IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
April 29, 2020

Lyle W. Cayce
Clerk

No. 18-50885

DANIEL CRUZ; ARMANDO SANCHEZ,

Plaintiffs - Appellees

v.

MAVERICK COUNTY; MAVERICK COUNTY SHERIFF'S DEPARTMENT,

Defendants - Appellants

Appeal from the United States District Court
for the Western District of Texas

Before ELROD, WILLETT, and OLDHAM, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

This appeal concerns a dispute between the Appellants, Maverick County and the Maverick County Sheriff's Department (Maverick County or County), and the Appellees, thirty-six Maverick County Sheriff's Deputies (Deputies). The district court found that Maverick County willfully violated the Fair Labor Standards Act (FLSA) and that the Deputies were entitled to backpay, liquidated damages, and attorneys' fees. Maverick County appeals. We AFFIRM the district court on all issues and REMAND to the district court to consider an award of attorneys' fees incurred on appeal.

I.

Maverick County, the Defendant-Appellant, is the employer of the Plaintiffs-Appellees, thirty-six current and former Maverick County Sheriff Deputies. The Deputies were paid on an hourly basis and classified as non-exempt employees who were eligible to receive overtime premium pay for any hours worked in excess of 40 hours per workweek.

In 2005, the Department of Labor completed an investigation of the Maverick County Sheriff's Department and concluded that it was failing to pay minimum wages or overtime pay to employees. Maverick County gave its assurance to the Department of Labor of "full future compliance with all provisions of the Act" from that time forward.

In 2011, Judge David Saucedo became the County Judge. He was responsible for setting the annual budget for each county department, including the sheriff's department. Upon assuming the position of County Judge, he experienced difficulty maintaining budgets, describing Maverick County as "hemorrhaging money." In response, he took steps towards limiting overtime work and implementing an across-the-board "pay freeze" in 2011, 2012, 2013, 2015, and 2016.

As part of these cutbacks, in October 2011 Maverick County allegedly elected to stop paying the Deputies comp time for the hours worked in excess of 40 per workweek. The Deputies allegedly complained about the unfair pay practice publicly at County Commissioner's meetings and informally to Maverick County Sheriffs Tomas Herrera and Tom Schmerber. Many of the Deputies also allege that they were told not to record their time accurately because they would not be compensated for any hours worked over 40 per workweek.

In October 2014, the Department of Labor completed a second investigation of Maverick County's failure to pay its employees' overtime

wages. The investigation covered March 2012 through March 2014, nearly the entire time the illegal pay practice was allegedly in place.

In August 2014, the Deputies filed this case in the Western District of Texas alleging that Maverick County violated the FLSA. Deputies Cruz and Sanchez were the initial Plaintiffs and sought permission from the district court for a conditional class certification in April 2015. Over thirty additional Deputies joined Cruz and Sanchez by filing voluntary consent forms.

Five days before trial, Maverick County moved to strike the lawsuit as a sanction for the Deputies' failure to comply with their written discovery obligations. The case was called for trial in September 2017. The parties stipulated to a bench trial and Maverick County stipulated to liability for the Deputies' damages in failing to pay for any time worked over 40 hours per workweek. The issues for trial were the willfulness of the County's FLSA violation and the amount of damages.

Maverick County invoked Federal Rule of Evidence 615 (Rule 615) for exclusion of witnesses. The district court acknowledged the invocation of the Rule and admonished counsel that witnesses would need to be sequestered. On the second day of trial, the Deputies' testimony regarding their overtime hours shifted significantly from the first day's testimony and their interrogatories, becoming more uniform. The County believed that the Deputies violated Rule 615 and filed an oral and written motion to strike all Plaintiffs' testimony.

In March 2018, the district court issued its Final Order of Judgment. In this order it struck seven of the Deputies for failing to answer written discovery requests. It denied Maverick County's motion to strike testimony for a violation of Rule 615, and it found that Maverick County willfully violated the FLSA. It also awarded back wages and liquidated damages. In September 2018, the district court rendered an order awarding attorneys' fees, taxable costs, and interest to the Deputies. Maverick County appeals.

II.

