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THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HILDA SOLIS, Secretary of Labor, United
States Department of Labor

Plaintiff,

vs.

CONSOLIDATED GUN RANGES and N.
BRIAN HALLAQ,

Defendants.

No. C10-338Z

ORDER

THIS MATTER comes before the Court on defendants' motion for attorneys' fees, docket no. 47. Having reviewed the papers filed in support of, and opposition to, defendants' motion, the Court DENIES the motion.

1 **I. BACKGROUND**¹

2 This case arose out of the defendant’s actions on two occasions, which the
3 government alleged violated the whistleblower protection provisions of the
4 Occupational Safety & Health Act (“OSHA”), 29 U.S.C. § 651(c) (“Section 11(c”).
5 The first event occurred in September 2008, when defendant Consolidated Gun
6 Ranges, LLC (“CGR”) terminated the employment of Heath Gunns, the general
7 manager of a gun range operated by CGR. FF&CL at 9, docket no. 42. CGR
8 terminated Mr. Gunns less than six weeks after he sent his employers an email
9 regarding a lead contamination health hazard at the gun range. Id. at 7. The second
10 event occurred in October 2008, when defendant Hallaq filed a defamation lawsuit in
11 state court against Mr. Gunns. Id. at 11-12. The defamation lawsuit was a direct
12 response to the administrative complaint Mr. Gunns filed against CGR in connection
13 with his termination. Id.

14 The United States brought the present lawsuit on behalf of Mr. Gunns, seeking
15 injunctive relief and damages for his lost wages. Compl., docket no. 1. After
16 conducting a bench trial, on March 30, 2011, the Court entered judgment in favor of
17 the defendants. Judgment, docket no. 43. Defendants, as the prevailing party in an
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24 ¹ For the sake of brevity and convenience, the Court incorporates by reference its
25 factual findings from trial. See Findings of Fact & Conclusions of Law (“FF&CL”),
26 docket no. 42.

1 action brought by the United States,² now move for their attorneys’ fees under the
2 Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d). Mot., docket no. 47.

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4 **II. DISCUSSION**

5 **A. Standard for Evaluating EAJA Fee Petitions**

6 In certain circumstances, the EAJA provides for a mandatory award of
7 attorneys’ fees to parties who prevail in litigation against the United States. See
8 Oregon Nat. Res. Council v. Madigan, 980 F.2d 1330, 1331 (9th Cir. 1992) (noting
9 that EAJA fee awards to eligible parties are mandatory). As the EAJA constitutes a
10 partial waiver of sovereign immunity, it must be strictly construed in favor of the
11 United States. Ardestani v. I.R.S., 502 U.S. 129, 137 (1991).

13 Eligibility for a fee award under the EAJA requires: (1) that the claimant be a
14 prevailing party; (2) that the government’s position was not “substantially justified;”
15 (3) that no special circumstances make an award unjust; and (4) that any fee
16 application be submitted to the court within thirty days of final judgment. Comm’r,
17 I.N.S. v. Jean, 496 U.S. 154, 158 (1990); 28 U.S.C. § 2412(d)(1)(A). In this case, the
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22 ² The EAJA defines a “party” as a corporation or other business organization with a
23 net worth of \$7 million or less and 500 or fewer employees, or an individual with a net
24 worth of \$2 million or less. 28 U.S.C. § 2412(d)(2)(B). It is undisputed that the
25 defendants in this action qualify as “parties” for purposes of a fee award under the
26 EAJA. See Gossing Decl. at ¶¶ 4-6, docket no. 48; Hallaq Decl. at ¶ 3, docket no. 49;
Resp. at 2, docket no. 53 (conceding that the government has no evidence to dispute
that the defendants satisfy the financial qualifications necessary to meet the definition
of a “party” under the EAJA).

1 only disputed element is whether the United States' position was substantially
2 justified.

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4 The government bears the burden of proving, by a preponderance of the
5 evidence, that its position was substantially justified. Edwards v. McMahon, 834 F.2d
6 796, 802 (9th Cir. 1987); 28 U.S.C. § 2412(d)(1)(A). "Substantial justification" means
7 that the government's position must have "a reasonable basis both in law and in fact."
8 Bay Area Peace Navy, 914 F.2d at 1230. The government's position need not be
9 justified "to a high degree," but rather, "to a degree that could satisfy a reasonable
10 person." Id. However, substantially justified means more than merely undeserving of
11 sanctions for frivolousness. Mester Mfg. Co. v. I.N.S., 900 F.2d 201, 204 (9th Cir.
12 1990). The fact that the government does not prevail in the litigation does not raise a
13 presumption that the government's position was not substantially justified. Edwards,
14 834 F.2d at 802.
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17 **B. The Government's Position was Substantially Justified**

18 To establish a prima facie claim for wrongful discharge under OSHA section
19 11(c), the government bears the burden of proving that (1) the employee engaged in a
20 protected activity; (2) subsequent adverse action by the employer or other person; and
21 (3) a causal connection between the protected activity and the subsequent adverse
22 action. Schweiss v. Chrysler Motors Corp., 987 F.2d 548, 549 (8th Cir. 1993). A
23 complaint is "protected" under section 11(c) if it arises under or is related to a health
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1 or safety hazard. 29 C.F.R. § 1977.9. A complaint made to an employer only arises
2 under section 11(c) if it is made in good faith. Id. at § 1977.9(c).

