IN THE SUPREME COURT OF IOWA

NO. 16-1884

TINA LEE

Plaintiff/Appellant

vs.

STATE OF IOWA and POLK COUNTY CLERK OF COURT

Defendants/Appellee

APPEAL FROM THE IOWA DISTRICT COURT

FOR POLK COUNTY

THE HONORABLE JAMES RICHARDSON

PLAINTIFF-APPELLANT'S FINAL BRIEF

Paige Fiedler AT0002496
paige@employmentlawiowa.com
Brooke Timmer AT0008821
brooke@employmentlawiowa.com
8831 Windsor Parkway
Johnston, IA 50131
Telephone (515) 254-1999
Facsimile (515) 254-9923
ATTORNEYS FOR
PLAINTIFF/APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY CUTTING PLAINTIFF'S FEES FAR MORE DRASTICALLY THAN WOULD FAIRLY ACCOUNT FOR HER INABILITY TO RECOVER RESTROSPECTIVE RELIEF

Cases

Hensley v. Eckerhart, 461 U.S. 424 (1983)
Lee v. State, 874 N.W.2d 631 (Iowa 2016).

A. THE DISTRICT COURT FAILED TO CONSIDER HOW FEW ACTUAL HOURS WERE INCURRED IN PURSUING ONLY THE UNSUCCESSFUL CLAIMS

Cases

ACLU v. Barnes, 168 F.3d 423 (11th Cir. 1999)
Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994)
Hensley v. Eckerhart, 461 U.S. 424 (1983)
Herrin v. LaMachys Village at Indigo Lakes, Inc., 2011 WL 7333928 (M.D. Fla.)
I.W. v. The Sch. Dist. of Philadelphia, 2016 WL 147148 (E.D. Pa.)
Lee v. State, 874 N.W.2d 631 (Iowa 2016)
Mitchell v. Sec'y of Commerce, 1992 WL 10509 (D.C.D.C.)
Rode v. Dellarciprete, 892 F.2d 1177 (3d Cir. 1990)
United States v. Eleven Vehicles, 200 F.3d 203 (3d Cir. 2000)
Vaughan v. Must, Inc., 542 N.W.2d 533 (Iowa 1996)
Wales v. Jack M. Berry, Inc., 192 F. Supp. 2d 1313 (M.D. Fla. 2001)

B. THE PERCENTAGE REDUCTION CHOSEN BY THE DISTRICT COURT BEARS NO RELATION TO THE ACTUAL TIME SPENT PURSUING ONLY THE UNSUCCESSFUL CLAIMS

Cases

Dutcher v. Randall Foods, 546 N.W.2d 889 (Iowa 1996)
Edson v. Chambers, 519 N.W.2d 832 (Iowa Ct. App. 1994)
Goos v. Nat'l Ass'n of Realtors, 68 F.3d 1380 (D.C. Cir. 1995)
Grant v. Martinez, 973 F.2d 96 (2d Cir. 1992)
Greene v. Dillingham Const., N.A., Inc., 101 Cal. App. 4th 418 (2002)
Jenkins v. Missouri, 127 F.3d 709 (8th Cir. 1997)
Jordan v. City of Cleveland, 464 F.3d 584 (6th Cir. 2006)
Landals v. George A. Rolfes Co., 454 N.W.2d 891 (Iowa 1990)
Lee v. State, 874 N.W.2d 631 (Iowa 2016)
Leuzinger v. County of Lake, 2009 WL 839056 (N.D. Cal.)
Lewis v. Heartland Inns of America, L.L.C., 764 F. Supp. 2d 1037 (S.D. Iowa 2011)
Miller v. Davenport Cmty. Sch. Dist., 2000 WL 210292 (Iowa Ct. App.)
Smith v. Iowa State Univ. of Sci. & Tech., 885 N.W.2d 620 (Iowa 2016)
Wallace v. DTG Operations, Inc., 563 F.3d 357 (8th Cir. 2009)
Wooldridge v. Marlene Indus. Corp., 898 F.2d 1169 (6th Cir. 1990)

C. THE DISTRICT COURT FAILED TO CONSIDER THE HIGH DEGREE OF PLAINTIFF'S OVERALL SUCCESS

Cases

City of Riverside v. Rivera, 477 U.S. 561 (1986)
Gabelmann v. NFO, Inc., 606 N.W.2d 339 (Iowa 2000)
Hensley v. Eckerhart, 461 U.S. 424 (1983)
Jenkins v. Missouri, 127 F.3d 709 (8th Cir. 1997)
Lee v. State, 874 N.W.2d 631 (Iowa 2016)
Loggins v. Delo, 999 F.2d 364 (8th Cir. 1993)
Lynch v. City of Des Moines, 464 N.W.2d 236 (Iowa 1990)
Partington v. Broyhill Furniture Indus., 999 F.2d 269 (7th Cir. 1993)

