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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

HALEY VIDECKIS and LAYANA WHITE, individuals,

Plaintiffs,

v.

PEPPERDINE UNIVERSITY, a corporation doing business in California,

Defendant.

CASE NO. 2:15-CV-00298-DDP (JCx)
[Assigned to Hon. Dean D. Pregerson, Courtroom 9C]

NOTICE OF ERRATA RE PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR ATTORNEY'S FEES

Date: October 30, 2017
Time: 10:00 A.M.
Crtrm.: 9C

TO THE COURT IN THE ABOVE-REFERENCED MATTER:

PLEASE TAKE NOTICE that Plaintiffs Haley Videckis and Layana White hereby submit this Notice of Errata regarding Docket No. 264, which was inadvertently filed without pleading paper and a glitch with the Table of Contents and Authorities. Please disregard Docket No. 264 and replace with the corrected Opposition, attached hereto, as Exhibit A.

Dated: October 9, 2017

Respectfully submitted,

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EXHIBIT A

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PEPPERDINE UNIVERSITY, a corporation doing business in California,

Defendant.

CASE NO. 2:15-CV-00298-DDP (JCx)
[Assigned to Hon. Dean D. Pregerson, Courtroom 9C]

PLAINTIFFS HALEY VIDECKIS AND LAYANA WHITE'S OPPOSITION TO DEFENDANT PEPPERDINE UNIVERSITY'S MOTION FOR ATTORNEY'S FEES

Date: October 30, 2017
Time: 10:00 A.M.
Crtrm.: 9C

Plaintiffs Haley Videckis and Layana White hereby oppose Defendant Pepperdine University's Motion for Attorney's Fees, Dkt. 256. This objection is made pursuant to Local Rule 7-9.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

These motions disrespect this Court's participation in an extended trial, and disrespects the Court's own assessment in its prior order denying costs. Dkt. 252. The Court already concluded that Plaintiffs' case had sufficient merit and basis on which to exercise its discretion, *sua sponte*, for the parties to bear their own costs. Dkt. 252. Moreover, just because the jury disagreed with Plaintiffs does not mean that Plaintiffs' case was without merit. Pepperdine speculating on the meaning behind the speed with which the jury returned a verdict is a false and dubious basis on which to surmise as to the merits. That surmise is as unreliable as Plaintiffs' contention that Pepperdine spent hours conducting a deposition-style presentation, not a trial, introduced hundreds of irrelevant documents (most never mentioned in closing), to lull the jury into stupor sufficient to render the most expedient, but meritless, verdict possible. On the basis of the evidence, however, there were legitimate questions of credibility throughout the trial that a jury did have cause to resolve.

With respect to the overall merits of the case and this motion, in anticipation of this pretrial motion, Pepperdine reached out to Plaintiffs and asked whether they would consider entering a mutual release. *See* Declaration of Rob Dickerson ("Dickerson Decl.") at ¶ 2, Ex. 1. After the call, Ms. Victor said she would prepare a draft. Dickerson Decl. at ¶ 2, Ex. 1. The draft was not entirely consistent with her email about the terms. *See* Declaration of Jayesh Patel ("Patel Decl.") at ¶¶ 2-3, Ex. 1. When Plaintiffs tried to get an assurance that the agreement necessarily included a release of malicious prosecution claim, Pepperdine refused and filed their motions and application. Patel Decl. at ¶¶ 2-3, Ex. 1. The only conceivable purpose behind Pepperdine's tactics, and underlying its decision to pursue these motions and costs is to chill litigation from similarly situated Plaintiffs—the very observation on which this Court originally declined to charge such costs and fees to Plaintiffs.

II. LEGAL STANDARD

A. The Court Already Determined Pepperdine Should Not Be Compensated For Its Defense

42 U.S.C. § 1988(b) gives the Court the ability to decide whether or not to award the prevailing party attorney's fees. 42 U.S.C. § 1988(b). Where statutes grant the power to shift attorney's fees, case law provides guiding standards or factors in determining what fees can be awarded. In the civil rights area, courts have developed different presumptions for plaintiffs and defendants with regard to their ability to obtain fee awards.

