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DISTRICT OF UTAH
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IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

KRISTIN FOOTE, Plaintiff, vs. ROGER SPIEGEL, et al., Defendants.	ORDER Case No. 2:94-CV-754(C)

This matter is before the court on the parties' cross-motions for attorney's fees and costs. Having determined that oral argument would not materially assist in the resolution of the questions presented by the pending motions, pursuant to D. Ut. 202(d), the court will rule on the basis of the written memoranda of the parties without the assistance of oral argument. The court now enters the following order based upon the submissions of the parties and the applicable legal authorities.

Background

The facts underlying this lawsuit are, briefly, as follows.[1] On May 8, 1994, defendant Robert Howe, a Utah Highway Patrol officer, pulled over a car driven by plaintiff Kristin Foote. Another Highway Patrol officer, defendant Roger Spiegel, subsequently arrested plaintiff for

[1] The facts of this much-litigated case are more fully set out in several previous decisions, including Foote v. Spiegel, 903 F. Supp. 1463 (D. Utah 1995), Foote v. Spiegel, 118 F.3d 1416 (10th Cir. 1997), Foote v. Spiegel, 995 F. Supp. 1347 (D. Utah 1998), and Foote v. Spiegel, 36 F. Supp. 2d 1320 (D. Utah 1999).

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driving under the influence of drugs and brought her to the Davis County Jail. While at the jail, and prior to her booking, plaintiff was strip searched by defendant Catherine Williams, a correctional officer.

Various tests administered to plaintiff revealed no evidence of drug or alcohol use on May 8, 1994. Sometime after the incident, plaintiff was diagnosed with a neurological disorder, possibly mild cerebral palsy, which may have caused her slurred speech, poor coordination and balance problems that the officers mistook for the effects of drugs.

On August 1, 1994, plaintiff filed a civil rights action against Highway Patrol Officers Spiegel, Howe, Eric McPherson and Jeffrey Graviet ("the State defendants"). On October 18, 1995, plaintiff filed a separate lawsuit against the State defendants, alleging violations of the American's with Disabilities Act ("ADA"). On January 12, 1996, plaintiff amended her ADA complaint to assert claims against Davis County and the correctional officer, Catherine Williams ("the County defendants"). Plaintiff filed a third action against the County defendants on April 26, 1996, alleging violations of her civil rights. All three cases were later consolidated before this court.

On October 23, 1995, the Honorable Judge David K. Winder issued a decision granting in part and denying in part the State defendants' motion for summary judgment in the first civil rights action. In his memorandum decision and order, Judge Winder made the following findings: (1) genuine issues of material fact existed as to whether Howe's stop of plaintiff's vehicle was an unconstitutional pretext stop; (2) Howe's continued detention of the plaintiff was illegal; (3) Spiegel was entitled to qualified immunity on plaintiff's false arrest claim; (4) the strip search ordered by Spiegel was illegal; (5) MacPherson was entitled to qualified immunity;

and (6) Graviet was not liable as a supervisor. See Foote v. Spiegel, 903 F. Supp. 1463 (D. Utah 1995). On appeal, the Tenth Circuit affirmed Judge Winder's decision that Spiegel was not entitled to qualified immunity for ordering the strip search, but reversed and remanded the issue of whether Howe's continued detention of plaintiff was illegal. See Foote v. Spiegel, 118 F.3d 1416 (10th Cir. 1997).

On February 23, 1998, this court held that the County defendants violated plaintiff's constitutional rights by subjecting her to a strip search without adequate justification. See Foote v. Spiegel, 995 F. Supp. 1347 (D. Utah 1998). The court held that Williams was not entitled to qualified immunity for the constitutional violation, and that Davis County was liable for failing to promulgate a policy forbidding strip-searches of detainees absent reasonable suspicion of concealed drugs or other contraband. The court's order granted summary judgment against the County defendants on the issue of liability, and reserved the issue of damages for the trier of fact.

Shortly before trial, on February 16, 1999, this court dismissed plaintiff's ADA claims as a matter of law. In a written order dated February 23, 1999, the court found that plaintiff was not an individual with a disability under the ADA. See Foote v. Spiegel, 36 F. Supp. 2d 1320 (D. Utah 1999).

