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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

HALEY VIDECKIS and LAYANA WHITE, individuals,

Plaintiffs,

vs.

PEPPERDINE UNIVERSITY, a corporation doing business in California,

Defendant.

Case No. 2:15-cv-00298-DDP (JCx)

REPLY MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID R. HUNT AND REQUEST FOR JUDICIAL NOTICE IN SUPPORT THEREOF

Date: October 30, 2017
Time: 8:30 a.m.
Crtrm.: 9C

COMES NOW Defendant PEPPERDINE UNIVERSITY ("Pepperdine") and briefing the issues in reply to Plaintiffs' opposition to Pepperdine's Motion for Attorney's Fees, as follows:

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INTRODUCTION

This case was meritless by definition. The jury determined it had no merit and therefore it was meritless. That having been said, that is not the issue before this Court. The question was whether or not it was "frivolous, unreasonable, or groundless." (*Christiansburg Garment Company v. EEOC,* 434 U.S. 412, 422.) Pepperdine asserts, as argued in its moving papers, no disrespect meant for this Court, that indeed the case was and is "frivolous, unreasonable, or groundless." Nothing stated in Plaintiffs' opposition changes this fact.

I. DISCUSSION

A. This Case is Meritless by Definition.

In our system of justice the jury determines which cases have merit and which ones do not. Here the jury resoundingly held this case has no merit and thus by definition it is "meritless." The jury's verdict coming four hours after a 17 day trial stating unequivocally that Plaintiffs did not have reasonable expectation of privacy, did not suffer discrimination, harassment, or retaliation based upon their sexual orientation, were not denied full and equal access to accommodations, advantages, facilities, privileges or services, and Pepperdine did not act outrageously, clearly defines this case is meritless. Any arguments to the contrary must be taken up with the nine-member jury that unanimously made this decision in merely four hours.

B. This Case is Frivolous, Unreasonable, and Groundless.

Contrary to the Plaintiffs' consistent rendition, *Christianburg Garment Company v. EEOC,* 434 U.S. 412 (1978), does not set a standard for the award of attorney's fees to the defendant based upon the case's "merit." *Christianburg* clearly holds that a defendant must establish that the Plaintiffs' case was "frivolous, unreasonable, or groundless" in order to recover attorney's fees. (*Christianburg Garment Company,* 434 U.S. at 422.) Plaintiffs' case, as clearly argued in Pepperdine's moving papers, was indeed "frivolous, unreasonable, and groundless," and nothing Plaintiffs argue in their opposition changes this fact.

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C. Plaintiffs Make Pepperdine's Argument.

Plaintiffs repeatedly argue that there were significant "credibility issues" throughout their opposition papers. By making this argument they confirm Pepperdine's position that they had no affirmative evidence of wrongful conduct by Pepperdine and its employees except for their own testimony. They based their entire case upon attempting to tear down the people of Pepperdine and their witnesses. This lack of affirmative evidence and Plaintiffs' reliance on credibility attacks demonstrates that their case was indeed frivolous, unreasonable, and groundless.

An award of attorney's fees would not chill the bringing or prosecution of any legitimate claim. Frivolous lawsuits have no protection under the law. Trumped up charges or charges brought without a reasonable basis are by their definition frivolous, unreasonable, and groundless. The courts have uniformly held that in cases such as this a plaintiff is not protected from an award of attorney's fees in favor of a prevailing defendant. If the contrary were true, Congress would not have authorized an award of attorney's fees to any "prevailing party" under 42 U.S.C. Section 1988 and the *Christianburg* court would have simply stated that under no circumstances would a prevailing defendant in a civil rights case be entitled to an award of attorney's fees. Instead, the *Christianburg* court articulated a basis for award of attorney's fees to a prevailing defendant based upon an action that was "frivolous, unreasonable, or without foundation." (*Christianburg Garment Company v. EEOC, supra*, 421-422.) Moreover, the Ninth Circuit has recognized that frivolous civil rights cases are not entitled to protection against fee awards under 42 U.S.C. Section 1988. (*See, Harris v. Maricopa County Superior Court,* 631 F.3d 963 (9th Cir. 2011).) Thus, cases that are indeed frivolous, unreasonable or without foundation received no protection from an award of prevailing party attorney's fees to a defendant.

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D. Plaintiffs' Claims Were Indeed Frivolous.

1. *Plaintiffs' privacy claim was frivolous.*

Plaintiffs' attempt to argue that openly gay women invaded their privacy in order to harass or discriminate against them based upon their sexual orientation is ludicrous. For all the reasons stated in the moving papers, this argument ignores the factual reality of this case and simply seeks to triumph Plaintiffs' alleged perceptions over reality. Any reasonable person would have rejected such a claim, as did the jury.