D. THE DISTRICT COURT FAILED TO CONSIDER HOW PLAINTIFF'S ATTORNEYS' WORK ADVANCED THE PUBLIC INTEREST

Cases

Ayala v. Center Line, Inc., 415 N.W.2d 603 (Iowa 1987)
City of Riverside v. Rivera, 477 U.S. 561 (1986)
Lee v. State, 874 N.W.2d 631 (Iowa 2016)
Lynch v. City of Des Moines, 464 N.W.2d 236 (Iowa 1990)
Newman v. Piggie Park Enter., Inc., 390 U.S. 400 (1968)

II. THE DISTRICT COURT ERRED IN FAILING TO AWARD AT LEAST 60% OF PLAINTIFF'S LITIGATION EXPENSES

ROUTING STATEMENT

Because this case presents substantial questions of enunciating or changing legal principles, Plaintiff respectfully requests that it be retained by this Court. In addition, this Court is best equipped to judge whether the district court's decision was consistent with its prior instructions.

STATEMENT OF THE CASE

Nature of the Case: Plaintiff appeals from the district court's order cutting her attorney fees by 40% and failing to order Defendants to reimburse her for the vast majority of her litigation expenses.

Procedural History: In September 2007, the jury found that Defendants fired Plaintiff Tina Lee in violation of the Family Medical Leave Act ("FMLA"). *Lee v. State*, 815 N.W.2d 731, 735 (Iowa 2012) (*Lee I*).

On October 26, 2007, the district court ordered Defendants to reinstate Tina to the job from which she was illegally fired and ordered Defendants to pay her wages until the actual day of the reinstatement. *Id.* at 735. The court also granted Plaintiff's motion for attorney fees under the FMLA. *Id.*

Reinstatement was stayed by this Court, pending Defendants' appeal. *Id.* After affirmance by the Court of Appeals, this Court granted further review. *Id.* at 735-36. The Court of Appeals' opinion was vacated based on the United States Supreme Court's decision in *Coleman v. Court of Appeals of Maryland*, 132

S.Ct. 1327 (2012). *Id.* at 743. This case was then remanded "to determine what relief granted in its judgment is still available to Lee within the framework of this lawsuit, findings of the jury at trial, and the cloak of immunity protecting the State." *Id.*

Plaintiff then filed a motion to enforce the district court's order of equitable relief from October 2007. *Lee v. State*, 844 N.W.2d 668, 673 (Iowa 2014) (*Lee II*). The court granted the motion. *Id.* at 673-74.

Defendants appealed again. This Court affirmed, agreeing with the district court that, notwithstanding the State's Eleventh Amendment immunity, equitable relief was an appropriate remedy against the Clerk of Court under *Ex parte Young*, 209 U.S. 123 (1908). *Id.* at 684.

Back at the district court, after Defendants indicated their intent not to pay any of Plaintiff's attorney fees or litigation expenses, Plaintiff filed a Third Supplemental Motion for Attorney Fees. *Lee v. State*, 874 N.W.2d 631, 636-37 (Iowa 2016) ("*Lee III*"). She sought enforcement of the prior fee awards, as well as the additional fees and expenses incurred since the last order was entered. *Id.* Alternatively, in the event that Defendants did not agree that the prior judgments were enforceable, Plaintiff requested that Defendants be required to pay all her fees at her attorneys' current hourly rates. 3d Motion Fees 5/1/14 at 3-4 (App. 39-40).

Defendants resisted, claiming that their Eleventh Amendment immunity allowed them to refuse to pay an employee's attorney fees awarded under the FMLA. Resp. 3d Motion Fees, p. 1 (App. 54).

Plaintiff filed a Statement of Additional Attorney Fees and Expenses at the June 24, 2014, hearing. Statement Add'l Fees 6/24/14 (App. 57-60). The district court granted Plaintiff's motion, holding that this case remained an FMLA case, for which fees were properly shifted to an employer who broke the law. Order 7/17/14,[1] p. 5 (App. 65). It also held that because portions of the relief were still enforceable, the prior fee orders could also be enforced. Order 7/17/14, p. 5 (App. 65). Thus, Plaintiff's attorneys' time prior to 2008 was compensated at their old rates.

In their third appeal, Defendants claimed that because the Plaintiff relied on *Ex Parte Young* to obtain relief, this was no longer an FMLA case so Plaintiff was no longer entitled to any attorney fees at all. *Lee III*, 874 N.W.2d at 646. The Court rejected that argument in *Lee III*, just like it had in *Lee II*. *See id.*

Nevertheless, although Defendants had not preserved error on its new argument that the amount of fees awarded was too high, the Court held the district court erred in failing to ensure that fees were not awarded for tasks specifically related to seeking retrospective relief. *Id.* at 648.

[1] The Order was signed June 26, 2014, but not filed until July 17, 2014.

