APPENDIX

APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 19a0563n.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-3793

[Filed November 7, 2019]

SCOTTIE A. BAGI, et al.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
CITY OF PARMA, OHIO,	)
	)
Defendant-Appellee.	)
	)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: BOGGS, SUHRHEINRICH, and WHITE, Circuit Judges.

PER CURIAM. Plaintiffs Scottie A. Bagi and Gary Vojtush brought a First Amendment retaliation claim against their employer, Defendant City of Parma (the City), under 42 U.S.C. § 1983. The district court

granted summary judgment to the City, and we affirmed. Plaintiffs now appeal the district court's orders assessing $173,125.50 in attorney fees against Plaintiffs under 42 U.S.C. § 1988. We **AFFIRM** in part, **VACATE** in part, and **REMAND** for further proceedings.

BACKGROUND

I. Factual Background

Plaintiffs are firefighters and medics for the Parma Fire Department (PFD). The PFD has a "Tactical Emergency Medical Specialist" (TEMS) unit staffed by internally selected firefighter/medics who are appointed by the Fire Chief. *Id.* at 2. In 2004, the PFD held a test to select firefighters for the unit. Captain Poznako administered the test, which included a written portion. Bagi took and failed the written test.

Bagi and some other firefighters had concerns about the way the 2004 test was administered. Bagi believed that Captain Poznako had taken steps to manipulate the test and give certain people a higher score, and others testified to hearing rumors that the test was unfair. Between 2004 and 2010, Bagi brought his concerns to three union presidents, each of whom looked into the 2004 test and discovered no impropriety.

In June 2011, the PFD announced an opening on the TEMS unit and administered another competitive exam. Bagi did not take the test because he believed that the person who would be selected for the team had been pre-determined. In early July 2011—before the TEMS-unit test was administered—Bagi drafted a

letter expressing his concerns that the test would be administered unfairly. Specifically, Bagi expressed concern that Captain Poznako would select Firefighter Fetter—who had fewer years of experience than other firefighters applying—because Fetter was Poznako's friend. Bagi also reiterated his concern that Poznako had favored his friends in selecting TEMS-unit members in 2004, stating, "many are under the belief that Captain Poznako gave the answers, or at least identified the areas to specifically study, to his friends and close associates so they could perform well on the test." R. 70-2, PID 1172. Bagi, Vojtush, and five other firefighters signed the letter. Several of the signatories, including Vojtush, testified that they either did not read or only partially read the letter before signing it.

Firefighters Fetter and Iacoboni received the highest scores on the 2011 test and were offered positions on the TEMS unit. After Fetter and Iacoboni were selected, Bagi had the letter delivered to Chief French. Bagi also sent a copy of the letter to the Human Resources Director with a cover letter expressing his concerns that Chief French and Captain Poznako would retaliate against him for writing and sending the letter.

Assistant Chief Ryan investigated the letter's allegations. Ryan concluded that the allegations in the letter were false, that none of the signatories could provide any evidence to support the assertions in the letter, and that the assertions were based on rumor. Following Ryan's investigation, the City investigated the letter's signatories. Chief French brought charges against Bagi and Vojtush and recommended that their

employment be terminated. In October 2012, after pre-disciplinary hearings, Safety Director Baeppler suspended Bagi for thirty-four tours and Vojtush for thirteen tours. The remaining signatories to the letter were suspended for two tours.

Bagi grieved the suspension. The arbitrator concluded that Bagi's assertions of impropriety were false and based on "nothing more than suspicions." R. 54-35, PID 511-12. However, the arbitrator rejected the City's claims that Bagi "made the charges knowing that they were false" and that his actions were "motivated by malice."[1] *Id.* at 512. Based on guidance from a policy manual, consideration of the less severe penalties imposed on other signatories, and Bagi's "length of service and clean record," the arbitrator in February 2014 reduced Bagi's suspension to eight tours. *Id.* at 52-21. The arbitrator reduced Vojtush's suspension to two tours, finding that, like the other signatories who had received a two-tour suspension, Vojtush's involvement with the letter was limited to signing it.

II. Procedural History

Plaintiffs brought this action against the City in March 2014, alleging one count of First Amendment

[1] When asked later whether he believed Bagi intentionally made false accusations when writing the letter, Chief French testified, "I believe he felt there was some truth to the basis of it." R. 55-1, PID 696.

retaliation under 42 U.S.C. § 1983.[2] A plaintiff claiming First Amendment retaliation must make a prima facie showing that: "(1) he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; [and] (3) . . . the adverse action was motivated at least in part by his protected conduct." *Benison v. Ross*, 765 F.3d 649, 658 (6th Cir. 2014) (citation omitted).

