

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

HAROLD MURRAY : CIVIL ACTION
 :
 v. :
 :
 :
 SOUTHEASTERN PENNSYLVANIA :
 TRANSIT AUTHORITY : NO. 96-7971

MEMORANDUM ORDER

Plaintiff in this Title VII case alleged that he was terminated because of his race from his job as a cashier for defendant. SEPTA contended that plaintiff was terminated because after a revenue investigation by four minority officials, it was determined that fare money for which plaintiff was responsible was missing. The court granted defendant's motion for summary judgment on plaintiff's Title VII claim.

Presently before the court is defendant's Motion for an Award of Attorney's Fees and Expert Fees. Defendant seeks \$32,290 for fees expended in the defense of this action.

SEPTA contends that plaintiff pursued his claim despite knowing it was meritless in view of the disposition of the earlier cases of Davis v. Southeastern Pennsylvania Transportation Auth., 1993 WL 169864 (E.D. Pa. May 14, 1993), aff'd, 19 F.3d 642 (3d Cir.), cert. denied, 513 U.S. 119 (1994) and Barnes v. Southeastern Pennsylvania Transportation Auth., 1996 WL 92098 (E.D. Pa. Feb. 28, 1996), aff'd, 106 F.3d 384 (3d Cir. 1996). The court in Davis and Barnes expressly rejected the

same argument on which plaintiff Murray relied that statistical evidence showing black cashiers were disproportionately affected by revenue audits gives rise to a reasonable inference that SEPTA intentionally discriminated against its black cashiers. See Davis, 1993 WL 169864, at *4; Barnes, 1996 WL 92098 at *5 n.4.

Counsel for SEPTA avers that he informed plaintiff's attorney about the rulings in Davis and Barnes and sent him copies of the opinions along with the expert report of Leonard A. Cupingood, Ph.D. which SEPTA had submitted in Barnes. Counsel for SEPTA avers that plaintiff's attorney "completely ignored the documents and continued the case without any evidence to support his client's claims."

Title VII provides that in "any action under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs . . ." See 42 U.S.C. § 2000e-5(k); Brown v. Borough of Chambersburg, 903 F.2d 274, 277 (3d Cir. 1990).

The standard for awarding fees to a prevailing defendant is stringent. A prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." EEOC v. L.B. Foster Co., 123 F.3d 746, 750 (3d Cir. 1997) (citation omitted), cert. denied, 118 S. Ct. 1163 (1998). Awards of fees to prevailing defendants,

however, "are not routine, but are to be only sparingly awarded." Id. at 751 (citation omitted). A prevailing defendant may receive attorney's fees only if the court finds that the plaintiff's "claim was frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Hicks v. Arthur, 891 F. Supp. 213, 214 (E.D. Pa. 1995), aff'd, 91 F.3d 123 (3d Cir. 1996). A prevailing defendant, however, need not prove that the plaintiff acted in bad faith. Quiroga v. Hasbro, Inc., 934 F.2d 497, 503 (3d Cir.), cert. denied, 502 U.S. 940 (1991).

Courts must "resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." Christiansburg Garment, 434 U.S. at 421-22; L.B. Foster Co., 123 F.3d at 751. Such post hoc reasoning "would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." Christiansburg Garment, 434 U.S. at 422; L.B. Foster Co., 123 F.3d at 751.

Significantly, attorney's fees under the fee-shifting provision of Title VII may not be assessed against the losing party's attorney but, if at all, only against the losing party.

See Quiroga, 934 F.2d at 504. Courts have thus found it appropriate to consider whether a losing plaintiff personally knew or should have known that his claim was "frivolous, unreasonable or groundless" before assessing attorney's fees against him. See Brown v. Borough v. Chambersburg, 903 F.2d at 277; Hicks v. Arthur, 891 F. Supp. 213, 214-15 (E.D. Pa. 1995) (declining to assess attorney's fees in absence of showing that plaintiffs were personally aware their discrimination claims lacked merit), aff'd, 91 F.3d 123 (3d Cir. 1996). Typically, a discharged plaintiff genuinely believes he has been wronged but must depend on his attorney to assess whether there is a legally cognizable or supportable claim. Id.

In moving for summary judgment, SEPTA did not argue that plaintiff failed to make out a prima facie case. Rather, the case turned on the lack of evidence to cast doubt on SEPTA's nondiscriminatory reason for firing plaintiff, i.e., the conclusion he had violated SEPTA's fare registration policy.

Plaintiff, of course, was not barred by res judicata or collateral estoppel from litigating his claim or the probative value of his statistical analysis because other plaintiffs were unsuccessful in presenting similar claims supported by like analyses in other actions against the same defendant. Nevertheless, the cogent discussion by Judge Fullam in his opinion in Davis regarding the lack of probative value of the

type of statistics relied on by plaintiffs in both cases should have given considerable pause to plaintiff's counsel in this case. Moreover, when subjected to scrutiny, the statistics presented by plaintiff in the instant case were virtually meaningless.

The court is not persuaded that plaintiff's Title VII claim was "frivolous," although arguably it was "unreasonable or groundless." Defendant, however, has not sought sanctions against counsel. It seeks to impose liability for significant fees on plaintiff personally. The court cannot conclude that plaintiff knew or should have known his claim was or had become unreasonable or groundless.

ACCORDINGLY, this day of November, 1998, upon consideration of Defendant's Motion for an Award of Attorney's Fees and Expert Fees (Doc. #25) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.