The case was once again remanded, with instructions to award Plaintiff attorney fees consistent with prior case law, but excluding "fees and costs Lee incurred in proving aspects of her claims for retroactive relief that were wholly unrelated to the common core of facts or legal theories establishing her entitlement to prospective relief." *Id.* at 650.

Plaintiff filed a new Application for Attorney Fees and Expenses (App. 67-101), along with a Brief (App. 102-109) which incorporated by reference her Brief of October 1, 2007. (App. 1-16). Defendants resisted. (App. 110-113). Plaintiff filed a Reply to that Resistance. (App. 114-117). A hearing was held on October 3, 2016 (*see* Hearing Transcript (App. 122-142)), after which the district court issued its ruling. (Order 10/10/16) (App. 143-147).

STATEMENT OF FACTS

The FMLA does not allow actual damages for anything except lost wages. 29 U.S.C. § 2617(a)(1)(A). Consequently, no fees or costs were expended during the discovery process or trial related to family members or medical professionals testifying about damages for emotional distress.

At trial, the parties stipulated to the amount of Tina Lee's lost wages. (Hearing Transcript, p. 6) (App. 127). Little to no time was consumed for the parties simply to inform the jury the amounts they agreed Plaintiff had lost. The trial was about liability and only liability.

Plaintiff filed a post-trial motion and brief to obtain liquidated damages, but that took very little time since most of it had been copied from work done for previous clients. *See* Fee Appl., Ex. 1, p. 6 (cutting one hour for work related to liquidated damages).

Ultimately, Tina Lee was reinstated and is being allowed to work out the rest of her tenure in peace. She recovered $377,279, which was the dollar value of her delayed reinstatement plus interest. Tina's IPERS account was amended to give her credit for the years she missed. This will enable her to retire at the time she would have been eligible but for Defendants' violations of the FMLA.

At the time Tina Lee was fired in 2004 until this Court's decision in *Lee II*, it was the position of the State of Iowa that its 50,000 or so employees had no remedy when it violated the self-care provisions of the FMLA. While state workers had (on paper) the right to take a leave of absence to seek treatment for and recover from a serious health condition, Defendants claimed the power to fire them for it at will. Because of Tina, her lawyers, and this Court, that is no longer the case. Defendants now know that employees have an actual remedy in the event they ignore federal law like they did with respect to Tina. State workers have been assured that their rights are real and enforceable. Civil rights attorneys now know exactly what to do to force the State of Iowa to follow the FMLA.

ARGUMENT

Preservation of Error: Plaintiff preserved error in making her Application for Attorney Fees and Expenses (App. 67-101), filing her Brief (App. 102-109), filing her Reply to Defendants' Resistance (App. 114-117), and making her oral arguments to the district court. (App. 116).

Standard of Review: The standard of review is abuse of discretion. *Lee III*, 874 N.W.2d at 649; *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983).

INTRODUCTION

Plaintiff's attorneys have been working on this case since she was fired in 2004. Although this matter is on its fourth trip to the Supreme Court, this is the first time Plaintiff is the appellant. In each of the other appeals, Plaintiff was defending relief she had obtained at the trial court level. Indeed, if Plaintiff had not responded to each of Defendants' previous three appeals, she would not have received any remedy for their violations of federal law. In doing so, Plaintiff naturally incurred attorney fees for which federal law requires compensation.

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY CUTTING PLAINTIFF'S FEES FAR MORE DRASTICALLY THAN WOULD FAIRLY ACCOUNT FOR HER INABILITY TO RECOVER RESTROSPECTIVE RELIEF

On February 12, 2016, the Iowa Supreme Court issued its latest opinion in this case, finding the district court correctly ordered Defendants to pay

Plaintiff's attorney fees and expenses, but finding the court was required to take into account any fees and expenses incurred in seeking retrospective money damages that were not recoverable because of Defendants' sovereign immunity. The case was remanded for entry of a new order for the attorney fees and expenses incurred seeking prospective relief "in accordance with the principles set forth in [the] opinion." *Lee III*, 874 N.W.2d at 650.

This Court made clear that all the general principles governing attorney fee awards apply to this case, particularly those related to lawsuits in which the plaintiff does not succeed on every single claim or contention. *Id.* at 648-49. While the Court may not award fees that were "*obviously* incurred in pursuing only the unsuccessful claims," an attorney's fees related to claims "involving 'a common core of facts' or 'based on related legal theories'" are recoverable. *Id.* at 649. The *Lee III* opinion included specific guidance from the United States Supreme Court case of *Hensley v. Eckerhart*: "'[T]wo questions much 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?'" *Id.* at 649 (quoting *Hensley*, 461 U.S. at 434) (emphasis added).

