UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AFSCME Council 25 and Its Affiliated Locals,

Plaintiffs,

v.

Charter County of Wayne and Warren Evans,

Defendants.

_____/

Case No. 15-cv-13288

Judith E. Levy
United States District Judge

Mag. Judge R. Steven Whalen

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR ATTORNEY FEES [62]

On July 21, 2016, the Court issued an opinion and order granting defendants' motion to dismiss plaintiffs' second amended complaint, denying plaintiffs' motion to stay this case, and denying plaintiffs leave to amend their complaint. (Dkt. 60.) On August 4, 2016, defendants filed a motion for attorney fees under 42 U.S.C. § 1988, arguing that they were the prevailing parties in this matter. (Dkt. 62.)

Under § 1988, the Court may, in its discretion, award the prevailing party in a case brought under 42 U.S.C. § 1983 "a reasonable

attorney's fee as part of the costs." 42 U.S.C. § 1988(b). "While district courts customarily award attorney's fees to prevailing *plaintiffs* in § 1983 actions, they may award them to *defendants* in such actions only 'upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation.'" *Lowery v. Jefferson Cty. Bd. of Educ.*, 586 F.3d 427, 437 (6th Cir. 2009) (citation omitted) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)) (emphasis in original). It is "an extreme sanction [that is] limited to truly egregious cases of misconduct." *Id.* (quotation omitted).

Here, plaintiffs brought numerous claims under § 1983 through three iterations of their complaint. A prevailing party under § 1988 is "one who has been awarded some relief by the court." *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Res.*, 532 U.S. 598, 603 (2001). Defendants argue, and plaintiffs do not dispute, that defendant was the prevailing party in this matter, as it achieved dismissal of every claim plaintiffs asserted.

Plaintiffs' conduct in this case was not so egregious that it warrants an award of attorney fees to defendants under § 1988. Defendants rely on plaintiffs' repeated amendment of their complaint,

along with plaintiffs' repeated failure to secure temporary restraining orders and preliminary injunctions as the basis for an award of fees. (Dkt. 62 at 11-12.) In particular, defendant points to the fact that the amended complaints in parts failed to exclude already-dismissed claims. (*Id.* at 11.)

In a motion for attorney fees under § 1988, "a prevailing *defendant* should only recover upon a finding by the district court that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Wayne v. Village of Sebring*, 36 F.3d 517, 530 (6th Cir. 1994) (internal quotation omitted), *cert. denied*, 514 U.S. 1127 (1995). "[C]ourts have awarded attorneys fees to prevailing defendants where no evidence supports the plaintiff's position or the defects in the suit are of such magnitude that the plaintiff's ultimate failure is clearly apparent from the beginning or at some significant point in the proceedings after which the plaintiff continues to litigate." *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 183 (6th Cir. 1985).

Here, plaintiffs' ultimate lack of success on their claims was not clearly apparent from the beginning. Notably, the Court permitted

plaintiffs to amend their complaint to assert new or amended claims after full briefing by both sides regarding amendment of the complaint, including a determination of whether the new claims would be futile. (Dkt. 35.) Further, the significant point at which it became clear that plaintiffs' claims would fail was the granting of each of defendants' motions to dismiss. (Dkts. 30, 60.) The portions of the amended complaints that continued to assert already-dismissed claims were both easily addressed by defendants and pled alongside claims that were still viable. An award of attorney fees would not be warranted under § 1988.

The Court must also address the fact that defendants have failed to demonstrate what a reasonable fee would have been in this case. "The trial court's initial point of departure, when calculating a 'reasonable' attorney fee, should be the determination of the fee applicant's 'lodestar,' which is the proven number of hours reasonably expended on the case by an attorney, multiplied by his court-ascertained reasonable hourly rate." *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). A § 1988 motion for attorney fees likewise requires a

lodestar calculation to determine whether a fee request is reasonable. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550-52 (2010).

When determining whether the number of hours submitted was reasonably expended, the Court must determine "whether a reasonable attorney would have believed the work to be reasonably expended in the pursuit of success at the point in time when the work was performed." *Woolridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990). The Court may reduce the award at its discretion if the work is not sufficiently documented. *Hensley*, 461 U.S. at 433.

Inherent in the need to determine that work was reasonably expended is the expectation that the party seeking fees will describe the work its counsel performed. The billing records defendants submitted do not describe any work their counsel performed. Instead, the records list filings made by the parties and the Court each month, then state the number of hours unidentified counsel worked in that month, and the total amount billed. The hours are not assigned to any defined task or filing. The Court cannot discern what work was done in relation to any of those filings, let alone whether the work was reasonably expended.

To determine a reasonable rate, the Court would normally assess the "prevailing market rate in the relevant community." *Adcock-Ladd*, 227 F.3d at 350 (quoting *Blum v. Stenson*, 465 U.S. 886, 895 (1984)). That rate should represent the "rate which lawyers of comparable skill and experience can reasonably expect to command." *Id.* The Court cannot compare defendants' counsel to other counsel in the relevant community, because defendants do not identify their counsel, or their counsel's levels of skill or experience.

Defendants have not met the high bar warranting an award of attorney fees under § 1988. Even if they had, defendants also failed to show that the award they are seeking is based on time reasonably expended at a reasonable rate. Accordingly, defendants' motion for attorney fees (Dkt. 62) is DENIED.

IT IS SO ORDERED.

Dated: September 16, 2016
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on September 16, 2016.

s/Felicia M. Moses
FELICIA M. MOSES
Case Manager