

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

ANTHONY BARBEE,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 04-4063
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, S.J.

FEBRUARY 1, 2007

Presently before this Court is the Defendant Southeastern Pennsylvania Transportation Authority's ("SEPTA") Motion for an Award of Attorney's Fees, and the Plaintiff Anthony Barbee's Response in Opposition. For the following reasons the Defendant's Motion for an Award of Attorney's Fees is denied.

I. Background

A jury returned a verdict against Anthony Barbee and in favor of SEPTA on October 31, 2006. They found that Mr. Barbee had not endured racial discrimination at the hands of SEPTA. Mr. Barbee had alleged that SEPTA violated 42 U.S.C. § 1983, the Fourteenth Amendment, the Racketeer Influenced and Corrupt Organizations Act, the Family and Medical Leave Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act ("Title VII"), when they fired him from his job after he had exhausted his sick leave benefits.

SEPTA terminated Mr. Barbee pursuant to the collective bargaining agreement they had

with the Transport Workers Union, who represented Mr. Barbee. The agreement required that SEPTA terminate employees from active status and place them on the priority recall list after they exhausted all of their sick leave benefits. Mr. Barbee could have been re-hired while on recall. However, his physician deemed him medically disqualified from returning to his previous job as a bus driver. This doctor also found him physically incapable of performing any other full time job. SEPTA was thus precluded from hiring Mr. Barbee for any position, as only full time jobs were available in the organization.

Mr. Barbee filed this lawsuit after he was terminated. SEPTA moved for summary judgment. Only the Title VII claim survived summary judgment. Mr. Barbee presented enough evidence to establish that a genuine issue of fact existed requiring a trial. He submitted his deposition testimony in which he stated that Ms. Yoxtheimer, a human resources manager at SEPTA, made comments about his hair style and treated him differently because of his race. SEPTA denied that any statements were made and asserted that its actions were not motivated by any racial animus. At trial Mr. Barbee and Ms. Yoxtheimer testified. The jury found her testimony more credible, and returned a verdict against Mr. Barbee. The weight of the evidence clearly supported the jury's findings.

SEPTA has now filed a motion for attorney's fees pursuant to Federal Rule of Civil Procedure 54(d)(2) and 42 U.S.C. § 1988¹ which allow for the recovery of fees against the other

¹ The district court can award attorney's fees pursuant to 42 U.S.C. § 1988 when an action has been brought to enforce a provision of 42 U.S.C. § 1983. Mr. Barbee brought a claim against SEPTA for a violation of § 1983, but that claim was dismissed on summary judgment. Only the Title VII claim was litigated at trial. Consequently, this motion would have been more appropriately filed pursuant to 42 U.S.C. § 2000e-5(k). That provision allows a court to grant attorney's fees in an action under Title VII of the Civil Rights Act. Regardless, the standards used in conjunction with these two provisions are the same. This Court will address the motion as though it was brought under 42 U.S.C. § 2000e-5(k).

party in civil rights litigation, and also pursuant to 28 U.S.C. § 1927 which allows this Court to impose fees against an attorney who unreasonably or vexatiously increases the costs of litigation. It should also be noted that on November 22, 2005, this Court ordered Mr. Barbee to pay \$5,040 for costs SEPTA incurred when he failed to appear for his deposition.

II. Discussion

1. Fee award against Anthony Barbee

It is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees. Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412, 415 (1978). Title VII of the Civil Rights Act has an enforcement provision which allows a district court the discretion to grant reasonable attorney's fees to the prevailing party in an action arising under that section. 42 U.S.C. § 2000e-5(k). The Supreme Court has said that a prevailing plaintiff should be awarded attorney's fees in all but special cases. Christianburg, 434 U.S. at 417. However, a district court should only award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, without foundation, or unreasonable. Id. at 421. The Third Circuit has established guidelines for district courts to use in evaluating whether an unsuccessful civil rights claim is frivolous. Barnes Found. v. Twp. of Lower Merion, 242 F.3d 151, 158 (3d Cir. 2001). Those guidelines include (1) whether the plaintiff had established a prima facie case, (2) whether the defendant offered to settle², and (3) whether the trial court dismissed the case prior to trial or the case continued to

² SEPTA has argued that Mr. Barbee's disclosure of settlement negotiations was a violation of Fed. R. Evid. 408 and thus should be barred from consideration in this motion. The district court for New Jersey ruled in Alphonso v. Pitney Bowes, Inc., 356 F. Supp. 2d 442, 447 fn. 4 (D. N.J. 2005) on a similar question, and found that disclosing a settlement offer in a motion for attorney's fees did violate Fed. R. Evid. 408. Since this opinion will not discuss this element of the test, we will not make a

trial on the merits. Id. Ultimately, the Supreme Court has cautioned the district courts against the temptation of engaging in post hoc reasoning after a plaintiff has lost his claim for Title VII relief. Christianburg, 434 U.S. at 422.

