12-14-1992

Respondents' Brief in Opposition (On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit)

Lewis M. Steel '63

No. 92-831

In The

Supreme Court of the United States

October Term, 1992

THE BETHLEHEM STEEL CORP., ET AL.,
Petitioners,

-against-

ROYSWORTH D. GRANT AND WILLIE ELLIS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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List of Parties

The parties to the proceedings below were the petitioner Bethlehem Steel Corporation petitioners James Deaver, Thomas R. Connelly and E. Richard Driggers (all of whom were formerly employed by Bethlehem Steel Corporation), and the respondents Roysworth D. Grant and Willie E. Ellis, individually and as representatives of a class of Black and Hispanic ironworkers, and respondent Louis Martinez, as plaintiff-intervenor.

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No. 92-831

IN THE
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OCTOBER TERM, 1992

THE BETHLEHEM STEEL CORP., et al.,

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-against-

ROYSWORTH D. GRANT and
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Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO
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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari filed in this matter. The petition raises no conflict between the Second Circuit's decision and the decisions of any other court of appeals [1] and raises no special or important

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1 Bethlehem admits that no other federal circuit court has adopted the rule urged by them and that the Second Circuit decision generally

issue not previously settled by this Court. Nor does the decision below conflict in any way with this Court's decision in Farrar v. Hobby, No. 91-990, decided December 14, 1992, since the results achieved below served an important public purpose and were not "technical," "insignificant," "pyrrhic" or "nominal," as this Court applied these terms in the Farrar case.

The case presents a unique factual pattern in which Respondents had received a significant settlement of their class-action employment discrimination case ($60,000), which was entered into after the passage of time made the possibility of injunctive relief highly improbable. That amount, as the courts below found, afforded members of the class most if not all the potential relief they would have achieved at trial. (A50). Unlike the situation present in Farrar, the Second Circuit found that the monetary settlement was significant and "defies the 'nominal' label." (A11).

In addition, the Court below found that an important precedent had been established in earlier decisions in the case, which served an important public purpose: "the monetary settlement in this case did not reflect the benefit the public gleaned from the litigation leading up to the settlement: the precedent that this case helped to establish [and] contributed to changes in the hiring practices of the building trades and opened the courts to other meritorious civil rights claims." (A12-13). Thus to the extent a "public interest" or "public purpose" component is necessary to justify the award of a fee which exceeds the amount of a damage award or settlement, such a public benefit did exist in this case.

Under these circumstances, and given the findings below that class action attorneys handled the entire case competently and efficiently, the fees awarded were eminently reasonable -- a total of $512,000 for

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comports with the decisions from other circuits. See Petition for Certiorari at 21.

sixteen years of work, which was expended to meet the tenacious litigation strategy of Bethlehem and which amount was carefully examined through three levels of judicial review and reduced by $127,920.31 from those requested (a 20% reduction). [2]

STATEMENT OF THE CASE

A. Proceedings Below

Respondents, through counsel, filed a complaint on February 20, 1976 in the United States District Court for the Southern District of New York, under the provisions of the Civil Rights Act, 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981, alleging that the Bethlehem Respondents ("Bethlehem") had violated their rights under that law by discriminating against blacks and Hispanics in their selection of ironwork foremen in the structural steel business. Both injunctive and compensatory relief was requested.

The proceedings were long and complex. After a motion for class-certification was made by Respondents, Bethlehem argued that no class-wide injunctive relief was possible because it was going out of the structural steel business. Contrary to Bethlehem's assertion at p. 4 of its certiorari petition that "when the action was commenced, injunctive relief was unavailable," and "as a practical matter . . . the only available remedy was back pay," the District Court rejected that argument, stating in its decision of January 12, 1977 certifying the class, that some such injunctive relief was feasible:

> Although as we discussed in our opinion on the preliminary injunction motion, injunctive relief in

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2 The Magistrate Judge specifically found that "counsel are experienced and competent, and have worked diligently." (A85). See discussion below at 16.

> the form or ordering Bethlehem to hire a certain number of plaintiffs is impossible, there are other forms of injunctive relief which may prove appropriate. For example, although we rejected the notion that Bethlehem be required preliminarily to create "make-work" jobs that would give some training and experience to the plaintiffs, we note that it might be perfectly feasible to require Bethlehem to participate in -- or finance -- a training program for minority structural steel workers who wish promotion. (2d Circuit Appendix -- "2dA" -- at 111)

No cross-appeal was ever taken from this decision.

