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## **Attorneys' Fees in Federal Civil Rights Lawsuits Part Two**

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### ❖ **Introduction**

[Part One](#) of this article focused on attorneys' fees awards to plaintiffs in federal civil rights lawsuits. Part Two discusses the circumstances when courts in such cases will award attorneys' fees to defendants who prevail, as well as discussing how certain types of settlement offers can be used to reduce the amount of exposure of defendants to attorneys' fees awards to plaintiffs. At the end of this article, there is a listing of relevant references.

### ❖ **Awards to Defendants**

Defendants who prevail in federal civil rights lawsuits are certainly "prevailing" parties. But courts do not routinely award attorneys' fees to such defendants. They generally limit such awards to cases in which the plaintiffs filed claims that were utterly frivolous, malicious, fabricated, or pursued for an improper purpose.

They will not impose such awards on plaintiffs simply because they lose, failing to prove their claims by a preponderance of the evidence, if those claims were at least arguable, have some evidence to support them, and are brought in good faith. See [Hughes v. Rowe](#), #79-6000, 449U.S.5 (1980), holding that a defendant in an action brought under 42 U.S.C. 1983 may recover attorney's fees from the plaintiff only if the district court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation,"

In [\*Walker v. City of Bogalusa\*](#), #97-31331, 168 F.3d 237 (5th Cir. 1999), for example, a city was entitled to an award of attorneys' fees and costs against plaintiffs and their attorney in a case where it was frivolously alleged, without sufficient evidence, that the city failed to evacuate black residents in the same manner as non-black residents following a chemical plant explosion.

Similarly, in [\*Swiney v. State of Texas\*](#), #SA-06-CA-0941, 2008 U.S. Dist. Lexis 51522 (W.D. Tex.), affirmed [\*Swiney v. State\*](#), #07-51196, 2008 U.S. App. Lexis 16410 (Unpub. 5<sup>th</sup> Cir.), a plaintiff's \$250 million lawsuit concerning the ownership of several pieces of personal property seized by a police department, asserting claims for theft, violation of civil rights, and violations of the Americans with Disabilities Act was frivolous and groundless. Since the plaintiff failed to present a viable case for any of his claims, the defendant was entitled to an award of \$6,591 in attorneys' fees.

Attorneys' fees may be awarded to a defendant when the plaintiff had an underlying claim, but no good faith basis to pursue that particular defendant. In [\*Rivera v. City of Chicago\*](#), #06-1318, 469 F.3d 631 (7th Cir. 2006), for example, a federal appeals court ruled that a trial court abused its discretion in denying an award of costs to a city after it was granted summary judgment in a lawsuit brought by an arrestee attempting to collect on a civil rights judgment against a former police officer.

The city was not liable for the officer's conduct in ransacking the plaintiff's apartment because he was not then acting within the scope of his employment, and the plaintiff was therefore not entitled to enforce the judgment against the city. While the appeals court upheld an exception to [Federal Rule of Civil Procedure 54\(d\)\(1\)](#) allowing losing indigent parties to avoid paying costs, the losing plaintiff in this case failed to adequately show that she would be unable to pay such costs to the city, and had not even yet attempted to discover what assets the ex-police officer (now in prison), against whom she had a \$175,000 judgment, might have against which she could collect

In [\*Evans v. Monroe County Sheriff's Department\*](#), #05-10077, 148 Fed. Appx. 902 (11th Cir. 2005), a federal appeals court ruled that a sheriff and sheriff's department were entitled to an award of attorneys' fees when an arrestee's lawsuit for harassment, malicious prosecution, abuse of process, and intentional infliction of emotional distress in connection with the issuance of an arrest warrant was voluntarily dismissed.

The court found that the lawsuit brought had been frivolous when the arrest never took place, the sheriff's department, named as a defendant, was not a legal entity which could be sued, and there was no showing that there was any alleged violation of constitutional rights related to official county policies or practices.

Illustrating the difference in result between a defendant prevailing on frivolous and arguable claims is [Myers v. City of West Monroe](#), #98-30729, 211 F.3d 289 (5th Cir. 2000). The appeals court held that a trial court properly assessed attorneys' fees against a motorist who sued an officer for alleged illegal search of her car when she presented no evidence of illegality and even conceded at trial that she had consented to the search. Awarding attorneys' fees against her on a claim surrounding a second stop, however, was an abuse of discretion when her claim was not frivolous, although a jury rejected it.

### ❖ **Attorneys' Fees and Settlement Offers**

There is an available mechanism, in appropriate cases, which a defendant in a federal civil rights lawsuit can use to limit the amount of attorneys' fees awarded should the plaintiff prevail. This involves making a formal pre-trial settlement offer to the plaintiff under [Federal Rule of Civil Procedure 68](#).

The U.S. Supreme Court examined how this works in [Marek v. Chesny](#), #83-1437, 473 U.S. 1 (1985).

In that case, officers answering a call on a domestic disturbance shot and killed a man's adult son, resulting in a federal civil rights lawsuit. Before trial, the officers made a \$100,000 settlement offer, expressly including accrued costs and attorney's fees, but the plaintiff did not accept the offer.

The lawsuit subsequently went to trial, and the plaintiff was awarded \$5,000 on a state law claim, \$52,000 in compensatory damages on the federal civil rights claim, and \$3,000 in punitive damages. The plaintiff then asked the court to award him attorneys' fees under Sec. 1988 as a prevailing party.

The attorneys' fees he sought to recover included fees for hours worked after the settlement offer, including the trial. The trial court, relying on Rule 68, declined to award these latter fees. The Rule provides that if a timely pretrial offer of settlement is not accepted and "the

judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.”

The U.S. Supreme Court held that this was the correct result, and that the defendant officers were not liable for the attorneys’ fees incurred by the plaintiff after their settlement offer, which was higher than the damages awarded, was rejected. Applying the Rule in this way, the Court found, encourages settlements.

The Court also noted that the Rule does not require that a defendant’s offer itemize the amounts being offered for settlement of the various claims and for costs. Whether or not the offer states that costs are included or indicates an amount for costs, the offer has allowed judgment to be entered against the defendant both for damages caused by the alleged rights violation and for costs.

Accordingly, in appropriate cases where liability is either clear or arguable in the defendants’ view, it may be helpful to make a reasonable settlement offer, which is either accepted, or, if rejected, cuts off the accruing of further attorneys’ fees and other costs which may be awarded should the plaintiff prevail but achieve an award no higher than the settlement offer.

A case applying the principles in *Marek, [Marryshow v. Flynn](#)*, #92-1348, 986 F.2d 689 (4th Cir. 1993), is instructive on how this may work in practice, at least in the view of one federal appeals court. In that case, a jury awarded a man \$7,500 in compensatory damages and \$7,000 in punitive damages, or \$14,500 total, against two officers who he claimed used excessive force against him in connection with a false arrest. The court then awarded him attorneys’ fees and costs of \$24,892 under Sec. 1988.

The defendants objected to the attorneys’ fees award, on the basis that, two weeks before trial, they had made a Rule 68 offer for the entry of a judgment for damages, attorneys’ fees, and costs in the amount of \$20,000, which they argued was more than the \$14,500 awarded by the jury. They asserted that this meant that they should be entitled to shift the post-offer costs, including attorneys’ fees, to the plaintiff because the judgment obtained was not more favorable than the offer.

The appeals court disagreed. It noted that at the time of the offer of judgment, the time records of the plaintiff’s attorney showed that he had spent over 105 hours on pre-trial preparation. The attorney claimed that his time was worth \$175 per hour, or over \$18,000,

while the trial court ultimately allowed \$125 per hour and reduced the hours by 10%, attributing slightly more than \$11,800 to the fees due as of the date of the offer.

The appeals court ruled that this amount had to be added to the amount awarded by the jury, and that when it was, the sum, which was \$14,500 plus \$11,800, totaled \$26,300, which was more than the \$20,000 offer that was intended to cover both damages and costs (including attorneys' fees).

Accordingly, viewed in this manner, the damages awarded by the jury, \$14,500, were less than the portion of the settlement offer properly attributable to damages (\$20,000 minus the \$11,800 for the attorneys' fees accrued up to that point in time, or \$8,200). This calculation apparently seemed appropriate to the court since the settlement offer had specified the \$20,000 as well as indicating that the amount offered would include attorneys' fees and other costs.

The appeals court summarized:

“Rule 68 requires that a comparison be made between an offer of judgment that includes ‘costs then accrued’ and the ‘judgment finally obtained.’ It is neither logical nor consistent with the rule and applicable authority to compare an offer of judgment which includes all costs, including attorney’s fees, and a judgment finally obtained which includes no costs.”

It should be noted that Rule 68 offers require some formality. They must be served in writing on the plaintiff more than ten days before trial, and then, if within ten days the plaintiff serves notice on the defendant accepting the offer, either party may file the offer and notice of acceptance, plus proof of service with the court, after which the court clerk must enter a judgment on the settlement. An informal oral settlement offer or one that is not timely under the Rule will not suffice.

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