2. *Plaintiffs' claims of sexual orientation discrimination are frivolous.*

Allegations of sexual orientation discrimination under Title IX are by no means a case of first impression. With respect to this Honorable Court, this issue was addressed over the years by a landslide of federal authority holding that sexual orientation discrimination claims cannot be addressed under Title IX. (*Frasier v. Fairhaven School Comm.*, 27 F.3d 52, 66 (1st Cir. 2002); *Hoffman v. Saginaw Public Schools,* 2012 WL 2450805 (E.D. Mich. June 27, 2012); *Howell v. North Central College,* 320 F.Supp.2d 717 (N.D. Ill. 2004); *Hamm v. Weyauweja Mild Products, Inc.,* 332 F.3d 1058, 1066 (7th Cir. 2003); *Hamner v. Saint Vincent Hosp. and Healthcare Center,* 224 F.3d 701, 707 (7th Cir. 2000); *Montgomery v. Independent School Dist. No. 709,* 109 F.Supp.2d 1081, 1089-90 (D. Minn. 2000); *Tyrrell v. Seaford Union Free School Dist.* 792 F.Supp.2d 601, 622-23 (E.D. N.Y. 2011); *Swift v. Countrywide Home Loans, Inc.,* 770 F.Supp.2d 483, 488 (E.D. N.Y. 2011); *Dawson v. Bumble and Bumble,* 398 F.3d 211, 217 (2nd Cir. 2000); *Simonton v. Runyan,* 232 F.3d 33, 36 (2nd Cir. 2000).) Thus, while Pepperdine acknowledges and respects this Honorable Court's decision that sexual orientation claims could be heard and adjudicated under Title IX, Pepperdine respectfully submits that this was not a case of first impression.

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Moving party's argument is not, however, based upon the status of the law. It is based upon the fact that the evidence does not support a claim of sexual orientation discrimination.

Plaintiffs go to great lengths to argue a negative culture at Pepperdine by citing testimony of Dr. Jones-Jovilet and Dr. Mark Davis. Plaintiffs take this testimony out of context. Both Dr. Jones-Jovilet and Dr. Davis testified that Pepperdine was moving the campus toward full acceptance of the LGBT community within its midst and in fact testified that it was the policy of the University to not discriminate against an individual who identified as gay. Plaintiffs' own fears and alleged perceptions did not change this fact.

Moreover, the evidence is uniform that the Athletics Department did not contain such a culture. Plaintiffs offered ***no*** evidence that would suggest the Athletics Department contained a culture of discrimination against gay individuals. In fact, the evidence showed that the women's basketball program along with its staff had many members who identified as LGBT. To then say that the Athletics Department discriminated against them or harassed them for their sexual orientation flies in the face of the true facts of the case.

Even Plaintiffs' evidence about being directed to file a Title IX claim completely undercuts their assertion that Pepperdine was harassing or discriminating against them based upon their sexual orientation. They testified that Pepperdine's own staff indicated they should file a claim. Had Pepperdine been attempting to harass or discriminate against them based upon sexual orientation, Pepperdine would have simply swept their allegations under the rug. Moreover, Plaintiffs offer no evidence to dispute the fact that they were not denied any benefits from their scholarship or the opportunity to attend classes or even were kicked off the basketball team after filing their claim. The evidence is uniform, the Athletics Director, Dr. Stephen Potts, and the Title IX investigator, Dr. Jones-Jovilet, protected their interests after the filing of the claim. Therefore, the evidence

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Plaintiffs argue about their lack of sophistication simply shows that Pepperdine was not a discriminatory environment.

3. *The Unruh Civil Rights Act claim was frivolous.*

Plaintiffs' reliance upon the use of the term "lesbianism" to establish discrimination under the Unruh Civil Rights Act is without foundation and frivolous. Even assuming the term was used, that fact alone does not establish discrimination or even discriminatory or harassing intent. The term "lesbianism" is an accepted term in the American lexicon.[1] To be sure, if the evidence supported a conclusion that Coach Ryan Weisenberg used the term lesbianism in a vitriolic manner and that it was offensive to the players or staff who identified as gay, it would be evidence of discrimination or harassment. Yet, there is no such evidence in the record. Thus Plaintiffs grab at straws in an attempt to turn a word that is recognized in the American lexicon into some discriminatory or harassment related vehicle. That personal assertion does not remove this case from the area of being frivolous.

Based upon the above, and as argued and stated in the moving papers, a claim for denial of accommodations under the Unruh Civil Rights Act is frivolous.

4. *The intentional infliction of emotional distress claim is frivolous.*

Plaintiffs' intentional infliction of emotional distress claim was frivolous and their arguments to the contrary do not change that fact. Again, Defendant Pepperdine is faced solely with Plaintiffs' own testimony on the issues of the intensity of their infliction of emotional distress.

Plaintiff White's and Videckis's testimony of the alleged attempt at suicide by Ms. White is not in and of itself sufficient to show unreasonable conduct. The jury

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[1] See Declaration of David R. Hunt and Request for Judicial Notice.

