

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NATHALIE THUY VAN,

Plaintiff,

v.

WAL-MART STORES, INC.,

Defendant.

) Case No.: 5:08-CV-05296 PSG
)
) **ORDER DENYING DEFENDANT’S**
) **MOTION FOR ATTORNEYS’ FEES**
) **AND GRANTING DEFENDANT’S**
) **BILL OF COSTS**
)
) **(Re: Docket Nos. 435, 432)**

Before the court are Defendant Wal-Mart Stores, Inc.’s (“Wal-Mart”) motions for attorneys’ fees and for a bill of costs against Plaintiff Nathalie Thuy Van (“Van”). Wal-Mart moves for attorneys’ fees only for the period between November 2008 and January 2011. Van opposes any award of fees or costs to Wal-Mart. The court took the matters under submission without oral argument pursuant to Civ. L.R. 7-1(b). Having considered the arguments and evidence presented by both parties, the court DENIES Wal-Mart’s motion for attorneys’ fees and GRANTS the bill of costs.

I. BACKGROUND

Van filed this action on November 21, 2008, alleging various civil rights violations on behalf of herself and her minor son, “RVN.” In her initial and First Amended Complaint (“FAC”),

1 Van alleged that Wal-Mart engaged in racial profiling and a practice of unlawfully detaining minor
2 customers and their parents in violation of 42 U.S.C. § 1983, Cal. Civ. Code §§ 51.7 and 52.1, and
3 the Fourth, Fifth, and Fourteen Amendments of the United States Constitution. The factual basis
4 for Van’s civil rights claims was Wal-Mart’s allegation that RVN had removed several Lego pieces
5 from a box and flushed them down the toilet, when in actuality the pieces that RVN “accidentally
6 dropped into the [] toilet ... were the two pieces he had brought with him from home.”¹ With
7 respect to her Section 1983 and derivative constitutional and statutory claims, Van further alleged
8 that Wal-Mart acted under color of law in depriving RVN and her of their constitutional rights.²

9
10 After the February 2010 withdrawal of Van’s counsel³ and a stay of approximately five
11 months during which time Van did not retain new counsel, the court allowed Van to proceed on her
12 own behalf in pro se.⁴ On August 2, 2010, Van filed a Second Amended Complaint (“SAC”). In
13 her SAC, Van removed the allegation that the Lego figures dropped in the toilet belonged to RVN,
14 but retained the Section 1983 and derivative claims premised on Wal-Mart’s acting under color of
15 law in wrongly accusing RVN of theft and detaining Van and RVN.⁵ In addition to the civil rights
16 causes of action in her earlier complaints, Van added tort claims for false imprisonment and
17 defamation.⁶ Wal-Mart moved to dismiss the SAC pursuant to Fed. R. Civ. P. 12(b)(6) for failure
18 to state a claim upon which relief may be granted. On January 6, 2011, the court granted-in-part
19 Wal-Mart’s motion, dismissing all of Van’s Section 1983, statutory and constitutional claims, and
20

21
22 ¹ See Docket No. 21 ¶ 12 (FAC).

23 ² See *id.* ¶ 24.

24 ³ See Docket No. 41 (Order Granting Plaintiff’s Counsel’s Motion to Withdraw, Staying Case for 90 Days, and Vacating Pretrial and Trial Dates).

25 ⁴ See Docket No. 44 (Order Extending Stay of Case) (explaining that Van may not represent her
26 minor son and extending time to find and retain counsel); Docket No. 87 (Order re Plaintiff’s
Motion to Represent Herself in Pro Per).

27 ⁵ See Docket No. 91 ¶¶ 13, 36-41 (SAC).

28 ⁶ See *id.* ¶¶ 46-47, 88-92.