Maverick County raises four issues for our review. First, whether the district court abused its discretion by not dismissing the class of Plaintiffs for not complying with discovery rules. Second, whether the district court abused its discretion in not striking litigants' testimony because of violations of Rule 615. Third, whether the district court clearly erred in finding that Maverick County willfully violated the FLSA. And fourth, whether the district court abused its discretion by awarding the Deputies attorneys' fees. We discuss each issue in turn and affirm the district court on all issues.

A.

The first issue before us in this case is whether the district court committed reversible error by declining to dismiss the entire class of Plaintiffs for failing to make Federal Rule of Civil Procedure 26 (Rule 26) initial disclosures and comply with the court's discovery orders. Maverick County complains that out of the thirty-six class members, not a single litigant provided a computation of damages. And after the district court ordered the Deputies to answer discovery, thirteen of the thirty-six provided answers that Maverick County views as "inadequate." Maverick County moved to strike the entire class of plaintiffs, which would result in a dismissal of the entire suit. The district court declined to do so and instead struck only seven class members from the case. Maverick County claims that this was reversible error because it believes the district court should have struck the entire class. We disagree and hold the district court did not abuse its discretion by allowing the majority of the class members to participate in the suit.

1.

We review sanctions for violations of discovery orders by first reviewing the underlying discovery order. *F.D.I.C. v. Conner*, 20 F.3d 1376, 1380 (5th Cir. 1994). The "review of the underlying discovery order is deferential: 'The trial

court's exercise of discretion regarding discovery orders will be sustained absent a finding of abuse of that discretion to the prejudice of a party.'" *Id.* at 1381 (quoting *Hastings v. N.E. Indep. Sch. Dist.*, 615 F.2d 628, 631 (5th Cir. 1980)).

2.

We have said that for a court to justify dismissal as a sanction for violating a discovery order, each of the following factors must be clearly present in the record: "(1) the refusal to comply results from willfulness or bad faith and is accompanied by a clear record of delay or contumacious conduct; (2) the violation must be attributable to the client instead of the attorney; (3) the violating party's misconduct must substantially prejudice the opposing party's preparation for trial; and (4) a less drastic sanction would [not] substantially achieve the desired deterrent effect." *Conner*, 20 F.3d at 1380–81. We have also required that some lesser, preliminary sanction be proven futile before resorting to dismissal. *See id.* at 1380.[1]

Maverick County cannot demonstrate these factors on this record. Maverick County's brief is silent on any bad faith on the part of the Deputies. And it cannot point to any specific delay or noncompliance that was directly the result of the Deputies' conduct and not that of their attorneys. There is no evidence in the record that Maverick County asked the district court to compel

[1] In its briefing, Maverick County contends that the standard for reviewing sanctions for failure to comply with a discovery order is not as strict as the test outlined in *Oprex*. The County argues that we instead should consider: "(1) the importance of the witnesses' testimony; (2) the prejudice to the opposing party of allowing the witnesses to testify; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to comply with the discovery order." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 572 (5th Cir. 1996). But Maverick County does not ask for just any discovery sanction. It asked the district court to dismiss the case entirely. This remedy "should not be used lightly, and should be used . . . only under extreme circumstances." *Conner*, 20 F.3d at 1380. It is therefore subject to the more stringent review outlined in *Oprex*. 704 F. App'x at 378.

discovery or impose a lesser, preliminary sanction. And while Maverick County claims that the Rule 26 disclosures prejudiced it, it cannot point to any substantial prejudice.

In fact, Maverick County itself only passively participated in discovery. It did not seek any depositions until after the close of discovery, it did not file a single motion to compel discovery, and it provided 4000 additional pages of discovery documents to the Deputies *after* trial. While the Deputies did not comply with all discovery rules, and it is safe to assume that Maverick County's trial preparation was hampered by the Deputies' failure to comply with discovery obligations, the County's own passive participation in discovery makes it difficult to conclude that the Deputies' shortcomings substantially prejudiced Maverick County. And it makes it even more difficult to conclude that dismissal is warranted, as we have reserved dismissal as a discovery sanction for "extreme circumstances." *Oprex*, 704 F. App'x at 378.

