

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION**

<b>R. JOHN WRAY,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>CAUSE NO. 1:03-CV-216</b>
	)	
<b>ALLEN COUNTY COMMISSIONERS, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM OF DECISION AND ORDER**

**I. INTRODUCTION**

On July 12, 2004, this Court granted summary judgment to the Allen County Board of Commissioners (“the Commissioners”) and Commissioner Marla Irving (“Irving”) individually (collectively, “the Defendants”), in a suit brought by Plaintiff R. John Wray (“Wray”). Wray alleged that the Commissioners violated his due process rights under the Fourteenth Amendment by terminating him as the attorney for the Allen County Department of Planning Services (“DPS”). Wray’s due-process claim against Irving individually alleged that, in her role as a member of the Allen County Plan Commission, she was the one primarily responsible for his firing. The Court granted summary judgment on these claims because it ultimately determined that the Plan Commission, which was not named as a defendant, had the sole power to terminate Wray, and did in fact terminate him. Wray also advanced some state law claims, but those were dismissed without prejudice under 28 U.S.C. § 1367 and can be ignored for purposes of this Order.<sup>1</sup>

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<sup>1</sup>This Order assumes familiarity with the Court’s July 12, 2004, Memorandum of Decision and Order.

Having escaped liability on these claims, the Defendants now request \$38,272.50 in attorney fees under 42 U.S.C. § 1988. The Commissioners argue that Wray's case was frivolous because he failed to show that he was their employee or that they, or any municipal policy, had anything to do with his firing. They also contend that Wray's case was "doubly flawed" because his due process claim failed on the merits. (Mem. in Supp. at 4-5.) Irving argues that she deserves fees because Wray was never in a position to show that she was the proximate cause of his termination, given that the entire Plan Commission voted overwhelmingly, with the help of Irving's one vote, to terminate his employment.

Wray argues that his case was not frivolous because, although the Court ultimately held that only the Plan Commission had authority to fire him, he reasonably believed he was employed by the Commissioners based on the deposition testimony of Dennis Gordon ("Gordon"), Executive Director of the Department of Planning Services ("DPS"). (See Resp. at 6 (citing Dep. of Dennis Gordon at 16-18).) Wray also says he was on the County payroll as a DPS employee (apparently viewing that as distinct from his role as Plan Commission attorney), and that since Gordon claimed the Commissioners created the DPS, it was not frivolous to sue them "by and through [the] [DPS]." (*Id.* at 7.) Finally, Wray contends that his constitutional claims against Irving in her individual capacity were not frivolous because he was justified in arguing that only Gordon could terminate him, and it was Irving who pressured Gordon into doing so. (*Id.* at 9.)

For the reasons given below, the Court finds that the Defendants' Petition for Attorneys' Fees should be GRANTED in part and DENIED in part, as the Commissioners are entitled to only \$9,560.25 in fees, and Irving is not entitled to fees at all.

## II. THE § 1988 STANDARD FOR PREVAILING DEFENDANTS

Section 1988(b) provides that "in any action or proceeding to enforce a provision of [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs." However, this standard is asymmetrical between plaintiffs and defendants. *Coates v. Bechtel*, 811 F.2d 1045, 1048 (7th Cir. 1987) (citing *Vandenplas v. City of Muskego*, 797 F.2d 425, 428-29 (7th Cir. 1986); *Hershinow v. Bonamarte*, 772 F.2d 394, 395 (7th Cir. 1985)); *Curry v. A.H. Robins Co.*, 775 F.2d 212, 219 (7th Cir. 1985). A plaintiff may be deemed a prevailing party, and thus awarded attorney fees, if he or she succeeds on "any significant issue in litigation which achieves some of the benefit [he or she] sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In contrast, a prevailing defendant may not recover fees under § 1988 unless the district court finds that the plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978))<sup>2</sup>.

