IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

EMILY KANE,

Petitioner/Appellee,

v.

Ct. App. No. 32,683
(related appeal Ct. App. No. 32,383)

THE CITY OF ALBUQUERQUE,

Respondent/Appellant.

APPELLANT'S BRIEF-IN-CHIEF

Appeal from the Second Judicial District Court
The Honorable Beatrice Brickhouse, Presiding
No. D-202-CV-2012-05075

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I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This appeal arises from an award of attorney's fees and costs, and relates to a prior appeal from the underlying merits decision in the district court action. The merits decision appeal is assigned to the General Calendar as Ct. App. No. 32,383.

Petitioner Emily Kane, a Captain in the Albuquerque Fire Department, filed an Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction and for Declaratory Judgment against her employer, the City of Albuquerque ["the City"]. RP:1-10. Kane sought protection against potential disciplinary action based on her candidacy for the state legislature. RP:1-3. Article X, Section 3 of the City of Albuquerque Charter ("Charter") and Section 311.3 of the City Personnel Rules and Regulations ("Personnel Rules") prohibit City employees from running for or holding elective public office. RP:20-21.

Kane asserted that the City's prohibitions violate her First and Fourteenth Amendment rights under the United States Constitution and the New Mexico constitution's qualifications for state office, are preempted by NMSA 1978, § 10-7F-9 (2010) of the New Mexico Hazardous Duty Officers Employer-Employee Relations Act ["HDOA"], and breach the Collective Bargaining Agreement ["CBA"] between her firefighters union and the City. RP:1-3;TR-1:19. Kane requested injunctive relief precluding the City from taking any action to require her to withdraw her candidacy, or to choose between taking office as a legislator and retaining her position with the City. RP:3. She further requested a declaratory

judgment that the CBA prohibited the City from enforcing its Charter and personnel rule prohibitions against her running for or holding elective state office. RP:3,10.

The district court held an evidentiary hearing on Kane's application and the City's declaratory judgment motion. TR-1:4. The court granted Kane's application for injunctive relief and denied the City's motion. RP:132-34;TR-1:99-104. The district court permanently restrained the City from taking any action to discipline Kane for seeking or holding office as a Representative in the state House of Representatives while remaining actively employed with the City. RP:132-34.

The Preliminary And Permanent Injunction And Final Judgment On Application For Injunctive Relief And Declaratory Judgment And On Motion For Declaratory Judgment was entered August 8, 2012. Id. The City timely appealed on August 10, 2012. RP:136-37.

Kane thereafter sought an award of attorney's fees and costs under 42 U.S.C. § 1983, 42 U.S.C. § 1988, and NMSA 1978, § 44-6-11 (1975). RP:142-59. On December 3, 2012, a hearing was held on Kane's motion. TR-2:1,3. The district court awarded Kane $7,644.50 in attorney's fees and $242.70 in costs, with interest running on those amounts at the rate of 8.75 percent per annum from the date of entry of the order. RP:253.

The City filed a Rule 12-201(A)(2) NMRA Notice of Appeal Regarding Fees and Costs on December 28, 2012, before entry of an order. RP:247-49. The Order And Final Judgment On Motion For Award Of Attorney's Fees And Costs was entered on January 11, 2013. RP:253. By operation of Rule 12-201(A)(2), the Notice of Appeal Regarding Fees and Costs was deemed filed on January 11, 2013 – the same date as entry of the order being appealed. Thus, the City's appeal from the order awarding attorney's fees and costs was timely. A Supplement to Notice of Appeal Regarding Fees and Costs, attaching a copy of the January 11, 2013, order was filed on February 11, 2013. RP:255-59.

II. SUMMARY OF RELEVANT FACTS AND PROCEEDINGS

In the underlying action, Kane asserted multiple grounds as to why the City's Charter provision and personnel rule were unlawful and/or unenforceable against her. RP:1-10. She argued that the requirements that she not seek or hold elective public office while being actively employed with the City violated her First and Fourteenth Amendment constitutional rights. RP:1-3;TR-1:7-10,14-19. She also claimed that these restrictions on her City employment conflict with the New Mexico constitution's provisions setting qualifications for elective state office, are preempted by § 10-7F-9 of the HDOA, and breach the CBA between her firefighters union and the City. RP:1-3;TR-1:10-14,16,35-37. Thus, in seeking injunctive and declaratory relief, Kane pursued two different federal constitutional

rights claims (First Amendment free speech and association and Fourteenth Amendment equal protection), a New Mexico constitutional claim, a New Mexico statutory law claim, and a common law breach of contract claim. RP:1-10;TR-2:7-19,35-37.

