IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

EMILY KANE,

Petitioner/Appellee,

v.

THE CITY OF ALBUQUERQUE,

Respondent/Appellant.

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

APPELLANT'S REPLY BRIEF

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

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ORAL ARGUMENT IS REQUESTED

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I. INTRODUCTION

This appeal addresses the award of attorney's fees and costs. The related merits appeal is Ct. App. No. 32,383.

The district court's 42 U.S.C. § 1988 attorney's fees award must be reversed if this Court concludes, in the merits appeal, that the City's prohibitions against its employees seeking and/or holding elective public office are constitutionally permissible restrictions on Kane's public employment. The fees awarded would fail for lack of statutory support. Costs previously awarded to Kane for prevailing in district court should also be reversed as not equitable and just, under NMSA 1978, § 44-6-11 (1975), if the City prevails on the merits appeal.

If the district court's decision holding that the City's prohibitions against candidacy by its employees are unconstitutional is affirmed, the district court's fees and costs award should still be reversed as an abuse of discretion. The district court failed to follow governing legal principles in determining the fees and costs awarded, and awarded fees and costs not supported by the particular circumstances of the case.

II. ARGUMENT

A. Kane Cannot Recover Fees And Costs For Prevailing On Erroneous Grounds In District Court That Are Reversed On Appeal

Kane argues either that she may recover the fees and costs award from the district court litigation even if she loses on appeal or that she remains "entitled" to

the award until she loses on appeal. See Answer Brief at 1-4. Her first argument is wrong. Her second argument is a needless exercise in semantics.

New Mexico follows the American rule, which provides that, absent statutory or other authority, a party is responsible for bearing its own attorney's fees. N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 9, 127 N.M. 654, 986 P.2d 450. Kane claimed she was statutorily entitled to fees under 42 U.S.C. § 1988 because she vindicated 42 U.S.C. § 1983 federal civil rights in challenging the constitutionality of the City's prohibitions against its employees seeking or holding elective public office. RP:155-56 The district court awarded fees on that basis. TR-2:6.

A party who is awarded fees for vindicating a federal civil right obviously cannot collect those fees when the merits decision supporting the fees award is subsequently reversed on appeal. See Bogan v. Sandoval Cnty. Planning and Zoning Comm'n, 1994-NMCA-157, 119 N.M. 334, 345, 890 P.2d 395, 406 (a party must prevail on a federal civil rights claim to be eligible for a fees award under 42 U.S.C. § 1988). Once reversed, the party simply has not "prevailed" to support a fees award. The same rationale holds true as to any costs award.

Kane's argument that she need not *ultimately* win on appeal to still collect the fees and costs awarded for prevailing erroneously at the district court is illogical and refuted by governing law. See Answer Brief at 3 (emphasis in

original)); see also Bogan, 1994-NMCA-157, 119 N.M. at 345, 890 P.2d at 406 (noting that even when a plaintiff wins on one or more state claims, but loses on the federal claims, the plaintiff is not eligible for a fees award under 42 U.S.C. § 1988 because any such award lacks statutory support); see also NMSA 1978, § 44-6-11 (providing that a court may award costs only as "equitable and just"). Kane's argument that she remains "entitled" to her fees and costs award until this Court rules against her on the merits appeal misses the point. Reversal of the district court decision holding that the City's prohibitions against elective public office candidacy by its employees are unconstitutional vitiates Kane's first argument and silences her second one.

B. No Ground Exists For Awarding Kane Attorney's Fees Under 42 U.S.C. § 1988 Based On A Fourteenth Amendment Claim

Kane asserted no Fourteenth Amendment due process claim below — nor could she have done so — because she sought and obtained injunctive relief precluding the City from proceeding with the disciplinary process. RP:1-10,26-35,38-43,87-91,140. Kane was receiving all process due her before the injunction was entered. Id. She never couched her Fourteenth Amendment claim in terms of deprivation of due process. Instead, in an inadequate effort to prove unequal treatment, she argued that the City had permitted other firefighters to seek and/hold

elective public office in the past without subjecting them to the disciplinary process.[1] See Ct. App. No. 32,383, Brief-in-Chief at 22-26.

Thus, the only Fourteenth Amendment theory Kane appeared to pursue in district court — though she subsequently denounced any such claim on appeal (see Ct. App. 32,383, Answer Brief at 17, n.2) — sounded in equal protection. A violation of the equal protection clause is not among the 42 U.S.C. § 1983 federal civil rights for which attorney's fees may be awarded under 42 U.S.C. § 1988. 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.), cert. denied, 456 U.S. 975 (1982).

