UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-cv-80655-ROSENBERG

JAMES TRACY,

Plaintiff,

v.

FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES a/k/a FLORIDA ATLANTIC UNIVERSITY,

Defendant.
_____ /

DEFENDANT JOHN KELLY'S REPLY IN SUPPORT OF MOTION TO BIFURCATE THE ISSUES OF ENTITLEMENT AND AMOUNT OF ATTORNEYS' FEES AND ACCOMPANYING MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

Defendant, Dr. John Kelly ("Dr. Kelly"), hereby replies in support of his Motion to Bifurcate the Issues of Entitlement and Amount of Attorneys' Fees and Accompanying Motion for Entitlement to Attorneys' Fees [DE 475] (the "Motion") and states as follows:

Introduction

Plaintiff's claims against Dr. Kelly in his individual capacity were unsupported by the facts and under the law and were therefore frivolous, unreasonable, and without foundation. The factors articulated by the Eleventh Circuit in *Sullivan v. School Board of Pinellas County*, along with the totality of the circumstances throughout the case, support an award of attorneys' fees in favor of Dr. Kelly. Plaintiff was unable to show a *prima facie* case against Dr. Kelly and his claims were disposed of on summary judgment, prior to trial. Plaintiff refused to acknowledge clear precedent, making arguments in direct contravention to well established law and using only frivolous and unreasonable contentions that were without factual support. Plaintiff's attempts to paint his actions as being in "good faith" do not absolve him of liability for the fees incurred in

defending Dr. Kelly against Plaintiff's frivolous claims. Dr. Kelly should be awarded entitlement to attorneys' fees expended in defending against these frivolous claims.

Plaintiff's claims were frivolous, unreasonable, and without foundation, and were appropriately disposed of on summary judgment

This Court has the discretion to award attorneys' fees to a prevailing defendant when the action was "frivolous, unreasonable, or without foundation." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). *See also Sullivan v. Sch. Bd. of Pinellas Cnty.*, 773 F.2d 1182, 1188 (11th Cir. 1985) (holding a case is frivolous when it "is so lacking in arguable merit as to be groundless or without foundation"). A determination of frivolity is not based on immutable rules, but rather, is determined by the Court on a case-by-case basis. *See Head v. Medford*, 62 F.3d 351, 355 (11th Circ. 1995). However, courts do consider several factors when determining whether a claim was frivolous: (1) whether the Plaintiff established a *prima facie* case, (2) whether the defendant offered to settle, and (3) whether the trial court dismissed the case prior to trial. *Id*. (citing *Sullivan*, 773 F.2d at 1189).

In his Response in Opposition to the Motion, Plaintiff seeks to avoid the *Sullivan* factors, opting instead to re-litigate his failed arguments on summary judgment. Plaintiff spends the entirety of his response rehashing cherry picked, out of context, alleged "facts" that he claims supported his allegations. But the Court has already determined that those alleged "facts" did not support his claim, and in fact, that he had "no evidence" to support his claims. *See* Omnibus Order on All Pending Motions for Summary Judgment [DE 362 at pp. 24-25]. The fact that Plaintiff's claims were dismissed on summary judgment after undertaking such a detailed analysis of his allegations supports that the claim was frivolous, unreasonable, or without foundation.

In *Head v. Medford*, the Eleventh Circuit determined that the defendant was entitled to an award of attorneys' fees after summary judgment was entered in its favor on a constitutional claim

brought by the plaintiff. "Although the district court did not specifically determine that plaintiff failed to establish a prima facie case for her federal constitutional claims, this concept was the necessary import of the district court's order." *Head*, 62 F.3d at 356. Here, Plaintiff's claims against Dr. Kelly did not survive summary judgment. Notably, the Court's analysis of the claims against Dr. Kelly was not limited to the issue of qualified immunity. Rather, the Court undertook a detailed analysis as to whether Plaintiff had met the burden to establish that Dr. Kelly could be held personally liable, as well-settled precedent in the Eleventh Circuit declares that respondeat superior or vicarious liability alone is insufficient to bring a Section 1983 claim against an individual. *See* [DE 362]. In doing so, this Court found that "Plaintiff has no evidence that Defendant Kelly directly participated in Plaintiff's termination or was otherwise casually [sic] involved and, at the very least, Plaintiff has no evidence upon which a reasonable jury could rely to meet the 'extremely rigorous' standard necessary to impose supervisor liability on Defendant Kelly." [DE 362 at pp. 24-25 (emphasis supplied)]. The necessary import of the Court's order dismissing Plaintiff's claim against Dr. Kelly at the summary judgment stage was that Plaintiff had failed to make a *prima facie* case to support liability. *See Head*, 62 F.3d at 356.

