UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK BEAM and RENEE BEAM,	)	
Plaintiffs,	)	No. 07-cv-1227 (RRP)
v.	)	
	)	REPLY
MATTHEW S. PETERSEN, FEDERAL ELECTION COMMISSION CHAIRMAN,	)	
Defendant.	)	

FEDERAL ELECTION COMMISSION'S REPLY
IN SUPPORT OF ITS BILL OF COSTS

I. INTRODUCTION

The Federal Election Commission ("Commission" or "FEC") — the prevailing party in this case — timely filed its bill of costs. (Doc. 213.) "Federal Rule of Civil Procedure 54(d) provides that costs should be allowed as a matter of course to the prevailing party," *Little v. Mitsubishi Motors N.A., Inc.*, 514 F.3d 699, 701 (7th Cir. 2008), and "where Rule 54(d) applies, . . . the losing party must overcome that presumption." *Delta Air Lines, Inc. v. Colbert*, 692 F.2d 489, 490 (7th Cir. 1982). Nevertheless, plaintiffs filed numerous objections to the Commission's bill of costs, arguing that the Court should either deny costs altogether or disallow certain costs. (Doc. 215.) Plaintiffs' opposition does not overcome the "strong presumption" created by Rule 54(d). *Mother & Father v. Cassidy*, 338 F.3d 704, 708 (7th Cir. 2003). Plaintiffs' brief relies upon arguments that this Court has rejected, appears to misunderstand the applicable law, and mischaracterizes or misinterprets facts in a failed effort to demonstrate Commission misconduct. In itemizing its costs, the Commission asked for amounts within the limits set by federal law and

sought less than all the costs to which it is entitled.[1] The amounts the Commission has been forced to expend in this case, which plaintiffs initiated in March 2007 and pursued with two amended complaints, are public funds. The Court should award the full amount sought.

II. PLAINTIFFS FAIL TO OVERCOME THE STRONG PRESUMPTION THAT THE COMMISSION SHOULD BE AWARDED THE COSTS IT HAS CLAIMED

A. Plaintiffs Have Failed to Carry Their Burden to Show that They Should Not Be Taxed for Any of the Commission's Costs

Neither legal precedent nor the facts support denying the Commission's bill of costs in toto. The Beams wrongly characterize the Commission's vigorous defense of this lawsuit as evidence of "unclean hands." And, despite their disclaimer to the contrary (Opp. 3), plaintiffs use their opposition to raise arguments that the Court earlier rejected.

Although a district court has discretion in deciding whether to award costs, the Seventh Circuit has held that the discretion is "narrowly confined" because of the strong presumption created by Rule 54(d). *Contreras v. City of Chicago*, 119 F.3d 1286, 1295 (7th Cir. 1997). The Seventh Circuit recognizes "only two situations in which the denial of costs might be warranted: the first involves misconduct of the party seeking costs, and the second involves a pragmatic exercise of discretion to deny or reduce a costs order if the losing party is indigent." *Mother & Father*, 338 F.3d at 708; *see also, e.g., Rivera v. City of Chicago*, 469 F.3d 631, 634 (7th Cir. 2006).[2] The Beams do not claim they are indigent, but they do assert that the Commission has "unclean hands," in effect accusing the Commission of what the Seventh Circuit calls

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[1] The Supreme Court has concluded that 28 U.S.C. § 1920 defines the term "costs" in Federal Rule of Civil Procedure 54(d). *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987).

[2] In explaining these circumstances, the Seventh Circuit assumed that the prevailing party complied with the procedural requisites for filing a bill of costs, *e.g.,* filing timely. A failure to comply may also result in denying the bill. *See*, *e.g.*, *In re Gallo*, 585 F.3d 304 (7th Cir. 2009).

"misconduct." However, that term applies only in "exceptional circumstances." *Overbeek v. Heimbecker*, 101 F.3d 1225, 1228 (7th Cir. 1996).