The parties stipulated to facts and exhibits before the evidentiary hearing. RP:125-27. At hearing, Kane argued all her theories challenging the City's prohibitions against its employees seeking or holding elective public office. TR-1:7-19,35-37. In granting requested relief to Kane, and in denying the City's declaratory judgment motion, the district court stated the following findings and conclusions:

1. The City has a valid interest in preventing City employees from running for and holding City elective office;

2. The City has no valid interest in preventing City employees from running for or holding non-City elective offices;

3. The federal Hatch Act does not apply to this action as any federal grant money received by the Albuquerque Fire Department is de minimis, in relation to the $70,000,000.00 million operating budget of the Department;

4. None of Kane's salary is funded by tax dollars;

5. The City of Albuquerque entered into a Collective Bargaining Agreement whereby it agreed that members of the firefighters' union may hold elected office and may be granted leave without pay to serve in elected office;

6. The blanket prohibition against City employees seeking election to, and holding, elective office of the State of New Mexico or any of its political subdivisions contained in Section 311.3 of the City's Personnel Rules and Regulations is overbroad and unconstitutional;

7. The City's Merit System Ordinance, Section 3-1-21(B), which prohibits City employees from being a candidate for or holding any elective City office, is not overbroad; and therefore is constitutional;

8. The City's Administrative Instruction, Section 7-19-2(B) only prohibits City employees from holding an elected position at the City level;

9. The City failed to establish a credible, foreseeable conflict of interest arising out of service as a City firefighter and service as an elected state representative, a partisan political office;

10. The City failed to establish that there would be an impact on the actual or foreseeable operation of the City as a result of Kane holding a non-City political office while a City employee;

11. The harms that were cited by the City are based on conjecture and speculation;

12. At least three City firefighters have sought and held political offices while employed by the City;

13. Those firefighters were not sanctioned or disciplined by the City in any way;

14. The City had actual knowledge that those firefighters sought and held political offices;

15. Kane met her burden of proof to show that the blanket prohibition in the City Charter against holding a non-City elected office is overbroad and thus unconstitutional; and

16. The New Mexico Hazardous Duty Employee-Employer Relations Act, NMSA 1978, § 10-7F-9, preempts and voids the prohibition on political activity contained in the City's home rule Charter, Article X, Section 3, as applied to City firefighters, including Kane. RP:132-34.

The district court's order indicates that it granted relief to Kane for all the bases asserted in her petition except for, perhaps, her argument regarding the New Mexico constitution. See id. (¶¶ 1, 2, 6-11,15, First Amendment; ¶¶ 12-14, Fourteenth Amendment; ¶¶ 16, HDOA; ¶¶ 5, Contract). Kane filed a motion for attorney's fees, arguing that 42 U.S.C. § 1988 entitled her to a fees award as the prevailing party in an action to vindicate her civil rights pursuant to 42 U.S.C.

§ 1983. RP:155-58. Kane also sought an award of costs under § 44-6-11 of New Mexico's Declaratory Judgment Act. RP:158-59.

The supporting affidavit to Kane's motion included vague entries of time billed for "Extensive research on ability to run for office" (2.00), "Research and write letter to city attorney" (3.00), and "Research for hearing" (4.3). RP:144-45. Two other entries clearly related solely to Kane's HDOA argument as "Research state hazardous worker act" (0.80), and "Research 'political activity'" (0.30). RP:144, 150. Time billed for drafting findings and conclusions was included even though they were never filed, and it was never shown how much of that work related to Kane's First Amendment claim. RP:150.

Many entries were generic block-billing such as, "Prepare for hearing" (1.00, 3.00, 2.90), "Prepare for trial" (2.80), "draft petition and brief and order" (1.30), "Draft findings and conclusions" (2.20), and provided no detail as to how much of the time billed was devoted to Kane's First Amendment claim, as distinguished from the other claims, which rested on their own facts and law. RP:144,150-51. Over $600 in fees were requested for time related to calling firefighters Torres, Luna, and Montoya as witnesses to support Kane's disparate treatment, equal protection claim. RP:148,150-51;TR-1:9,17-19;TR-2:16. Most of the hours sought in attorney's fees were supported by billing entries that were vague, did not relate to Kane's First Amendment claim, and/or which failed to

detail how much of block-billed time related to the First Amendment claim as opposed to Kane's other theories. See RP:144-51.