In August 2016, the district court granted summary judgment for the City. *Scottie Bagi, et al., v. City of Parma*, No. 1:14 CV 558, 2016 WL 4418094, *15 (N.D. Ohio Aug. 19, 2016). The district court held that, although public employees are not required to prove the truth of their statements to benefit from the protections of the First Amendment, Plaintiffs' statements were outside the realm of constitutional protection because Plaintiffs made them with reckless indifference to their falsity. *Id.* at *14 (citing *Westmoreland v. Sutherland*, 662 F.3d 714, 721 (6th Cir. 2011)).[3] The court rested its conclusion on its findings that: Bagi wrote and signed the letter despite having no first-hand knowledge that the assertions therein were true; Vojtush signed the letter without reading it, having heard only rumors; when he wrote the letter, Bagi knew that investigations into the 2004

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[2] Vojtush also brought one claim of retaliation under the Family and Medical Leave Act, but voluntarily dismissed that claim.

[3] The City did not dispute that Plaintiffs suffered adverse consequences because of their speech (the letter).

test had uncovered no evidence of wrongdoing; Bagi did not take the 2011 test and turned down the opportunity to attend an informational meeting to learn more about its administration; Bagi misled other signatories as to the letter's purpose and contents; and Plaintiffs wrote and signed the letter without regard to its consequences for the PFD and individual firefighters. *Id.* at *14-*15. Thus, the court held that, because the letter was written with reckless disregard to its falsity, it was not constitutionally protected speech.

Plaintiffs appealed. We affirmed on different grounds, holding that Plaintiffs' speech was not protected because "Bagi's letter concerned personnel and internal policy issues, not matters of public concern." *Bagi v. City of Parma*, 714 F. App'x 480, 486 (6th Cir. 2017). We noted that Plaintiffs had not claimed that "Fetter was unqualified or that the administration of the 2011 test put the members of the SWAT team or the public at risk," and that "Bagi's personal interest *qua* employee appears plainly to predominate over his interest . . . as a member of the public." *Id.* at 486-87. We did not reach the question whether Plaintiffs spoke with reckless indifference to the falsity of their statements.

While the district court's decision was pending on appeal, the City moved for attorney fees pursuant to 42 U.S.C. § 1988. The district court granted the motion for fees, explaining:

> As summarized briefly above—and discussed at length in the Court's Memorandum Opinion dated August 19, 2016— Firefighters Bagi and Vojtush had zero evidence of any wrongdoing by

Captain Poznako or Firefighter Fetter prior to drafting and signing the Letter at the center of this lawsuit. There was nothing at all to substantiate the accusations made therein. The allegations were investigated within the Fire Department and the Parties proceeded to arbitrate their claims . . . . Each time, the investigation of Plaintiffs' accusations revealed no evidence of wrongdoing.

Despite not having any evidence to support the allegations they made against Captain Poznako and Firefighter Fetter, Plaintiffs then filed this lawsuit, forcing the City to once again address Plaintiffs' meritless claims against Captain Poznako and Firefighter Fetter and defend itself against baseless claims that Plaintiffs' First Amendment rights had been violated. Firefighter Bagi drafted—and both he and Firefighter Vojtush signed—the Letter without any evidence that the serious and damaging accusations contained therein were true and neither acknowledged the fact that the allegations were repeatedly investigated and found to be baseless. The City was forced to expend significant resources . . . The First Amendment under these facts and circumstances does not protect statements that are false or statements that are made with reckless disregard for their falsity. There was no basis for this lawsuit. Accordingly, the City is entitled to attorneys' fees . . . .

R. 101, PID 1783-84. The City submitted documentation of fees totaling $139,903.50. Plaintiffs objected to the appropriateness and amount of the fees and sought a hearing and time for limited discovery.

After prevailing on appeal, the City filed a motion for supplemental fees accrued on appeal. Plaintiffs responded with a motion for reconsideration, arguing that their claim was not frivolous and that no award of fees was warranted, and renewing their request for discovery and a hearing on the reasonableness of the fee award. Plaintiffs also raised the issue of their inability to pay an assessment of attorney fees in the six-figure range on their salaries as firefighters. The district court denied Plaintiffs' motion for reconsideration and granted the motion for additional fees. The court explained:

> The First Amendment does not protect false statements or statements made with reckless indifference to their falsity . . . . As previously determined by this Court, the Letter drafted by Mr. Bagi included serious and damaging accusations against others which Plaintiffs either knew, or should have known, to be false, and the statements made therein were not entitled to First Amendment protection. Further, the Sixth Circuit held that regardless of whether or not the statements were false or made with reckless disregard to their falsity, the subject matter of the Letter did not touch on a matter of public concern. The serious allegations made in the Letter were false and Plaintiffs' claims in this case were both unreasonable and

> without foundation. The Court finds no basis upon which to revisit its prior ruling and no basis upon which to deny the City's request to supplement its attorney fees calculation. This is precisely the type of case in which an award of attorney fees is both warranted and appropriate.