1 allowing Van to move forward on her tort claims of false imprisonment and defamation.⁷ Wal-Mart
2 later prevailed in a motion for summary judgment on Van's remaining claims.⁸ Van has appealed
3 the court's ruling on summary judgment to the Ninth Circuit.⁹

4 During the period between November 2008 and January 2011, or the filing of Van's initial
5 complaint and the court's dismissal of Van's Section 1983 and related statutory and constitutional
6 claims, the parties engaged in active motion practice. Van filed six motions relating to various
7 aspects of the litigation process and requesting sanctions against Wal-Mart and Wal-Mart's
8 counsel, including on May 21, 2010 (seeking sanctions for "court contempt, intimidation,
9 obstruction of justice, malicious practice, and lack of good faith), May 28, 2010 (asking the court
10 to "dismiss" Van's deposition for "civil conduct violation" by Wal-Mart's counsel), May 28, 2010
11 (seeking sanctions for "harassment" related to Wal-Mart's inquiries and actions related to e-filing
12 of documents), May 28, 2010 (seeking sanctions for "professional and civil conduct violations"),
13 September 8, 2010 (seeking order holding Wal-Mart in contempt for evasive and incomplete
14 discovery responses), and November 18, 2010 (seeking sanctions for Wal-Mart's "conduct and
15 breach of confidentiality"). On November 9, 2010, Wal-Mart moved for sanctions against Van,
16 seeking to "deter the filing of future Motions without meaningful meet and confer efforts," and
17 similarly moved for sanctions on November 15, 2010 in conjunction with a motion for protective
18 order. In a number of written orders, the court denied all of the sanction requests.¹⁰

19 Wal-Mart seeks attorneys' fees for the period in question in the amount of \$274,610.50.
20 Wal-Mart also seeks payment of its bill of costs in the amount of \$4,684.67. Wal-Mart has
21

22
23
24
25 ⁷ See Docket No. 176 (Order Granting-In-Part and Denying-In-Part Defendant's Motion to Dismiss).

26 ⁸ See Docket No. 430 (Order Granting Defendant's Motion for Summary Judgment).

27 ⁹ See Docket No. 442 (Notice of Appeal).

28 ¹⁰ See Docket Nos. 86, 88, 89, 90, 181, 182.

1 provided documentation in support of both motions, including summaries of hours worked, market
2 data on comparable attorney compensation rates, and billing invoices to Wal-Mart from the
3 vendors used throughout the relevant litigation period.

4 **II. ATTORNEYS' FEES**

5 Wal-Mart seeks to recoup its expenses in responding to and defending against Van's
6 repeated filing of what it calls "groundless vexatious motions" during the relevant time period.
7 Because Van brought these motions as part of her 42 U.S.C. § 1983 action, Wal-Mart argues that
8 an award of reasonable attorneys' fees is warranted pursuant to 42 U.S.C. § 1988(b). Van responds
9 that she brought her motions and Section 1983 allegations in good faith.
10

11 **A. Legal Standard**

12 Section 1988(b) provides that the court, in its discretion, may allow the prevailing party in a
13 Section 1983 action reasonable attorneys' fees as part of the costs.¹¹ When a defendant is the
14 prevailing party in a civil rights action, fees are not awarded merely because the defendant prevails
15 on the merits.¹² Rather, the court must find that the plaintiff's action was unreasonable, frivolous,
16 meritless, or vexatious, even if not brought in subjective bad faith.¹³ An action is meritless if it is
17 "groundless or without foundation"¹⁴ and becomes frivolous "when the result appears obvious or
18 the arguments are wholly without merit."¹⁵ In a case involving both frivolous and non-frivolous
19 claims, a court may award costs to the prevailing defendant only for expenses "it would not have
20
21
22

23
24 ¹¹ 42 U.S.C. § 1988(b).

25 ¹² See *Allen v. City of Los Angeles*, 66 F.3d 1052, 1058, n.2 (9th Cir. 1995).

26 ¹³ See *id.* See also *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *Galen v. County of Los Angeles*, 477 F.3d 652, 666 (9th Cir. 2007).

27 ¹⁴ *Hughes v. Rowe*, 449 U.S. 5, 14 (1980).

28 ¹⁵ *Galen*, 477 F.3d at 666.

