IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Brooke Henderson and Jennifer Lumley,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 6:21-CV-03219**
	)	
School District of Springfield, R-12; Board of Education for the School District of Springfield, R-12; Dr. Grenita Lathan; Yvania Garcia-Pusateri; and Lawrence Anderson,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY SUGGESTIONS IN SUPPORT OF THEIR MOTION FOR ATTORNEY'S FEES

Plaintiffs do not dispute that Defendants prevailed in this case. Plaintiffs also do not dispute the reasonableness of Defendants' hourly rates or that Defendants' counsels' litigation of this case required knowhow in specialized areas for which their counsel is experienced. Instead, Plaintiffs extensively rehash their case and nitpick at various time entries requested by Defendants as part of their award. Plaintiffs' attempt to relitigate their claims and nitpick should be rejected. Defendants' Motion for Attorney's Fees should be granted.

I. Plaintiffs concede Defendants are Prevailing Parties

Plaintiffs do not challenge Defendants' prevailing party status. *See* Doc. 103, p. 13. Thus, Defendants should be awarded their reasonable attorney's fees under 42 U.S.C. § 1988.

II. Plaintiffs concede that they did not prevail on the merits, but still argue, unsuccessfully, that their action was not frivolous, unreasonable, or without foundation.

Plaintiffs admit they did not prevail on the merits of their claims yet contend that Defendants are not entitled to attorney's fees because Defendants have failed to show that

Plaintiffs' claims had no basis in law or fact. Plaintiffs spend much time rearguing their claims. This is not remotely helpful to Plaintiffs' position. This Court has already ruled that Plaintiffs presented "a frivolous claim and theory." Doc. 88, p. 24. This Court's finding of frivolity is further supported by the following bold statement in Plaintiffs' Opposition:

> "Just because the law is still unsettled in some regards does not render legal theories based on that law indisputably meritless. Plaintiffs' claim that *SPS went too far as an employer by pressuring them to adopt anti-racism* may be novel, but it is not frivolous."

See Doc. No. 103, p. 17 (emphasis added). Plaintiffs' continued claim that a school district can only request its employees to follow anti-racism policies to a certain, or limited degree, is frivolous, and in fact, unlawful. Attempting to prosecute such a theory clearly warrants an attorney's fee award for Defendants.

Additional arguments presented by Plaintiffs, such as Defendants not moving to dismiss Plaintiffs' claims, are also not helpful to their argument. Defendants very early on asserted that Plaintiffs suffered no injury-in-fact, and thus, had no standing to bring their claims. Even if Plaintiffs' suit was not frivolous when filed, which Defendants deny, it certainly became so later through the production of persuasive evidence solidifying the fact that Plaintiffs suffered no injury. *See, e.g., Steward v. UPS of America, Inc.*, 2008 WL 2704612 at *3 (W.D. Okla. 2008) (finding plaintiff "misse[d] the mark" when suggesting that "Defendants fail[ure] to move for dismissal earlier in the[] proceedings indicate[d] that no fees should be awarded for defending against otherwise groundless claims"); *also see Piljan v. Mich. Dept. of Soc. Servs.*, 585 F.Supp. 1579, 1582 (E.D. Mich. 1984) (stating fees may be granted if plaintiff continues to litigate a groundless case, even if defendant fails to file a motion for summary judgment). In short, Defendants did not need to expend additional resources filing a motion to dismiss. Plaintiffs are

liable for Defendants' attorney's fees for continuing aggressive litigation, including the filing of Plaintiffs' own Motion for Summary Judgment, which was summarily denied.

