RENDERED: December 23, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000037-MR

KENTON COUNTY, KENTUCKY; KENTON COUNTY FISCAL COURT; CLYDE MIDDLETON, AS KENTON COUNTY JUDGE EXECUTIVE; CLYDE MIDDLETON, AS MEMBER OF KENTON COUNTY FISCAL COURT; CHARLES L. SUMME, AS KENTON COUNTY COMMISSIONER; and CHARLES L. SUMME, AS MEMBER OF KENTON COUNTY FISCAL COURT — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE ROBERT W. McGINNIS, SPECIAL JUDGE
ACTION NO. 93-CI-001311

ELIZABETH A. BERNARD — APPELLEE

AND

NO. 1997-CA-000130-MR

BARBARA D. BONAR and WOLNITZEK, ROWEKAMP, BENDER AND BONAR, P.S.C. — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE ROBERT W. McGINNIS, SPECIAL JUDGE
ACTION NO. 93-CI-001311

KENTON COUNTY, KENTUCKY; CLYDE MIDDLETON, KENTON AS COUNTY JUDGE EXECUTIVE; CLYDE MIDDLETON, AS MEMBER OF KENTON COUNTY FISCAL COURT; RICHARD T. COMBS, AS KENTON COUNTY COMMISSIONER; RICHARD T. COMBS, AS MEMBER OF KENTON COUNTY FISCAL COURT; — APPELLEES

CHARLES L. SUMME, AS KENTON
COUNTY COMMISSIONER;
CHARLES L. SUMME, AS MEMBER OF
KENTON COUNTY FISCAL COURT; and
KENTON COUNTY FISCAL COURT

OPINION
AFFIRMING

* * *

BEFORE: GUIDUGLI, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: These two appeals arise from a jury trial in which the jury found that Betty Bernard (Bernard) was not appointed Assistant County Administrator (the assistant position) as a result of sexual discrimination and awarded her damages in the amount of $93,361. The Kenton Circuit Court, presided over by a Special Judge, entered judgment in Bernard's favor on June 13, 1996, and entered an award of attorney fees in the amount of $49,835 on December 16, 1996.

In case no. 1997-CA-000037-MR, appellants, Kenton County, Clyde Middleton (Middleton), in his capacity as Kenton County Judge Executive and as a member of the Kenton County Fiscal Court, Richard T. Combs, in his official capacity as Kenton County Commissioner and as a member of the Kenton County Fiscal Court, Charles L. Summe, in his official capacity as Kenton County Commissioner and as a member of the Kenton County Fiscal Court, and the Kenton County Fiscal Court (the fiscal court) (collectively the County), appeal from the trial court's order granting judgment in favor of Bernard and from its denial

of the County's motion for judgment notwithstanding the verdict (JNOV). In case no. 1997-CA-000130-MR, appellants, Barbara D. Bonar and Wolnitzek, Rowekamp, Bender, & Bonar, P.S.C. (collectively Bonar), appeal from the trial court's order setting attorney fees in the amount of $49,825. Although these appeals were heard together on oral argument, we will separate them for purposes of this opinion.

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Former Kenton County Judge Executive Robert B. Aldemeyer (Aldemeyer) appointed Bernard as Director of Administration of Kenton County in 1989 at an annual salary of $35,256, pursuant to an executive order of the fiscal court. The order provided that Bernard was appointed pursuant to KRS 67.711, which permits a county judge executive to appoint a deputy judge executive, assistants, secretaries, and clerical workers "who shall serve at his pleasure." KRS 67.711(1).

Aldemeyer was defeated by Middleton in the November 1989 elections. Bernard sought reappointment as Director of Administration in Middleton's administration. Although Middleton interviewed Bernard, another individual was ultimately appointed. Middleton recommended to the fiscal court that Bernard be temporarily appointed as Director of Special Projects at her current salary. The fiscal court approved Middleton's recommendation by executive order dated February 13, 1990. Bernard's appointment was to last until the end of the fiscal year on June 30, 1990, and the minutes of the fiscal court

indicate that Bernard was aware of the need to find another position.

