IN THE SUPREME COURT OF IOWA

No. 16–1884

TINA ELIZABETH LEE,

Appellant,

vs.

STATE OF IOWA and POLK COUNTY CLERK OF COURT,

Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE JAMES M. RICHARDSON, JUDGE

APPELLEES' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

THOMAS J. MILLER
ATTORNEY GENERAL OF IOWA

JEFFREY S. THOMPSON
SOLICITOR GENERAL

DAVID M. RANSCHT
JEFFREY PETERZALEK
Assistant Attorneys General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
Ph: (515) 281-7175
E-mail: David.Ranscht2@iowa.gov
Jeffrey.Peterzalek@iowa.gov

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

Cases

Other Authorities

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DOES A DISTRICT COURT ABUSE ITS DISCRETION IN SETTING AN ATTORNEY FEE AWARD WHEN IT ASSESSES ALL FEES AT THE ATTORNEYS' CURRENT RATES BUT REDUCES THE OVERALL AWARD TO ACCOMMODATE ONLY PARTIAL SUCCESS?

Authorities

NevadaCare, Inc. v. Dep't of Human Servs., 783 N.W.2d 459 (Iowa 2010)

Lee v. State (Lee III), 874 N.W.2d 631 (Iowa 2016)

Tilton v. Iowa Power & Light Co., 250 Iowa 583, 94 N.W.2d 782 (1959)

Bremicker v. MCI Telecomms. Corp., 420 N.W.2d 427 (Iowa 1988)

Green v. Iowa Dist. Ct., 415 N.W.2d 606 (Iowa 1987)

Smith v. Iowa State Univ.of Sci. & Tech., 885 N.W.2d 620 (Iowa 2016)

Dutcher v. Randall Foods, 546 N.W.2d 889 (Iowa 1996)

Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933 (1983)

Lynch v. City of Des Moines, 464 N.W.2d 236 (Iowa 1990)

In re Condemnation of Lands, 261 Iowa 146, 153 N.W.2d 706 (1967)

Schaffer v. Frank Moyer Constr., Inc., 628 N.W.2d 11 (Iowa 2001)

Vaughan v. Must, Inc., 542 N.W.2d 533 (Iowa 1996)

Gabelmann v. NFO, Inc., 606 N.W.2d 339 (Iowa 2000)

City of Riverside v. Rivera, 477 U.S. 561 (1986)

Lara v. Thomas, 512 N.W.2d 777 (Iowa 1994)

Landals v. George A. Rolfes Co., 454 N.W.2d 891 (Iowa 1990)

Coonrad v. Van Metre, 362 N.W.2d 197 (Iowa 1985)

Miss. Valley Broad., Inc. v. Mitchell, 503 N.W.2d 617 (Iowa Ct. App. 1993)

McNally & Nimergood v. Neumann-Kiewit Constructors, Inc., 648 N.W.2d 564 (Iowa 2002)

Equity Control Assocs. v. Root, 638 N.W.2d 664 (Iowa 2001)

Hernandez v. Bridgestone Ams. Tire Operations, LLC, 831 F.3d 940 (8th Cir. 2016)

Marez v. Saint-Gobain Containers, Inc., 688 F.3d 958 (8th Cir. 2012)

Andrade v. Jamestown Hous. Auth., 82 F.3d 1179 (1st Cir. 1996)

Dotson v. Pfizer, Inc., 558 F.3d 284 (4th Cir. 2009)

Ky. Rest. Concepts, Inc. v. City of Louisville, 117 F. App'x 415 (6th Cir. 2004)

Scheeler v. Crane Co., 21 F.3d 791 (8th Cir. 1994)

Loggins v. Delo, 999 F.2d 364 (8th Cir. 1993)

Lusk v. Va. Panel Corp., 96 F. Supp. 3d 573 (W.D. Va. 2015)

GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration, Inc., 691 N.W.2d 730 (Iowa 2005)

Rode v. Dellarciprete, 892 F.2d 1177 (3d Cir. 1990)

Wooldridge v. Cent. United Life Ins. Co., 568 N.W.2d 44 (Iowa 1997)

Quigley v. Winter, 598 F.3d 938 (8th Cir. 2010)

Friolo v. Frankel, 91 A.3d 1156, 1158 (Md. 2011)