The trial court said the answer to the first question was no—that there was no claim unrelated to Plaintiff's request for prospective relief. "This court has consistently found that the legal work performed by plaintiff's attorneys is so inclined as to make a common core for all relief initially sought by plaintiff. Tina Lee's claims for monetary relief and reinstatement are so intertwined as to make them inseparable." Order 10/10/16, p. 3 (App. 145).

This conclusion appears to be different than the law of the case, as set forth in *Lee III*. The heart of this Court's rationale for remanding the case rather than affirming the 2014 fee award was that there had to have been at least some attorney fees expended that were solely related to the awards for money damages. The Court noted: "The documentation Lee submitted to the district court reveals a portion of the attorney fees the court awarded Lee was specific to her claims for retroactive monetary relief. For example, Lee requested attorney fees her counsel charged for calculating her lost wages and bringing her claim for liquidated damages." *Lee III*, 874 N.W.2d at 648. This is true.

Plaintiff understands *Lee III* to stand for the proposition that it would violate the State's sovereign immunity to require it to pay attorney fees that were incurred strictly for the purpose of obtaining retrospective relief. The *Lee III* Court held that, as a matter of law, when sovereign immunity is involved, a

claim for retrospective relief can never be part of "a common core of facts" for which fees are recoverable.

If that was the extent of the district court's error, Plaintiff would not have appealed. It was in answering *Hensley's* second question that the analysis really went astray and caused prejudice. Did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award? *See id.* at 649.

In analyzing this issue, other courts have consistently simply compared the relief obtained with the fees incurred, giving due consideration to how the resulted benefited the public. *See* Sections C & D, *infra*.

In contrast, the district court dissected the entire litigation into five "issues" and then engaged in a bizarre kind of quantitative breakdown about whether the plaintiff won or lost each point.

The Order states:

> In the case at hand, Tina Lee basically has addressed five distinct matters in this action. These five areas are: (1) sovereign immunity [monetary damages for wrongful termination]; (2) reinstatement of her employment; (3) reinstatement of employee benefits [IPERS etc.]; (4) an award of attorney fees and costs, and; (5) the amount of attorney fees and costs. The Iowa Supreme Court in its various opinions has addressed all five issues. Defendant was successful in the first and last areas. Plaintiff was successful on appeal in all the remaining three (3) areas.

Order 10/10/16, p. 3 (App. 145). The court then divided five by two and concluded that Plaintiff's attorney fees should be slashed by 2/5 or 40%. Order 10/10/16, pp. 3-4 (App. 145-146).

The court gave no advance notice that it might be considering such an unprecedented procedure, and neither party was allowed to give any input into what they believed the main issues had actually been or which side had prevailed on each of those issues.

The most glaring error in this procedure was the court's failure to recognize **liability** as the first and most crucial issue in the case. Virtually all attorney fees expended during discovery and trial focused on the question of whether Defendants violated the substantive provisions of the FMLA and retaliated against Plaintiff for exercising her rights under the statute. The court's ad hoc segmentation of the case did not give Plaintiff any credit for winning the integral and time-intensive battle to establish Defendants' liability.

It is also difficult to see how the amount of attorney fees could fairly have been considered one of the five main issues in the litigation, since Defendants have *never* disputed the reasonableness of Plaintiff's fees. *See Lee III*, 874 N.W.2d at 648. In addition, which party was successful on that issue was to be determined by the court's October 2016 Order itself. Like a circular reference in an Excel spreadsheet, that question could not be answered without

factoring in the answer to that very question. Plaintiff's *entitlement* to attorney fees should not have been dependent on the *outcome* of her application for attorney fees.

A. THE DISTRICT COURT FAILED TO CONSIDER HOW FEW ACTUAL HOURS WERE INCURRED IN PURSUING ONLY THE UNSUCCESSFUL CLAIMS

Having no idea how much actual time was spent specifically pursuing money damages, the *Lee III* opinion entrusted the district court to exercise its discretion to decide the most appropriate way to ensure that those fees were not included in the award. "Precisely how the district court determines an attorney fee award to reimburse Lee for fees she reasonably incurred in pursuit of her claims for prospective relief is within its discretion." *Id.* at 649-50 *see also Hensley*, 461 U.S. at 437. """"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 can simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment."""" *Id.* at 649 (quoting *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 541 (Iowa 1996) (quoting *Hensley*, 461 U.S. at 433).

Plaintiff identified 7.1 hours that were spent working on obtaining retrospective relief. Notably, Defendants failed to identify any additional hours they believed were non-compensable. *See* Def. Resistance (App. 110-113).

Under these circumstances the district court abused its discretion by failing simply to cut Plaintiff's total hours by 7.1 and awarding her compensation for the remaining hours.