In an article which appeared in The Kentucky Post on June 12, 1990, it was announced that an assistant administrator position was going to be created and that Bernard would be appointed to the position at a salary of $37,024. However, it appears that the creation of the assistant position was not initially discussed by the fiscal court until June 26, 1990. At that time, it was decided to discuss the assistant position at the next caucus and that further action be delayed. The fiscal court also voted to extend Bernard's temporary position until August 1, 1990.

The assistant position was next discussed by the fiscal court on July 31, 1990. At that time a resolution was adopted creating the assistant position at Salary Grade 53. Although we cannot determine the actual dollar amount of Salary Grade 53 from the record, we note that Bernard was a Salary 73/G at this time. We assume that Salary Grade 53 is lower.

At the fiscal court meeting on August 28, 1990, Middleton recommended that Ralph Bailey (Bailey) be appointed to the assistant position. The matter was discussed during an executive session and ultimately approved. Bailey was hired at a salary rate of $26,500.

Bernard was appointed Director of Human Services by an executive order dated September 25, 1990. The salary for that position was $24,897.60. Bernard served in this position until

1994, when she voluntarily left her county job for a new position.

Bernard filed a civil action against the County alleging sexual discrimination in violation of KRS 344.040 and Title VII of the Federal Civil Rights Act (42 U.S.C. Sec. 2000(e)). Bernard's complaint also included claims for breach of contract, violation of the County's affirmative action policy, and retaliatory discharge. Bernard sought compensatory and punitive damages, costs, and attorney fees.

Bernard's claims were tried before a jury. The trial court entered a directed verdict in favor of the County on all of Bernard's claims except for her allegation that the County discriminated against her on the basis of her sex in not appointing her to the assistant position. The jury returned a verdict in Bernard's favor and awarded compensatory damages in the amount of $93,361. The County's JNOV motion was denied and this appeal followed.

The County contends that the trial court erred in denying its motion for JNOV on the ground that appointment to the position of assistant director is discretionary under KRS 67.711 and not subject to KRS 344.040. We will begin our discussion of the County's argument by stating that the facts that appointments made pursuant to KRS 67.711(1) are discretionary and the appointee serves at the pleasure of the judge executive do not mean that the judge executive and the fiscal court may engage in

discrimination in making the appointment. To the extent the County makes this argument, it is completely without merit.

The County also maintains that the assistant position is not subject to the provisions of KRS 344.040. In support of its argument, the County points us to the Federal Civil Rights Act where the term "employee," as defined for the purpose of the Act, does not include any person chosen by an elected official to be on his personal staff or any appointee responsible for making policy. The County cites several cases for the authority that KRS 344.040 "should be interpreted consonant with federal interpretation" of the Federal Civil Rights Act. Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814, 821 (1992).

The exact issue was addressed by the United States District Court for the Eastern District of Kentucky in Lococo v. Barger, 958 F. Supp. 290 (E.D. Ky. 1997), not cited by either party. We agree with the Court's disposition of this argument and adopt the following portion of Lococo as our own:

> Like Title VII, the Kentucky Civil Rights Act, KRS Chapter 344, proscribes certain unlawful employment practices. In fact, the general purpose of the Kentucky act is to provide a means for implementing within the state the policies embodied in the Federal Civil Rights Act of 1964, as amended, as well as other related federal statutes. KRS 344.040(1). It is, therefore, common practice to look to the federal counterpart in construing KRS 344. See Palmer v. International Ass'n of Machinists, 882 S.W.2d 117, 119 (Ky. 1994) (noting that KRS Chapter 344 was modeled after the federal statute, Title VII of the Civil Rights Act of 1964).

