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 REPLY BRIEF

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ARGUMENT

I. THE DISTRICT COURT'S REDUCTIONS WERE INCONSISTENT WITH THIS COURT'S INSTRUCTIONS, AS WELL AS THE LAW AND THE FACTS

Standard of Review: There is no precedent, existing or cited, for Defendants' contention that a party objecting to a fee award is "heavy" unless the amount awarded was zero or everything the plaintiff requested. *See* Def. Brief, p. 15.

A. THE REDUCTIONS WERE INCONSISTENT WITH THIS COURT'S INSTRUCTIONS

Defendants' Brief largely ignores the fundamental problems in the trial court's analysis. Although the trial court held this case contained no claims that were unrelated to Plaintiff's request for prospective relief (*see* Order 10/10/16, p. 3 (App. 145), it went on to drastically cut her fees. This was contrary to the law, as well as to the mandate of *Lee III*, which ordered the court to award Plaintiff the "attorney fees and costs she incurred in seeking prospective relief." *Lee III*, 874 N.W.2d at 650.

Contrary to Defendants' representation on page 17 of their Brief, exclusion of fees expended solely to seek retrospective relief was not the *Lee III* Court's only condition for the remand. The 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. *Lee III*, 874 N.W.2d at 648-49. The Supreme Court gave clear direction that fees "*obviously* incurred in pursuing only the unsuccessful claims" should be cut, but that fees related to claims "involving 'a common core of facts' or 'based on related legal theories'" are recoverable. *Id.* at 649 (emphasis added). Defendants argue that when this Court set forth these legal principles, it was just giving the trial judge ideas he could either accept or reject. *See* Def. Brief, p. 17. In other words, when the Court instructed that fees related to claims involving a common core of facts were recoverable, it must have meant only that recoverability was not out of the question—not that Plaintiff should actually collect them. *See id.* This is not a fair reading of *Lee III*, nor is it consistent with the law. *See, e.g. 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.; Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983).

The Court also specifically directed the trial judge 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. The trial judge utterly failed to do so. *See* Order 10/10/16 (App. 143-147). This alone mandates reconsideration of the fee award.

This Court ordered a specific reduction—the amount of fees that Plaintiff "incurred in seeking retroactive monetary relief." *Lee III*, 874 N.W.2d at 648. The undisputed facts show the actual amount of this reduction turned out to be only $4,963.75,[1] yet the judge slashed Plaintiff's fees by an astounding $153,154.77.[2] Thus, the trial court's cut was ***over 30 times greater*** than the reduction ordered by this Court. Although the *Lee III* opinion did not mandate the method the district court used to ensure that the State was not on the hook for fees related to retrospective relief, *see Lee III*, 874 N.W.2d at 649-50, it was surely an abuse of discretion to slash Plaintiff's fees by amounts so far removed from undisputed reality.

B. THE REDUCTIONS WERE INCONSISTENT WITH THE LAW AND THE FACTS

The fee reductions ordered by the district court did not make sense; nor did they follow the law.

Plaintiff requested a total of $376,946.65, which included:

(a) $356,063.25 in attorney fees incurred prior to July 12, 2016 ($361,027 less the $4,963.75 of time that was incurred in seeking money damages) (Appl. Fees, pp. 2-4) (App. 68-70);

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[1] *See* Appl. Fees, pp. 2-4 (App. 68-70).

[2] Rather than awarding the $376,946.65 requested, the trial court awarded only $223,791.88.

(b) $13,707.72 in litigation expenses incurred prior to July 12, 2016 (Appl. Fees p. 4) (App. 70);

(c) $7,032.50 in attorney fees incurred between July 12 and October 4, 2016 (Suppl. to Appl.) (App. 118-121);

(d) $143.18 in expenses incurred between July 12 and October 4, 2016 (Suppl. to Appl.) (App. 118-121);

As explained above, the $153,154.77 discount Defendants received bore no relationship whatsoever to the actual amount of fees "incurred in pursuing only the unsuccessful claims." *See Lee III*, 874 N.W.2d at 649.

This error was compounded by the trial court's failure to consider the enormity of Plaintiff's overall success in the case. The court failed to give Plaintiff any credit for establishing that Defendants violated the FMLA in the first instance, despite the fact that that issue dominated every aspect of the case until after the jury trial. *See* Pl. Brief, pp. 15-24.