R. 116, PID 1958-59. Following additional submissions by the City, the district court found that limited discovery and a hearing were not necessary or warranted and awarded the City a total of $173,125.50 in fees.

DISCUSSION

I. Standard of Review

This court reviews a district court's award of attorney fees under an abuse of discretion standard. *Wilson-Simmons v. Lake Cty. Sheriff's Dep't*, 207 F.3d 818, 823 (6th Cir. 2000). "In light of a district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what are essentially factual matters, an award of attorneys' fees under § 1988 is entitled to substantial deference." *Id.* (quoting *Reed v. Rhodes*, 179 F.3d 453, 469 n. 2 (6th Cir. 1999).

II. Whether the District Court Abused its Discretion in Awarding Fees to the City

An award of attorney fees to a defendant in a civil-rights action "is an extreme sanction, and must be limited to truly egregious cases of misconduct." *Jones v. The Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986). In *Christiansburg Garment Co. v. EEOC*, the

Supreme Court held that attorney fees should not be assessed against a civil-rights plaintiff unless the action is "frivolous, unreasonable, or groundless, or the plaintiff continued to litigate after it clearly became so." 434 U.S. 412, 421 (1978).[4] Application of these standards requires examining a plaintiff's basis for filing suit, and awards to prevailing defendants depend on the factual circumstances of each case. *Smith v. Smyth-Cramer Co.*, 754 F.2d 180, 183 (6th Cir. 1985). Although a finding that a plaintiff brought a claim in bad faith will warrant an award of attorney fees, an action may be frivolous, unreasonable, or without foundation even if brought in good faith. 434 U.S. at 421. The *Christiansburg* Court cautioned that district courts should "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." *Id.* The Court explained that "[t]his kind of hindsight logic could discourage all but the most airtight claims." *Id.*

Plaintiffs argue that the district court relied on post hoc reasoning in awarding fees to the City. Plaintiffs rely on *Riddle v. Egensperger*, 266 F.3d 542, 551 (6th Cir. 2001), where we reversed a district court's award of attorney fees to prevailing defendants in a civil-rights action after finding that the district court

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[4] *Christiansburg* involved an award of attorney fees to a prevailing defendant in an action brought under Title VII of the Civil Rights Act. In *Hughes v. Rowe*, the Supreme Court extended the *Christiansburg* standards to actions brought under 42 U.S.C. § 1983. 449 U.S. 5, 14-15 (1980).

impermissibly relied on hindsight. Plaintiffs note that like the defendants in *Riddle*, the City did not move to dismiss their claim. They also point out that, as in *Riddle*, the district court did not use the word "frivolous" until it granted the City's motion for fees. Although we are mindful of the *Christiansburg* Court's warning against relying on post hoc reasoning, we cannot say based on these factors alone that the district court relied on hindsight logic in this case. The district court consistently found that Plaintiffs' First Amendment claim was "wholly without merit" and "baseless," and that there was no evidence to support it. R. 90, PID 1668; R. 101, PID 1784. The record supports those findings; Plaintiffs admitted that they wrote and signed the letter without any direct knowledge that the statements made were true.

Moreover, at the time Plaintiffs brought this action the law in this Circuit was settled that the First Amendment does not protect statements made with reckless indifference to their falsity. *See Westmoreland v. Sutherland*, 662 F.3d 714, 721 (6th Cir. 2011) (the First Amendment does not protect employee "statements [made] with knowledge of, or reckless indifference to, their falsity"). In reviewing a district court's award of § 1988 fees to defendants, we have previously considered whether the area of law underlying a plaintiff's claim is well-settled. *See Tarter v. Raybuck*, 742 F.2d 977, 988 (6th Cir. 1984) (overturning an assessment of fees against a § 1983 plaintiff where the nature of the plaintiff's Fourth Amendment rights were not well-settled). In this case, that factor favors upholding the award.

We conclude that the district court did not abuse its discretion in awarding fees on the ground that Plaintiffs' suit was frivolous, unreasonable, or groundless under the *Christiansburg* standards.

III. Whether the District Court Abused its Discretion by Denying Discovery or a Hearing

Plaintiffs argue that the district court abused its discretion by denying limited discovery or a hearing on the reasonableness of the fee award. We disagree. Although limited discovery and a hearing on the issue of attorney fees is often appropriate, Plaintiffs have not identified what information they would have sought had discovery been permitted. Instead, they argue only that "discovery on the reasonableness of the fees" was warranted. Appellants' Br. at 23. On these facts, we find no basis to conclude that the district court abused its discretion in denying Plaintiffs discovery and a hearing on the reasonableness of the fee award.

