reasonably need to attend the same discovery depositions.

The State also points out that Plaintiff put considerable effort into what the State calls the "State property claims" and the court described as "tort claims based on the actions or inactions of other State employees." (See ruling on the State's summary judgment motion.) These are the claims in which the Plaintiff sought to hold the State responsible for more sexual encounters than simply the photo shoot on the grounds that other State employees were aware of Lyons' activities and the risk he posed to Plaintiff while in Lyons' company on state facilities, and they failed to protect him. If successful, the extent of damages the Plaintiff could seek against the State would be more significant. The court is aware that Plaintiff pursued these claims vigorously, and that they consumed a great deal more time and attention than the FEPA claim, both in relation to factual development and legal research and argument, and they involved analytically challenging issues of law. Review of the summary judgment motions and rulings show what a substantial aspect of the Plaintiff's case this was, whereas the FEPA claim, while based on connected facts, received much less attention. The tort claims were ultimately not successful. Despite full opportunity to develop

the facts related to these claims, the Plaintiff did not present evidence sufficient to support a jury verdict, and at the close of the Plaintiff's case, the court granted the State's motion for judgment as a matter of law on both the negligent supervision and failure to warn claims against the State. This left only the FEPA claim against the State, upon which the Plaintiff obtained a verdict. The court agrees with the State that the State should not be responsible for all the work that went into developing the tort claims that ultimately were unsuccessful.

Because the court does not have before it information that makes it easy to isolate in a precise manner the amount of work reasonably necessary to prevail on the FEPA claim, without being joined with the claims against Lyons, the court is obliged to make its award of attorneys fees and expenses using an imprecise methodology, but based on consideration of all of the factors described above.


The court concludes that the revised fees and expenses totaling \$122,945.22 represent a reasonable amount of attorneys fees for the claims against both Lyons and the State (excluding Betty Lyons) based on the "lodestar" amount as the presumptive level of compensation. The number of hours and the hourly rates are reasonable, and this total represents a reasonable starting point. Taking into account, though, that a good deal of the investigation and discovery reasonably related to pursuing the claims against Lyons was not necessary in relation to the FEPA claim, and that multiple attorney involvement in discovery was not necessary in relation to the FEPA claim, the court will reduce the total by 35% to account for these factors. Next, taking into account that the bulk of the case as a whole was devoted to pursuing State liability on eight separate counts, and particularly the tort claims based on the actions or inactions of other State employees, and that not only were these claims not successful but seven were dismissed on motions prior to being submitted to the jury, the court will reduce the total by another 35% to account for the work reasonably attributable to these unsuccessful claims.

As a consequence, reasonable attorneys fees and expenses are 30% of the total claimed, or \$36,883.57.

Order

For the foregoing reasons, Plaintiff's Motions for Award of Attorneys' Fees is *granted*, and attorneys fees and expenses are awarded to the Plaintiff against the State in the amount of \$36,883.57.

Date at Montpelier, Vermont this 11th day of February, 2004.


Hon. Mary Miles Teachout
Superior Judge