UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 9:18-cv-80771-ROSENBERG/REINHART

ROBERT W. OTTO, PH.D. LMFT, individually and on behalf of his patients, and JULIE H. HAMILTON, PH.D., LMFT, individually and on behalf of her patients,	)
Plaintiffs,	)
v.	)
CITY OF BOCA RATON, FLORIDA, and COUNTY OF PALM BEACH, FLORIDA,	)
Defendants.	)

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO REPORT AND RECOMMENDATION ON MOTION FOR ATTORNEY'S FEES AND NON-TAXABLE EXPENSES AND COSTS

Pursuant to Local Magistrate Rule 4(a)(1) and 28 U.S.C. §636(b)(1)(A), Plaintiffs Robert W. Otto, Ph.D., LMFT and Julie H. Hamilton, Ph.D, LMFT ("Plaintiffs") hereby respond to Defendants' Objections to the Report and Recommendation on Plaintiffs' Motion for Attorney's Fees and Non-taxable Expenses and Costs (ECF Nos. 243, 244).[1] For the following reasons, Defendants' objections are not well taken and should be overruled.

INTRODUCTION

On November 1, 2023, the Magistrate Judge issued his Report and Recommendation concerning Plaintiffs' Motion for Attorney's Fees and Non-taxable Expenses and Costs. (ECF No. 240.) Some of the Magistrate Judge's conclusions in the Report and Recommendation are in error and should be overruled, as demonstrated in Plaintiffs' Objections (*see* ECF No. 246). However,

[1] Defendant County of Palm Beach "adopts the City of Boca Raton's position as to the Report and Recommendation [ECF No. 240] as outlined in Defendant, City of Boca Raton's Objection to Report and Recommendation on Motion for Attorney's Fees and Non-Taxable Expenses and Costs [ECF No. 243]." (ECF No. 244 at 1.) Because Defendant County of Palm Beach has adopted in full the objections of Defendant City of Boca Raton, Plaintiffs' response will cite only to the City's objections (ECF No. 243), but this response is applicable to both Defendants.

the conclusion to which Defendants object is not one of them. Defendants object to "only one discrete aspect" of the Report and Recommendation, namely "that three attorneys – who are not members of this District's bar and never sought *pro hac vice* admission in this matter – be awarded the same hourly rates as those attorneys who are entitled to practice in this District." (ECF No. 243 at 2.) And, Defendants suggest that the appropriate remedy for this purported error is to reduce the hourly rate for the reasonable hours expended by the three attorneys to the same rate granted to paralegals. (*Id*.) This is erroneous, and should be rejected by the Court.

ARGUMENT

A. Defendants' Objection That Plaintiffs' Counsel Should Be Compensated At Paralegal Rates Is Unmerited And Should Be Overruled.

The Report and Recommendation correctly concluded that "the better reasoned approach is taken by the Ninth Circuit in *Winterrowd v. American General Annuity Insurance Co.*, 556 F.3d 815 (9th Cir. 2009)," and recommended that Plaintiffs, as prevailing parties, recover attorney rates for all attorneys working on this matter, even if *pro hac vice* admission was not sought by three attorneys. (ECF No. 240 at 30-31.) The Report and Recommendation reached the correct conclusion on this point and should be adopted as to this conclusion.

Contrary to Defendants' original contentions (ECF No. 228 at 2–3; ECF No. 229 at 7) and their objections here (ECF No. 243 at 2), the Court should not penalize *some* of Plaintiffs' attorneys for not seeking *pro hac vice* admission in this case, where the only attorneys who *appeared* before the Court in this case are members of this Court's bar, and no attorney violated the Court's rules. The Court's Attorney Rule 4 provides, in pertinent part, "Only members of this Court's bar may *appear* as attorneys before the Court, except when the Court permits an *appearance* pro hac vice." S.D. Fla. L.R., Atty. R. 4(a) (emphasis added). Regarding *pro hac vice* appearance, the Rule provides, "An attorney who . . . is not admitted to practice in the Southern District of Florida may, upon submission of a *pro hac vice* motion filed and served by co-counsel admitted to practice in this District, be permitted to *appear* and participate in a particular case." S.D. Fla. L.R., Atty. R. 4(b)(1) (emphasis added). By its plain language, Attorney Rule 4(a) prohibits the *appearance* of attorneys who are not members of the Court's bar, unless permitted to *appear pro hac vice*. Attorney Rule 4(b) provides the *pro hac vice* process.