Courts of this circuit have rarely found circumstances so "exceptional" as to justify completely denying a prevailing party's bill of costs. "[O]nly misconduct by the prevailing party worthy of a penalty (for example, calling unnecessary witnesses, raising unnecessary issues, or otherwise unnecessarily prolonging the proceedings) . . . will suffice to justify denying costs." *Congregation of the Passion, Holy Cross Province v. Touche, Ross, & Co.*, 854 F.2d 219, 222 (7th Cir. 1988); *see also*, *e.g.*, *Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 945 (7th Cir. 1997) (same). For example, in *Overbeek*, the Seventh Circuit concluded that the district court did not abuse its discretion in denying all costs where the prevailing party's counsel caused a decade of protracted and needless litigation. Counsel refused multiple settlement offers of an insurance policy limit, needlessly pursued a trial, appealed the jury's decision not to award punitive damages (even though the defendants were judgment-proof), vanished for long periods, and made frivolous arguments. 101 F.3d at 1228.

Unlike the prevailing party in *Overbeek*, the Commission engaged in no "misconduct . . . worthy of a penalty" during this litigation. *Congregation of the Passion*, 854 F.2d at 222. Indeed, as explained below, the Commission engaged in no misconduct at all.

1. The Commission's "Reason to Believe" Finding in the Pre-Litigation Administrative Proceedings Does Not Evidence Misconduct

Plaintiffs' opposition errs by relying (Opp. 3-4, 7) on the Commission's pre-litigation vote to find "reason to believe" ("RTB") that they may have violated the Federal Election Campaign Act ("Act" or "FECA"), 2 U.S.C. §§ 431-455. Plaintiffs offer no legal support, however, for their erroneous suggestion that pre-litigation action could support a claim of

litigation misconduct. Under the Seventh Circuit's criteria for misconduct, plaintiffs' arguments about the Commission's RTB finding are irrelevant to the taxing of costs. *See supra* p. 3.

Even if a party's pre-litigation conduct were relevant, plaintiffs misunderstand the Act's "elaborate and detailed administrative process." *Stockman v. FEC*, 138 F.3d 144, 147 (5th Cir. 1998); *see* 2 U.S.C. § 437g. An RTB finding is a preliminary determination that an investigation is warranted, a statutory prerequisite to the Commission's initiating a formal investigation to determine whether there is "probable cause to believe" that the named individual has violated the Act. *See* 2 U.S.C. § 437g(a)(2); *see also* § 437g(a)(3)-(4). It does not represent a prejudgment of the issue. An "FEC[ ] investigation does not determine any rights of the person under review and merely leads to a possible FEC decision to seek *de novo* judicial review to enforce the provisions of the Act." *Stockman*, 138 F.3d at 155. *See also*, *e.g.*, *FTC v. Standard Oil Co.*, 449 U.S. 232, 240-41 (1980) ("By its terms, the [Federal Trade] Commission's averment of 'reason to believe' that [the respondent] was violating the Act is not a definitive statement of position. It represents a threshold determination that further inquiry is warranted . . . .").

The Commission made RTB findings about a number of individuals associated with the Fieger law firm and the firm's principals, the focus of the agency's enforcement proceedings in Matter Under Review ("MUR") 5818. The Commission's RTB finding as to plaintiffs was based in part on their affiliation with the Fieger firm and the fact that they had made substantial contributions to the Edwards for President campaign at roughly the same time as many Fieger firm conduits did so. (FEC's Factual and Legal Analysis, dated Sept. 26, 2006, at 2 (Joint Trial Exhibit ("Exh.") 2; *see* Trial Transcript ("Tr.") at 44).) In fact, the Commission did not

ultimately find "probable cause" to believe that the Beams violated the Act.[3] Moreover, by voting to find RTB, the Commission did not, as plaintiffs assert (Opp. 7), "harass[ ]" and "threaten[ ]" them. Although the subject of an RTB finding may be inconvenienced, complying with an administrative investigation is not legally cognizable harm.[4]

2. The Commission's Objections to Plaintiffs' Discovery Requests Do Not Evidence Misconduct

The Commission objected to some of plaintiffs' discovery requests and explained why in an opposition (Doc. 119, filed January 28, 2009). Plaintiffs now allege (Opp. 4-5) that the Commission has "unclean hands" because it opposed the requested discovery. To support that allegation, however, plaintiffs rely (*id.*) on pejorative, conclusory assertions and refer to this Court's discovery orders without mentioning the limits the Court imposed on discovery. Plaintiffs have wrongly equated the Commission's vigorous defense with "unclean hands" or misconduct. A court may not "penalize[ ] [a party] for maintaining an aggressive litigation posture." *Lipsig v. Nat'l Student Marketing Corp.*, 663 F.2d 178, 180-81 (D.C. Cir. 1980) (citing *Adams v. Carlson*, 521 F.2d 168, 170 (7th Cir. 1975)).