Typically, where a fee-shifting determination is committed by statute to a court's discretion, equitable considerations govern. *U.S. Steel Corp. v. United States*, 519 F.2d 359, 363 (3d Cir. 1975). A court's judgment may be guided by a number of elements, including the public interest in encouraging particular suits, the conduct of the parties and economic considerations. *U.S. Steel Corp. v. United States*, 519 F.2d 359, 363 (3d Cir. 1975).

In assessing whether or not the action was frivolous, unreasonable, or groundless for purposes of deciding whether to award attorney's fees to a prevailing defendant, "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. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable." *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421–22, 98 S. Ct. 694, 700, 54 L. Ed. 2d 648 (1978).

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/ / /

B. It Is Much More Difficult For A Civil Rights Defendant To Obtain An Award Of Fees Than It Is For A Prevailing Plaintiff

Courts have found that, in enacting the fee-shifting statutes for civil rights actions, Congress wanted to assure private citizens a meaningful opportunity to remedy civil rights violations by encouraging plaintiffs of limited means to bring meritorious suits. *See City of Riverside v. Rivera*, 477 U.S. 561, 562 (1986) ("Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights… ."); *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 418; 420 (1978) (The plaintiff is the "chosen instrument of Congress" to vindicate a policy that Congress considered of the highest priority.).

On the other hand, a defendant is not the "chosen instrument of Congress" in vindicating important policies and may obtain a fee award only under limited circumstances. *See Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 418–19 (1978) (A successful defendant seeking counsel fees under § 706(k) must rely on quite different equitable considerations.); *Davis v. City of Charleston, Mo.*, 917 F.2d 1502, 1504 (8th Cir. 1990); *Eichman v. Linden & Sons, Inc.*, 752 F.2d 1246, 1248 (7th Cir. 1985). When a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 418–19 (1978). These policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant. *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 418–19 (1978).

As a result, Federal civil rights attorney's fee statutes that simply provide for an award to the "prevailing party" have been interpreted so that the standard for obtaining fees is higher where it is the defendant, rather than the plaintiff, who is seeking fees as the prevailing party. *Christiansburg Garment Co. v. Equal*

Employment Opportunity Commission, 434 U.S. 412 (1978); *see Davis v. City of Charleston, Mo.*, 917 F.2d 1502, 1504 (8th Cir. 1990) ("[M]ore rigorous standards apply for fee awards to prevailing defendants than to prevailing plaintiffs in Title VII cases."); *Eichman v. Linden & Sons, Inc.*, 752 F.2d 1246, 1248 (7th Cir. 1985) ("[A] prevailing defendant is entitled to attorney's fees only in very narrow circumstances.").

III. DISCUSSION

A. An Award Of Attorney's Fees Would Run Contrary To The Intent Behind The Civil Rights Attorney's Fees Awards Act Of 1976

The general rule in US litigation is that each party will be responsible for their own attorney's fees. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975); *see U.S. Steel Corp. v. United States*, 519 F.2d 359, 361 (3d Cir. 1975). In 1976, Congress enacted a statute providing otherwise with the goal of encouraging enforcement of some of our most important rights: civil rights. 42 U.S.C. § 1988(b). To award Pepperdine attorney's fees in this case would run contrary to that intent behind 42 U.S.C. § 1988(b).

An award to Pepperdine would chill future enforcement of civil rights.

B. Plaintiffs' Claims Were Not Frivolous, Unreasonable, Or Without Foundation

Pepperdine's self-serving view mischaracterizes the evidence, the issues on which the jury was asked to make credibility determinations, and ignores admissions and perjury of Pepperdine's own witnesses. *See, e.g.*, Daily Trial Transcript, R. Weisenberg Testimony, August 1, 2017, 123:9-125:23 (contradicting his deposition testimony about Ms. Raniewicz. being upset about being outed); Daily Trial Transcript, K. Brockway Testimony, August 2, 2017, 76:4-21 (contradicting deposition her testimony about fear of losing scholarship if she spoke out against Pepperdine); Daily Trial Transcript, W. Williams Testimony, July 31, 2017, 50:1-52:19 (contradicting deposition testimony regarding use of term "lesbianism").

