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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Robert McBurnie,

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No. CV-09-8139-PCT-FJM

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Plaintiff,

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**ORDER**

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vs.

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City of Prescott, et al.,

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Defendants.

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The court has before it defendants' motion for attorney's fees (doc. 141) and memorandum in support (doc. 157), plaintiff's response (doc. 167), and defendants' reply (doc. 170). We also have before us plaintiff's motion to modify clerk's judgment on taxation of costs (doc. 168), defendants' response (doc. 169), and plaintiff's reply (doc. 171).

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Plaintiff filed this action against the City of Prescott and individual City employees asserting 13 claims related to his discharge, including wrongful discharge and retaliation in violation of state and federal law, breach of contract, intentional interference with contract, intentional and negligent infliction of emotional distress, and violations of his first amendment and equal protection rights under the United States Constitution. Plaintiff argued that his discharge was in retaliation for his complaining about Fair Labor Standards Act (FLSA) and workplace safety violations. Plaintiff also filed a separate claim for attorney's fees related to a settlement of his FLSA wage claim. He succeeded on this claim only. The 12 other claims were resolved in defendants' favor on summary judgment, directed verdict,

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1 or jury verdict following a six-day trial.

## 2 **Taxation of Costs**

3 The clerk of the court apportioned the taxation of costs, awarding defendants costs in  
4 the amount of \$9,378.51 and plaintiff costs in the amount of \$256.60. Plaintiff now asks us  
5 to modify the clerk's judgment on taxation of costs to require each party to bear its own  
6 costs. He argues that the City should be awarded no costs because he prevailed on one small  
7 aspect of the case regarding attorney's fees on the FLSA settlement.

8 Under Rule 54(d)(1), Fed. R. Civ. P., costs are awarded to the prevailing party. We  
9 have discretion, however, to apportion or deny costs where there is a mixed judgment.  
10 Economics Lab., Inc. v. Donnolo, 612 F.2d 405, 411 (9th Cir. 1979) ("The district court has  
11 broad discretion in apportioning and taxing costs where, as here, neither party completely  
12 prevailed.") (citation omitted). Defendants prevailed on 12 of the 13 claims. They are  
13 clearly the prevailing party. We conclude that the clerk of the court reasonably apportioned  
14 costs based on each parties' relative success on the claims.

15 Plaintiff also argues that even if we determine that apportionment is appropriate we  
16 should reduce the judgment by certain non-taxable amounts. We reject defendants' argument  
17 that these claims were waived because they were not presented to the clerk for consideration.  
18 Our review indicates that each issue was raised, albeit broadly, in plaintiff's objections to  
19 defendants' bill of costs. See doc. 143.

20 Plaintiff first argues that \$652.12 in witness fees paid to defendant parties testifying  
21 in their own behalf are not recoverable and should be omitted from the taxation of costs. See  
22 LRCiv 54(e)(4). Defendants argue that they testified as fact witnesses, not party witnesses,  
23 after the individual defendants were dismissed from the case. But the individual defendants  
24 were not dismissed from the case until after the plaintiff's close of evidence on defendants'  
25 motion for judgment as a matter of law. See Minute Entry (doc. 123). At the time the  
26 individual defendants were subpoenaed and paid witness fees, they were still defendants in  
27 the case. See Defendants' Bill of Costs (doc. 140). We agree with plaintiff that witness fees  
28 paid to party defendants in the amount of \$652.12 should be subtracted from the clerk's

1 judgment.

2 Plaintiff also challenges the clerk's taxation of costs for copies of plaintiff's workers'  
3 compensation claims file obtained from the Industrial Commission in the amount of \$531.25.  
4 Plaintiff argues that defendants made no showing that the records were necessarily obtained  
5 from a third-party records custodian or were admitted into evidence at trial. See LRCiv  
6 54.1(e)(5). A bill from the Industrial Commission is attached to defendants' bill of costs,  
7 sufficiently establishing that these copies were obtained from a third-party custodian.  
8 Moreover, it is undisputed that portions of the file were admitted into evidence by both  
9 parties. Therefore, this cost was properly taxed to plaintiff.