The Commission acted reasonably in opposing plaintiffs' discovery requests, which were broad and burdensome. As the Commission explained in its opposition, the Commission had furnished sworn declarations from knowledgeable government employees who stated that the agency had not received any personal financial information about the Beams from the

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[3] Plaintiffs appear to claim (Opp. 4) that the RTB finding was based on an error as to whether they had made campaign contributions in the past, but plaintiffs mistakenly assume that past contributions would eliminate the possibility that they had acted as conduits in the factual situation involved in MUR 5818.

[4] *See*, *e.g.*, *Laird v. Tatum*, 408 U.S. 1 (1972) (finding that plaintiffs could not challenge Army's intelligence-gathering investigation because it did not threaten plaintiffs' cognizable interests); *Stockman*, 138 F.3d at 154-55. *Cf. Standard Oil*, 449 U.S. at 244 (noting that the "expense and annoyance of litigation is part of the social burden of living under government" (internal quotation marks and citation omitted)).

Department of Justice. In response, plaintiffs even sought to depose litigation counsel representing the Commission in this very case. Moreover, plaintiffs did not limit their document requests to items relevant to the alleged violation of the Right to Financial Privacy Act — the only remaining claim at that time. And requested documents included confidential information about ongoing law enforcement proceedings. (FEC Opp. (Doc. 119) at 5-8, 11-13.) This Court ordered modified discovery — permitting some parts of plaintiffs' requested discovery but denying others — and in doing so the Court did not find that the Commission's objections were frivolous or sanctionable. (*See* Transcript of Jan. 7, 2009, hearing (Doc. 120); Transcript of Feb. 11, 2009, hearing (Doc. 127), at, *e.g.*, pp. 5, 7-12, 14.)

3. Witness Olaya's Testimony Does Not Evidence Commission Misconduct

Contrary to plaintiffs' allegation (Opp. 3), FEC staff attorney and witness Phillip Olaya did not "flip[ ]" his testimony at trial. Before trial, he executed a declaration explaining that he had mistakenly answered in the affirmative a question at his deposition about whether he had seen materials related to plaintiffs on a CD of public trial materials. *See* Trial Tr. at 304-08, 333-34; Joint Trial Exh. 19. At trial, Mr. Olaya further explained that, in answering that question, he "perhaps was not paying attention or had lost . . . [his] concentration and just responded 'Yes' to seeing that information." Trial Tr. at 324, lines 1-3; *see also id*. at 336. Mr. Olaya also stated that he is "not a litigator. I had never been part of a deposition. . . . So there were some nerves . . . ." *Id.* at 337, lines 9-12. Finally, he testified that he was not "pressured" to change his deposition testimony and that he himself had discovered his error. *Id*. at 318, 334-35. In sum, an inexperienced and nervous deponent made a mistake in answering a question and corrected it before the bench trial began. This Court assessed his credibility in finding for

the FEC. (Memorandum Opinion ("Mem. Op.") at 9 (Doc. 211).) The Commission engaged in no misconduct regarding Mr. Olaya.