Maverick County cites to *Moore v. CITGO Refining and Chemicals Co.*, 735 F.3d 309 (5th Cir. 2013), for support. In *Moore*, the district court dismissed twenty-one out of twenty-four class members as a discovery sanction. *Id.* at 314. Later, the remainder of the class was prevented from testifying at trial because the class members had engaged in a pattern of "fail[ing] to participate in discovery, fail[ing] to properly supplement responses, and fail[ing] to preserve documents." *Id.* This court upheld the discovery sanction. The County argues that this case is analogous, but it is not. The plaintiffs in *Moore* were actively engaged in the spoliation of evidence. *Id.* at 314–15. The spoliation continued even after an intermediate fine of $100 per piece of destroyed evidence was imposed. *Id.* And, the defendants in *Moore* were prompt in complying with their own discovery obligations and regularly complained to the court to compel the plaintiffs' compliance. *Id.* Here, Maverick County makes no allegations regarding spoliation or bad faith, there was no

intermediate sanction requested or imposed, and Maverick County did not diligently comply with its own discovery obligations.

The district court did not turn a blind eye to the County's motion to strike or the Deputies' lackluster discovery performance. In its final judgment, the district court struck seven Plaintiffs who did not make initial disclosures or answer interrogatories. But in its discretion, the district court determined that the remainder of the Deputies should not be dismissed. We affirm this decision.

B.

Maverick County next argues that the district court erred "by tolerating blatant violations of [Rule 615] that allowed the [Deputies] to float overinflated and scripted damage calculations into evidence." It asks that we reverse the district court's decision and determine the Deputies' testimony should not be considered. We affirm the district court's decision.

1.

To reverse a judgment based on a decision to include testimony that violated a sequestration order, "a party must demonstrate an abuse of discretion and 'sufficient prejudice.'" *United States v. Wylie*, 919 F.2d 969, 976 (5th Cir. 1990) (quoting *United States v. Ortega-Chavez*, 682 F.2d 1086, 1089 (5th Cir. 1982)). "In evaluating whether an abuse of discretion has occurred, the focus is upon whether the witness's out-of-court conversations concerned substantive aspects of the trial and whether the court allowed the defense fully to explore the conversation during cross examination." *Id.* The district court has broad discretion to determine whether Rule 615 has been violated and, if so, what sanctions should be imposed. *McKee v. McDonnell Douglas Tech. Servs. Co.*, 700 F.2d 260, 262 (5th Cir. 1983). Even if the Rule has been violated, the trial court has discretion to allow the testimony thereafter. *Wylie*, 99 F.2d at 976. "In general, failure of a witness to abide by the sequestration order

rarely will require reversal." *Verdin v. Sea-Land Serv.*, No. 92-2833, 1993 WL 455645, *4 (5th Cir. Oct. 25, 1993) (unpublished).

2.

On the second day of trial, the Deputies' testimony significantly shifted from their interrogatories and the testimony given on the first day of trial. It changed so much that the district court remarked: "[I]t's amazing how they all have different numbers in their interrogatories and they all very magically come in and say 15 hours per week all of a sudden." One Deputy, Mr. Aaron Horta, referenced conversations with a group of Plaintiffs that occurred outside of the courtroom and while carpooling to the courthouse with fellow litigants. He mentioned that the Deputies had discussed matters related to their testimony and the number of overtime hours they would claim.

Maverick County takes issue with Mr. Horta's testimony and believes that the discussions he referenced caused the shift in the number of reported hours seen on the second day of trial. The County moved to strike nearly every plaintiff's testimony based on a violation of the sequestration order. It argues that Cruz and Sanchez, the lead litigants, as well as nearly all other Plaintiffs, were implicated by Horta's testimony in "colluding to fabricate . . . grossly inflated estimates of hours worked."