SEPTA is not entitled to recover its attorney's fees. Under the Third Circuit's guidelines, in cases where the plaintiff has introduced evidence sufficient to survive summary judgment, a finding of frivolity is typically not justified. See E.E.O.C. v. L.B. Foster Co., 123 F.3d 746, 751 (3d Cir. 1997). A district court should not hold that a claim tried on the merits is frivolous merely because a plaintiff lost. Id. In L.B. Foster Co., a discrimination and retaliation claim was brought against an employer who failed to promote a female employee. Summary judgment was denied and the case proceeded to a bench trial. At trial, the judge found in favor of the employer and against the female employee. The judge then awarded the employer fees for having to defend against a claim that in retrospect he found groundless. The Third Circuit reversed that decision, holding that the district court abused its discretion by engaging in post hoc reasoning. L.B. Foster Co., 123 F.3d at 753. SEPTA is now asking this Court to engage in the kind of post hoc reasoning which the Third Circuit and the Supreme Court have ruled is not allowed.

The award of attorney's fees against Mr. Barbee is not justified given that his claim survived summary judgment. This Court found that the little evidence he presented was enough to require putting the question to a jury. Ultimately, the jury weighed that evidence and found it wanting. They did not think that Mr. Barbee endured intentional racial discrimination. But the fact that he lost does not mean that he brought a groundless claim. He thought that he was subjected to racial discrimination, and testified under oath to that claim. SEPTA countered that

decision on whether Fed. R. Evid. bars use of this evidence in post trial motions.

he was fired pursuant to the union contract. At summary judgment, this Court reviewed the evidence and found that Mr. Barbee presented evidence establishing a genuine issue of fact. While Mr. Barbee's claim may appear frivolous in hindsight, at the outset there appeared to be a genuine issue in need of jury resolution. Because Mr. Barbee was granted a trial on the merits, this Court is reluctant to find that his claim was frivolous, groundless, or without foundation. Consequently, SEPTA will not be granted its attorney's fees for having to defend against this Title VII claim.

2. Fee award against Shelly Farber, Esquire

An attorney may be subjected to sanctions for engaging in conduct during litigation that has no legitimate purpose. Under 28 U.S.C. § 1927, the district courts may impose sanctions on an attorney who conducts himself in an unreasonable or vexatious manner such that the costs and length of the legal proceedings are multiplied. A court cannot impose any costs on an attorney without first finding that the attorney acted in willful bad faith. Baker Indus., Inc. v. Cerebus Ltd., 764 F.2d 204, 208 (3d Cir. 1985); Campana v. Muir, 615 F. Supp. 871, 874 (M.D. Pa. 1985). The case law shows that bad faith will be inferred when the attorney's actions are so completely without merit as to have been undertaken only for some improper purpose. Alphonso v. Pitney Bowes, Inc., 356 F. Supp. 2d 442, 452 (D. N.J. 2005). The Third Circuit has said that the "power to assess the fees against an attorney should be exercised with restraint lest the prospect thereof chill the ardor of proper and forceful advocacy on behalf of his client." Baker Indus., Inc., 764 F.2d at 208.

Mr. Farber's conduct during this trial has not been shown to have been in willful bad faith. Willful bad faith exists where an attorney advances claims that he knows or should have

known were meritless because he wants to harass the other party or delay the litigation. In re Prudential Ins. Co., 278 F.3d 175, 188 (3d Cir. 2002). While Mr. Farber's actions have not been exemplary, this Court is reluctant to find that he committed them in the willful bad faith necessary to justify the imposition of sanctions under § 1927. SEPTA has shown that Mr. Farber did numerous things during the course of this litigation that slowed down the process. However, his actions appear to have been motivated by zealous advocacy rather than an improper purpose like harassment or delay.

Mr. Farber's actions included failing to respond to defense discovery requests, failing to file a timely pre-trial memorandum, and advancing claims that were dismissed on summary judgment. He forced SEPTA to file motions in response to these actions, and required this Court to issue orders forcing his compliance. Mr. Farber also listed witnesses he intended to call in his pre-trial memorandum who he had not identified during discovery. SEPTA was forced to move to have those witnesses excluded, and this Court was required to rule on that motion. SEPTA incurred additional costs because of these actions, however, they have not shown that Mr. Farber was motivated by a desire to harass or delay.

Mr. Farber does not appear to have advanced meritless claims. The fact that six of his seven claims were dismissed on summary judgment is not proof that he had no reasonable basis in fact and law to file a lawsuit. When this action commenced, Mr. Farber could have reasonably believed that his client had a claim against SEPTA for the violations he alleged. Mr. Barbee was injured on the job. He was over 50 years old. He had been exercising his sick leave benefits, and was fired by his employer pursuant to a collective bargaining agreement. There appears to have been enough in the factual record to justify bringing all of the claims that Mr. Farber advanced.

When SEPTA moved for summary judgment, discovery had uncovered the fact that some of the claims should not move forward. However, none of these claims were deemed frivolous. Thus, this Court declines to impose sanctions against Mr. Farber under 28 U.S.C. § 1927.

An appropriate Order follows.

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TRANSPORTATION AUTHORITY,	:	
	:	
Defendant.	:	
	:	

ORDER

AND NOW, this 1st day of February, 2007, upon consideration of the Defendant Southeastern Pennsylvania Transportation Authority's ("SEPTA") Motion for an Award of Attorney's Fees (Doc. No. 58), and Plaintiff Anthony Barbee's Response in Opposition, it is hereby **ORDERED** that the Defendant's Motion for an Award of Attorney's Fees is **DENIED**.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY, Sr. J.