**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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| JANE DOE, | ) | |
| | ) | |
| Plaintiff, | ) | Civil Action No. 10-1761 |
| | ) | |
| v. | ) | |
| | ) | Chief Magistrate Judge Lenihan |
| ALLEGHENY COUNTY, RAMON C. RUSTIN, JOHN JOHNSON, JR., and ALLEGHENY CORRECTIONAL HEALTH SERVICES, INC., | ) | |
| | ) | |
| Defendants. | ) | |

**MEMORANDUM OPINION AWARDING DAMAGES TO PLAINTIFF AGAINST DEFENDANT JOHN JOHNSON, JR.**

On March 27, 2013, the Court granted Plaintiff's Motion for Summary Judgment against Defendant Johnson. The case settled with all Defendants other than Johnson, and a damages hearing as to Johnson was scheduled for June 19, 2013. At the hearing, counsel for Plaintiff appeared and advised the Court that his client was incarcerated. The case was administratively closed and counsel was instructed to file a status report with the Court within 30 days. Subsequent status reports were filed, and on July 24, 2014, the Court was advised that Plaintiff had been released. A damages hearing was held on August 8, 2014. Both Plaintiff and Defendant Johnson were present. The Defendant appeared pro se.

Damages

Plaintiff testified and was cross examined by Defendant Johnson. She gave brief testimony about what occurred and how it affected her. In addition to the testimony, counsel asked that the Court refer to her deposition, which had been filed with the Motions for Summary Judgment. He also requested that the Court read the reports of Lawson Bernstein and Nurse Floro. All of these items were reviewed by the Court following the hearing. Counsel for Plaintiff provided the Affidavit of Joann Zacharias, which was also part of the Summary Judgment submissions (ECF No. 150-1). No medical records were provided and no other documents were introduced other than a multiple page listing of entities, dates, and brief descriptions of instances where Plaintiff sought mental health treatment or counseling. The entities on this list were Pittsburgh Action Against Rape, Allegheny Correctional Health Services (the organization providing all health services within the Allegheny County Jail), and Western Psychiatric Institute and Clinic. The dates of the services were both before, and after, the alleged assaults by Defendant Johnson.

In setting a damages award, it is important to determine what occurred, and how often it occurred. Plaintiff's testimony was confusing at best. At the hearing, she testified that Johnson had touched her inappropriately between 2 and 20 times. She could not be more specific. She testified that she arrived at the Allegheny County Jail ("ACJ") on March 23, 2010, and started receiving methadone two days later. She stated that the touching started approximately the third week in April. She testified that the touching went on for 2 months. Mr. Johnson testified, and Plaintiff stipulated, that his last day of employment at the ACJ was April 25, 2010.

In Plaintiff's deposition, she testified that the touching did not start until she had been receiving methadone and Phenergan injections from Johnson for approximately 2 to 3 weeks.

(Depo. p. 61, ECF No. 140-8.) By this calculation, 2 weeks from March 25 would have been April 8, 2010. She also testified that the touching went on for 2 months, until the second or third week of June. (Depo. p. 64, ECF No. 140-8.) In her Statement of Material Facts (ECF No. 95, ¶ 44) Plaintiff states that "prior to April 14, 2010 . . . Johnson performed indecent sexual acts upon Doe." In its review of all the documents and briefs submitted with the Summary Judgment Motions, the Court concluded that Johnson had "sexual contact" with Doe "5 more times" between April 15 and April 26, 2010. (ECF No. 160 at 5.) In Johnson's guilty plea, he pleaded guilty to institutional sexual assault against this Plaintiff, but there is no indication of how many assaults occurred. In his arguments and cross examination, Johnson argued that no assault ever occurred. It is not possible to accept this argument as the Defendant has entered a guilty plea in his criminal case. [1]

While any assault in an institutional setting is abhorrent, the matter of determining damages implicates the issue of how often the assaults occurred, as well as what occurred. Taking Plaintiff at her word, the assaults began, at the earliest, on April 8, 2010. Johnson was discharged on April 25, 2010. This fact is undisputed. That leaves a potential of 17 days. Plaintiff testified in her deposition that sometimes she received her shot and methadone from a nurse named Linda. Obviously Johnson did not work continuously for 17 days. In addition, the assaults could not have gone on for two months as claimed. The numerous inconsistencies give the Court pause.