The City brought these issues to the district court's attention in the City's filings opposing Kane's motion and at the hearing. RP:160-70;TR-2:6-10. The City argued that some of the amounts billed were excessive, and that others lacked sufficient specificity to prove they were related to Kane's constitutional claims. Id. Given that Kane also pursued several claims clearly not based on alleged violations of federal civil rights under 42 U.S.C. § 1983, the City asserted that any fees awarded should be reduced accordingly given the lack of detail in the time entries. RP:163-64;TR-2:7. The City further noted that fees for preparing the bill of costs and related motion should not be awarded, or should be awarded at a reduced amount, because it was not part of the substantive pursuit of the purported federal civil rights claim. RP:164-65;TR-2:10. The City also argued that, if the district court were going to award any fees, it should apply the lodestar approach for determining the amount that was reasonable and necessary under the circumstances. RP:162-63.

At hearing, Kane withdrew her request for fees for research by a law clerk, which had been objected to by the City. TR-2:4. Some duplicative charges identified by the City were also withdrawn. TR-2:3-4. The City further noted that Kane sought fees for her attorney to attend a pre-litigation administrative hearing

conducted pursuant to the HDOA and, after Kane's counsel essentially conceded to the City's objection, those fees were disallowed. TR-2:11-13. However, the district court awarded the remainder of the fees requested in full, without conducting any specific analysis as to whether the amount of time spent was reasonable and necessary, and without explaining how the amount awarded was appropriate under any particular rationale. See generally, TR-2:1-19; see also RP:253. The district court also failed to make any reductions based on the vagueness of the entries and their failure to itemize time spent on Kane's First Amendment civil rights claim in particular, as opposed to the other theories she pursued. Id.

Although the district court stated it was awarding subpoena and witness fee costs for the three firefighter witnesses that Kane did not call to testify at the evidentiary hearing, the order entered does not appear to include all those amounts. TR-2:16-18;RP:253. The $242.70 in costs awarded apparently include the filing and service fee for Kane's Application, do not include the witness and mileage fees for the three witnesses but, inexplicably, still awarded the service of process costs for those same witnesses even though they were not related to Kane's First Amendment claim. RP:98-109,253;TR-1:9,17-19;TR-2:16.

III. ARGUMENT

A. Kane Has No 42 U.S.C. § 1983 Constitutional Right To Support The Attorney's Fees Award Under 42 U.S.C. § 1988

1. Standards governing review.

A district court's award of attorney's fees and costs is generally reviewed for abuse of discretion. Nava v. City of Santa Fe, 2004-NMSC-039, ¶ 24, 136 N.M. 647, 103 P.3d 571; Bird v. State Farm Mut. Auto. Ins. Co., 2007-NMCA-088, ¶ 27, 142 N.M. 346, 165 P.3d 343. However, the district court's application of the legal principles underlying the fees and costs award is reviewed de novo. Huffman v. Saul Holdings, Ltd. P'ship, 262 F.3d 1128, 1131 (10th Cir. 2001). "A discretionary decision based on a misapprehension of the law is an abuse of discretion that must be reviewed de novo." In re New Mexico Indirect Purchasers Microsoft Corp. Antitrust Litigation, 2007-NMCA-007, ¶ 6, 140 N.M. 879, 149 P.3d 976.

An abuse of discretion occurs when the district court's decision is contrary to logic and reason. Id. While a district court's determination of fees and costs is discretionary, "the exercise of that discretion must be reasonable when measured against objective standards and criteria." Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist., 2012-NMCA-091, ¶ 13, 287 P.3d 318 (quoted authority omitted).

2. Kane has no constitutionally guaranteed right to maintain active City employment while simultaneously seeking or holding elective public state office.

This issue was raised by Respondent's Opposition to Petitioner's Motion for Award of Attorney's Fee and Costs, and argument at the December 3, 2012 hearing. RP:160-61,170;TR-2:6

Under 42 U.S.C. § 1988, attorney's fees may be awarded only for the vindication of a recognized federal civil right. The City appealed the district court's merits decision in Kane's favor. In the merits appeal, the City has shown that Kane has no constitutional right to maintain active City employment while simultaneously seeking or holding elective public state office and that the district court erred in holding otherwise. See generally, Ct. App. No. 32,383, Brief-in-Chief, pp. 13-28, and Reply Brief, pp. 1-14.

