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

GEORGE CONNER,

Plaintiff,

v. **No. 1:08-cv-1146-JDB**

THE CITY OF JACKSON, TENNESSEE, and JERRY GIST, in his individual and official capacity as Mayor of the City of Jackson,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR ATTORNEY'S FEES

Defendants City of Jackson, Tennessee and Jerry Gist, individually and in his capacity of Mayor of the City of Jackson, Tennessee ("Defendants") have filed a Motion for Attorney's Fees pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 2000e-5(k) and 28 U.S.C. § 1927 (D.E. 44), which was referred to the Magistrate Judge for determination (D.E. 47). The basis for Defendants' request is that they are the prevailing parties and that that Plaintiff's Complaint was without foundation. Also, Defendants seek recovery of an award of attorney's fees against Plaintiff's attorney, asserting that the attorney pursued this action without legal foundation, with the result of multiplying the proceedings. George Conner ("Plaintiff"), through his attorney, filed Plaintiff's Opposition to the Defendant's Motion for Costs and Attorney's Fees (D.E. 52). After considering the pleadings and the record in this case, the Court finds that Defendants' Motion should be granted in part and denied in part.

BACKGROUND

Plaintiff filed his initial claims against Defendants on June 18, 2008 (D.E. 1) and amended his Complaint on February 19, 2009 (D.E. 19). The Complaint, as amended, alleged violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, *et.seq.;* the Civil rights Act of 1866 as amended, 42 U.S.C. § 1981, the Tennessee Human Rights Act, § 4-21-701 ("THRA"), Tennessee common law, and retaliation and hostile work environment claims under Title VII. Both the factual and procedural histories of this case are summarized in Judge Breen's Order Granting in Part and Denying in Part Defendants' Motion for Partial Summary Judgment (D.E. 29) and the Order Granting Defendants' Motion to Dismiss (D.E. 26). Judge Breen dismissed Plaintiff's demotion claim under the THRA as time-barred; did not accept jurisdiction over, and declined by dismissing without prejudice, the state claims brought under the Tennessee Governmental Tort Liability Act ("TGTLA"); and dismissed the Title VII hostile work environment claim for failure to exhaust administrative remedies. Only Plaintiff's claim of failure to promote based on retaliation remained.

On August 24, 2009, Defendants filed their Motion for Summary Judgment (D.E. 34). In his Order granting that Motion, Judge Breen granted the Motion for Summary Judgment as it pertained to all federal issues. Namely, the Court granted Mayor Gist's Motion because a Title VII claim does not provide for individual liability (which Plaintiff made no effort to dispute) and because Plaintiff never alleged facts to supportive of a § 1981 violation by the Mayor. The Court granted the Motion for the City of Jackson as well, because no municipal liability is created by § 1981; the Title VII race discrimination allegations were based only on the conjecture and opinions of Plaintiff and he failed to establish a prima facie case. The Court further granted the City's Motion on the retaliation claim under Title VII (failure to prove a pretextual reason to the City's

alleged retaliation) and the THRA (failure to prove a prima facie case to the city's alleged hostile work environment). The Court dismissed the remaining state claims without prejudice. Essentially, Plaintiff's federal claims failed, and therefore the Court declined to exercise jurisdiction over his state claims.

ANALYSIS

Under 42 U.S.C. § 2000e-5(k) and 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 Riddle v. Egensperger, 266 F.3d 542, 547 (6th Cir. 2001) (citing Wayne v. Village of Sebring, 36 F.3d 517, 530 (6th Cir. 1994); 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 case is not in itself a sufficient justification for the assessment of fees." *Id.*

Based on the District Court's findings, the Magistrate Judge now finds that Plaintiff's Complaint against Defendants meets the applicable standard, as his claims are without foundation and have caused Defendants to incur attorney's fees through the termination of this action in federal court.

Among the Plaintiff's objections to the awarding of attorney's fees is the statement of his counsel as to his financial condition. 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). The Magistrate Judge does believe Plaintiff's ability to pay is an important consideration here. Consistent with 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k), weighing all factors and finding that Defendants are the prevailing parties herein, the Magistrate Judge ORDERS Plaintiff George Conner to pay Defendants' attorneys the amount of $500 as

reimbursement of their attorneys' fees.

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 Magistrate Judge is concerned because of the language on page 20, footnote 10, of Judge Breen's Order on Motion for Summary Judgment. Judge Breen is critical of counsel's response to summary judgment on the hostile work environment claim, and writes, "this clearly incorrect statement of the standard governing summary judgment motions is disturbing, particularly when coupled with her failure to offer any support whatsoever for her client's hostile work environment claim at a point in the litigation when such support is essential for maintaining the claim."

In addition, and for the purposes of considering this request for attorneys' fees, it should be noted that Judge Breen dismissed all of Plaintiff's claims against the Defendants. Plaintiff's counsel failed to recognize the statute of limitations had run on the THRA demotion claim and failed to properly exhaust all administrative remedies regarding the Title VII hostile work environment claim. Defendant Mayor Gist, individually, was improperly joined in the Title VII lawsuit and counsel conceded that the other allegations against him actually pertained to Chief Wayne Arnold. Under the law, there is no § 1981 claim against the City. The remainder of the allegations failed on motion because they lacked sufficient *prima facie* evidence or were based simply on conjecture or opinion of the Plaintiff.

Plaintiff is a well-respected veteran of the Jackson Fire Department who continues to work, and the Court can understand Plaintiff's counsel's desire to assist him. But the facts and law underlying his complaints, *ab initio*, were legally insufficient to carry him past the dispositive motions. The Court, however, declines to apply §1927, because even though Plaintiff's counsel may have been "unreasonable" in her handling of this lawsuit, she did not attempt to "multiply this litigation vexatiously." Simply put, Plaintiff's counsel's conduct did not rise to a level of misconduct such that attorney's fees are appropriate. This motion for attorneys' fees under 28 U.S.C. § 1927 is DENIED.

IT IS SO ORDERED.

s/Edward G. Bryant
EDWARD G. BRYANT
UNITED STATES MAGISTRATE JUDGE

March 17, 2010

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.