UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Robert T. Quasius,

Plaintiff,

v.

Civil No. 08-575 (JNE/JJG)
ORDER

The Schwan Food Company and
Schwan's Global Supply Chain, Inc., a
division of The Schwan Food Company,

Defendants.

This case is before the Court on the Amended Motion for Attorney Fees and Motion for Review of Costs Judgment of The Schwan Food Company and Schwan's Global Supply Chain, Inc. (collectively, Defendants). For the reasons set forth below, the Court denies the Amended Motion for Attorney Fees and grants in part and denies in part the Motion for Review of Costs Judgment.

I. BACKGROUND

Robert T. Quasius claimed Defendants violated the Americans with Disabilities Act of 1990 (ADA) and the Minnesota Human Rights Act (MHRA) by discriminating against him based on his asthma condition. On August 13, 2008, Defendants filed a Motion for Dismissal, for Judgment on the Pleadings, Alternatively for Summary Judgment, and for Sanctions. Defendants sought dismissal of The Schwan Food Company (Food Company) on the grounds of failure to exhaust administrative remedies, estoppel, and election of remedies. They also moved to dismiss the MHRA claims and part of the ADA claims as time-barred. In an Order dated November 14, 2008, the Court dismissed the MHRA claims as time-barred and dismissed the ADA claims to the extent they were based on discrete acts that occurred before September 17,

2005. The Court denied Defendants' motion to the extent it sought dismissal of the Food Company and declined to decide the sanctions issue at that time.

Defendants served requests for admissions on Quasius on August 8, 2008. Quasius did not timely respond to the requests for admissions. Consequently, they were deemed admitted as of September 11, 2008. *See* Fed. R. Civ. P. 36(a)(3). Quasius served his responses on Defendants on October 10, 2008, the date of the hearing on the August 13 motion. At the hearing, the Court inquired whether any motions were pending regarding the admissions and counsel for Quasius responded that no such motions were pending. In the November 14 Order, the Court granted Quasius until December 14, 2008, to bring a motion to withdraw his admissions, but Quasius never so moved. On December 16, 2008, Defendants filed a letter seeking summary judgment based on Quasius's admissions. Quasius did not respond to Defendants' letter and the Court granted summary judgment on December 23, 2008.

On December 24, 2008, Quasius requested reconsideration of the grant of summary judgment, which the Court construed as a motion pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure. The Court denied that motion on January 15, 2009. Quasius appealed the dismissal to the United States Court of Appeals for the Eighth Circuit, which affirmed on March 5, 2010. *See Quasius v. Schwan Food Co.*, 596 F.3d 947 (8th Cir. 2010). Having obtained dismissal of Quasius's claims based on the deemed admissions, Defendants now seek over $24,000 in attorney fees from Quasius and his attorney and over $2,000 in costs from Quasius.

II. DISCUSSION

A. Motion for attorney fees

Defendants seek attorney fees pursuant to 42 U.S.C. § 12205 (2006) and Minn. Stat. § 363A.33, subd. 7 (2008), which permit a discretionary award of attorney fees to a prevailing

party in an action brought pursuant to the ADA and MHRA, respectively. A prevailing defendant in an ADA case is entitled to attorney fees "only in very narrow circumstances." *Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 848 (8th Cir. 1994) (quotation marks omitted). "[A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). The *Christiansburg* standard applies to an award of attorney fees under the MHRA. *Sigurdson v. Isanti County*, 386 N.W.2d 715, 722-23 (Minn. 1986).

Defendants also seek to hold counsel for Quasius personally liable for $24,347.71 in attorney fees pursuant to 28 U.S.C. § 1927 (2006), which provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Sanctions are proper under § 1927 when the attorney's conduct, viewed objectively, manifests either intentional or reckless disregard of her duties to the Court. *Lee v. First Lenders Ins. Servs., Inc.*, 236 F.3d 443, 445 (8th Cir. 2001).

1. Continued litigation after admissions were deemed admitted

Defendants contend they are entitled to attorney fees under the ADA, MHRA, and § 1927 because Quasius continued to litigate after the admissions were deemed admitted on September 11. They argue that Quasius should have "simply agreed to dismiss his case with prejudice" because the case was "effectively ended by the admissions" and that his failure to do so amounted to frivolous and vexatious litigation. Quasius responds that his continued litigation and appeal had a basis in case law and therefore were not unreasonable or frivolous.