After all, the party opposing a fee application is required to make specific and reasonably precise objections, so that the fee applicant has notice of those objections. *United States v. Eleven Vehicles*, 200 F.3d 203, 211-12 (3d Cir. 2000); *ACLU v. Barnes*, 168 F.3d 423, 428 (11th Cir. 1999); *Gates v. Rowland*, 39 F.3d 1439, 1450-51 (9th Cir. 1994); *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990); *I.W. v. The Sch. Dist. of Philadelphia*, 2016 WL 147148 at *3 (E.D. Pa.); *Herrin v. LaMachys Village at Indigo Lakes, Inc.*, 2011 WL 7333928 at *5 (M.D. Fla.); *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1313, 1320 (M.D. Fla. 2001); *Mitchell v. Sec'y of Commerce*, 1992 WL 10509 at *3 (D.C.D.C.).

Once Defendants articulated no quarrel with the Plaintiff's counsel's professional representation that 7.1 hours were devoted to the pursuit of retrospective relief, the court abused its discretion by not making that reduction and awarding Plaintiff the remainder of her fees.

B. THE PERCENTAGE REDUCTION CHOSEN BY THE DISTRICT COURT BEARS NO RELATION TO THE ACTUAL TIME SPENT PURSUING THE UNSUCCESSFUL CLAIMS

Alternatively, even if the court could have found a percentage reduction appropriate, a 40% reduction was capricious. Such an enormous cut bore no

relationship to the actual time expended on non-compensable activities. The 7.1 hours identified by Plaintiff was only .7% of the 967.28 hours worked on the case. Plaintiff suggested that if the court believed a percentage reduction was more appropriate, that 1% would be reasonable. Fee Appl., p. 4 (App. 70).

The unreasonableness of the court's approach is plain in light of the reason why fees were to be reduced. The purpose of the fee reduction was not to punish Plaintiff for seeking money damages or to rank the relative importance of the various issues at stake in the litigation. It was merely to ensure the State did not have to pay fees for which it was immune. The only fees Plaintiff incurred to which she is not entitled are the fees that were "*obviously* incurred in pursuing *only* the unsuccessful claims." *Lee III*, 874 N.W.2d at 649 (emphasis added). "A defendant should not be immunized 'against paying for the attorney's fees that the plaintiff reasonably incurred in remedying' the violation for which attorney fees were recoverable." *Smith v. Iowa State Univ. of Sci. & Tech.*, 885 N.W.2d 620, 624 (Iowa 2016).

The court, of course, was required to exercise its discretion consistent with legal precedent. *Edson v. Chambers*, 519 N.W.2d 832, 834 (Iowa Ct. App. 1994). It was required to allow the parties to develop an evidentiary basis for the fee award. *Dutcher v. Randall Foods*, 546 N.W.2d 889, 896 (Iowa 1996). No

evidentiary basis existed to support the manner in which the court adjusted fees.

The court's virtually random 40% reduction is precisely the type of mechanical, simplistic approach that courts have counseled against. The law is clear that plaintiffs are to recover "for time spent on interrelated issues and theories upon which [they] did not prevail." *Miller v. Davenport Cmty. Sch. Dist.*, 2000 WL 210292 at *8 (Iowa Ct. App.).

"The question is not whether a party prevailed on a particular motion or whether in hindsight the time expenditure was strictly necessary to obtain the relief achieved. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed." *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990); *see also Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992) ("The relevant issue . . . is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures.").[2]

[2] This Court has remarked that, contrary to most caselaw, a plaintiff's attorney's decisions may be second-guessed with 20/20 hindsight. *See, e.g. Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990). Although a contrary holding is certainly not necessary in order for Plaintiff to win this appeal, Plaintiff respectfully requests that the Court reconsider this viewpoint in the future.

In *Lewis v. Heartland Inns of America, L.L.C.*, 764 F. Supp. 2d 1037, 1045 (S.D. Iowa 2011), the defendant argued the plaintiff's attorneys' fees should be cut because she lost her discrimination claim, even though she won her retaliation claim. The court disagreed. *Id.* "Litigation is unpredictable and the mere fact that the jury ruled against Lewis on one of her claims does not mean that her attorneys failed her." *Id.* Her claims for discrimination and retaliation "were clearly related and the evidentiary bases for these claims were inextricably intertwined. Indeed, it is difficult to see how the evidence Lewis presented—or her attorneys' trial preparation more generally—would have differed in any meaningful way if she had only brought a retaliation claim." *Id.* at 1046. Accordingly, the court ruled that her attorneys "should receive fully compensatory fees for their work on this litigation as a whole." *Id.; see also Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 363 (8th Cir. 2009) (defendant

---

Other courts have recognized that "attorneys 'generally must pursue all available legal avenues and theories in pursuit of their clients' objectives; it is impossible, as a practical matter, for an attorney to know in advance whether or not his or her work on a potentially meritorious legal theory will ultimately prevail.'" *Leuzinger v. County of Lake*, 2009 WL 839056 at *6 (N.D. Cal.) (quoting *Greene v. Dillingham Const., N.A., Inc.*, 101 Cal. App. 4th 418, 424 (2002)). As the Eighth Circuit has noted: "Lawsuits usually involve many reasonably disputed issues and a lawyer who takes on only those battles he is certain of winning is probably not serving his client vigorously enough; losing is part of winning." *Jenkins v. Missouri*, 127 F.3d 709, 718 (8th Cir. 1997).

required to pay all plaintiff's fees, even though she had voluntarily dismissed her retaliation claim before trial).