Mims v. Shapp, 744 F.2d 946 (3d Cir. 1984)

Greater Los Angeles Council on Deafness v. Cmty. Television of S. Cal., 813 F.2d 217 (9th Cir. 1987)

Foster v. Mydas Assocs., Inc., 943 F.2d 139 (1st Cir. 1991)

Lee v. State (Lee II), 844 N.W.2d 668 (Iowa 2014)

Lee v. State (Lee I), 815 N.W.2d 731 (Iowa 2012)

In re Estate of Engelkes, 256 Iowa 213, 127 N.W.2d 111 (1964)

ROUTING STATEMENT

If expediency were the sole criterion, it might make sense for the Supreme Court to keep this case. After all, this Court has already issued three decisions—*Lee v. State (Lee I)*, 815 N.W.2d 731 (Iowa 2012); *Lee v. State (Lee II)*, 844 N.W.2d 668 (Iowa 2014); and *Lee v. State (Lee III)*, 874 N.W.2d 631 (Iowa 2016)—so it knows the case well. But the issue in this fourth appeal is legally discrete, so transferring the case would not significantly hamper expediency. Accordingly, the trend of biennial Iowa Supreme Court decisions need not continue. *See Baur v. Baur Farms, Inc.*, No. 14–1412, 2016 WL 4036105, at *3 (Iowa Ct. App. July 27, 2016) (deciding a subsequent appeal even though a previous appeal in the same case went before the Iowa Supreme Court).

The legal principles regarding attorney fee awards—particularly those discussed in *Lee III* and in *Smith v. Iowa State University of Science & Technology*, 885 N.W.2d 620 (Iowa 2016) (per curiam)—are not enunciating or changing merely because recent decisions discuss them. Because the principles are well established and the legal issue is discrete, the State contends the routing guidelines outweigh this Court's familiarity with the case. Accordingly, it recommends transfer to the court of appeals. *See* Iowa R. App. P. 6.1101(3)(*a*).

STATEMENT OF THE CASE

Lee correctly presents this case's procedural history, but the dispute now boils down solely to the amount of an attorney fee award, so the most relevant events are as follows.

The decision in *Lee III* vacated the previous attorney fee award (which totaled $233,090.26) and discussed principles for the district court to follow when entering a new one. *Lee III*, 874 N.W.2d at 649–50. In particular, the Court found it evident that the district court calculated the fee award improperly by including "fees [Lee] incurred in seeking both retroactive and prospective relief." *Id.* at 648. Accordingly, the Court was compelled to reverse the award and remand for a new calculation. *Id.*

Lee III contained some mandates regarding what should occur on remand, but most fee-setting principles remained subject to the district court's broad discretion. *Compare id.* at 648–49 ("[T]he district court should consider the general principles governing attorney fee awards in actions in which plaintiffs are only partially successful."), *and id.* at 650 ("[T]he court must reduce its initial award . . . ."), *with id.* at 649 ("The court may properly award any fees incurred . . . involving 'a common core of facts' . . . ."), *and id.* at 649 ("On

remand, the district court may consider . . . the degree to which [Lee's] core claim served to vindicate the public interest.").

After procedendo issued, Lee filed a new application for attorney fees and expenses (dated July 12, 2016) and included a fee report, an expense report, fee affidavits, and a brief in support. (Lee Fee Application, App. 67–109.) The State resisted Lee's calculation of the fees and proposed its own calculation that involved a larger reduction for partial success. (State Resistance to Fee Application, App. 110–13.) Lee then filed a supplemental application for attorney's fees and costs, requesting an additional $7100 for amounts incurred after July 12, 2016. (Lee Supp. Application, App. 118–21.) After a hearing, the district court entered a fee award applying a forty percent reduction and stating the rationale for awarding that amount. (Dist. Ct. Ruling, App. 143–47.) Lee appealed.

