

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EUNICE RIVERA, et al. : CIVIL ACTION
 :
v. :
 :
CITY OF PHILADELPHIA, et al. : NO. 97-CV-1130

MEMORANDUM AND ORDER

J. M. KELLY, J.

July , 1998

Presently before the Court is the "Motion of Defendant Delta Airlines, Inc. Requesting Order for Taxation of Costs and Request for Attorneys' Fees." For the reasons stated below, the Motion is denied.

BACKGROUND

Plaintiffs Eunice Rivera ("Rivera"), Viola Gambrell ("Gambrell") and Verna Lee Jewell ("Jewell") brought this action against Defendants Delta Airlines, Inc. ("Delta") and the City of Philadelphia ("the City"). The Plaintiffs claimed that they are qualified individuals with disabilities and that the Defendants failed to provide them with the reasonable accommodations that they needed to board an airplane. The claims against the City were based on the Americans With Disabilities Act, 42 U.S.C. § 12131 and 42 U.S.C. § 1983, and the claims against Delta were based on the Air Carriers Access Act, 49 U.S.C. § 41705 ("ACAA").

On September 26, 1997, while I dismissed all but one of the claims against the City, I refused to dismiss the ACAA claims

against Delta. Jewell subsequently sought leave to voluntarily discontinue her suit and Delta agreed to the dismissal. Rivera and Gambrell then accepted offers of judgment made by Delta in accordance with Rule 68 of the Federal Rules of Civil Procedure. On February 19, 1998, I granted Jewell's request for voluntary dismissal and refused to exercise supplemental jurisdiction over the remaining substantive claim. This did not end the litigation.

On February 19, 1998, I denied the City's petition for attorney's fees because the City did not meet its burden of showing that the Plaintiffs' case was "frivolous, unreasonable or without foundation." At the same time, I denied Rivera and Gambrell's petitions for attorney's fees against Delta, because Congress did not provide for the recovery of attorney's fees in the ACAA.

Delta now seeks an award of costs and attorneys' fees, under 28 U.S.C. § 1927, against Jewell's attorneys Thomas More Holland ("Holland") and Edith Pearce ("Pearce"). Delta recounts a number of episodes in support of its motion.

Delta claims that attorney Pearce solicited Jewell to be a party to this lawsuit in violation of Rule 7.3 of the Rules of Professional Conduct. Jewell testified at her deposition that Pearce called her and told her that she had a claim against Delta and the City. Jewell testified that she had not intended to sue

anyone before Pearce contacted her. In addition, Delta claims that Pearce unreasonably refused to agree to a request for an extension of time to respond to the Plaintiff's complaint in violation of Rule of Professional Conduct 3.2. Delta also contends that both Holland and Pearce unreasonably continued to pursue Jewell's claim, despite the fact that her April 23, 1997 deposition showed that she did not have a colorable claim.

Delta claims that attorney Holland was rude and unprofessional throughout this litigation. In support of its claim, Delta attached the transcript of a deposition of an expert witness. The following exchange, in response to an objection by defense counsel, was highlighted as an example of Holland's conduct:

MR. HOLLAND: And I thought that you had this preserved, so why do you have to enunciate it to the point that it interrupts the deposition and makes it go longer other than the fact that it increases the amount of time you get to put on your time sheet. Back on the record.

MR. SILVERMAN [attorney for Delta]: Do we have that on the record? I'd like that on the record.

MR. HOLLAND: And I want that underscored on the record. Triple time. He's got two attorneys here. They need something to do and they need time to bill.

MR. O'HAYER [attorney for City]: Counsel's comments are apparently not directed to me, I don't have anyone joining me here, first off. Second off, I don't see -- I don't understand why Counsel sees the need to insult Counsel that happened to just be representing the opposing parties in this litigation and I find it unfortunate that he needs to make this gratuitous statements.

MR. HOLLAND: And aren't you Mr. Olive Branch. Why is it that he has to stink and you have to smell too. Everything he says, you say. And he says it better than you, so why don't you just leave it alone.

MR. O'HAYER: All the same, I wanted to state that --

MR. HOLLAND: Great. And when you become a Judge and you put on the black robe, you can make such statements.

DISCUSSION

Section 1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings 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.

28 U.S.C. § 1927.

The behavior recounted above is unprofessional. Section 1927, however, is not intended to federalize the regulation of attorneys. The conduct of attorneys is generally regulated by the state in which they practice. Section 1927 is designed to provide a means of recouping costs that were incurred because of an attorney's unreasonable expansion of litigation. Incidents such as Holland's comments and Pearce's failure to grant an extension did not expand this litigation. Most of these incidents should be addressed, if at all, by the appropriate state ethics officials.

Delta claims that Jewell's deposition revealed that she did not have a colorable claim, and that her attorney's subsequent

pursuit of the case was unreasonable. This claim is cognizable under Section 1927, but Delta did not show that Holland and Pearce's behavior was unreasonable. Delta complains that it "incurred unnecessary costs and wasted a considerable amount of time in connection with the taking of Jewell's deposition and in researching and filing a motion for partial summary judgment based on her deposition testimony." Delta's motion for partial summary judgment was denied. I found that Jewell stated a prima facie case. Jewell subsequently requested leave to withdraw her claim. Holland and Pearce's behavior was not unreasonable in this regard.

Alternatively, Delta requests that costs of \$815.40 be taxed against Jewell under Rule 54(d) of the Federal Rules of Civil Procedure. Rule 54(d) states, in pertinent part:

Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs. . . . Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Local Rule of Civil Procedure 54.1(c) states: "All bills of costs requiring taxation shall be taxed by the Clerk, subject to an appeal to the Court." Delta did not comply with this procedure.

In addition, I find that under the circumstances of this case, Delta is not a prevailing party. After I found that Jewell

stated a prima facie case under the ACAA, she voluntarily withdrew her claim. Jewell did nothing, individually, to justify liability for costs.¹ Therefore, Delta's request for taxation of costs against Jewell is denied.

¹ Jewell had a prima facie ACAA claim, her joinder in this case was not an unreasonable expansion of the litigation. Nevertheless, it appears that she was solicited to be a party in a manner that violates Rule of Professional Conduct 7.3. This fact weighs against an award of costs against Jewell individually.

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ORDER

AND NOW, this day of July, 1998, upon consideration of
the "Motion of Defendant Delta Airlines, Inc. Requesting Order
for Taxation of Costs and Request for Attorneys' Fees," and the
responses thereto, it is hereby ordered that the Motion is
DENIED.

BY THE COURT:

JAMES MCGIRR KELLY, J.