

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

NATHANIEL BORRELL DYER,

Plaintiff,

v.

ATLANTA INDEPENDENT SCHOOL
SYSTEM,

Defendant.

Civil Action No. 1:18-CV-03284-TCB

DEFENDANT’S MOTION FOR ATTORNEY’S COSTS AND FEES

Pursuant to 42 U.S.C. § 1988(b), Federal Rule 54(b), Federal Rule 54(d), Local Rule 54.1, and Local Rule 54.2, Defendant Atlanta Independent School System (“AISS”) or “District”), the prevailing Defendant in the above-styled matter, submits this Motion for Attorney’s Costs and Fees, stating as follows:

PROCEDURAL BACKGROUND

On June 4, 2018, Plaintiff, proceeding *pro se*, filed this lawsuit in the Superior Court of Fulton County. [Doc 1-1.] Dyer challenged the Atlanta Board of Education’s decision to suspend him from AISS meetings after he used offensive language during its public meetings. Dyer asserted a claim for a violation of his First Amendment rights, a claim for a violation of his procedural due process rights under the Fourteenth Amendment, and three claims under state law. [*Id.*] On July 9, 2018,

AISS removed the case to this Court. [Doc. 1].

AISS filed a Pre-Answer Motion to Dismiss on July 16, 2018. [Doc. 2.] Plaintiff's response was due on or before July 30, 2018, yet Plaintiff did not respond until August 15, 2018, after this Court directed him to show cause as to why his Complaint should not be dismissed. [Doc. 6, 7, 8.] In addition to being untimely, Plaintiff's response to AISS's Motion to Dismiss was thirty-four pages, well above Local Rule 7.1(D)'s twenty-five-page limitation. [Doc. 9]. AISS filed a reply brief in support of its Motion to Dismiss on August 29, 2018. [Doc. 10.] Plaintiff continued to violate the Local Rules of this Court by filing a surreply without permission to do so. [Doc. 10.] AISS moved the Court to disregard the surreply, to which Plaintiff responded by filing a Motion for Leave to File a Surreply, a Motion to Withdraw his Motion for Leave to File a Surreply, then an Amended Response in Opposition to AISS's Motion to Dismiss. [Docs. 15, 17, 18.]

On March 14, 2019, the Court granted AISS's Motion to Dismiss, in part. [Doc. 22.] In its Order, this Court dismissed Dyer's state-law claims (counts 3, 4, and 5) on the grounds that they were barred by sovereign immunity. [*Id.* at 31-33.] The Court denied AISS's motion to dismiss Dyer's First Amendment claim (count 1) and Fourteenth Amendment procedural due process claim (count 2). [*Id.* at 24, 31.] The Court also ruled that any claims arising from Dyer's suspensions prior to

June 4, 2016, are time-barred, with the exception that Dyer’s First Amendment claim may include a portion of the January 2016 suspension, which did not end until after June 4, 2016. [*Id.* at 8, 10 fn. 4.]

On October 3, 2019, AISS moved for summary judgment on Dyer’s remaining claims. [Doc. 34.] On December 5, 2019, the Court issued an Order granting AISS’s Motion for Summary Judgment in its entirety, thus closing this matter. [Doc. 42.]

ARGUMENT AND CITATION TO AUTHORITY

I. AISS IS ENTITLED TO RECOVER ITS LITIGATION COSTS UNDER FED. R. CIV. P. 54.

Federal Rule of Civil Procedure 54(d) provides that “costs other than attorney’s fees shall be allowed to the prevailing party unless the court otherwise directs.” *Hall v. Freeman*, 1:07-CV-0831-JOF, 2008 WL 11322130, at *2 (N.D. Ga. June 11, 2008). “Rule 54(d) ‘establishes a presumption that costs are to be awarded to a prevailing party.’” *Id.* (citing *Chapman v. Al Transport*, 229 F.3d 1012, 1038-39 (11th Cir. 2000) (en banc)).

There is no question that AISS is the prevailing party. The Court dismissed all of Plaintiff’s state law claims at the motion to dismiss phase. [Doc. 22.] Then, the Court entered summary judgment on Plaintiff’s remaining federal claims. [Doc. 42.] Because AISS is the prevailing party, the Federal Rules presumptively entitle it to recoup its litigation costs. And this Court has never instructed the parties that they

cannot recover costs in this matter.

