

FILED

AUG 21 2006
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEPUTY CLERK

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

**EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**

Plaintiff,

VS.

MOTHERS WORK, INC.

Defendant.

Civil Action No: SA-04-CA-873-XR

ORDER

On this date, the Court considered Defendant Mothers Work, Inc.'s ("Mothers Work") motion for attorney's fees and costs (docket no. 68), Plaintiff Equal Employment Opportunity Commission's ("EEOC") response in opposition (docket no. 72), and Mothers Work's reply thereto (docket no. 75). After careful consideration, the Mothers Work's motion is GRANTED in part, and DENIED in part (docket no. 68).

I. Factual and Procedural Background

On September 28, 2004, the EEOC brought suit against Mothers Work for disability discrimination under the Americans with Disabilities Act of 1990. Specifically, the EEOC alleged that Mothers Work discharged Monica Sarfaty from her position as a regional sales manager because she was disabled. On January 17, 2006, Mothers Work filed a motion for summary judgment arguing that Sarfaty was not disabled as that term is defined under the ADA, or alternatively, that Sarfaty was discharged for legitimate, non-discriminatory reasons and the decision makers were not aware of Sarfaty's condition at the time they decided to terminate her employment.

On May 8, 2006, the Court granted summary judgment in favor of the Mothers Work.

Docket no. 65. The Court held that:

The EEOC has failed to adduce evidence that, when taken in a light most favorable to it, shows that Sarfaty's bipolar disorder has substantially limited one or more major life activities. Alternatively, the EEOC fails to present any evidence that at the time of her discharge, Mothers Work was aware that Sarfaty suffered from any bi-polar condition. Finally, the EEOC has failed to adduce any evidence to support a reasonable finding that Mothers Work regarded Sarfaty as disabled.

Docket no. 65, at 14. Mothers Work, as the prevailing party, moves for an award of attorney's fees and costs.

II. Analysis

A. Attorney's Fees.

In *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, the United States Supreme Court held that "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. 412, 421 (1978); *see also Vitale v. Ga. Gulf Co.*, 82 Fed. Appx. 873, 876 (5th Cir. 2003) ("In contrast to prevailing plaintiffs in civil rights actions . . . prevailing defendants may receive fees under the *Christianburg* standard." (emphasis in original)). District courts must "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.* at 421-422. The frivolity of a plaintiff's claims is reviewed "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). The Fifth Circuit has found the *Christianburg* standard to be equally applicable to claims for attorney's fees brought by a prevailing

defendant in an ADA case. *No Barriers, Inc. v. Brinker Chili's Tex., Inc.*, 262 F.3d 496, 498 (5th Cir. 2001).

Sarfaty suffers from bipolar disorder, which the ADA recognizes as a disability with the capability of impairing major life activities. Docket no. 65, at 10 *see also* 42 U.S.C. § 12102(2)(A). Consequently, when afflicted with uncontrolled depression, Sarfaty was unable to substantially perform normal life functions, even requiring hospitalization. Docket no. 65, at 5. Sarfaty sought medical leave based on her condition and provided Mothers Work with evidence of her diagnosed condition. Docket no. 65, at 5 & 12. Sarfaty's requested leave coincided with the busy holiday retail season. Mothers Work proceeded to terminate Sarfaty after her medical leave commenced. Docket no. 65, at 3. The extent of Mothers Work's knowledge of Sarfaty's disability and whether the company regarded her as disabled was unknown prior to the EEOC filing this case because Mothers Work failed to explain its reasons for terminating Sarfaty during the EEOC's administrative investigation. Resp., at Appx. B, Ex. 4. Based on these facts, it was conceivable for the EEOC to conclude Sarfaty was terminated in retaliation for taking medical leave or upon discovery that she had a disability that required her absence during the busiest retail season of the fiscal year.

In reviewing the EEOC's claims, the Court cannot conclude that the case was groundless or frivolous. While Mothers Work is correct that the Court ultimately determined the EEOC had failed to establish a prima facie case of disability discrimination, the EEOC's case did have arguable merit at the onset of litigation. Accordingly, Mothers Work's motion for attorney's fees is DENIED.

B. Costs.

Federal Rule of Civil Procedure 54(d)(1) allows the prevailing party in a civil suit to recover costs, other than attorney's fees, as authorized by 28 U.S.C. § 1920. Mothers Work moves for an

award of costs totaling \$24,349.44, including \$145.00 for fees paid to the Clerk of Court, \$60.00 for fees associated with serving a subpoena, \$4,362.07 in court reporter fees, \$360.00 for witness fees, \$18,468.73 in other costs, and \$953.64 in exemplification and copying costs. The EEOC opposes Mothers Work's requested costs on various grounds.

1. Clerk of Court fees.

Mothers Work's \$145.00 Clerk of Court fees are comprised of \$120.00 in fees for good standing certificates and a \$25.00 *pro hac vice* fee. Neither of these fees are recoverable under § 1920. See *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987) (explaining that the district court does not have the discretion pursuant to Rule 54(d) to award costs other than those specifically listed in § 1920); *Romero v. United States*, 865 F. Supp. 585, 594 (E.D. Mo. 1994) (finding that *pro hoc vice* fees are an expense of counsel and not a cost of litigation).