4. Plaintiffs' Subjective Belief in Their Case Does Not Support Denying the Commission's Bill of Costs

Plaintiffs' brief includes arguments why they believe their case against the Commission was strong. But to deny the prevailing party its bill of costs, the losing party must demonstrate something more than his good-faith belief in the strength of his case. "More than just a showing of good faith is necessary to immunize the losing party from paying costs." *Muslin v. Frelinghuysen Livestock Mgrs., Inc.*, 777 F.2d 1230, 1236 (7th Cir. 1985). "[I]t is insufficient that the losing plaintiff had a reasonable basis for her case." *Delta Air Lines*, 692 F.2d at 491. Moreover, plaintiffs will not be "penalized" (Opp. 3) by having to pay the winning defendant's costs. Rule 54(d) is not a penalty or sanction; rather, it is a generally applicable modification of the former practice that each side bears its own costs. *See, e.g.*, *Anderson v. Griffin*, 397 F.3d 515, 522 (7th Cir. 2005). In contrast, denying the prevailing party all its costs does function, as the Seventh Circuit has said, as a "penalty." *See supra* p. 3. Plaintiffs have failed to make the necessary showing that the Commission should be so penalized.

B. Plaintiffs Have Failed to Carry Their Burden to Show that the Commission Is Not Entitled to Reimbursement for Certain Specific Costs

1. Lodging and Per Diem Expenses for Commission Witnesses

Contrary to plaintiffs' assertions (Opp. 5-6), the amounts the Commission seeks for the lodging and per diem expenses of witnesses are not excessive. Plaintiffs' objection to those costs rests on the trial's lasting two days. But whether a claim of costs is reasonable depends on the prevailing party's assessment at the time the party made its plans, not in hindsight. *See*, *e.g.*, *Majeske v. City of Chicago*, 218 F.3d 816, 825 (7th Cir. 2000) (stating that "the determination of

necessity must be made in light of the facts known when the transcript was requested"). The last pretrial order that Commission counsel submitted to the Court stated that plaintiffs believed the trial would take three or four days to complete and that the FEC expected the trial could last three days. *See* "Final Pretrial Order" at p. 4, attached to August 18, 2010, e-mail from Benjamin Streeter to Ena Ventura (with a copy to plaintiffs' counsel), and provided here as Exh. 1. The Commission therefore made hotel reservations for most of the government witnesses for three nights. By the time the Commission's attorneys realized the trial would likely end some time in the afternoon of the second day — the trial transcript shows that the trial ended at 3:46 p.m. on August 26 (Tr. at 361) — it was too late for the Commission to avoid incurring hotel charges for the third night. If the Commission had made hotel reservations for only two nights, the witnesses would have had to check out in the morning and, if the trial had not ended by the second day, they would have faced the difficult task of finding lodging at the last minute for the third night. For the same reasons, plaintiffs' challenge to the award of the costs for meals and other per diem expenses for the third day also fails. The federal government sets the per diem rates, and the Commission seeks no more than the amounts allowed by federal law. *See* 28 U.S.C. § 1821(d)(2), (3).

2. Transportation Costs for Commission Witnesses

Although plaintiffs broadly dispute the claimed costs for ground transportation, they cite only the costs incurred by witness Roger Hearron. (Opp. 6.) However, the $50 charge for taxi service from O'Hare Airport was for transporting both Mr. Hearron and fellow witness Thomas Andersen, who shared the taxi. (*See* Declaration of Thomas Andersen, attached as Exh. 2; *see also* Bill of Costs, Exh. B at B-04 (showing that Andersen did not claim any amount for transportation from the airport to the hotel).) Plaintiffs' counsel states (Opp. 6) that he usually

paid about $27 per trip from O'Hare to an unspecified hotel. Under plaintiffs' apparent view, if the two FEC witnesses had traveled in separate taxicabs, a reasonable fare for each would have been $27, for a total of $54 — a sum greater than the amount Mr. Hearron actually paid. Going home, Mr. Hearron paid $47.55 for a taxi to O'Hare. (Bill of Costs, Exh. D at D-04.) Because traffic and other factors affect a taxi charge, this amount is reasonable for the trip involved. *See*, *e.g.*, Chicago Taxi Fare Finder, http://chicago.taxiwiz.com (estimating the cost at "roughly $43" including tip, and noting that "[t]raffic and other factors will affect the actual fare") (last visited Nov. 29, 2010). Plaintiffs ignore the cost-saving measures by two other witnesses who traveled between the airport and the hotel by train or other inexpensive means. (*See*, *e.g.*, Bill of Costs, Exh. F at F-04.)[5] In questioning the lack of taxi receipts (Opp. 6), plaintiffs also overlook the federal government's travel regulations, which do not require government employees to get a receipt for a miscellaneous expense less than $75. *See* 41 C.F.R. §§ 301-11.25, 301-52.4.