> KRS Chapter 344, however, is not the mirror image of Title VII in every respect. The policy statements of the Kentucky act go further than the federal counterpart. The Kentucky act, for example, was implemented to "'protect ... personal dignity and freedom from humiliation.'". Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 817 (Ky. 1992) (quoting KRS 344.020(1)(b)). The federal act has no such policy statement. Id. In addition, the Kentucky act goes beyond Title VII in proscribing certain employment practices. To wit, it is a violation of a Kentuckian's civil rights for an employer to discriminate against an individual "because the individual is a smoker or nonsmoker, so long as the person complies with any workplace policy concerning smoking." KRS 344.040(1).
>
> The definition of employee under the Kentucky act presents another example in which the acts are dissimilar. It simply states:
>
> > "Employee" means an individual employed by an employer, but does not include an individual employed by his parents, spouse, or child, or an individual employed to render services as a domestic in the home of the employer.
>
> KRS 344.030(5). Clearly, the Kentucky definition of employee does not contain the personal staff exception set forth in the federal counterpart. Had the General Assembly intended to include such an exemption, it, presumably, would have done so explicitly. Consequently, the Court declines to borrow the exception from federal law and impose it within the statutory scheme of the Kentucky Civil Rights Act.

Lococo, 958 F. Supp. at 293-94.

Finally, the County argues that the trial court submitted an erroneous instruction on the issue of damages to the jury. The gist of the County's argument is that the trial court

should have used the salary of the assistant position as fixed by the fiscal court at $26,500 instead of her former salary of $35,000. Bernard maintains that her previous salary of $35,000 should be used to determine her damages because, but for the discrimination, she would have been appointed to the assistant position at a salary of $35,000 per year instead of being "demoted" to a lower paying job.

"The appropriate standard for the measurement of a back pay award is to take the difference between the actual wages earned and the wages the individual would have earned in the position that but for discrimination, the individual would have attained." Gunby v. Pennsylvania Electric Co., 840 F.2d 1108, 1119 (3rd Cir. 1988), cert. denied, 492 U.S. 905, 109 S. Ct. 3213, 106 L. Ed. 2d 564 (1989). The purpose of a back pay award in a discrimination action is to erase the effects of the discrimination by construing the hypothetical employment history of the person discriminated against to determine the amount of back pay due. Equal Employment Opportunity Commission v. Ford Motor Co., 645 F.2d 183, 199 (4th Cir. 1981), rev'd. on other grounds, Ford Motor Co. v. Equal Employment Opportunity Commission, 458 U.S. 219, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (1982). Although the employment history of the person actually placed in the disputed position is often the best indicator of the hypothetical employment history of the person discriminated against, it is not controlling on the issue of back pay. Ford,

645 F.2d at 199. The true focus should be on the probable job career of the person discriminated against. Id.

We agree with Bernard that the damages awarded to her for back pay were justified based on a comparison of what she actually earned and what she would have earned had the discrimination not occurred. The jury was free to award back pay in a lesser amount under the instruction given by the trial court, and the fact that their verdict was the maximum as set by the trial court shows that they believed that, but for the discrimination, Bernard would have obtained the position at the salary of $35,000 per year.

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Bernard was represented throughout these proceedings by appellant, Barbara D. Bonar, a partner in the law firm of Wolnitzek, Rowekamp, Bender & Bonar (collectively Bonar). Bonar was assisted by David Shearer (Shearer), an associate with the firm, and he also relied on the firm's paralegals, law assistants, and law clerks for support. The County was represented by four attorneys during the trial. The case lasted five years, and the record shows that it was vigorously defended by the County.

Following the jury's return of a verdict in favor of Bernard, Bonar applied for attorney fees for successful prosecution of the case under KRS 344.450, which provides:

> Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to

> enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter.

(Emphasis added.)

In her affidavit in support of her motion for attorney fees, Bonar sought an hourly rate of $150 for herself and $110 for Shearer. Paralegals were billed at the rate of $70 per hour, law assistants at $50 per hour, and law clerks at the rate of $40 and $35 per hour. Bonar sought a total of $77,916, representing a total of 652.45 hours. Bonar further stated in her affidavit that the billing rates were "fair, reasonable, and customary in the Northern Kentucky area for legal services rendered of this nature." Bonar also attached a detailed, itemized billing statement to her motion.

In response to Bonar's motion, the County agreed that Bonar was entitled to attorney fees under KRS 344.350, but disputed the amount sought by Bonar. First, the County pointed out that Bernard only succeeded on one of her claims and stated that because she did not prevail on all of her claims, Bonar was not entitled to a fee of $78,000. The County also alleged that the hourly rates for Bonar and Shearer were not reasonable and that the prevailing hourly rate in Northern Kentucky was $100 per hour.

