D.C. Circuit Court

Case: *Copeland v. Marshall*, 641 F.2d 880 (D.C. Circ. 1980) (en banc) **Date:** Sept. 2, 1980

Judges: McGowan*, Wright, Robinson, MacKinnon, Robb, Mikva **Dissent:** Wilkey (w/ Tamm)

Tags: Attorney fees, gender discrimination, Department of Labor, Title VII, lodestar w/ adjustments, "cost-plus," private enforcement, Civil Rights Act, "reasonable"

Gravamen/Question(s) at issue:

(1) What standards are to be applied in awarding attorney's fees in Title VII suits against Gov't?
(2) Was the District Court's fee award reasonable?

Holdings: District Court's award deemed reasonable and affirmed (even if the way they calculated it isn't the best way).

Rationale: Even if you run the numbers the way we want everybody to do it (lodestar plus adjustments), you end up with just about what the DC got to via a different route, so it's an appropriate fee.

Facts: District Court awarded attorney's fee of $160K for successful prosecution of a gender discrimination claim against USDoL by a Black woman, Dolores Copeland, a computer specialist denied training, promotions, and interesting tasks.

Prior Appeals & Trial Court Input:

- **USDCDC (1974):** Gender discrimination class action suit: awarded attorney fees (22% less than what plaintiff had requested). Determined that $57.17/hr was "well within the local range for associates of larger firms."
    - "What plaintiffs' counsel lacked in seasoned trial experience was offset by other factors. They were always well prepared, effective, and knowledgeable. No time was deliberately wasted and counsel proceeded with full recognition of the congressional directive to expedite litigation of this type." (q., 888)
    - "Where a fee is sought from the United States, which has infinite ability to pay, the Court must scrutinize the claim with particular care." (q., 888)
    - "A reasonable fee can only be fixed by the exercise of judgment, using the mechanical computations simply as a starting point to reach a higher or lower figure. The Court must perform this function." (q., 888)
    - "Taking into account each of the factors itemized in *Evans v. Sheraton Park Hotel*, 530 F.2d 177 (D.C. Cir.1974), including the matters specifically mentioned, the Court has concluded that a

reasonable fee in this litigation, weighing the results achieved, the novelty of the issues, the difficulties encountered and the effectiveness of the excellent representation given is $160,000." (q., 888)

- **DCCA:** Reversed award & remanded
- **USDCDC:** Denied rehearing, but clarified decision
- **DCCA:** Granted hearing en banc.

Appeals to Statute & Precedent:

- **Civil Rights Act of 1964, Title VII:** "In any action or proceeding under . . . (Title VII) the court, in its discretion, may allow the prevailing party, other than the (Equal Employment Opportunity) Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." (42 U.S.C. § 2000e-5(k) (1976))
- ***Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02, 88 S.Ct. 964, 966-67, 19 L.Ed.2d 1263 (1968):** "private attorney general" should not be forced to pay own attorney's fees.
- ***Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (1974):** "explained, in general terms, how the fee should be calculated under Title VII" (399).
- ***Evans v. Sheraton Park Hotel*, 503 F.2d 177, 187-88 (DC Cir.1974):** Applying *Johnson* factors
- ***National Treasury Employees Union v. Nixon*, 521 F.2d 317 (D.C. Cir. 1975):** Employed *Lindy* lodestar calculation as the starting point.

Dicta & Discussion:

- "We think the very intricacy of the litigation—which was a product, in part, of the government's vigorous and long-continued resistance to the claim asserted against it—is highly relevant to the reasonableness of the fee award." (884)
- Gov't stipulated that plaintiff is entitled by statute to attorney's fees: the dispute is about whether they were **reasonable** as awarded by the D.C.
- Lists *Johnson* factors: "Many other courts have applied the Johnson factors in subsequent cases, and those factors remain central to any fee award." (889)
- "Simply to articulate those twelve factors, however, does not itself conjure up a reasonable dollar figure in the mind of a district court judge. A formula is necessary to translate the relevant factors into terms of dollars and cents. This is particularly true because the twelve factors overlap considerably." (890)
- "For these reasons, scholars have noted that the twelve Johnson factors, without more, cannot guarantee a rational setting of fees." (890) (Quotes Berger)
- "District court judges for this reason have had difficulty applying the Johnson factors. A common, yet understandable, fault is for the trial judge to make the conclusory statement, 'After considering each of the twelve factors in Johnson, I find that a reasonable fee is X dollars.' This very often leads to reversal and remand." (890)

- Need to set fee high enough to encourage litigation.
- Third Circuit fee-setting formula: Lodestar fee, *Lindy Brothers* (1973)—"the Third Circuit articulated a formula that considered all the relevant factors but eliminated the redundancy and imprecision that many have identified in other fee-setting schemes." (890) ← Lodestar is the base, then adjust.
- **Hours Reasonably Expended:** should be documented by lawyers. "the judge . . . can segregate into categories the kinds of work performed by each participating attorney." (Example actually given!) (891)