On February 24, 1999, the following two questions were presented to a jury: (1) Did the stop of plaintiff's vehicle or her continued detention constitute an unreasonable seizure in violation of the Fourth Amendment, and, if so, what amount of damages, if any, were caused by Howe stopping and detaining plaintiff? (2) What amount of damages, if any, were caused by the actions of Spiegel, Williams, and Davis County? The jury found that the traffic stop and continued detention of plaintiff by Howe did not violate plaintiff's constitutional rights. The jury

awarded plaintiff general damages in the amount of $1.00 against Spiegel and the County defendants for the illegal strip search at the Davis County Jail.

Discussion

The plaintiff has moved for an award of attorney's fees against Spiegel and the County defendants pursuant to 42 U.S.C. § 1988. Plaintiff argues that she is entitled to reasonable attorney's fees and costs as a "prevailing party" in an action brought under 42 U.S.C. § 1983. See 42 U.S.C. § 1988. Both Spiegel and the County defendants argue that plaintiff should not be considered a prevailing party entitled to attorney's fees because she recovered only nominal damages at trial. Alternatively, defendants argue that the amount of fees awarded should be drastically reduced to reflect limited success.

The State and County defendants have also moved for their attorney's fees and costs incurred after plaintiff rejected the defendants' Offers of Judgment, pursuant to Federal Rule of Civil Procedure 68. Plaintiff argues that the cost-shifting provisions of Rule 68 do not apply because the Offers of Judgment were not more favorable that the judgment ultimately obtained.

Finally, the County defendants have moved for attorney's fees and costs incurred in defending plaintiff's ADA claim, on the ground that this claim was frivolous.

I. Prevailing Party Status

Plaintiff is a prevailing party by virtue of her success on her civil rights claims against the County defendants and Spiegel. However, the Supreme Court has held:

> In some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. . . . When a plaintiff recovers only nominal damages, because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee in usually no fee at all.

Farrar v. Hobby, 506 U.S. 103, 115 (1992) (internal citations omitted). To determine "whether a prevailing party achieved enough success to be entitled to an award of attorney's fees," the court must examine: "(1) the difference between the judgment recovered and the judgment sought; (2) the significance of the legal issue on which plaintiff prevailed; and (3) the public purpose served by the litigation." Brandau v. Kansas, 168 F.3d 1179, 1181 (10th Cir. 1999) (internal quotations omitted).

First, the difference between the judgment sought and the judgment recovered in this case is immense. In his closing argument to the jury, plaintiff's counsel suggested an award of $500,000.00. The jury awarded only $1.00 in nominal damages. Because of the vast difference between the judgment recovered and the judgment sought, the first factor weighs against an award of attorney's fees.

Second, the legal issue on which the plaintiff prevailed has great significance. The plaintiff succeeded in proving, as a matter of law, that the strip search practices of Davis County Jail and the Utah Highway Patrol were unconstitutional. Because plaintiff achieved a significant legal victory, this factor favors an award of attorney's fees.

Third, this litigation served an important public purpose. Although the Tenth Circuit had previously held that Davis County's policy of strip searching all persons arrested on suspicion of drugs was unconstitutional, Davis County continued this practice up until November 1995. See Foote v. Spiegel, 995 F. Supp. 1347, 1357 (D. Utah 1998) (noting that Cottrell v. Kaysville City, 994 F.2d 730 (10th Cir. 1993), "put the County on warning that gross constitutional violations were occurring under the strip search policy then in existence"). Just weeks after Judge Winder's decision finding that the strip search requested by Spiegel was unconstitutional, Davis County

finally changed its policies and procedures regarding strip searches. Although the County defendants were not named in the lawsuit at the time of Judge Winder's decision, the court has no doubt that plaintiff's action, along with others alleging similar violations, prompted the long over-due policy change. In addition, several months before this case went to trial, the Utah Highway Patrol changed its policy on requesting strip searches. The court finds that plaintiff's action was instrumental in affecting these policy changes, and her efforts have succeeded in safeguarding the public against the type of unconstitutional intrusion that she suffered in this case. Therefore, the court finds that the public purpose served by this litigation weighs heavily in favor of an award of attorney's fees.

Having considered the factors set forth in Brandau v. Kansas, the court finds that the jury's award of nominal damages should have no effect on plaintiff's award of attorney's fees, based on the significance of the legal issue on which plaintiff prevailed and the important public purpose served by this litigation.