STATEMENT OF FACTS

According to the district court, Lee requested a total award of $368,202.68—$361,027.00 plus the uncontested amount of fees and expenses stated in her supplemental application.[1] (Dist. Ct. Ruling p. 2, App. 144.) At

[1] The parties agree the amount stated in Lee's supplemental application for fees and expenses—a little over $7100—is not subject to any reduction.

the hearing, Lee asserted that the reduction "necessary to ensure [the fee award] does not include fees and costs Lee incurred in proving aspects of her claims for retroactive relief," *Lee III*, 874 N.W.2d at 650, was 1%—leaving a total request of $364,592.41.[2] Although this case began in 2006, Lee calculated all fees in her most recent request at her attorneys' *current* hourly rates—including hours for attorneys who first became licensed during the pendency of the case. (Lee Fee Application, App. 72–95.) This calculation increased Lee's total request even though *Lee III* determined she was not entitled to $233,000. *Id.* The district court concluded in its order that assessing all fees at the attorneys' current rates "offsets any delay in payment." (App. 145.)

Although it did not suggest a specific amount the court should award, the State proposed a 40% reduction from Lee's newest request. (App. 112.) A 40% reduction from $361,027, added to the uncontested amounts in Lee's supplemental application, entitled Lee to $223,791.88, just 4% less than the

[2] Lee adopts $361,027 as a figure representing the total amount of fees incurred without counting time spent pursuing unsuccessful claims. (Lee Br. at 29 & n.5.) But her motion said otherwise; there, she requested only $356,063.25 plus a separate amount of costs. (App. 70.) The parties did not make exact numerical requests during the hearing on the motion. (App. 122–42.) While the district court did not directly address Lee's initial request for costs (only her supplemental application), its decision is affirmable on the ground that its initial cost award was rolled in to the $361,027 figure.

award vacated in *Lee III*.[3] *See id.* at 635–37, 650. The State's proposed reduction reflected Lee's success obtaining prospective relief but also took into account her unsuccessful claims for monetary damages and accommodated *Lee III*'s determination that Lee is not entitled to recoup from the State *all* of the attorney fees she has incurred during this case. (App. 111.) *See id.* at 648–50.

The district court found the work Lee's attorneys performed largely centered on a common core of work directed toward obtaining both prospective and retroactive relief. (App. 145.) However, it also concluded that under *Lee III*, it had discretion to reduce a fee award "based on the ultimate result or partial success of a case." (App. 145.) Because "there is no precise methodology the district court must employ to calculate an appropriate award," *id.* at 650, the court utilized its discretion and balanced the total amount requested plus the common core of work with the increased hourly rate and the fact the State prevailed on two substantive issues in *Lee I* and *Lee III*. *See id.* at 650; *Lee I*, 815 N.W.2d at 743. It ultimately applied a forty percent reduction and awarded Lee $223,791.88. (App. 146.)

[3] Although the State resisted Lee's proposal to calculate all fees at her attorneys' current hourly rates on the grounds that the rates exceed "the current and appropriate market rate for the attorneys involved" (App. 111), the State acknowledges the district court ruled otherwise and it has not cross-appealed that issue.

ARGUMENT

I. THE DISTRICT COURT'S FEE CALCULATION METHODOLOGY AND ULTIMATE AWARD IN THIS CASE WERE WITHIN ITS DISCRETION.

Preservation of Error: The State agrees Lee preserved error.

Standard of Review: Review is for an abuse of discretion. *NevadaCare, Inc. v. Dep't of Human Servs.*, 783 N.W.2d 459, 469 (Iowa 2010). In attorney fee matters, the district court's discretion is broad. *Lee III*, 874 N.W.2d at 649; *accord Tilton v. Iowa Power & Light Co.*, 250 Iowa 583, 590, 94 N.W.2d 782, 786 (1959) ("considerable"). Its decision is "presumed to be correct until the contrary is shown." *Bremicker v. MCI Telecomms. Corp.*, 420 N.W.2d 427, 428 (Iowa 1988).

