

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY

TEXAS MEDICAL PROVIDERS PERFORMING
ABORTION SERVICES, et al.,
Plaintiffs,

-vs-

Case No. A-11-CA-486-SS

DAVID LAKEY, M.D., et al.,
Defendants.

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically the State Defendants' Motion for Attorneys' Fees [#126], Plaintiffs' response [#127] thereto, and the State Defendants' reply [#128]. Having reviewed the documents, the relevant law, and the file as a whole, the Court now enters the following opinion and order DENYING the State Defendants' motion.

Background

On June 13, 2011, Plaintiffs filed their original class action complaint, in which they alleged Texas House Bill Number 15 ("the Act"): (1) was unconstitutionally vague; (2) violated the First Amendment rights of both physicians and patients; and (3) violated the Equal Protection Clause. Plaintiffs subsequently amended their complaint to include claims that the Act violated women's rights to bodily integrity, and subjected abortion facilities to illegal searches and seizures. Plaintiffs moved to certify their proposed plaintiff and defendant classes on June 17 and July 22, respectively. Defendant David Escamilla moved to dismiss Plaintiffs' complaint on July 1, 2011, and Defendants

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Lakey and Robinson filed several motions to strike on July 5. Plaintiffs further asked the Court to grant a preliminary injunction on the basis of their First Amendment, Equal Protection, and vagueness challenges to the Act.

On August 30, 2011, the Court entered an order disposing of all of these motions. Specifically, the Court granted Plaintiffs' motions to certify, dismissed Defendant Escamilla's motion to dismiss, denied Defendants Lakey and Robinson's motions to strike, and granted in part and denied in part Plaintiffs' motion for preliminary injunction. In particular, the Court granted a preliminary injunction on the basis of Plaintiffs' First Amendment "compelled speech by doctors" claim, and three of their vagueness challenges, while denying injunctive relief as to the remainder of their asserted claims.

Defendants appealed this Court's order and, on January 17, 2012, Chief Judge Jones, writing on behalf of herself and Judge Smith, vacated this Court's judgment, and remanded the case for further proceedings. Chief Judge Jones also decided that any further appeals from this case would be heard by the same panel, "[f]or the sake of judicial efficiency." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 572 (5th Cir. 2012). On February 6, 2012, the Court granted Plaintiffs' motion to dismiss the claims not addressed in the Court's preliminary injunction order, and granted summary judgment in favor of Defendants as to the remaining claims. Plaintiffs did not appeal.

The State Defendants now seek attorneys' fees from Plaintiffs, under 42 U.S.C. § 1988(b). Because Plaintiffs claims were not frivolous, unreasonable or groundless, the Court denies the State Defendants' motion.

Analysis

I. Attorneys' Fees Under 42 U.S.C. § 1988(b) — Legal Standard

42 U.S.C. § 1988(b) states, in part: “In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs” The Supreme Court has interpreted these words to mean that “a district court may in its discretion award attorney’s fees to a prevailing defendant . . . upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.” *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). As the Court went on to explain:

In applying these criteria, it is important that a district court 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. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. . . . [N]o matter how meritorious one’s claim may appear at the outset, the course of litigation is rarely predictable. . . . Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Id. at 421–22.

The Fifth Circuit has echoed this standard, indicating that “[w]e review frivolity by asking whether the case was so lacking in merit that it was groundless, rather than whether the claim was ultimately successful.” *United States v. Mississippi*, 921 F.2d 604, 609 (5th Cir. 1991). More specifically, “[t]he factors important to frivolity determinations are (1) whether plaintiff established a *prima facie* case, (2) whether the defendant offered to settle, and (3) whether the district court dismissed the case or held a full-blown trial.” *Id.* The Fifth Circuit has explained that the restrictive

standard for an award of attorneys' fees to defendants "attempts to prevent any chilling effect on the enforcement of civil rights." *Myers v. City of W. Monroe*, 211 F.3d 289, 292 n.1 (5th Cir. 2000).

II. Application

Though of varying merit, none of Plaintiffs' claims were frivolous, unreasonable, or without foundation. Even the claims on the weaker end of the spectrum—most notably, some of Plaintiffs' vagueness challenges—were not so wholly lacking in merit as to meet the restrictive standard for an award of attorneys' fees to the State Defendants.¹ Likewise, although this Court found Plaintiffs' Equal Protection claims could not justify the entry of a preliminary injunction, the Court finds those claims were neither frivolous nor unreasonable, under the circumstances. As the State Defendants point out, the standard of review for many Equal Protection claims is very deferential to the government; however, awarding attorneys' fees to defendants simply because such claims are ultimately unsuccessful would "discourage all but the most airtight claims," *Christiansburg Garment*, 434 U.S. at 421, and would have a "chilling effect on the enforcement of civil rights," *Myers*, 211 F.3d at 292 n.1. Given the important rights at stake in Plaintiffs' lawsuit, and the nature of constitutional challenges generally, the Court declines to disincentivize similar suits through an award of attorneys' fees to the State Defendants.

The Court further finds that Plaintiffs' decision to voluntarily dismiss some of their claims does not justify an award of attorneys' fees to the State Defendants. In this case, the primary focus of the parties' briefing, and the Court's efforts, was on Plaintiffs' motion for preliminary injunction,

¹ The factors suggested by the Fifth Circuit in *United States v. Mississippi* are not fully applicable here, given the posture of this case. Most notably, it seems unlikely the State Defendants offered to settle this case; nor would the Court expect them to, considering the nature of Plaintiffs' claims. Likewise, although the Court did not dismiss any of Plaintiffs' claims—except upon their own request, after the panel issued its opinion—it also did not conduct a full trial. Ultimately, then, the Court's analysis focuses on the potential merit of Plaintiffs' claims when they were originally asserted.

and the claims asserted therein. These claims were addressed by this Court, and by the Fifth Circuit panel, and the Court has already concluded they were not so groundless as to warrant an award of attorneys' fees to the State Defendants.

Plaintiffs' remaining claims were dismissed before this Court addressed their merits. However, considering those claims now, and regardless of whether they would have ultimately succeeded, the Court finds they were not frivolous, unreasonable, or without merit when they were brought. Further, in light of Chief Judge Jones's opinion, and her decree that further appeals would be heard by the same panel, there could be little doubt that the claims would have received a chilly reception on appeal, even if this Court had found in Plaintiffs' favor on them. Effectively, then, the State Defendants ask the Court to penalize Plaintiffs for dropping plausibly meritorious claims when it became clear they were far less legally viable than originally thought. However, this behavior—voluntarily dismissing a claim when it becomes apparent that it has no reasonable hope of success—is exactly what one would expect from responsible and ethical attorneys. The Court is unwilling to award attorneys' fees to the State Defendants simply because Plaintiffs did not insist on litigating questionable claims to their conclusion.

Conclusion

Although Defendants' ultimately prevailed in this lawsuit, Plaintiffs' claims were sufficiently plausible, when the suit was filed, to preclude an award of attorneys' fees to the State Defendants. Nor does Plaintiffs' requested dismissal of some claims justify such an award.

Accordingly,

IT IS ORDERED that the State Defendants' Motion for Attorneys' Fees [#126] is DENIED.

SIGNED this the 28th day of March 2012.



SAM SPARKS
UNITED STATES DISTRICT JUDGE