As requested, the Court reviewed the opinions of Dr. Bernstein and Nurse Floro. They were brief and simply stated that by the sexual contact, Nurse Johnson violated the standard of care. That much is obvious. Dr. Bernstein further stated that the "transgression would be

[1] Johnson argued that he only pleaded guilty because he was told he would be sentenced to 18 months as opposed to facing a possible 9 or 10 year sentence.

expected to have adverse psychiatric consequences." Again, there is no doubt that this would be the case; however, given this Plaintiff's history of psychological conditions prior to the incidents in question, and without any medical testimony or records, it is difficult to determine the extent of the damage caused by Defendant's actions. For example, Plaintiff testified both at the hearing and in her deposition, that she has been seeing a psychiatrist since age 9. She is a long time drug user (both before and after the assaults), has been in at least 4 drug treatment programs, and attempted suicide multiple times before and after the assaults.

It is against this backdrop of inconsistencies and lack of specific evidence that the Court is asked to determine damages. The Court concludes that an appropriate amount of compensatory damages is $40,000.

Plaintiff also requested punitive damages. The extent to which a particular amount of money will adequately punish a defendant and deter or prevent future misconduct may depend on the defendant's financial situation. As such, if the court finds that punitive damages are warranted, it may consider the financial resources of the Defendant in fixing the amount of such damages. Third Circuit Model Jury Instructions (Civil) § 4.8.3 (2013). To determine whether punitive damages are appropriate the following factors may be considered: (1) the character of the act; (2) the nature and extent of the harm caused; and (3) the wealth of the defendant. McDermott v. Party City Corp., 11 F. Supp. 2d 612, 630 (E.D. Pa. 1998) (citing Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800, 803 (Pa. 1989) (citing Restatement (Second) of Torts § 908(2) (1978))).

At the hearing, Defendant submitted documentation reflecting a monthly income of $1,164.50, monthly expenses of $951.10, leaving him a difference of $213.40 to live on, including food. Defendant appears to be living a very modest existence based upon the

information provided. The document was submitted under seal as it contained personal identifiers for Defendant. Plaintiff had no objection to the admission of the document and did not cross examine Defendant on its contents.

Based upon Defendant's wealth, the Court awards an additional $10,000 in punitive damages.

Legal Fees and Costs

At the damages hearing, counsel for Plaintiff submitted an untitled document containing descriptions of his legal work, time spent and costs incurred, commencing on November 30, 2010 and ending on May 29, 2013. He requested that the Court order this Defendant to pay the full amount of his fees and costs for the case. No other documents were submitted by counsel for Plaintiff.

The fee and cost submission offered by counsel includes his entire bill for the case, without eliminating work done in prosecuting the case as to Defendants other than Mr. Johnson. In addition, some of the charges and time entries reference persons that the court does not recognize, i.e. "Miller." Most of the cost items are not specific, but simply reference parking or mailing, etc. Finally, counsel is requesting an hourly rate of $400, but has not provided any supporting documentation, such as an affidavit that this rate is a reasonable amount in this community for the type of legal work done. The total bill submitted includes costs in the amount of $14,450.84, legal fees in the amount of $174,280, for a total bill of $188,730.84.

The United States Court of Appeals for the Third Circuit set forth the appropriate standard for determining attorney's fees in Lindy Bros. Builders, Inc. of Philadelphia v. Am. Radiator and Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I), and Lindy Bros.

Builders, Inc. of Philadelphia v. Am. Radiator and Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (en banc) (Lindy II ). An appropriate attorney's fee is determined by calculating a "lodestar" amount; this "lodestar" is calculated by multiplying a reasonable hourly rate by the number of hours reasonably expended on successful claims. Lindy I, 487 F.2d at 167-68. The fee is based on the hours reasonably expended on the successful claims. Hensley v. Eckerhart, 461 U.S. 424, 435-36 (1983). The party submitting the fee application bears the burden of showing that the claimed rates and number of hours are reasonable. See Pennsylvania v. Delaware Valley *Citizens' Council*, 478 U.S. 546, 564 (1986).

When determining if the hours spent on litigation are reasonable, the Court must "review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described, and then exclude those that are 'excessive, redundant, or otherwise unnecessary.'" Pub. Interest Research Grp. of N.J., Inc. v. Windall, 51 F.3d 1179, 1188 (3d Cir. 1995) (noting that "[i]t is the duty of the party seeking fees to exclude such hours from its initial calculation of the total hours expended.") (emphasis added).