No abuse of discretion occurs even if "the fee is at the low end of a permissible range for the services performed" and even if it might discourage the attorney(s) from undertaking similar cases in the future. *Green v. Iowa Dist. Ct.*, 415 N.W.2d 606, 609 (Iowa 1987); *accord Tilton*, 250 Iowa at 591, 94 N.W.2d at 786 (concluding that although "a larger allowance of attorney fees might have been upheld," the amount ordered was not manifestly inadequate). Many abuses of discretion in attorney fee matters occur at either end of a spectrum: when the district court inadequately awards *zero* fees or when it

awards *all* requested fees just because the case presents a common core of facts. *See, e.g.*, *Smith*, 885 N.W.2d at 624 ("[T]he district court abused its discretion in awarding Smith all of his requested attorney fees on the ground that this case presented a 'common core of facts.' "); *Lee III*, 874 N.W.2d at 650 ("[T]he [district] court must reduce its initial award . . . to ensure it does not include fees and costs Lee incurred in proving aspects of her claims for retroactive relief . . . ."); *Dutcher v. Randall Foods*, 546 N.W.2d 889, 894–95 (Iowa 1996) (premature denial of any fees).[4]

While the standard of review does not alone control the Court's decision, it illustrates that Lee's burden on appeal—when the amount awarded was neither a blanket zero nor a blanket "everything"—is heavy.

Argument: *Lee III* emphasized that "there is no precise methodology the district court must employ to calculate an appropriate award." *Lee III*, 874 N.W.2d at 650; *see id.* at 649–50 (stating the same point two more times). Rather, on remand, the district court was merely required to provide a concise

[4]*But see Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 344 (Iowa 2000) (remanding for a new fee award because the district court placed "undue emphasis on the size of the judgment, to the exclusion of all other pertinent factors"); *Olson v. Niemans, Ltd.*, 579 N.W.2d 299, 316 (Iowa 1998) (affirming a wholesale denial of attorney fees); *Wooldridge v. Cent. United Life Ins. Co.*, 568 N.W.2d 44, 50 (Iowa 1997) (reducing a fee award further than the district court did).

explanation of its reasons for the award. *See id.* at 650. It could do so by making "clear that it . . . considered the relationship between the amount of the fee awarded and the results obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941 (1983).

The district court's new fee award follows that directive. It balances the relatedness of the legal work performed with the delay in payment, notes Lee's success, and avoids entering a greater fee award than the one vacated in *Lee III*. While Lee may second-guess the district court's reliance on particular factors or its relative weighing of them, disagreement does not establish the district court abused its discretion. *See Lynch v. City of Des Moines*, 464 N.W.2d 236, 239 (Iowa 1990). This Court should affirm.

A. *Lee III* required the district court to reduce its initial award but did not remove the district court's overarching discretion to determine the amount of the reduction.

The gravamen of Lee's appeal is that the district court disregarded both federal law and *Lee III*'s instructions; she notes federal law "requires compensation" under these facts (Lee Br. at 9) and calls the district court's decision bizarre (Lee Br. at 12), "virtually random" (Lee Br. at 17), and "unprecedented and nonsensical" (Lee Br. at 20).

But the story is a little deeper than that. The law requires *some* compensation under these facts, but not necessarily the full amount Lee requested. *Lee III*, 874 N.W.2d at 647 ("[T]he amount of fees awarded is within the district court's broad discretion."). Furthermore, *Lee III* instructed the district court to reduce its initial award without specifying the exact steps it should undertake or the number it should reach. *Id.* at 650. Rather, *Lee III* properly let the district court—indeed, the same judge who has overseen this case since its inception—be the calculator, with one condition: the district court's award could not include any fees incurred in seeking retrospective relief. *Id.*; *see Hensley*, 461 U.S. at 437, 103 S. Ct. at 1941 (acknowledging the district court often has "superior understanding of the litigation"); *In re Condemnation of Lands*, 261 Iowa 146, 155, 153 N.W.2d 706, 711 (1967) (Garfield, C.J., dissenting in part) ("Certainly the trial court knew considerably more about the case than we do.").

That limiting principle worked only in one direction; it imposed a singular mandate but did not foreclose the district court from considering other factors and weighing them as it saw fit, according to its expert judgment. *Lee III*, 874 N.W.2d at 649 (noting fees related to claims involving a common core of facts are *recoverable*—not that the district court must award them); *see Schaffer v.*

Frank Moyer Constr., Inc., 628 N.W.2d 11, 24 (Iowa 2001) ("The district court is an expert on the issue of reasonable attorney fees."). Nor did it order an exact reduction, despite Lee's assertions to that effect at the hearing. (App. 141.) Recognizing as much, the district court merely followed the directions *Lee III* gave it. Following directions on remand is not an abuse of discretion.

