

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 91-7221

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JOHN D. OLITSKY,

Plaintiff-Appellee,

versus

SPENCER GIFTS, INC.,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Northern District of Texas  
(CA3-84-1117-G)

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(January 18, 1993)

Before KING and WIENER, Circuit Judges.\*

PER CURIAM:\*\*

Spencer Gifts, Inc. (Spencer) appeals the district court's award of attorney's fees to John D. Olitsky after that court rendered judgment in favor of Olitsky on his age discrimination claim against Spencer. The judgment followed the second trial on

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\* Although Chief Judge Emeritus John R. Brown participated as a member of the oral argument panel for this appeal, his subsequent illness prevents his participation in the opinion we render today. Consequently, this appeal is decided by quorum. See 28 U.S.C. § 46(d).

\*\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

the merits of Olitsky's claim. The award of attorney's fees included fees in connection with the first trial of this case, in which Olitsky prevailed, and the subsequent appeal to this court, in which we reversed and remanded to the district court for a new trial. Finding that the district court did not abuse its discretion in making the award of attorney's fees, we affirm.

I.

FACTS

Olitsky filed suit against Spencer alleging that Spencer fired him in violation of the Age Discrimination in Employment Act (ADEA)<sup>1</sup> and the Employee Retirement Income Security Act (ERISA).<sup>2</sup> After a jury trial, the district court entered judgment in favor of Olitsky on both claims. Spencer appealed, raising six points of error. Olitsky cross-appealed, arguing that the district court erred in not awarding prejudgment interest and additional liquidated damages. We reversed and remanded for a new trial, holding that the district court erroneously admitted into evidence the Equal Employment Opportunity Commission's (EEOC) file on Olitsky's charge.<sup>3</sup> We did not address Olitsky's arguments on cross-appeal. The Supreme Court denied Olitsky's petition for certiorari. The first trial, appeal and petition for certiorari are collectively referred to as Olitsky I.

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<sup>1</sup>29 U.S.C. §§ 621-634.

<sup>2</sup>29 U.S.C. §§ 1001-1461.

<sup>3</sup>Olitsky v. Spencer Gifts, 842 F.2d 123 (5th Cir.), cert. denied, 488 U.S. 925, 109 S. Ct. 307, 102 L. Ed. 2d 326 (1988).

At the second trial on remand, the jury returned a verdict for Olitsky, finding that Spencer willfully discriminated against Olitsky on the basis of age, and awarding him back pay of \$500,000 and lost pension benefits of \$100,000. The district court accepted the jury's finding of willfulness, doubled the jury's back pay and lost pension benefits awards as liquidated damages, and awarded \$400,000 as front pay and \$123,000 as lost pension damages under Olitsky's ERISA claim.<sup>4</sup> We affirmed the decision of the district court on the merits of Olitsky's claims.<sup>5</sup> The second trial and appeal are collectively referred to as Olitsky II.

The district court also awarded Olitsky \$203,580 in attorney's fees, which included time spent on Olitsky I and in preparing for and litigating the trial on remand. In this appeal, Spencer challenges that award of attorney's fees.

## II.

### ANALYSIS

We review a district court's award of attorney's fees for abuse of discretion.<sup>6</sup> Spencer argues that the district court erred

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<sup>4</sup>The district court stated that in light of its \$123,000 award as lost pension benefits under ERISA and the jury's award of \$100,000 as lost pension benefits under the ADEA, Olitsky would be entitled to recover only \$123,000 for lost pension benefits (in addition to \$100,000 as liquidated damages for willfulness) so as to prevent a double recovery of lost pension benefits.

<sup>5</sup>Olitsky v. Spencer Gifts, Inc., \_\_\_ F.2d \_\_\_ (5th Cir. 1992) (No. 91-1010).

<sup>6</sup>Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); Leroy v. City of Houston, 906 F.2d 1068, 1078 (5th Cir. 1990).

in awarding Olitsky attorney's fees related to Olitsky I because (1) Olitsky was ultimately unsuccessful in those proceedings and (2) those proceedings were not essential and did not contribute to Olitsky's success on remand. Spencer further argues that the amount of the award is unreasonable.

#### A. PREVAILING PARTY STATUS

Under 29 U.S.C. § 626(b), an award of attorney's fees to a plaintiff who obtains a judgment under the ADEA is governed by 29 U.S.C. § 216(b). To be eligible for an award of attorney's fees, the plaintiff must have been a "prevailing party,"<sup>7</sup> which means that "the plaintiff has succeeded on 'any significant issue in the litigation which achieve[d] some of the benefit the parties sought in bringing suit.'"<sup>8</sup> The district court concluded that Olitsky was a prevailing party because (1) Olitsky achieved ultimate success in the litigation and (2) although the first judgment in favor of Olitsky was reversed, Olitsky's claim was never determined to be without merit because that judgment was reversed and remanded for a new trial rather than reversed and rendered in favor of Spencer. That conclusion by the district court was not an abuse of discretion.