A hearing on Bonar's motion was held on August 20, 1996. Both the trial and this hearing were presided over by a

Special Judge from the 18th Judicial Circuit, which includes Pendleton, Harrison, Nicholas, and Robertson counties, which are near Kenton County. The trial judge expressed his opinion on attorney fees. He stated that the highest hourly rate in his circuit is $75 per hour but allowed $100 per hour for Kenton County because he understands that attorneys charge more in the greater Cincinnati area. He considered such things as inter-office consultations between attorneys and research on issues which appeared in the statutes as overhead, not to be billed separately. He opined that two attorneys were unnecessary in many cases. As for paralegals, the trial judge took issue with the fact that paralegals were paid separately, especially when they were paid $10 per hour but billed at $70. He opined that fees for paralegals, secretarial work, and office overhead were included in the attorney fees. The trial judge stated that he would allow Bonar to submit additional evidence, her billing statements, but that he would most likely set the hourly rate at $100. The trial judge further indicated that he would go through the statement submitted by Bonar with a pen, and line through what he would disallow, to calculate Bonar's fee.

Bonar filed additional evidence regarding attorney fees with the trial court, which included affidavits from several local attorneys stating that the fee sought by Bonar was reasonable. Bonar also filed another itemized statement with the trial court seeking an additional $3,362.50 for time spent on the

case since the previous statement, raising the total to $81,416.20.

On December 16, 1996, the trial court entered an order granting Bonar attorney fees in the amount of $49,825. The order provided:

> Attached to this order is a copy of counsel's itemized list of services. Items disallowed are crossed from said list. Disallowed items include services by non-attorneys, interoffice consultations, and repetitive or unnecessary services. An hourly rate of $100.00 per hour was applied to the remaining time. Said rate represents a reasonable rate for the 16th judicial circuit.

Kentucky, through Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814, 826 (1992), has adopted the approach used by the United States Supreme Court in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), to determine the appropriate attorney fees owed to counsel for a prevailing party where the fee is authorized by statute to insure effective access to the judicial process for persons with civil rights grievances. In Hensley, the Court noted that the most logical starting point for this determination is to multiply the number of hours which were reasonably expended on litigation by a reasonable hourly rate, which would produce a "lodestar" figure, which may then be adjusted for special factors in the litigation. See Hensley, 461 U.S. at 433, 103 S. Ct. at 1939, 76 L. Ed. 2d at 50. While the parties have found no published Kentucky decisions dealing directly with what special factors require an adjustment, we can look at historic decisions to see the elements to be considered

in awarding attorney fees in Kentucky. In the case of Harding's Adm'r. v. Harding, 132 Ky. 133, 116 S.W. 305 (1909), the Court recognized the attorney fee should be reasonable, taking into consideration: the character of services rendered; time employed; size of the estate; and, the extent of the litigation. In Axton v. Vance, 207 Ky. 580, 269 S.W. 534, 536-37 (1925), the Court considered these elements as historic considerations in awarding attorney fees in Kentucky:

> (a) Amount and character of services rendered.
> (b) Labor, time, and trouble involved.
> (c) Nature and importance of litigation or business in which the services were rendered.
> (d) Responsibility imposed.
> (e) The amount of money or the value of property affected by the controversy, or involved in the employment.
> (f) Skill and experience called for in the performance of the services.
> (g) The professional character and standing of the attorneys.
> (h) The results secured.

Greenway v. Irvine's Ex'r., 234 Ky. 597, 28 S.W.2d 760 (1930) stressed variables peculiar to the facts and circumstances of each case in fixing an attorney fee. Realizing the trial court should have a handle on these variables, the Court in Motch's Ex'x. v. Motch's Ex'rs., 306 Ky. 334, 207 S.W.2d 759 (1948) said the attorney fee should be left largely to the trial court's discretion, and Martin v. Martin's Ex'rs., 311 Ky. 164, 223 S.W.2d 345, 347 (1949) added that in seeking the reasonableness of the attorney fee in probate cases, the trial court should consider:

> (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; (6) the character of the employment, whether casual or for an established or constant client.