Fees on related matters are recoverable "because litigation is not an exact science." *Jordan v. City of Cleveland*, 464 F.3d 584, 604 (6th Cir. 2006).

> Lawyers cannot preordain which claims will carry the day and which will be treated less favorably. Good lawyering as well as ethical compliance often requires lawyers to plead in the alternative. Fee awards comport with that reality by giving full credit to a meaningful successful plaintiff, rather than making a mechanical per-losing-claim deduction from an attorney's fee award.

Id. "Moreover, awarding fees for services connected with related claims, though the claims prove unsuccessful, 'supports the underlying purpose of . . . encouraging attorneys to take on civil rights actions in view of the ethical duty of zealous representation.'" *Id.* n.25 (quoting *Goos v. Nat'l Ass'n of Realtors*, 68 F.3d 1380, 1386 (D.C. Cir. 1995)).

The Court is familiar with the uncertain state of the law in the early years of this case regarding whether Defendants had immunity for self-care claims under the FMLA. Tina Lee brought the case anyway. If she and her attorneys had not doggedly continued to pursue it at all stages, she would have lost. Tina would still be unemployed and would have received no monetary relief for the years after which Defendants reneged on their promises to reinstate her. Tina would not be looking forward to retirement with her IPERS benefits intact as if

she had never been fired. Finally, and perhaps most importantly, if Tina and her attorneys had not performed all the work for which they now seek compensation, no legal principles would be established by which thousands of employees can now hold the State of Iowa accountable to follow the FMLA and other federal laws.

Plaintiff's attorneys should not be punished simply because each and every one of her arguments was not ultimately successful, particularly in light of "the degree to which her core claim served to vindicate the public interest." *See Lee III*, 874 N.W.2d at 649.

The district court abused its discretion by selecting an unprecedented and nonsensical manner of dividing the issues in the case that bore no relation to the amount of fees that were actually incurred to litigate each issue.

C. THE DISTRICT COURT FAILED TO CONSIDER THE HIGH DEGREE OF PLAINTIFF'S OVERALL SUCCESS

"The most important factor in determining what is a reasonable fee is the magnitude of the plaintiff's success in the case as a whole." *Jenkins v. Missouri*, 127 F.3d 709, 716 (8th Cir. 1997) (*en banc*). "If the plaintiff has won excellent results, he is entitled to a fully compensatory fee award, which will normally include time spent on related matters on which he did not win." *Id.* "If the plaintiff's success is limited, he is entitled only to an amount of fees that is reasonable in relation to the results obtained." *Id.*

As a result of this litigation, Plaintiff achieved the following successes:

- Tina's reinstatement to the job she held for 23 years;
- Recovery of $377,279 (the dollar value of her delayed reinstatement plus interest);
- Amendment of Tina's IPERS account to give her credit for the years she missed and enable her timely retirement.
- Reestablishment of the rule of law, requiring the State to follow the FMLA for employees' self-care leave;
- A blueprint for courts and civil rights attorneys to follow to enforce state workers' rights under the FMLA.

The second question the *Lee III* Court directed the trial judge to address was whether the plaintiff achieved a level of success that justifies the hours expended. *See Lee III*, 874 N.W.2d at 649; *see also Partington v. Broyhill Furniture Indus.*, 999 F.2d 269, 273 (7th Cir. 1993). "The standard is whether the fees are reasonable in relation to the difficulty, stakes, and outcome of the case." In other words, was it worth $381,910 in fees and expenses[3] to achieve the significant victories set forth above?

A review of relevant case law suggests the answer is a resounding "yes." For instance, in *Lynch v. City of Des Moines*, 464 N.W.2d 236, 238 (Iowa 1990),

[3] A breakdown of those amounts is set forth at page 28, *infra*.

the defendant suggested the plaintiff was foolish to have expended $95,139 in fees and expenses in order to obtain equitable relief and a money judgment of only $10,000. The Iowa Supreme Court disagreed and soundly rejected any rule that required proportionality between the fees incurred and the amounts awarded. *Id.* at 239. It cited three main reasons. First, the court must consider the plaintiff's contributions toward an improved working environment. *Id.* "The city's contention that fees be awarded in proportion to the amount of judgment would not compensate plaintiff's counsel for this public interest achievement." *Id.* Second, to focus on the size of the award would give insufficient weight to "the difficulty of the issues, experience of the lawyer, and customary charges." *Id.* Third, such a rule would essentially force victims of discrimination to settle all smaller claims. *Id.*

> It would be ironic, indeed, if a victim of discrimination is provided rights under chapter [216] but could not enforce them because the victim's attorney could not be adequately compensated.
>
> All these reasons suggest that we cannot place undue emphasis on the size of the judgment, but must look at the whole picture. Also, we must give consideration into the public interest advanced by counsel for a civil rights plaintiff.