Kane dismissively refers to the Texas federal district court's Alford decision as a "backwater" case but offers no authority contradicting Alford's statement that equal protection claims fall outside 42 U.S.C. § 1988 fees awards. See Answer Brief at 5. Her further attempts to undermine Alford's value by criticizing the cases that have cited it fail because none of those cases cited Alford for the proposition on which the City relies. See Cheng v. GAF Corp., 713 F.2d 886, 893 n.1 (2nd Cir. 1983) (addressing an issue regarding appellate court collateral order jurisdiction over a fees award; the dissent citing Alford as noting that fees for an ADEA action are not recoverable under 42 U.S.C. § 1988); Crosland v. Charlotte

[1] The witness costs awarded for these firefighters also pertain to this disparity issue.

Eye, Ear and Throat Hosp., 686 F.2d 208, 212 (4th Cir. 1982) (citing Alford for the proposition that an ADEA action was timely filed because the claim accrued upon retirement).

Kane's reliance on the "intrinsically related" rationale from Case v. Unified Sch. Dist. No. 233, Johnson Cnty., Kan., 157 F.3d 1243 (10th Cir. 1998) to support awarding fees for her disparate treatment Fourteenth Amendment claim is misplaced. See Answer Brief at 5-6. Case involved a Fourteenth Amendment *due process* claim — which, unlike an equal protection claim, is eligible for fees under 42 U.S.C. § 1988. 157 F.3d at 1247 (emphasis added); see also Bogan, 1994-NMCA-157, 119 N.M. 334, 345, 890 P.2d 395, 406 (addressing award for attorney's fees under 42 U.S.C. § 1988 based on a Fourteenth Amendment due process claim).

Moreover, Kane's Fourteenth Amendment disparate treatment claim was not "intrinsically related" in law or in fact with her First Amendment claim, which rested on pure First Amendment legal principles having nothing to do with whether other firefighters had purportedly been treated differently than Kane under similar circumstances in the past. The district court's holding regarding overbreadth related to First Amendment analysis. Its conclusion that the City's prohibitions against candidacy are overbroad stemmed from the district court's flawed reasoning that the City could not prohibit its employees from seeking or holding

non-City elective public office without running afoul of First Amendment principles. See TR-1:46-51,99-103.

In a further attempt to implicate 42 U.S.C. § 1988 fees, Kane characterizes her unequal treatment claim as resting on First Amendment grounds by arguing she was treated differently from the other three firefighters based on the content of political speech. See Answer Brief at 25, 31. However, that argument was never raised before the district court and fails for lack of evidentiary support. See Ct. App. No. 32,683, Reply Brief at 6-7. Kane presented no evidence of political speech by herself or the other firefighters to show that their different political speech was tolerated, while hers was not, because of its content. Id. Thus, she could not have prevailed on this theory to support any of the fees or costs awarded.

C. Kane's Extensive, Repetitive Merits Appeal And Pleading Threshold Arguments Are Inapposite

Kane devotes numerous pages restating arguments from her merits appeal Answer Brief. See Answer Brief at 6-17. However, the decision on the merits appeal will already have been made by the time this Court turns its attention to the fees and costs award appeal. The City rests on its filings in Ct. App. No. 32,383 as its reply to Kane's reiterated arguments. To the extent Kane's arguments could be construed as raising new arguments not previously briefed, they should be stricken and ignored.

Kane also asserts a pleading threshold argument for 42 U.S.C. § 1988 fees even though the City has not argued that her claim was pleaded inadequately for that purpose. See Answer Brief at 16-17. Kane's pleading threshold argument is irrelevant to the merits appeal and has no bearing on the issues presented by the City's appeal from the fees and costs award.

D. The District Court Abused Its Discretion By Failing To Follow Governing Legal Principles In Arriving At The Fees And Costs Award, And By Awarding Fees And Costs Unsupported By The Circumstances[2]

Nothing in the record indicates that the district court actually considered the legally required reasonable and necessary factors, or attempted a lodestar analysis, in arriving at the amount of fees and costs awarded. Neither does the district court explain how the fees awarded were, in any way, reasonable and necessary under the particular circumstances of the case. All the record reflects is that the district court reviewed the parties' filings, accepted Kane's counsel's concessions on duplicative, excessive or otherwise improperly billed fees to which the City had objected, subtracted those amounts, and then awarded the remainder:

> Mr. Cadigan: Your Honor, using my calculator rather than my limited math skills, 7644.50, 7644.50 and that's deducted, 367 for the two entries disallowed.

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[2] Kane seems to argue precedent requires that fees and costs awards be of a large monetary value to merit appellate review. See Answer Brief at 18-19. Neither the cases cited, nor any statute or rule, set a minimum monetary requirement on a party's right to appeal an erroneous fees and costs award.

The Court: That's the May one attending the administrative hearing, your withdrawal of the May 29 entry for $105.

Mr. Cadigan: Yes, Your Honor.

The Court: I think that sounds right, looking at the itemization. Any last comments?