B. The district court appropriately balanced competing concerns and factors in setting the fee award.

Smith describes the process a district court must follow when exercising its discretion in setting the amount of fees awarded under a fee-shifting statute:

> [W]hile fees can be awarded for time devoted generally to the litigation as a whole, the district court should make an appropriate reduction for unrelated time spent on unsuccessful claims . . . . Then, after this initial step has been performed, if the plaintiff only obtained partial or limited success on the claim for which the legislature authorized fees, the court must consider the reasonableness of the hours expended in light of this ultimate result. The second step may warrant a further reduction.

Smith, 885 N.W.2d at 625–26 (footnote omitted). Those principles are longstanding; for decades district courts awarding fees have been "entitled to consider . . . the result obtained." *Tilton*, 250 Iowa at 590, 94 N.W.2d at 786; *see also In re Condemnation of Lands*, 261 Iowa at 153, 153 N.W.2d at 710 (majority opinion) ("The determination of reasonable attorney fees must be made [within] the context of the whole case . . . ."). Under those principles, "a

reduction in the fee award may be appropriate even if the entire lawsuit flows from a common core of facts." *Smith*, 885 N.W.2d at 624; *accord Lee III*, 874 N.W.2d at 649–50 (acknowledging the district court "may properly award . . . fees" based on a common core of facts but nonetheless requiring the district court on remand to "reduce its initial award").

In this case, the district court understood its obligation to follow *Lee III* and *Smith*, and ruled accordingly. It noted Lee prevailed in some aspects of the lawsuit while the State prevailed in others. (Dist. Ct. Ruling pp. 3–4, App. 145–46.) It found that although Lee sought different types of relief, her attorneys' work supporting requests for both prospective relief and monetary damages were intertwined. (App. 145.) It further concluded Lee's suit succeeded because she has been reinstated and, to offset "delay in payment," granted Lee's request to calculate all fees at her attorneys' current hourly rates. (App. 145.) As Lee acknowledges, that marked a change from the district court's previous fee awards. (Lee Br. at 6.)

But the court also recognized that "*Lee III* requires a second step analysis based on the ultimate result or partial success of a case." (App. 145.) So it ultimately chose the option that *Smith* allows: a reduction even if the lawsuit flows from a common core of facts. *See Smith*, 885 N.W.2d at 624. Because

the court assessed fees at the attorneys' current rates, the net award of both fees and costs (over $223,000) is only marginally (4%) less than the award vacated in *Lee III* (over $233,000).

While the Supreme Court has stated that a "fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit," *Hensley*, 461 U.S. at 435, 103 S. Ct. at 1940, the decision in *Lee III* stated otherwise, *see Lee III*, 874 N.W.2d at 650. Indeed, the *Hensley* Court also held that a court may utilize its discretion to reduce a fee award "even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith"—as Lee's claims were here. *Hensley*, 461 U.S. at 436, 103 S. Ct. at 1941.

In this case, the district court did exactly that. The court utilized a percentage reduction as one step in its calculation, but that was not the end of its analysis; it tempered the impact of the reduction with an increase in the applicable hourly rates. Thus, the district court's approach was not purely mechanical or simplistic. Nor did it ignore Lee's degree of success or the important public interest that was vindicated; those considerations are rolled in to the rate increase. Most importantly, however, the district court reduced Lee's attorney fees based on a qualitative assessment of her relative success—not on a strictly numerical relationship with her actual damages. *See Vaughan v. Must*,

Inc., 542 N.W.2d 533, 541 (Iowa 1996) (rejecting an assertion that the court should "tie the recovery of fees to a precise ratio of the amount of damages awarded"); *Lynch*, 464 N.W.2d at 239 (similar). Because it did not tie Lee's fees to her monetary damages, the statements in *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 344 (Iowa 2000) and *City of Riverside v. Rivera*, 477 U.S. 561, 580–81 (1986) cautioning against such a practice should not cause the Court any heartburn here. To the extent Lee implies that the district court assessed fees in proportion to her monetary recovery, the implication lacks support in the record.

The district court's decision is consistent with Iowa caselaw generally addressing attorney fee awards. In most contexts, as long as the district court awards some fees and shows its work, an attorney fee award is rarely found manifestly inadequate on appeal. *See, e.g.*, *Lara v. Thomas*, 512 N.W.2d 777, 786–87 (Iowa 1994) (affirming a fee award that represented a seventy-five percent reduction because the district court "considered a number of factors," including the extent of overlap between claims "and the overall degree of success"); *Lynch*, 464 N.W.2d at 240 (affirming a district court's award of approximately $95,000 after the plaintiff requested $171,000); *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897–98 (Iowa 1990) (affirming a fee award both parties had appealed because the district court properly "viewed the

case as a whole" and determined certain "factors balanced out each other"); *Green*, 415 N.W.2d at 608–09; *Coonrad v. Van Metre*, 362 N.W.2d 197, 200 (Iowa 1985) (concluding a rate of $40 per hour for indigent criminal defense work was not "so low as to be an abuse of discretion" despite affidavits establishing most attorneys in the area would charge "$50 to $75 per hour for similar work"); *see also Miss. Valley Broad., Inc. v. Mitchell*, 503 N.W.2d 617, 619–20 (Iowa Ct. App. 1993) (finding no abuse of discretion in a district court's fee award that reduced the plaintiff's request by about ninety percent).

Likewise, this Court has often affirmed fee awards challenged as excessive. *See, e.g.*, *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 578 (Iowa 2002) (concluding a twenty percent reduction adequately assured the fee award was not excessive); *Equity Control Assocs. v. Root*, 638 N.W.2d 664, 673–74 (Iowa 2001) (finding no abuse of discretion in a fee award that represented "roughly seventy percent of the amount requested"); *Vaughan*, 542 N.W.2d at 541–42 (Iowa 1996) (affirming a fee award because the district court "examined the case as a whole" and applied a twenty-five percent reduction to account for the plaintiff's respective successes and failures). Infrequent reversals on either inadequacy or excessiveness grounds are a tangible illustration of the abuse-of-discretion standard.

The district court's decision in this case is also consistent with caselaw from other jurisdictions addressing both mandatory fee awards under the Family Medical Leave Act (FMLA) and other fee-shifting provisions. Other courts' decisions are persuasive here because the important civil rights at stake suggest courts' discretion in fee matters should be roughly similar across jurisdictions. *See Dutcher*, 546 N.W.2d at 898.

For example, in an opinion filed after the decision in *Lee III*, the Eighth Circuit Court of Appeals rejected a plaintiff's assertion that the FMLA attorney fee award was inadequate under *Hensley*, concluding the reduction for partial success—the plaintiff prevailed on one claim out of several—was not too severe. *Hernandez v. Bridgestone Ams. Tire Operations, LLC*, 831 F.3d 940, 948–49 (8th Cir. 2016) (per curiam); *see also Marez v. Saint-Gobain Containers, Inc.*, 688 F.3d 958, 966 (8th Cir. 2012) (affirming a fifty percent reduction from a FMLA fee award); *Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179, 1191 (1st Cir. 1996) (concluding a ninety-one percent reduction under the fee-shifting provision in 42 U.S.C. § 1988 was not a misapplication of *Hensley* or an abuse of discretion).

Similarly, the Fourth Circuit Court of Appeals affirmed a district court's thirty-percent reduction for a FMLA fee award because the plaintiff "did not

obtain all the relief requested in his complaint." *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 303 (4th Cir. 2009); *see also Ky. Rest. Concepts, Inc. v. City of Louisville*, 117 F. App'x 415, 421 (6th Cir. 2004) (affirming a thirty-five percent reduction under § 1988 even though the plaintiffs obtained a permanent injunction—the primary relief they sought); *Scheeler v. Crane Co.*, 21 F.3d 791, 793 (8th Cir. 1994) (affirming a thirty-two percent reduction under the Iowa Civil Rights Act because the plaintiff did not recover every measure of damages she initially claimed); *Loggins v. Delo*, 999 F.2d 364, 369 (8th Cir. 1993) (concluding a twenty-eight percent reduction under § 1988 did not violate *Hensley* because considering "limited success" includes weighing the types of damages requested against the type obtained). And a federal district court in Virginia reduced a FMLA fee award even though the plaintiff's claims were "somewhat interrelated" because "she . . . received only part of the relief she requested." *Lusk v. Va. Panel Corp.*, 96 F. Supp. 3d 573, 583 (W.D. Va. 2015). Even accounting for Lee's substantive success in this case, the district court was still entitled to make the reduction it did.