1 incurred but for the frivolous claims.”¹⁶ Moreover, a defendant may recover under Section 1988 “if
2 the plaintiff violates this standard at any point during the litigation, not just its inception.”¹⁷

3 The standard for awarding a defendant costs pursuant to Section 1988 reflects “quite
4 different equitable considerations” from those applied to plaintiffs prevailing on their civil rights
5 claims.¹⁸ A defendant’s award is intended to protect from “burdensome litigation having no factual
6 or legal basis.”¹⁹ Courts apply this standard with heightened scrutiny when the plaintiff proceeds
7 *pro se*.²⁰

8
9 In cases involving “multiple claims for relief that implicate a mix of legal theories and have
10 different merits,” the district court may apply Section 1988 only “to relieve a defendant of
11 expenses attributable to frivolous charges.”²¹ It is not the court’s goal to “achieve auditing
12 perfection;” the court may use estimates in calculating and allocating an attorney’s time.²² In doing
13 so, the court takes begins with a lodestar figure, which can then be adjusted to account for various
14 factors, including the results obtained and the financial resources of the plaintiff.²³ “While an
15 award of attorney’s fees for a frivolous lawsuit may be necessary to fulfill the deterrent purposes of
16 42 U.S.C. § 1988 ..., the award should not subject the plaintiff to financial ruin.”²⁴

17
18
19
20 ¹⁶ See *Fox v. Vice*, 131 S.Ct. 2205, 2211 (2011).

21 ¹⁷ *Galen*, 477 F.3d at 666 (citing *Christiansburg Garment*, 434 U.S. at 422).

22 ¹⁸ See *Fox*, 131 S.Ct. at 2213 (citing *Christiansburg Garment*, 434 U.S. at 419).

23 ¹⁹ See *id.* (citing *Christiansburg Garment*, 434 U.S. at 420).

24 ²⁰ See *Miller v. Los Angeles County Bd. of Education*, 827 F.2d 617, 19 (9th Cir. 1987).

25 ²¹ See *Fox*, 131 S.Ct. at 2214.

26 ²² See *id.* at 2216.

27 ²³ See *Miller*, 827 F.2d at 621.

28 ²⁴ See *id.*

1 **B. Pursuit of Frivolous or Meritless Claims**

2 Whether an award of attorney’s fees is warranted thus turns on whether Wal-Mart was
3 forced to defend against “unreasonable, frivolous, meritless, or vexatious” claims during the
4 relevant period. At the outset, as the Ninth Circuit requires, the court takes into consideration the
5 fact that Van proceeded without the benefit of counsel for the majority of the period in question.

6 Wal-Mart contends that Van knew at the time of filing her first complaint that Wal-Mart
7 and the Wal-Mart security team involved in the incident were not acting under color of state law,
8 and that the toys flushed by RVN were Wal-Mart property, not RVN’s figures from home. Wal-
9 Mart points to the fact that Van did not and could not allege that Wal-Mart or its security were
10 performing a public function, engaged in joint action with the state, influenced or encouraged by
11 the state, or so closely related for their actions to be fairly treated as that of the state.²⁵ Instead,
12 Wal-Mart argues that Van relied solely on conclusory allegations that Wal-Mart acted under color
13 of law, notwithstanding the absence of any facts to support the claim. Similarly, according to Wal-
14 Mart, Van premised her civil rights claims on the allegation that Wal-Mart stopped and detained
15 RVN because of his race, even though she knew that RVN had destroyed Wal-Mart property.²⁶
16 Therefore, Wal-Mart argues that Van’s claims until the court’s January 2011 order dismissing all
17 but the later-added tort claims were without foundation because (1) Van knew that Wal-Mart had a
18 legitimate basis for its actions, and (2) could not be sued pursuant to Section 1983 because its
19 actions were not under color of law. Because Van continued to pursue these groundless claims and
20 related motions practice, Wal-Mart argues that Van should pay attorneys’ fees for the entire period
21 from November 2008 through January 2011.
22
23
24

25 _____
26 ²⁵ See Docket No. 435 at 7 (Def.’s Mot. For Attorneys’ Fees) (citing *Stanley v. Goodwin*, 475 F.
27 Supp. 2d 1026, 1038-40 (D. Hawaii 2006)).

28 ²⁶ See *id.* at 9 (citing Docket No.436, Pliner Decl., Ex. A (Van Depo. 59:2-19, 86:8-17)).