Moreover, despite making a cursory explanation of the legal standard, Pepperdine does not actually apply the law to support any of the arguments it makes.

1. Invasion Of Privacy

Ms. Videckis and Ms. White testified as to how the Pepperdine women's basketball coaches and athletic training staff subjected Plaintiffs to intrusive questioning about their sexual orientation, unlike other students, and that the invasive questioning continued even after they requested it stop. *See generally* Daily Trial Transcript, H. Videckis and L. White, July 19-25, 2017. Ms. Videckis and Ms. White testified that they tried to keep their relationship and their sexual orientation secrets while they were at Pepperdine. *See generally* Daily Trial Transcript, H. Videckis and L. White, July 19-25, 2017. There were several concessions by a number of Pepperdine witnesses that coaches were probing into Ms. Videckis and Ms. White's relationship. *See, e.g.*, Daily Trial Transcript, B. Richardson Testimony, August 2, 2017, 199:20-25.[1]

Ms. Videckis and Ms. White also testified that their right to their private medical information was ignored by Pepperdine. *See generally* Daily Trial Transcript, H. Videckis and L. White, July 19-25, 2017. Ms. Scherer, Pepperdine's athletic trainer, admitted that she had never asked for anyone else's gynecology records at Pepperdine, other than Ms. White's and Ms. Videckis'. Daily Trial Transcript, K. Scherer Testimony, July 27, 2017, 89:23-25.

Simply because Plaintiffs lost on their invasion of privacy claims does not mean they were meritless. *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421–22, 98 S. Ct. 694, 700, 54 L. Ed. 2d 648 (1978). In assessing whether to award attorney's fees to a prevailing defendant, "it

[1] Plaintiffs did not purchase the trial transcript, which cost approximately $14,000. For cost efficiency purposes, Plaintiffs cite to the Daily Trial transcript, which both sides received.

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. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable." *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421–22, 98 S. Ct. 694, 700, 54 L. Ed. 2d 648 (1978).

The above evidence that was introduced at trial proves that Plaintiffs' claims were not frivolous, unreasonable, or without foundation.

2. Sexual Orientation Harassment And Discrimination[2]

In *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 423–24 (1978), the Supreme Court upheld the District Court's denial of attorney's fees to the prevailing defendant in part because the issue upon which the defendant prevailed was an issue of first impression requiring judicial resolution. The situation in *Christiansburg* is similar to that in *Videckis*. The Court, for the first time, definitively ruled that claims of discrimination based on sexual orientation are covered by Title VII and IX, but not as a category of independent claims separate from sex and gender stereotype. Dkt. 40. Rather, claims of sexual orientation discrimination are gender stereotype or sex discrimination claims. Dkt. 40.

The *Videckis* plaintiffs' claims were not frivolous, unreasonable, or without foundation – they raised genuine issues with the Court in areas of law that were

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[2] As Pepperdine brought up in its Motion for Attorney's Fees, California Education Code provisions sued under in Videckis were modeled after Title IX. Therefore, just as Pepperdine is not entitled to recover attorney's fees for defense of Plaintiffs' Title IX claims, neither is Pepperdine entitled to recover attorney's fees for defense of Plaintiffs' Education Code claims.

murky at best. As the Court stated in its earlier Order Granting In Part and Denying In Part Motion to Dismiss, Dkt. 25, "[t]he law is rapidly developing and far from settled insofar as determining where sexual orientation discrimination lies within the framework of gender-based discrimination." Plaintiffs could not have been tasked with the foresight of being able to divine how their particular claims were going to fair in such an unsettled area.

