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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

DAVID ARENBERG,)	
)	
Plaintiff,)	2:10-cv-2228 JWS
)	
vs.)	ORDER AND OPINION
)	
CHARLES L. RYAN, et al.,)	[Re: Motions at docs. 214, 226 & 227]
)	
Defendants.)	
)	

I. MOTIONS PRESENTED

At docket 214, plaintiff David Arenberg (“Arenberg”) moves for an award of attorney’s fees against defendant James Taylor (“Taylor”). The memorandum required by the local rules, which supports that motion, is at docket is at docket 232. That memorandum makes clear that Arenberg is also seeking an award of non-taxable costs. Taylor’s response is at docket 233. Arenberg’s reply is at docket 235.

At docket 226 defendants Ryan, Rowe, and Taylor moved for an award of costs as a sanction, and amended the motion at docket 227. Arenberg’s response is included in the memorandum at docket 232. Defendants’ reply is at docket 234.

Oral argument was not requested and would not be of assistance to the court.

1 **II. BACKGROUND**

2 When Arenberg commenced this action he was proceeding *pro se*. The court
3 screened his complaint pursuant to 28 U.S.C. § 1915A (a) and dismissed defendant
4 Sharon Malcom in November of 2010.¹ In his amended complaint at docket 64,
5 Arenberg, still proceeding *pro se*, named Charles L. Ryan, Director of the Arizona
6 Department of Corrections (“Department”); James Taylor, Regional Health
7 Administrator of the Department’s Northern Region; Richard Rowe, Medical Program
8 Director for the Department; and Sandra Lawrence, a Corrections Officer IV employed
9 by the Department, as defendants. Defendants’ motion for summary judgment was
10 addressed in the court’s order at docket 117, which provides considerable background
11 information about this lawsuit. In the order at docket 117, the court dismissed
12 Arenberg’s claim against Ryan in his official capacity, and it dismissed his claim against
13 Lawrence. The court allowed the individual capacity claims for compensatory damages
14 and the punitive damages claims against Ryan, Rowe, and Taylor to proceed. On
15 November 15, 2012, five weeks after the order at docket 117 was filed, Nerner Hadous
16 and David Ali Chami appeared as counsel for Arenberg. Messrs. Hadous and Chami
17 represented Arenberg in the final pre-trial preparations and at trial.
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21 Before trial defendants made an offer of judgment pursuant to Fed. R. Civ. P. 68
22 in the amount of \$20,000. Arenberg rejected the offer on June 28, 2013.
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25 _____
26 ¹Order at doc. 6. The screening order also dismissed Arenberg’s claim against Taylor.
27 Thereafter, in her order at docket 17, Judge Murguia, to whom this case was originally
28 assigned, vacated the dismissal of Taylor.

1 establish that he prevailed. As noted by defendants, the claim against Taylor was
2 based on different facts and a different theory than the claims against Ryan and Rowe.
3 Accordingly, any award of fees should be limited to time spent on the claim against
4 Taylor.⁴

6 **B. Attorney's Fees**

7 Analysis begins with determination of a reasonable hourly rate for Arenberg's
8 lawyers. Ordinarily that would require the court to apply the relevant factors identified in
9 *Kerr v. Screen Actors' Guild, Inc.*⁵ However, as both parties recognize, the hourly rate
10 in this case is capped at \$112.50 by virtue of the Prison Litigation Reform Act ("PLRA")
11 limitation on hourly rates in prisoner cases.⁶

13 The next step would ordinarily be determination of the number of hours
14 reasonably expended by the prevailing party's lawyers. Mr. Haddous' affidavit indicates
15 that 178.5 hours of time was spent on the claim against Taylor. However, the PLRA
16 also affects this step of the analysis, because when the relief obtained is confined to a
17 monetary award, the attorney's fees award is limited to 150% of the monetary award.
18 Here, that works out to be \$4,500 ($\$3,000 \times 1.5 = \$4,500$). Given the capped hourly
19 rate and the \$4,500 limitation, the number of compensable hours is, in effect, limited to
20 40 hours ($\$4,500$ divided by $\$112.50$ per hour = 40 hours).

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25 ⁴*Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1933).

26 ⁵526 F.2d 67, 69-70 (9th Cir. 1975).

27 ⁶42 U.S.C. § 1997e (d)(3).

1 Defendants argue that the hours claimed are inadequately explained and that
2 there are inconsistencies between the hours presented at docket 232 and those earlier
3 presented at docket 214. Concerning the adequacy of the explanations provided, the
4 court finds that the information contained in docket 232 and the attached itemization at
5 docket 232-2 is in substantial compliance with Local Rule 54.2. While the format used
6 by Arenberg's counsel is in narrative format rather than the invoice format often used, it
7 does contain enough detail to allow assessment of the amounts claimed.
8

9 Turning to the inconsistency between docket 214 and docket 232, the court finds
10 Arenberg's explanation in the reply at docket 235 to be credible. There it is explained
11 that the summary at docket 214 was based only on Mr. Haddous' time, because his
12 time alone was adequate to reach the \$4,500 limit. The memorandum at docket 232
13 displays more time, because Mr. Chami's time is also included.
14

15 Defendants also contend that Arenberg is not entitled to an award of attorney's
16 fees incurred after he rejected the offer of judgment on June 28, 2013. Even so, that
17 does not alter the outcome, for Messrs. Chami and Haddous had invested well over 40
18 hours prior to that date.
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20 Mr. Haddous' affidavit contends that the 178.5 hours claimed did not include
21 "fees for time spent primarily or solely regarding the claims against Defendants Rowe
22 and Ryan."⁷ In general, the court accepts this characterization. But, there are specific
23 instances in which the representation cannot be correct. To begin with, the court
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27 ⁷ Doc. 232-3, ¶9.
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1 agrees with defendants' contention regarding the time spent to prepare an objection to
2 defense exhibits E and F:

3 Plaintiff claims 2.5 hours for preparation of Plaintiff's objection to
4 Defendant's proposed trial exhibits E & F. (Dkt. 232 at 6) Defendants'
5 proposed exhibits E and F are contract cancellation documents (dkt. 161),
6 which related to the dismissed claim against Defendant Ryan only.
7 Defendant Taylor had no involvement with outside medical contracts.⁸

8 The court will deduct \$281.25 (\$112.50 capped rate x 2.5 hours) to adjust for this error
9 by Arenberg's counsel.

10 The court is similarly persuaded that the 1.5 hours claimed for preparing a
11 motion to strike Kristine Harkins from defendants' witness list was unrelated to
12 Arenberg's claim against Taylor. Her testimony would have related to changes in
13 Arenberg's housing, something with which Taylor had no connection. This results in a
14 reduction of \$168.75 (\$112.50 x 1.5).

15 With respect to the 1.5 hours claimed in relation to motion practice concerning
16 Exhibit 9, the court concludes that, because the purpose of the exhibit was to show the
17 habits and routines of defendants Ryan and Rowe, this work was unrelated to the claim
18 against Taylor. The result is a further reduction of \$168.75.

19 These three adjustments total \$618.75. They reduce the otherwise adequately
20 supported request for a \$4,500 award to \$3,881.25 (\$4,500 - \$618.75).

21 **C. Non-taxable Costs**

22 The court now turns to the request for an award of \$623.99 in non-taxable costs.
23 The analysis is controlled by the Ninth Circuit's teaching that such costs may be

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27 ⁸Doc. 234 at p. 8.

1 awarded in a case of this type only if they are costs which would normally be charged to
2 a fee-paying client by his counsel.⁹

3 The bulk of the non-taxable costs are associated with the February 2, 2013 trip
4 Messrs. Haddous and Chami made from Scottsdale to Kingman to meet with Arenberg.
5 This portion of the request includes \$231.20 as “mileage” for the 409 mile round trip,
6 \$80.00 for gasoline for the trip, and \$120 in food expense incurred on the trip. A fee-
7 paying client would usually be billed for the expenses incurred on such a trip.
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9 However, the \$231.20 claim for mileage is insufficiently supported. Moreover, under
10 the ordinary understanding of “mileage” charges, gasoline would be included as part of
11 the mileage charge. While the mileage charge must be denied for lack of sufficient
12 information to allow its evaluation, the \$80.00 claimed for gasoline expense on a 409-
13 mile trip is supported by common sense and plainly reasonable. The \$120 food
14 expense requested is not supported. The absence of information sufficient to allow
15 evaluation of the amount claimed dooms this request.
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17 Arenberg also requests \$51.00 for parking during the trial. While adequately
18 supported, and an expense of a type for which a fee-paying client would be billed, this
19 expense was incurred after Arenberg had rejected the offer of judgment. As noted
20 above, the result of the trial was a recovery by Arenberg which was substantially less
21 favorable than the offer of judgment. This request will be denied.
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23 The remainder of the non-taxable expenses sought are for providing clothing for
24 Arenberg to wear so that he need not appear in court in prison attire. This is not an
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27 ⁹*Chalmers*, 796 F.2d at 1216 n.7.

1 expense which would ordinarily be charged to a fee-paying client. Such clients can
2 afford their own clothes. Even if this is a type of expense for which some leeway should
3 be afforded, the fact is that in this case the jury necessarily knew that Arenberg had
4 been incarcerated.
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6 The non-taxable costs to be awarded are all based on the lawyers' trip to
7 Kingman to meet with Arenberg. That meeting necessarily involved all of Arenberg's
8 claims. The court therefore will allow only 1/3 of the costs set out above, for 2/3 of
9 those costs are reasonably allocated to the claims against Rowe and Ryan. The
10 adjustment lowers the \$80 to \$26.40.
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12 **C. Single Payer**

13 As the parties have earlier recognized, the financial obligations associated with
14 this litigation are all borne by the State of Arizona. Thus, it is appropriate to consolidate
15 the financial results set out above. The total awarded to Arenberg is \$3,908.05
16 (\$3,881.25 + \$26.80). The award to defendants is \$609.65. This yields a net award to
17 Arenberg of \$3,298.40 (\$3,908.05 - \$609.65).
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19 **D. Required Contribution by Arenberg**

20 By statute a portion of any award of attorney's fees (and here also non-taxable
21 costs) must be paid by the plaintiff from the damages recovered.¹⁰ The portion to be
22 paid may not exceed 25% of the judgment. Here, the contingent fee contract between
23 Arenberg and his lawyers contemplated payment of 35% of any recovery to counsel in
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27 ¹⁰42 U.S.C. § 1997e (d)(2).
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