1 Van responds that she did not bring this action in bad faith and argues that her motions
2 were necessary to report Wal-Mart's conduct to the court. She also emphasizes that Wal-Mart
3 having prevailed on the merits does not create a presumption of vexatious or bad faith litigation.
4 Otherwise, Van largely fails to address Wal-Mart's arguments. In response to the contention that
5 there was no basis in law or fact for her Section 1983 and related claims, Van asserts that
6 Defendant delayed in filing its summary judgment motion for twenty months, did not comply with
7 all applicable rules in litigating the case, and caused serious emotional injuries to Van.²⁷ On these
8 grounds, Van argues that the court should deny the motion for attorneys' fees in its entirety.
9

10 Despite the opportunity to gather and verify facts throughout the discovery process and to
11 twice amend her complaint, Van was unable to allege action under color of state law under any
12 cognizable legal theory.²⁸ The court thus agrees with Wal-Mart that by maintaining her Section
13 1983 and related claims that were based upon an allegation of state action, Van continued to pursue
14 a set of claims that lacked foundation in fact. Yet in the case of a pro se litigant seeking to enforce
15 her civil rights, the court must take into account the difficulties inherent in ascertaining the merit of
16 a claim, and the danger that assessing fees against such an individual increases the risk of a chilling
17 effect.²⁹ For these reasons, the Supreme Court has suggested that "attorney's fees should rarely be
18 awarded against such plaintiffs."³⁰
19
20
21

22 ²⁷ See Docket No. 445 at 5 (Pl.'s Opp'n to Def.'s Mot. For Attorney's Fees).

23 ²⁸ See Docket No. 176 at 1.

24 ²⁹ See *Hughes*, 449 U.S. at 14-15 ("An unrepresented litigant should not be punished for his failure
25 to recognize subtle factual or legal deficiencies in his claims."); *Christiansburg Garment*, 434 U.S.
26 at 422 (noting the risk that assessing fees against plaintiffs "simply because they do not finally
27 prevail would substantially add to the risks inhering in most litigation and would undercut the
28 efforts of Congress to promote the vigorous enforcement of the provisions of Title VII").

³⁰ See *Hughes*, 449 U.S. at 15 (citing to the principle set forth in *Haines v. Kerner*, 404 U.S. 519
(1972) that the pleadings of pro se litigants should be held to a less stringent standard than formal
pleadings drafted by lawyers). See also *Miller*, 827 F.2d at 619 ("The *Christiansburg* standard is
applied with particular strictness in cases where the plaintiff proceeds pro se.").

1 In *Miller v. Los Angeles County Bd. of Education*, the Ninth Circuit vacated a fee award
2 under 42 U.S.C. § 1988, finding that the district court on remand must take into consideration the
3 plaintiff's pro se status in assessing whether the action was without merit under *Christiansburg*.³¹
4 The court set forth factors for consideration in such a case, including whether the court found the
5 action appropriate for dismissal short of trial, the ability of the pro se plaintiff to recognize the
6 objective merit (or lack of merit) of a claim, and whether there is evidence of bad faith.³²

7
8 In *Miller*, the district court had determined that the plaintiff's action lacked merit in part
9 based on the fact that several administrative bodies had previously reviewed and rejected the same
10 discrimination claims.³³ In contrast, here Van did not have the guidance of previous findings
11 regarding the objective lack of merit of her claims against Wal-Mart. On the other hand, the *Miller*
12 district court found a sufficient factual basis to allow plaintiff's case to go to trial, whereas here the
13 court here dismissed the pertinent claims at the pleading stage, after Van had several opportunities
14 to amend. In sum, while there may be a sufficient basis upon which to find Van's Section 1983 and
15 related claims lacked foundation, there are equally compelling reasons to find that she was without
16 sufficient ability or even capacity to fairly assess their merit. Nor does Wal-Mart suggest – and the
17 court does not find – evidence of bad faith.

18
19 Other district courts have refrained from awarding fees against a pro se plaintiff under
20 similar circumstances. In *Jefferson v. Save Mart Supermarket*, the court dismissed the pro se
21 plaintiff's claim for failure to state a claim under Fed. R. Civ. P. 12(b)(6), but rejected the
22 defendant supermarket's motion for attorney's fees under Section 1988.³⁴ The court found that
23 notwithstanding the lack of legal merit to the claim, the plaintiff appeared to be unaware of the
24

25 ³¹ See *Miller*, 827 F.2d at 620.