II. Degree of Success

Having found that plaintiff is a prevailing party entitled to attorney's fees under § 1988, the court must next determine whether to reduce the fee award to reflect plaintiff's degree of success.[2] To determine the degree of success, the court must first consider whether plaintiff's award should be reduced by the number of hours spent pursuing unsuccessful claims, or whether

[2] Generally, the court first arrives at the "lodestar amount," by determining a reasonable rate and the number of hours reasonably expended on the litigation, before looking to the plaintiff's "degree of success" to determine whether the lodestar amount should adjusted upward or downward. See Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Even though the court has not yet calculated the lodestar amount in this case, the court has chosen to determine degree of success at this time so that plaintiff can tailor her fee affidavit to omit hours excluded by the court.

the unsuccessful claims were so related that such a reduction would be inappropriate. See Hensley v. Eckerhart, 461 U.S. 424, 434-35 (1983). Additionally, in view of the overall results obtained by plaintiff, the court must decide whether the number of hours reasonably expended by plaintiff's counsel should be reduced to reflect limited success. Id. at 436.

The court must initially determine whether the fee award should exclude hours spent pursuing unsuccessful claims. Because plaintiff was wholly unsuccessful on the ADA claim, the court finds that these fees should be excluded from the attorney's fee award. The ADA claim presented a distinct claim for relief based on a different legal theory. Specifically, the unsuccessful ADA claim was based on the theory that defendants regarded plaintiff as disabled and that she was subjected to discrimination because of this perceived disability. In contrast, in her successful civil rights claims, plaintiff alleged that the strip search was an unreasonable search under the Forth Amendment. Based on the differing legal theories involved, the court finds that counsel's work on the ADA claim is unrelated to the successful civil rights claims. See id. at 434-35.

On the other hand, the court finds that fees incurred in pursuing the unsuccessful civil rights claims should not be excluded. Unlike the ADA claim, the hours spent on the civil rights claims against various defendants involved not only a common core of facts, but were also based on related legal theories regarding unreasonable searches and seizures under the Fourth Amendment. See id. at 435. Therefore, instead of viewing plaintiff's civil rights action as a series of discrete claims, the court must "focus on the significance of the overall relief obtained by the plaintiff." Id.

Next, the court finds that, despite the jury's award of nominal damages, the overall results

obtained by plaintiff on her civil rights claims were excellent. Plaintiff prevailed as a matter of law on her core theory that her strip search was unconstitutional. The judgment in favor of the plaintiff "constitutes a victory on a significant legal issue that furthers a public goal, a goal that is advanced notwithstanding the fact that [the] plaintiff recovers no damages." Gudenkauf v. Stauffer Communications, Inc., 158 F.3d 1074, 1081 (10th Cir. 1998). In view of the overall results obtained by plaintiff, the court finds that the reduction for the unsuccessful ADA claims adequately makes the necessary adjustment reflecting plaintiff's degree of success and the fee award should not be further reduced to reflect limited success on the civil rights claims.

III. Rule 68 Cost-Shifting

Although the court has found that plaintiff is a prevailing party entitled to a full award of attorney's fees, less those incurred in pursuing the ADA claims, the court must still consider the effect of plaintiff's rejection of the settlement offers made by both the State and County defendants.

Under Federal Rule of Civil Procedure 68, if a party rejects a settlement offer made more than ten days before trial begins and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after making the offer." Fed. R. Civ. P. 68. The purpose of Rule 68 is to encourage settlement and "prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success." Marek v. Chesny, 473 U.S. 1, 5 (1985). Both attorney's fees and costs available to a plaintiff in a civil rights action "are subject to the cost-shifting provision of Rule 68." Id. at 9.

A. Does Rule 68 Apply to the State Defendants' Offer of Judgment?

On April 28, 1995, the State defendants presented plaintiff with a Rule 68 Offer of

Judgment in the amount of $1,000.00, plus costs and attorney's fees to be determined by the court. (See Mem. in Supp. of State Def.'s Mot. for Costs Ex. A.) The Offer of Judgment applied to all claims asserted by plaintiff against the State and State employees. Because the plaintiff did not accept the offer "within 10 days after the service of the offer," the offer was "deemed withdrawn." Fed R. Civ. P. 68.

The State defendants argue that the Offer of Judgment was more favorable than the results ultimately obtained because, on October 23, 1995, Judge Winder dismissed the claims against McPherson and Graviet, and, at trial, the jury found no cause of action against Howe and awarded only $1.00 in nominal damages against Spiegel. Plaintiff argues, however, that the offer was less favorable than the results ultimately obtained because the offer contained no admission of wrongdoing or promise to discontinue the Utah Highway Patrol's practice of requesting strip searches of all persons arrested on suspicion of drugs. After the Offer of Judgment, Judge Winder held that the actions of Spiegel violated plaintiff's constitutional rights, and, according to plaintiff, her continued pursuit of this case caused the Utah Highway Patrol, in October 1998, to change its policy of requesting strip searches in October 1998.

