

Edward TEMENGIL, et al.,  
vs.  
TRUST TERRITORY OF THE  
PACIFIC ISLANDS, et al.

Civil Action No. 81-0006  
District Court NMI

Decided November 13, 1987

Reversed on other grounds,  
881 F.2d. 647 (9th Cir. 1989)

**1. Attorneys' Fees - Factors Considered**

In determining an award of attorney fees the most useful starting point is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate and the product of this calculation may then be adjusted on the basis of other considerations, but there is a strong presumption that this lodestar figure represents a "reasonable" fee.

**2. Attorneys' Fees - Factors Considered**

An upward adjustment in an attorneys fee award based upon considerations other than a reasonable hourly rate and the time expended is proper only in rare and exceptional cases, and when supported by specific evidence on the record and detailed findings by the trial court. 42 U.S.C. §1988.

**3. Attorneys' Fees - Factors Considered**

The critical inquiry in determining a reasonable attorney's fee under the civil rights statute is the reasonable hourly rate, and that the prevailing market rate in the community is indicative of a reasonable hourly rate. 42 U.S.C. §1988.

**4. Attorneys' Fees - Burden of Proof**

The burden is upon the attorney fee applicant to produce satisfactory evidence, in addition to affidavits of its counsel, that the hourly fees sought conform to those prevailing in the community for similar services of lawyers of reasonably competent skill and reputation and if the burden is met, the resulting product is presumed to be the reasonable fee. 42 U.S.C. §1988.

**5. Attorneys' Fees - Time Records**

The time records submitted by counsel in support of a request for attorneys fees must be sufficiently detailed that a neutral judge could make a fair evaluation of the time expended, the nature of and need for the service, and the reasonable fees to be allowed.

**6. Attorneys' Fees - Factors Considered**

Adjustments, if any, to the lodestar figure in attorney fee awards, are to be made using the twelve-factor test considering: (1) the time and labor required; (2) the novelty and difficulty of the question involved; (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. 42 U.S.C. §1988.

**7. Attorneys' Fees - Burden of Proof**

The burden of showing justification for an upward adjustment in a fee request is on the litigant and such an adjustment is

appropriate only where it is necessary to provide fair and reasonable compensation.

**8. Attorneys' Fees - Factors Considered**

Where a significant number of hours were spent preparing a case of first impression and high impact in the Micronesian community by attorney who exhibited notable degree of skill, and where award secured would be approximately \$20 million, attorney would be entitled to a fee of \$265,608, representing an hourly rate of \$117.50 for 452.1 hours with a multiplier of 5.

**9. Attorneys' Fees - Factors Considered**

Attorney's activities as lead counsel for intervenors and absent class members in a class action lawsuit placed upon him an added responsibility, which he faithfully met, entitling him to a multiplier of one and one half where his efforts contributed significantly to obtaining a large judgment on behalf of class members.

FILED  
Clerk  
District Court

NOV 13 1987

IN THE DISTRICT COURT FOR THE  
NORTHERN MARIANA ISLANDS

For The Northern Mariana Isla.  
By [Signature]  
(Deputy Clerk)

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4 EDWARD TEMENGIL, et al., )  
5 Plaintiffs, )  
6 vs. )  
7 TRUST TERRITORY OF THE )  
8 PACIFIC ISLANDS, et al., )  
9 Defendants )

CIVIL ACTION NO. 81-0006

ORDER

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12 THIS MATTER came before the Court on October 23, 1987,  
13 for consideration of plaintiffs' attorneys' requests for fees and  
14 costs, to which they are entitled pursuant to 42 U.S.C. §1988.

15 [1,2] The prevailing standards required to be considered  
16 prior to an award of attorney fees and costs have been addressed  
17 by the U.S. Supreme Court and recently reaffirmed and refined in  
18 the Ninth Circuit. In determining an award of fees "the most  
19 useful starting point... is the number of hours reasonably  
20 expended on the litigation multiplied by a reasonable hourly  
21 rate." Hensley v. Eckerhart, 103 S.Ct. 1933, 1939 (1983). The  
22 product of this calculation may then be adjusted on the basis of  
23 "other considerations," Id., at 1940, but there is a strong  
24 presumption that this lodestar figure represents a 'reasonable'  
25 fee. Pennsylvania v. Delaware Valley Citizens' Council for Clean  
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1 Air, 106 S.Ct. 3088, 3098 (1986). An upward adjustment based  
2 upon the "other considerations" is proper only in "rare" and  
3 "exceptional" cases, and when supported by specific evidence on  
4 the record and detailed findings by the trial court. Blum v.  
5 Stenson, 104 S.Ct. 1541, 1548-49 (1984).

6 **[3-5]** Jordan v. Multnomah County, 815 F.2d 1258 (9th Cir.  
7 1987), reiterates that a critical enquiry in determining a  
8 reasonable attorney's fee under §1988 is the reasonable hourly  
9 rate, and that the prevailing market rate in the community is  
10 indicative of a reasonable hourly rate. Id., at 1262. The  
11 burden is upon the fee applicant to produce satisfactory  
12 evidence, in addition to affidavits of its counsel, that the  
13 hourly fees sought conform to those prevailing in the community  
14 for similar services of lawyers of reasonably competent skill and  
15 reputation. Id., at 1263. If the burden is met, the resulting  
16 product is presumed to be the reasonable fee contemplated by  
17 §1988. Id. The time records submitted by counsel must be  
18 sufficiently detailed that a neutral judge could make a fair  
19 evaluation of the time expended, the nature of and need for the  
20 service, and the reasonable fees to be allowed. Id., quoting  
21 Hensley, 103 S.Ct. at 1943 (Burger, C.J., concurring). Counsel  
22 cannot baldly assert that all time claimed was usefully spent,  
23 nor may the court uncritically accept counsel's representations  
24 in this regard. Jordan, 815 F.2d at 1263 n.8, citing Sealey,  
25 Inc. v. Easy Living, Inc., 743 F.2d 1378, 1385 (9th Cir. 1984).

16 **[6]** Adjustments, if any, to the lodestar figure are to be

1 made using the twelve-factor test first enunciated in Johnson v  
2 Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), and  
3 adopted in this circuit in Kerr v. Screen Extras Guild, Inc., 526  
4 F.2d 67 (9th Cir. 1975), cert. denied, 96 S.Ct. 1726 (1976). As  
5 stated before by this Court, these are:

- 6
- 7 1. The time and labor required;
- 8 2. The novelty and difficulty of the  
9 question involved;
- 10 3. The skill requisite to perform the legal  
11 service properly;
- 12 4. The preclusion of other employment by the  
13 attorney due to acceptance of the case;
- 14 5. The customary fee;
- 15 6. Whether the fee is fixed or contingent;
- 16 7. Time limitations imposed by the client or  
17 the circumstances;
- 18 8. The amount involved and the results  
19 obtained;
- 20 9. The experience, reputation, and ability  
21 of the attorneys;
- 22 10. The "undesirability" of the case;
- 23 11. The nature and length of the professional  
24 relationship with the client; and,
- 25 12. Awards in similar cases.
- 26

[7] Litigants seeking an upward adjustment have the burden  
of justifying their request. Blum, 104 S.Ct. at 1548. Such an  
adjustment is appropriate only where it is necessary to provide  
fair and reasonable compensation. Id., at 1550.

The Court will consider in turn the fee requests submitted by plaintiffs' attorneys.

DOUGLAS F. CUSHNIE

[8] Mr. Cushnie claims 461.2 hours of time devoted to this lawsuit to date. The hours claimed are supported by many pages of detailed time records, beginning in December 1980 and continuing to the present. He has also submitted an affidavit indicating that since the inception of the case his hourly fee has increased from \$110 to \$125. Since there is no indication when the higher fee took effect, therefore, the Court will calculate all hours at an average of \$117.50 per hour.

The Court has reviewed all time records submitted and has determined that, with one exception, all time appears to have been reasonably expended on the litigation. The Court finds that the time records are sufficiently detailed so that even a judge unfamiliar with the case could make a fair evaluation of the time expended and the nature of and need for the services. Jordan, 815 F.2d at 1263.

The Court will disallow the time requested for activities dealing solely with the appearance before the United Nations. This time, totalling approximately 9.1 hours, does not appear to have been reasonably necessary for the prosecution of the legal aspects of this case.

The Court of its own knowledge and from having reviewed the affidavits on file herein finds that the hourly rates

requested by Mr. Cushnie conform to those prevailing in the community for similar services of lawyers of reasonably competent skill and reputation.

Based on the foregoing analysis, the Court calculates the lodestar figure thusly:

452.1 hours reasonably devoted to this  
litigation x average hourly fee of \$117.50

for a total of \$53,121.75.

The court now turns to the question of whether or not an upward adjustment of this figure is justified. For reasons explained more fully below, the Court is of the unalterable opinion that a significant upward adjust is necessary to provide fair and reasonable compensation. Blum, 104 S.Ct. at 1550.

