

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

GERALD LINDSLY	:	Case No. 1:07-cv-588
Plaintiff	:	(Judge Spiegel)
vs.	:	<u>DEFENDANTS' MOTION FOR</u>
MICHAEL WORLEY	:	<u>ATTORNEY FEES AND COSTS</u>
and	:	
WILLY DALID	:	
Defendants	:	

Now come Defendants, through Counsel, who move that this court exercise its discretion to award attorney fees and costs to Defendants under Civil Rule 54 and 42 U.S.C. 2000e-5(k) for reasons set out in the attached memorandum.

Respectfully submitted,

/s/ Jerome A. Kunkel
Jerome A. Kunkel, 0039562
Christian J. Schaefer, 0015494
Assistant Prosecuting Attorneys
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
513-946-3103 (Kunkel)
513-946-3041 (Schaefer)
513-946-3018 (Facsimile)

MEMORANDUM

Procedural Posture:

On May 4, 2009, this Court dismissed this case for failure to comply with the Prison Litigation Reform Act because Plaintiff was confined in a mental hospital at the time the suit was filed. (Doc. 41).

The history of the case demonstrates that the issue of Plaintiff's confinement in a mental hospital was raised early on in the litigation by the defendants. After raising this issue by defendants, Plaintiff recited that as of January 9, 2008, he was no longer confined in a mental hospital. (Doc. 13). Defendants Amended Answer, filed February 8, 2008 raised the issue of non-compliance with the Prison Litigation Reform Act. (Doc. 16, Twentieth Defense).

This Court granted leave to Plaintiff to file an Amended Complaint to bring the suit in the name of a next friend on June 6, 2008. This was to avoid creating inefficiency in the judicial system and to save Plaintiff from having to pay additional costs. (Doc. 19). The deadline on filing the amended Complaint was July 6, 2008.

Instead of complying with the Court's order, Plaintiff did nothing until a Motion to Dismiss was renewed by defendants because Plaintiff failed to file an amended Complaint in the time allowed. Plaintiff responded by moving to Amend the Courts Order on July 11, 2008. (Doc. 23). The Court changed its prior Order on July 16, 2008. (Doc. 26).

The Court's concern of inefficiency in the judicial system and the saving of costs was effectively defeated by Plaintiff's refusal to file an Amended Complaint. Had he filed the Amended Complaint, after his release from the mental hospital as the Court

ordered on June 6, 2008, he could have argued the issue left undecided by the Sixth Circuit in *Cox v. Mayer*, 332 F. 3d 422 (2003) footnote 3.

Defendants were forced to defend the case on the merits and expend \$7,188.70 of scarce county resources in this matter by taking 13 depositions and the hiring of an expert witness. (See attached costs form). Additionally, two local government attorneys were required to spend time working on the defense of the case. The estimated time an effort of those attorneys is \$10,000 each, for a total of \$20,000.

Argument

Fed. Civ. Rule 54(d) allows that costs may be awarded in favor of the prevailing party. As this Court dismissed the case, undoubtedly, Defendants were the prevailing parties. Local Rule 54.1 provides for a procedure for the clerk to determine the costs. This rule does not, in this case, provide adequate relief to Defendants. The expert and the multiple depositions were made necessary by Plaintiff's decision not to file an Amended Complaint after Plaintiff was released from confinement in a mental hospital. This Court has authority to order costs beyond those allowed by Local Rule 54.1.

Additionally, in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 98 S.Ct. 694 (1998), the Supreme Court held that District court may, in its discretion, award attorneys fees to prevailing party in a Civil Rights Act case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith. Civil Rights Act of 1964, § 706(k) as amended 42 U.S.C.A. § 2000e-5(k).

In *Christianburg*, the Defendants were denied costs including attorney fees under 42 U.S.C.A. § 2000e-5(k) because the EEOC was litigating an unconstructed statute. Here,

the basis of dismissal was the Prison Litigation Reform Act. The act has been litigated extensively in the Sixth Circuit and the United States Supreme Court. The only unconstrued element of the act appears to be whether defaulted claims can be revived by release of the prisoner from confinement. Plaintiff could have (but chose not to) kept this issue alive with an Amended Complaint. He chose not to do so, despite the opportunity granted by this Court.

Finally, the Defendants in this case were two corrections officers sued solely in their individual capacities. The Sheriff was not sued. The County government was not sued. The only witness Plaintiff alleged to provide the basis for suing these two individuals was Inmate Theodore Gentry. Inmate Gentry identified a corrections officer, other than the two defendants in this case, as the one who caused the orbital fracture for which Plaintiff sought compensation. Inmate Gentry testified that he witnessed the event in which Plaintiff Lindsly was injured and that within one minute he saw that Plaintiff Lindsly eye was swollen and nose was bleeding. (Gentry Depo. P. 42, 43, 44). Inmate Gentry testified that it was Deputy Lally, who is not a defendant in this case, that intentionally struck Plaintiff Lindsly in the face with his knee causing the eye and nose injuries. (Gentry Depo. p. 29, 40, 41, 43). No witness to the events has identified Defendants Worley or Dalid as causing the injury.

While perhaps not filed in bad faith, this case was baseless both a legally and factually. Under the test set out in *Christiansburg*, this Court should exercise its discretion in this case and award Defendants both attorney fees and costs not normally recoverable under Fed. Civ. R. 54.

Conclusion

This Court should award defendants attorney fees and costs estimated to be \$27,188.70 in this case.

Respectfully submitted,

/s/ Jerome A. Kunkel

Jerome A. Kunkel, 0039562

Christian J. Schaefer, 0015494

Assistant Prosecuting Attorneys

230 East Ninth Street, Suite 4000

Cincinnati, Ohio 45202

513-946-3103 (Kunkel)

513-946-3041 (Schaefer)

513-946-3018 (Facsimile)

CERTIFICATE OF SERVICE

This is to confirm that a copy of the foregoing Motion was electronically filed on the 18th day of May, 2009. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system, and the filing may be accessed through that system.

/s/ Jerome A. Kunkel

Jerome A. Kunkel, 0039562

Assistant Prosecuting Attorney