10 Finally, plaintiff challenges taxation of a \$12.00 fee related to a subpoena for medical  
11 records, because the subpoena was issued after discovery had closed. We agree that costs  
12 related to out of time discovery are not taxable and accordingly reduce the taxable amount  
13 by \$12.00.

14 We therefore reduce the clerk's taxation of costs by a total of \$664.12, for a modified  
15 cost award to defendants of \$8,714.39.

### 16 **Attorney's Fees**

17 Defendants seek an award of attorney's fees on a variety of legal theories, including  
18 42 U.S.C. § 1988, A.R.S. §§ 12-341, 12-341.01(A), (B), and (C), and Rules 11(a) and 41(a)  
19 and (d), Fed. R. Civ. P. They incorrectly argue that as the prevailing party they are entitled  
20 to fees under 42 U.S.C. § 1988 "unless special circumstances would render such an award  
21 unjust." Memorandum at 4 (citing Hensley v. Eckerhart, 461 U.S. 424, 429, 103 S. Ct. 1933,  
22 1937 (1983)). Defendants ignore the well-established rule that fee shifting to a prevailing  
23 defendant under § 1988 is available only "upon a finding that the plaintiff's action was  
24 frivolous, unreasonable, or without foundation." Christiansburg Garment Co. v. EEOC, 434  
25 U.S. 412, 421, 98 S. Ct. 694, 700 (1978). Defendants have made no showing that plaintiff's  
26 federal claims meet this test.

27 Defendants other purported bases for attorney's fees are similarly inapplicable.  
28 A.R.S. § 12-341 is irrelevant because it provides for recovery of taxable costs, not attorney's

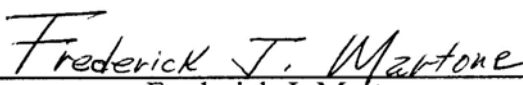
1 fees. Rules 11(a) and 41(a) and (d), Fed. R. Civ. P., provide no basis for an award of fees.  
2 A.R.S. § 12-341.01(A) and (B) relate to an award of attorney’s fees in an action arising out  
3 of contract. Although plaintiff originally asserted contract claims, these claims were an  
4 insignificant part of plaintiff’s action. Defendants make no effort to limit fees to the contract  
5 claims or otherwise attempt to support an award of fees under § 12-341.01(A). See  
6 Associated Indem. Corp. v. Warner, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985).

7 Defendants abandon each of these bases for the recovery of fees by not responding  
8 to plaintiff’s objections, instead focusing solely on recovery of fees under A.R.S. § 12-  
9 341.01(C) in their reply. Section 12-341.01(C) provides for attorney’s fees only “upon clear  
10 and convincing evidence that the claim . . . constitutes harassment, is groundless and is not  
11 made in good faith.” Defendants contend that plaintiff’s claim that he was wrongfully  
12 discharged because he made workplace safety complaints to ADOSH were groundless and  
13 not made in good faith. They argue that plaintiff must have known that A.R.S. § 23-425 does  
14 not provide for a private cause of action. Not only is this an insufficient showing under § 12-  
15 341.01(C), but the argument was raised for the first time in defendants’ reply brief. We will  
16 not consider an argument raised for the first time in a reply. Gadda v. State Bar of Cal., 511  
17 F.3d 933, 937 n.2 (9th Cir. 2007).

18 **IT IS ORDERED GRANTING** plaintiff’s motion to modify clerk’s judgment on  
19 taxation of costs (doc. 168). Costs are taxed for the defendants in the modified amount of  
20 \$8,714.39.

21 **IT IS FURTHER ORDERED DENYING** defendants’ motion for an award of  
22 attorney’s fees (doc. 141).

23 DATED this 21<sup>st</sup> day of October, 2011.

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 Frederick J. Martone  
27 United States District Judge  
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