C. Under this case's unique circumstances, the Court itself can make any necessary adjustments to the award rather than remanding the case yet again.

"A request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437, 103 S. Ct. at 1941. The State contends the district court did not abuse its discretion with respect to either fees or expenses. However, if the district court *did* abuse its discretion, the unique circumstances of this case suggest the Court can adjust the award at the appellate level.

Usually, if the district court abused its discretion in awarding fees, the proper disposition is to remand "for a fresh consideration" of the fee application. *Gabelmann*, 606 N.W.2d at 344; *accord GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration, Inc.*, 691 N.W.2d 730, 734 (Iowa 2005). That practice defers to "the district court's superior understanding of the litigation." *Hensley*, 461 U.S. at 437, 103 S. Ct. at 1941; *see Rode v. Dellarciprete*, 892 F.2d 1177, 1192 (3d Cir. 1990) ("[A]ppellants requested that we not remand this case to the district court, but, instead, award a reasonable fee . . . ourselves. This we cannot do.").

However, in the past this Court has modified fee awards upward and downward rather than remanding for determination anew. *Wooldridge v. Cent.*

United Life Ins. Co., 568 N.W.2d 44, 50 (Iowa 1997); *In re Condemnation of Lands*, 261 Iowa at 153, 153 N.W.2d at 710. That kind of disposition, which approaches de novo review, is perhaps subject to criticism on the ground that it "usurp[s] the traditional role of district courts in determining the proper fee award." *Quigley v. Winter*, 598 F.3d 938, 959 (8th Cir. 2010) (Gruender, J., concurring in part and dissenting in part). But even so—and even if *Wooldridge* and *Condemnation of Lands* are outliers—this case's unique posture and history may justify a similar disposition in the event the award requires adjustment.

In *Friolo v. Frankel*, the Maryland Court of Appeals expressed frustration that an attorney fee case "making its third appearance in this Court" was "wearing out its welcome," but ultimately—and begrudgingly—concluded it "must again direct that the case be remanded" for another consideration of the fee application. 91 A.3d 1156, 1158, 1171 (Md. 2011). Should this Court conclude Lee's fees must be recalculated, it can dispense with that kind of begrudging disposition—and importantly, conserve judicial resources—by adopting a procedure some federal courts of appeals use.

In *Mims v. Shapp*, the plaintiff received both damages and injunctive relief. 744 F.2d 946, 949 (3d Cir. 1984). The district court awarded all of the plaintiff's requested attorney fees, but on appeal, the Third Circuit reversed the

damages award and accordingly concluded the "award of injunctive relief c[ould] at best be characterized as 'limited success' " for attorney fee purposes. *Id.* at 955. Because the case had been active for over a decade—including multiple trips up the appellate ladder—the court took a case-specific approach rather than remanding it once again:

> Under ordinary circumstances, we would remand these proceedings to the district court to make a proper apportionment . . . . Remand to the district court in the first instance is the general rule which we have meticulously followed in the past and intend to follow vigorously in the future. But we find here an overarching consideration—the conservation of judicial resources—that compels us to invoke the narrowest of exceptions to our normal procedures. This case has persisted for over ten years in the court system, commanding the attention of three separate district judges, three panels of this court, and in one instance, the court *in banc*. We decide that it is now time to close the case.

Id. Accordingly, the Third Circuit remanded with instructions to award a specific amount of attorney fees. *Id.*

Other courts have made similar decisions in appropriate circumstances. For example, in a case's second appeal to the Ninth Circuit Court of Appeals, the court concluded a fee reduction was necessary and decided to "make this reduction ourselves rather than remand again." *Greater Los Angeles Council on Deafness v. Cmty. Television of S. Cal.*, 813 F.2d 217, 222 (9th Cir. 1987). Likewise, the First Circuit Court of Appeals has on several occasions "taken the

bull by the horns" and awarded fees itself when the appeal involved "only a single question: how much should be awarded to a prevailing plaintiff?" *Foster v. Mydas Assocs., Inc.*, 943 F.2d 139, 144 n.8 (1st Cir. 1991) (collecting cases). And more recently, the Eighth Circuit concluded in *Quigley* that "remand would be inefficient" and calculated attorney fees at the appellate level to help the court "comply with the Supreme Court's command" in *Hensley* that attorney fee requests should not result in additional major litigation. *Quigley*, 598 F.3d at 959 (majority opinion).