To date, AISS has incurred \$3,159.02 in costs, all of which should be awarded to AISS. Pursuant to Local Rule 54.1, AISS will submit a bill of costs within thirty days of entry of the Court's Order on AISS's Motion for Summary Judgment.

II. 42 U.S.C. § 1988 ENTITLES AISS TO RECOVER ITS REASONABLE ATTORNEY'S FEES.

42 U.S.C. § 1988 permits the prevailing party in a case brought under 42 U.S.C. § 1983 to recover its reasonable attorney's fees. In relevant part, § 1988 states:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title,...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs

42 U.S.C.A. § 1988(b). The Supreme Court has recognized that, in enacting § 1988, "Congress sought 'to protect defendants from burdensome litigation having no legal or factual basis.'" *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978)). To achieve that goal, Section 1988 authorizes a district court to award attorney's fees to a defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Id.* "[I]f a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney's

fees incurred by the defense.” *Christiansburg*, 434 U.S. at 422. “The Defendant need not prove that all of the claims were frivolous to recover fees for defending against one or more that was.” *Adams v. Austal, U.S.A., L.L.C.*, 569 F. App’x 728, 731 (11th Cir. 2014).

In the cases in which Eleventh Circuit courts have sustained findings of frivolity warranting an award of fees, plaintiffs have typically failed to “introduce any evidence to support their claims.” *Sullivan v. Sch. Bd. of Pinellas Cty.*, 773 F.2d 1182, 1189 (11th Cir. 1985). Other factors that may be relevant to this inquiry include (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. *Cordoba v. Dillard’s, Inc.*, 419 F.3d 1169, 1176-77 (11th Cir. 2005) (citing *Sullivan*, 773 F.2d at 1189). These factors, however, are “general guidelines only, not hard and fast rules,” and “[d]eterminations regarding frivolity are to be made on a case-by-case basis.” *Id.*

As discussed in the following, AISS is entitled to recover its attorney’s fees. Plaintiff knowingly asserted state-law claims against AISS that were barred by sovereign immunity, asserted claims that were barred by the statute of limitations, and asserted federal law claims for which he lacked a factual or legal basis.

a. Plaintiff knew or should have known that his state-law claims against AISS were barred by sovereign immunity.

It is well established that the Georgia Constitution grants sovereign immunity to school districts. Ga. Const. art. I, § II, ¶ IX(e); *Bomia v. Ben Hill Cty. Sch. Dist.*, 320 Ga. App. 423, 424, 740 S.E.2d 185, 188 (2013); *Coffee Cty. Sch. Dist. v. Snipes*, 216 Ga. App. 293, 296, 454 S.E.2d 149, 151 (1995). Sovereign immunity is not a mere defense to the merits of a claim, but instead, deprives courts of subject matter jurisdiction to consider a claim against a school district in the first place. *Dept. of Transp. v. Dupree*, 256 Ga. App. 668, 672, 570 S.E.2d 1, 5 (2002).

A party seeking to assert a tort claim against a school district must point to a specific legislative act that explicitly waives sovereign immunity and describes the extent of the waiver. *See* Ga. Const. art. I, § II, ¶ IX(e); *McCobb v. Clayton Cty.*, 309 Ga. App. 217, 218, 710 S.E.2d 207, 210 (2011). Here, the burden to identify a statutory waiver fell on Plaintiff. *Board of Regents, etc. of Ga. v. Daniels*, 264 Ga. 328, 329, 446 S.E.2d 735 (1994) (“[A] waiver of sovereign immunity...must be established by the party seeking to benefit from that waiver.”). Plaintiff knew, or should have discovered with any degree of diligence, that these principles governed his state-law claims against AISS.

Yet, Plaintiff brazenly disregarded sovereign immunity and pursued three state law claims against AISS, even though the legislature had never passed a statute

that waived AISS's immunity from those claims. On July 16, 2018, AISS filed a Motion to Dismiss, asserting, among other defenses, that sovereign immunity barred Plaintiff's state-law claims against AISS. Plaintiff belatedly responded to that motion and failed to assert *any* waiver of sovereign immunity in his response. [Doc. 10.]

That Plaintiff asserted three claims, even though he never had a good faith argument for waiver of sovereign immunity, warrants an award of attorney's fees under 42 U.S.C. § 1988(b) and Federal Rule of Civil Procedure 54.

b. Plaintiff's claims included allegations that were barred by a two-year statute of limitations.

