Batz v. City of Sebring

United States District Court for the Southern District of Florida

July 30, 2019, Filed

CASE NO. 17-14107-CIV-MARRAIMAYNARD

Reporter
2019 U.S. Dist. LEXIS 127789 *

BRADLEY BATZ, Plaintiff, v. CITY OF SEBRING, Defendant. .

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Opinion

[*1] **REPORT AND RECOMMENDATION ON**

DEFENDANT'S MOTION FOR ATTORNEY FEES (DE 57)

THIS CAUSE comes before this Court upon an Order of Reference (DE 58) and the

above Motion. Having reviewed the Motion and Response, noting that no Reply was filed, this

Court recommends as follows:

1. The Defendant is the prevailing party in this case. The District Court granted the Defendant's Motion for Summary Judgment and rendered Final Judgment in its favor. As the prevailing party, the Defendant moves pursuant to Rule 54(d), Fed.R.Civ.P., for an award of attorney fees. The Defendant claims $100,328.50 as the reasonable amount of attorney and paralegal fees that it incurred to defend itself.

2. The Defendant does not cite what statute permits him to shift his attorney fee to the Plaintiff. Implicit in his Motion is that he is moving under 42 U.S.C. § 1988. Subsection (b) of that statute permits "the court, in its discretion, [to] allow the prevailing party ... a reasonable attorney's fee". However, when the prevailing party is the defendant, case law imposes a qualifier. In that situation the court may award the defendant attorney fees only if the plaintiffs § 1983 lawsuit was "frivolous, unreasonable, or without foundation". See Sullivan v. Sch. Bd. of

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Pinellas County, 773 F.2d 1182, 1188 (11th Cir. 1985) (citing [*2] the seminal case of Christiansburg

Garment Co. v. E.E.O.C., 434 U.S. 412 (1978)).

3. The purpose of the Christiansburg standard is to prevent the fee-shifting statute of

§ 1988 from discouraging plaintiffs from bringing only "air-tight" § 1983 claims. The following opinions were rendered in the context of litigation analogous to the instant one: Southern Atlantic Cos. LLC v. Sch. Bd. of Orange County, 699 Fed.Appx. 842 (11th Cir. 2017), Howard v. Augusta-Richmond County, 615 Fed.Appx. 651 (11th Cir. 2015), Watson Constr. Co. v. City of Gainesville, 256 Fed.Appx. 304 (11th Cir. 2007), Patsalides v. City of Fort Pierce, 2017 WL 10402990 (S.D.Fla. 2017), Wixson v. Sch. Bd. ofMartin County, Case No. 14-14460-CIV (S.D.Fla. Sept. 11, 2015 at DE 58), and Indigo Room, Inc; v. City of Fort Myers, 2015 WL 4069595 (M.D.Fla. 2015). From them this Court draws the below guidelines for how to apply the Christiansburg standard and how to determine whether a case is "frivolous, unreasonable, or without foundation".

4. The Christiansburg standard requires a court to consider a case objectively. A plaintiffs subjective intent---that is, whether a plaintiff subjectively perceived his lawsuit as frivolous or not---is irrelevant. As for the degree of frivolousness, the Christiansburg standard sets a high bar. It requires frivolousness that falls just short of subjective bad faith. It is not enough that the plaintiff lost on the merits. Indeed the case law cautions courts not to measure frivolousness with the benefit of hindsight on a post-hoc basis nor to assume that a case is frivolous merely because the plaintiff lost. Accommodation [*3] must be made for the unpredictable course of litigation. The way in which the litigation played out can be informative, however. One

point of inquiry is (1) whether the plaintiffs claims for relief were fact-specific and whether the

plaintiff presented substantial evidence and legal arguments in support. Two additional points of 2 of 12

inquiry are (2) the amount of effort that the defendant expended to successfully defend itself

against the litigation and (3) how carefully and attentively the court considered the plaintiffs claims in the dispositive ruling. The Christiansburg standard is met when a plaintiff wholly fails to substantiate his claims or persists in a legal argument despite learning of on-point and binding

precedent that is clearly to the contrary.