Neither the First Amendment, nor any other provision of the Constitution, invalidates a law prohibiting partisan political conduct by public employees, including becoming a partisan candidate for, or campaigning for, an elective public office. State ex rel. Harkleroad v. N.M. State Police Bd., 103 N.M. 270, 271, 705 P.2d 676, 677 (1985); see State ex rel. Gonzales v. Manzagol, 87 N.M. 230, 234, 531 P.2d 1203, 1207 (1975) (holding that state statute which prohibited employee from seeking or holding partisan elective office as a City Councilman for the City of Santa Fe was a reasonable standard or restriction on his employment with the

State). "The proposition is well-established that a government may, consistent with the First Amendment and other provisions of the Federal Constitution, place restrictions upon the political activities of its employees, including a prohibition against running for political office." State ex rel. Harkleroad, 103 N.M. at 271, 705 P.2d at 677; see also State ex rel. Gonzales, 87 N.M. at 232, 531 P.2d at 1205 (State statute prohibiting employee from seeking or holding elective public office did not impose an unconstitutional restriction on his ability to run for elective public office, but rather, affected his eligibility for continued State employment).

Should the City obtain reversal of the district court's decision that the City's Charter and personnel rule prohibitions are unconstitutional, the district court's award of attorney's fees to Kane, based on 42 U.S.C. § 1988, must also be reversed. A plaintiff must prevail on a federal civil rights claim to be eligible for a fee award under 42 U.S.C. § 1988. Bogan v. Sandoval Cnty. Planning and Zoning Comm'n, 119 N.M. 334, 345, 890 P.2d 395, 406 (Ct. App. 1994). "A plaintiff who prevails on one or more state claims but loses on all federal claims will not be eligible for an attorney's fee award under 42 U.S.C. § 1988." Id. (cited authorities omitted). Therefore, the fees award must be reversed if, on appeal, the City's Charter and personnel rule provisions prohibiting City employees from seeking or holding elective public office are found to be constitutional restrictions on City employment.

B. The Court Committed Reversible Error By Awarding Fees For Work Unrelated To Kane's First Amendment Claim And For Duplicative And Excessive Work, And By Not Conducting Any Lodestar Analysis

This issue was raised by Respondent's Opposition to Petitioner's Motion for Award of Attorney's Fees and Costs, and argument at the December 3, 2012 hearing. RP:162-70;TR-2:7-10.

1. The district court abused its discretion by awarding fees for time spent pursuing Kane's Fourteenth Amendment, HDOA, and breach of contract claims.

Many billing entries offered by Kane's counsel to support her fees request were vague and failed to distinguish between how much time was devoted to Kane's First Amendment claim as opposed to all her other claims. See RP:144-45,150-51 ["Research and write letter to city attorney" (3.00); "Research for hearing" (4.30); "Prepare for hearing" (1.00; 2.00; 2.90); "prepare for trial" (2.80); "draft petition and brief and order" (1.30), "Draft findings and conclusions" (2.20)] Fees were awarded for time that related solely to Kane's HDOA preemption argument, and for time billed drafting findings and conclusions that were never filed. See RP:144,150 ["Research state hazardous worker act"; "Research 'political activity'"] Fees awarded also included all time related to firefighters Torres, Luna, and Montoya as witnesses. RP:148,150-51,167-68,253. However, those witnesses related to Kane's disparate treatment, equal protection claim and were irrelevant to her First Amendment claim. TR-1:9,17-19; TR-2:16.

The district court's order indicates that it found in Kane's favor on all her asserted theories other than, perhaps, her New Mexico constitutional claim. See RP:132-34. New Mexico follows the American Rule that attorney's fees are generally not awardable, and fee awards are permitted only as provided by statute, court rule, or contract. New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 9, 127 N.M. 654, 986 P.2d 450 (1999); Am. Civil Liberties Union of New Mexico v. City of Albuquerque, 1999-NMSC-044, ¶ 26, 128 N.M. 315, 992 P.2d 866. Kane relied solely on 42 U.S.C. § 1988 to support her fees request. But 42 U.S.C. § 1988 does not provide for awarding attorney's fees for prevailing on a Fourteenth Amendment equal protection clause claim, or on state statutory or common law claims. See Alford v. City of Lubbock, 484 F. Supp. 1001, 1008 (N.D. Tex. 1979), aff'd in part rev'd in part on other grounds, 664 F.2d 1263 (5th Cir. 1982) (denying request for attorney's fees, even though plaintiffs' Fourteenth Amendment equal protection rights were violated, because 42 U.S.C. § 1988 does not allow for recovery of fees when recovery is gained under the equal protection clause); Bogan, 119 N.M. at 345, 890 P.2d at 406 (a plaintiff who prevails on state law claims, but not federal claims, is not eligible for an attorney's fee award under 42 U.S.C. § 1988).