Every attorney for Plaintiffs who *appeared* in this case on behalf of Plaintiffs is a member of the Bar of this Court. (*See generally* ECF No. 221-1, ¶¶18, 19a-b.) No attorney who worked on

the case and who was not admitted to the Bar of this Court *appeared* in the case. Thus, no attorney who worked on the case violated any Local Rule. The Report and Recommendation reached the correct conclusion on this point, noting that there is a critical distinction between attorneys performing review, research, and drafting assistance to the primary counsel *appearing* before the Court in the matter. (ECF No. 240 at 31-32 ("An attorney who merely drafts or reviews documents, or helps another attorney prepare for a hearing, is not 'appearing before this Court.'").)

It would be improper and prejudicial to penalize Plaintiffs' counsel with a rate reduction, to paralegal rates, where none of Plaintiffs' attorneys violated any rule. Neither the principal case cited by Defendants in their original submission (ECF No. 243 at 3-4), *Zech v. Commissioner of Social Security*, 680 F. App'x 858 (11th Cir. 2017), nor the current unpublished case cited by Defendants, *Herfield v. Comm'r*, 839 F. App'x 322 (11th Cir. 20203), require the Court to penalize Plaintiffs' counsel with paralegal rates.

First, both *Zech* and *Herfield* are unpublished decisions of the Eleventh Circuit which "are not precedential [and] *do not bind us or the district courts to any degree*." *Barber v. Governor of Alabama*, 73 F.4th 1306, 1320 (11th Cir. 2023) (emphasis added) (quoting *Patterson v. Ga. Pacific, LLC*, 38 F.4th 1336, 1346 (11th Cir. 2022)); *United States v. Izurieta*, 710 F.3d 1176, 1179 (11th Cir. 2013) ("Unpublished decisions are not binding precedent."). *See also* Eleventh Circuit Rule 36-2 (same). Thus, this Court should not consider either case as relevant, and Defendants' reliance on them is misplaced.

Second, both *Zech* and *Herfield* are Equal Access to Justice Act (EAJA) cases, and pertain to an attorney's fee scheme wholly different from 42 U.S.C. § 1988. *Zech*, 680 F. App'x at 859; *Herfield,* 839 F. App'x at 323. In fact, as a matter of the plain text of the statute, "[t]he EAJA sets an hourly rate cap at $125 per hour" for attorneys practicing under its regime. *Baily v. Comm'r of Social Security*, No. 7:20-CV-00241 (WLS-TQL), 2023 WL 2817716, *2 (M.D. Ga. Apr. 6, 2023). *See also* 28 U.S.C. 2412(d)(1)(2)(A). EAJA and Section 1988 fee litigation are fundamentally different and not suitable for rate reduction comparisons in this litigation. Section 1988 is "a fee shifting statute without an hourly rate limitation," *Pierce v. Underwood*, 487 U.S. 552, 579 (Brennan, J., concurring), but "Congress clearly meant to contain the potential costs of the EAJA by limiting the hourly rate of attorneys where fees are awarded." *Id.* And, applied here, the rate reduction Defendants seek as to attorneys Schmid, Mast, and McAlister would amount to a mere

$7.27 hourly cut if this were an EAJA matter, not an enormous cut of over $500.00 per hour from the prevailing market rates for these attorneys.

Third, neither the *Zech* nor the *Herfield* court held that district courts *must* reduce the rates of counsel who work on a case without seeking permission for *pro hac vice* appearance, or even that such a reduction is correct in all cases. Rather, the Eleventh Circuit explained that the lenient abuse of discretion standard that applied to its review of a fee award "usually implies a range of choices, and we will affirm even if we would have decided the matter the other way." *Zech*, 680 F. App'x at 859; *Herfield*, 839 F. App'x at 324 (same). Thus, "while the magistrate judge was not required to award compensation in this manner, his decision represented one choice in a range of permissible options that he was free to choose from." *Zech*, 680 F. App'x at 860. As the Report and Recommendation points out, "[a]t most, *Zech* holds that the trial court has discretion to deny full rates to non-admitted lawyers under some circumstances." (ECF No. 240 at 31.)

Importantly, neither the Eleventh Circuit nor the magistrate judge it affirmed, *see Zech v. Colvin*, No. 14-81426-CIV-BRANNON, 2016 WL 8996959 (S.D. Fla. Mar. 10, 2016), elucidated the factual circumstances on which the court held the rate reduction was not an abuse of discretion. For example, neither decision states whether all attorneys who did appear in the case were members of the bar of the Court, or whether the work of attorneys who did not seek permission to appear *pro hac vice* was limited to work that did not require an appearance. And Defendants do not cite any binding or persuasive precedent that the work of non-admitted attorneys should be devalued to paralegal rates under *these* circumstances. *Cf., e.g.*, *Cunningham v. Berryhill*, No. 17-cv-10022-KMM, 2018 WL 5098890, at *1–2 (S.D. Fla. Aug. 30, 2018) (adopting magistrate recommendation to reduce plaintiff's attorneys' rates where *none* was admitted to the Court's bar or sought permission for pro hac vice appearance). In the absence of any Local Rule violation by any of Plaintiffs' attorneys, and in the absence of binding authority requiring a reduction under the specific the circumstances of this case, or even under the relevant statutory scheme applicable to Section 1988 for that matter, this Court should not punish Plaintiffs' counsel with such a drastic and draconian reduction.