In challenging the witnesses' overall transportation costs, plaintiffs again focus on Mr. Hearron's costs. His airline ticket cost $211.40, and the airline also charged a baggage check fee of $23 each way. (Bill of Costs, Exh. D at D-03, D-04.) For each witness, including Mr. Hearron, the Commission paid a travel agent fee of $28.50. (Bill of Costs, Exh. A at A-01.) Thus, adding in the taxi expenses described above, the costs for Mr. Hearron's travel total $383.45, the sum for which the Commission is seeking reimbursement.

3. Internet and ATM Fees

As plaintiffs admit, the Commission stated it is not seeking reimbursement for any Internet and ATM fees. (Opp. 6; Summers Decl. at 2 ¶ 3.) Plaintiffs claim that the FEC is

[5] In arguing that a $27 charge would be reasonable, plaintiffs incorrectly state that witness Olaya paid $27.10 for taxicab rides to and from O'Hare. In fact, Mr. Olaya did not travel by taxi to or from the airport and did not seek reimbursement from the Commission for his travel. (*See* Bill of Costs, Exh. E at E-03.)

nonetheless seeking reimbursement for these expenses, but in fact, the Commission excluded (subtracted) those fees in calculating its bill of costs.

4. Transcript Expenses

Contrary to plaintiffs' assertion (Opp. 6-7), the expenses for videotaping the deposition of Ms. Wassom Bayes were reasonable and necessary. The amount sought is within the limits set by this Court and the Judicial Conference of the United States, and the Commission has explained the important roles Ms. Wassom Bayes played. (Summers Decl. ¶ 4.) Because she was unable to travel to Chicago for the trial due to the recent birth of her child, the deposition was in lieu of her trial testimony. Submitting both a videotape of the deposition and a transcript would better allow the Court to evaluate the witness's demeanor and credibility. As the Court's opinion confirms, the credibility of the government's witnesses was an important factor in the Court's decision. (Mem. Op. (Doc. 211) at 9.)

The Seventh Circuit has held that the Federal Rules authorize a district court to award the prevailing party the costs of both video-recording and stenographically transcribing the same deposition. *Little v. Mitsubishi Motors*, 514 F.3d at 702. *Accord*, *e.g.*, *Fairley v. Andrews,* No. 03 C 5207, 2008 WL 961592, at *11 (N.D. Ill. Apr. 8, 2008) (awarding fees for video recordings and stenographic transcripts in connection with the depositions of all non-parties because "there was a reasonable possibility that they would be unavailable for trial"). Most federal courts of appeals that have recently addressed this issue have reached the same conclusion.[6]

Plaintiffs also object (Opp. 7) to the Commission's request for the costs of transcripts of two hearings. But plaintiffs merely assert (*id.*) that the costs (respectively $25.20 and $82.45)

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[6] *See, e.g.*, Kurtis A. Kemper, Annotation, *Taxation of Costs Associated with Videotaped Depositions under 28 U.S.C. § 1920 and Rule 54(d) of Federal Rules of Civil Procedure*, 156 A.L.R. Fed. 311 (1999; updated 2010); 4 John H. McElhaney & Vincent J. Hess, Bus. & Com. Litig. Fed. Cts. § 49:17 (2d ed. 2009) ("*Types of costs — Videotape deposition*").

were "unnecessary and served no purpose other than to add extra items to [the] bill of costs." This bald statement of plaintiffs' opinion fails to rebut the Commission's detailed explanation. (*See* Summers Decl. ¶ 6.) A losing party must provide objective reasons to overcome the presumption in favor of awarding a cost. *See*, *e.g.*, *Rivera*, 469 F.3d at 636.

III. CONCLUSION

The Beams have failed to carry their burden to overcome the presumption in favor of awarding costs to the Commission as the prevailing party. Accordingly, this Court should award the Commission the full amount it seeks in its bill of costs.

Respectfully submitted,

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