5. To determine whether the instant litigation meets the Christiansburg standard of frivolousness, this Court reviews the evidence in the light most favorable to the plaintiff. See Patsalides, 2017 WL 10402990 (citing Johnson v. Florida, 348 F.3d 1334 (11th Cir. 2003)). The subject of this lawsuit is the decision by the City of Sebring to fire the Plaintiff who at the time had served as the chief of its fire department for the prior ten years. He had worked for the fire department since 1990, all told. The [*4] city's mayor conceded at deposition that the Plaintiffs technical knowledge of the fire and life safety codes is probably best in the state. His annual performance reviews consistently were laudatory, the Plaintiff asserts. The Plaintiffs direct supervisor and the person who conducted his performance reviews was City Administrator Scott Noethlich.

6. What precipitated the Plaintiff's termination was a dispute that arose between him and the city over what to do about the historic hotel, Kenilworth Lodge. The Kenilworth Lodge is a one-hundred-year-old, four-story tall building of wooden construction. It first came to the Plaintiff's attention on May 10, 2016 when a small fire broke out there. The fire was unrelated to the building's age or physical state. However the follow-up fire safety inspection revealed a variety of concerns regarding the building's fire prevention and suppression systems, such as non-functioning sprinkler and alarm systems, and fire hazards such as exposed wires. The

Plaintiff initiated steps to compel the hotel to bring itself into compliance with Florida's Fire

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Prevention Code and the National Fire Protection Association's Life Safety Code which Florida mandates [*5] at§ 633.202, Fla. Stat. The Plaintiff wore the hats of both the Fire Chief and Fire

Inspector, and as such, he was acting within the scope of his authority.

7. Several months passed without the hotel taking any substantive action towards

fire code compliance. The issue of the hotel's non-compliance---and indeed whether the hotel

even needed to bring itself into compliance in the first place---became a matter of dispute_

between the Plaintiff and certain city officials. Council Member Mark Stewart, who owned 49%

of the hotel, opposed the Plaintiffs actions. City Administrator Noethlich also opposed the

Plaintiffs actions. He felt that as a historic building, the hotel should be exempt. City

Administrator Noethlich began communicating with the hotel owners directly, giving them

instructions contrary to the Plaintiff's. The Plaintiff suspected the back-channel communications

to be the reason why the hotel remained non-compliant.

8. The Plaintiff persisted in his effort to have the hotel bring itself into compliance. The Plaintiff also began complaining about the interference. On August 5, 2016 the Plaintiff met with several city officials including City Administrator Noethlich to discuss his plan to issue a condemnation [*6] notice by which to give the hotel a final deadline of seven days to comply. On August 12, 2016 the mayor, Council Member Lowrance (who also served as the city's liaison with the fire department), City Administrator Noethlich, and the city attorney met and agreed to proceed with the condemnation notice.

9. Afterwards City Administrator Noethlich voiced concern that the hotel would respond to the condemnation notice by declaring bankruptcy. Learning of that prompted the Plaintiff on August 15, 2016 to email City Administrator Noethlich and the other involved city

officials to inquire whether the condemnation process would proceed as originally agreed. The

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Plaintiff used that email to request formal clarification for what should happen with the hotel. The Plaintiff expressed confusion over why the city did not seem to be following through on the condemnation plan and frustration over his exclusion from conversations on the matter. The Plaintifftherefore formally requested the city to advise him "in writing as to the step by step procedures that it wishes for [him] to follow".

10. City Administrator Noethlich reached out to the Plaintiff personally to try and convince him to stop the [*7] planned condemnation. After he was unable to change the Plaintiffs mind, he clarified that the condemnation should proceed forward as originally planned.

11. The hotel did not bring itself into compliance by the condemnation notice's deadline. (Nor did the hotel file for bankruptcy.) Before the hotel was to be formally condemned, the involved city officials including City Administrator Noethlich and Council Member Stewart called the Plaintiff to a meeting. That meeting took place on August 16, 2016. Council Member Stewart spoke to the Plaintiff in an aggressive manner in opposition to the hotel's condemnation. The Plaintiff persisted in his pursuit of condemnation as a means to compel at least some needed repairs. The Plaintiff also complained about the city's lack of support and indeed its obstructive counter-actions.