A defendant is not required to show either subjective or objective bad faith on the part of the plaintiff in order to recover § 1988 attorney fees. *Hamer v. County of Lake*, 819 F.2d 1362, 1366 (7th Cir. 1987). Instead, an award of fees to the defendant is appropriate when the defendant can demonstrate that the plaintiff's action is "meritless in the sense that it is groundless or without foundation." *Hughes*, 449 U.S. at 14; *Munson v. Milwaukee Bd. of Sch. Directors*, 969 F.2d 266, 269 (7th Cir. 1992). Therefore, Defendants must show that "a civil rights suit is lacking in any legal or factual basis." *Munson*, 969 F.2d at 269 (citing *Coates*, 811 F.2d at

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<sup>2</sup>While *Christiansburg* was a Title VII case, the Supreme Court held in *Hensley*, 461 U.S. at 433 n.7, that the analysis set forth in that case applies to § 1983 cases as well.

1050).

The Court is not "to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421-22. This proposition follows from the logical observation that, at the time suit is brought, a plaintiff seldom can be sure of ultimate success; for example, even facts that appear unquestioned at the outset of a case, can become less so during or after discovery. *Id.* at 422. As the Seventh Circuit put it, "[t]here is a significant difference between making a weak argument with little chance of success ... and making a frivolous argument with no chance of success. As the courts have interpreted § 1988, it is only the latter that permits defendants to recover attorney's fees." *Khan v. Gallitano*, 180 F.3d 829, 837 (7th Cir. 1999).

### **III. DISCUSSION**

#### **A. Wray's Official Capacity Claim Against the Commissioners Ultimately Became Groundless**

On August 27, 2003, a scheduling conference in this case turned into a lengthy discussion on what appeared to be a fatal flaw in Wray's case: how could he show that the Commissioners were liable in their official capacity when he was actually terminated by Gordon at the direction of the Plan Commission? (*See* Gordon Dep. at 105-06.) Ultimately, Wray's counsel indicated that more investigation of the county's records was necessary to determine how the DPS came into existence and that he anticipated amending Wray's complaint. Indeed, Wray filed an Amended Complaint on September 24, 2003, but it contained essentially the same allegations against the Commissioners, and still no claim against the Plan Commission or Gordon.

The Defendants primarily zero in on Wray's Amended Complaint as the basis for fee shifting under § 1988. (*See* Def.'s Mem. at 4 ("In the present case, it is clear that the allegations

made by the Plaintiff in his Amended Complaint were frivolous from the time they were pled.”). To be sure, the allegations in the Amended Complaint are confusing, but it essentially says that the Commissioners “are responsible for the actions of . . . [the DPS]” and that they terminated Wray as counsel for the DPS “at the instance [*sic*] of the Allen County Planning [*sic*] Commission, which had no authority to do same.” (*See* Am. Compl. ¶¶ 8, 9, 15.) However, when responding to the motion for summary judgment, Wray’s focus shifted from the action of the Plan Commission to Gordon; he argued that when the Commissioners created the DPS they gave Gordon the power to hire and fire its employees, and that if he acted improperly in terminating Wray, they were liable. (*See* Mem. in Opp’n to Def.’s Mot. for Summ. J. at 12.)

Victorious on summary judgment, the Commissioners argue they were the victims of a frivolous suit, just like the municipal Defendant in *Nisenbaum v. Milwaukee County*, 333 F.3d 804, 807-808 (7<sup>th</sup> Cir. 2003) (citing *Christiansburg*, 434 U.S. at 412), because as this Court observed in ruling on the motion for summary judgment, “they [were] not the proper defendants because they had no role in Wray’s termination...[.]” (Mem. of Decision and Order at 10.)

Actually, the ruling can best be summed up as follows:

Therefore, there is nothing in the record to indicate that the Commissioners were directly involved in either Wray’s hiring or firing, or delegated it to the Plan Commission or Gordon. Instead, under Indiana state law, I.C. § 36-7-4-311(a), I.C. § 36-7-4-402(a), the “apex of authority” for Wray’s termination was clearly the Plan Commission, *Gernetzke [v. Kenosha Unified School Dist. No. 1]*, 274 F.3d 464, 468 7<sup>th</sup> Cir. 2001], a separate legal entity from the Commissioners and one inexplicably not named in Wray’s Amended Complaint.

(*Id.* at 13-14.)