The Court added that, "No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service." Id. The case of In re Citizens Fidelity Bank & Trust Company, Ky. App., 550 S.W.2d 569, 570 (1977) (citing Boden v. Boden, Ky., 268 S.W.2d 632 (1954)) gave us eight variables to determine a reasonable attorney fee:

> (a) Amount and character of services rendered
> (b) Labor, time and trouble involved
> (c) Nature and importance of the litigation as business in which services were rendered
> (d) Responsibility imposed
> (e) The amount of money as the value of property affected by the controversy, as involved in the employment
> (f) Skill and experience called for in the performance of the services
> (g) The professional character and standing of the Attorneys
> (h) The results secured[.]

Finally, the Kentucky Rules of Professional Conduct (KRPC) (Rules Of The Supreme Court, Rule 3.130) Rule 1.5(a) list these factors

to be considered in the determination of the reasonableness of a fee:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) Whether the fee is fixed or contingent.

Elements used to compile the "lodestar figure," before adjustments, are also not set in stone. For instance, the trial judge stated at the hearing that he was going to completely disallow hours for Shearer's attendance at the trial because he was unaware of any benefit provided by Shearer's presence. We note that seeking fees for more than one attorney is not unreasonable per se in a complex and difficult case. See Meyers, 840 S.W.2d at 825, holding that it was proper to allow attorney fees for three attorneys where the case was "sufficiently complex and difficult to prosecute." We also note that the County was represented by four attorneys at trial. If we were deciding this issue de novo, and not for abuse of discretion, we would probably conclude that Shearer provided tangible assistance. Even the trial court recognized that a prevailing party is not prohibited

from sending an extra attorney into the court to observe the trial, as he/she may be needed to plan strategy, elicit testimony, and evaluate facts and law. Dailey v. Societe Generale, 915 F. Supp. 1315, 1327 (1996). In this case, whether two attorneys are needed is a judgment call by the trial court and we cannot go so far as to say he abused his discretion.

The time spent by Bonar in consultation with other individuals in her firm on this case is also a judgment call. To the extent that these discussions were essential to Bernard's case, such as planning strategy and preparing for trial, conferences and consultations between co-counsel can be considered a reasonable expenditure of time and may be compensable. But again, this is a judgment call by the trial court that we review for an abuse of discretion.

Time incurred by non-attorney support staff such as paralegals, law clerks, and assistants could be part of overhead included in a flat attorney fee rate or billed separately. The United States Supreme Court addressed this issue in Missouri v. Jenkins by Agyei, 491 U.S. 274, 288, 109 S. Ct. 2463, 2471, 105 L. Ed. 2d 229, 243, (1989) (citing Cameo Convalescent Center, Inc. v. Senn, 738 F.2d 836, 846 (7th Cir. 1984), cert. denied, 469 U.S. 1106, 105 S. Ct. 780, 83 L. Ed. 2d 775 (1985)):

> Where, however, the prevailing practice is to bill paralegal work at market rates, treating civil rights lawyers' fee requests in the same way is not only permitted . . . but also makes economic sense. By encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting

> market-rate billing of paralegal hours "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes."

Once the lodestar calculation is reached, the trial court may then again adjust the fee upward or downward based upon the results achieved, recognizing the fact that Bernard did not prevail on all her claims. Hensley, 461 U.S. at 434, 103 S. Ct. at 1940, 76 L. Ed. 2d at 51. Hensley recognizes that when a party has only limited success at trial, the lodestar amount may be excessive for the results achieved. Id. at 436, 103 S. Ct. at 1941, 76 L. Ed. 2d at 52. The Hensley opinion contains a well-reasoned analysis as to how to account for a party's success in awarding attorney fees in this type of action, and we adopt the following portion of that opinion as our own:

> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?
>
> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants--often an institution and its

officers, as in this case--counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved." The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable

> hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.
>
> Application of this principle is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions. This type of litigation is lengthy and demands many hours of lawyers' services. Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved. In this case, for example, the District Court's award of fees based on 2,557 hours worked may have been reasonable in light of the substantial relief obtained. But had respondents prevailed on only one of their six general claims . . . a fee award based on the claimed hours clearly would have been excessive.
>
> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

Id. at 434-37, 103 S. Ct. at 1940-1941, 76 L. Ed. 2d at 51-52 (footnotes omitted) (citations omitted).

