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U.S. Supreme Court limits 'enhanced' attorney's fees

By Frank J. Saibert

Most employment civil rights statutes, including Title VII of the Civil Rights Act of 1964 (Title VII), the Americans With Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA) and the Illinois Human Rights Act (IHRA), contain a fee-shifting provision that allows a prevailing employee to recover from the losing employer her or his "reasonable attorney's fees."

Sometimes, the attorney fee award actually comprises a majority of the aggrieved employee's overall recovery.

In an April 21, 2010 decision, the U.S. Supreme Court made it very clear that except in the rare and exceptional case, the measure for such attorney fee awards under federal law is the number of hours worked multiplied by the lawyer's prevailing hourly rate, the so-called "lodestar" calculation. *Perdue v. Kenny*, 559 U.S. ___ (2010) (No. 08-970). In so ruling, the court majority expressed its displeasure with enhanced fee awards in excess of the lodestar and articulated exacting standards that will serve as serious roadblocks to the imposition of such fee enhancements.

Perdue involved a federal class action under 42 U.S.C. §1983 (Section 1983) on behalf of some 3,000 Georgia children in state foster care. The class children alleged that the conditions in Georgia's foster care program were so ghastly as to violate the children's constitutional and statutory rights. The children alleged, among other things, that the foster care shelters were unsanitary, dilapidated and rat-infested; that understaffing and improper staffing placed children in the custody of caregivers with dangerous criminal records; that

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children were physically assaulted by staff; and that the system's more vulnerable children were subjected to regular physical and sexual abuse by other, predatory children whom staff could or would not control.

Georgia fought the lawsuit hard. It initially raised multiple complex procedural and jurisdictional defenses, none of which succeeded. It unsuccessfully opposed class certification. Its conduct during discovery resulted in an admonishment from the district court to cease "relying on technical legal objections to discovery requests in order to delay and hinder the discovery process." 454 F.Supp.2d 1260, 1268 (N.D. Ga. 2006). It lost its lengthy summary judgment motion. And after agreeing to mediate the matter, it forced protracted litigation over who would serve as the mediator. Georgia paid outside counsel some \$2.4 million to defend it, while internal Georgia lawyers spent an additional 5,200 hours on the case.

At the end of the road, Georgia and the class entered into a consent decree, approved by the district court. The consent decree significantly reformed the Georgia foster care system. The only issue the consent decree left undecided was the class attorneys' legal fees. That's when the battle got interesting.

The children's attorneys requested that the district court award them more than \$14 million in fees. Half that amount was based on a lodestar calculation, approximately 30,000 hours multiplied by hourly rates of \$200 to \$495 for attorneys and \$75 to \$150 for paralegals and other

non-attorneys. The other half requested represented a fee enhancement claimed for superior work and results. Georgia, unsurprisingly, objected to the fee request, arguing among other things that the requested enhancement would duplicate factors already reflected by the lodestar amount.

The district court awarded class counsel overall fees of approximately \$10.5 million. See 454 F.Supp.2d 1260, 1296 (N.D. Ga. 2006). Approximately \$6 million of this amount was the court's lodestar calculation, in which it reduced non-travel hours by 15 percent and halved the hourly rate for travel hours. It then enhanced the lodestar by about 75 percent, or \$4.5 million, to reach the \$10.5 million, reasoning that the attorneys took the case on contingency, were required to advance expenses in excess of \$1.5 million over the litigation's course and were not paid on an ongoing basis. 454 F.Supp.2d at 1288. The district court, significantly, remarked that the children's attorneys had exhibited "a higher degree of skill, commitment, dedication, and professionalism ... than the court has seen displayed by the attorneys in any other case during its 27 years on the bench." 454 F.Supp.2d at 1289. A sharply divided 11th Circuit affirmed the fee award. 532 F.3d 1209 (11th Cir. 2008).

The Supreme Court granted certiorari. In an opinion authored by Justice Samuel Alito, it confirmed prior precedent that under federal fee-shifting statutes, attorneys' fees may be enhanced for superior performance and results. The entire court agreed with this part of the decision. The majority then went on to reverse the 11th Circuit, finding that the enhancement above the lodestar in this case was improper, and remanded the case for further proceedings. Justice Stephen Breyer, joined by Justices John Paul Stevens, Ruth Bader Ginsburg and Sonia Sotomayor, dissented from the reversal.

In reversing, the majority articulated "six important rules" regarding fee-shifting. First, it explained that a "reasonable" fee under fee-shifting

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statutes is one that is enough to induce competent counsel to prosecute a meritorious civil rights case, not one that produces financial windfalls for attorneys. It seemed clear how the majority viewed the enhancement awarded in *Perdue*.

Second, the majority ruled that in fee-shifting cases, the lodestar method enjoys a strong presumption.

Third, and a corollary to the second rule, is that enhancements may be awarded only in very “rare” and “exceptional” cases.

Fourth, the majority noted that the lodestar generally encompasses most of the relevant factors that comprise a “reasonable” fee. Accordingly, considerations such as the case’s novelty already is accounted for in the hours calculation, while the quality of the attorney’s performance is reflected by the hourly rate. In the majority’s view, then, enhancements above the lodestar can result in a double recovery.

Fifth, the majority confirmed that the burden of proving entitlement to an enhancement is borne by the fee applicant.

Sixth, the majority reminded that any enhancement must be based on “specific evidence” justifying it.

Applying these rules to the facts before it, the majority scored the district court’s award of an enhancement as “essentially arbitrary.” It questioned why the enhancement was 75 percent of the lodestar rather than the 100 percent the class lawyers requested or, for that matter, any other particular percentage. And it noted that the enhancement’s effect was to increase the top hourly rate for the class attorneys to over \$866 per hour.

Significantly, the majority criticized the district court for relying on a personal comparison of the class lawyers’ performance with the performance of other, unnamed lawyers who had appeared before it in prior cases. Such an

“impressionistic basis,” the majority cautioned, essentially precludes meaningful appellate review. The majority further lamented the fact that, at least in Section 1983 cases, fee enhancements paid by state and local taxpayers deprive municipalities of money that could be used for “vital public services.”

The dissent would have upheld the enhancement. In its view, the district court was better positioned than a removed, appellate tribunal to measure the class attorneys’ “value.”

Perdue, while not an employment case, is an important victory for employers. For virtually all federal employment cases, it will restrict any prevailing party fee award to the lodestar. In addition to minimizing the ultimate monies losing employers may have to pay, it will add a fair degree of certainty to a case’s damage calculation that can only benefit settlement negotiations.