26 ³² See *id.*

27 ³³ See *id.*

28 ³⁴ See No. S-09-2562 FCD/GGH, 2011 WL 3606643 (E.D. Cal. Aug. 16, 2011).

1 defect in his claim and had not attempted previously to bring the same claim, militating against a
2 finding that the action was unreasonable, frivolous, meritless or vexatious.³⁵ Similarly in *Page v.*
3 *Jefferson Transit Authority*, the court rejected the defendant transit authority's motion for fees after
4 it prevailed against the pro se plaintiff's discrimination claims at summary judgment.³⁶ Looking at
5 the record as a whole, the court in *Page* noted that the plaintiff's inability to carry his burden at
6 summary judgment and the fact that he earlier had lost a related claim and been ordered to pay fees
7 were insufficient grounds for awarding attorney's fees under the Ninth Circuit's stringent Section
8 1988 standard for pro se plaintiffs.³⁷ In contrast, an award of fees against pro se plaintiffs may
9 appropriate under more extreme circumstances. For example, in *DeNardo v. Johnstone*, the court
10 ordered payment of attorney's fees based on the plaintiff's bad faith and extreme indifference to
11 multiple, earlier court rulings that "any lay person" would have recognized as a clear directive to
12 halt further litigation on the same claims, inclusive of an injunction against further litigation issued
13 by the Ninth Circuit.³⁸

14
15
16 In light of Van's pro se status for the majority of the period in question, including the entire
17 period affected by what Wal-Mart deems to be vexatious motion practice, and the absence of any
18 evidence of bad faith or of Van's ability to objectively weigh the merit of her Section 1983 and
19 related claims, the court finds insufficient grounds to grant Wal-Mart's motion for attorneys' fees.
20
21
22
23
24

25 ³⁵ See *id.*, 2011 WL 3606643, at *3.

26 ³⁶ See No. C08-5456RJP, 2009 WL 2884754 (W.D. Wash. Sept. 8, 2009).

27 ³⁷ See *id.* at *2.

28 ³⁸ See 772 F. Supp. 462,467-70 (D. Alaska, 1991).

III. BILL OF COSTS

1
2 Fed. R. Civ. P. 54 creates a presumption in favor of allowing the prevailing party to collect
3 costs other than attorneys' fees.³⁹ Nevertheless, the district court retains discretion to refuse to
4 award costs based upon "specific reasons."⁴⁰ These reasons may include the losing party's limited
5 financial resources, misconduct on the part of the prevailing party, and in the context of civil rights
6 cases, the potential chilling effect of imposing high costs on future civil rights litigants.⁴¹ Because
7 costs generally are awarded "as a matter of course," the requirement that the district court must
8 give reasons for denying costs "is, in essence, a requirement that the court explain why a case is not
9 'ordinary' and why, in the circumstances, it would be inappropriate or inequitable to award
10 costs."⁴² The court need not explain its reasons, however, for awarding costs consistent with Rule
11 54.⁴³ The party objecting to the assignment of costs bears the burden of overcoming the
12 presumption and establishing why the prevailing party is not so entitled.⁴⁴

13
14 Wal-Mart requests the court award its costs in the amount of \$4,684.67. Wal-Mart has
15 submitted counsel's summary of costs and copies of invoices submitted for services rendered in
16 connection with the litigation.⁴⁵ In opposing costs, Van raises four issues: the economic disparity
17 between herself as an individual and Wal-Mart; her inability to pay the costs; the chilling effect on
18

19
20 ³⁹ See Fed. R. Civ. P. 54(d)(1) ("Unless a federal statute, these rules, or a court order provides
21 otherwise, costs – other than attorney's fees – should be allowed to the prevailing party."). See also
22 *Ass'n of Mexican-Am. Educators v. State of Calif.*, 231 F.3d 572, 591 (9th Cir. 2000) ("By its
23 terms, [Rule 54(d)(1)] creates a presumption in favor of awarding costs to a prevailing party, but
24 vests in the district court discretion to refuse to award costs.") (citing *National Info. Servs., Inc. v.*
25 *TRW, Inc.*, 51 F.3d 1470, 1471 (9th Cir. 1995)).