Thus, attorney's fees were not awardable under 42 U.S.C. § 1988 for the majority of the multiple theories that Kane pursued—even if she had lawfully

prevailed on those claims, which she did not. See generally, Ct. App. No. 32,383, Brief-in-Chief and Reply Brief. Under the circumstances, the district court clearly abused its discretion by not reducing the requested fees award by an appropriate percentage and limiting any potential fees recovery to time spent pursuing just the First Amendment claim.[1]

2. The district court abused its discretion by awarding fees without conducting the required lodestar analysis for determining whether the fees awarded were reasonable and necessary for Kane's First Amendment claim.

Within the Tenth Circuit, 42 U.S.C. § 1988 attorney's fees must be calculated according to the lodestar method. Kennedy v. Dexter Consol. Schs., 2000-NMSC-025, ¶¶ 35, 37, 129 N.M. 436, 10 P.3d 115 (noting the absence of any state law indicating that New Mexico state courts award attorney's fees under 42 U.S.C. § 1988 in any other way than keeping with the federal method). The lodestar analysis involves multiplying the reasonable hours the attorney spent working on the case by a reasonable hourly rate. Case v. Unified Sch. Dist. No. 233, Johnson Cnty., Kan., 157 F.3d 1243, 1249 (10th Cir. 1998).

[1] Although Kane has denied that her Fourteenth Amendment claim rested on equal protection grounds (see Ct. App. No. 32,383, Answer Brief, p. 17, n.2), her argument of purportedly disparate treatment as compared to other firefighters seeking or holding elective office contradicts her denial. TR-1:9,17-19;TR-2:16. In any event, the City has shown that Kane failed to prove an equal protection violation (see Ct. App. No. 32,383, Brief-in-Chief, pp. 6-9, 14-26), and the record is devoid of Fourteenth Amendment claims on any other grounds.

New Mexico courts use the factors in Rule 16-105(A) NMRA to examine the reasonableness of attorney's fees, which include:

> the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent.

In re New Mexico Indirect Purchasers, 2007-NMCA-007, ¶¶ 76-77; see also Lane v. Page, 862 F. Supp. 2d 1182, 1235-36 (D.N.M. 2012) (listing similar factors for consideration). These factors are not of equal weight and all factors need not be considered, but the district court's basis for giving greater weight to some more than others should be clearly reflected in the record. In re New Mexico Indirect Purchasers, 2007-NMCA-007, ¶ 78 (cited authority omitted). A district court must provide a concise but clear explanation of its reasons for the fee award. Case, 157 F.3d at 1249. Not only must the record reflect consideration of the lodestar factors, but ample evidence must also exist in the record to support the reasons relied on by the district court in arriving at the fee award. In re New Mexico Indirect Purchasers, 2007-NMCA-007, ¶ 78 (cited authority omitted).

The district court erred not only in failing to reduce requested fees by an appropriate percentage based on Kane's multiple non-First Amendment claims, but

also erred in not conducting a lodestar analysis to determine what fees were actually reasonable and necessary in relation to the First Amendment claim. Although the district court allowed Kane's counsel to withdraw requests for concededly duplicative, excessive or legally unsupported fees, it awarded the remainder being requested, in full, without conducting any lodestar factor examination or providing any explanation as to how the amount being awarded was reasonable and necessary. See TR-2:1-19;RP:253.

District courts are duty-bound to ensure that any award of attorney's fees is reasonable. Huffman, 262 F.3d at 1134. A district court cannot meet its obligation in this regard without conducting an inquiry into the reasonableness of the time entries submitted in the fee petition. Id.; see also Rio Grande Sun, 2012-NMCA-091, ¶¶ 17, 21 (holding that trial court abused its discretion when it did not determine the time reasonably necessary to provide the services required and failed to use the lodestar method or any objective basis for determining a reasonable fee award). Before awarding any fees, a district court should examine the hours reported for tasks that are properly billable, and should evaluate the hours spent on each task to determine their reasonableness. Ramos v. Lamm, 713 F.2d 546, 554 (10th Cir. 1983). The record reflects no such evaluation by the district court.