The fee applicant is responsible for providing evidence from independent parties in the community to support the claim that their hourly rates are reasonable and in line with "the community billing rate charged by attorneys of equivalent skill and experience performing work of similar complexity." Washington v. Philadelphia Court of Common Pleas, 89 F.3d 1031, 1036 (3d Cir. 1996) (citing Student Pub. Interest Research Grp. v. AT&T Bell Labs., 842 F.2d 1436, 1450 (3d Cir. 1988)). No such evidence was provided.

Based upon the above, in reviewing the bill and determining what amount, if any, the Court will award to counsel, the following general rules were applied.

1. All costs for which no specific detail was provided were deducted. This includes AKF, which the court knows are court reporters, but no specificity was provided as to who was deposed, and the Court could not determine if the deposition was relevant to the action as it pertained to Johnson.
2. Costs which pertain to all Defendants, such as expert fees, were divided by 4 to take into account the 4 Defendants in the case.
3. Time entries pertaining to all Defendants were also divided by 4.
4. Time entries for actions that did not require a lawyer to perform, such as letters requesting medical records were reduced to an administrative fee of $50 per hour in addition to being divided by 4.
5. Time entries relating to Defendants other than Johnson were deducted.
6. Counsel billed .25 or 15 minutes, every time an e-mail was received from the clerk of court notifying him that something had been filed. The Court deducted all of these charges. Billing for these emails was unnecessary, and at best, looking at those e-mails is something that would take less than 1 minute.
7. No supporting bill was submitted for the exorbitant witness fee for Bernstein. Therefore, the Court cut this fee by 50%, and allocated 25% of that fee to this Defendant. In addition, there was an entry on July 28, 2011 "Letter to Floro regarding medical records review and fee" with a cost next to it of $750.45. This may be a fee paid to Floro, but that is far from clear. Therefore, the Court discounted this amount by 50% and divided by 4.

8. The Court did not assess any of the mediator's fee against this Defendant as it is not likely he actively participated in the mediations in the sense that he made any offers of settlement.

9. Some items were reduced if it was determined that the time billed was excessive or repetitive.

10. Finally, because counsel failed to provide any supporting affidavits as required by the law to support his claim that his hourly rates are reasonable and in line with the community billing rate charged by attorneys of equivalent skill and experience performing work of similar complexity, the rate for the legal work was reduced to $200 per hour.[2]

In addition to the above, as Johnson was unrepresented and incarcerated for most of the time the work was being done, very little of the time billed pertained to him.

Based upon the above rules, the Court determined that the appropriate amount of fees and costs to be awarded to counsel for Plaintiff as to this Defendant are:

Fees: $5,030.00[3]
Costs: $ 965.09
Total: $5,995.09

[2] Without a proper legal basis for his proposed hourly rate, counsel has failed to meet his prima facie burden and the Court has "significant discretion to adjust the fee and costs downwards." Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 426 F.3d 694, 711 (3d Cir. 2005). The Court is cognizant of the statement in this case that the court is not to reduce a damages award sua sponte but must wait for specific objections made by the opposing party. Bell v. United Princeton Properties, Inc., 884 F.2d 713, 719 (3d Cir. 1989). The Third Circuit in Bell stated that "because statutory fee litigation is adversarial litigation, there is no need to allow the district court to reduce a fee award on its own initiative." Id. at 719. This case, however, is hardly adversarial. Defendant Johnson has no legal training, is proceeding pro se and is clearly not aware that he can challenge the fee petition. Finally, a court must employ less stringent standards when considering pro se pleadings than when judging the work product of an attorney. Haines v. Kerner, 404 U.S. 519, 520 (1972). The Court has instead chosen to address the obvious issues pursuant to its duty as set forth in other Third Circuit cases cited above.

[3] This amount is the sum of 2 hours of administrative time at $50/hour, and 2,465 hours of legal time at $200/hour.

If counsel or Defendant Johnson would like a detailed explanation as to how this number was derived, they are directed to file a motion within 5 days requesting a conference on the fee issue, and the Court will review the bill in detail and explain its ruling as to each entry.

An Order consistent with this Opinion will be entered.

Dated: August 28, 2014

LISA PUPO LENIHAN
Chief United States Magistrate Judge

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