After proceedings commenced, a formal offer of settlement of $40,000.00 was made by Bethlehem in October, 1977. Although the attorneys from the outset were willing, indeed eager, to settle the case on responsible terms, (see 2dA796-97), the initial offer was rejected for the following reasons:

(1) counsel had not obtained sufficient discovery from Bethlehem and thus did not have enough information to consider the settlement proposal on behalf of the class. Class counsel noted in a contemporaneous affidavit submitted to the court that:

> Plaintiffs, at present, due to the failure of the corporate defendants to comply with discovery requests, would not be able to satisfy the Court's need for information to determine under Rule 23(e) if a compromise should be accepted. To date, despite the fact that plaintiffs have served detailed interrogatories on the corporate defendants, and have attempted to negotiate their compliance, the corporate defendants have yet to provide plaintiffs with a full list of Bethlehem's construction projects in this area over the years covered by this dispute, nor has Bethlehem provided the plaintiffs with the names

> and employment records of Black and Puerto Rican ironworkers who have worked on Bethlehem projects in this area, and, therefore, are members of the classes involved in this litigation. (2dA120-121).

Counsel asserted that it would have been irresponsible and even unethical to consider the settlement without full awareness of all the relevant facts. See Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982)(requiring sufficient development of underlying facts before settlement can be approved in class action litigation);

(2) all the potential members of the class were not identified at the time of the initial offer of settlement, and therefore it was not possible to estimate the scope of monetary relief for all those adversely affected by the discriminatory practices of Bethlehem (2dA798));

(3) it was not clear in October, 1977 that future injunctive relief was not feasible; although Bethlehem had announced it was going out of the structural steel business, it was conceivable that a change in market conditions might lead it to change its mind. (2dA111).

Class counsel therefore made a motion to strike the settlement offer at the time (2dA116). The request to strike the offer was denied by the District Court without prejudice to plaintiffs' right to renew the motion: the court noted that the motion was denied "without prejudice to renewal on all points should sanctions under F.R.C.P. 68 be invoked at a later date," see endorsed order dated October 28, 1977 (2dA138).

After trial, when Bethlehem sought to invoke Rule 68 and to obtain costs (on the ground that the judgment after trial was less favorable than the rejected offer of settlement), the District Court reconsidered the motion to strike the settlement offer and granted it. Thus, in the order of February 26, 1979, the Court held:

> Several months before the trial in this class action...defendant Bethlehem Steel made an offer of judgment pursuant to F.R.C.P. 68. The representatives of the plaintiff class at that time moved to strike the offer, contending that since discovery was far from complete they were then unable to evaluate the claims of the class members and were accordingly in no position to represent to the Court that the offer should, in fairness to all members of the class, be accepted. By order of October 28, 1977, we denied plaintiffs' motion without prejudice to renewal on all points. Plaintiffs have renewed that motion by letter dated February 15, 1979. We find plaintiffs' position well taken and grant their motion to strike the offer of judgment. (2dA159)(emphasis added).

After extensive pretrial discovery, the case was tried in 1978 (in an eight-day bench trial) before Judge Whitman Knapp. On January 2, 1979, the District Court found for the Bethlehem defendants and dismissed the complaint (2dA139-153). Respondents appealed and in a decision reported at 635 F.2d 1007 (2d Cir. 1980)(Appendix G to Petition, A91-115), the Second Circuit reversed, holding that the Respondents had proved a prima facie case of discrimination on both a discriminatory impact and a discriminatory treatment theory.

With respect to disparate treatment, the Court of Appeals found that the three named plaintiffs were qualified for foremen positions, but had been rejected in favor of whites, on the basis on improper subjective criteria applied by the superintendents: "the record is replete with examples of superintendents' efforts to hire whites who never applied to be foremen," while plaintiffs were rejected after applying for the positions, on what the Court considered "lame excuses." 635 F.2d at 1017 (A108). The Court found that their refusal to "solicit qualified blacks as foremen constitutes a form of

unacceptable discrimination in this case, since whites here were being solicited at the same time." Id. (A109) Given the long history of discriminatory treatment of blacks in the ironwork trade and the selection by Bethlehem of only one black foreman against 126 white foremen, a prima facie violation of Title VII under a disparate treatment theory was shown.

Similarly, the Court held that the statistics revealed a disparate impact violation as well. Besides evidence showing that only one black foreman had been hired, as against 126 whites, there was other evidence revealing that many white ironworkers had been made foremen after less than one year experience, while many of the black workers had much longer tenure with Bethlehem, but were never offered the positions. 635 F.2d at 1018. (A110-111).