The cases relied on by Defendants involve serious misconduct by an employment discrimination plaintiff or the plaintiff's attorney. *See, e.g.*, *Meriwether v. Caraustar Packaging*

Co., 326 F.3d 990, 994 (8th Cir. 2003) (affirming award of attorney fees where plaintiff's deposition testimony, EEOC complaint, and verified complaint were contradictory); *Perkins v. Gen. Motors Corp.*, 965 F.2d 597, 600-01 (8th Cir. 1992) (affirming sanctions under § 1927 for "persistently pursuing" unsupported allegations that one of defendant's employees had been "'drummed' out" of the Army for sexual harassment because the allegations were intended to harass that employee); *Heaser v. AllianceOne Receivables Mgmt., Inc.*, Civil No. 07-2924, 2009 WL 205209, at *4-5 (D. Minn. Jan. 27, 2009) (awarding attorney fees where plaintiff's previous "virtually identical case against her prior employer" resulted in Eighth Circuit authority binding the district court in the later case, plaintiff's counsel withdrew for that reason, and plaintiff declined the opportunity to dismiss her case after the withdrawal yet did not oppose defendant's subsequent motion for summary judgment). The failure of Quasius and his attorney to understand the operation of Rule 36 and their attempts to remedy the effects of that failure bear little resemblance to the conduct in those cases. Although counsel for Quasius's interpretation of Rule 36 was in error, her conduct did not evidence intentional or reckless disregard of her duties to the Court, and the seven-page opinion of the Eighth Circuit affirming the dismissal of Quasius's claims gave no indication that his appeal of this Court's application of that Rule was frivolous, unreasonable, or groundless. The Court therefore denies Defendants' motion for attorney fees insofar as it is based on Quasius's continued litigation after September 11.[1]

[1] Defendants also assert that attorney fees should be awarded pursuant to Rule 16(f)(2) of the Federal Rules of Civil Procedure because the Court gave Quasius thirty days to move to withdraw his admissions and he failed to do so. Defendants portray this failure and Quasius's subsequent motion under Rules 59(e) and 60(b) as noncompliance with a scheduling order. The November 14 Order did not require Quasius to file a motion to withdraw. Defendants therefore are not entitled to attorney fees under Rule 16(f)(2) because Quasius has not violated any Order of this Court.

2. ADA and MHRA claims against the Food Company

Defendants argue that Quasius's continued pursuit of claims against the Food Company was unreasonable and groundless. To the extent Defendants seek fees for bringing the August 13 motion, the November 14 Order denied that motion insofar as it sought dismissal of the Food Company. Defendants now suggest that Quasius's pursuit of those claims was unreasonable because Quasius admitted, through the operation of Rule 36(a)(3), that the Food Company was not his employer. This argument extends the effect of Quasius's failure to move to withdraw his admissions too far. Quasius's claims against the Food Company did not become "meritless" for purposes of an attorney fees award because he misunderstood the operation of Rule 36(a)(3). *See Chester*, 873 F.2d at 209 ("In this context 'the term "meritless" is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his [or her] case.'" (quoting *Christiansburg*, 434 U.S. at 421)). To the extent Defendants seek attorney fees for litigation after the time to move to withdraw the admissions had expired, the Court rejects this argument for the reasons stated above. Therefore, the Court denies Defendants' motion for attorney fees incurred in pursuing dismissal of the Food Company.

3. Time-barred claims

Defendants seek attorney fees under the ADA and § 1927 for successfully obtaining dismissal of part of Quasius's ADA claims as time-barred. "Asserting a time-barred claim alone does not justify an award of attorney's fees." *Hoover v. Armco, Inc.*, 915 F.2d 355, 357 (8th Cir. 1990). Defendants cite no authority establishing that Quasius's pursuit of the time-barred part of the ADA claims was meritless, but instead rely on the effect of Quasius's admissions. As previously stated, the Court declines to conclude that Quasius's claims were meritless or that his continued litigation was groundless or vexatious based solely on the deemed admissions.

Defendants' motion for attorney fees is denied to the extent it seeks fees incurred in obtaining dismissal of the time-barred part of Quasius's ADA claims.