Kane's counsel compounded this error by resting the fee petition on insufficiently detailed billing records. The party seeking attorney's fees bears the

burden of showing that both the hours spent working on the case and the hourly rate are reasonable. Case, 157 F.3d at 1249. To carry this burden, the party requesting fees must submit to the court "meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how much those hours were allotted to specific tasks." Kennedy, 2000-NMSC-025, ¶ 35 (quoted authority omitted). Indeed, a lodestar figure cannot fairly or properly be ascertained without sufficient evidence detailing the number of hours spent engaged in specific activities relating to the preparation and litigation of a 42 U.S.C. § 1983 claim. Id., ¶ 36.

Even when adequate time records are provided—which did not occur in this case—the district court must determine whether the prevailing party's attorney exercised "billing judgment," which consists of winnowing the hours actually spent down to the hours reasonably spent. Case, 157 F.3d at 1250. Hours spent on tasks that could not be billed to the client cannot reasonably be billed to the adverse party. Id.; see also Ramos, 713 F.2d at 554 (holding that time for reading background cases and other materials is absorbed into a private firm's overhead and not charged to clients). After reviewing the specific tasks and determining whether they are properly chargeable, the district court should examine the hours expended on each task to determine if they are reasonable. Case, 157 F.3d at 1250. These principles apply equally to the district court's full award of all time spent

preparing the fee request. See Case, 157 F.3d at 1254 (noting that, although reasonable fees may be awarded to compensate for work performed in preparing and presenting a fee application, a district court may refuse to reimburse for time spent doing so if it is excessive or unreasonable).

Under these governing principles, the district court abused its discretion by awarding attorney's fees for pursuing claims falling outside 42 U.S.C. § 1988, based on vague billing records, and without conducting the requisite analysis for determining the amount that should reasonably and necessarily be awarded under the circumstances.

3. The district court improperly awarded subpoena costs for witnesses who did not testify and who were not related to Kane's First Amendment claim.

"In any proceeding under the Declaratory Judgment Act, the court may make an award of costs as may seem equitable and just." NMSA 1978, § 44-6-11 (1975). Such costs may include filing fees, fees for service of summonses, witness mileage or travel fare and per diem expenses, and subpoenas. Rule 1-054(D) NMRA. The City objected to the costs associated with witnesses who never appeared for trial. RP:168-69;TR-2:16-18. Although the district court initially indicated it was awarding all costs associated with those witnesses, it apparently reconsidered the City's objections and ultimately decided not to award the witness

and mileage fees. TR-2:17-19;RP:253. However, it still awarded the subpoena costs for those same witnesses. RP:253.

At hearing, the district court reasoned it could award costs related to the firefighter witnesses because the City's conduct of treating those firefighters differently than Kane demonstrated the City knew its prohibitions against employees seeking or holding elective public office were unconstitutionally overbroad. TR-2:18. The district court's strained and illogical reasoning in this regard is refuted by the record establishing both the absence of similar circumstances and and/or disparate treatment to support any equal protection claim. See Ct. App. No. 32,383, Brief-in-Chief, pp. 6-9, 14-26. Moreover, even if the City's prohibitions violated equal protection principles on overbreadth grounds—which they do not—fees for such claims are not awardable under 42 U.S.C. § 1988. See Alford, *supra* at 14. The district court's further reasoning that awarding fees relating to the witnesses was supported by the City's stipulations, which made the witnesses' testimony unnecessary (TR-2:18-19), fails given that fees could not have been awarded under 42 U.S.C. § 1988 for those equal protection claim witnesses in the first place. TR-2:18-19. The district court abused its discretion is awarding subpoena costs for serving those witnesses.

IV. CONCLUSION

For all the foregoing reasons, the district court's award of fees and costs should be reversed.

V. STATEMENT REQUESTING ORAL ARGUMENT

The City requests oral argument because the judgment on appeal affects public funds. The City's important obligations and interests in prudent management of public funds includes ensuring that public funds are not dispensed to pay attorney's fees and costs awards that were not awarded in accordance with the law.

Respectfully submitted,

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I HEREBY CERTIFY that true and correct copies of the forgoing Brief-in-Chief were served on the following by U.S. First Class Mail on July 2, 2013:

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