12. City Administrator Noethlich called the Plaintiff for another meeting. This time the subject of the meeting was the Plaintiffs complaints to Council Member Carlisle about the lack of support. Now the city's mayor expressed disapproval of the Plaintiffs continued pursuit of condemnation. This meeting took place on September 22, 2016.

13. On November 7, 2016 the city [*8] placed the Plaintiff on administrative leave. The mayor recommended the Plaintiffs termination because of complaints from business owners and

firefighter employees about his demeanor and attitude. (There is no written record of these

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complaints.) The mayor referenced a recent incident between the Plaintiff and Council Member Carlisle as an additional example of the Plaintiffs negative behavior. The mayor also referenced

the Plaintiffs own complaints about the city and its lack of support. The city denies any relationship between the Plaintiffs termination and the hotel matter. City officials met on December 6, 2016 and voted to formally terminate the Plaintiff. (Because the Plaintiff was a department head, his termination required a majority vote by city council members.) Council Members Scott Stanley, Charlie Lowrance, Lenard Carlisle, and Bud Whitlock followed the mayor's recommendation and voted to officially terminate the Plaintiffs employment. Council Member Stewart abstained; the mayor and City Administrator Noethlich had no vote.

14. The Plaintiff sued the city alleging that his termination was in substance retaliation for seeking the hotel's code compliance and for complaining [*9] about the interference in that effort. The specific complaints subject ofthis lawsuit are his August 15, 2016 email and those he raised orally at the August 23rd and September 22nd inquiry meetings. Those complaints constitute speech that is protected both constitutionally and by Florida statute, he argues.

15. First, he argues that the First Amendment protected that exercise of speech. The District Court discussed the legal framework of that theory of relief in its Order Granting Motion for Summary Judgment (DE 48). The District Court's legal discussion shows how, as a general rule, the First Amendment does protect a public employee who speaks about a matter of public concern. However that First Amendment protection does not extend so far as to apply to this particular situation, the District Court concluded. This is because, as the District Court explained, the Plaintiff did not speak as a citizen but rather as an employee; he spoke within the workplace

setting rather than in a public forum; and the subject of his speech was his own employment

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rather than a public matter. Because his speech occurred in the employment context, the

Defendant had a legitimate interest to control it.

16. The Plaintiff argues that his First Amendment retaliation [*10] claim was reasonable even if it ultimately proved unsuccessful on the merits. Enforcing the fire and life safety codes is his job, not having to speak out against interference in a particular enforcement action, he stresses citing to Givhan v. Western Line Consol. School District, 439 U.S. 410 (1979) and Lane

v. Franks, 573 U.S. 228 (2014) in support. The Plaintiff also points out the highly unusual nature of the two inquiry meetings to which he was summoned. The meetings' unusual nature is evidence ofhow he was acting outside the scope ofhis usual job duties, the Plaintiff argues.

17. The Plaintiff disagrees with the District Court's legal reasoning for why Lane does not apply to him. The Plaintiff argues that he was not complaining about the terms or conditions of his employment. Consequently his situation is distinguishable from cases such as Boyce v. Andrews, 510 F.3d 1333, 1343-46 (11th Cir. 2007), King v. Bd. of County Comm'rs, 916 F.3d 1339, 1347 (11th Cir. 2019), Alves v. Bd. of Regents, 804 F.3d 1149, 1166 (11th Cir. 2015), and Watkins v. Bowden, 105 F.3d 1344, 1353 (11th Cir. 1997), which declined to extend free speech protection to employment grievances. The subject of his speech was a matter of public concern: the risk of fire that the hotel posed.

18. The Plaintiff argues that his speech also was protected by statute: Florida's Whistle-blower's Act, § 112.313(6) and§ 112.3187, Fla. Stat., ("FWA"). As the District Court itself emphasized at page 28 of its Order, the FWA: "is remedial in nature and should be construed liberally in favor [*11] of granting access to the remedy so as not to frustrate the legislative intent of preventing retaliatory action against employees and persons who disclose certain types

of government wrongdoing to appropriate officials", citing Rice-Lamar v. City of Fort

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Lauderdale, 853 So.2d 1125, 1132 (Fla. 3rd DCA 2003) (internal citations omitted). The Plaintiff

sought to invoke FWA's broad remedial scope.