IV. Reasonableness of Fee Award

Finally, Plaintiffs argue that the district court's failure to address Plaintiffs' ability to pay the considerable fee award rendered its explanation inadequate.

"The starting point for determining a reasonable [attorney] fee is the lodestar, which is the product of the number of hours billed and a reasonable hourly rate." *Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 616 (6th Cir. 2007) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 438 (1983)). "The district court's calculation of the lodestar . . . deserves substantial deference, but only

when the court provides a clear and concise explanation of its reasons for the fee award." *Id.* (internal quotations omitted). When fees are assessed against plaintiffs in a civil-rights action, concerns about the reasonableness of the award are "heightened" because "such an award is an **extreme sanction**." *Garner v. Cuyahoga Cty. Juv. Ct.*, 554 F.3d 624, 643 (6th Cir. 2009) (emphasis in original).

In *Garner v. Cuyahoga County Juvenile Court*, we reviewed the reasonableness of a district court's award of fees to a prevailing defendant in a § 1983 case. *Id.* at 642. Like Plaintiffs here, the *Garner* plaintiffs did not take issue with the district court's basic calculation of the lodestar value; instead, they argued that the district court abused its discretion by failing to consider their abilities to pay. *Id.* We held that although the plaintiffs had the burden to prove their inability to pay, the district court's failure to address information in the record regarding the plaintiffs' modest salaries amounted to a failure to adequately explain its reasons for the award, which made meaningful appellate review impossible. *Id.* at 643. We therefore declined to grant deference to the district court's calculations and remanded for consideration of the plaintiffs' abilities to pay. *Id.*

Although Plaintiffs did not provide documentation of their income, Plaintiffs did raise the issue of the parties' disparate means in their Memorandum in Opposition to the City's initial Motion for Bill of Costs and Fees and their response to the City's Supplemental Motion for Fees. The district court, however, did not address Plaintiffs' ability to pay anywhere in its

opinions. As in *Garner*, that omission makes it impossible for this court to determine whether the issue was considered or properly analyzed. Because the district court failed to provide a "clear and concise explanation of its reasons for the fee award," we remand to allow Plaintiffs an opportunity to demonstrate their inability to pay and the district court to reconsider the amount of fees assessed. *Id.* at 643. We are satisfied that the assigned district judge can assess the appropriate award objectively.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's finding that the City should be granted attorney fees under § 1988. With respect to the reasonableness and amount of the award, we **VACATE** and **REMAND** with instructions to allow Plaintiffs an opportunity to demonstrate their inability to pay.

HELENE N. WHITE, Circuit Judge, dissenting. I concur in the per curiam opinion except as to Section II. Because the district court failed to correctly apply *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), and there was some basis for Plaintiffs' claim, I would reverse the award of fees.

In assessing fees against Plaintiffs, the district court focused on the falsity of the allegations made in the 2011 letter. Specifically, the court found that the lawsuit was meritless, and an award of fees against Plaintiffs was warranted, because Plaintiffs "had zero evidence of any wrongdoing" by the PFD and brought this lawsuit anyway, thereby "forcing the City to once again address Plaintiffs' meritless claims against

Captain Poznako and Firefighter Fetter and defend itself against baseless claims that Plaintiffs' First Amendment rights had been violated." R. 101, PID 1783-84.

This was a misapplication of the *Christiansburg* standards. The district court's statement that the Plaintiffs' lawsuit "forc[ed] the City to once again address Plaintiffs' meritless claims against Captain Poznako and Firefighter Fetter" is incorrect. R. 101, PID 1784. Plaintiffs' First Amendment claim alleged that they suffered adverse employment consequences because of their protected speech; this claim is different from the allegations they made within the PFD against Poznako and Fetter. The district court should have focused not on whether Plaintiffs presented evidence to support the allegations in the letter, but on whether they had any basis to bring a First Amendment retaliation claim. *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 183 (6th Cir. 1985). Plaintiffs' actions leading up to the suit are only part of that inquiry; the district court should have also examined whether the City's actions could reasonably have led Plaintiffs to believe they had a basis for bringing their claim. *Riddle v. Egensperger*, 266 F.3d 542, 558 (6th Cir. 2001) (Clay, J., concurring).