The district court viewed the shift in testimony differently. It explained that "[u]nquestionably, the testimony of the [Deputies] shifted to reflect more uniformity, thus indicating that the [Deputies] indeed conferred with each other. However, based on the record, the Court finds that counsel was central to the majority of any of the out-of-court communications between the [Deputies.]" The district court noted that after failed settlement negotiations on the morning of the second day of trial, it ordered counsel to confer with their clients. The district court concluded that "counsel must have had a conversation with the [Deputies] about the discussion in chambers, which

would explain the uniformity of the numbers of hour[s] worked during the testimony of the later witnesses." Because "[t]he right to counsel, even in civil cases 'is one of constitutional dimensions and should thus be freely exercised without impingement,'" the district court concluded Rule 615 could not be applied to attorney-client communications. It therefore "f[ound] insufficient evidence that any of the [Deputies] violated [Rule 615]."

We ultimately affirm the district court's conclusion. However, we are concerned by the sudden shift in testimony on the second day of trial and the possible violations of the sequestration order that came to light in Mr. Horta's testimony. It appears likely to this court that the sequestration order was not carefully followed or enforced. If this question was before us in the first instance or here on *de novo* review, we may have found a sanction was warranted. But our caselaw instructs that district courts have broad discretion to assess whether a violation of Rule 615 occurred. *McKee*, 700 F.2d at 262. Here, the district court concluded that there was insufficient evidence to conclude that a violation occurred. It did so after allowing thorough cross-examination of Mr. Horta by the County and a review of other factors that could have led to the shift in testimony—such as conversations between the Deputies and their attorney. *See United States v. Posada-Rios*, 158 F.3d 832, 872 (5th Cir. 1998) (citing *Wylie*, 919 F.2d at 976) (finding no abuse of discretion where the defense was permitted to fully explore the conversation during cross-examination). This conclusion was within the district court's discretion. We may well have used our discretion differently, but that is not the question before us.

The district court further supported its decision to not strike the testimony by concluding that even if the Deputies had violated the Rule, they did not do so knowingly. It explained that "some of the witnesses may have talked beforehand with others about their testimony" but "these witnesses had

not yet been sworn in by the Court or warned by the Court of its obligation under [Rule] 615." And "[e]ven though they were still bound by the confines of [Rule] 615, and even though counsel should have warned them of their obligation, their level of culpability in violating the [R]ule is very low. Striking their testimony would therefore be too harsh a sanction."

And the district court reasoned that any prejudice caused to Maverick County from an alleged violation was mitigated because the district court was "well aware of the shift in testimony" and as the finder of fact could "assess the credibility of witnesses and determine an accurate average number of hours worked by the [Deputies]." It therefore concluded that even if the Rule was violated, the testimony should be considered.

The conclusion that any alleged violation of the Rule was not willful or prejudicial was reasonable. And allowing the testimony was within the court's discretion. For the foregoing reasons we conclude the district court did not commit reversible error by not striking the Deputies' testimony.

C.

The third issue that Maverick County raises on appeal is that the district court erred in determining Maverick County's violation of the FLSA was willful. The FLSA provides for a two-year statute of limitations for suing under the statute. 29 U.S.C. § 255(a). However, the period may be extended to three years if an employer's conduct was in willful violation of the law. *Id.* Maverick County argues that its conduct was not willful and therefore the two-year statute of limitations applies. The district court determined the conduct was willful and therefore the three-year statute of limitations applied. The County argues that the finding of willfulness was erroneous. We disagree and affirm the district court.

1.

The issue of an employer's willfulness pursuant to the FLSA is a question of fact we review for clear error. *Steele v. Leasing Enters., Ltd.*, 826 F.3d 237, 248 (5th Cir. 2016). To the extent that a court bases its determination of willfulness upon credibility determinations, those determinations are "subject to great deference on appeal." *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1413 (5th Cir. 1990), (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) ("[F]or only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.")). Conduct is willful if the employer either "knew or showed reckless disregard for . . . whether its conduct was prohibited by the statute." *Singer v. City of Waco*, 324 F.3d 813, 821 (5th Cir. 2003) (quoting *Reich v. Bay, Inc.*, 23 F.3d 110, 117 (5th Cir. 1994)).

2.