A two-year statute of limitations governed all of Plaintiff's claims—those he raised under state law and those he raised under 42 U.S.C. § 1983. AISS cited to undisputed authority in its Motion to Dismiss to alert Plaintiff of the applicable statutory periods. Despite that authority, Plaintiff argued in his response to AISS's Motion to Dismiss that all of his claims were timely under Georgia's "discovery rule." [Doc. 8.] Almost three months later, Plaintiff finally conceded that a two-year statute of limitations barred his claims predating June 4, 2016. [Doc. 18.] Plaintiff should not have asserted and then continued to pursue untimely claims. This Court should permit AISS to recoup the attorney's fees it spent defending against these meritless claims.

c. Plaintiff's Section 1983 claims were frivolous and without factual or legal foundation.

Plaintiff has never had the necessary factual basis or legal authority to maintain a viable First Amendment or Fourteenth Amendment claim against AISS. Plaintiff's insistence on pursuing this lawsuit despite the manifest lack of support for his claims demonstrates that Plaintiff pursued this action unreasonably and in bad faith.

In *Sullivan v. School Board*, the Eleventh Circuit analyzed cases involving "frivolity determinations" and stated that "findings of frivolity have been sustained when either a motion for summary judgment or a motion for involuntary dismissal, Fed. R. Civ. P. 41(b), has been granted in instances where plaintiffs did not introduce any evidence to support their claim." *Head v. Medford*, 62 F.3d 351, 355-56 (11th Cir. 1995) (citing *Sullivan*, 773 F.2d at 1189). In *Walker v. Fulton County School District*, Judge Cooper, citing a magistrate judge's recommendation, found that the plaintiff, a former teacher, presented no evidence that his race was a factor in the school district's determination of his compensation. 1:12-CV-4030-CC, 2015 WL 10709901, at *3 (N.D. Ga. Sep. 30 2015). The court also noted that the plaintiff admitted that he did not present evidence that his identified comparator earned higher wages than him, and that even if she did earn higher wages than him, that such discrepancy was based on race. *Id.* The court ultimately awarded attorney's

fees to the school district. *Id.*

The same is true here. AISS put Plaintiff on notice in its Motion to Dismiss of the legal hurdles that Plaintiff would have to overcome to prevail on his First Amendment and Fourteenth Amendment claims. Yet, Plaintiff neglected to take any discovery and failed to offer any evidence to support either claim in his response to AISS's Motion for Summary Judgment.

In response to AISS's argument that this Court should grant summary judgment on Plaintiff's First Amendment claim, Plaintiff needed to identify a genuine issue of material fact. AISS argued that any restrictions on Plaintiff's speech were content-neutral, narrowly tailored to achieve a significant government interest, and left ample alternative channels of communications for Plaintiff to convey his desired message. Plaintiff rehashed the same legal argument he made in his response to AISS's Motion to Dismiss and pointed to no evidence suggesting the existence of a material issue of fact. Plaintiff did not offer any evidence to support his Fourteenth Amendment claim either. Rather, he argued that summary judgment should not be granted on his due process claim based on a faulty legal argument, which this Court rejected.

This case represents the quintessential type of frivolous lawsuit that Congress sought to protect defendants from in enacting 42 U.S.C. § 1988. Accordingly, AISS

is entitled to recover reasonable attorney's fees associated with defending this case.

CONCLUSION

For the foregoing reasons, AISS respectfully asks this Court to grant this Motion for Attorney's Costs and Fees. As of the date of this filing, AISS currently estimates its costs to be in the amount of \$3,159.02 and its fees to be in the amount of \$73,977.50. In accordance with Local Rule 54.1, within thirty days of the entry of the Court's Order on AISS's Motion for Summary Judgment, AISS will file a bill of costs. Further, pursuant to Local Rule 54.2(A)(2), within thirty days of the filing of this Motion, AISS will file a detailed specification and itemization of the requested fee award, along with appropriate affidavits and other supporting documentation.

Respectfully submitted this 19th day of December, 2019.

/s/MaryGrace K. Bell

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was prepared using Times New Roman font, 14-point type, which is one of the font and print selections approved by the Court in L.R. 5.1(C).

This 19th day of December, 2019.

/s/MaryGrace K. Bell

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2019, I served a copy of **DEFENDANT’S MOTION FOR ATTORNEY’S COSTS AND FEES** via first-class mail and CM/ECF notification to the following:

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