Finally, Defendants seek attorney fees under the MHRA and § 1927 for fees incurred in obtaining dismissal of Quasius's time-barred MHRA claims. Those state-law claims were time-barred because Quasius did not serve his Complaint within forty-five days after receiving notice of the dismissal of his charge by the Minnesota Department of Human Rights. *See* Minn. Stat. § 363A.33, subd. 1(1); *Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *Kimble-Parham v. Minn. Mining & Mfg.*, Civil No. 00-1242, 2002 WL 31229572, at *7 (D. Minn. Oct. 2, 2002). Defendants contend that they explained the legal basis of their statute of limitations defense to the MHRA claims to Quasius's attorney in June and August 2008 and offered to forego seeking attorney fees if Quasius voluntarily dismissed those claims before they filed the August 13 motion. Quasius responds that Defendants did not provide any legal authority for their argument that the MHRA claims were time-barred until August 2008.

Regardless of when Defendants provided the legal authority supporting their statute of limitations defense to the MHRA claims, the stipulation proposed by Defendants would have required Quasius to dismiss the Food Company as well as the time-barred MHRA claims. Having denied Defendants' motion to dismiss the Food Company on November 14, the Court cannot fault Quasius or his attorney for rejecting Defendants' proposed stipulation. Moreover, the MHRA claims were dismissed early in the case, any discovery related to those claims would have been equally applicable to the ADA claims, and Defendants' argument relating to the dismissal of the MHRA claims constituted only a very small portion—two of thirty-four pages—of Defendants' briefs supporting the August 13 motion. In view of those facts, the Court declines to award attorney fees to Defendants for fees incurred in obtaining dismissal of the

MHRA claims.[2] *See Henke v. Allina Health Sys.*, 698 F. Supp. 2d 1115, 1127-28 (D. Minn. 2010) (declining to award attorney fees incurred in seeking dismissal of time-barred claims in part because claims were dismissed early in the case and the motion to dismiss would have been brought even if the plaintiff had agreed to dismiss the time-barred claims).

B. Motion for review of costs judgment

Defendants seek review of the Clerk of Court's decision denying costs incurred in connection with taking Quasius's deposition on December 8, 2008. The costs consist of $1,468.71 in transcript fees and $675.00 in video recording fees. A district court has substantial discretion in awarding costs to a prevailing party under 28 U.S.C. § 1920 (2006) and Rule 54(d) of the Federal Rules of Civil Procedure. *Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 363 (8th Cir. 1997). "[E]ven if a deposition is not introduced at trial, a district court has discretion to award costs if the deposition was 'necessarily obtained for use in [a] case' and was not 'purely investigative.'" *Id.* (quoting *Slagenweit v. Slagenweit*, 63 F.3d 719, 720 (8th Cir. 1995) (per curiam)).

The Clerk of Court denied costs for Quasius's deposition because it had not been submitted into evidence or in connection with an event that terminated the litigation and Defendants provided insufficient explanation of why the deposition was reasonably necessary. Defendants argue that the deposition was reasonably necessary to defend against Quasius's claims because he still had time to move to withdraw his admissions at the time the deposition was taken and that video recording was necessary to memorialize Quasius's breathing and

[2] The Court does not condone the pursuit of time-barred claims after the legal basis for their untimeliness is made clear. In the future, counsel for Quasius should take care to properly assess the merits of her claims before signing any pleading or other document filed with the Court. *See* Fed. R. Civ. P. 11(b).

physical abilities during the deposition. Quasius responds that costs should not be awarded because his deposition was "purely investigative" and that the video recording was unnecessary.

The Court concludes that deposing Quasius was reasonably necessary because, as the plaintiff in an employment discrimination case, Defendants could reasonably expect him to testify at trial and needed to determine the basis for his claims. *See Zotos*, 121 F.3d at 363 ("[T]he determination of necessity must be made in light of the facts known at the time of the deposition, without regard to intervening developments that later render the deposition unneeded for further use." (quotation marks omitted)). However, the video recording was unnecessary because Quasius alleged that his asthma attacks were triggered by extreme cold, not room-temperature conditions. The Cost Judgment is therefore amended to tax against Quasius the $1,468.71 in costs attributable to transcript fees, but not the $675.00 for the video recording.

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Defendants' Amended Motion for Attorney Fees [Docket No. 53] is DENIED.

2. Defendants' Motion for Review of Costs Judgment [Docket No. 69] is GRANTED IN PART and DENIED IN PART.

3. The Cost Judgment [Docket No. 68] is AMENDED to tax an additional $1,468.71 in transcript fees for Quasius's deposition for a total of $1,902.76.

4. The Clerk of Court is directed to enter an Amended Cost Judgment in accordance with this Order.

Dated: August 13, 2010

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge