

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

KERI WILLIAMS,

Plaintiff,

v.

No. 1:08-cv-01235-JDB

**THE CITY OF MILAN, TENNESSEE,
a Municipal Corporation, and MAYOR
CHRIS CRIDER, in his individual and
official capacities,**

JURY DEMANDED

Defendants.

**ORDER ON MOTIONS FOR ATTORNEY'S FEES PURSUANT
TO 42 U.S.C. § 1988 AND 28 U.S.C. § 1927**

Defendant Chris Crider (“Defendant”) and Defendant City of Milan have filed Motions for Attorney’s Fees Pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1927 (D.E. 82 and 84), which were referred to the Magistrate Judge for determination (D.E. 83 and 87). Defendants assert that Plaintiff’s Complaint was frivolous and without foundation. Further, Defendants seek recovery of an award of attorney’s fees against Plaintiff’s attorneys, asserting that her attorneys pursued this action knowing that it was without foundation and resulted in needlessly multiplying the proceedings. Plaintiff filed Responses opposing the motions. After considering the pleadings and the record in this case, the Court finds that Defendants are entitled to recovery of attorney’s fees against

the Plaintiff, but not Plaintiff's Counsel, and therefore GRANTS the Motions in part and DENIES them in part.

BACKGROUND

Plaintiff initially filed claims against Defendant as Mayor and in his individual capacity for violations of the First Amendment, the Fourteenth Amendment, the Tennessee Human Rights Act, the Tennessee Constitution, and for promissory estoppel. Plaintiff filed additional claims, including the Tennessee Public Protection Act and the Public Employee Political Freedom Act, against Defendant in his individual capacity only.

Both the factual and procedural histories of this case are summarized in Judge Breen's Order Granting in Part, And Holding in Abeyance in Part Crider's Motion for Partial Summary Judgment (D.E. 29) and Order Granting the Defendants' Motions to Dismiss Plaintiff's First Amendment Claim and Dismissing Without Prejudice Plaintiff's Remaining State Claims (D.E. 75). In the first Order, Judge Breen granted Defendant Crider's Motion for Partial Summary Judgment as to Plaintiff's claims for violation of the TPPA, PEPFA, the Tennessee state Constitution and § 1983 with respect to her due process argument under the Fourteenth Amendment. In the second Order, Judge Breen dismissed all of Plaintiff's remaining claims except her state claims, which were dismissed without prejudice. Essentially, because Plaintiff's federal claims failed, the Court declined to exercise jurisdiction over her state claims.

ANALYSIS

Under 42 U.S.C. § 1988, a prevailing defendant may be awarded attorney's fees if the case was frivolous, unreasonable, or without foundation, even if it was not filed with

subjective bad faith. *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980). The action must have been meritless. *Id.* “The fact that a plaintiff may ultimately lose his [or her] case is not in itself a sufficient justification for the assessment of fees.” *Id.*

As to Defendants’ request for attorney’s fees pursuant to 42 U.S.C. § 1988, this Court has reviewed Judge Breen’s Orders which completely dispose of Plaintiff’s claims, for the purposes of federal court. In her arguments opposing summary judgment, Plaintiff conceded that two of her claims did not apply to Defendant Crider. As to her argument regarding state constitutional law, the Court said “[b]ecause Tennessee courts and federal courts interpreting Tennessee law have not found that actions offending state constitutional provisions give rise to a private right of action (Plaintiff cited no case law recognizing a cause of action on these grounds), the Plaintiff may not pursue damages for these purported violations.” Regarding Plaintiff’s due process argument, the Court agreed with Defendants that Plaintiff was an “at will” employee with no Fourteenth Amendment interest at stake, in effect relying on the plain language of the City Charter. In the second Order dismissing the remaining First Amendment claim, the Court found that the Plaintiff “unequivocally contradicted” herself between her pleadings and her later testimony, causing this claim to fail as well.

Based on the District Court’s findings, the Magistrate Judge now finds that Plaintiff’s Complaint against Defendants meets the § 1988 language, as her claims are without foundation and have caused Defendants to incur attorney’s fees through the termination of this action in federal court. This Court finds that Plaintiff should be responsible for those fees in light of her concession on the Tennessee Public Protection Act and the Public Employee Political Freedom Act, as noted in Judge Breen’s first Order. Plaintiff’s

counsel indicates in her response to this motion that she did not file suit against Defendant in his individual capacity regarding these causes of action, but a reasonable interpretation of the language in her Complaint convinces the Court that she did. Moreover, Plaintiff's allegations of violations of the state Constitution had no merit whatsoever. Because it was apparent that Plaintiff was an "at will" employee, her due process claim was frivolous as well.

The Court is particularly concerned with Plaintiff's documented inconsistencies during the pursuit of her First Amendment free speech claim and finds this to be a compelling basis for recovery of fees. Plaintiff makes a 42 U.S.C. § 1983 claim against Defendant Crider in his individual capacity, and her Complaint reads: "Due to Plaintiff's duties as City Recorder, Plaintiff has spoken out in order to maintain the legality of the operations of the City of Milan." (emphasis added) (D.E.1). Within her later-filed amended affidavit of August 7, 2009, Plaintiff stated she did not believe she, as the City Recorder, had an "official duty" speak out on these matters. (D.E.63-11). Based specifically on this set of contradictions, Judge Breen found her First Amendment claim failed to set out "a claim to relief that is plausible on its face." This Court is troubled by the contradictions, given that Plaintiff supplied the information to her attorney for both the Complaint and her affidavit, and in the latter, made oath to its truth.

Among Plaintiff's objections to the awarding of attorney's fee is the Amended Affidavit of Keri Williams Regarding Costs and Fees (D.E.91-2). This presents evidence of her financial condition, her family responsibilities and her inability to pay costs and fees "at this time or the foreseeable future." Where a defendant is the prevailing party, "the Court may consider the plaintiff's ability to pay in determining the proper amount of

the attorney's fee award under Section 1988." *Multari v. Cleveland Community Hospital*, 2006 U.S. Dist. LEXIS 92578 at *11-12 (E.D. Tenn. (2006)). Defendants seek recovery of attorney's fees of \$22,714.00. Based on the pleadings and record and giving substantial consideration to the Plaintiff's financial affidavit, the Court awards Defendants \$4,000.00 in attorney's fees to be paid by the Plaintiff, to be divided equally amongst Defendants.

Finally, Defendants seek to recover attorney's fees from Plaintiff's attorneys pursuant to 28 U.S.C. § 1927 for multiplying this litigation. This statute provides: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceeding in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." "A federal district court in its sound discretion may award attorney fees and costs." *PML North America, LLC v. ACG Enterprises of NC, Inc., and Carlos Brown* 2008 WL 440995 (E.D. Mich.) (citing *Roadway Express Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 1229 (6th Cir. 1986)). The Sixth Circuit, in *Holmes*, observed:

In this Circuit, we have determined that the application of § 1927 is warranted when an attorney has engaged in some sort of conduct that, from an objective standpoint, 'falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.' *In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987), *cert. denied*, 485 U.S. 934, 108 S.Ct. 1108, 99 L.Ed.2d 269 (1988). However, the attorney's misconduct, while not required to have been carried out in bad faith, must amount to more than simple inadvertence or negligence that has frustrated the trial judge. *Id.*; *Orlett v. Cincinnati Microwave, Inc.*, 954 F.2d 414, 419 (6th Cir.1992)."

Holmes v. City of Massillon, Ohio; 78 F.3d 1041, 1049 (6th Cir. 1996).

In this case, the Court declines to apply § 1927. While it is true that all federal claims against the Defendant were dismissed, under the facts of this case this Court determines that Plaintiff's counsels' conduct did not rise to a level of misconduct such that attorney's fees are appropriate. Accordingly, Defendants' request for fees pursuant to § 1927 are DENIED.

IT IS SO ORDERED.

s/Edward G. Bryant
EDWARD G. BRYANT
United States Magistrate Judge

March 9, 2010
Date

ANY OBJECTIONS OR EXCEPTIONS TO THIS ORDER MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE ORDER. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.