Further, although whether a claim has survived summary judgment is not conclusive,[1] it certainly has value when determining whether a claim was, or became, frivolous, unreasonable or without foundation. *See Lamboy-Ortiz v. Ortiz-Velez*, 630 F.3d 228, 242 (1st Cir. 2010) (stating that while a claim surviving summary judgment is not, on its own, "entitled to decretory significance," it has value when assessing a defendant's attorney's fee award); *also see Walker v. NationsBank of Fla. N.A.*, 53 F.3d 1548, 1559 (11th Cir.1995) (holding district court abused its discretion in finding suit unreasonable and groundless where it had denied two prior summary judgment motions); and *Jensen v. Stangel*, 762 F.2d 815, 818 (9th Cir.1985) (same). As was the case here, "most claims that would warrant an award of attorney's fees under section 1988's relatively stringent standards—those that are truly 'frivolous, unreasonable, or without foundation,' … will not survive summary judgment." *See Lamboy-Ortiz*, *supra*, 630 F.3d at 242 (internal citation omitted).[2] The fact that Defendants did prevail as to all issues at the summary judgment phase is significant and dispels Plaintiffs' argument that their claims are not frivolous.

[1] *See and cf. Williams v. City of Carl Junction, Mo.*, 523 F.3d 841, 843 (8th Cir. 2008) (plaintiff did not introduce direct evidence of retaliatory motive but presented undisputed evidence that he was issued 26 citations for ordinance violations in less than 2 years; thus, although plaintiff lost on summary judgment, defendant was not entitled to fees as there was some factual basis for his retaliation claim; "Retaliatory motive…may be proved by circumstantial evidence giving rise to an inference of retaliatory intent") (*also distinguishing Flowers v. Jefferson Hospital*, *infra* n. 2, 49 F.3d 391, 392 (8th Cir. 1995)).

[2] But even claims surviving summary judgment may warrant a defendant's attorney's fee award. *See*, *e.g.*, *Flowers*, *supra* n. 1, 49 F.3d at 392 (affirming defendant's fee award and noting the fact that plaintiff's claim survived summary judgment did not necessarily mean defendant was not entitled to attorney's fees; the only evidence offered of defendant's alleged unconstitutional motivation was plaintiff's opinion and unsupported testimony of another witness).

In this regard, and while repeatedly arguing that their claims have a basis in law or fact, Plaintiffs ignore that their claims did not survive summary judgment. Their analysis of *Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842 (8th Cir. 1994), *abrogated by CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 421 (2016), and their other cited authority, is misguided. The failure to establish a prima facie case may certainly be considered in determining whether a claim is frivolous and without foundation.[3] The plaintiff's claim in *Marquart* was not frivolous because that defendant, unlike here, never made a motion for summary judgment on the merits. *Id.* at 846.[4] Conversely, "[c]ases where findings of 'frivolity' have been sustained typically have been decided in the defendant's favor on a motion for summary judgment or a Fed.R.Civ.P. 41(b) motion for involuntary dismissal." *Sullivan v. Sch. Bd. of Pinellas Cty.*, 773 F.2d 1182, 1189 (11th Cir. 1985). "In [such] cases, [as in the instant case], the plaintiffs did not introduce any evidence to support their claims." *Id.* (*citing Beard v. Annis* , 730 F.2d 741 (11th Cir. 1984); *Jones v. Dealers Tractor & Equipment Co.*, 634 F.2d 180 (5th Cir. 1981); *Church of Scientology of California v. Cazares*, 638 F.2d 1272 (5th Cir. 1981); and *Harris v. Plastics Mfg. Co.*, 617 F.2d 438 (5th Cir. 1980))." *Id.*

Comparatively, voluntarily dismissing a case when it becomes apparent that it is groundless may protect a losing party from an award of fees. This in fact occurred in *Marquart, supra*, 26 F.3d at 852, wherein the plaintiff voluntarily withdrew her complaint with prejudice prior to a judicial determination on the merits. *Also see, e.g., EEOC v Tarrant Distributors, Inc*., 750 F.2d 1249 (5th Cir. 1984) (fees were not awarded against the EEOC, which had enough

[3] A judgment on the merits, however, is not a perquisite to a prevailing defendant's attorney's fee award. *See CRST, supra*, 578 U.S. at 421 (*abrogating Marquart, supra*, 26 F.3d at 851-52).

