IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20849

KATHERINE HODGES,

Plaintiff-Appellee,

VERSUS

CITY OF HOUSTON, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(92-CV-1749)

November 15, 1995

Before KING, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Defendant City of Houston appeals a judgment (1) finding defendant liable for race discrimination, (2) assessing damages, and (3) imposing attorney's fees. We affirm as to liability, reverse as to the amount of damages, and remand for reconsideration of the amount of attorney's fees.

---

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Plaintiff Katherine Hodges is a Houston city marshal. After suffering a job-related injury to her left arm, shoulder, and hand, Hodges asked her supervisor to delay her annual gun qualification and not to assign her to prisoner transports. Lieutenant R.D. Lynn, Jr., who supervised Hodges's direct supervisor, requested Hodges to provide a doctor's excuse. Hodges's doctor wrote a note recommending that she perform only inside office duties and "be exempt from gun range shooting until further testing is completed." Lynn then assigned Hodges to inside office duty and ordered her not to wear a marshal's uniform, drive a marshal's vehicle, carry a gun, or work a second job. Hodges's privileges were fully reinstated approximately three months later.

At least four partially-disabled marshals were not taken out of uniform or prevented from working second jobs. Hodges is black; the other partially-disabled marshals are not. The parties dispute the comparability of those marshals' disabilities, especially in light of the note from Hodges's doctor. There is also evidence that Lynn made racist statements and did not object when employees he supervised made racist remarks in the workplace.

Hodges does not claim to have lost any salary or fringe benefits from the marshal's office because of discrimination. Rather, Hodges contends that she suffered severe psychological injuries that required her to spend $1,800 on psychiatrist's bills and prevented her from working a second job for four years. Hodges claims to have lost $44,000 in secondary employment income.

II.

Hodges filed suit against the city and three of her supervisors for race and sex discrimination and intentional infliction of emotional distress. A panel of this court held that the individual defendants have qualified immunity from the constitutional claims, and the district court severed the trials of the city from that of the individual defendants on the state law claims. A jury found the city liable for sex but not race discrimination under 42 U.S.C. §§ 1981 and 1983 and awarded Hodges $3,500 in compensatory damages. The district court then found the city liable for both sex and race discrimination under 42 U.S.C. § 2000e et seq. ("title VII") and awarded $45,800 in equitable relief and $65,000 in attorney's fees.

The city appeals only the judgment of liability for race discrimination, the award of title VII damages, and the amount of attorney's fees. Liability for sex discrimination is not before us.

III.

Hodges filed a motion to strike the appeal of the individual defendants or, in the alternative, to clarify that the district court still has jurisdiction over them in their personal capacities. The district court then issued an order clarifying that it had such jurisdiction because the claims against the individual defendants were severed from those against the city. The appellants responded by stipulating that this appeal relates only to claims against the city and the three individuals in their official capacities. Accordingly, there is no jurisdictional problem.

IV.

The city challenges the finding of race discrimination on the grounds that it is (1) inconsistent with the jury verdict and (2) factually incorrect. We review a district court's findings of fact for clear error and its legal conclusions de novo. Phillips Petroleum Co. v. Best Oilfield Servs., 48 F.3d 913, 915 (5th Cir. 1995).

A.

The city first claims that the jury verdict estopped the district court from finding it liable for race discrimination. When issues common to both legal and equitable claims are tried together, the findings of the jury on the legal issues are binding on the trier of the equitable claims. Beacon Theatres v. Westover, 359 U.S. 500 (1959). In this case, the jury returned a verdict on the constitutional claims, and the district court then entered a judgment on the title VII claims. The city contends that the district court was therefore bound by the jury's findings.

Hodges does not dispute the city's reading of Beacon Theatres; instead, she argues that her title VII claim raises an issue different from the issue in her §§ 1981 and 1983 claims.[1] Hodges cites Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986), for the proposition that the elements of title VII differ from those of

[1] Hodges also argues that any error was harmless because the race discrimination judgment did not entitle her to additional damages. Assuming arguendo that race discrimination caused no compensable injury in addition to that caused by sex discrimination, the judgment is still relevant to the award of attorney's fees. See infra Part VI.

§§ 1981 and 1983. In Hamilton, this circuit reversed a judgment of race discrimination under § 1983 while affirming the same judgment under title VII, explaining that while § 1983 requires a showing of municipal policy or practice, title VII holds employers vicariously liable for the acts of their supervisory employees. Id. at 444; see also Jett v. Dallas Indep. School Dist., 798 F.2d 748, 762 n.13 (5th Cir. 1986), aff'd in part, 491 U.S. 701 (1989) (holding that unlike §§ 1981 and 1983, title VII makes municipalities vicariously liable for acts of their supervisors that discriminate against employees in the terms and conditions of their employment).