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4 At trial, the government argued that the email Mr. Gunns sent to the defendants
5 on August 7, 2008 was a good faith attempt to report a legitimate health and safety
6 hazard. Consistent with this theory, Mr. Gunns testified that he sent the email solely
7 out of his concern for the health and safety of his employees. The defendants argued
8 that Mr. Gunns did not send the email out of concern for employee safety, but rather in
9 an effort to deflect responsibility for his failings as a supervisor. Mr. Gossing and
10 Mr. Hallaq both testified about how Mr. Gunns' poor job performance contributed to
11 the lead contamination problems. The record also demonstrated that many of the
12 allegations in Mr. Gunns' email were incorrect, or unsupported, suggesting that the
13 email was a bad faith attempt to blackmail the defendants. The Court evaluated the
14 credibility of the various witnesses and concluded that Mr. Gunns sent the email in a
15 bad faith attempt to save his job and shift responsibility for the lead contamination
16 problems to his employers. FF&CL at ¶ 7, docket no. 42.

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19 Despite the Court's ruling in favor of the defendants, the government argues
20 that it was substantially justified in litigating this case because the primary disputed
21 issue before the Court was Mr. Gunns' intent, the resolution of which necessarily
22 involves a credibility determination. The government can meet its burden to show that
23 its litigation position was substantially justified where the testimony of the
24 government's witness, if believed, establishes facts which would support the
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1 government's claims. Mester Mfg. Co., 900 F.2d at 204; see also Beauchamp v.
2 F.A.A., 384 Fed. Appx. 259 (4th Cir. 2010) (“[A]n agency does not necessarily act
3 unreasonably simply by relying on the credibility of a witness whose testimony the
4 fact finder ultimately declines to credit.”). Thus, the government argues, if the Court
5 had credited Mr. Gunns’ testimony, the government would have made a prima facie
6 showing on its OSHA section 11(c) whistleblowing claim.³

8 Defendants argue that Mr. Gunns’ testimony was so blatantly false, the Court
9 would never have found him credible. As such, defendants contend that the
10 government’s position is not substantially justified because even a cursory
11 investigation into the facts of this case would have revealed that Mr. Gunns’ version of
12 events was not credible. In support of their contention, defendants rely heavily on
13 S.E.C. v. Zahareas, 374 F.3d 624, 628-30 (8th Cir. 2004). In Zahareas, the Eighth
14 Circuit held that the SEC’s position was not substantially justified because the SEC
15 did not sufficiently investigate the claims prior to bringing its action. Id. For example,
16 the SEC did not obtain testimony or documents from the defendant prior to filing suit.
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20 ³ The Court also concluded, however, that even if Mr. Gunns was engaged in protected
21 activity when he sent the August 7, 2008 email, the defendants had met their burden to
22 show that they would have made the same decision to terminate his employment. See
23 FF&CL at 15, docket no. 42 (citing 29 C.F.R. § 1977.6 (providing that the government
24 cannot show a violation of section 11(c) if the employer can show that the adverse
25 action would have taken place even if the employee had not engaged in the protected
26 activity)). The Court’s alternative holding does not alter the Court’s analysis on the
question of substantial justification because it was also based on a credibility
determination. The Court credited Hallaq’s and Gossing’s testimony about their
frustration with Mr. Gunns’ poor performance and conduct. See FF&CL at 3-6,
docket no. 42.

1 Id. The SEC also failed to comply with a number of procedural requirements, such as
2 obtaining approval from senior regulators, and did not discuss the case with related
3 Greek regulatory agencies before initiating the litigation. Id.
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5 In this case, the defendants tacitly acknowledge that the government performed
6 a thorough investigation. For example, the defendants sought costs for time spent
7 during the government's investigation, including interviews with all of the principle
8 witnesses, some of them multiple times. Mot. at 3, docket no. 44. Moreover, unlike in
9 Zahareas, the case went through all of the agency's prerequisite procedural
10 requirements, including multiple levels of review and approval. See Mot. at 8, docket
11 no. 11.
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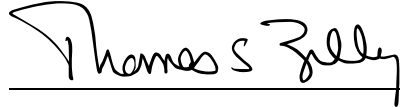
13 The Court concludes that resolution of the good faith issue involved a
14 credibility determination that could only be assessed at trial. Accordingly, the
15 government's position was substantially justified, for purposes of the EAJA. Mester
16 Mfg. Co., 900 F.2d at 204. The Court also concludes that the defamation lawsuit
17 claim against defendant Hallaq was based on the same witness credibility issues as the
18 claim arising out of Mr. Gunns' email. As such, the government's position on that
19 claim was also substantially justified.
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21 **III. CONCLUSION**

22 For the foregoing reasons, the Court DENIES the defendants' motion for
23 attorneys' fees, docket no. 47.
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1 IT IS SO ORDERED.

2 DATED this 27th day of May, 2011.

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6 Thomas S. Zilly
7 United States District Judge
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