Wray responds that the present argument for fees ignores the Court’s remark that the case turned on the “surprisingly complex question” of who actually hired Wray, “or more accurately,

who was entitled to fire him.” (See Mem. of Decision and Order at 2.) However, as the Court further noted, this question merely set the stage for the real issue: “who actually controlled [the DPS]” (*id.*), because if it turned out to be the Plan Commission, Wray’s official capacity case against the Commissioners, either as former counsel to the Plan Commission, or as a former DPS employee, was indisputably dead. Of course, the Court eventually ruled that the Plan Commission does control the DPS, but the question here is whether that conclusion was so obvious as to make Wray’s claim against the Commissioners frivolous. *Coates*, 811 F.2d at 1051; *Munson*, 754 F.2d at 697. That analysis is best understood by first looking at Wray’s termination claim as Plan Commission counsel, and then from his perspective as a DPS employee.

#### 1. Wray’s Official Capacity Claim Against the Commissioners as a Terminated Plan Commission Attorney Was Groundless and Frivolous

To the extent Wray sued the Commissioners in his role as a terminated Plan Commission attorney, he was stymied by one simple, incontestable legal fact: the statutory authority to hire and fire the Plan Commission attorney has always rested solely with that body. (See Mem. of Decision and Order at 12 (citing I.C. § 36-7-4-311(a); I.C. § 36-7-4-402(a).) Wray, as its counsel, served at its pleasure and was its employee at will as a matter of law. (See *id.* at 17-18.) Indeed, Wray ignored Indiana statutory law, I.C. § 36-7-4-311(a); I.C. § 36-7-4-402(a), when he at first asserted that the Plan Commission had no authority to terminate him as their attorney. (See Am. Compl. ¶¶ 8, 9, 15.) He then ignored both documented reality and his own personal knowledge when he later alleged that it was the Commissioners who fired him. (See February 21, 2002, Minutes of the Plan Commission Meeting.)

Moreover, since the Commissioners never possessed firing authority over Wray as the

attorney for the Plan Commission, they were never in a position to delegate it to Gordon or anyone else. (*Id.* at 12-13.) Thus, to the extent Wray was pursuing the Commissioners based on his termination as the Plan Commission attorney, his case was frivolous because its fundamental flaw was easily revealed through a mere examination of the Indiana statutes. *Nisenbaum*, 333 F.3d at 807-808.

## 2. Wray's Official Capacity Claim Against the Commissioners as a Terminated DPS Employee Became Groundless After Gordon's Deposition

Nonetheless, Wray's alternative argument was that as a DPS employee, separate from his role as Plan Commission attorney, he could pursue a claim against the Commissioners based on Gordon's testimony that they created the Plan Commission. (*See Resp.* at 6.) This argument ignores two important propositions: (1) Indiana law gives the Plan Commission the right to "remove" any employee, I.C. § 36-7-4-402(a), not just its lawyer; and (2) Gordon testified that even after the DPS was created, he was required by Indiana law to fire a staff member if the Plan Commission, which had "ultimate authority," instructed him to do so (*see Gordon Dep.* at 19, 32, 84). This latter point illustrates that the DPS was not some phantom county department whose employees were insulated from any adverse employment actions by the Plan Commission.

However, as noted earlier, by the time he responded to the Commissioner's Motion for Summary Judgment, Wray's argument had shifted. He then contended that when the Commissioners created the DPS they gave Gordon their authority to hire and fire, so that if Gordon acted improperly in terminating Wray as a DPS employee, they were liable. The delegation of such authority by a decision-maker is a perfectly valid theory for municipal liability, *see, e.g., Brokaw v Mercer County*, 235 F.3d 1000, 1013 (7<sup>th</sup> Cir. 2000), but the yawning gap here is that after Gordon's deposition of February 26, 2004, Wray had no evidence

of any such delegation by the Commissioners to either Gordon or the Plan Commission.

Without any evidence of delegation, Wray tries to create some by arguing that the Commissioners' lack of authority to rescind Wray's firing (*see* Gordon Dep. at 64-65, 82) demonstrates that they delegated every bit of their firing authority to Gordon. There are at least two problems with this argument. First, there is no evidence or competent legal authority for the proposition that the Commissioners ever possessed firing authority over Wray, let alone that they ever delegated it to Gordon. (*See* July 12, 2004, Mem. of Decision and Order at 12 (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-83 (1986)).