19. In its summary judgment order, the District Court engaged in an in-depth legal analysis to determine whether the evidence shows any violation of that statute under its specific definitions. As the District Court summarized at page 29 of its Order: "the FWA sets forth several specific requirements regarding the types of disclosures protected, to whom those disclosures must be made, and who is protected." Consequently there were several facets to the District Court's legal analysis. The District Court resolved a few of them in the Plaintiffs favor, but ultimately, in the end analysis, the District Court found no meritorious FWA-based claim. There is no need to repeat that lengthy analysis here. Instead it suffices for present purposes to show how the Plaintiff at least did present reasonable FWA claims and did proffer evidence in support [*12] of them, even if ultimately he did not prevail on them. The Plaintiff defends his FWA claims at pages 10-17 of his Response.

20. The District Court did not construe the subject of the Plaintiffs August 15, 2016 email to concern official corruption, misfeasance, or malfeasance. The Plaintiff disagrees with that finding and argues that there was evidence of such. Underlying that email was the interference that he was encountering, and that interference financially benefitted Council Member Stewart even if only indirectly. The Plaintiff argues that the involved city officials were

acting corruptly to obtain a fire code exemption for the hotel. Moreover that email should be . construed in the greater context ofwhat was happening, the Plaintiff adds. "The August 15,2016 email can thus be seen as part of that ongoing course of resisting and complaining about Noethlich's interference in the enforcement process, and should be construed in light of that history", the Plaintiff summarizes at page 12 of his Response. The Plaintiff furthers that his

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email should be construed as the type of written complaint that FWA protects. The email's

recipient, City Administrator Noethlich, himself regarded [*13] it as a "complaint" and accusation "of

not following through with the decision to condemn the [hotel]."

21. Further along the legal analysis, the District Court assumed in the Plaintiffs favor that the oral complaints that the Plaintiff had raised at the two inquiry meetings did support a prima facie FW A case. The District Court therefore pro~eeded to conduct a McDonnell Douglas shifting burden of proof analysis. The District Court noted the legitimate, non-retaliatory reason that the Defendant gave for firing the Plaintiff. It was supported by the affidavits of the voting council members where they recounted business owners' descriptions of the Plaintiffs demeanor and attitude as difficult. Alternatively the mayor based his termination recommendation on the Plaintiffs "relations with the City Council and administration". The Plaintiff then failed to rebut that the Defendant's proffered reason as pretext, the District Court found. The District Court also stressed how the

voting council members were not directly involved in the hotel code enforcement and condemnation matter. In his Response the Plaintiff restates his position that the evidence, taken on the whole, reasonably could support [*14] the inference of pretext and that the real motivation for his termination was retaliation for handling the hotel's fire code violations differently than it wanted.

22. The foregoing shows how the Plaintiffs free speech retaliation claims were not frivolous, unreasonable, or without foundation. To the contrary, the Plaintiffs claims for relief involved a matter of at least some public concern, that rested on a substantial body of evidence, and were governed by complex legal standards. Underlying this litigation is the Plaintiffs attempt as the city's Fire Chief to compel a specific hotel to improve fire hazard mitigation.

There is no dispute that the hotel fell short of the fire safety codes. This case also involves

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alleged interference by certain city officials in that process where that interference might have

benefitted a council member. Despite that interference, the hotel still was condemned. Soon

afterwards, however, the city fired the Plaintiff for reasons that appear inconsistent, at least superficially, to what his generally satisfactory and well-established employment record with the

city's fire department including the ten years as its Fire Chief.

23. Ultimately the Plaintiff [*15] did not prevail on any of his free speech retaliation claims.

However both the length ofthe District Court's summary judgment ruling---at 49 pages long---

and the depth of its analyses imply reasonable claims for relief. That ruling, in turn, synthesized

down the 83 pages of summary judgment briefing and 700 pages of exhibits. The amount of the

attorney fees---$1 00,328.50---that the Defendant incurred in defending itself against those claims

likewise corroborates the reasonableness of the litigation by further showing how its resolution

entailed careful attention and review. That the Plaintiff ultimately would not prevail on his

claims was not necessarily evident when he first filed his lawsuit. Nor did the Plaintiff

unnecessarily prolong the litigation. The summary judgment analysis depended on discovery that

was gathered during the pre-trial stage. Such important, dispositive discovery included affidavits

from and depositions of the various involved city officials. Consequently this case does not meet

the Christiansburg standard for shifting the Defendant's attorney fee to the Plaintiff to pay.

24. Nor do the three Sullivan factors, to the extent they help guide and inform the

Christiansburg [*16] analysis, support a finding of frivolousness. Those three factors are: (1) whether

the plaintiff established a prima facie case, (2) whether the defendant offered to settle, and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits. See Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1177-78 (11th Cir. 2005). Regarding the first factor, the District Court found that the Plaintiff did establish a prima facie FWA case with

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respect to his oral complaints. This Court adds that none of his claims for relief were dismissed

under Rule 12(b) for the failure to state a claim but rather were resolved at the summary

judgment stage on the basis of the full evidentiary record. The Plaintiff argues that the second

factor weighs in his favor. The parties went to mediation where the Defendant offered to settle

this case for a significant amount. (Pursuant to Local Rule 16(g)(2), the Plaintiff preserves the

confidentiality of what happened at mediation by not disclosing the specific amount.) Regarding

the third factor, the case did not proceed to trial. However it did proceed to the merits-

determination stage. To the extent the Sullivan factors weigh in the Defendant's favor, that does

not necessarily mean its Motion for Attorneys Fees should be granted. [*17] As the Plaintiff argues at

pages 21-24 ofhis Response citing Lawver, 300 Fed.Appx. at 773, Mersch v. City of Coral

Springs, 2011 WL 13175630, *6 (S.D.Fla. 2011), Bates v. Islamorada, 2007 WL 2113586, *7

(S.D.Fla. 2007), and Manuel v. Jamison, 2017 WL 563185, *2-3 (M.D.Fla. 2017), his lawsuit

was overall reasonable even if the Sullivan factors weigh against him.

25. As the Plaintiff points out at pages 6-7 of his Response, the standard that FWA

uses for shifting fees is similar to but more rigorous than the Christiansburg standard. FWA

permits an award of attorney fees to the prevailing defendant-employer if the losing plaintiff-

employee filed "a frivolous action in bad faith." See § 112.3187(9)(d), Fla. Stat. Consequently, if

the Defendant does not meet the lesser Christiansburg standard, then it follows that the

Defendant does not meet FWA's standard, either.

CONCLUSION

26. The merits of the Plaintiffs lawsuit is not at issue here. The District Court ruled

on the lawsuit's merits in its summary judgment order. What is at issue here is whether the

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Plaintiffs lawsuit is frivolous. For that analysis, this Court construes the record in a light favorable to the Plaintiff. As a result the review that this Court undertakes above may different somewhat and may not include all of the findings that the District Court made in the Defendant's favor. While the Defendant ultimately prevailed, [*18] record shows that the Plaintiff at least brought

his free speech retaliation claims with a reasonable basis. In other words this case was not frivolous. The Plaintiff offers a vigorous and persuasive defense of his lawsuit in his Response (to which the Defendant does not reply.) For all of the above reasons, this Court finds that the Defendant does not meet the Christiansburg standard for shifting its attorney fee to the Plaintiff to pay.

ACCORDINGLY, this Court recommends to the District Court that the Defendant's Motion for Attorney Fees (DE 57) be **DENIED.**

The parties shall have fourteen (14) days from the date ofthis Report and

Recommendation within which to file objections, if any, with the Honorable Kenneth A Marra,

the United States District Judge assigned to this case. Failure to file timely objections shall bar

the parties from a de novo determination by the District Court of the issues covered in this Report and Recommendation and bar the parties from attacking on appeal the factual findings

contained herein. LoConte v. Dugger, 847 F.2d 745, 749-50 (11th Cir. 1988), cert. denied, 488

U.S. 958 (1988).

DONE AND SUBMITTED in Chambers at Fort Pierce, Florida, this a_~ ~ay of July, 2019.

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UNITED STATES MAGISTRATE JUDGE 12 [*19] of 12