Once the district court determines that a plaintiff is a prevailing party, the plaintiff is entitled to a fee award of some

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<sup>7</sup>Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 789, 109 S. Ct. 1486, 103 L. Ed. 2d 866, (1989) (TSTA v. Garland); Hensley, 461 U.S. at 433.

<sup>8</sup>TSTA v. Garland, 489 U.S. at 791-92 (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)).

kind,<sup>9</sup> but the quantum of the award must be reasonable. The award may not include compensation for services on unsuccessful, unrelated claims.<sup>10</sup> The district court must "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."<sup>11</sup> The district court must not include in the calculation of an award of attorney's fees hours which are "'excessive, redundant or otherwise unnecessary,' or which result from the case being 'overstaffed' . . . ."<sup>12</sup> Spencer contends that because Olitsky was not ultimately successful in Olitsky I, his claim was not successful to that extent, and he is therefore not entitled to attorney's fees for the services rendered in connection with Olitsky I, especially given that Olitsky introduced the evidence the admission of which by the district court ultimately caused the reversal of the first trial.

Olitsky argues in response that his opposition to Spencer's appeal in Olitsky I was essential to his ultimate success on the merits of his claim because, in the absence of any opposition, we would have reversed and rendered in favor of Spencer, rather than remanding for a new trial. Olitsky further asserts that as it was the district court's decision to admit the EEOC's file into evidence in the first trial--not Olitsky's decision to introduce

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<sup>9</sup>Id.

<sup>10</sup>Hensley, 461 U.S. at 435.

<sup>11</sup>Id.

<sup>12</sup>Leroy, 906 F.2d at 1079 (quoting Hensley, 461 U.S. at 434).

the file--that we held to be reversible error, we should not penalize him for the district court's erroneous evidentiary ruling by preventing him from recovering attorney's fees for Olitsky I. This argument is tenuous but not wholly without merit.

True, it was Olitsky who introduced the evidence that ultimately caused the reversal of the first judgment and the additional attorney's fees associated with the appellate proceedings and second trial; yet, we are not convinced that Olitsky's action was so wrong as to prohibit him from recovering those fees. At the time of the first trial, this circuit had not decided whether section 706(b) of Title VII of the Civil Rights Act of 1964,<sup>13</sup> which prohibits the use of conciliation material as evidence in subsequent proceedings, applied to ADEA cases. Furthermore, we did not address that question in our opinions in either Olitsky I or Olitsky II. Thus, when Olitsky introduced the EEOC file into evidence at the first trial, it was far from settled that the admission of such evidence would cause reversible error. It is unfortunate that the admission of that evidence caused the parties to incur additional time and expense in pursuing appeals and in retrying this case. Nevertheless, we find that Olitsky not only introduced the evidence in good faith, but did so when the admissibility was an open question. Under those circumstances the district court did not abuse its discretion in awarding attorney's fees to Olitsky for the first trial and appellate proceedings.

#### B. DUPLICATIVE LEGAL SERVICES

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<sup>13</sup>42 U.S.C. § 2000e-5(b).

Spencer correctly argues that Olitsky is not entitled to recover attorney's fees for services performed in connection with the second trial that were duplicative of the services performed in connection with the first trial. The district court specifically addressed that concern, recognizing that duplicative efforts should not be awarded. Following its examination of the records submitted by Olitsky's counsel, the court concluded that the number of hours claimed was reasonable and did not appear to be the result of duplicative work. We cannot say that the quantum of the district court's award of attorney's fees was unreasonable or that the award resulted from an abuse of that court's discretion.

We do not suggest by our opinion today that district courts are in any way relieved of their duty to examine time records and other fee-related evidence to prevent the award of attorney's fees for duplicative work. We are satisfied in the instant case, however, that the district court performed this duty in a manner consistent with the exercise of its discretion.

### III.

#### CONCLUSION

In the exercise of its discretion, the district court concluded that Olitsky was entitled to recover attorney's fees as the prevailing party in his action against Spencer. The district court's award included fees for services rendered in connection with the first trial of this case. Even though Olitsky introduced evidence the admission of which caused a reversal of the first judgment and required a new trial, the district court did not abuse

its discretion either in awarding Olitsky attorney's fees for those proceedings or in determining the quantum of the award.

In addition, Olitsky is entitled to recover attorney's fees for the appeal in Olitsky II, as the prevailing party in those proceedings. Counsel for Olitsky may submit verified documentation in support of the quantum of attorney's fees for the appeal in Olitsky II, including this appeal, within fifteen days following release of this opinion. Counsel for Spencer may respond within fifteen days following receipt of copies of Olitsky's documentation.

In all other respects, the judgment of the district court is AFFIRMED.