26
27 ⁴⁰ See *Ass'n of Mexican-Am. Educators* at 591.

28 ⁴¹ See *id.* at 592 (citations omitted).

⁴² See *id.* at 593.

⁴³ See *Save Our Valley v. Sound Transit*, 335 F.3d 932, 945 (9th Cir. 2003).

⁴⁴ See *id.* at 944-945 (citing *Stanley v. Univ. of Southern California*, 178 F.3d 1069, 1079 (9th Cir. 1999)).

⁴⁵ See Docket No. 433 (Pliner Decl. in Support of Bill of Costs), Exs. B, C, D.

1 future civil rights litigants; and whether the issues of the case were “close and complex.”⁴⁶ Van
2 repeats the same arguments with respect to all aspects of Wal-Mart’s bill of costs. Van provides
3 little, however, support for her arguments. Her accompanying declaration states only that she has
4 “paltry resources” while Wal-Mart is a “large and powerful economic company,” and that Van
5 “cannot pay any costs in this litigation due to hardship.”⁴⁷ Beyond these conclusory statements,
6 Van does not offer any evidence that she is of limited financial resources or would be subjected to
7 hardship if ordered to pay Wal-Mart’s costs.⁴⁸ Moreover, as discussed with respect to Wal-Mart’s
8 motion for attorneys’ fees, Van’s civil rights claims were not meritorious because she could not
9 allege state action on the part of Wal-Mart.
10

11 Even assuming the accuracy of Van’s statements regarding her limited financial resources
12 and the complexity and merits of her case, the court does not find these reasons sufficient to
13 overcome the presumption under Rule 54(d)(1). In *Save Our Valley v. Sound Transit*, the Ninth
14 Circuit affirmed the district court’s assignment of costs, even though the court did not explain its
15 reasoning and the losing party was a nonprofit organization with limited resources that had brought
16 a meritorious civil rights case raising issues of public importance.⁴⁹ Although the Ninth Circuit
17 surmised that the district court may have believed the “relatively small sum” at issue would not
18 create a chilling effect on future civil rights litigation, and that there was no misconduct on the part
19 of the prevailing party or that were other reasons to award costs, the court rested its affirmance on
20
21
22
23

24 ⁴⁶ See Docket No. 449 at 2 (Pl.’s Opp’n to Def.’s Bill of Costs).

25 ⁴⁷ See Docket No. 448 at 2 (Van Decl. in Opp’n to Def.’s Bill of Costs).

26 ⁴⁸ Wal-Mart disputes that Van’s financial resources are so limited as to cause hardship and
27 provides some support with its references to Van’s deposition testimony, as well as that of her
28 husband. See Docket No. 452 at 3-4 (Def.’s Reply in Support of Bill of Costs).

⁴⁹ See *Save Our Valley v. Sound Transit*, 335 F.3d at 945-46.


1 the fact that the district court “need only conclude that the reasons advanced by the party bearing
2 the burden – the losing party – are not sufficiently persuasive to overcome the presumption.”⁵⁰

3 Here, the court has not received evidence that would indicate an assignment of \$4,684.67 in
4 costs will place Van in danger of financial hardship, and the only claims surviving until summary
5 judgment were based in tort, weakening any likelihood of a chilling effect on plaintiffs seeking to
6 raise meritorious civil rights claims under similar circumstances. Nor does the economic disparity
7 between Van and Wal-Mart or the fact that she zealously litigated her claims warrant a shift away
8 from the presumption of costs to the prevailing party in this case. The court therefore GRANTS
9 Wal-Mart’s Bill of Costs.
10

11 **IV. CONCLUSION**

12 In accordance with the foregoing, IT IS HEREBY ORDERED that Wal-Mart’s motion for
13 attorneys’ fees is DENIED and Wal-Mart’s Bill of Costs is GRANTED. The clerk shall enter Wal-
14 Mart’s bill of costs as filed.⁵¹

15 Dated: 1/20/2012

16
17 

18 _____
19 PAUL S. GREWAL
20 United States Magistrate Judge
21
22
23
24
25
26

27 _____
28 ⁵⁰ See *id.* at 946.

⁵¹ See Docket No. 432.