In response, the city cites a line of cases stating that when a plaintiff brings parallel title VII, § 1981, and § 1983 claims, the elements of the three claims are identical.[2] These cases do not contradict the square holding of Hamilton, however, as they refer only to establishing liability in general; to establish municipal liability, the additional element of "policy or practice" must be shown for §§ 1981 and 1983 but not for title VII.[3] Accordingly, when a jury could have found that supervisory personnel discriminated against a plaintiff in the terms and

[2] See, e.g., Ward v. Texas Employment Comm'n, 823 F.2d 907, 908-09 (5th Cir. 1987) (holding that jury verdict of no liability under § 1983 precludes liability under title VII); Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir. 1980) (stating that elements of §§ 1981 and 1983 are identical to those of title VII).

[3] The "policy or practice" requirement was not at issue in Whiting. While the per curiam opinion in Ward does not explain the facts or claims at issue in that case, the district court's opinion states that the individual alleged to have discriminated was the administrator of the agency. Ward v. Texas Employment Comm'n, No. H-81-2845, 1986 WL 12575, at *1-*2 (S.D. Tex. Nov. 6, 1986); as a result, "policy or practice" presumably was established as a matter of law. As the other cases cited by the city come from other circuits, Hamilton is our controlling authority.

conditions of his employment but did not do so in accordance with a municipal "policy or practice," a verdict of no municipal liability under § 1981 or § 1983 does not estop a judge from finding the municipality liable under a title VII respondeat superior theory.

The city does not deny that Lynn supervised Hodges's direct supervisor. The city argued at trial that there was no municipal "policy or practice" of discrimination, however, and the jury may have agreed.[4] Thus, the district court was not estopped from finding the city liable based upon Lynn's actions affecting the conditions of Hodges's employment.

B.

The district court's findings of disparate treatment and racial motivation are not clear error. The court found that the city's reaction to Hodges's disability constituted disparate treatment. A white man who was substantially disabled on one side of his body was allowed to wear his uniform, carry a gun, and drive vehicles; both another white man with a glass eye and a pregnant hispanic woman also received better treatment.

With respect to motivation, the district court found that the city gave two reasons for restricting Hodges's privileges: She was unable to complete her annual weapons qualification, and the department was concerned about her ability to handle a physical

[4] The jury instructions properly stated that the jury needed to find a "policy or practice" to hold the city liable under either § 1981 or § 1983.

confrontation or citizen call. The court found the first justification to be pretextual. Although Hodges delayed her annual qualification on doctor's orders, the city had no "hard and fast rule" about the qualification date and, in fact, allowed other officers to delay qualification for longer periods of time without taking them out of uniform.

The city's primary contention is that the district court ignored its primary justification——the doctor's note. The city argues that (1) its concerns were reasonable in light of the note; (2) none of the other marshals who were treated differently ever had a doctor's statement restricting him from full duty; and (3) the other marshals were not similarly situated, in any event.

While the district court did not directly address the "doctor's note" defense, its finding of disparate treatment implicitly rejects it. The court found that white men who were more disabled than Hodges——and who also were assigned to office duty——were allowed to remain in uniform, wear a gun, and drive vehicles. After reviewing the record, we conclude that neither party has a compelling argument on whose injuries were more severe; the district court's finding of disparate treatment is therefore not clear error.

With respect to motivation, the city does not contest the district court's finding that there was no "hard and fast" rule that marshals had to qualify by a certain date; accordingly, the finding that the gun-qualification justification was pretextual is not clear error. Finally, the city does not deny that Lynn (who

was responsible for the disparate treatment) made racist remarks during the time period in question.[5] The district court's finding of racial motivation survives clear error review.

V.

Although the verdict did not estop the district court from finding the city liable for race discrimination, it did estop the court from awarding additional damages. Pursuant to an interrogatory, the jury awarded plaintiff $3,500 for: " a. Loss of income; b. Physical pain; c. Mental injury pain, humiliation and anguish." The district court entered final judgment for $45,800, awarding $44,000 for lost moonlighting wages and $1,800 for doctor bills.

Hodges does not deny that Beacon Theatres requires the district court to follow the jury's findings. The jury found that compensatory damages, including lost wages, were $3,500. While plaintiffs receive full compensatory damages under §§ 1981 and 1983, Whiting, 616 F.2d at 122 n.4, only equitable relief is available under the pre-amendment version of title VII. Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989). As a result, any monetary recovery permitted by title VII in this case is also recoverable under

[5] The city does not dispute that racist statements were made. Instead, it argues that the comments were not persistent enough to rise to the level of a "hostile environment." As the district court considered those remarks only as evidence of racist motivation for discriminatory treatment, the argument is irrelevant.