B. The Magistrate Judge Was Correct In Determining That The Better Reasoned Approach Requires Compensating Plaintiffs' Counsel At Attorney Rates, Regardless Of Pro Hac Vice Admission.

The Magistrate Judge was correct in determining that the better reasoned approach is that taken by the Ninth Circuit in *Winterrowd v. American General Annuity Insurance Co.*, 556 F.3d 815 (9th Cir. 2009). The *Winterrowd* court reviewed an arrangement very similar to this case: prevailing plaintiffs, whose counsel of record were in-state and admitted to the bar of the district court, sought fee recovery for an additional non-appearing, out-of-state lawyer who worked on the case under the supervision of the admitted attorneys but "did not physically appear before the [district court], did not sign pleadings in the case before the [district court], had minimal, nonexclusive contacts with the . . . plaintiffs . . . and did not render legal services directly to the plaintiffs," and was "not admitted *pro hac vice* in connection with the case before the [district court], but no evidence in the record shows that he would not have routinely been so admitted had he applied." 556 F.3d at 817, 825. In holding that plaintiffs could fully recover for the non-admitted attorney's work, the court reasoned:

> Today, largely because of the benefits of modern technology, hundreds of U.S.-based law firms are composed of many hundreds, or even thousands, of lawyers and support personnel contemporaneously doing business in many states and throughout the world. Lawyers throughout the United States regularly participate in teleconferences and group email sessions with other lawyers in other states, and lawyers and paralegals from one or more firms participate in massive discovery projects arising out of a single case concerning papers and data located in several states. In many such instances, only a small fraction of the lawyers involved in a case are members of the bar of the state where the presiding court sits. Current law does not compel us to be judicial Luddites, and we may properly accommodate many of the realities of modern law practice, while still securing to federal courts the ability to control and discipline those who practice before them.

Id. at 819–820. Thus, the court continued,

> Our holding does not adversely impact the very important role *pro hac vice* admissions play in our federal court system. An out of state attorney must still apply for *pro hac vice* admission if that attorney appears in court, signs pleadings, or is the exclusive contact in a case with the client or opposing counsel. Moreover, an attorney may not receive attorney's fees under the holding in this case if there is evidence he did not meet the legal qualifications to be admitted *pro hac vice* to the bar of the relevant court had he applied; thus, disbarred, suspended or otherwise unqualified attorneys may not be the beneficiaries of the holding in this case. Although we agree with the dissent that "there is a reason behind" the *pro hac vice*

> rule, we need not apply the rule in a draconian fashion when the attorney has not "appeared" in front of the court, thus denying the . . . plaintiffs their statutory right to recover fees.

Id. at 825–26. On remand, the district judge awarded plaintiffs a fully compensatory market rate for the non-appearing, out-of-state attorney, without reduction for not seeking permission to appear pro hac vice. No. CV 00-0677 CAS (RCx), 2010 WL 11507799, at *7 (C.D. Cal. Feb. 8, 2010).

The Report and Recommendation appropriately refrains from turning the Court into "judicial Luddites" by applying the *pro hac vice* rules in the "draconian fashion" suggested by Defendants. *Id.* As was true in *Winterrowd*, the Report and Recommendation properly notes that "[l]aw firms frequently use non-admitted lawyers for drafting documents, research, and other non-court activities." (ECF No. 240 at 31.) The non-appearing, out-of-state Liberty Counsel lawyers for whom Plaintiffs seek fee recovery in this case are analogous in all respects to the non-appearing attorney in *Winterrowd* for whom the plaintiffs were permitted to recover a fully compensatory market rate. Defendants have not suggested or presented any evidence that Plaintiffs' counsel, Daniel J. Schmid, Richard L. Mast, or Mary E. McAlister, had abused the *pro hac vice* rules of this Court or that they were attempting to evade this Court's requirement that appearing attorneys move for admission. (*Id*.) Rather, as the Report and Recommendation states, the attorneys for whom Defendants raise an objection merely "draft[ed] documents," preformed research, "review[ed] documents," and "help[ed] another attorney prepare for a hearing," (ECF No. 240 at 31-32), and thus did not "appear before this Court" in such a manner that required moving for admission *pro hac vice*. These are quintessential *lawyer* not *paralegal* tasks, and the fully compensatory fee required by 42 U.S.C. § 1988 demands that they be compensated at market rates for *lawyers*, not paralegals. There is no justification for rejecting the Report and Recommendation, or for penalizing Plaintiffs' counsel for engaging in a lawful and ethical practice that occurs daily throughout the practice of law.

Even if the three non-appearing attorneys had done something improper by not appearing before the Court, which they absolutely did not, the "remedy" that Defendants seek is truly draconian. Defendants suggest that the penalty for failure to appear pro hac vice should be crippling. (ECF No. 243 at 2-4.) Defendants suggest the appropriate punishment here is to dock Mr. Schmid 82% of his market rate, dock Mr. Mast 82% of his market rate, and dock Ms. McAlister 84% of her market rate. As the 18th Century Italian criminologist Cesare Beccaria

suggested long ago: "the punishment should fit the crime." *Payne v. Tennessee*, 501 U.S. 808, 820 (1991). There was certainly no "crime" here, nor even an infraction. What Defendants seek is to punish Plaintiffs for prevailing against them.

C. Adopting Defendants' Position Would Undermine Section 1988's Purpose To Fully Compensate Civil Rights Counsel.

The purpose of Section 1988 is "to ensure that federal rights are adequately enforced," *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550 (2010), "by making it financially feasible to litigate civil rights violations." *Dowdell v. City of Apopka*, 698 F.2d 1181, 1189 (11th Cir. 1983). The touchstone of Section 1988 and its purpose to make it financially feasible to litigate civil rights violations is to "ensure effective access to the judicial process for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983) (cleaned up). And, "[a] civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law, and in so doing, has vindicated Congress's statutory purposes." *Fox v. Vice*, 563 U.S. 826, 834 (2011). As here, "[w]here a plaintiff has obtained excellent results, his attorney should recover a *fully compensatory fee*. Normally, this will encompass *all hours* reasonably expended on the litigation, and indeed, in some cases of exceptional success an enhanced award may be justified." *Hensley*, 461 U.S. at 435 (emphasis added). Sometimes, to vindicate a violation of a plaintiff's civil rights, a party needs to seek the help of counsel outside the jurisdiction in which the action is brought, a point the Report and Recommendation accepts. (ECF No. 240 at 19.) It would undermine Section 1988's purpose if some of those attorneys are compensated at undervalued paralegal rates for their zealous out-of-court representation of civil rights plaintiffs, just because those attorneys were not required to personally appear in Court.

Here, Plaintiffs' primary counsel—attorneys Horatio G. Mihet and Roger K. Gannam—were both admitted in this Court and handled all in-court proceedings and filings in this matter. (*See* ECF No. 221-1, ¶12.) And, the one other attorney that invested substantial time in the prosecution of Plaintiffs' claims was attorney Daniel J. Schmid, who did not seek *pro hac vice* admission because he never appeared, filed pleadings, or practiced before the Court. (ECF No. 240 at 32.) Plaintiffs' employment of Mr. Schmid was also abundantly reasonable, and demonstrated Plaintiffs' efforts to "balance experience, efficiency, and expense" by using Mr. Schmid's less-expensive time to perform numerous tasks. (*See generally* ECF No. 221-1, ¶¶12, 19.) Had Plaintiffs not relied significantly on Mr. Schmid, Plaintiffs' fee reports would have necessarily

increased substantially by "alternating responsibilities" between attorneys Mihet and Gannam, who each have market hourly rates significantly higher than Mr. Schmid's rate, because they have more experience. Thus, Mr. Schmid's 464.20 hours of work would necessarily have been performed by attorneys billing at $700.00 per hour, rather than his $625.00 hourly rate. (ECF No. 221-1, ¶27.) And, concomitantly, his requested compensation of $290,125.00 would have resulted in Plaintiffs' requested award increasing by approximately $35,000. Instead of applauding Plaintiffs for reasonably staffing the matter and attempting to keep fees down, *Hensley*, 461 U.S. at 434, Defendants are seeking severe punishment for the use of Mr. Schmid's less-expensive time. The Report and Recommendation rightly rejected Defendants' punitive approach, and its conclusion that non-admitted attorneys who do not appear before the Court may still receive attorney compensation should be sustained. To hold otherwise would undermine Section 1988's purpose of fully compensating civil rights litigators.

CONCLUSION

Because the Magistrate Judge's Report and Recommendation was well-reasoned on the issue presented herein, and compensated non-admitted and non-appearing counsel at attorney rates, Defendants' objections should be overruled and the Report and Recommendation should be adopted as to the refusal to reduce Attorneys Schmid, McAlister, and Mast to paralegal rates.

Respectfully submitted,

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