Again, there were concessions by several witnesses that coaches were probing into Ms. Videckis and Ms. White's relationship, which Ms. Videckis and Ms. White were trying to keep secret. *See, e.g.*, Daily Trial Transcript, B. Richardson Testimony, August 2, 2017, 199:20-25. Mr. Weisenberg admitted that no such inquiries were made of the male student athletes. Daily Trial Transcript, R. Weisenberg Testimony, August 1, 2017, 121:9-25. Pepperdine's Title IX Coordinator testified to there being a culture problem at Pepperdine for LGBT students. Daily Trial Transcript, T. Jones Jolivet Testimony, July 25, 2017, 102:10-15. Dean of Student Affairs Mr. Davis admitted that students expressed concern to him about the environment for LGBT at Pepperdine. Daily Trial Transcript, M. Davis Testimony, August 7, 2017, 150:6-12. Even Pepperdine's witnesses did not deny that the term "lesbianism" was used. *See, e.g.*, Daily Trial Transcript Ms. Wallace, August 3, 2017, 118:5-10.

Pepperdine claims that Plaintiffs' case was frivolous, unreasonable, and without merit in part because they never complained to anyone until the Title IX complaint. What Pepperdine ignores is the disparity of Pepperdine's and the Plaintiffs' respective positions and power. Plaintiffs were unsophisticated parties compared to Pepperdine.

In fact, Plaintiffs did not come up with the idea to file a formal complaint. It was Pepperdine who came up with the idea that a civil rights violation might have taken place. Prior to that suggestion, no one that Ms. Videckis and Ms. White had complained to suggested they elevate their complaints. Pepperdine cannot now

claim that because Plaintiffs had not elevated their claims earlier, that their lawsuit is frivolous.

As mentioned above, the fact that Plaintiffs lost on their sexual orientation harassment and discrimination claims does not mean they were meritless. *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421–22, 98 S. Ct. 694, 700, 54 L. Ed. 2d 648 (1978). Further, the Court already determined there was a justiciable issue. Dkt. 252. The foregoing proves that Plaintiffs' claims were not frivolous, unreasonable, or without foundation.

3. Violations Of The Unruh Civil Rights Act

Pepperdine mischaracterizes the evidence again, and without citing to any record. It is patently false that there was no evidence of sexual orientation discrimination, but for those testified to by Plaintiffs. None of Pepperdine's witnesses Pepperdine's witnesses did not deny that the term "lesbianism" was used. *See*, *e.g.*, Daily Trial Transcript Ms. Wallace, August 3, 2017, 118:5-10. Mr. Weisenberg admitted to asking invasive questions about Ms. Videckis' and Ms. White's sexual orientation, even though he also admitted he never made those inquiries of the male athletes he coached. Daily Trial Transcript, R. Weisenberg Testimony, August 1, 2017, 121:9-25. Again, Ms. Jones Joilvet testified to there being a culture problem at Pepperdine for LGBT students at the time Ms. Videckis and Ms. White were there, and Mr. Davis admitted that students expressed concern about the environment for LGBT at Pepperdine. Daily Trial Transcript, T. Jones Jolivet Testimony, July 25, 2017, 102:10-15.; Daily Trial Transcript, M. Davis Testimony, August 7, 2017, 150:6-12.

Again, just because the jury concluded Plaintiffs did not succeed on their Unruh Civil Rights Act claims does not make Plaintiffs claims meritless. *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421–22, 98 S. Ct. 694, 700, 54 L. Ed. 2d 648 (1978). The above evidence that was introduced at trial proves that Plaintiffs' claims were not frivolous,

unreasonable, or without foundation.

4. Intentional Infliction Of Emotional Distress

Pepperdine's treatment of Plaintiffs was so outrageous that it caused Ms. White attempted suicide. Daily Trial Transcript, L. White Testimony, July 19, 2017, 137:11-140:9. That evidence, at least, was a triable issue, and was unrebutted by any factual evidence.