2. Fees for service of subpoena.

Mothers Work claims it incurred a \$60.00 fee for the service of a subpoena on December 5, 2005. This fee is allowable and will be taxed against the EEOC. *Card v. State Farm Fire & Cas. Co.*, 126 F.R.D.658, 662 (N.D. Miss. 1989), *aff'd*, 902 F.2d 957 (5th Cir. 1990) ("The expense of serving subpoenas upon witnesses is a recoverable cost.").

3. Court reporter fees.

Mothers Work claims it incurred \$4,362.07 in court reporter fees. A review of the records submitted by Mothers Work, however, identifies only \$4,186.30 in court reporter fees. Court reporter fees are recoverable costs as long as there is a reasonable expectation that the deposition or hearing transcript may be used for trial preparation. See *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 536 (5th Cir. 1999). Mothers Work's court reporter fees are recoverable with the

exception of fees associated with the second deposition of Phillip Williams. The Court allowed the EEOC to redepose Williams with the express understanding that Mothers Work would bear the cost. Resp., at Appx. B, Ex. 7. Accordingly, Mothers Work's requested court reporter fees are reduced by \$238.95, the amount associated with Williams' second deposition on February 9, 2006.

4. Witnesses fees.

Mothers Work claims it incurred \$360.00 in witness fees. Although witness fees are generally recoverable under § 1920(4), there is no evidence that the witnesses identified by Mothers Work were actually deposed. Because Mothers Work has failed to demonstrate that these witness fees were actually incurred, the fees may not be taxed against the EEOC.

5. Other Costs.

Mothers Work requests recovery of \$18,468.73 in "other costs." Included in these "other costs" are: (1) Westlaw and Lexis online research fees (\$9876.04); (2) telephone charges (\$62.07); (3) facsimile charges (\$124.65); (4) postage and courier fees (\$252.59); (5) parking and transportation costs (\$527.17); (6) airfare (\$4992.83); (7) word processing fees (\$147.60); (8) meals and lodging (\$780.07); (9) internal messenger fee (\$5.00); (10) video deposition fees (\$555.00); (11) witness fee for Williams (\$45.20); and (12) duplicating fees (\$999.36). This Court finds Mothers Work's submitted "other costs" total \$18,367.58.

Mothers Work is not entitled to recover as costs any expenses or fees related to online research, telephone and facsimile charges, postage, courier, word processing, and internal messenger services, parking and transportation, airfare, or meals and lodging. *See Lewis v. Hurst Orthodontics, PA*, 292 F. Supp. 2d 908, 914 n.11 (W.D. Tex. 2003) (finding that on-line research, courier fees, overnight delivery charges, hotel expenses, transportation and parking, postage, and fax charges are

representative of out of pocket expenses and not as costs recoverable under the plain language of § 1920).

Costs associated with videotaped depositions are not necessary costs recoverable under § 1920. *See Mota v. The Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 529-30 (5th Cir. 2001) (finding an abuse of the trial court's discretion for awarding costs for a videotaped deposition); *see also West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 396 (5th Cir. 2003) ("[V]ideographer fees are not recoverable as costs under § 1920."); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891 (5th Cir. 1993) (disallowing recovery of costs for video technician fees incurred in taking depositions by videotaping). Mothers Work is not entitled to recover the \$555.00 it incurred with regard to videotaped depositions.

The \$45.20 witness fee Mothers Work allegedly incurred for Williams' second deposition is not recoverable. As previously noted, the Court ordered Mothers Work to pay all costs associated with the EEOC's second deposition of Williams.

Mothers Work also seeks reimbursement for \$999.36 in expenses associated with duplicating services. The Court must initially determine if costs are necessary expenses. *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 892 (5th Cir. 1993). To be necessary, the duplicating expenses must be sufficiently explained and linked to a need in the litigation. *See Holmes v. Cessna Aircraft Co.*, 11 F.3d 63, 64 (5th Cir. 1994) ("Before the district court can tax costs for photocopies, it must find that the copies for which costs are sought were necessarily obtained for use in the litigation."). The Court finds Mothers Work's copying expenses, while sufficiently detailed, are duplicative of its request for fees for exemplification and copies of papers necessarily obtained for use in trial. Accordingly, Mothers Work's is not entitled to recover the \$999.36 duplicative copying expenses.

6. Fees for exemplification and copies.

Mothers Work also requests it be reimbursed \$953.64 for fees associated with exemplification and copies of papers necessarily obtained for use in the trial. As discussed above, Mothers Work provided sufficient evidence to support an award for duplication costs. Mothers Work is entitled to recover \$953.64 for copying expenses necessarily obtained for use in the litigation.

III. Conclusion

For the reasons stated herein, Defendant Mothers Work, Inc.'s motion for attorney's fees and court costs (docket no. 68) is GRANTED in part, and DENIED in part. Mothers Work is entitled to receive court costs totaling \$4,960.99, including \$60.00 for fees associated with the service of a subpoena, \$3,947.35 for court reporter fees, and \$953.64 for copying expenses.

SIGNED this 18th day of August, 2006.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE