IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	:	
	:	
Plaintiff,		
	:	Case No. 3:06cv302
vs.		
	:	JUDGE WALTER HERBERT RICE
UNITRIN SPECIALTY, *et al.*		
	:	
Defendants.		

DECISION AND ENTRY OVERRULING DEFENDANTS' MOTION FOR ATTORNEYS' FEES (DOC. #57)

Thomas Allmond was employed by Defendant Unitrin Speciality or its predecessor from 1999 until his termination in 2005. Unitrin Speciality is a business segment of Defendant Unitrin, Inc. Defendant Trinity Universal Insurance Company is a wholly owned subsidiary of Unitrin, Inc. (Defendants Unitrin Speciality, Unitrin, Inc., and Trinity Universal Insurance Company will be referred to collectively as "Unitrin".) Plaintiff Equal Employment Opportunity Commission ("EEOC) brought suit against Unitrin, on behalf of Allmond, alleging retaliation for having complained of age and sex discrimination, in violation of Title VII and the Age Discrimination in Employment Act ("ADEA").

In a decision dated September 22, 2008, this Court ruled in favor of the Defendants on their Motion for Summary Judgment. Doc. #54. Therein, the Court

determined that the case was to be decided in the context of Title VII's opposition clause. Factually, Allmond sent his supervisor an e-mail that fairly clearly set forth an opposition to what he perceived to be sex discrimination, but then he immediately recanted the same, in both conversation and a subsequent e-mail. Unitrin terminated him two weeks later, based on several factors, including the initial e-mail. In the summary judgment decision, this Court concluded that, based on these facts (specifically to include the recanting of the initially voiced opposition), the Plaintiff had not set forth sufficient evidence to establish that he had engaged in protected conduct, at the time of his termination and, thus, had not satisfied a *prima facie* case of retaliation.

Subsequently, the Defendants filed a Motion for Attorney Fees, which is presently before the Court. Doc. #57. The Court will begin its analysis with a review of the applicable legal standard for assessing such motions and then apply that standard to the facts of the present case.

I. Legal Standard for Awarding Attorneys' Fees

The Defendants have moved for attorneys' fees, under 42 U.S.C. § 2000e-5(k).[1] Doc. #57. Title VII allows a court to award reasonable attorney fees to a

[1]The Defendants have not moved for attorneys' fees, under the ADEA. The ADEA incorporates certain provisions from the Fair Labor Standards Act, to include the attorney fees provision, but that provision only allows for recovery of fees for prevailing plaintiffs. 29 U.S.C. § 216(b) (incorporated into the age discrimination context by 29 U.S.C. § 626(b)). Nevertheless, courts have recognized, under the American common-law rule, that "attorney's fees may be awarded against a party

prevailing party. 42 U.S.C. § 2000e-5(k). The Sixth Circuit instructs, however, that

> [t]he standard for granting attorneys' fees to a prevailing employer is more stringent than that for awarding attorneys' fees to a prevailing employee. The employer may be awarded attorneys' fees where the plaintiff's claim was "frivolous, unreasonable, or without foundation," or where the plaintiff continued to litigate after it became clear that her claim was frivolous, unreasonable, or without foundation.

Balmer v. HCA, Inc., 423 F.3d 606, 615-16 (6th Cir. 2005) (quoting and citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417-18, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978)); see also Christiansburg, 434 U.S. at 421-22. Further, "[c]ourts should not conclude that a claim was groundless just because it was ultimately unsuccessful." Balmer, 423 F.3d at 615.

The Sixth Circuit emphasizes that "[d]efendants may recover fees for frivolous claims only" and that "[a]ttorneys' fees should be awarded only in the most egregious of circumstances." Id. at 616 (citing Gutierrez v. Denver Post, Inc., 691 F.2d 945, 948 (10th Cir. 1982); Gettings v. Bldg. Laborers Local 310 Fringe Bens. Fund, 349 F.3d 300, 310 (6th Cir. 2003)). Factors that should be considered when determining the propriety of awarding attorneys' fees include, "(1) whether plaintiff presented sufficient evidence to establish a prima facie case; (2) whether defendant offered to settle the case; and (3) whether the trial court

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who has proceeded in bad faith." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978). The Defendants, in this case, have not proceeded on this theory, however, since they have made no allegations of bad faith.

dismissed the case prior to trial or held a full-blown trial on the merits." Id. (citing EEOC v. L.B. Foster Co., 123 F.3d 746, 751 (3rd Cir. 1997)).

II. Analysis

In the present case, the Defendants couch their argument in terms of the three factors set forth above, pointing out that the Court previously determined that the Plaintiff did not present sufficient evidence to establish its *prima facie* case, that the Defendants offered to settle the case (during mediation negotiations with Magistrate Judge Ovington), and that the Court decided the case on summary judgment, rather than allowing the case to proceed to trial. Docs. #57, #61. The Plaintiff responds by arguing that the three factors are merely part of the Court's consideration and that the Court's decision must be focused on the overarching question of whether this case was "frivolous".

The Court starts by noting that the premise of each of the parties' arguments is correct. As suggested by the Defendants, the three aforementioned factors weigh against the Plaintiff. However, the Court notes that, as the Plaintiff contends, these are merely factors to be considered in determining whether the Plaintiff's case was frivolous and not the sole determiners of such an outcome.[2]

[2]The Court pauses here to note that a significant number of cases, in this Court, are decided on summary judgment (rather than proceeding to settlement or trial), because the plaintiffs do not satisfy at least one element of their *prima facie* cases. Further, throughout the course of many of these cases, the defendants have entered into settlement negotiations. Finding that all such prevailing

See Balmer v. HCA, Inc., 423 F.3d 606, 616 (6th Cir. 2005). In weighing whether the Plaintiff's case was "frivolous", the Court will consider those factors along with the other considerations to which the parties point.

In its argument, the Defendants point out that the Plaintiff was aware of the law and facts (to include Allmond's recantations of his oppositional e-mail communication), which remained unchanged before and during the pendency of the case, thus indicating (argues the Defendants) that the Plaintiff continued to litigate

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defendants would be entitled to attorneys' fees would run counter to the Sixth Circuit's instruction that such fees may only be granted for "frivolous" claims and "in the most egregious of circumstances," however. Balmer v. HCA, Inc., 423 F.3d 606, 616 (6th Cir. 2005).

On another note, in further support of their present contention, the Defendants are seemingly arguing that the Sixth Circuit has upheld an award of attorney fees on behalf of the prevailing defendant, based solely on the plaintiff's inability to establish a *prima facie* case. In so doing, the Defendants argue that, in Haynie v. Ross Gear Div. of TRW, 799 F.2d 237 (6th Cir. 1986), vacated as moot, 482 U.S. 901, 107 S. Ct. 2475, 96 L. Ed. 2d 368 (1987), the Sixth Circuit "equat[ed] the plaintiff's inability to establish a *prima facie* claim with a 'totally baseless' case." Doc. #57 at 4. While the Haynie Court did determine that the plaintiff's claim against the union was "totally baseless," it did so based on the specific facts of that case (e.g., "the union did exceedingly well" by the plaintiff, the union's representative was "obviously sympathetic" toward the plaintiff, the approach the union followed before the arbitrator was approved in advance by the plaintiff, the union gave satisfactory post-arbitration assistance to the plaintiff). After reviewing these facts, the Court determined that the plaintiff "was unable to make a *prima facie* case against the union because no such case existed" and that her claim against the union was, thus, "totally baseless". Id. at 242. This case cannot be read, however, for the overly general proposition that the plaintiff's failure to establish her *prima facie* case, in and of itself, equated to her having a totally baseless claim. (Footnote to this footnote: Despite the fact that the Supreme Court vacated the Haynie decision as moot, 482 U.S. 901, the Sixth Circuit has continued to rely on its decision, in subsequent cases. E.g., Balmer v. HCA, Inc., 423 F.3d 606, 617 (6th Cir. 2005)).

this case after it became clear that its claim was frivolous, unreasonable, or without foundation. In support of their position, the Defendants cite Smith v. Smythe-Cramer Co., 754 F.2d 180, 183 (6th Cir. 1985), for the proposition that "courts have awarded attorneys['] fees to prevailing defendants where no evidence supports the plaintiff's position or the defects in the suit are of such magnitude that the plaintiff's ultimate failure is clearly apparent from the beginning or at some significant point in the proceedings after which the plaintiff continues to litigate."