The case was then remanded for Bethlehem to try to show a "business necessity" for the difference in treatment, that is, a "genuine business need." Id. at 1015. (A115).

On remand, the District Court directed Magistrate Judge Bernikow to explore the possibilities of settlement. Finally, a settlement was achieved between the attorneys in 1982, in the amount of $60,000.00. Even after the monetary amount was arrived at, the parties then had to agree to a complex distribution methodology to class members based upon appropriate criteria, all of which made up the proposed judgment to be examined at the fairness hearing (2dA833-845).

The reason for accepting the monetary settlement in 1982 while rejecting it in 1977, was explained in great detail by Richard Levy, in his affidavits dated June 28, 1985 and November 12, 1985, submitted in support of settlement approval (Appendix H and I to certiorari petition, A117-137). Once counsel was armed with knowledge of all the class members, the period of time in which they worked, the amount of

foremen's work that could have been available, how much of this work could have been performed by Black and Hispanic ironworkers, they could then determine how much "foremen's work" the class had been deprived of by the discriminatory actions of Bethlehem. The total was multiplied by three years, the most generous limitations period applicable. The total damage figure determined under this formula was quite close to the settlement figure offered. That amount of total lost earnings for members of the class under the best hypothesis was $61,000.00 (A122). This statistical analysis could not have been made in 1977, at the time of the initial offer of settlement. Furthermore, Bethlehem had indicated that if the settlement was not accepted, it was prepared "to relitigate every possible question bearing on liability." (A123).

It was also clear after trial, appeal and remand although it was not true in 1977, that injunctive relief of any kind was no longer feasible after the long litigation path the case had already followed. As the Magistrate Judge noted in his Report and recommendation, dated June 27, 1986, approving the settlement:

> injunctive relief of the kind [originally] contemplated by plaintiffs is problematical because Bethlehem is no longer in the structural steel business. Moreover, the increasingly lengthy passage of time in this would appear to call into question the appropriateness of retraining or other similar remedy. (A82)

Notice of the proposed settlement was then served on members of the class. A fairness hearing was held in June, 1985 before Magistrate Bernikow, who found that the settlement was fair (and recommended its acceptance)(A73-85). The District Court adopted Magistrate Judge Bernikow's recommendation that the settlement be approved (2dA575).

The named plaintiffs then appealed to the Second Circuit, on the ground that the settlement should

be set aside because all class members responding to the notice of the proposed settlement opposed the settlement. The Court rejected that contention and approved the settlement in all respects, 823 F.2d 20 (2d Cir. 1987)("Grant II")(Appendix E, A63-71). Thereafter, the case was again remanded for a determination of the manner in which distribution of the fund would be made to the class.

A considerable period of time was then devoted to determining the method of distribution to the class, all of which was performed by class counsel. (2dA815-18). On October 24, 1988, the District Court approved the distribution plan. (2dA605).

The Application for Fees

Class counsel made their application for fees on December 21, 1989. Bethlehem vigorously opposed every phase of the application, insisting on obtaining various items of discovery and otherwise disputing every element of the application. In light of the substantial resistance to the fee application, Magistrate Judge Bernikow found that class counsel had appropriately expended 237 hours to defend their claim for fees, for which he ordered compensation, (See Report and Recommendation on Fees, dated, June 18, 1991, A58-59). The Magistrate also reduced the total hours requested by class counsel by 419 hours (151 on specific tasks which were found not compensable and 268 as an across-the-board reduction) and the total fee request by $127,000.00. By order dated February 26, 1992, the District Court adopted the Report in its entirety (A17-19), awarding a total of $512,590.02 in fees (A16).

B. The Decision Sought to Be Reviewed.

The Second Circuit affirmed the decision of the District Court. The Court found that the district court order had already reduced the fees requested by 20%. It found first, that class counsel acted reasonably in rejecting the initial offer of settlement of $40,000. At the

time, Counsel "lacked the information necessary to evaluate the offer." (A6). In addition, some sort of injunctive relief -- "such as training programs for minority steel workers" -- was still feasible at the time the offer was made. (A7).

The Court also found that the time expended on defending the reasonableness of the settlement was compensable and also found that it was proper to apply the current hourly rate of counsel to make up for the delay in payment.

The Court refused to reduce the attorney fee award on the basis of "limited success," since it was not necessary that plaintiffs succeed in obtaining both damages and injunctive relief, pursuant to this Court's decision in Hensley v. Eckerhart, 461 U.S. 424, 436, n. 11 (1983).

The Second Circuit also stated that the fee application should not be further reduced, for two reasons:

First, it rejected any requirement of direct "proportionality" between the fee award and the plaintiff's recovery in this case. Referring to this Court's decision in City of Riverside v. Rivera, 477 U.S. 561 (1986), the Court noted that Rivera did not establish any blanket proportionality requirement. Focusing on Justice Powell's concurring opinion, the Second Circuit rejected the argument that the opinion required some kind of proportionality between the fee award and recovery "except in the rare case in which the public interest is served by the vindication of constitutional rights." (A12). The Second Circuit had previously rejected any direct proportionality requirement in Cowan v. Prudential Insurance Co. of America, 935 F.2d 522 (2d Cir. 1991). It noted that civil rights suits which seek to eliminate every type of racial discrimination do vindicate an important public interest, even if a low damage award is made.

Second, the Court below noted that even if it accepted Justice Powell's concurring opinion as interpreted by Bethlehem as the controlling law, an important public interest was vindicated in this case:

> The monetary settlement in this case does not fully reflect the benefit the public gleaned from the litigation leading up to the settlement: the precedent that this case helped to establish [and] contributed to changes in the hiring practices of the building trades and opened the courts to other meritorious civil rights claims. In so doing, appellees vindicated a policy that Congress considered of the highest importance . . . a public benefit for which appellees and their counsel may be compensated. (A12-13)

REASONS FOR DENYING THE WRIT

THE DECISION BELOW RAISES NO CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER COURT OF APPEALS AND RAISES NO SPECIAL OR IMPORTANT ISSUE NOT PREVIOUSLY SETTLED BY THIS COURT.

I. The Second Circuit Decision Sought to be Reviewed is Totally Consistent with this Court's Recent Decision in Farrar v. Hobby and Therefore Review is Not Necessary to Measure the Impact or Effect of That Decision.

On December 14, 1992, this Court handed down its decision in Farrar v. Hobby, No. 91-990. The decision dealt with the unrelated issue of what fee, if any, should be awarded when plaintiffs achieve only a nominal or technical victory that does not accomplish any of the goals for which suit was brought. This Court held that in such a case, no fee should be awarded. The

determination in Farrar does not effect the judgment of the Court below in any respect. Indeed the judgment is consistent in every way with the result in the Farrar case.

This Court held in Farrar that a mere "technical" victory (slip opinion at 10) or the award of "nominal" damages (id. at 11) may indicate that it was not really a victory at all: "the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury." (id. at 11). Such a nominal award shows that plaintiff has "fail[ed] to prove an essential element of his claim for monetary relief." (id. at 11).

Here by contrast, as all the Courts below held, the $60,000 was indeed the most that plaintiffs could have achieved at the trial and amounted to all the damages that the plaintiff class was entitled to. See Report and Recommendation of Magistrate Judge Bernikow, dated June 27, 1986 approving the settlement: "Thus, even if plaintiffs were successful on all of their claims, the most they could reasonably expect to recover is the amount of the proposed settlement." (A82-83). Thus there was no "failure" of any kind to prove any element of the claim.

In addition, an important precedent was established that aided class members in achieving promotions in the iron work field, as they moved from job to job in the industry. See discussion below at 22 and Second Circuit opinion at A13.

To the extent that this Court held that a reasonable fee depends primarily upon the results secured, the results were significant in this case. Not only was all the monetary relief which could have been awarded obtained, but an important public benefit, interest and purpose was achieved by the precedent established in the earlier appeal in this case (see concurring opinion of Justice O'Connor in Farrar: "success might be considered material if it accomplished some public goal, other than occupying the time of

counsel, court and client, (concurring opinion, slip opinion at 7). See discussion below in III.

The Second Circuit therefore anticipated the result in the Farrar case and its reasoning is perfectly consistent with the decision in that case.

II. Respondents Were Prevailing Parties and Were Entitled to a Reasonable Fee for Their Efforts; The Courts Below Followed the Proper Methodology in Determining the Reasonable Fee.

The petition for certiorari does not present any important question justifying review by this Court. Rather the petition challenges, not the decision of the Second Circuit below in this specific case, but the initial decision of Congress to enact as law the Civil Rights Attorneys' Fee Award Act of 1976.

Bethlehem argues here that attorneys fees in civil rights litigation must be treated on the exact same basis as fees in private litigation, jot for jot, even with respect to the decision to take on the case. This Court has unequivocally rejected that claim: "'[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." Blanchard v. Bergeron, 109 S.Ct. 939, 945 (1989), quoting plurality opinion in City of Riverside v. Rivera, 466 U.S. 561, 574 (1986).

It is certainly true that once a civil rights plaintiff is found to have prevailed, the methodology for determining the fee is the same as the marketplace model for fixing a fee in private litigation. See Missouri v. Jenkins, 491 U.S. 274, 286 (1989)(fees to be "calculated on the basis of rates and practices prevailing

in the relevant market.") But Bethlehem argues that the marketplace model for private litigation must also govern with respect to the decision whether to file a case initially, an assertion which is contrary to the Congressional purpose in enacting the fee award act.

Bethlehem argues in its petition that a civil rights case must be seen from the beginning to lead to significant economic relief to the plaintiff, which would justify a private attorney in bringing the case. Also civil rights attorneys must predict the exact outcome of the case. If such a case is brought and does not lead to significant economic recovery, then the attorneys should not be compensated on the lodestar basis for their efforts even if the plaintiff "prevails" on a significant issue, as this Court has defined the term, or achieves a significant public benefit. "A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either pendente lite or at the conclusion of the litigation," Texas State Teachers v. Garland Indep. School Dist., 109 S.Ct. 1486, 1492 (1989).

Thus Bethlehem claims in its Petition (at 14):

> If, in this action, a fee-paying client had been told in 1976 that after 16 years of litigation, he would be billed approximately $500,000 for a maximum possible recovery of $60,000, it is likely that the action would not have been brought. . . If that same hypothetical client had been induced by counsel to litigate from 1977, when Bethlehem's $40,000 offer was rejected, until 1982 when the $60,000 settlement was reached, a bill for the hundreds of thousands of dollars pointlessly expended in those five years would likely have gone unpaid.

There are a number of factual and legal assumptions contained in this statement, all of which are demonstrably incorrect.

Assumption 1. Plaintiffs in this matter were improperly "induced by counsel to litigate" a hopelessly small damage case, which counsel knew from the beginning could not lead to significant monetary or injunctive relief.

The lower courts which considered the matter, to whom great deference is due, see Hensley v. Eckerhart, 461 U.S. 424, 437 (1983), have specifically rejected this assertion. First, the Magistrate Judge and the District Court have rejected Bethlehem's claim that injunctive relief was a "chimera" and "never a real possibility." (Petition, p. 12, n. 8). The district court found that injunctive relief was still possible in 1977. The Magistrate Judge found that there was a good reason to reject the settlement in 1977 when injunctive relief was still possible, while accepting it in 1982, when conditions had changed. See A82. Both of these factual findings are subject to deferential review.

To that extent, the situation here is far different from that presented by Chief Justice Rehnquist's hypothetical in his dissenting opinion in City of Riverside v. Rivera, 477 U.S. 561, 594 (1986). There Chief Justice Rehnquist postulated a situation where counsel knew beforehand exactly what tort recoveries were achieved in certain types of cases but such counsel expanded far more hours in a given case than the predictable results justified. Here by contrast, the courts below found that counsel could not predict the outcome since they did not have sufficient information to evaluate the initial settlement offer and properly rejected the settlement offer since injunctive relief was still feasible. [3]

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3 After the settlement was rejected, Bethlehem withdrew its settlement offer and litigated the case as vigorously as it could through trial and appeal, thereby forcing class counsel to expend the hours necessary to present and defend plaintiffs' claim. As explained in the text, the decision to expend the hours was therefore not a carefully calculated pre-litigation decision by

Second, the reason for the years of litigation and the expenditure of hundreds of hours by class counsel was not based upon the rejection of the initial settlement offer, which the courts all found was proper, but was directly related to Bethlehem's decision to litigate every phase of the case through a trial and an appeal as vigorously as it could, after it withdrew the initial settlement offer. [4] Bethlehem can hardly claim that it was not responsible for the many hours expended by class counsel after it put forward such a vigorous defense. See City of Riverside v. Rivera, 477 U.S. 561, 580, n. 11 (1986).

Assumption 2. Class counsel improperly rejected the settlement offer, in order to continue the litigation and run up its fees.

The District Court found that plaintiffs' counsel acted properly when it rejected the initial offer of settlement, since it did not possess all the information required to properly evaluate the offer. See Order dated February 26, 1979, striking the Rule 68 Offer of

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plaintiffs' counsel, but the necessary consequence of Bethlehem's litigation strategy. Respondents could certainly never have "predicted" that the district court would misconstrue the law on disparate impact and disparate treatment (as the Second Circuit later found) thereby requiring a full appeal, long unnecessary delays and the resulting frustration by the named plaintiffs which lead to the long wrangling over the final settlement.

4 The Magistrate Judge found in his Report and Recommendation on fees that the "history of this litigation . . .shows that Bethlehem vigorously contested liability . . . Bethlehem indicated that it would attempt to relitigate 'every possible issue bearing on liability.'" A45.

Judgment: "We find plaintiffs' position well taken and grant their motion to strike the offer of judgment." (2dA159).

In addition, the courts below explicitly found that class counsel properly handled the case. The Magistrate Judge found that "counsel are experienced and competent, and have worked diligently." (A85).

Assumption 3. All civil rights litigation must be justified on strictly economic terms. If a private attorney would not take such a case because it would not lead to a substantial fee justifying the time necessary to litigate, then it is "uneconomical." Therefore, Bethlehem argues, a civil rights attorney should not be compensated if he or she took the case. but did not win significant monetary relief. This would be true even if the plaintiff "prevailed" within the meaning of this Court's decisions.

That assumption is contrary to the very purpose of the Civil Rights Attorneys Fee Award Act. In passing the law, Congress realized that many potential civil rights plaintiffs lacked sufficient resources to hire private attorneys. In addition, the civil rights laws and other fee-shifting provisions would generate either no damages or only small recoveries which would not attract private counsel on a standard contingency fee arrangement. Nevertheless, Congress found that important civil and constitutional rights issues would not be brought if counsel would not be attracted to such cases. Thus it passed the fee award act which granted fees to attorneys who prevailed on any significant issue in the case, even if the issue was non-economic in nature. See discussion of legislative history in City of Riverside v. Rivera, 477 U.S. 561, 576-78 (1986).

Thus this Court has awarded counsel a fully compensatory fee for prevailing in a civil rights injunctive case where no damages were awarded and the injunctive relief that was awarded could not be translated into economic terms. See Texas State Teachers Association v. Garland Independent School

Dist., 109 S.Ct. 1486 (1989)(fully compensatory fee should be awarded when injunction issued permitting public school teachers to communicate with each other on employee organization and union activities).

Assumption 4. Civil rights attorneys are responsible for predicting the precise costs and fees and the exact outcome of a case. If they do not finally win significant economic relief, they should be "punished" for not foreseeing the total costs and the final result, and their fees must be reduced to a nominal amount, commensurate with the final recovery.

As noted above, this assertion is contrary to specific findings of the courts below that class counsel acted properly in rejecting the initial offer of settlement since they lacked sufficient information to evaluate the offer and since injunctive relief was still feasible at the time of the offer. In addition, the Court below properly rejected that argument on legal grounds, in accordance with this Court's decisions on what constitutes a "reasonable" fee. "Bethlehem's argument, however, succeeds only if we engage in an ex post facto determination of whether attorneys hours were necessary to the relief obtained. The relevant issue, is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." (A6)

Bethlehem's diffuse argument that somehow the attorney fee awarded below was unreasonable because of the rejected offer of settlement does not require review by this Court. The argument is based upon the unique factual pattern in this case, upon certain factual assumptions -- all of which were rejected by the courts below -- and upon a view of the purpose of the fee award act which has been explicitly rejected by Congress and this Court. Having determined that plaintiffs were the prevailing party, the courts below examined the fee application carefully and applied the proper lodestar calculation in accordance with this Court's decisions in

Blum v. Stenson, 465 U.S. 886 (1984) and Hensley v. Eckerhart, 461 U.S. 424, 436, n. 11 (1983). The total fee requested was reduced by over 20% after careful factual analysis. None of the arguments presented by Bethlehem require any further reduction or present recurring legal issues warranting review by this Court.

III. There is no Requirement of Proportionality Between the Fee Awarded and the Results Achieved, When a Significant Public Interest Benefit Was Conferred, as Occurred in this Case.

The second argument made by Bethlehem to justify review by this Court is that there must be some proportionality between the fee awarded and the economic results achieved, an issue previously examined by this Court in City of Riverside v. Rivera, 477 U.S. 561 (1986).

At the outset, it must be noted again that this case is not dependent in any way upon the decision of this Court in Farrar v. Hobby, Docket No. 91-990)(December 14, 1992). In that case, a nominal award of only $1 was awarded and fees of over $300,000 were granted by the district court. This Court held that although plaintiffs were "prevailing parties," the victory achieved was so technical, insignificant and minimal and revealed such a fundamental failure to prove any actual injury, that the only "reasonable" fee was no fee at all.

Here by contrast, the $60,000 settlement was not "nominal" but indeed amounted to most, if not all, the damages that plaintiffs could have achieved at trial. The Second Circuit noted "a reduction would be inappropriate in the case at hand where the parties settled for $60,000 - an amount that defies the 'nominal' label." (A11). See also Report and Recommendation of Magistrate Judge Bernikow, dated June 27, 1986 approving the settlement: "Thus, even if plaintiffs were successful on all of their claims, the most they could reasonably expect to recover is the amount of the proposed settlement." (A82-83).

In the Rivera case, a plurality of four Justices held that the amount of damages that a plaintiff recovers is, of course, relevant to the attorneys' fees awarded under Section 1988. But the plurality held that it is only one of a number of factors to be considered, and there is no necessary requirement that the fee award be proportionate to the amount of damages actually recovered. 477 U.S. at 574. This Court agreed in Farrar that a court must consider the total recovery and relation between the amount of damages awarded as compared to the amount sought. (Slip opinion at 11).

Justice Powell, concurring in the judgment in Rivera, agreed with the plurality that neither the decisions of this Court nor the legislative history of § 1988 support a "rule" of proportionality. 477 U.S. at 585. If the purpose of a litigation was only to obtain damages, a court should give "primary consideration to the amount of damages awarded." He noted that while the damage award in that case was not large and no injunction had been requested, the lower courts had found that counsel for plaintiff had vindicated important constitutional rights. Thus the "public interest" was served by a judicial declaration that five police officers in the City of Riverside had violated eight citizens' Fourth Amendment rights. Justice Powell wrote: "In some civil rights cases, ...the court may consider the vindication of constitutional rights in addition to the amount of damages recovered, " in fixing the fee award, id. at 585.

Chief Justice Rehnquist, in dissent, agreed that "if the litigation produces significant, identifiable benefits for persons other than the plaintiffs, then the purpose of Congress in authorizing attorneys' fees under § 1988 should allow a larger award of attorneys' fees than would be 'reasonable' where the only relief is the recovery of monetary damages by individual plaintiffs." 477 U.S. at 594, (Rehnquist, J., dissenting).

More recently, Justice O'Connor joined in this analysis in her concurring opinion in Farrar: "success

might be considered material if it accomplished some public goal, other than occupying the time of counsel, court and client. . . Indeed it insures that vindication of important rights, even when large sums of money are not at stake, by making attorney's fees are available under a private attorney general theory." (concurring opinion, slip opinion at 7).

All of these tests (of Chief Justice Rehnquist, and Justices Powell and O'Connor) were met in this case. The proportion of fees to damages was similar in this case to the ratio in the Rivera case -- $33,350 in damages and $245,456.25 in fees in Rivera, a ratio of 7.36 to one. In this case, there was a settlement of $60,000 and fees of $498,922.34 were awarded, a ratio of 8.3 to one. An additional $13,676.68 was awarded for defending the Magistrate Judge's report before the district court. See A5, n. 1.

There is no doubt that this case meets Chief Justice Rehnquist test of "significant, identifiable benefits for persons other than the plaintiffs" or Justice Powell's "public interest" test or the "public purpose" test of Justice O'Connor. The case was filed as a class action to attack a pernicious pattern of conduct in the ironwork industry under which minorities were virtually foreclosed from other than entry level jobs. (In New York, as in other cities, there was considerable unrest because of the widespread and systematic restriction of minorities in the construction trades, a finding accepted by the Second Circuit in its initial decision in this case, see A94, 635 F.2d at 1018.) This case focused on the devices which were used to restrict the upward mobility of minorities -- nepotism, the lack of standards for promotion, the inability of minorities to apply for advancement, and the unfettered discretion of site superintendents to appoint whom they wished to supervisory positions.

The Second Circuit's initial decision reversing the dismissal (Appendix G, A91-115) dealt a strong blow to the use of subjective hiring and promotion criteria in the

construction industry. It swept aside the "lame excuses" that the Bethlehem had offered as to why there were so few promotions of minority workers. The Court also rejected the notion, urged by Bethlehem, that an actual job application had to be made and turned down in order for a class member to recover. 635 F.2d at 1016. (A106).