There was at least some basis in the record for Plaintiffs to bring this action. Plaintiffs unquestionably experienced adverse consequences because of their speech, including suspensions that the arbitrator concluded were unduly severe. As Chief French testified and the arbitrator concluded, Plaintiffs believed there was some truth to the assertions made

in the letter. Even accepting that their assertions were in fact not true, this concession and the arbitrator's statement gave Plaintiffs a reasonable basis to dispute that their speech was made with reckless indifference to its falsity. Likewise, given the PFD's status as a public entity and Plaintiffs' concern that Poznako had chosen members of a SWAT team based on favoritism rather than qualifications, Plaintiffs had some basis to argue that their speech was a matter of public concern. The law surrounding public-employee speech is complex, and whether a matter is of public or personal concern is not always apparent. To assess attorney fees against Plaintiffs under these circumstances risks discouraging future plaintiffs from filing suit, thus undermining "the efforts of Congress to promote the vigorous enforcement" of civil rights laws. *Christiansburg*, 434 U.S. at 422.

In sum, the fact that the allegations made by Plaintiffs in the letter were false did not provide the necessary foundation for an assessment of fees against Plaintiffs. Because there was some basis for Plaintiffs' First Amendment retaliation claim, it was not frivolous, unreasonable, or groundless. For these reasons, I conclude that the district court applied the *Christiansburg* standards incorrectly and abused its discretion in awarding fees to the City.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:14 CV 558

JUDGE DONALD C. NUGENT

[Filed July 27, 2018]

SCOTTIE A. BAGI, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
CITY OF PARMA,	)
	)
Defendant.	)
	)

ORDER

As set forth in this Court's prior Orders, "Attorney's fees may be awarded to prevailing Defendants in civil rights litigation under 42 U.S.C. § 1988 upon a finding that the suit was frivolous, unreasonable, or without foundation." *Meyers v. City of Chardon*, Case No. 1:14 CV 2340, 2015 U.S. Dist. LEXIS 48292, at *33 (N.D. Ohio Apr. 13, 2015) (citing *Hughes v. Rowe*, 449 U.S. 5, 14 (1980); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *Wolfe v. Perry*, 412 F.3d 707, 720

(6th Cir. Mich. 2005); *N.E. v. Hedges*, 391 F.3d 832, 836 (6th Cir. Ky. 2004)). "Reasonable attorney fees include preparation of post-judgment filings and appeals." *Black-Hosang v. Mendenhall*, Case No. 2:01 CV. 623, 2006 U.S. Dist. LEXIS 102192 (S.D. Ohio 2006).

On December 15, 2016, this Court granted Defendant, City of Parma's Motion for Bill of Costs and Fees. (Docket #101.) On May 8, 2018, this Court granted the City of Parma's Motion for Additional Attorney Fees incurred during Plaintiffs' appeal of the Court's prior order granting summary judgment in favor of the City of Parma. (Docket # 116.) The Court's determination on summary judgment, as well as both Orders granting attorney fees, included a detailed analysis and explanation regarding why this lawsuit, in particular, satisfied the "'frivolous, unreasonable, or without foundation" requirement for an award attorney fees under to 42 U.S.C. § 1988.

The City of Parma originally requested attorney fees in the amount of $139,903.50, broken down as follows:

Biller	Hours	Rate	Amount
Michelle J. Sheehan	574.60	$185.00	$106,301.00
Stephanie Hathaway	50.10	$185.00	$ 9,268.50
Jonathon Krol	62.80	$185.00	$ 11,618.00
Paralegal	138.70	$85.00	$ 11,789.50

Law Clerk	10.90	$85.00	$ 926.50

The City of Parma, and asks for an additional $33,223.00 for attorney fees incurred during the appeal, broken down as follows:

Biller	Hours	Rate	Amount
Michelle J. Sheehan	155.30	$195.00	$30,283.50
Brian D. Sullivan	3.00	$195.00	$ 585.00
Holly M. Wilson	3.00	$195.00	$ 585.00
Jonathon Krol	2.10	$195.00	$ 409.50
Paralegal	12.30	$85.00	$ 1,045.50
Law Clerk	3.70	$85.00	$ 314.50

The supporting documentation submitted by Defense Counsel regarding the qualifications and experience of Counsel; explanation of hourly billing rates; and, work performed, as well as this Court's thorough review, demonstrates without question the reasonableness of the hourly rates and hours expended by Counsel relative to both the underlying litigation and the appeal. The hourly rates charged in this case by Defense Counsel are well-below the prevailing market rate for attorneys with similar experience and qualifications in Cleveland, Ohio, and there is nothing within the billing records submitted by Counsel that

suggests duplicative or unnecessary charges.[1] Plaintiffs have had a full and fair opportunity to respond to the motions and supporting documentation filed by the City of Parma and their arguments have been thoughtfully considered by the Court. A hearing and/or additional discovery are neither necessary nor warranted under the facts and circumstances in this case.

Conclusion

For the foregoing reasons, Defendant, the City of Parma, is hereby awarded attorney fees in the amount of $173,125.50.