§§ 1981 and 1983.[6] Roebuck v. Drexel Univ., 852 F.2d 715, 739 n.44 (3d Cir. 1988).

Title VII cannot be used to double-count damages, Williams v. Trans World Airlines, 660 F.2d 1267, 1274 (8th Cir. 1981) (double recovery under title VII and § 1981 reversed), and Hodges herself argues that her damages for race and sex discrimination are identical.[7] The district court therefore erred in not entering final judgment for $3,500.[8]

VI.

The city claims that the $65,000 in attorney's fees is excessive because (1) Hodges's attorney failed to segregate his hours worked by specific claim, (2) the attorney's claimed billing rate is exorbitant, and (3) Hodges obtained only limited success. We review an award of attorney's fees for abuse of discretion and findings of fact supporting the award for clear error. Shipes v. Trinity Indus., 987 F.2d 311, 319 (5th Cir.), cert. denied, 114 S. Ct. 548 (1993).

In awarding fees, the district court must consider not only the product of hours worked and billing rate, but also whether the

---

[6] Although the interrogatory on damages did not specifically instruct the jury to consider medical expenses, the jury instructions required the jury to award "full, just, and reasonable compensation," and evidence of medical expenses was presented.

[7] Hodges argues that the race discrimination judgment is at worst harmless error because it entitled her to no additional damages. See supra note 2.

[8] The city also contends that the award of arguably compensatory damages is (1) improper under title VII, which permits only equitable relief, and (2) clearly erroneous. We do not reach these arguments.

plaintiff failed on alternative claims and whether the award is excessive in light of the plaintiff's overall level of success. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). When the plaintiff's claims involve a common core of facts and related legal theories, the district court need not attempt to divide counsel's hours among the claims. Instead, it should consider "the significance of the overall relief obtained." Id. at 435. While counsel obtaining "excellent results" are entitled to a fully compensatory fee, those with limited success may not be. Id. at 435-36. In fact, a plaintiff who receives only nominal damages is usually entitled to no fees at all. Farrar v. Hobby, 113 S. Ct. 566, 575 (1992).

The city's first two arguments fail. First, the city is correct in observing that Hodges's attorney failed to segregate his hours between the various claims. Such failure is meaningless, however, as Hodges prevailed on both the race and sex discrimination claims.

Second, the city is also correct that the attorney's claimed billing rate is high. Hodges's attorney requested $70,500 in attorney's fees for 235 hours of work at $300 an hour. The district court initially awarded that amount but later reduced the fee to $65,000. While we admit to some skepticism on this point, the district court considered sworn affidavits from both sides and adopted the testimony of the only non-party affiant. As a result, the district court's finding that $300 is a reasonable hourly

billing rate does not amount to clear error.[9]

In light of Hodges's limited success at trial, however, $65,000 is grossly excessive. "The degree of success obtained" is "the most critical factor" in awarding fees. Farrar, 113 S. Ct. at 574. "Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." Id. at 575 (quoting Riverside v. Rivera, 477 U.S. 561, 585 (1986) (Powell, J., concurring in judgment)). Hodges asserted $45,800 in monetary losses and requested $1 million in damages during closing argument. The jury's award of $3,500 not only rejects Hodges's claim that she was psychologically unable to work a second job, but also minimizes any injury from pain and humiliation. This is hardly the "excellent result" required for a fully compensatory fee.[10]

The district court's award of $65,000 amounts to roughly 92% of a fully compensatory fee, and that calculation is based upon a questionable billing rate. At the time the district court entered final judgment on fees, it had found that Hodges was entitled to $45,800 in damages; damages are actually only $3,500. Accordingly,

---

[9] We emphasize that while we decline to find clear error on the basis of the record in this case, our holding is not tantamount to establishing $300 as a reasonable fee in every case in the Houston market.

[10] Hodges disagrees, arguing that she obtained injunctive relief against further discrimination and established the existence of a municipal policy of sex discrimination. In Pembroke v. Ward County, 981 F.2d 225, 231 n.27 (5th Cir.), cert. denied, 113 S. Ct. 2965 (1993), we held that a plaintiff who had not sought damages was entitled to fees because he had caused a change in policy. In this case, Hodges sought primarily monetary relief and met with only limited success; she is therefore entitled to only limited fees.

we remand for reconsideration in light of this opinion, with the expectation that the district court will reduce its fee award substantially.

Accordingly, we AFFIRM the judgment as to liability, REVERSE and RENDER judgment for $3,500 on damages, and REMAND for a redetermination of attorney's fees.