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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 10 C 2001
RJB PROPERTIES, INC., and BLACKSTONE CONSULTING, INC., Defendants.	)	

ORDER

Before me are defendant BCI's motions for costs pursuant to Fed. R. Civ. P. 54(d), and for attorneys' fees and untaxed costs pursuant to 42 U.S.C. § 2000e-5(k).[1] For the reasons explained below, the motion for costs is denied and the motion for attorneys' fees and untaxed costs is granted in part.

BCI is a "prevailing party" because I dismissed all claims against

[1] While the EEOC does not object to my resolving BCI's motions, it raises the "concern" that my exercise of jurisdiction at this juncture might somehow imply that "referral of the whole case to Magistrate Judge Keys may not have been proper because all of the parties did not consent." I am not troubled by this issue. As the record reflects, BCI was dismissed from the case after I granted its motion for summary judgment. Because it was no longer a party, its consent was neither required nor implied by "the parties'" February 15, 2013, written consent (executed only by the EEOC and RJB) to have a magistrate judge conduct all further proceedings. Indeed, as the Consent Decree specifically states: "The Court granted BCI's motion for summary judgment and dismissed BCI from this case entirely. As a result, this Decree is entered into solely between EEOC and RJB." Neither of the cases the EEOC cites—*Hatcher v. Consolidated City of Indianapolis*, 323 F.3d 513 (7th Cir. 2003), nor *Mark I, Inc. v. Gruber*, 38 F.3d 369 (7th Cir. 1994), causes me to believe either that I lack jurisdiction over BCI's motions, or that Magistrate Judge Keys lacked jurisdiction to enter the Consent Decree.

it on April 23, 2012, and entered a final judgment in its favor on May 1, 2013. Accordingly, Fed. R. Civ. P. 54(d) presumptively entitles it to recover certain taxable costs. BCI's amended bill of costs (which asserts a lesser amount than its original bill of costs in response to certain of the EEOC's objections) seeks $65,894.87 for the costs of court reporters; expert depositions; copying costs; and interpreters. All of these categories of costs are recoverable in principle under § 1920.

The EEOC argues, however, that BCI is not entitled to any costs because it "has not shown that any of the costs were incurred solely because it was a named party." What the EEOC means by this somewhat baffling formulation (after all, BCI would have incurred no costs at all but for the fact that it *was* a named party) is that BCI is not entitled to recover the costs it seeks because the claims on which it prevailed were "inextricably linked" to claims on which the EEOC prevailed against BCI's co-defendant, RJB. The EEOC cites three § 1983 cases—*Montanez v. Chicago Police Officers Fico (Star #6284), et al.*, 931 F. Supp. 2d 869, 2013 WL 1110870, *17 (N.D. Ill. 2013) (Finnegan, MJ); *Gilfand v. Planey*, No. 07 C 2566, 2012 WL 5845530, *6-7 (N.D. Ill. Nov. 19, 2012)(Leinenweber, J.); and *Edwards v. Rogowski*, No. 06 C 3110, 2009 WL 742871, *10 (N.D. Ill. Mar. 18, 2009) (Coar, J.)—in which courts have, indeed, declined to award costs to prevailing defendants in "mixed results" cases. These cases

support the notion that even when a defendant has clearly prevailed, it is not entitled to recover costs under Rule 54(d) if it cannot "make any meaningful distinction" between the costs it incurred and the costs its jointly-represented, non-prevailing, co-defendant incurred in defending significantly overlapping claims. *See Montanez*, 2013 WL 1110870, *17; *Edwards*, 2009 WL 742871, *10.

BCI insists that these cases are both non-controlling and distinct. Their reasoning is compelling, however, and BCI does not persuade me that the distinction it seizes upon—that the plaintiffs in those cases were "largely indigent" individuals, rather than a government agency—makes a meaningful difference. BCI cites *Weeks v. Samsung Heavy Industries Co., Ltd.*, 126 F.3d 926, 945 (7th Cir. 1997), for the proposition that "[t]he presumption in favor of awarding costs to the prevailing party is difficult to overcome," and requires a showing of either misconduct by the prevailing party or the losing party's inability to pay. But neither *Weeks*, nor the remaining authorities BCI cites, *Hudson v. Nabisco Brands, Inc.*, 758 F.2d 1237, 1242 (7th Cir. 1985) *overruled on other grounds by Provident Bank v. Manor Steel Corp.*, 882 F.2d 258 (7th Cir. 1989); *Congregation of the Passion Holy Cross Province v. Touche, Ross & Co.*, 854 F.2d 219, 222 (7th Cir. 1988); and *Hakim v. Accenture United States Pension Plan*, 901 F. Supp. 2d 1045, 1049 (N.D. Ill. 2012), were "mixed-results"

cases such as this. Because the costs BCI seeks to recover are, from all that appears, indistinguishable from the costs RJB incurred to defend against claims on which the EEOC prevailed, BCI is not entitled to recovery under Rule 54(d).