The factors required to be considered by Kerr are:

Time and Labor Involved in This Lawsuit. As revealed by the time records of counsel, a significant number of hours were spent preparing this case. In addition, the labor required increased significantly as the lawsuit progressed and the number of plaintiffs rose dramatically. Both the time and labor militate toward an upward adjustment.

Novelty and Difficulty of the Questions. Counsel should be "appropriately compensated" for accepting the challenge of a case of first impression. Johnson, 488 F.2d at 718. This lawsuit presented plaintiffs' counsel with novel and difficult questions, including the jurisdiction of this Court to try this case, whether or not the Trust Territory was subject to the

jurisdiction of this Court, the sovereign immunity of the Trust Territory, the constitutional protections to be afforded Micronesian employees of the Trust Territory, and the issue of class certification. The case resulted in a landmark decision.

Skill Required. Considered here are the attorney's work product, preparation, and general ability before the Court, as gauged by the trial judge based upon his or her past experience and observations of lawyers at work. Johnson, 488 F.2d at 718. An attorney of average skill would have been hard-pressed to visualize, let alone undertake and achieve, a legal campaign to rectify the inequities visited upon Micronesian employees of the Trust Territory. The skill required of, and exhibited by, Mr. Cushnie was of a notable degree.

Preclusion of Other Employment. Here we have only counsel's representation that the sheer number of hours involved here necessarily deprived him of other business. While the Court cannot disagree, it finds that a definitive determination here is impossible.

Customary Fee. The customary fee for similar work in the community should be considered. Johnson, 488 F.2d at 718. This case was novel and of first impression, not only in this jurisdiction but in the history of American jurisprudence. A "customary fee" cannot be determined.

Fixed or Contingent Fee. The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when the case was



1 accepted. Johnson, 488 F.2d at 718. Mr. Cushnie represented  
2 that, when the case first began, he represented a handful of  
3 clients with whom he had a contingent fee agreement. There is no  
4 indication of what percentage he was to receive if the case was  
5 pursued to a successful conclusion. In any event, the class of  
6 plaintiffs now numbers approximately 900. The monetary award  
7 secured by plaintiffs, as of the date of judgment, is  
8 approximately \$20 million. In this jurisdiction, settlement or  
9 victory prior to trial typically results in a contingent fee of  
10 25 percent. Here, that would be \$5 million. An award of five  
11 percent of the judgment would be \$1 million. One percent of the  
12 award would equal \$200,000.

13 Time Limitations Imposed by Client or Circumstances.

14 Counsel points out that with the long-planned phase-out of the  
15 Trust Territory a concern of the plaintiffs throughout was that a  
16 decision be obtained before the possibility existed that the  
17 entity (Trust Territory) from which they sought to collect a  
18 judgment ceased to exist. The Court is not terribly persuaded by  
19 this argument, but recognizes that the uncertainty over the Trust  
20 Territory's future undoubtedly spurred plaintiffs onward.  
21 However, there is no indication that this factor was significant.

22 Amount Involved and Result Obtained. The Court should  
23 consider the amount of damages and if the decision corrects  
24 across-the-board discrimination affecting a large class, the fee  
25 award should reflect the relief granted. Johnson, 488 F.2d at  
26 718. Probably none of the litigants could have foreseen the size

1 to which this case has grown or anticipated the sums which  
2 ultimately would be involved. It is hard to over-estimate the  
3 impact this case has had on hundreds of Micronesians scattered  
4 throughout Micronesia. It has resulted in correcting  
5 across-the-board discrimination with significant money damages,  
6 usually with individual awards in five or six figures.

7 Experience, Reputation, and Ability of the Attorney.

8 Mr. Cushnie has practiced law since 1964 and is licensed to  
9 practice in several jurisdictions. He states that he has been  
10 practicing law in Micronesia longer than any other active  
11 attorney. He was the first attorney in Guam and Micronesia to  
12 have a petition for certiorari granted by the U.S. Supreme Court  
13 and has argued many times before the U.S. Court of Appeals for  
14 the Ninth Circuit. It is not unreasonable to assert that he is  
15 one of a very small number of attorneys with the knowledge of and  
16 experience in Micronesia to handle this lawsuit. Plaintiffs  
17 class members are found in all corners of Micronesia, an area of  
18 the Pacific larger in size than the continental United States,  
19 but with a total land mass about half the size of Rhode Island  
20 and only slightly larger than the City of Los Angeles.

21 Undesirability of the Case. It has been represented  
22 without quarrel to the Court that the case in its early stages  
23 was refused by other attorneys. The Court believes that it was  
24 indeed considered undesirable because it involved the  
25 representation of Micronesians against the might and authority of  
26 the United States of America.

1                   Nature and Length of the Professional Relationship with  
2 the Client. There is no indication of a professional (as opposed  
3 to a personal) relationship with the clients prior to the  
4 beginning of the case. Since its inception, however, the  
5 attorney-client relationship has endured for more than seven  
6 years. There is nothing before the Court to indicate any  
7 adjustment based upon this factor is relevant.

8                   Awards in Similar Cases. There have been no cases  
9 similar to this case; it was unique in its most important  
10 aspects.

11                   Based upon the foregoing, the Court strongly believes a  
12 multiplier of five is fair and results in Mr. Cushnie receiving a  
13 reasonable attorney's fee for his efforts in this case.

14                   Mr. Cushnie is awarded attorney fees in the amount of  
15 \$265,608.75.

16                   In late 1983, almost two years after this lawsuit was  
17 filed, intervention was sought and obtained by other plaintiffs,  
18 who were represented by the attorneys listed below.

19  
20                   BORJA and SALAS

21                   The law firm of Borja and Salas was appointed by the  
22 Court to act as lead counsel for intervenors and absent class  
23 members. The firm has submitted time records in support of its  
24 request for attorney fees in the amount of \$10,625.00 and costs  
25 in the amount of \$898.10. They request fees for 125 hours at \$85  
26 per hour, which hourly rate the Court finds to be most

reasonable. The costs requested also are reasonable and appear to have been incurred in this lawsuit.

[9] The time records adequately document the effort expended by the firm on behalf of its clients. Furthermore, the Court finds that Mr. Borja's activities as lead counsel for intervenors and absent class members placed upon him an added responsibility, which he faithfully met, and that his firm is entitled to a multiplier of one and one half. The Court believes that the skill required and exhibited in this role warrants an upward adjustment. His efforts contributed significantly to the obtainment of the large judgment. The firm deserves recognition for its extraordinarily successful efforts on behalf of its clients. Therefore, the firm is awarded attorney fees of \$15,937.50 and costs of \$898.10.

RANDALL T. FENNEL

Mr. Fennell has requested attorney fees based upon 206.4 hours of his time at his hourly rate of \$125 and 19 hours of paralegal time at \$35.00 per hour, for a total of \$26,465. He also requests \$141.80 for costs. The Court has in the past found reasonable and approved Mr. Fennell's hourly rate of \$125 and does so again here.

The Court has reviewed the time records and is of the opinion that they are reasonable and that the time documented was reasonably related to the prosecution of this lawsuit. The costs meet the same test.

However, there is nothing to overcome the strong presumption that the lodestar figure alone represents reasonable remuneration. At the time of Mr. Fennell's involvement those Kerr factors which would justify an upward adjustment had been for the most part already resolved. The Court has reviewed the Kerr factors and finds they have no applicability here.

WHITE, NOVO-GRADAC and THOMPSON

The law firm of White, Novo-Gradac, and Thompson has submitted, through the firm of Borja and Salas, a request for attorney fees in the amount of \$294.00 and costs of \$100.00. The fees are calculated at 2.8 hours at \$105.00 per hour and the costs at \$100 for 500 photocopies. Both the time spent and the hourly fee requested are reasonable and appear to have been incurred in this lawsuit. However, there is nothing to overcome the strong presumption that the lodestar figure alone represents a reasonable fee.

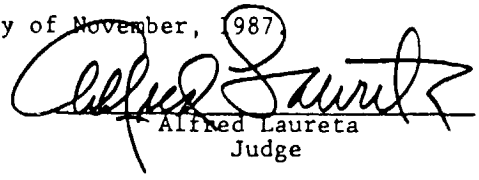
IT IS THE ORDER of this Court that the following fees and costs be awarded:

Douglas F. Cushnie	\$ 265,608.75	Fees.
Borja and Salas	\$ 15,937.50	Fees.
	898.10	Costs.
Randall T. Fennell	\$ 26,465.00	Fees.
	141.80	Costs.
White, Novo-Gradac & Thompson	\$ 294.00	Fees.
	100.00	Costs.

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IT IS SO ORDERED.

DATED this 13<sup>th</sup> day of November, 1987.

  
Alfred Laureta  
Judge