UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

STATE EMPLOYEES BARGAINING AGENT COALITION, et al,	:	
PLAINTIFFS,	:	
V.	:	NO. 3:03 CV 221 (AVC)
JOHN G. ROWLAND, et al	:	
DEFENDANTS.	:	SEPTEMBER 21, 2015

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ORDER APPROVING THE PROVISIONS OF THE PARTIES' SETTLEMENT AGREEMENT FOR ATTORNEYS' FEES AND COSTS

I. Introduction

Pursuant to the Settlement Agreement in this action, the State of Connecticut has agreed to pay directly to Class Counsel 17.5% of the value of the award to each class member. The State will also pay the law firm of Livingston, Adler, Pulda, Meiklejohn, & Kelly, P.C., the sum of $250,000.00 for legal services rendered by that firm to the plaintiff unions in connection with this action (and the concurrent state court litigation). The State has further agreed to pay Class Counsel an additional $400,000.00 in reimbursement of litigation expenses in this action – including both litigation expenses incurred up to the date of the Settlement Agreement as well as expenses anticipated in connection with the administration of the Settlement.

These provisions of the Settlement Agreement for direct payment of attorneys' fees and costs by the State of Connecticut were negotiated at arms'-length by Class Counsel and the Attorney General's Office after the other terms of the Settlement had been agreed upon. Under

the Settlement Agreement, Class Counsel have agreed to represent each class member in the determination of the class member's individual damages claims, and payments of attorneys fees' on class members' awards will not be made until after the specific award to each class member has been determined. In addition, the amounts to be paid by the State in attorneys' fees (and costs) will not be deducted from the economic or compensatory damages paid to each class member individually.

The State's payments pursuant to these provisions do not reduce the amounts paid to individual class members pursuant to the Settlement Agreement.

Class Counsel submit that the proposed provisions in the Settlement Agreement for payment of attorneys' fees and costs are fair and reasonable to the class (and to defendants). In conjunction with the parties' pending Motion for Approval of the Settlement, Class Counsel also move, pursuant to Fed.R.Civ.P. 23(h), for an Order approving the provisions for attorneys' fees and costs in the Settlement Agreement, and for a determination by this Court that the attorneys' fees and cost provisions agreed to by the parties are fair and reasonable.

No member of the class has given notice of any objection to these provisions.

II. Procedural History Relevant to the Attorneys' Fee Application

This action was commenced by Class Counsel in February 2003, pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983, on behalf of the State Employees Bargaining Agent Coalition ("SEBAC") that represents approximately 40,000 Connecticut state employees. In addition to SEBAC, the plaintiffs include 12 of its 13 constituent labor unions and several individual union members.

Plaintiffs' Complaint, as amended in May 2003, asserted claims against the then-Governor of the State of Connecticut and the then-Secretary of Connecticut's Office of Policy and Management in both their official and individual capacities, alleging that defendants had intentionally violated their constitutional rights to freedom of speech, freedom of association, due process and equal protection of the law under the First, Fifth and Fourteenth Amendments to the U.S. Constitution by ordering the terminations of over 3,000 union members in retaliation for the unions' refusal to forego certain statutorily protected contract rights. Consistent with Eleventh Amendment limitations, plaintiffs' Amended Complaint in this action sought only declaratory and injunctive relief against the State (official capacity) defendants. Plaintiffs' Amended Complaint sought money damages against the defendants in their individual capacities. Plaintiffs' Amended Complaint also sought an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

In January 2006, after defendants filed a Motion to Dismiss all claims in this action, this Court ruled that plaintiffs' claims for monetary damages, but not injunctive relief, were barred by the doctrine of sovereign immunity, but denied the motion to dismiss the claims against defendants in their official capacities for injunctive relief, ruling that further discovery was required on the issue of whether legislative immunity applied to bar such official capacity claims.[1]

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[1] Defendants thereafter filed an interlocutory appeal from this Court's denial of their Motion to Dismiss to the United States Court of Appeals for the Second Circuit, which affirmed the order of this Court insofar as it denied legislative immunity and Eleventh Amendment immunity with respect to plaintiffs' claims for the injunctive relief of reinstatement.

Coincident with this litigation, Class Counsel, on behalf of several members of the putative class in this action, brought claims arising out of the same layoffs against the State of Connecticut in the Connecticut Superior Court pursuant to Conn. Gen. Stat. § 31-51q, which prohibits any employer, including the State, from subjecting any employee to adverse employment action "on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution" or by equivalent guarantees under the Constitution of Connecticut. *See Conboy, et al. v. State of Connecticut,* Docket No. HHD-CV-05-5001734 S (Conn. Super. Ct. at Hartford), and *Parizo v. State of Connecticut*, Docket No. HHD-CV-03-0828527S (Conn. Super. Ct. at Hartford). In accordance with the provisions of Gen. Stats. § 31-51q, plaintiffs' complaints in the state court actions sought state law compensatory damages (encompassing, *inter alia*, lost wages and other economic losses and damages for emotional distress), as well as attorneys' fees and statutory punitive damages. The State initially sought dismissal of plaintiffs' claims on sovereign immunity grounds. The trial court's denial of the State's Motion to Dismiss was subsequently affirmed by the Connecticut Supreme Court. *See Conboy v. State*, 292 Conn. 642 (2009).

In July 2009, the parties agreed to enter into a Stipulation of Facts to establish a factual record upon which to seek adjudication of plaintiff's official capacity claims – i.e., whether it is constitutionally permissible, consistent with the First Amendment, for the Executive Branch of the State of Connecticut, in exercising its authority to manage the size of the work force to single out union employees for lay-off and to limit lay-offs to union employees.

By agreement of counsel, the parties' Stipulation and the disposition of the First Amendment claims in this action would control the determination in the state court actions with

respect to the issue of whether the plaintiffs in those cases had established claims for adverse employment action in violation of the First Amendment.

In March 2010, this Court granted plaintiff's Motion for Class Certification, certifying a class as to plaintiffs' official capacity claims.

In June 2010, the parties filed cross motions for summary judgment on plaintiffs' official capacity claims based on their joint stipulated facts. (Docs. 230, 232). The parties requested declaratory relief only, having stipulated that the issue of remedy would be considered in subsequent proceedings, if necessary.

On July 1, 2011, this Court issued its ruling, granting the defendants' motion for summary judgment and denying plaintiffs' motion on all of the official capacity claims before the Court. (Doc. 251). On plaintiffs' subsequent appeal, the Second Circuit reversed, concluding that, based on the stipulated factual record, the plaintiffs "had made out a claim that Defendants violated their First Amendment rights to freedom of association by targeting union employees for firing based on their union membership." The Second Circuit, therefore, reversed this Court's grant of summary judgment to the Defendants and remanded to this Court with instructions to grant summary judgment to plaintiffs on their First Amendment official capacity claim and to craft appropriate equitable relief. *SEBAC v. Rowland*, 718 F.3d 126 (2d Cir. 2012).

The Second Circuit also revived plaintiffs' claims against defendants Rowland and Ryan in their individual capacities which had previously been dismissed by this Court, holding that Eleventh Amendment does not apply to or bar individual capacity claims. Because the Stipulation of Facts did not govern the claims against the individual defendants, the Second

Circuit remanded those claims for further proceedings – including full litigation of whether the individual defendants were entitled to qualified immunity on plaintiffs' claims. *Id.* at 138.

The State (official capacity) defendants initially filed a petition for a writ of *certiorari* to the United States Supreme Court, but withdrew the petition, without prejudice, in December 2013 in order to engage in settlement discussions.[2]

By virtue of counsel's prior agreement that the disposition of the First Amendment claims in this action would control the liability determination in the state court actions, the Second Circuit's adjudication of the First Amendment claims in this action, effectively established the class members' claims under Gen. Stat. § 31-51q in the state court action, including their claims for lost wages and other economic damages (not otherwise available in an official capacity § 1983 claim against state officials in federal court). Accordingly, during the settlement discussions following the remand from the Second Circuit, the parties agreed to enter into a global settlement to resolve both the equitable and injunctive claims in this action as well as the monetary damages claims in the state court action under state law. The settlement discussions also resolved plaintiffs' individual capacity claims in this action.

Under the terms of the Settlement Agreement subsequently negotiated by the parties, approximately 3,500 class members who sustained economic damages as a result of the employment actions at issue in this litigation will receive 70% of their entire economic loss, plus interest (retroactive to the date of loss) on those recoveries of 5% per annum to make up for the time value of money. All employees of the State of Connecticut who were members of

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[2] The individual defendants pursued their petition for writ of *certiorari*, which was denied by the Supreme Court. 134 S.Ct. 132 (2014).

bargaining units as of November 2002 will also receive compensation in the form of compensatory damages for the chilling of their exercise of their First Amendment free speech and association rights. And, no class member will have to pay any portion of their recovery to defray any of the attorneys fees or costs of the litigation which made this Settlement possible.

Subsequent to the negotiation of the settlement terms with respect to both the economic damages to be paid to those class members who sustained actual economic damages and the compensatory damages to be paid to the union membership – the parties separately negotiated provisions for Class Counsel's attorneys' fees and costs, which are to be paid directly by the State and will not be deducted from the class members' individual settlement proceeds. [*See* Declaration of David S. Golub, dated September 21, 2015 ("Golub Dec."), ¶ 45]. Pursuant to the Settlement, the State of Connecticut has agreed to pay directly to Class Counsel 17.5% of the value of the award to each class member. The State has further agreed to pay Class Counsel an additional $400,000.00 in reimbursement of litigation expenses in this action – including litigation expenses incurred to date, as well as expenses anticipated in connection with the administration of the Settlement. Under the Agreement, the State will also pay the law firm of Livingston, Adler, Pulda, Meiklejohn, & Kelly, P.C., the sum of $250,000.00 for legal services rendered by that firm to the plaintiff unions in connection with this action (and the concurrent state court litigation).

These provisions for direct payment of counsel's attorneys' fees and costs by the State were the product of an arms'-length negotiation. Although Class Counsel's fee agreements with the individual plaintiffs in the state court actions pursuant to Gen. Stat. § 31-51q (which provided the principal legal basis for award of lost wages and economic damages) provided for a

contingent fee of 33 1/3%, Class Counsel compromised their claim for prevailing party legal fees at 17.5%. [Golub Dec., ¶ 46]. Similarly, although Class Counsel were separately entitled to recovery of prevailing party attorneys' fees in this action, pursuant to 42 U.S.C. § 1988, *see Missouri v. Jenkins*, 491 U.S. 274, 283 (1989), – and although counsel had expended over 2,500 hours of legal time, with a resulting lodestar in excess of $1.4 million – counsel also agreed, as part of the compromise of their claim for fees, to waive any claim for reimbursement of their fees under § 1988. [Golub Dec., ¶ 47].

III. Plaintiffs' Counsel Are Entitled to the Reasonable Fee Agreed to by the Parties in the Settlement Agreement.

Section 31-51q of Connecticut General Statutes expressly mandates that a prevailing plaintiff recover an award of his attorneys' fees. *McClain v. Pfizer*, No. 3:06-cv-1795 (WWE), 2011 WL 2533670, *3 (D. Conn. Jun. 27, 2011) (awarding attorneys' fees to prevailing plaintiff in § 31-51q claim); *Burrell v. Yale University*, No. X02 CV 00-0159421-S, 2004 WL 1155350, *2 (Conn. Super. May 10, 2004) (§ 31-51q requires an award of attorneys' fees to a prevailing plaintiff).

Under Connecticut law, a plaintiff's contingent fee agreement with his attorneys provides the basis for determining the amount of an attorneys' fee award under § 31-51q. *Schoonmaker v. Lawrence Brunoli, Inc.*, 265 Conn. 210, 270-71 (2003) (fee agreement, where reasonable, states measure of attorneys' fees to be imposed on defendant); *Burrell v. Yale University*, No. X02 CV 00-0159421-S, 2005 WL 1670613 1155350, *1 (Conn. Super. May 26, 2005) (where plaintiff had 1/3 contingency fee agreement, awarding § 31-51q attorneys' fees equaling one third of plaintiff's recovery); *McClain*, 2011 WL 2533670 at *3 (granting attorneys' fees pursuant to

§ 31-51q "in accordance with the one-third contingent fee agreement [plaintiff] entered into with her attorneys"); *see, generally, Sorrentino v. All Seasons Services, Inc.*, 245 Conn. 756, 775-76 (1998) (in awarding attorneys' fee, court should not depart from reasonable fee agreement absent substantial unfairness to defendant).