Mr. Cadigan: Nothing else for the Plaintiff, Your Honor.

The Court: So then I will award that amount in attorneys fees to the plaintiff. And costs are awarded. ...

TR-2:3,4,11-12,19. The district court gave no explanation as to how all the remaining fees were awardable as reasonable and necessary under the specific circumstances of this case — it simply awarded them.[3]

[3] Case and Anchondo v. Anderson, Crenshaw & Assocs., L.L.C., 616 F.3d 1098 (10th Cir. 2010) do not, as Kane argues, support giving deference to the district court's perfunctory approach in awarding her fees. See Answer Brief at 18, 20-21, 27, 30, 32. Case involved complex litigation and an extensive fees petition which, for practical reasons, supported not requiring the district court to document each and every conclusion and rationale used in arriving at its fees award. See Case, 157 F.3d at 1250 (noting that a general reduction in hours was acceptable because case involved thousands of pages of written work product and hundreds of pages in billing records). No similar burden existed on the district court in Kane's case. Also, any deference given in Anchondo arose from the record reflecting that the district court had engaged in appropriate analysis before arriving at the amount awarded. See Anchondo, 616 F.3d at 1102, 1107 (stating that the district court arrived at its fee award "by methodically proceeding through a calculation of the lodestar amount" and "provided a fully adequate basis for an appropriate fee award"). No similar meticulous or methodical approach exists under the record in the present case.

The district court's required inquiry did not end upon removing the improper billings. That was just the starting point. Those charges should never have been in included in the first place.

After removing the charges that were included improperly, the district court should have determined the amount of reasonable and necessary fees from among those remaining, as governed by guiding legal principles, before arriving at a final award. The district court's failure to do so was error. See Huffman v. Saul Holding, Ltd. P'ship, 262 F.3d 1128, 1134 (10th Cir. 2001) (noting that district courts are duty-bound to ensure that a fees award is reasonable and that a court does not meet its obligations in this regard without conducting an inquiry into the reasonableness of the time entries submitted in the fees petition); see also Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist., 2012-NMCA-091, ¶¶ 17, 21, 287 P.3d 318 (finding abuse of discretion where trial court 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 fees award).

Kane argues it should be assumed that the district court conducted the appropriate analysis, and that all fees awarded should be considered presumptively reasonable and necessary, because the district court proceeded with awarding them after removing the improperly billed charges. See Answer Brief at 25-26, 29-30, 32. Under Kane's rationale, a district court may simply award all fees requested in

a petition, with no record of conducting a reasonableness inquiry at all, as long as none of the fees requested are blatantly duplicative, excessive, or otherwise improper. The standards governing appropriate consideration of fees petitions reject such blanket assumptions. See Case, 157 F.3d at 1249 (noting that a district court must provide a concise but clear explanation of the reasons supporting its fees award); see also In re New Mexico Indirect Purchasers Microsoft Corp. Antitrust Litigation, 2007-NMCA-007, ¶ 78, 140 N.M. 879, 149 P.3d 976 (stating that the record must reflect not only the court's consideration of 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 fees award).[4]

Kane further tries to justify the district court's fees award by arguing it appropriately multiplied the *total* number of attorney hours by a reasonable hourly rate in reaching the amount awarded. See Answer Brief at 19, 25-26, 29-31 (emphasis in original). However, because Kane's fees request rested on 42 U.S.C. § 1988, the district court first had to determine the total number of hours "reasonably spent" in prevailing on the First Amendment claim as the only theory eligible for 42 U.S.C. § 1988 fees. See Rio Grande Sun, 2012-NMCA-091, ¶ 20

[4] Kane's related argument that, after removing the duplicative, excessive and otherwise improper billings, the district court must have awarded all remaining fees because it found them "presumptively reasonable" does not justify the award, but rather, amplifies the district court's analytical error in awarding fees on that basis. See Answer Brief at 34; see also Huffman and Rio Grande Sun, *supra* at 9.

(stating that the first step in a lodestar analysis is to determine the number of hours reasonably spent on the claim); see also Bogan, 1994-NMCA-157, 119 N.M. at 345, 890 P.2d at 406 (noting that a plaintiff must prevail on a federal civil rights claim for a fees award under 42 U.S.C. § 1988). The district court attempted no such initial determination.

Moreover, the fees and costs awarded were an abuse of discretion under the circumstances of this case and could not have been explained as reasonable and necessary or "equitable and just" even if the district court had attempted to do so. Kane pursued multiple theories, only one of which — the First Amendment claim — could potentially support a fees award under 42 U.S.C. § 1983 and 42 U.S.C. § 1988. Kane's claims of Fourteenth Amendment disparate treatment, violation of the New Mexico constitution's qualification standards for candidacy, violation of the Hazardous Duty Officers Employer-Employee Relations Act's ("HDOA") provision regarding political activity, and breach of her union's collective bargaining agreement were distinct from, and unrelated to, her claim that the City's prohibitions against candidacy by its employees for elective public office violate the First Amendment.