Ms. Videckis and Ms. White testified that they tried to keep their relationship and their sexual orientation secrets while they were at Pepperdine. *See generally* Daily Trial Transcript, H. Videckis and L. White, July 19-25, 2017. Ms. Videckis also kept her status a secret from her parents. *See generally* Daily Trial Transcript, H. Videckis, July 21-25, 2017. Ms. Videckis' father ended up finding out that Ms. Videckis and Ms. White were dating once TMZ published a news article about their lawsuit against Pepperdine. *See generally* Daily Trial Transcript, H. Videckis, July 21-25, 2017. After finding out, Mr. Videckis disowned Ms. Videckis. *See generally* Daily Trial Transcript, H. Videckis, July 21-25, 2017. Ms. Videckis' father passed away before he and Ms. Videckis had a chance to reconcile. *See generally* Daily Trial Transcript, H. Videckis, July 21-25, 2017. Again, that triable issue was unrebutted.

Pepperdine's suggestion that Plaintiffs' emotional distress claims had no merit just because the jury disagreed is mistaken. *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421–22, 98 S. Ct. 694, 700, 54 L. Ed. 2d 648 (1978) (In assessing whether to award attorney's fees to a prevailing defendant, "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.).

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C. The Amount of Pepperdine's Fee Request is Unreasonable And Should Be Reduced

Similar to the equitable underpinnings of the authority to award attorney's fees, the determination of what fees to assess is left to the sound discretion of the court. *Davis v. Fletcher*, 598 F.2d 469, 470 (5th Cir. 1979). The burden is on the prevailing party to demonstrate the time spent and any other factors that would aid the court in deciding the reasonable amount to be awarded. *Davis v. Fletcher*, 598 F.2d 469, 470-71 (5th Cir. 1979).

The principal method that is applied in determining the amount of a fee award in fee-shifting cases involves first calculating a "lodestar" figure by multiplying the number of hours reasonably expended on litigation times a reasonable hourly rate. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 546 (2010). The lodestar is then subject to downward or upward adjustment in appropriate cases. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 546 (2010). An upward adjustment is only permitted in extraordinary circumstances. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 546 (2010).

"[T]here is a strong presumption that the lodestar is sufficient; factors subsumed in the lodestar calculation cannot be used as a ground for increasing an award above the lodestar; and a party seeking fees has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 546 (2010).

In determining the number of hours 'reasonably expended,' hours that are excessive, redundant, or otherwise unnecessary are excludable. *F. v. Blue Shield of California*, No. 09-CV-2037-PJH, 2016 WL 1059459, at *10 (N.D. Cal. Mar. 17, 2016) (on appeal). The court may also make a reduction for time expended on unsuccessful or otherwise non-compensable claims. *See, e.g., Aguirre v. Los Angeles Unified Sch. Dist.*, 461 F.3d 1114, 1121 (9th Cir. 2006).

Pepperdine's fee request falls outside of the standard of "reasonable" fees. If the issues were so simple, as Pepperdine posits in its Motion for Attorney's Fees, Dkt. 256, then there is no reason why the amount they request should be so massive. Pepperdine single-handedly prolonged the trial length by conducting the trail as if it were a deposition. Plaintiffs should not have to reimburse Pepperdine for those extra trial days.

Also, Pepperdine brought motions that were frivolous, including, for example, their Motion for Judgment On the Pleadings, which the Court said "border[ed] on the frivolous," (Dkt. 200 (Motion), Dkt. 216 (Order)), Motion to Strike (Dkt. 199), Pepperdine's Motion for Review of Magistrate Judge's Order Compelling Deposition of Andrew Benton (Dkt. 164, 167), this Motion for Attorney's Fees (Dkt. 256), Motion for Reconsideration (Dkt. 258), and Application for Costs (Dkt. 257). All of these motions and applications were superfluous.

IV. CONCLUSION

Based on the foregoing, the Court should exercise its sound discretion and decline to award attorney's fees to Pepperdine in any amount.

Dated: October 9, 2017

Respectfully submitted,

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