The named plaintiffs in the state court action pursuant to Conn. Gen. Stats. § 31-51q have a contingency fee agreement with their attorneys, pursuant to which they each agreed that their attorneys would be entitled to receive 33 1/3% of any recovery by way of judgment or settlement, including any recovery of compensatory and punitive damages. (A copy of Class Counsel's contingency fee agreement with the first named plaintiff in the *Conboy* action is attached to Golub Dec. as Exhibit A.) Plaintiffs' contingency fee agreements establish the basis for an award of an appropriate attorneys' fee under Connecticut law, as this contingency agreement is customary and reasonable for a case of this complexity and magnitude and will not result in substantial unfairness to either plaintiffs or defendant. *Sorrentino*, 245 Conn. at 775-76.

In addition, as prevailing plaintiffs in an action brought under 42 U.S.C. § 1983, Class Counsel was entitled to recover an award of attorneys' fees pursuant to 42 U.S.C. § 1988. *See, e.g., Arbor Hill Concerned Citizens Neighborhood Assoc. v. Cnty. of Albany*, 522 F.3d 182, 183 (2d Cir. 2008). As of January 2015, plaintiffs' counsel had expended approximately 2,500 hours in the litigation of this case, resulting in recoverable attorneys' fees in excess of $1.4 million. [Golub Dec., ¶ 47].

Although Class Counsel were entitled to seek attorneys' fees of 33 1/3% of plaintiffs' recovery on their § 31-51q claims, they agreed to compromise their claim at 17.5%, and also agreed to waive any claim for fees under 42 U.S.C. § 1988. [Golub Dec., ¶¶ 46-47].

Class Counsel submit that the attorneys' fee provisions of the Settlement Agreement are eminently fair – certainly when compared with attorneys' fees awards in this District in common fund cases of similar magnitude to this matter. Indeed, although the attorneys fees' in this case are being paid directly by the State and, thus, do not result in any reduction of the net proceeds payable to each class member, the requested award of 17.5% percent is considerably lower than the fees awarded in comparable common fund matters (which fees actually are deducted from the net proceeds payable to class members). *See, e.g., In re Priceline.com Sec. Litig.*, No. 3:00-CV-1884 (AVC), 2007 WL 2115592 (D. Conn. Jul. 20, 2007) (Covello, J.) (awarding attorneys' fees of 30% on common fund settlement of $80 million); *Haddock v. Nationwide Life Insurance Co.*, No. 3:01-cv-1552 (SRU) (Doc. No. 601) (D. Conn. 2015) (approving award of attorneys' fees of 35% on common fund settlement of $140 million); *Spencer v. The Hartford Financial Services Group*, 3:05-cv-1681 (JCH) (Doc. No. 258) (D. Conn. 2010) (approving attorneys' fees of 30% on $72.5 million common fund settlement).[3]

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[3] Other courts in this Circuit have, likewise, routinely awarded attorneys' fees in common fund cases well in excess of the 17.5 percent fee sought here. *See, e.g., In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726 (S.D.N.Y. Jul. 16, 2007) (Rakoff, J.) (awarding 30% of $65.87 million settlement); *In re Buspirone Antitrust Litig*, No. MDL 1413, 01-CV-7951 (JGK) (S.D.N.Y. Apr. 17, 2003) (Koeltl, J.) (awarding 331/3% of $300 million settlement); *Kurzweil v. Philip Morris Cos., Inc.*, No. 94 Civ. 2373 (MBM), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999) (Mukasey, J.) (awarding 30% of $123 million settlement); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320 (E.D.N.Y. 1993) (Nickerson, J.) (awarding 34% of $42 million settlement); *In re Wedtech Sec. Litig.*, MDL No. 735 (LBS) (S.D.N.Y. Jul. 30, 1992) (Sand, J.) (awarding 39.2% of $53 million); see also *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009) (Scheindlin, J.) (awarding 331/3% of $586 million settlement); *In re Deutsche Telekom AG Sec. Litig.*, No. 00 Civ. 9475 (NRB) (S.D.N.Y. June, 7, 2005) (awarding 28% of $120 million settlement) (Buchwald, J.); *In re Oxford Health Plans, Inc. Sec. Litig.*, No. MDL 1222 (CLB), 2003 U.S. Dist. Lexis 26795 (S.D.N.Y. June 12, 2003) (Brieant, J.) (awarding 28% of $300 million settlement); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 400 (S.D.N.Y. 1999) (Pollack, J.) (awarding 27.5% of $116 million settlement); *In re Prudential Securities Ltd. Partnership Litig.*, 912 F. Supp. 97 (S.D.N.Y. 1996) (Pollack, J.)

The proposed attorneys' fees are especially fair in light of the substantial litigation work and the excellent result achieved for the settlement class. This was extremely hard-fought litigation in multiple fora. This action has encompassed more than 275 docket entries to date, and has involved two separate appeals to the United States Court of Appeals for the Second Circuit, *see State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71 (2007); *State Emp. Bargaining Agent Coalition v. Rowland*, 718 F.3d 126 (2d Cir. 2013), as well as a successful defense of a petition for *certiorari* to the United States Supreme Court filed by the individual defendants. *See Rowland v. State Employees Bargaining Agent Coalition*, 134 S.Ct. 1002 (2014). Before they were stayed pending the outcome of this litigation, the concurrent state court actions were, likewise, hard-fought, including an interlocutory appeal to the Connecticut Supreme Court from the denial of a motion to dismiss by the defendant State of Connecticut. *Conboy v. State*, 292 Conn. 642 (2009). Private counsel for the defendants also resisted discovery in these actions at virtually every turn and, when that discovery was finally obtained, entailed review of tens of thousands of pages of documents [Golub Dec., ¶ 37]. Class Counsel's continued representation of individual class members in the determination of their economic damages will continue to involve significant document review in connection with the determination and adjudication of the class members' individual claims for economic damages.

(awarding 27% of $110 million settlement); *Dusek v. Mattel, Inc.*, CV 99-10864-MRP(C.D. Cal. Sep. 29, 2003) (awarding 27% of $122 million settlement); *In re Comverse Technology, Inc. Securities Litigation*, No. 06 cv 1825 (NGG), 2010 WL 2653354 (E.D.N.Y. June 24, 2010) (Garaufis, J.) (awarding 25% on $225 million settlement); *In re RJR Nabisco, Inc. Sec. Litig.*, MDL No. 818, 1992 WL 210138, at * 7 (S.D.N.Y. Aug. 24, 1992) (Mukasey, J.) (awarding 25% of $72.5 million settlement).

The outstanding result achieved in this case – a recovery on behalf of the employees most significantly affected by the layoffs of 70% of their entire economic loss, plus interest (retroactive to the date of loss) on those recoveries of 5% per annum to make up for the time value of money as well as appropriate adjustments to pension entitlements – will provide a significant recovery to those class members. That result could not have been obtained without counsel willing to assume the enormous financial risks of pursuing a possible class action on behalf of the named plaintiffs, whose individual claims – like those of the other class members – could not possibly have warranted the legal time and litigation expenses necessary to prosecute this action. To obtain this recovery, Class Counsel risked thousands of hours of legal time and thousands of dollars in litigation expense. They did so in a case with highly uncertain prospects at the outset: indeed, each of the legal theories asserted in both this action as well as the concurrent state court actions was subject to a host of significant immunity defenses (including several that were highly fact-intensive), including Eleventh Amendment immunity, legislative immunity, and qualified immunity in this Court and sovereign immunity in the state court actions.

Moreover, Class Counsel's responsibility to the class is ongoing: As part of the settlement, Class Counsel has undertaken to represent each of approximately 3,700 individual class members who sustained economic damages in the administrative process created by the Settlement Agreement to determine and/or adjudicate class members' claims for economic damages, including through any appeals to the Claims Administrator or the Claims Appeal Panel established by the Agreement, and Class Counsel will not be able to obtain any fee on those class

members' recoveries until each class member's economic damages are agreed upon or adjudicated.

V. Conclusion

For the foregoing reasons, Class Counsel respectfully request that the Court, in conjunction with its Ruling on plaintiffs' Motion for Final Approval of the Settlement Agreement, enter an Order, pursuant to Fed.R.Civ.P. 23(h) approving as fair and reasonable the provisions for attorneys' fees and costs agreed by the parties in the Settlement Agreement.

Dated: September 21, 2015

PLAINTIFFS STATE EMPLOYEES BARGAINING AGENT COALITION, ET AL,

BY /s/ *David S. Golub*

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CERTIFICATION

I hereby certify that on September 21, 2015, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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