The second problem is that Wray takes this so-called evidence, that the Commissioners lacked authority to rescind Gordon's firing decisions (an accurate statement of Indiana law, by the way, I.C. § 36-7-4-311(a); I.C. § 36-7-4-402(a)) and asks the Court to thereby infer that the reason for this lack of authority was because they had delegated it all away. This is a legal *non-sequitur*. As the Supreme Court has explained, the basis for municipal liability in such an instance is that the subordinate's decision remains subject to review by the municipality's authorized policymakers, with the understanding that they have retained that authority in order to measure that conduct *vis-a-vis* their policies. *See, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). In other words, the Commissioners' inability to review Gordon's firing decision is evidence that no delegation occurred, and to suggest otherwise turns the basis for the rule on its head.

Finally, Gordon's deposition testimony closed the door on another potential argument, that after the creation of the DPS, a well-settled local practice or custom had grown up whereby the Commissioners, and not the Plan Commission, did DPS's hiring and firing. *See, e.g.,*

*McGreal v. Ostrov*, 368 F.3d 657, 684 (7th Cir. 2004).

To recapitulate, Wray’s claim that the Commissioners were liable in their official capacity for his termination as Plan Commission attorney was legally groundless from the start, but his claim that they were liable for his termination as a DPS employee only became groundless after Gordon’s deposition testimony demonstrated a complete lack of factual support. Therefore, because the Commissioners would have had to defend the official capacity case in any event, and on substantially the same grounds, and because they probably could have knocked out at least part of Wray’s official capacity claim with a motion to dismiss, any shifting of fees should only begin after the taking of Gordon’s deposition. *Hamer v. Lake County*, 819 F.2d 1362, 1371 (7th Cir. 1987) (“In considering the amount of fees to be imposed some reasonable consideration should be given to the fact that not all the plaintiffs’ claims were frivolous, although no ‘fine tuning’ need be attempted.”) (citing *Quiros v. Hernandez Colon*, 800 F.2d 1, 2 (1st Cir. 1986)).<sup>3</sup>

**B. Wray’s § 1983 Claim against Irving, Although Weak, Was Never Frivolous**

Irving’s request for fees, however, is another matter. Although it is true that summary judgment was entered in her favor, it was not a foregone conclusion that Wray’s case against her in her individual capacity was doomed. Wray was required, as in all cases involving common law torts, to show a causal link between the alleged harm (i.e., his termination) and Irving’s alleged unlawful conduct. *See, e.g., Dixon v. Burke County, Georgia*, 303 F.3d 1271, 1275 (11<sup>th</sup> Cir. 2002). Clearly that was going to be a tall order considering that the Plan Commission as a

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<sup>3</sup>Since under this reasoning the Commissioners should not have had to defend any claim after February 26, 2004, there is no need to address whether Wray’s various claims under § 1983 lacked such merit that they too were frivolous.

whole voted to terminate Wray by a 6-1 vote. A difficult evidentiary burden, however, does not necessarily equate with an impossible one. Wray still had the opportunity to argue that Irving coerced the other members of the Plan Commission to vote for his ouster, such that they were deprived of their “individual freedom of rational choice.” *Id.*

Wray had some evidence on this point, namely Bodenhafer, the Plan Commission President, who solicited Wray’s resignation at a private meeting because otherwise Irving “had the votes” to terminate him. (*See* Wray Dep. at 92.) The problem with this statement is that without something more it does not give rise to an inference that Irving obtained those votes through coercion. Indeed, Wray admits he does not know how Irving got the votes (*id.*), and none of the other Plan Commission members who testified in the record (*see, e.g.,* Bodenhafer Dep; Frisinger Dep.) indicate that Irving did anything to them or anyone else to deprive them of their “individual freedom of rational choice,” *Dixon*, 303 F.3d at 1275.

Therefore, in the final analysis, although Wray’s evidence was entirely speculative, and fell well short of getting his claim against Irving past summary judgment, it was not so entirely groundless that it should result in the shifting of fees. *Khan*, 180 F.3d at 837.

### **C. The Calculation of Fees**

The Court now turns to the amount of the fees that should be shifted to Wray, a question he does not even address in his response brief.