While plaintiff is correct that her continued litigation did produce favorable results, Rule 68 does not allow the court to look beyond the terms of the ultimate judgment. Because "Rule 68 calls for a comparison only between the offer and the judgment actually obtained, . . . the comparison can only be made to the provisions of the court's order of judgment, and other consequences of the suit are irrelevant." Wright & Miller, Federal Practice and Procedure Civ. 2d § 3006.1 (1997); see also Spencer v. General Elec. Co., 894 F.2d 651, 664 (4th Cir. 1990) (holding that "the unambiguous language of Rule 68 must be given its plain meaning and

accordingly, in making the comparison required by the Rule, a trial court should consider only the terms of the 'judgment finally obtained' by the offeree, and nothing more"). The terms of the judgment in this case, which awarded only $1.00 in nominal damages, is less favorable than the State defendants' Offer of Judgment for $1,000 plus attorney's fees and costs. Therefore, the cost-shifting provisions of Rule 68 apply.

B. Does Rule 68 Apply to the County Defendants' Offer of Judgment?

On March 13, 1998, the County defendants presented plaintiff with a Rule 68 Offer of Judgment in the amount of $29,000.00, which included costs and attorney's fees incurred by plaintiff. (See Mem. in Supp. of Pl.'s Mot. for Atty's Fees Ex. C.) The Offer of Judgment applied to the civil rights case only, and did not apply to the ADA case. Plaintiff did not accept the offer within 10 days, so the offer was deemed withdrawn under Rule 68.

Because plaintiff would be entitled to attorney's fees and costs as a prevailing party, the County defendants' offer, which included attorney's fees and costs, could only be more favorable than the judgment obtained if plaintiff's attorney's fees and costs were less than $29,000.00 at the time of the offer. Plaintiff argues that her attorney's fees and costs as of March 13, 1998, exceeded $29,000.00, and therefore the County defendants' Offer of Judgment was less favorable than the $1.00 judgment eventually obtained, plus attorney's fees and costs.

At the time of the offer, however, plaintiff's counsel represented in letter to the County defendants' counsel that the fees and costs incurred in litigating the claims against the County defendants totaled approximately $8,373.50.[3] Plaintiff now argues that because the claims

[3] In determining the attorney's fees incurred as of the date of the offer, the court relies in part on the letter of W. Andrew McCullough dated March 13, 1998, which indicates that the attorney's fees "directly relevant to our case against Davis County" total approximately $8,373.50. (County Def.'s Mem. Supp. M. to Allow Consideration

against the State and County defendants are interrelated, the court should consider the fees and costs incurred in the lawsuit as a whole up until the date of the offer. The court finds that the best evidence of the fees and costs incurred in the civil rights case against the County defendants as of March 13, 1998, is the contemporaneous statement of plaintiff's counsel made in his letter, which he intended the County defendants to rely upon in making the offer. Because the Offer of Judgment clearly exceeded the $1.00 in nominal damages plaintiff recovered at trial, plus the $8,373.50 in attorney's fees and costs incurred up until the date of the offer, the cost-shifting provisions of Rule 68 apply.

C. What is the Effect of Rule 68?

Because the terms of the offers were more favorable than the terms of the judgment obtained, plaintiff may not recover costs or attorney's fees for services performed after the dates of the offers. See Marek v. Chesny, 473 U.S. 1, 10 (1985). In addition, plaintiff must pay the costs incurred by defendants after making a more favorable offer of judgment. See Fed. R. Civ. P. 68. Although this result is harsh, the court is afforded no discretion by Rule 68. See Jordan v. Time, Inc., 111 F.3d 102, 105 (11th Cir. 1997) (noting that the "language contained in Rule 68 is mandatory; the district court does not have the discretion to rule otherwise").