Thus, the district court abused its discretion by awarding fees for tasks specifically relating to the HDOA claim — a theory not eligible for fees under 42 U.S.C. § 1988. See RP:144,150 ("Research state hazardous worker act";

"Research 'political activity'"). The district court further acted contrary to law, logic, and reason when it failed to reduce the numerous generic and vague time entries by a reasonable percentage in light of Kane's multiple non-First Amendment theories, which were ineligible for 42 U.S.C. § 1988 fees. See RP:144-45,150-51 ("Extensive research on ability to run for office" (2.00); "Research and write letter to city attorney" (3.00); "Research for hearing" (4.30); "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)[5]).

Had the district court attempted a lodestar analysis, it should and would have determined that a general deduction was warranted given the lack of requisite detail in the billing records. See Kennedy v. Dexter Consol. Schs., 2000-NMSC-025, ¶ 36, 129 N.M. 436, 10 P.3d 115 (noting that a lodestar figure cannot be fairly or properly ascertained where billing records do not detail the time spent engaged in specific activities related to the 42 U.S.C. § 1983 claim); see also Case, 157 F.3d at 1250 (stating that "[a] district court is justified in reducing the reasonable

[5] Kane contends that she did not file her proposed findings and conclusions as a response to the City's litigation maneuvering of agreeing to stipulated facts. See Answer Brief at 23-24. However, the stipulations contained no legal conclusions, other facts remained disputed, and nothing about the stipulations prevented Kane from filing her proposed findings and conclusions — if they were of any value. Because they are not of record, no basis existed for the district court to conclude that they contributed to Kane prevailing in district court or that any effort spent on preparing the findings and conclusions related, if at all, to Kane's 42 U.S.C. § 1988 eligible First Amendment claim.

number of hours if the attorney's time records are 'sloppy and imprecise' and fail to document adequately how he or she utilized large blocks of time") (quoted authority omitted).

Kane's assertion that the City never requested a general reduction is wrong. See Answer Brief at 22-24, 28-29. The City did so in its written response opposing Kane's fees and costs petition and again at hearing. See RP:163-70 (arguing that fees unrelated to legal theories covered by 42 U.S.C. § 1988 should not be awarded); TR-2:7 (requesting that the district court impose a percentage reduction on generically billed entries because Kane argued multiple theories ineligible for 42 U.S.C. § 1988 fees).

The record establishes that, after removing duplicative, excessive or otherwise unsupportable fees objected to by the City, the district court failed to follow legal principles governing the process of determining what amounts, among the remaining fees charged, were actually reasonable and necessary to Kane's First Amendment claim. In doing so, it abused its discretion. See In re New Mexico Indirect Purchasers, 2007-NMCA-007, ¶ 6 (a discretionary decision based on a misapprehension of the law is an abuse of discretion); see also Huffman, 262 F.3d at 1131 (a district court's application of the legal principles underlying a fees and costs award is reviewed de novo). Even if, as Kane argue, it is presumed that the district court considered required factors for determining whether fees were

reasonable and necessary, the district court abused its discretion by awarding fees for multiple theories ineligible under 42 U.S.C. § 1988 and unrelated to Kane's First Amendment claim. See Rio Grande Sun, 2012-NMCA-091, ¶ 13 (in determining a fees and costs award, the district court's exercise of discretion must be reasonable when measured against objective standards and criteria).

E. Kane Stipulated To Her Proposed Witnesses' Testimony Due To Convenience Considerations — Not In Reaction To Litigation Maneuvering By The City

Kane contends the stipulations regarding her subpoenaed witnesses' testimony was a response to litigation maneuvering by the City that justifies awarding the subpoena costs. See Answer Brief at 24-25. The hearing transcript establishes otherwise. Although Kane's counsel argued that the subpoenas somehow inexplicably compelled the City to reach stipulations, he thereafter admitted, "We simply released them because one of them was on duty, one of them lived out in the middle of nowhere, and it seemed more polite to just come to a stipulation." TR-2:17. No "maneuvering" by the City either necessitated that Kane subpoena her witnesses to ensure their appearance if they were unwilling to appear voluntarily or resulted in them not being called. Kane, with the City's cooperation, reached stipulations to avoid having to call her witnesses inconveniently to the stand for their very brief testimony. The subpoena costs awarded are not "equitable and just" under these circumstances.

III. CONCLUSION

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

IV. 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 managing public funds includes ensuring that public funds are not dispensed to pay attorney's fees and costs that were awarded contrary to law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing Reply Brief was served on the following by U.S. First Class Mail on September 5, 2013:

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