Courts use the well-known “lodestar” method to determine a reasonable amount of fees. *E.g., People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996); *Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983). Under this method, the court must first determine the reasonable hourly rate for each of the movant’s attorneys and the reasonable number of hours

worked by each attorney. *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 518 (7th Cir.1993). The court then multiplies each attorney's reasonable number of hours worked by his or her respective reasonable hourly rate, generating the reasonable amount of fees attributable to each attorney. *Id.* Finally, those sums are tallied to reach a single figure (the “lodestar”) representing the total amount of attorneys' fees to be awarded. *Id.* The court may then adjust this award based on various factors, *see People Who Care*, 90 F.3d at 1310 n.1, but the Commissioners do not argue for any upward adjustment in this instance.

The movant bears the initial burden of documenting its fees to the satisfaction of the court; once it has done so, those fees are presumptively appropriate unless challenged by the opposing party. *Tomazzoli v. Sheedy*, 804 F.2d 93, 96 (7th Cir. 1986).

#### 1. The Hourly Rate of \$150 is Both Unchallenged and Reasonable

There is no dispute concerning the hourly rates for the Commissioners’ counsel. The affidavit of attorney Fishing discloses that “the billing rate for any attorney working on this matter for this client was \$150.00 per hour.” (Fishing Aff. ¶ 4.) “This is the regular, contractual rate billed by attorneys working on matters for [the Commissioners].” (*Id.*) The Court thus finds that \$150 per hour is reasonable.

#### 2. The Hours Reasonably Expended From February 26, 2004 Defending the Official Capacity Claim

As the Court explained earlier, the shifting of fees should not commence until after February 26, 2004, when it became abundantly clear that Wray’s pursuit of an official capacity claim against the Commissioners lacked factual or legal support. Accordingly, the hours expended by counsel for the Commissioners before that date are not subject to shifting under § 1988. *Hamer*, 819 F.2d at 1371.

Thus temporally confined, an analysis of the post-February 26, 2004, time records (*see* Fishing Aff., Ex. A) reveal that some of the entries should be disallowed. In short, the following items and hours are disallowed because they are vague and fail to reveal the nature of the work performed: March 2, 2004, Telephone Conference (.15); March 2, 2004, Conferences (.50); March 3, 2004, Telephone Conference (.15); April 1, 2004, Call Re: Chuck Holm Claim (.20); April 2, 2004, Telephone Conference (.30); July 21, 2004, Conference (apparently concerning a different case) (.1). *See Stark v. PPM America, Inc.*, 354 F.3d 666, 674 (7th Cir. 2004) (“Because so many entries on the fee request were particularly vague, the judge reduced the hours by 30 percent . . . . the district judge's care should be commended”); *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 656 (7th Cir. 1985) (affirming reduction of hours where fee petitions were “vague, inconsistent, and lacking adequate identification of hours”).

After the reduction of this time (1.4 hours), the remaining 91.05 hours are allowed as being reasonably incurred in defense of all the claims Wray was asserting against all of the Defendants after February 26, 2004. However, as discussed earlier, not all of the § 1983 claims advanced by Wray were groundless, and indeed, the Commissioners did not prevail on his state law claims contained in the Amended Complaint, because those were dismissed without prejudice under 28 U.S.C. §1367.

Thus, the Court must assess from the records or otherwise determine how much time was expended on Wray’s groundless official capacity claim against the Commissioners as opposed to Wray’s remaining non-frivolous claims. However, the time records submitted by attorney Fishing are not particularly helpful in making this exacting assessment. The Court must therefore review the record and estimate the time reasonably expended. *See Hensley*, 461 U.S. at

436-7 (“There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.”).

In exercising the necessary discretion, a review of the time records and the filings suggests that a significant majority of the time and effort of defense counsel was spent addressing the frivolous claims Wray advanced against the Commissioners. A fair assessment of that time after February 26, 2004, is 70%. Applying that factor reveals the following lodestar calculation:  $70\% \times 91.05 \text{ hours} \times \$150/\text{hour} = \$9,560.25$ . The Court therefore finds that a judgment in that amount should be entered accordingly.

#### **IV. CONCLUSION**

Based on the foregoing, the Defendants’ Petition For Attorney Fees is GRANTED in part and DENIED in part. The Commissioners are awarded attorney fees against Plaintiff R. John Wray under 42 U.S.C. § 1988 in the amount of \$9,560.25, and the Clerk is directed to enter

a judgment accordingly.

Enter this 9<sup>th</sup> day of September, 2004.

S/Roger B. Cosbey  
Roger B. Cosbey  
United States Magistrate Judge