However, plaintiff is not liable for defendants' post-offer attorney's fees under Rule 68. In Marek v. Chesny, the Supreme Court held that because "Congress expressly included attorney's fees as 'costs' available to a plaintiff in a § 1983 suit, such fees are subject to the cost

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of Letter Ex. 1.) This letter is considered not to establish the liability of the County defendants or the amount of plaintiff's claim against the County defendants, but only as evidence of the amount of attorney's fees. Because the letter is not offered to "prove liability for or invalidity of the claim or its amount," the court may consider it under Federal Rule of Civil Procedure 408.

shifting provision of Rule 68." 473 U.S. at 9. Therefore, the Court held that civil rights plaintiffs "who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected." Id. at 10. Yet lower courts interpreting Marek have refused to extend its reasoning to shift the defendant's post-offer attorney's fees to the plaintiff. See Wright & Miller, Federal Practice and Procedure Civ. 2d § 3006.2 (1997). Marek specified that only "costs properly awardable" in a particular action are subject to Rule 68. 473 U.S. at 9. In a civil rights action, attorney's fees are "properly awardable" to a defendant only if the action was "frivolous, unreasonable, or groundless." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). Thus, "civil rights defendants can recover their fees as a part of costs under Rule 68 only if they can satisfy the otherwise-applicable standard for recovery by defendants." Wright & Miller, Federal Practice & Procedure Civ. 2d § 3006.2 (1997). Of course, "[s]ince Rule 68 only applies where plaintiff has won a judgment, it is difficult to imagine a situation in which a court could nevertheless conclude that plaintiff's suit was frivolous." Id.

The court finds that plaintiff's civil rights claims against the State and County defendants were not frivolous, unreasonable, or groundless. To the contrary, the court determined that, as a matter of law, the actions of Spiegel and the County defendants violated plaintiff's constitutional rights. Therefore, defendants are not entitled to their post-offer attorney's fees under Rule 68.

IV. County Defendants' Attorney's Fees on the ADA Claim

The County defendants have moved for an award of attorney's fees and costs on plaintiff's unsuccessful ADA claim. Defendants may recover attorney's fees incurred in defending against unsuccessful claims under limited circumstances. However, "a plaintiff should

not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that plaintiff continued to litigate after it clearly became so." Christiansburg v. EEOC, 434 U.S. 412, 422 (1978).

The court finds that plaintiff's ADA claims were not frivolous. Although the court dismissed these claims as a matter of law before trial, the court did not do so summarily. See Foote v. Spiegel, 36 F. Supp. 2d 1320 (D. Utah 1999). Plaintiff's ADA claims presented somewhat novel issues of law and the court has no doubt that these claims were asserted in good faith. Therefore, the court finds that the County defendants are not entitled to attorney's fees incurred in defending plaintiff's ADA claim.

Order

In summary, the court finds as follows:

1. Plaintiff is a prevailing party for purposes of a fee award.

2. To account for limited success, plaintiff is not entitled to recover attorney's fees related to the ADA claims. However, the remainder of plaintiff's claims are sufficiently interrelated that no reduction for partial success is appropriate.

3. The State defendants' Offer of Judgment was more favorable than the judgment ultimately obtained. Therefore, plaintiff is not entitled to her post-offer costs or attorney's fees related to claims against the State defendants. In addition, plaintiff must pay the post-offer costs of the State defendants; these costs do not include attorney's fees.

4. The County defendants' Offer of Judgment was more favorable than the judgment ultimately obtained. Therefore, plaintiff is not entitled to her post-offer costs or attorney's fees associated with the civil rights claims against the County defendants. In addition, plaintiff must

pay post-offer costs of the County defendants; these costs do not include attorney's fees.

5. Plaintiff's unsuccessful ADA claim was not frivolous, unreasonable or groundless. Therefore, the County defendants are not entitled to attorney's fees incurred in defending this claim.

6. Plaintiff shall file affidavits, conforming with this order, in support of an award of fees and costs within 30 days of the date of this order. After plaintiff has filed her affidavits, the State and County defendants will have 15 days to file their oppositions. Plaintiff may then file a reply within 10 days.

7. The State defendants shall file affidavits in support of an award of post-offer costs within 30 days of the date of this order. After the State defendants have filed their affidavits, plaintiff will have 15 days to file her opposition. The State defendants may then file a reply within 10 days.

8. The County defendants shall file affidavits in support of an award of post-offer costs within 30 days of the date of this order. After the County defendants have filed their affidavits, plaintiff will have 15 days to file her opposition. The County defendants may then file a reply within 10 days.

DATED this 1 day of September, 1999.

BY THE COURT:

TENA CAMPBELL
United States District Judge

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United States District Court
for the
District of Utah
September 2, 1999

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:94-cv-00754

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