Attorney & Type of Work	Hours
Senior Partner: Court Appearances	17.3
Senior Partner: Review of pleadings	39.2
Junior Associate: Research & drafting	87.6
Junior Associate: Depositions	35.5

- **Billing Judgment:** "no compensation is due for nonproductive time. For example, where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time. Similarly, no compensation should be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail." (891-892)
- **Adjusting the Lodestar:**
  - Party wanting to adjust has the burden of justifying the adjustment.
  - Seems to apply Berger's suggestion re. contingency compensation, though not numerically, just sort of vaguely.
  - May be appropriate to add a percentage to make up for the delay in payment of court-ordered fees.
  - "To the district court judge falls the task of calculating as closely as possible a contingency adjustment with which fiarly to compensate the successful attorney. We have not, however, lost sight of the fact that this adjustment is inherently imprecise and that certain estimations must be made. . . **Thus, we ask only that the district court judges exercise their discretion as conscientiously as possible, and state their reasons as clearly as possible."** (893)
  - Adjusted for quality of representation: "It is important to make clear precisely the analysis that must accompany such an adjustment. A quality adjustment is appropriate only when the representation is unusually good or bad, taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute the lodestar."(893)
  - Adjusted for results of litigation: Appropriate if result was "exceptional."
  - "Quality adjustments may be upward or downward. Thus, if a high-priced attorney performs in a competent but undistinguished manner, a decrease in the 'lodestar' may be necessary under the 'quality of representation' rubric because the hourly rate used to calculate the 'lodestar'

proved to be overly generous." (894) [I do not think "clear and precise" mean what this judge thinks they mean.]

- "It is neither practical nor desirable to expect the trial court judge to have reviewed each paper in this massive case file to decide, for example, whether a particular motion could have been done in 9.6 hours instead of 14.3 hours." (903)

- **Critique of District Court's Award:**
  - They had a different beginning formula (cost of litigation plus some more) because they thought there was some different formulation if the losing party was the Gov't—stricter scrutiny, lower fee.
  - "We agree that a judge setting any award should scrutinize the amount with care. But we do not think that the amount of the fee should depend on the identity of the losing party." (894)
  - "Cost-Plus" method sounds too complicated, so they should stick with our formula. Too much involved in discovery. Anyway, a "fee should be based on the market value of services rendered, not on some notion of 'cost' incurred by the law firm." (897) (NB: "cost-plus" will yield lower awards for nonprofits!)
  - DCCA thinks that it's appropriate for District Court to have the job of figuring out what is "reasonable," because they're closer to the action and can evaluate the quality of representation in the case.
  - Gov't gets all complainy about there not being a hearing re. the attorney's fee: "We think that 'having sought no hearing on (the attorney's fee) motion, counsel could hardly have been surprised when none was held.'" (q., 905)
  - "The District Court considered all the relevant factors in awarding an attorney's fee. Although its discount of the proposed 'lodestar' amount could perhaps have been computed with greater specificity, that discount was quite substantial however it may have been measured. It was an exercise of judgment informed by both experience and direct observation of what had transpired in the course of the litigation." (908)

Dissent: Wilkey (with Tamm)

- "In our colleagues' 'lodestar' opinion, the path of attorney's fees in Title VII litigation is easy to discern. It is Up, Up, and Away! It is Per Calculos Ad Astra." (908)

- "Before going to the extraordinary calculos of the majority opinion . . ." (908)

- "The issue is not whether they shall be paid . . . The issue is not, on this appellate level, even how much they shall be paid. The issue here is only—but unfortunately not simply—the formula by which these attorney's fees should be calculated by the trial court." (908)

- "The question has required much time and effort on the part of this court to attempt to resolve. All members should have come to grips with the obvious fact, as we analyzed and dissected this particular case, that previous precedents in the field, even in our own circuit, rested on contradictory, overlapping, disharmonious, even spurious and irrelevant 'factors.' This incoherent mélange provides no consistent rationale for a conscientious trial judge to apply, at least in a case in which the Government is the paying defendant; the effort to do so here has highlighted the inadequacies and inapplicability of previous precedents." (908-909)

- "Judge McGowan's opinion for the majority is the most strenuous effort so far to pull a basically incoherent rationale . . . together, to smooth putty into the visibly widening cracks of logic and to cover with the lacquer of a polished style. We in the dissent cannot buy the product." (909)

Dissent Discussion:

- **Gov't v. Private Parties as Defendants**
  - "In any developing area of the law such as this, courts setting forth general principles must attempt to design them to produce just results in various fact situations to which they will logically apply in the future." (910)
  - Thinks that attorneys in this case took advantage of the lodestar promise and got busy devoting excessive hours to trial prep, and that such behavior might easily occur in the future.
  - When Gov't is the defendant, there are deep pockets.
  - "In private litigation the incentive to expand the discovery and pretrial motion stages is counterbalanced by the high cost that this will inflict on the client, because victory does not normally bring a recovery of the litigant's own attorney's fees from the other side." (911)

- "…in Title VII cases against the Government, the incentives become entirely lopsided, because expanded litigation costs for plaintiff not only increase his chance of winning, but also greatly increase the sum his lawyer stands to gain if he does win." (911)
- "When attorney's fee levels come to dwarf the actual monetary amount in controversy, as in the present case, the structure of these incentives is magnified further." (911-12)

- No real deterrent against Gov't: gov't can settle, or pay without much pain, and make no changes. Whatever they pay comes out of taxpayers' pockets.

- **"Reasonable" Fees**
  - Gov't pays its lawyers less than private sector; therefore, attorney's fees in these cases should reflect Gov't rate, not private rate.

  - "…why should the private attorneys be compensated on a scale other than actual costs (salary and overhead) plus a reasonable profit to encourage them to continue accepting employment in this type of litigation?" (913)

- **Majority's "Market Value" Fee**
  - "the Government is financing this litigation under circumstances in which there are no market value forces to restrict or to set 'reasonable attorney's fees'; fundamentally, because there is no market." (913)

  - "There is missing an a priori pecuniary relation between the legal services undertaken and the willingness of any beneficiary to pay for them. Therefore, charging a losing defendant for the prevailing party's legal expenses at 'market' rates which no one would ever have voluntarily assumed is to destroy the market concept by purporting to respect it." (914)

  - "We believe there are indeed ways by which we can try to solve this problem, rather than throw up our hands and permit attorney's fees in Title VII cases to continue up to the stars." (914)
    - Limit fees acc to similar cases
    - Limit fees acc to amount recovered/results obtained

  - Way of calculating "reasonable" fee for a private defendant may be different than the way you calculate fee when gov't is defendant. (915)

  - Title VII suits allowed against gov't only since 1972.

- "…the cost-plus formula will best promote the congressional policy of encouraging deserving litigants to bring Title VII suits, without making the attorney's position so lucrative as to ridicule the whole notion of a 'reasonable attorney's fee.'" (917)

- **Critique of Majority Opinion**
  - "When the contingency factor is applied to the market hourly rate, as the majority would do, the results are confusing and can lead to excessive awards." (917)
  - Re. calculating hours: "The firm can never calculate its hourly charge for an attorney on the fallacious theory that every hour of work is going to be productive." (917)
  - "It is basic common sense that the bill for legal services in successful litigation may have a more comfortable margin than that for a losing effort. That margin, a sort of bonus for winning, acknowledges that litigators adjust their fees in accordance with each fluctuation in their win-loss record." (917-918)
  - "In the market, a request for fees or hourly rates not conforming to the results of litigation would be outrageous." (918)
  - "What our colleagues fail to realize is that the 'market value' fee they have taken as a 'lodestar,' the starting point to be adjusted for contingencies, already has a substantial contingency factor built into the fee." (918)
  - "Cost-plus provides a base figure that is free of any contingency factor; from that base figure the appropriate adjustments could then be made to reflect contingency of nonsuccess in the case at hand, as well as exceptional quality of work, without duplicating any built-in contingency factor already included in the fee." (920)
  - "It is simply not invidious to conclude that the fee schedule acceptable to General Motors when confronting a possible billion dollar liability is not necessarily applicable in Title VII attorney's fees determinations." (921)
  - **"We might add that we do not find logically persuasive the majority's notion that a decrease in the 'lodestar' may result if the quality of the representation was unusually poor. To be entitled to an award of attorney's fees, the attorney must prevail in the lawsuit. It stands to reason that the level of proficiency displayed will always be at least adequate (indicating no adjustment to the 'lodestar') if not exceptional (indicating an upward adjustment to the**

'lodestar') in cases in which the plaintiff prevails. It is thus difficult to conceive how a downward adjustment would ever be justified." (922)

- "In effect, the majority, perhaps influenced by this court's vast administrative law experience, has drifted into rulemaking like an administrative agency; the majority has made a rule for future cases, but declined to perform its primary function as a court—to adjudicate, to apply the rule to the very case at bar." (922)

- **Proposal: Actual Cost + Reasonable and Controllable Profit**
  - Salary, overhead, & profit
  - There's records somewhere for all of this.
  - "It may be that partners in fact develop more overhead cost for the firm than do associates (bigger offices, more luxurious furnishings, etc.), but this could be taken care of by an average overhead figure for associates and a different figure for partners." (926)

  - Profit: "This is a calculation involving many factors, including the attorneys' usual profit return to the firm, the social benefits, the direct gain to the litigants, the skill demonstrated in the particular case, and the degree of contingency involved." (926)

  - But what about small firms? Well, those lawyers wouldn't be getting anything more than what they'll get for these cases anyway.

  - Re. non-profits: some subjective evaluation of the quality of the work, for the "profit" adjustment.

  - "Contingency is a factor which should be evaluated at the time the trial judge is pondering the 'reasonable profit' part of the fee to be allowed. A 'reasonable profit' in a contingency fee case should be higher than where the fee is relatively certain and the only question decided by the outcome of the case is who pays it." (927)

  - Confidentiality re. attorney financial info: get an affidavit from a partner about averages in their firm.