Id.

In *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339 (Iowa 2000), the plaintiff's attorney requested $29,195.50 in fees necessary to recover $1,200 in a case

under Iowa's Wage Payment Collection Law. *Id.* at 341. The Court rejected the defendant's argument that the modest recovery did not justify the time and expense put forth by the plaintiff's attorney. *Id.* at 343-44. The remedial purpose of the law would be undermined by a rule "which places undue emphasis on the size of the judgment," thereby disregarding the important public interest involved. *Id.* at 343, 344. The trial court's adoption of the defendant's argument and arbitrary reduction in the plaintiff's award of attorney's fees was an abuse of discretion, mandating reversal. *Id.* at 344.

The United States Supreme Court agrees:

> Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards. . . . In addition, the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future.

City of Riverside v. Rivera, 477 U.S. 561, 574-75 (1986). "Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief." *Id.* at 575.

Thus, the *Rivera* Court affirmed the plaintiffs' attorney fee judgment for $245,456 (the full amount requested) after a jury awarded a total of $33,350 to be split among eight plaintiffs. *Id.* at 564-65. The Court found that limiting "attorney's fees in civil rights cases to a proportion of the damages awarded

would seriously undermine Congress' purpose in enacting [fee shifting statutes]." *Id.* at 576; *see also Loggins v. Delo*, 999 F.2d 364, 368-69 (8th Cir. 1993) (affirming $25,000 in attorneys' fees to achieve underlying judgment of Constitutional violations worth $102.50).

The Supreme Court recognized that civil rights cases involving unrelated claims are "unlikely to arise with great frequency." *Hensley v. Eckhart*, 461 U.S. at 435. It is not necessarily significant that a plaintiff does not end up receiving all the relief she requests. *Id.* at 435 n.11. "For example, a plaintiff who failed to recover damages but obtained injunctive relief . . . may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *Id.* This quote from *Hensley* is directly on point.

In light of this extensive precedent, the substantial equitable relief recovered, the dollar value of past equitable relief totaling $377,279, and the public interest achievement undoubtedly make the attorney fees and expenses incurred in this case worthwhile. The court erred in slashing them for "partial success."

D. THE DISTRICT COURT FAILED TO CONSIDER HOW PLAINTIFF'S ATTORNEYS' WORK ADVANCED THE PUBLIC INTEREST

Congress has expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit "'does so not for himself alone but also as a 'private

attorney general,' vindicating a policy that Congress considered of the highest importance." *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968); *see also Rivera*, 477 U.S. at 575. Since lawsuits like this one "seek to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms, the benefit derived is not directly related to the damages recovered." *See Rivera*, 477 U.S. at 574.

Congress made successful civil rights plaintiffs' attorney fees recoverable from defendants to further advance this public service. *Newman*, 390 U.S. at 402. To eliminate obstacles to the private enforcement on which the vibrancy of our civil rights laws depend, Congress decided to shift the full cost of enforcement to guilty defendants.

"The reason a successful civil rights litigant is entitled to attorney fees 'is to ensure that private citizens can afford to pursue the legal actions necessary to advance the public interest vindicated by the policies of civil rights acts.'" *Id.* (quoting *Ayala v. Center Line, Inc.*, 415 N.W.2d 603, 605 (Iowa 1987)). To award fees solely in relation to the size of the judgment would not appropriately compensate employees' attorneys for their "public interest achievement." *Lynch*, 464 N.W.2d at 239.

This Court specifically directed the lower court to consider "not only the significance of the success obtained to Lee personally, but also the degree to

which her core claim served to vindicate the public interest." *Lee III*, 874 N.W.2d at 649. Judge Richardson's Order does not mention the substantial benefits bequeathed on the public because of Plaintiff's counsel's work. The court erred in failing to factor in the societal improvements and legal advancements Plaintiff's work made possible.

II. THE DISTRICT COURT ERRED IN FAILING TO AWARD AT LEAST 60% OF PLAINTIFF'S LITIGATION EXPENSES

The district court ordered Defendants to pay the following:

(a) 60% of the $361,027 in attorney fees requested (i.e. $216,616.20),

(b) $7,032.50 in attorney fees incurred since July 12, 2016, and

(c) $143.18 in expenses incurred since July 12, 2016,

for a total of $223,791.88. Order, p. 4 (App. 146). In doing so, the court omitted Defendants' responsibility for any of Plaintiff's litigation expenses incurred prior to July 12, 2016.