The Plaintiff, on the other hand, argues that it had an "arguable basis" for pursuing its claim, given that the Court recognized that Allmond's first e-mail fairly clearly set forth an opposition to what Allmond perceived to be sex discrimination and that his supervisor admitted that the e-mail was a factor in his firing. The Plaintiff also argues that the Defendants have pointed to nothing to indicate that the Plaintiff's failure in this litigation was "clearly apparent", alleging that the Defendants did not even raise the issue that decided the case (i.e., that Allmond had not opposed an unlawful practice at the time of his termination) in their summary judgment brief.[3]

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[3]Both parties also dispute the significance of the Defendants previously providing the Plaintiff copies of Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989) and Bell v. Safety Grooving & Grinding, LP, 107 Fed. Appx. 607, 2004 U.S. App. LEXIS 18172 (6th Cir. Aug. 24, 2004), with the Defendants claiming that they "provided to the EEOC the governing Sixth Circuit authority that foreclosed its case" (Doc. #61 at 2) and the Plaintiff questioning to what extent both the Defendants and the Court relied on these cases in the summary judgment decision (Doc. #60 at 6-7). The Court agrees with the Plaintiff, on this point. The Court did not cite Bell, in its summary judgment decision. Doc.

The Court finds the Plaintiff's arguments to be sound for two reasons. First, there arguably existed facts that supported the Plaintiff's position, given the supervisor's admission that Allmond's initial e-mail had played a role in the termination decision. Second, and most significantly, the Defendants did not raise the issue that ultimately decided the case in their summary judgment brief, thus indicating that the Plaintiff's ultimate failure was not "clearly apparent" from the beginning (at least to the Defendants) and was also not clearly apparent from some significant point in the proceedings after which the Plaintiff continued to litigate. See Doc. #20.[4] (It was not until the Defendants filed their reply memorandum that they first made the clear assertion that, by withdrawing his e-mail allegations, Allmond also withdrew his charges of discrimination. Doc. #24 at 3, 4.[5]) To reiterate what the Sixth Circuit stated in Smythe-Cramer Co., courts have awarded

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#54. As to Booker, the Court relied on it for general propositions of long-established law, as well as citing it in support of the part of its decision pertaining to the ADEA claim. Id. at 18, 22-24. Since the Defendants have not moved for attorney fees, with regard to the ADEA claim, as previously noted, the Court finds their arguments pertaining to these cases to be without merit.

[4]The Defendants argued that Allmond's initial e-mail did not constitute protected activity, because it was a "false statement", with the focus being on the fact that Allmond lied therein, rather than on the legal conclusion that he withdrew his statement that constituted an opposition to sex discrimination. Doc. #20 at 11-13. The Defendants further asserted that the initial e-mail did not meet the standard of reasonableness required of oppositional conduct, but once again did not hone in on the act of the withdrawal of that e-mail. Id. at 13-15.

[5]Because the Defendants raised several new issues in their reply memorandum, the Plaintiff failed a Motion for Leave to File Surreply Brief (Doc. #26), which the Court sustained (Not. Order, dtd. Dec. 27, 2007).

attorneys' fees either "where no evidence supports the plaintiff's position" or "the defects in the suit are of such magnitude that the plaintiff's ultimate failure is clearly apparent from the beginning or at some significant point in the proceedings after which the plaintiff continues to litigate." Smythe-Cramer Co., 754 F.2d at 183. Because this Court finds that evidence arguably existed to support the Plaintiff's position and that the defects in the suit were not of such magnitude that the Plaintiff's ultimate failure was clearly apparent from the beginning or at some significant point in the proceedings after which the Plaintiff continued to litigate, the Court does not find that the present case was frivolous or presented "the most egregious of circumstances", which would warrant the award of attorney fees to the Defendants. Therefore, the Defendants' Motion for Attorneys' Fees (Doc. #57) is OVERRULED.

III. Conclusion

The Defendants' Motion for Attorneys' Fees (Doc. #57) is OVERRULED.

August 31, 2009

/s/ Walter Herbert Rice
WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:
Counsel of record