IT IS SO ORDERED.

s/_____
DONALD C. NUGENT
United States District Judge

DATED: July 27, 2018

[1] Counsels' standard hourly rate, given their years of expertise and qualifications to handle this type of litigation, is significantly higher than $185/$195 reduced hourly rate agreed upon between Counsel and the City of Parma. See Docket # 102 and 109, Declarations of Lead Counsel Michelle Sheehan, and attached Exhibits.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:14 CV 558

JUDGE DONALD C. NUGENT

[Filed May 8, 2018]

SCOTTIE A. BAGI, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
CITY OF PARMA,	)
	)
Defendant.	)
	)

ORDER

This matter is before the Court on the Supplemental Motion for Additional Attorney Fees filed by Defendant, City of Parma ("the City") (Docket #112), and the Motion for Reconsideration filed by Plaintiffs, Scottie A. Bagi and Gary C. Vojtush (Docket #114). The City seeks costs and attorney fees from Plaintiffs pursuant to 28 U.S.C. §§ 1920 and 1924, 42 U.S.C. § 1988, and Fed. R. Civ. P. 54. Previously, the Court held that the City was entitled to reasonable

attorney fees incurred, as well as costs in the amount of $15,463.26, as the prevailing party in this case. (Docket #101.) Thereafter, the City submitted attorney fee invoices for the Court's review.

The City seeks to supplement its original attorney fee documentation to include fees associated with Plaintiffs' unsuccessful appeal of the Court's Order granting the City's Motion for Summary Judgment. (Docket #112.) On April 2, 2018, Plaintiffs filed a Motion for Reconsideration and Response to Defendants Motion for Appellate Fees. (Docket 114.)

Plaintiffs argue that the City has failed to demonstrate that Plaintiffs' appeal was "frivolous or not well taken" and that attorney fee awards against a plaintiff should be limited to the most egregious cases so as not to dissuade individuals from pursuing their legal rights. Plaintiffs ask the Court to reverse its prior determination that the City is entitled to attorney fees and award no attorney fees in this case.

The City filed its Reply in Support of Supplemental Motion for Additional Attorney Fees and Opposition to Reconsideration of this Court's Award of Attorneys' Fees. (Docket #115.) The City argues that 42 U.S.C. § 1988 permits an award of reasonable attorney fees to the prevailing party, including fees incurred on appeal; that this Court has already determined that Plaintiffs' lawsuit was "frivolous, unreasonable, or without foundation;" that Plaintiffs knew when their lawsuit and appeal were filed that their claim was meritless; and, that a fee award in this case is supported by the public policy against baseless lawsuits.

Discussion

"Attorney's fees may be awarded to prevailing Defendants in civil rights litigation under 42 U.S.C. § 1988 upon a finding that the suit was frivolous, unreasonable, or without foundation." *Meyers v. City of Chardon*, Case No. 1:14 CV 2340, 2015 U.S. Dist. LEXIS 48292, at *33 (N.D. Ohio Apr. 13, 2015) (citing *Hughes v. Rowe*, 449 U.S. 5, 14 (1980); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *Wolfe v. Perry*, 412 F.3d 707, 720 (6th Cir. Mich. 2005); *N.E. v. Hedges*, 391 F.3d 832, 836 (6th Cir. Ky. 2004)). "Reasonable attorney fees include preparation of post-judgment filings and appeals." *Black-Hosang v. Mendenhall,* Case No. 2:01 CV. 623, 2006 U.S. Dist. LEXIS 102192 (S.D. Ohio 2006).

Plaintiff Bagi drafted, and both he and Plaintiff Vojtush signed, a Letter falsely accusing fellow employees of wrongdoing. The allegations in the Letter were repeatedly investigated and found to be unsubstantiated. Plaintiffs then filed this lawsuit arguing that the statements made in the Letter were protected speech under the First Amendment. This Court thoroughly and exhaustively reviewed the evidence of record in this case and determined that the Letter was written, and signed off on, without any evidence that the serious and damaging accusations contained therein were true and that Plaintiffs' claims were wholly meritless. As stated in this Court's Memorandum Opinion dated August 19, 2016:

> Plaintiffs' speech – the Letter – was written and signed off on with reckless indifference to whether the statements contained therein were

> false and, as such, is not a matter of public concern and not protected employee speech under the First Amendment. This lawsuit, like the allegations made by Plaintiffs in the Letter, is wholly without merit.
>
> Firefighter Bagi drafted, and Firefighters Bagi and Vojtush both signed the Letter, despite the fact that there was no evidence whatsoever of any wrongdoing in connection with the 2004 or 2011 TEMS Tests; no evidence of bias; and, no evidence that Firefighter Fetter was not qualified or that his selection was based on something other than merit.