BCI is entitled, however, pursuant to 42 U.S.C. § 2000e-5(k) and *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), to recover a portion of the attorneys' fees and untaxed costs it incurred in defending this suit. Under *Christianburg*, I have discretion to award that relief if I conclude that the EEOC's claims against BCI were "frivolous, groundless, or without foundation, even though not brought in subjective bad faith," or that the EEOC "continued to litigate after [its claims against BCI] clearly became so." *Id*. at 421, 422.

BCI argues, first, that its joinder as a defendant in the EEOC's action was unreasonable from the outset because there was no basis in law or fact to support EEOC's "single and/or joint employer" theories of liability. BCI also argues that even assuming it was a proper defendant, certain of the claims I dismissed on summary judgment were groundless, unreasonable, and/or meritless. I examine these arguments in turn.

The theory the EEOC advanced in support of its single employer theory of liability was, as I explained in my summary judgment opinion, based on an interpretation of *Papa v. Katy Industries, Inc.,* 166 F.3d 937, 941 (7th Cir. 1999), that was not supported

by the text of *Papa,* its progeny, or the remaining authorities the EEOC cited. Nevertheless, I disagree with BCI that the EEOC's position was "expressly rejected" in *EEOC v. State of Illinois*, 69 F.3d 167 (7th Cir. 1995). And while I concluded that the EEOC could not prevail, as a matter of law, on its theory of joint liability based on the facts of this case, I am not persuaded that that theory—that BCI could be considered the claimants' employer because its employee, Shumpert, exercised significant control over their working conditions—was affirmatively foreclosed by controlling precedent.

BCI next argues that specific claims dismissed at summary judgment meet the *Christianburg* standard entitling a prevailing defendant to attorneys' fees.[2] Indeed, a prevailing defendant's entitlement to attorneys' fees "is not all-or-nothing: A defendant need not show that every claim in a complaint is frivolous to qualify for fees." *Fox v. Vice*, 131 S. Ct. 2205, 2214 (2011). Accordingly, if any of the EEOC's claims meets the *Christianburg* standard, BCI is entitled to recover the portion of attorneys' fees it would not have incurred "but for the frivolous claim." *Id*. at 2215.

BCI revisits the merits of the termination claim the EEOC brought on

[2] BCI raises this argument with respect to all of the Thornwood claims on the ground of the EEOC's alleged lack of pre-suit investigation and failure to conciliate, but it drops the argument in reply, presumably in light of 1) the EEOC's evidence of its pre-suit investigation, and 2) the Seventh Circuit's holding in *E.E.O.C. v. Mach Min., LLC*, 738 F.3d 171 (7th Cir. 2013), that "an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit." *Id.* at 172.

behalf of Minerva Flores; the overtime and hostile work environment claims it brought on behalf of certain Thornwood claimants; and the failure to promote and hostile work environment claims it brought on behalf of certain IIT claimants, arguing that the EEOC knew or reasonably should have known early on—and, in any event, by the close of discovery—that none of these claims stood any chance of success. For the following reasons, I agree with BCI with respect to the EEOC's overtime and failure to promote claims only.

In opposition to BCI's motion, the EEOC states that its pursuit of overtime claims on behalf of certain Thornwood claimants was supported by the Seventh Circuit's four-decades-old opinion in *Williams v. General Foods Corp*., 492 F.2d 399 (7th Cir. 1974)—a case I described in my summary judgment as "nothing like" the present one. The EEOC acknowledges that I rejected its comparison to *Williams*, but insists that "that does not undermine the general legal principle that it can be an unlawful employment practice…to limit overtime opportunities based on membership in a protected class." EEOC's Opp. at 10 n. 3 [DN 265]. Recall, however, that the theory on which the EEOC defended its overtime claims at summary judgment was not that defendants limited claimants' overtime *opportunities*—but that defendants "limit[ed] the amount of information [claimants] received compared to their African-American co-workers." Even assuming the viability of

this theory (for which the EEOC cited no authority and identified no analytical framework) as a logical extension of *Williams*, the evidence the EEOC invokes to substantiate it—that two African-American day-shift employees "automatically" received overtime shifts that the claimants requested but were denied—is at odds with the premise that the claimants lacked "information" about (*i.e.*, didn't know about) available overtime opportunities.[3] At bottom, as I stated in my decision on summary judgment, the EEOC did not identify even a single instance in which a non-Hispanic employee was given an overtime shift that the claimants did not know about, nor did it otherwise proffer any affirmative evidence of information that was allegedly available to African-Americans but unavailable to claimants. While it may have been reasonable for the EEOC to believe that discovery would produce evidence to support its claims, by the time all the evidence was in, it should have been clear to the EEOC that it had no chance of success on its overtime claims.