[4] *Cf. EEOC v. Kenneth Balk & Associates, Inc*., 813 F.2d 197, 198 (8th Cir. 1987) (EEOC had "some basis" for its contention of discrimination; claim was not so baseless that employer sought either a pretrial dismissal or summary judgment).

evidence to establish a prima facie case, but later moved to dismiss voluntarily during the discovery phase of litigation). However, this certainly did not occur here. Plaintiffs did not dismiss, nor did they even remotely suggest that they ever had any intention of doing so. Rather, following this Court's case management conference wherein the Court intently questioned the foundation of Plaintiffs' claims and theories, or lack thereof, Plaintiffs vigorously pushed ahead engaging in extensive discovery, and then unbelievably filed a motion for summary judgment.

Finally, and inexplicably, Plaintiffs' Opposition clings to the notion that their claims had a basis in law or fact because Defendants have not claimed that the key facts on which Plaintiffs relied were false or delusional. Plaintiffs' facts are nothing more than Plaintiffs' opinions. This Court has already determined that Plaintiffs' claims based on those opinions are frivolous. Despite this fact, Plaintiffs nevertheless urge this Court to retread old ground and claim Plaintiffs did not contest the facts showing their lack of standing because they were not material to their theory. As this Court is aware, those facts, showing no injury-in-fact, formed the crux of this Court's ruling in Defendants' favor. The Court also considered all facts before it when granting Defendants' motion for summary judgment on the merits. This Court should set aside Plaintiffs' alleged facts—spanning more than seven pages of Plaintiffs' Opposition—as well as Plaintiffs' arguments based on those alleged facts—spanning more than eleven pages. Both simply seek to relitigate the issues, perfectly illustrating Plaintiffs' conduct throughout this litigation.

III. Plaintiffs concede Defendants' hourly rates are reasonable.

Plaintiffs do not contest the rates requested by Defendants. Doc. 103, p. 24. Thus, Defendants have established that Defendants' rates of $205/$215 per hour for senior litigators, rates of $195/$205 per hour for associates, and rates of $90/$95 for paralegals are reasonable.

IV. Plaintiffs have not shown that Defendants' attorney hours were not reasonably, necessarily and actually performed.

Plaintiffs fail to rebut the accuracy and overall reasonableness of Defendants' hours, instead making broad assertions that Defendants' counsel should not be compensated for the time spent successfully litigating this case. Although a fee applicant bears the initial burden, "[t]he party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits." *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992) (citations omitted); *see also Stallsworth v. Staff Mgmt*., 2018 WL 2125952, at *4 (W.D. Mo. 2018) ("There is a strong presumption that the lodestar calculation represents a reasonable fee award."). Plaintiffs have not met their burden.

Plaintiffs first question what they claim is "block billing" by Defendants. When reviewing Defendants' billing, this Court "must consider whether the disputed entries provide a sufficient level of detail to allow [the court] to effectively review the reasonableness of the claimed hours.' " *Bradley v. U.S.*, 2023 WL 1432639 at *14 (Fed.Cl., February 1, 2023). If a defendant's records track the course of the litigation proceedings, they are not so vague or unintelligible as to prevent meaningful review. *See id.* at 15 (stating, "Because almost all of the block-billed entries…include sufficient information to allow the court to determine the reasonableness of the time expended, a percentage reduction for block billing is not warranted."); *also see Washington v. Denney*, 2017 WL 4399566, at *6 (W.D. Mo. 2017) ("[B]lock-billing is problematic only where the hours billed for multiple tasks appears excessive, or where billed time needs to be eliminated for certain tasks.").