It appears the court was under the mistaken impression that the $361,027 in attorney fees also included costs and expenses. It does not. *See* Pl. Application, pp. 1, 3.

Plaintiff incurred an additional $13,707.72 in expenses. *See* Pl. Application, p. 4 & Ex. 2. Plaintiff's counsel made a professional statement to the Court that none of them were related to her pursuit of retrospective relief. Fee Appl., p. 4 (App. 70). Defendants did not identify any expenses that it

believed were related to retrospective relief.[4] They should be ordered to reimburse Plaintiff for all litigation expenses.

However, even if the Court does not disturb the rest of the Order, the judgment against Defendants should be increased by 60% of $13,707.72, or $8,224.63.

CONCLUSION

The Court might fairly question why it should once again involve itself in this case, as it has already consumed a disproportionate share of the Court's time and energy. Moreover, ensuring that attorneys are adequately compensated is not an issue that troubles most people. Now more than ever, however, the existence of civil rights depends on the existence of civil rights lawyers.

Plaintiff Tina Lee's overall degree of success in this ground-breaking case cannot be questioned. Her attorneys navigated complex issues, performed excellent work, achieved justice for her, and changed the law. Yet—even after their compensation was delayed for a decade or more—the district court's

[4] Instead, Defendants argued that this Court had taxed costs to Plaintiff in the first appeal and one-half of the costs in the third appeal. Def. Resistance, p. 3 (App. 112). It is unclear what effect, if any, that should have once the case has come to an end. *See Lee III*, 874 N.W.2d at 647 (recognizing that Plaintiff's "'status as a prevailing party is determined on the outcome of the case as a whole, rather than by piecemeal assessment of how [she fared] along the way").

order effectively compensates them at rates barely sufficient to cover overhead. That is wrong.

A fee award is supposed to be "informed by the statutory purpose of making it possible for poor clients with good claims to secure competent help." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 730-31 (1987). Congress intended fees awarded under federal civil rights laws to "be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and *not be reduced because the rights involved may be nonpecuniary in nature*." *Rivera*, 477 U.S. at 575 (quoting Senate Report, at 6 U.S. Code Cong. & Admin. News 1976, p. 5913) (emphasis in *Rivera*).

To leave in place the 40% reduction in Plaintiff's fees in the face of undisputed evidence that any non-compensable fees did not exceed 1%, sends a clear message to civil rights advocates that they would be better off practicing some other type of law. Iowa does not have nearly enough civil rights lawyers to serve the public's needs. There is far more illegal discrimination, harassment, and retaliation in Iowa than there are qualified attorneys to enforce the law. Every cut that is made to hours that were legitimately worked or to expenses that were incurred sends a message to the Bar, discouraging attorneys from choosing this challenging line of work. Perhaps more importantly, each one of those cuts also sends a message to employers, emboldening them to cut

corners in the hopes that they will never be held fully accountable for the losses their lawbreaking engenders.

For all these reasons, Plaintiff respectfully requests the Court remand this case for the district court to enter an amended Judgment and Order requiring Defendants to pay $381,910.40, which includes:

(a) $361,027 in attorney fees incurred prior to July 12, 2016;[5]

(b) $13,707.72 in litigation expenses incurred prior to July 12, 2016;

(c) $7,032.50 in attorney fees incurred between July 12 and October 4, 2016;

(d) $143.18 in expenses incurred between July 12 and October 4, 2016;

and reasonable attorney fees and expenses incurred since October 4, 2016.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff does not believe oral argument is necessary in this case because the controlling case law is clear. In the event the Court grants oral argument, however, Plaintiff requests to be heard.

[5] This is the total amount of fees Plaintiff incurred, less the $4,963.75 in fees she incurred "in pursuing only the unsuccessful claims." *See Lee III*, 874 N.W.2d at 649.

/s/ Paige Fiedler
FIEDLER & TIMMER, PLLC
Paige Fiedler AT 0002496
paige@employmentlawiowa.com
Brooke Timmer AT0008821
brooke@employmentlawiowa.com
8831 Windsor Parkway
Johnston, IA 50131
Telephone: (515) 254-1999
Facsimile: (515) 254-9923
ATTORNEYS FOR
PLAINTIFF/APPELLANT

ATTORNEY'S COST CERTIFICATE

I, Paige Fiedler, certify that there was no cost to reproduce copies of the preceding Appellant's Final Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

Certified by: */s/ Paige Fiedler*

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[_X_] this brief contains 6,061 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[_X_] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point font size in Garamond type style.

Certified by: */s/ Paige Fiedler*

CERTIFICATE OF SERVICE AND FILING

I, Robin Daisy-Jahn, hereby certify that on the 17th day of April, 2017, I electronically filed the foregoing Final Brief with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

Certified by: */s/ Robin Daisy-Jahn*