On the disparate impact aspect of the case, the Second Court broadened the potential for recovery in cases involving statistical showings based on small samples. It broadened the criteria under which the discriminatory impact test of Griggs v. Duke Power, 401 U.S. 424 (1970) should be applied. And it reinforced the requirement that a "business necessity" defense be predicated on showing a genuine business need. Id. at 1015. (A115).

These findings surely serve the "public interest," in destroying and eroding barriers to minority worker participation in the construction industry. As the Second Circuit noted:

> Many of the [white] men whom the superintendents hired as foremen were first hired as foremen from the union during the 1960's, when blacks were effectively excluded from competing with them for these positions, and when the entire industry was rife with entrenched discrimination....By treating as unassailable these whites' right to rehiring ahead of any black without foremen experience, the district court's narrowing of appellants' statistical case would allow Bethlehem to perpetuate impermissibly the results of its earlier discrimination. 635 F.2d at 1018 (A111).

The effect of the Second Circuit's decision -- in rejecting subjective hiring criteria that effectively closed the doors to minority promotion and in undermining any seniority advantage that was secured as a result of prior industry-wide discrimination -- set an important

precedent for the building trades. It was surely as important for the "public interest" or as "produc[ing] significant, identifiable benefits," and as meaningful in vindicating the civil rights of an important segment of the public as the finding that five police officers in the City of Riverside committed Fourth Amendment violations in a single illegal raid on a house.

The Court's decision was also significant for the parties since many persons in the building trades move from company to company as different construction projects are begun and completed. Thus a significant decision destroying a subjective hiring practice for one company must have had an impact industry-wide.

The case has been cited ten times by the Second Circuit in later employment discrimination cases, over a dozen times by lower courts in that Circuit, and many other times by other courts throughout the country, according to Shepards, an indication of its continued legal importance.

The importance of the decision and the precedent it created was recognized at the time by Bethlehem. It filed a petition for certiorari after Grant I was decided, emphasizing the significance of the decision. Thus counsel argued that certiorari should be granted by this Court since it involved no less than "four separate but inextricably related issues concerning the distinction, if any, between the nature, character and burden of proof in a 'disparate impact' case . . . as compared to a 'treatment' case." Bethlehem argued in the petition that issues raised by the case "were of fundamental importance to the orderly resolution of hundred of pending and future disparate impact cases." Bethlehem Steel Corp. v. Grant, Petition for Certiorari to the United States Court of Appeals for the Second Circuit, dated April 17, 1981 at 8 (2dA966). Bethlehem claimed at the time that the decision was directly contrary to other court of appeals decisions dealing with the burden of proof in disparate impact cases. Id.

Now, of course, Bethlehem sees nothing significant in the case, claiming that there were no public interest overtones in the case, (Petition for Certiorari at 20. n. 14). It claims, astonishingly, in light of its previous petition quoted above, that the Second Circuit decision "broke [no] new legal ground." id. That is not the position it took before this Court in its initial Petition for Certiorari.

The Court below found that indeed important public benefits were produced here for persons other than the plaintiffs: "The monetary settlement in this case did not reflect the benefit the public gleaned from the litigation leading up to the settlement: the precedent that this case helped to establish [and] contributed to changes in the hiring practices of the building trades and opened the courts to other meritorious civil rights claims." (A12-13).

The establishment of such precedents in the civil rights field meets the test outlined in the plurality, concurring and dissenting opinions in Rivera and Justice O'Connor's concurring opinion in Farrar. Circuit Judge Easterbrook (sitting by designation) wrote in Bohen v. City of East Chicago, 666 F. Supp. 154, 156 (S.D. Ind. 1987):

> Bohen lost the case outright in this Court. The court of appeals' reversal was the first. . . appellate decision holding that an employer's failure to protect female employees was sexual abuse is unconstitutional. . . The decision was not foreordained. . . The precedent set by the case will be valuable to other employees of the City and governments throughout the Seventh Circuit. The value of the precedent is a legitimate factor in considering the time appropriately invested in the litigation and therefore the appropriate compensation. (emphasis added).

Plaintiffs made an important contribution to the development of civil rights law in the area of

employment discrimination in the building trades and the destruction of subjective criteria used to perpetuate discriminatory practices. The decision in Grant I anticipated this Court's decision in Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988). To the extent that Bethlehem argues that the vindication of a public interest is necessary to justify the award of a fee in a case of this kind, such an interest was present here. There is no need to review the decision of the Court below, which simply followed the Rivera decisions. and is not in conflict with Farrar.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be denied.

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