Plaintiff failed to make a *prima facie* case against Dr. Kelly and his claims were disposed of prior to trial. Both of these factors weigh in Dr. Kelly's favor, supporting an award of attorneys' fees.[1] *See Sullivan*, 773 F.2d 1182; *O'Boyle v. Thrasher*, 647 Fed App'x 994 (11th Cir. 2016)

[1] As to the third factor, there is no evidence in the record regarding settlement discussions between the parties. However, this factor is entitled to little weight in this analysis given the cost of litigation alone. *See Hamilton v. Sheridan Healthcorp, Inc.*, 700 Fed. App'x 883, 886 (11th Cir. 2017) ("The other two factors similarly weigh in favor of awarding fees. When compared to Dr. Hamilton's demand and the cost of litigation, the defendants made only a nominal settlement offer."). In the Pretrial Stipulation, Plaintiff estimated his attorneys' fees alone to range between $1,750,000 to $2,500,000. [DE 321 at p. 13].

(upholding fees in favor of defendant when plaintiff failed to make a *prima facie* case and claims were dismissed prior to trial).

Plaintiff refused to acknowledge clear precedent and relied on frivolous contentions

Courts evaluating claims under Section 1988 may also award fees when the plaintiff refused to acknowledge clear precedent or asserted a claim that was based knowingly on a nonexistent interest. *See Head*, 62 F.3d at 356. Here, the long-standing precedent in the Eleventh Circuit prohibits personal liability for a government employee based solely on respondeat superior or vicarious liability. *Keith v. DeKalb Cnty., Ga.*, 749 F.3d 1034, 1047 (11th Cir. 2014); *Hartley v. Parnell*, 193 F.3d 1263, 1269 (11th Cir. 1999); *Braddy v. Fla. Dep't of Labor*, 133 F.3d 797, 801-02 (11th Cir. 1998).

Despite this well-settled precedent, in his opposition to Dr. Kelly's motion for summary judgment, and even in his Response in Opposition to the Motion at issue today, Plaintiff alleges that his claims were not frivolous because Dr. Kelly admitted that as President of the University, he had the "ultimate responsibility" regarding the termination of faculty and that he allegedly "monitored the fallout" from Plaintiff's termination. [DE 273 at pp. 3-4; DE 500 at pp. 5-6]. In rejecting this baseless argument in its Omnibus Order on All Pending Motions for Summary Judgment, this Court already ruled that this is "precisely the kind of vicarious liability that the Eleventh Circuit has repeatedly held is insufficient as a matter of law." [DE 362 at p. 23] (citing *Keith*, 749 F.3d at 1047-48).

The Court also carefully evaluated Plaintiff's other alleged "facts" – including an email wherein Dr. Kelly offered to personally "deal with" a complaint from the parent of a deceased child that Plaintiff contends shows that Dr. Kelly was personally involved in the decision to terminate his employment. In evaluating Plaintiff's arguments as it relates to this email, the Court

stated that Plaintiff's "contention is frivolous" finding instead that, in context, Dr. Kelly was expressing his desire to communicate with the parents of a deceased child. [DE 362 at p. 23].

Even in his Response in Opposition to the Motion, Plaintiff's recitation of alleged "facts" is based on Plaintiff's own speculation, conjecture, and conclusory allegations that are unsupported by record evidence. They are, in short, an *unreasonable* basis on which to form a claim and show that his allegations against Dr. Kelly were without foundation and were frivolous. It was undisputed that Dr. Kelly did not review the decision to terminate Plaintiff's employment, did not review the termination itself, and was not consulted by anyone from the Provost's office before Dr. Diane Alperin decided to terminate Plaintiff's employment. Thus, there was absolutely no evidence to support Plaintiff's conclusory assertions that Dr. Kelly was personally involved in the decision to terminate Plaintiff's employment.

In short, the alleged "facts" that Plaintiff contends supported his claims against Dr. Kelly were either: (1) in direct contravention of long-standing precedent in the Eleventh Circuit; or (2) deemed frivolous by this Court and were otherwise unreasonable. The fact that, more than four years later, Plaintiff is pointing to the same insufficient allegations that directly contradict well-established precedent supports that Dr. Kelly should be entitled to his fees.