Whether Maverick County knew its conduct was prohibited by statute was disputed at trial. The Deputies testified that "shortly after the illegal payment practice [went] into effect, several Deputies [began] to complain at public meetings of the Maverick County Commissioner's Court where Judge Saucedo was present." Judge Saucedo offered conflicting testimony. He admitted at trial that he "possibly" remembered Sheriff Herrera complaining about the improper pay practices. However, on questioning later he reversed course and said that neither Sheriff Herrera, nor anyone else, ever brought the unpaid overtime to his attention.

Based on the district court's final judgement, it is clear that it credited the Deputies' testimony over Saucedo's. It found that the "[D]eputies made statements, the week of the change, at the Commissioners Court meeting regarding the department no longer paying overtime or comp time." It also looked to the Labor Investigation findings from both 2005 and 2014 and

concluded that because there was a previous investigation in which Maverick County had violated the FLSA, Maverick County "had knowledge of the FLSA's overtime wage requirement."

It ultimately found that Maverick County "knew the [Deputies] were not being paid overtime in accordance with the law, and made promises to pay the [Deputies] correctly, but never did so." It concluded that "Maverick County, as an institution, did act willfully here because it knew about the failure to pay overtime wages and it was on notice it needed to be paying those wages." *See Singer*, 324 F.3d at 821 (explaining that conduct is willful if the employer either "knew or showed reckless disregard for . . . whether its conduct was prohibited by the statute") (quoting *Reich*, 23 F.3d at 117).

Maverick County disagrees but cannot demonstrate clear error. The willfulness finding came down to credibility determinations by the district court, which we have said entitles it to "great deference on appeal." *Mireles*, 899 F.2d at 1413. The district court reasonably credited the Deputies' testimony over Judge Saucedo's. It further supported its finding by relying on the fact that Maverick County knew of its obligations under the FLSA because of the previous Department of Labor investigations. Maverick County has not pointed us to any clear error. Therefore, we affirm the district court's finding of willfulness.[2]

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[2] Related to the district court's finding of willfulness, Maverick County challenges the district court's award of liquidated damages, because it claims it acted in good faith. The FLSA has a provision that says "any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). Section 260 contains an exception to the liquidated damages provision if an employer can show it acted in good faith and had reasonable grounds for believing his act or omission was not a violation of the FLSA. *Id.* § 260.

While Maverick County contends that it acted in good faith, our precedent makes clear that the exception in § 260 cannot be used when the district court found willfulness. *Singer*, 324 F.3d at 823 ("In this case, the jury found the City's actions to be willful. As a result, the

D.

Maverick County's last challenge on appeal is that the district court erred by awarding unreasonable attorneys' fees to the Deputies. The County acknowledges that the FLSA requires attorneys' fees to be awarded to the prevailing party, but it claims that the amount of attorneys' fees awarded to the Deputies was unreasonable. We affirm the district court's award of attorneys' fees.

1.

We review a district court's determination of reasonable attorneys' fees for an abuse of discretion and all findings of fact supporting the award for clear error. *Black v. SettlePou, P.C.*, 732 F.3d 492, 496 (5th Cir. 2013) (citing *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 284 (5th Cir. 2008)). We review "challenges to a district court's lodestar adjustment for abuse of discretion, and specifically to 'determine if the district court sufficiently *considered* the appropriate criteria.'" *Gurule v. Land Guardian, Inc.*, 912 F.3d 252, 258 (5th Cir. 2018) (quoting *Black*, 732 F.3d at 502).

2.

In this circuit, attorneys' fees are calculated by the lodestar method—multiplying the number of hours reasonably expended by an appropriate hourly rate. *Shipes v. Trinity Indus.*, 987 F.2d 311, 319-20 (5th Cir. 1993). After the lodestar method is applied, courts use a twelve-factor test to determine whether counsel's performance requires an upward or downward adjustment

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City could not show that it acted in good faith."); *Heidtman v. City of El Paso*, 171 F.3d 1038, 1042 (5th Cir. 1999) ("Because employers cannot act in good faith based on reasonable grounds when they suspect that they are out of compliance with the FLSA, it would have been an abuse of discretion if the district court had *not* awarded liquidated damages."). Because we affirm the district court's finding of willfulness, we also affirm the award of liquidated damages.

from the lodestar. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989).[3]

As mandated by the FLSA, the district court awarded attorneys' fees to the Deputies' counsel. It credited one attorney, Glenn Levy, with 424 hours and the other, Melinda Arbuckle, with 232 hours.[4] The County contests this award of attorneys' fees under two of the twelve *Johnson* factors: "time and labor required" and "the amount involved and the results obtained." *Id.* at 717–18.