In reviewing the trial court's order of December 16, 1996, in light of the above, the Court is of the opinion that the

final amount awarded as an attorney fee does not amount to an abuse of discretion and must be affirmed.

JOHNSON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS AND FURNISHES SEPARATE OPINION.

GUIDUGLI, JUDGE, DISSENTING.

While I agree with the majority's opinion of Kenton County's appeal (No. 1997-CA-000037-MR), I must respectfully dissent from the majority's position in Bonar's appeal (No. 1997-CA-000130-MR) as I believe the trial court erred in reducing the amount of attorneys' fees sought by Bonar.

As to the hourly rate, one of the things the trial court is to take into consideration is the "standard of fees at the local bar." Baxter v. Hubbard, Ky., 47 S.W.2d 743, 746 (1932). Bonar submitted a great deal of evidence in support of the hourly rate sought for herself and Shearer, including affidavits from local practitioners, attorneys' fees orders from similar cases tried in Kenton County, and a local judicial study of local attorneys' fees. The County submitted no evidence in support of its claim that $100 was a reasonable hourly rate and the trial judge cited no evidence in support of his finding that $100 per hour was a reasonable hourly rate for the 16th judicial circuit. In setting the hourly rate the trial court ignored Bonar's evidence and established an hourly rate which is unsupported by the evidence presented.

I also believe that the trial court erred in reducing the number of hours expended. First, the trial judge stated at the hearing that he was going to completely disallow hours for Shearer's attendance at the trial because he was unaware of any benefit provided by Shearer's presence. Fees sought for more than one attorney are not unreasonable per se in a complex and difficult case. See Meyers, 840 S.W.2d at 825 (holding that it was proper to allow attorneys' fees for three attorneys where the case was "sufficiently complex and difficult to prosecute"). In this case the County was represented by four attorneys at trial, the County did not object to the hours spent by Shearer at trial, and there was no evidence to support the trial court's conclusion that Shearer provided no tangible assistance. A prevailing party is not prohibited from sending an extra attorney into the court to observe the trial as he may be needed to plan strategy, elicit testimony, and evaluate facts and law. Dailey v. Societe Generale, 915 F.Supp. 1315, 1327 (1996).

I further believe the trial court erred in completely disallowing all time incurred by non-attorney support staff such as paralegals and law clerks and assistants. As noted by the majority, the United States Supreme Court addressed this issue in Missouri v. Jenkins, 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989), holding:

> Where, however, the prevailing practice is to bill paralegal work at market rate, treating civil rights lawyers' fee requests in the same way is not only permitted...but also makes economic sense. By encouraging the use

> of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes."

Jenkins, 491 U.S. at 288, 109 S.Ct. at 2471, 105 L.Ed.2d at 243, citing Cameo Convalescent Center, Inc. v. Senn, 738 F.2d at 836, 847 (7th Cir. 1984). Time spent by law clerks and assistants is clearly recoverable provided it is reasonable and not overly excessive. See Polacco v. Curators of the University of Missouri, 37 F.3d 366 (1994).

I believe this matter should be remanded to the trial court for reconsideration of the amount of attorneys' fees due Bonar pursuant to the dictates of Meyers and Hensley.

BRIEF FOR APPELLANTS/APPELLEES:

Joseph E. Conley, Jr.
Ann M. Henn
Crestview Hills, KY

ORAL ARGUMENT FOR APPELLANTS/APPELLEES:

Joseph E. Conley, Jr.
Crestview Hills, KY.

BRIEF AND ORAL ARGUMENT FOR APPELLEE/APPELLANTS:

Barbara D. Bonar
Covington, KY