Plaintiff cannot circumvent an award of attorneys' fees by claims of good faith

As for Plaintiff's attempts to circumvent an award of attorneys' fees, his arguments are without merit. Plaintiff repeatedly alleges that he brought his claims against Dr. Kelly in "good faith." *See* Plaintiff's Response to the Motion [DE 500 at pp. 1, 3]. In support of this contention, Plaintiff alleges that (1) his claim against Dr. Kelly survived a motion to dismiss on its face and (2) that Dr. Kelly did not file a Rule 11 motion for sanctions.

Plaintiff's purported "good faith" is not a defense to a fee award. A prevailing defendant is entitled to an award of attorneys' fees when a court finds that the plaintiff's claim was frivolous, "even though not brought in subjective bad faith." *Head*, 62 F.3d at 355 (quoting *Christianburg Garment Co.*, 432 U.S. at 421). A finding of bad faith is therefore not necessary for an award of attorneys' fees pursuant to Section 1988 and any "good faith" Plaintiff claims to have operated under is irrelevant. *Id*.

The fact that Plaintiff's claims survived dismissal is also not dispositive as to the issue of frivolity. *See Sullivan*, 773 F.2d at 1189 ("Cases where findings of 'frivolity' have been sustained typically have been decided in the defendant's favor on a motion for summary judgment or a Fed. R. Civ. P. 41(b) motion for involuntary dismissal."). Plaintiff relies on this Court's order on Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint to suggest that the Court has already ruled his claims were not frivolous or unfounded. As Plaintiff is no doubt aware, the standards on dismissal and summary judgment are vastly different. The Court determined that Plaintiff's unsupported allegations were sufficient to avoid dismissal, where the Court must accept those allegations as though true and make all inferences in Plaintiff's favor. But the issue before the Court now is whether Plaintiff's allegations were frivolous, unreasonable, or without foundation. The fact remains, Plaintiff never identified <u>any</u> evidence to support his allegation that Dr. Kelly was personally involved in the decision to terminate Plaintiff's employment and, in fact, the undisputed evidence showed otherwise. Yet, Plaintiff persisted in his vendetta, seeking not only summary judgment against Dr. Kelly (along with "all Defendants"), but also seeking even <u>punitive damages</u> against Dr. Kelly individually, without providing a single piece of evidence to support liability. *See* [DE 247 at pp. 17-18].

In further support of his alleged "good faith," Plaintiff contends that Dr. Kelly is not entitled to attorneys' fees because Dr. Kelly did not file a Rule 11 motion. Although Rule 11 permits a party to recover attorneys' fees for a frivolous claim, it is not the only mechanism to do so. Section 1988 does not require there to have been a Rule 11 motion served or filed. In fact, in *Head*, the Eleventh Circuit declined to even address whether fees were appropriate under Rule 11, when the Court had already determined they were appropriate according to Section 1988. *Head*, 62 F.3d at 356.

Plaintiff's purported "good faith" does not refute that Plaintiff's claim against Dr. Kelly was without factual support and was contrary to long standing legal precedent in the Eleventh Circuit. Plaintiff's insistence on pursuing claims against Dr. Kelly individually, without any factual support to show Dr. Kelly's personal involvement, was frivolous, unreasonable, and without foundation. Dr. Kelly is entitled to recover the attorneys' fees expended in defense of the claims against him.

Conclusion

Plaintiff was unable to establish a *prima facie* case against Dr. Kelly, resulting in the disposal of his claims prior to trial. Plaintiff never identified any evidence to support his allegations and, even in his Response in Opposition to the Motion at issue today, persisted with arguments in contravention of well-settled Eleventh Circuit precedent. Plaintiff's claims against Dr. Kelly were frivolous, unreasonable, and without foundation. Dr. Kelly should be awarded entitlement to the attorneys' fees expended in defending against such frivolous claims.

WHEREFORE, Defendant, Dr. John Kelly, respectfully requests that the Court enter an Order: (i) bifurcating the issues of entitlement and amount of attorneys' fees; (ii) ruling that Dr. Kelly is entitled to recover reasonable attorneys' fees incurred against Plaintiff in an amount

to be determined; (iii) granting Dr. Kelly an extension of time to file a motion regarding the amount of attorneys' fees; and (iv) granting such further relief as the Court deems necessary and just under the circumstances.

Dated: April 5, 2021

/s/ Holly Griffin Goodman

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