Further, as stated in this Court's December 15, 2016 Order granting the City's request for costs and attorney fees:

> . . . Firefighters Bagi and Vojtush had zero evidence of any wrongdoing by Captain Poznako or Firefighter Fetter prior to drafting and signing the Letter at the center of this lawsuit. There was nothing at all to substantiate the accusations made therein. The allegations were investigated within the Fire Department and the Parties proceeded to arbitrate their claims pursuant to the applicable Collective Bargaining Agreement. Each time, the investigation of Plaintiffs' accusations revealed no evidence of wrongdoing.
>
> Despite not having any evidence to support the allegations they made against Captain Poznako and Firefighter Fetter, Plaintiffs then

> filed this lawsuit, forcing the City to once again address Plaintiffs' meritless claims against Poznako and Firefighter Fetter and defend itself against baseless claims that Plaintiffs' First Amendment rights had been violated. Firefighter Bagi drafted – and both he and Firefighter Vojtush signed – the Letter without any evidence that the serious and damaging accusations contained therein were true and neither acknowledged the fact that the allegations were repeatedly investigated and found to be baseless. . . The First Amendment under these facts and circumstances does not protect statements that are false or statements made with reckless disregard for their falsity. There was no basis for this lawsuit.

On October 26, 2017, the Sixth Circuit Court of Appeals affirmed summary judgment in favor of the City, finding that the Letter did not discuss matters of public concern and therefore was not protected speech, ending its analysis. *See Bagi v. City of Parma*, Case No. 16-4011, 2017 U.S. App. LEXIS 21403 (6th Cir. Ohio Oct. 26, 2017). ("Because we affirm on this alternative ground, we need not reach the question the district court found dispositive, whether Plaintiffs spoke with reckless indifference to the falsity of the content of their speech.")

The First Amendment does not protect false statements or statements made with reckless indifference to their falsity, nor in the employment context does it extend to protect speech that does not implicate matters of public concern. As previously

determined by this Court, the Letter drafted by Mr. Bagi included serious and damaging accusations against others which Plaintiffs either knew, or should have known, to be false, and the statements made therein were not entitled to First Amendment protection. Further, the Sixth Circuit held that regardless of whether or not the statements were false or made with reckless disregard as to their falsity, the subject matter of the Letter did not touch on a matter of public concern. The serious allegations made in the Letter were false and Plaintiffs' claims in this case were both unreasonable and without foundation. The Court finds no basis upon which to revisit its prior ruling that the City is entitled to attorney fees and costs and no basis upon which to deny the City's request to supplement its attorney fees calculation. This is precisely the type of case in which an award of attorney fees is both warranted and appropriate.

Conclusion

The Supplemental Motion for Additional Attorney Fees (Docket #112) filed by Defendant, City of Parma, is hereby GRANTED. The Motion for Reconsideration (Docket #114) filed by Plaintiffs, Scottie A. Bagi and Gary C. Vojtush, is hereby DENIED. The City shall submit a revised attorney fee invoice within 1 0 days of this Order. Plaintiffs shall have 10 days thereafter to object to the City's attorney fee calculation.

IT IS SO ORDERED.

s/_____
DONALD C. NUGENT
United States District Judge

DATED: May 8, 2018

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:14 CV 558

JUDGE DONALD C. NUGENT

[Filed December 15, 2016]

SCOTTIE A. BAGI, ET AL.,)
)
Plaintiff,)
)
v.)
)
CITY OF PARMA,)
)
Defendant.)

ORDER

This matter is before the Court on the Motion for Bill of Costs and Fees filed by Defendant, City of Panna. (Docket #93.) The City seeks costs and attorneys' fees from Plaintiffs pursuant to 28 U.S.C. §§ 1920 and 1924, 42 U.S.C. § 1988, and Fed. R. Civ. P. 54. Plaintiffs filed their Opposition Brief on September 30, 2016; the City filed a Reply Brief on October 7, 2016; and, Plaintiffs filed an additional Response Brief on October 17, 2016. (Docket #s 95, 95

and 100.) The Court has thoroughly reviewed each, as well as the documentation submitted therewith and the applicable statutory and case law.

I. Background

On October 19, 2016, the Court granted the City's Motion for Summary Judgment, finding that the false accusations leveled by Plaintiffs against Captain Poznako and Firefighter Fetter were not entitled to First Amendment protection. As clearly and unequivocally stated in this Court's Memorandum Opinion, Plaintiffs had no evidence and no basis whatsoever to accuse Captain Poznako or Firefighter Fetter of any wrongdoing. The accusations were, at best, made with reckless disregard for the fact that they were false; did not constitute protected speech under the First Amendment; and, Plaintiffs' lawsuit was, without question, meritless.

II. Costs and Attorneys' Fees.

The City seeks reimbursement for costs in the amount of $15,463.26, as itemized in the amended Itemization of Costs attached to its Reply Brief. (Docket # 96-1.) Rule 54(d)(1) of the Federal Rules of Civil Procedure provides, "Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). "This language creates a presumption in favor of awarding costs, but allows denial of costs at the discretion of the trial court." *Soberay Mach. & Equipment Co. v. MRF Ltd., Inc.*, 181 F.3d 759, 770 (6th Cir. Ohio 1999) (quoting *White & White, Inc. v. American Hospital*

Supply Corp., 786 F.2d 728, 730 (6th Cir. Mich.1986)). In determining whether to deny a request for costs, the Court may consider whether the taxable costs are necessary or reasonable; whether the prevailing party should be penalized for unnecessarily prolonging trial or for injecting unmeritorious issues; whether the prevailing party's recovery is so insignificant that the judgment amounts to a victory for defendant; and, whether the litigation is close and difficult. The Court may also consider the good faith of the losing party and the "propriety with which the losing party conducts the litigation." *White*, 786 F.2d at 730.

28 U.S.C. § 1920, entitled Taxation of Costs, lists those expenses which may be taxed as costs, providing as follows:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title [28 USCS § 1923];
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation

> services under section 1828 of this title [28 USCS § 1828].

The costs sought by the City are permitted under Section 1920; were both reasonable and necessary; and, no reduction is warranted. Accordingly, the City is entitled to costs in the amount of $15,463.26.

The City also seeks attorneys' fees, estimated to be between $110,000 and $125,000, on the basis that the claims asserted by Plaintiffs in this case were unreasonable and frivolous.[1] "Attorney's fees may be awarded to prevailing Defendants in civil rights litigation under 42 U.S.C. § 1988 upon a finding that the suit was frivolous, unreasonable, or without foundation." *Meyers v. City of Chardon*, Case No. 1:14 CV 2340, 2015 U.S. Dist. LEXIS 48292, at *33 (N.D. Ohio Apr. 13, 2015) (citing *Hughes v. Rowe*, 449 U.S. 5, 14 (1980); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *Wolfe v. Perry*, 412 F.3d 707, 720 (6th Cir. Mich. 2005); *N.E. v. Hedges*, 391 F.3d 832, 836 (6th Cir. Ky. 2004)).

As summarized briefly above – and discussed at length in the Court's Memorandum Opinion dated August 19, 2016 – Firefighters Bagi and Vojtush had zero evidence of any wrongdoing by Captain Poznako or Firefighter Fetter prior to drafting and signing the Letter at the center of this lawsuit. There was nothing

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[1] The City notes that its estimation of fees does not include fees related to Plaintiff Vojtush's FMLA claim which was voluntarily dismissed, nor does it include any fees related to Plaintiffs' appeal of this Court's August 19, 2016 Order granting summary judgment in favor of the City.

at all to substantiate the accusations made therein. The allegations were investigated within the Fire Department and the Parties proceeded to arbitrate their claims pursuant to the applicable Collective Bargaining Agreement. Each time, the investigation of Plaintiffs' accusations revealed no evidence of wrongdoing.

Despite not having any evidence to support the allegations they made against Captain Poznako and Firefighter Fetter, Plaintiffs then filed this lawsuit, forcing the City to once again address Plaintiffs' meritless claims against Captain Poznako and Firefighter Fetter and defend itself against baseless claims that Plaintiffs' First Amendment rights had been violated. Firefighter Bagi drafted – and both he and Firefighter Vojtush signed – the Letter without any evidence that the serious and damaging accusations contained therein were true and neither acknowledged the fact that the allegations were repeatedly investigated and found to be baseless. The City was forced to expend significant resources – countless hours and great expense – ultimately borne by the taxpayer. The First Amendment under these facts and circumstances does not protect statements that are false or statements that are made with reckless disregard for their falsity. There was no basis for this lawsuit. Accordingly, the City is entitled to attorneys' fees and shall submit documentation within 10 days of this Order. Plaintiffs shall have 10 days thereafter to respond.

III. Conclusion.

The Motion for Bill of Costs and Fees filed by Defendant, City of Parma (Docket #93), is hereby GRANTED. The City is awarded costs in the amount of $15,463.26 and shall submit documentation of its attorney's fees within 10 days of this Order. Plaintiffs shall have 10 days thereafter to respond.

IT IS SO ORDERED.

s/_____
DONALD C. NUGENT
United States District Judge

DATED: December 14, 2016

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-3793

[Filed December 17, 2019]

SCOTTIE A. BAGI, ET AL.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
CITY OF PARMA, OHIO,	)
	)
Defendant-Appellee.	)
	)

BEFORE: BOGGS, SUHRHEINRICH, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge White would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

s/_____
Deborah S. Hunt, Clerk