

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger**

Civil Action No. 10-cv-00722-MSK-MJW

**ALLEN GRIDER;
GLENN BELCHER; and
VALERIE PILTZ,**

Plaintiffs,

v.

CITY OF AURORA,

Defendant.

**OPINION AND ORDER DENYING
MOTION FOR ATTORNEY FEES**

THIS MATTER comes before the Court on the Defendant City of Aurora's Motion for Attorney Fees and Nontaxable Costs (**#194**). The Plaintiffs did not respond to the motion.

I. Background

The Plaintiffs commenced this action in 2010, alleging that the Defendant's ordinances restricting certain dog breeds violated Title II of the Americans with Disabilities Act (ADA). The Plaintiffs asserted that the ordinance was discriminatory because it did not allow them to use their restricted breed service dogs. After two years of litigation, the Defendant moved to dismiss (**#140**) the claims of Plaintiff Glenn Belcher and Plaintiff Valerie Piltz. It also moved for summary judgment (**#141**) as to the claims of Plaintiff Allen Grider. The Court granted both motions. On July 25, 2013, the Court entered an Order (**#181**) dismissing Plaintiff Belcher's and Plaintiff Piltz's claims for lack of subject-matter jurisdiction. On July 30, 2013, the Court entered a second Order (**#182**) granting summary judgment in favor of the Defendant on Plaintiff

Grider's failure to accommodate claim under the ADA. Judgment on this claim was entered by the Clerk of the Court on July 31, 2013.

The Defendant now seeks an award of attorney fees and other nontaxable costs in the amount of \$132,447.33.

II. Analysis

The Defendant cites the fee-shifting provision of the ADA, 42 U.S.C. § 12205, as the basis for an award of fees. Section 12205 provides that, in an ADA action, “the court . . . , in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee, including litigation expenses, and costs.” A prevailing defendant in a civil rights action may recover attorney fees upon a finding that the plaintiff’s action was “frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith,” or where the plaintiff “continued to litigate after it clearly became so.” *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); *see also Roe v. Cheyenne Mountain Conf. Resort, Inc.*, 124 F.3d 1221, 1232 (10th Cir. 1997) (claims for attorney fees under ADA should be treated like claims for fees under Title VII or 42 U.S.C. § 1988). Only rarely will this difficult standard be met. *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1203 (10th Cir. 2000). The plaintiff’s action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees. *Houston v. Norton*, 215 F.3d 1172, 1174 (10th Cir. 2000).

As the prevailing party, the Defendant argues that the Plaintiffs’ claims were frivolous, unreasonable, and without foundation. The Defendant contends that when the Plaintiffs’ filed their Complaint, they should have known that Plaintiffs Belcher and Piltz had never been denied a reasonable accommodation by Aurora. As to Plaintiff Grider, the Defendant argues that as of

June 20, 2012, the date of Mr. Grider's deposition, it became known that Mr. Grider did not need his dog to access public services and programs in Aurora. In ruling on the Defendant's motion for summary judgment, the Court found that Mr. Grider had not provided sufficient evidence to establish a genuine dispute of material fact as to his ability to access Aurora's programs and services without his dog. The Defendant contends that by continuing to litigate this case, the Plaintiffs chose to ignore the evidence, as well as the requests by the Defendant to address the deficiencies in the case.

The fact that the Plaintiffs' case was ultimately unsuccessful is not sufficient to warrant an award of fees; nor does the fact that the Plaintiffs did not respond to this motion. Instead, the Court simply accepts as true the factual averments of the Defendant. Nevertheless, having reviewed the record and the pleadings, the Court does not find that an award of attorney fees is warranted. Admittedly, Plaintiffs' counsel struggled to adequately plead the Plaintiffs' claims, the Court does not find that the claims and theories as presented were flawed from the inception of the case. And although Plaintiffs' counsel probably should have put forth better effort in analyzing the jurisdictional requirements, the elements of the claims, and the facts necessary to support such claims, the Court does not find the record completely devoid of evidence so as to find that the Plaintiffs' action was "frivolous, unreasonable, or without foundation."

III. Conclusion

For the forgoing reasons, the Defendant's Motion for Attorney Fees and Nontaxable Costs is **DENIED**.

Dated this 16th day of December, 2013.

BY THE COURT:



Marcia S. Krieger
Chief United States District Judge