The same is true of the failure to-promote-claims the EEOC pursued on

[3] Actually, there is a further wrinkle in the EEOC's theory. By the EEOC's own account, the Thornwood claimants requested, but were denied, "overtime pay" for completing "this identical work" during their regular shifts. To the extent these facts tend to show that the claimants were required to do more work for less pay than their African-American colleagues, they are relevant to these claimants' hostile environment-based-on-disparate-treatment claims. Those claims, while legally insufficient for reasons I explained at summary judgment, were not frivolous. In the context of the EEOC's overtime claims, however, evidence that the claimants asked for overtime *pay* for completing work their African-American colleagues were assigned to do on their overtime *shifts* not only compares apples to oranges, it also establishes affirmatively that the claimants knew about these overtime shifts, eviscerating the EEOC's unequal information theory.

behalf of five IIT claimants, which, as I noted in my summary judgment opinion, were riddled with similar analytical flaws. To summarize, the EEOC—despite claiming in its summary judgment opposition that it could "easily make out a *prima facie* case of discrimination" as to these claimants—made no attempt to show that any individual claimant could establish each of the required elements, including that the claimant was qualified for a specific position, but was passed over for the position by a similarly or less-qualified person outside the protected class. Instead, the EEOC argued that because "numerous" African-Americans hired after the five claimants became full-time employees more quickly than they, a reasonable inference could be drawn of a "pattern of African-Americans receiving full-time positions ahead of the claimants." This logical leap was unwarranted on the undisputed facts for numerous reasons, as I explained at length in my summary judgment opinion. An overarching—and fatal—problem, however, is that the EEOC sought to prove "systematically more favorable treatment," *Loyd v. Phillips Brothers, Inc.*, 25 F.3d 518, 522 (7th Cir. 1004) (cited by the EEOC), with anecdotal evidence it made no effort to show was representative of a policy or practice.[4] While the EEOC may

[4] On this issue, I noted that "[t]he EEOC identifies, among nearly 200 African-American janitors employed at IIT during the relevant period, under thirty African-American comparators promoted more quickly than claimants, but omits any evidence or discussion of how long the remaining roughly 170 African-Americans spent as call-ins, nor does it attempt to compare the promotion rates of Hispanic employees versus African-American employees as a whole." SJ Op.

reasonably have believed, based on its pre-suit investigation, that discovery would establish a basis for its failure-to-promote claims, it should have known, at least by the close of discovery, that the evidence did not support these claims.[5]

BCI is not entitled to attorneys' fees or untaxed costs, however, for its defense of the EEOC's remaining claims. There is no evidence to support BCI's repeated suggestion that the EEOC pursued any of its claims for an improper purpose (to "extort" a higher settlement, for example). Moreover, while I ultimately concluded that the EEOC's factual support for the claims was insufficient to raise any triable issue, the record was not so wholly devoid of evidence as to render the claims frivolous, nor was the EEOC's theory of liability contrary to controlling law.

For the foregoing reasons, BCI's motion for costs pursuant to Rule 54(d) is denied, and its motion for attorneys' fees and untaxed costs pursuant to 42 U.S.C. § 2000e-5(k) is granted in part, as set forth above.

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at 22, n.6 [DN 199]. I concluded that the EEOC's "cherry-picked data" could not raise a statistical inference of the " pattern" it alleged. *Id*.

[5] To be perfectly clear: I do not agree with BCI that any of the claims the EEOC asserted in this case was groundless, frivolous, or unreasonable at the outset. While I conclude that the EEOC reasonably should have known, by the time discovery was complete, that neither its overtime claims nor its failure-to-promote claims had any chance of success on the facts uncovered, I do not find that the EEOC's pursuit of these claims before then was unreasonable. Accordingly, BCI is entitled only to fees and untaxed costs it would not have incurred but for the EEOC's pursuit of these claims beyond the close of discovery.

ENTER ORDER:

Elaine E. Bucklo
United States District Judge

Dated: February 7, 2014