Here, the entries are sufficient for the Court to determine that each attorney billed a reasonable amount of time, on an individual basis, for the tasks recorded. In this regard,

Defendants break down the time entries for which Plaintiffs object into the following categories: (1) non-case related time; (2) travel time; (3) time that could have been performed by a paralegal; (4) time for email review, billing for calls, and document review; (5) time responding to Plaintiff's statement of undisputed facts; and (6) clerical work.[5]

Regarding category one, non-case related time, Plaintiffs claim that the Jan-28-22 entry should be reduced by 1:14 hours as Mr. Ellis attended a board meeting during mediation. While Mr. Ellis did attend a board meeting, his entry on that date reflects he also prepared for mediation in advance of his attendance. *See* Exhibit A, p. 9, orange highlight. Thus, there is no basis for a reduction. As for Plaintiffs' dispute regarding the Sep-07-21 entry, Plaintiffs named the Board of Education as a defendant. Billing for preparing a factual and legal summary and discussing the same with the Board, as a named defendant, was certainly necessary and litigation related. *See id.*, p. 2, orange highlight. Again, there is no basis for a reduction.

As for category two, travel time, Plaintiffs challenge the entry on Sep-08-21. *See id.* at p. 2, blue highlight. Rather than having numerous individuals engage in travel, it was reasonable for Mr. Ellis to travel to the Kraft Administrative Center (KAC), home of the District's administrative offices, to meet with the District's Administrative Council and other staff regarding Plaintiffs' Complaint. Plaintiffs also question the entry on Nov-16-21. *Id.* at p. 5, blue highlights. As for this entry, travel to the federal courthouse and travel thereafter to meet with one named defendant, the Deputy Superintendent of Operations, and the Chief Human Resources Officer, was also reasonable and case related. Plaintiffs further challenge the entries on Oct-05-21 and Oct-06-21 relating to travel to meet with witnesses. *Id.* at p. 3, blue highlights. Although

[5] Defendants have highlighted and color-coded the questioned time entries on Exhibit A, attached hereto, as follows: category 1, orange; category 2, blue; category 3, green; category 4, yellow; category 5, pink; and category 6, red.

Defendants believe it was reasonable for Mr. Ellis to travel to the KAC to meet with case witnesses, Defendants will agree to a reduction of one-half hour from each entry. *See* Exhibit B.

Regarding time that could have been billed by a paralegal, category three, the following entries were, in fact, billed by a paralegal: Nov-24-21 (second entry), May-06-22 (second entry), May-09-22 (second entry), May-10-22 (second entry), May-11-22 entry, May 12-22 entry, and May-25-22 (second entry). *See id.* at pp. 6, 15, and 16. They are therefore appropriate. As for the other entries questioned by Plaintiffs, Defendants agree to reduce the following entries to paralegal rates: Nov-24-21 (first entry), Jun-22-22 (second entry), Jul-19-22 (final entry), one-fourth of Jul-20-22 first entry, one-fourth of July-21-22 first entry, one-fourth of Aug-09-22 entry, Aug-10-22 entry, and one-half of Aug-11-22 second entry. *Id.* at pp. 5, 19, 25, 30, and 31.

As for category four (time for email review, billing for calls, and document review), Plaintiffs challenge these entries for lack of description, lack of explanation, and for vagueness. However, these entries, highlighted in yellow on Exhibit A, when read in context, and in conjunction with other time entries, are not vague or unclear. *See Sheppard v. U.S. Dept. of Justice*, 2022 WL 245480, at *3 (W.D. Mo. 2022) (time entries were not vague, "especially when read in context with surrounding time entries") (citation omitted). For example, when reading the entries highlighted in yellow on page two of Exhibit A, in combination, it is clear that Defendants' counsel was engaged in early case assessment, research, and other factual development which included emails and conversations with named defendants as well as with school administrators. The same is true when reviewing the entries on page seven, by way of example. At this stage in the litigation, Defendants' counsel was engaging in written discovery work which would naturally include emails and calls with Defendants and school administrators.

Time responding to Plaintiff's statement of undisputed facts, category five, was certainly necessary and reasonable. These challenged entries, highlighted in pink on Exhibit A, reflect the hours that were necessary to respond to Plaintiffs' 118 separate fact paragraphs in support of their unsuccessful motion for summary judgment and to respond to Plaintiff's 33 separate fact paragraphs in opposition to Defendants' successful motion. The time also included preparing Defendants' 144 separate fact paragraphs in support of their motion for summary judgment. There is no basis for Plaintiffs' claim of excessiveness as to these entries.

The final category, clerical work, is highlighted in red on Exhibit A.[6] Defendants are willing to waive these entries and have adjusted their fee request accordingly.[7] *See* Exhibit B, attached hereto, showing all adjustments below the original, stricken-through entry, in red text.

After all additional reductions, *see* Exhibit B, Defendants respectfully request that the Court award Defendants their attorney's fees in the amount of $308,512.85.

V. Defendants already reduced the amount of their attorney's fees request; no additional discount beyond Exhibit B is warranted.

Defendants understand that the determination of whether the time entries are indeed reasonable for the work done falls squarely within the Court's discretion. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("We reemphasize that the district court has discretion in determining the amount of a fee award."); *also see Jarrett v. ERC Props., Inc.*, 211 F.3d 1078, 1085 (8th Cir. 2000). However, Plaintiffs' request for a proportional reduction of 90% should be

[6] The entries are adjusted proportionately based on the number of individual entries per date. Defendants also removed time for discussions with non-parties and non-District employees.

[7] However, Defendants do not agree to waive time for certain entries, highlighted in yellow, which included, by way of narrative explanation to the client, information as to case status in conjunction with the legal work that was performed (i.e. May-25-22 entry stating, in part, "Work on Plaintiffs' Second set of Discovery to Defendants. Revisions to Designation of Witnesses and Objections pleading. File with Court…"; and Jul-22-22 entry stating, in part, "Final editing to motion for summary judgment and suggestions…, filing all of the same with the federal court.").

denied. Such a hefty reduction is not warranted here, particularly in light of the substantial reductions Defendants have already made. Defendants already reduced their fee request by approximately 17%, and this reduction did not include time waived when preparing Defendants' instant fee motion and the further reduction in Exhibit B (making the overall reduction almost 18%). Nor does it take into account Defendants' counsels' below-market rates. Defendants' fee request should not be subject to further reduction. *See, e.g., M.B. v. Tidball*, 2020 WL 1666159, at *19 (W.D. Mo. 2020) (refusing further reduction above 22%); and *Comas v. Schaefer*, 2012 WL 5354589, at *5 (reducing prevailing counsels' initial 10% reduction by only another 10%).

In sum, and contrary to Plaintiffs' overall characterization, Defendants' counsel exercised billing judgment rigorously and chose to waive certain time for which they are not seeking recovery. "A party cannot litigate tenaciously and then be heard to complain about the time necessarily spent overcoming [their] vigorous [prosecution]." *Weitz Co. v. MH Washington*, 631 F.3d 510, 530 (8th Cir. 2011). Far from seeking a windfall, Defendants' counsels' fee request is reasonable, well-supported, and completely appropriate under the circumstances of Plaintiffs' tenacious and unsuccessful prosecution of their claims.

VI. Defendants request for costs is reasonable and Defendants' costs request should be granted once final judgment is entered.

Finally, Plaintiffs do not appear to challenge the amount of Defendants' costs. In order to advise the Court regarding the costs, Defendants will seek once final judgment is entered, Defendants will ask for costs in the amount of $5,073.35, described in Exhibit C, attached hereto.

WHEREFORE, Defendants respectfully request that this Court grant Defendants' Motion for Attorney's Fees and award to Defendants' their prevailing party attorney's fees in the amount of $308,512.85, and for such other relief as this Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and a copy was made available to all electronic filing participants.

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