Maverick County argued at the district court, and again on appeal, that a downward departure from the lodestar is necessary because the "time and labor required" by the case is less than the hours submitted by counsel. The County proposed caps of 150 hours for Mr. Levy and 66 hours for Ms. Arbuckle. It claims that is a reasonable assessment of the "time and labor required" because there was a long period of time during discovery that no work was done on the case, and Ms. Arbuckle did not make her initial appearance in the case until seven days before trial. However, both Mr. Levy and Ms. Arbuckle presented billing reports that provided a record of their hours that accounted for the long periods of inactivity during discovery by showing few to no hours

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[3] The *Johnson* factors are: (1) "the time and labor required"; (2) "the novelty and difficulty of the questions"; (3) "the skill requisite to perform the legal service properly"; (4) "the preclusion of other employment by the attorney due to acceptance of the case"; (5) "the customary fee"; (6) "whether the fee is fixed or contingent"; (7) "time limitations imposed by the client or the circumstances"; (8) "the amount involved and the results obtained"; (9) "the experience, reputation, and ability of the attorneys"; (10) "the 'undesirability' of the case"; (11) "the nature and length of the professional relationship with the client"; and (12) "awards in similar cases." 488 F.2d at 717–19.

[4] This was a slight downward departure from the hours submitted by counsel of 424.9 hours for Mr. Levy and 232.9 hours for Ms. Arbuckle. The court also departed downward from the proposed hourly rate for Mr. Levy, who requested a billing rate of $450 per hour, and Ms. Arbuckle, who requested a billing rate of $325 per hour. The court found they were both entitled to a billing rate of $300 per hour.

billed during that time. The County does not point to any specific part of the billing records that is unreasonable or inaccurate.

The County also argues that "the amount involved and the results obtained" warrant a downward departure. This factor considers "the amount of damages" and "relief granted." *Id.* at 718. Maverick County points out that the district court's final award was 51% lower than the Deputies sought in their post-trial motions and the Deputies lost 20% of the members of their class based on non-compliance during discovery. The County believes this result, which is an "order of magnitude" lower than what the Deputies demanded, warrants reducing the lodestar.

The district court "d[id] not agree" that a downward departure was warranted, "as the [Deputies] not only submitted enough evidence to establish that they were owed a significant amount of unpaid overtime" but that Maverick County "committed this violation willfully . . . entitling them to liquidated damages."

We agree with the district court. Despite the final award being lower than what the Deputies requested, the Deputies prevailed at trial and received both compensatory and liquidated damages. Maverick County cannot point to a single case in which this level of success at trial resulted in a downward departure to the lodestar.

Further, our case law instructs that in reviewing adjustments to the lodestar, we need only consider whether the district court properly considered the "appropriate criteria." *Gurule*, 912 F.3d at 258. The district court order makes clear that it evaluated the lodestar and *Johnson* factors. It looked at billing records, filings, the complexity of the case, and the degree of success experienced by the parties. All of these considerations are "appropriate criteria" for adjusting a lodestar. *See id.* The district court's award of attorneys' fees was not an abuse of discretion. We affirm the award of attorneys' fees.

III.

The Deputies ask us to remand to the district court for consideration of attorneys' fees on appeal. We have held that prevailing plaintiffs under the FLSA may recover "an additional fee to compensate counsel for their services in connection with the appeal." *Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1045–46 (5th Cir. 2010) (quoting *Montalvo v. Tower Life Bldg.*, 426 F.2d 1135, 1150 (5th Cir. 1970)). The County does not respond to this request. We remand to the district court to consider an award of attorneys' fees incurred on appeal.

IV.

For the foregoing reasons, we AFFIRM the district court on all issues and REMAND to the district court for consideration of attorneys' fees on appeal.