Like the dispute in *Mims*, this case has been active for over a decade and has seen multiple appeals—including three Iowa Supreme Court decisions. *See Mims*, 744 F.2d at 955; *see generally Lee III*, 874 N.W.2d at 631; *Lee II*, 844 N.W.2d at 668; *Lee I*, 815 N.W.2d at 731. Under those circumstances, it may be appropriate for this Court to undertake for itself any adjustments it deems necessary—even if it emphasizes that the procedure is case-specific and the practice going forward will be to remand.

For instance, while the State contends the district court included some of Lee's claimed expenses in its initial $361,027 figure, if the Court disagrees, it could add expenses (or a proportion thereof) to the award. But then, symbiotically, it would also have to reduce the base amount of fees (excluding

expenses and before reduction) to $356,063.25—both to conform the award to the evidence in the record and to ensure that the award contains no compensation for fees incurred in seeking retroactive relief. (App. 70.)

CONCLUSION

Recognizing the discretion trial judges possess in fee matters, appellate courts do not disturb the district court's judgment call unless it is clearly untenable. *See Schaffer*, 628 N.W.2d at 22; *see also Tilton*, 250 Iowa at 591, 94 N.W.2d at 786 (concluding an attorney fee award was not manifestly inadequate even though "a larger allowance of attorney fees might have been upheld"). For example, in the context of representing indigent criminal defendants—a cause carrying just as much societal importance as vindicating employees' civil rights—even a fee award that was "understandably discouraging" to the attorney did not constitute an abuse of discretion. *Green*, 415 N.W.2d at 609. The same principles are true here. The considerations Lee identifies certainly can inform the district court's fee determination, but the court's refusal to elevate some factors over others is not grounds for reversal.

There are many cogs involved in a district court's fee calculations:

> Delay in payment entered in the court's determination of a reasonable hourly rate and required no further adjustment of the fee allowance. The degree of success was impressive, but Landals asserted unsuccessful claims of discrimination and damages as

> well. The court concluded these factors balanced out each other and yielded no adjustment either upward or downward, and its conclusion cannot be characterized as an abuse of discretion.

Landals, 454 N.W.2d at 898. And while the district court's calibration of the various cogs in *this* case may not have been the same as in *Landals*, the methodology was still within the court's broad discretion. *Lee III*, 874 N.W.2d at 649–50.

Utilizing that broad discretion, the district court balanced a reduction for Lee's partial success with an increase in her attorneys' rates to set an award just 4% less than the amount vacated in *Lee III*. By contrast, Lee's proposed second-guessing of the district court's weighing process "would seem to leave courts with little discretion in matters of this kind." *In re Estate of Engelkes*, 256 Iowa 213, 219, 127 N.W.2d 111, 114 (1964). The district court committed no abuse, and this Court should affirm.

REQUEST FOR ORAL ARGUMENT

The State requests oral argument. Because this case has a lengthy and complicated history, oral argument may help the Court separate the figurative wheat from the chaff.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 5,079 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ David M. Ranscht
Assistant Attorney General

PROOF OF SERVICE

I, David M. Ranscht, hereby certify that on the 17th day of April, 2017, I or a person acting on my behalf did serve Appellee Final Brief and Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

Paige Fielder
paige@employmentlawiowa.com
Brooke Timmer AT0008821
brooke@employmentlawiowa.com
Attorneys For Plaintiff/Appellant
8831 Windsor Parkway
Johnston, IA 50131
Telephone (515) 254-1999
Facsimile (515) 254-9923

/s/ David M. Ranscht
DAVID M. RANSCHT
Assistant Attorney General

CERTIFICATE OF FILING

I, David M. Ranscht, hereby certify that on the 17th day of April, 2017, I or a person acting on my behalf filed Appellee Final Brief and Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

/s/ David M. Ranscht
DAVID M. RANSCHT
Assistant Attorney General