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concluded without a doubt that no conduct by Pepperdine was unreasonable. Moreover, the jury verdict and instruction requires that the conduct be intended to cause emotional distress and in fact did so. Moreover, under California law for conduct to result in liability for intentional infliction of emotional distress it must be "outrageous." (CACI 1602.) For conduct to be "outrageous", as stated by CACI, "Conduct is outrageous if a reasonable person would regard the conduct as intolerable in a civilized community. Outrageous conduct does not include trivialities such as indignities, annoyances, hurt feelings or bad manners that a reasonable person is expected to endure." Whether Ms. White actually attempted suicide or not, the jury found that there was no outrageous conduct. Moreover, they may well have found that Ms. White's alleged attempt at suicide lacked credibility. There was no evidence offered by Plaintiff establishing that she took a potential fatal dosage of medicine. The evidence established that she threw up and remained at her home. Ms. Videckis never took her to the hospital. Whether indeed there was an attempted suicide or not, the jury seems to have completely discounted that testimony.

Further, Ms. Videckis' protestations of her relationship with her father was irreconcilable after her filing this lawsuit became public is not Pepperdine's responsibility. Ms. Videckis could well have brought to her father's attention the issues she was facing and her own sexual identity well before this occurred. Instead, she chose to hide this fact regarding her life from her family. Pepperdine did not force her to file a lawsuit. Pepperdine did not force the lawsuit to get the public's attention. Pepperdine did not prevent Ms.Videckis from communicating with her own family regarding her sexual identity. Pepperdine did nothing to affect her personal relationship with her family. These were Ms. Videckis's choices, not Pepperdine's.

Neither Ms. Videckis's nor Mr. Whites' choices can be the basis of an outrageous action claim against Pepperdine.

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Plaintiffs' claims of intentional infliction of emotional distress were frivolous.

II. ATTORNEY'S FEES SOUGHT ARE REASONABLE

Plaintiffs brought this action seeking damages from Pepperdine University and seeking to destroy its and Coach Ryan Weisenberg's reputations in the community of women's basketball. Plaintiffs accused Pepperdine and Coach Weisenberg of actions that were purely false. Their accusations were calculated to vilify Coach Weisenberg and Pepperdine in the overall NCAA community. All the actions taken by Pepperdine to defend these heinous allegations were appropriate. A fee award in the amount expended, along with augmented costs is reasonable and justified.

III. CONCLUSION

Plaintiffs' lawsuit is frivolous by its nature. If it was not frivolous upon initiation, it was frivolous when the Plaintiffs received all of the information related to the Title IX investigation. Based upon all of the above, and the arguments and evidence supporting the moving papers, Pepperdine requests this Court award it its fees in defending this case.

DATED: October 16, 2017

Respectfully submitted,

ANDERSON, McPHARLIN & CONNERS LLP

By: /s/ David R. Hunt
Paula Tripp Victor
David R. Hunt
Peter B. Rustin
Attorneys for Defendant PEPPERDINE UNIVERSITY

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DECLARATION OF DAVID R. HUNT

I, David R. Hunt, declare:

1. I am an attorney licensed to practice law in the courts of the State of California and before the United States District Court, Central District of California. I was second chair in the handling of this litigation in trial. I conducted the investigation reflected in this declaration personally. I, therefore, know all of the facts in this declaration of my own personal knowledge and can testify competently thereto in a court of law.

2. Upon reading Plaintiffs' opposition points and authorities, I decided to investigate the use of the word "lesbianism" in the American lexicon. I personally conducted an internet search on October 13, 2017 seeking out the word "lesbianism" through google.com. I determined that the word "lesbianism" is used throughout the American lexicon and not in a derogatory manner. In fact, LGBT publications use the term "lesbianism" as well as other respected sources. I found the following uses of the word "lesbianism", among others, in my investigation:

- Wikipedia "History of Lesbianism," https://en.wikipedia.org/wiki/History_of_lesbianism,
- Encyclopedia Britannica, https://www.britannica.com/topic/lesbianism;
- "Lesbianism is Under Attack, Though Not by the Usual Suspects," feministcurrent.com, http://www.feministcurrent.com/2017/07/08/lesbianism-attack-though-not-usual-suspects/;
- encyclopedia.com, Homosexuality and Lesbianism, http://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/homosexuality-and-lesbianism;
- CWLU Herstory Project, "Lesbianism and Feminism," Ann Koedt (1971), https://www.cwluherstory.org/classic-feminist-writings-articles/lesbianism-and-feminism;

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- Jewish Women's Archive, Encyclopedia, "Lesbianism," https://jwa.org/encyclopedia/article/lesbianism;
- About Islam, "Lesbianism in the Quran," http://aboutislam.net/counseling/ask-about-islam/lesbianism-in-the-quran/;
- Merriam-Webster, https://www.merriam-webster.com/dictionary/lesbianism; and
- Free Dictionary, http://www.thefreedictionary.com/lesbianism.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on October 16, 2017 in Los Angeles, California.

/s/ David R. Hunt
DAVID R. HUNT

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REQUEST FOR JUDICIAL NOTICE

PLEASE TAKE NOTICE that Defendant Pepperdine University respectfully requests that this court take judicial notice, pursuant to Rule 201 of the Federal Rules of Evidence, that the word "lesbianism" is used commonly in American lexicon and not in a derogatory fashion. This request is based upon the Declaration of David R. Hunt and all of the evidence identified therein.

DATED: October 16, 2017 ANDERSON, McPHARLIN & CONNERS LLP

By: /s/ David R. Hunt
Paula Tripp Victor
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Peter B. Rustin
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