Defendants repeatedly imply that the district court must have wanted to ensure that the final number was less than the dollar amount of attorney fees it ordered in 2014. Def. Brief, pp. 12-13, 16, 30. However, the court never mentioned that as a factor it considered (*see* Order 10/10/16) (App. 143-147), even though the law required it to articulate its reasoning. *See, e.g. Dutcher v. Randall Foods*, 546 N.W.2d 889, 897 (Iowa 1996) ("Detailed findings of fact

with regard to the factors considered must accompany the attorney fee award."); *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 833, 834 (Iowa 2009); *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 558 (2010).

Furthermore, such a consideration would not have been appropriate. There was no indication in *Lee III* that the ultimate fee award, including fees and expenses that were incurred after the date of that decision or fees necessary to compensate Plaintiff for the extraordinary delay in payment, had to be less than the fees accumulated as of June 27, 2014. In its directive to recalculate the fee award, *Lee III* specifically required the court to take into account all general principles governing attorney fee awards. *Lee III*, 874 N.W.2d at 648-49.

One of those general principles is the rule that defendants are required to pay attorney fees at current hourly rates in order to compensate for delay in payment. *See Edson v. Chambers*, 519 N.W.2d 832, 840 (Iowa Ct. App. 1994). The Edson court also recognized that the United States Supreme Court has specifically ruled that "state sovereign immunity does not bar an award of fees including 'an enhancement for delay.'" *Id.* (quoting *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989)).

> Clearly, compensation received several years after the services were rendered—as it frequently is in complex civil rights litigation—is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings. We agree, therefore, that an appropriate adjustment for delay in payment—whether by

> the application of current rather than historic hourly rates or otherwise—is within the contemplation of [section 1988].

Jenkins, 491 U.S. at 283.

Given this explicit approval by the highest court in the land, it is not surprising that other courts almost uniformly award fees at the plaintiff's lawyers' current hourly rates to try and make up for the delay in payment. *See, e.g. Picket v. Sheridan Health Care Ctr.*, 813 F.3d 640, 647 (7th Cir. 2016); *Stanger v. McGee*, 812 F.3d 734, 740 (9th Cir. 2016); *Simring v. Rutgers*, 2015 WL 4620613 at *3 (3d Cir.); *West v. Potter*, 717 F.3d 1030, 1033-34 (D.C. Cir. 2013); *Reaching Hearts Int'l v. Prince George's County*, 478 F.3d. Appx. 54, 57, 60 (4th Cir. 2012); *Barnes v. City of Cincinnati*, 401 F.3d 729, 746 (6th Cir. 2005); *Lanni v. New Jersey*, 259 F.3d 146, 149-50 (3d Cir. 2001); *Little Rock Sch. Dist. v. Arkansas*, 127 F.3d 693, 697 (8th Cir. 1997); *Barjon v. Dalton*, 132 F.3d 496, 502-03 (9th Cir. 1997); *Smith v. Village of Maywood*, 17 F.3d 219, 221 (7th Cir. 1994); *Institutionalized Juveniles v. Sec. of Pub. Welfare*, 758 F.2d 897, 922-23 (9th Cir. 1985); *Ryan v. Editions*, 2016 WL 233093 at * 1, 5 (N.D. Cal.); *Franks v. Mkm Oil, Inc.*, 2016 WL 861182 at *1, 3 (N.D. Ill.); *In re Delta/Airtran Baggage Fee Antitrust Litig.*, 2015 WL 4635729 at *18-19 (D. Ga.); *Hargroves v. City of New York*, 2014 WL 1271039 at *3 (E.D.N.Y.); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 2013 WL 716460 at *4 (D. Minn.); *Rodriguez v. City of Chicago*, 2013 WL 5348307 at *2-3 (N.D. Ill.); *Tussey v. ABB, Inc.*, 2012 WL 5386033 at *3 (W.D. Mo.), *vacated on*

other grounds, 746 F.3d 327 (8th Cir. 2014); *Arizona v. Asarco., LLC*, 2011 WL 6951842 at *6 (D. Ariz. 2011); *Toussie v. County of Suffolk*, 2011 WL 2173870 at *1 (E.D.N.Y.); *Schaub v. County of Olmsted*, 2011 WL 3664565 at *3 (D. Minn.); *Mazet v. Halliburton Co. Long-Term Disab. Plan*, 2011 WL 3290468 at *1 (D. Ariz.); *Young v. Verizon's Bell Atl. Cash Balance Plan*, 783 F. Supp. 2d 1031, 1038 (N.D. Ill. 2011); *Cashcall, Inc. v. Morrisey*, 2014 WL 2404300 at *24 (W.V. S.Ct. App.); *Florida Dep't of Agric. & Consumer Servs. v. Bogorff*, 132 So. 3d 249, 257 (Fla. Dist. Ct. App. 2013); *Nix v. Verp*, 2011 WL 557947 at *8 (N.J. Super. Ct.).

Using current market rates is by far the preferred method of mitigating the prejudice caused by the delay in payment. *Rodriguez*, 2013 WL 5348307 at *2. It is also much simpler and more straightforward than any interest-based method. *Id.* at *3; *Franks*, 2016 WL 861182 at *2; *Ryan*, 2016 WL 233093 at *5.

While many decisions say that a district court has discretion to decide the best way to make up for a delay in payment, that discretion becomes more limited when the delay has been lengthy. *See, e.g. Anderson v. Director*, 91 F.3d 1322, 1325 (9th Cir. 1996) (finding abuse of discretion not to use current hourly rates when lawyer had represented client for 14 years without payment); *Tussey*, 2012 WL 5386033 at *3 (lengthy delay of 6 years made it proper to use contemporary rates); *Bogorff*, 132 So. 3d at 257 (calling delay of over 10 years "extraordinary").

By the time oral argument is held in this appeal, Paige Fiedler and Brooke Timmer will have represented Tina Lee in this case for 13 years. They have yet to be paid a single dime for any of their work. Meanwhile, employees of their law firm continue to expect to be paid bi-weekly and to receive employment benefits. They continue to need office space with heating, cooling, electricity, computers, desks, copiers, and telephones.[3] The State of Iowa continues to require Fiedler and Timmer to pay their obligations on time, including income taxes, unemployment insurance and other fees. At times during the last 13 years, these obligations have required Fiedler and Timmer to go into debt and pay interest because the State has failed to pay *its* obligations to *them*. The trial court properly ordered Defendants to pay counsels' current hourly rates in order to compensate for the delay in payment.

The law contains no other rationale to use current hourly rates *other than* to try and make up for the delay in payment. Defendants wrongly try and attribute the trial court's use of current rates to other motivations. Defendants imply the higher rates were used:

- to "temper the impact" of the enormous percentage reduction in fees;

[3] In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 714 (1987), the Supreme Court recognized that lawyers' business expenses continue all the while confirmation of their entitlement to fees is delayed.

- to recognize Lee's overall success in the litigation; and
- to recognize the important public interests that were vindicated.

Def. Brief, p. 20. There is no evidence that the trial court considered any of these factors in deciding the appropriateness of Plaintiff's counsels' hourly rates. Moreoever, there is no precedent for the use of higher hourly rates in order to accomplish any of these worthwhile goals. While it was absolutely appropriate for fees to have been calculated using attorneys' current rates, especially given the remarkable delay in compensation, that does not make up for the court's errors in failing to account for the very small amount of fees that were actually incurred in seeking money damages. Nor does it do anything to compensate Plaintiff's counsel for the societal benefits engendered by their public interest achievement. Failure to account for this factor violated this Court's express directive to take into account "the degree to which [Lee's] core claim served to vindicate the public interest." *See Lee III*, 874 N.W.2d at 649.

Defendants' attempted comparison of fees paid to compensate attorneys representing indigent criminal defendants is unfairly misleading. *See* Def. Brief, p. 29. Such decisions are subject to vastly different standards. The attorney in *Green v. Iowa District Court for Mills County,* 415 N.W.2d 606, 608 (Iowa 1987) took the case knowing that his fees would normally be capped at $2,500. Tina Lee's lawyers took her case believing in the law's promise that, if she won, they

could count on payment of virtually all their normal and customary fees. Congress has specifically communicated its intent that attorney fees in civil rights cases be compared, not to fees payable to court-appointed criminal lawyers, but to fees in "'equally complex Federal litigation such as antitrust cases. . . .'" *Casey v. City of Cabool*, 12 F.3d 799, 805 (8th Cir. 1993) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976)).

In addition, fees in such criminal cases are paid by taxpayers, while fees in FMLA cases are paid by lawbreaking employers, the actions of which directly caused the fees to be incurred.

For all these reasons and those set forth in her Brief, 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:

(e) $361,027 in attorney fees incurred prior to July 12, 2016;[4]

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

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

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

[4] 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.

for a total of $381,910.40, in addition to reasonable attorney fees and expenses incurred since October 4, 2016.

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ATTORNEY'S COST CERTIFICATE

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

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