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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 ERIC DODGE,

11 Plaintiff,

12 v.

13 EVERGREEN SCHOOL DISTRICT
#114, et al.,

14 Defendants.

CASE NO. C20-5224JLR

ORDER DENYING MOTION
FOR ATTORNEYS' FEES AND
COSTS UNDER 42 U.S.C. § 1988

15
16 **I. INTRODUCTION**

17 Before the court is Defendants Evergreen School District #144 ("EPS"), Jenae
18 Gomes, and Caroline Garrett's (collectively, Defendants) joint motion for attorneys' fees
19 and costs. (Mot. (Dkt. # 101); Reply (Dkt. # 111).) Plaintiff Eric Dodge opposes the
20 motion. (Resp. (Dkt. # 109).) The court has reviewed the motion, the submissions in

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1 favor of and in opposition of the motion, the relevant portions of the record, and the
2 applicable law. Being fully advised,¹ the court DENIES the motion.

3 II. BACKGROUND

4 The underlying case involved various claims arising out of Defendants' response
5 to and actions taken after Mr. Dodge brought a "Make America Great Again" ("MAGA")
6 hat to professional development sessions before the 2019-2020 school year at Wy'East
7 Middle School.² (*See generally* Compl. (Dkt. # 1); Am. Compl. (Dkt. # 25).) Mr. Dodge
8 originally asserted 1) a First Amendment retaliation claim brought under 42 U.S.C.
9 § 1983; 2) a Fifth and Fourteenth Amendment substantive due process claim brought
10 under 42 U.S.C. § 1983; 3) claims under 42 U.S.C. §§ 1985 and 1986; 4) violations of the
11 Washington State Constitution; 5) violations of RCW 41.06.250; 6) a defamation claim;
12 and 7) an outrage claim. (Compl. ¶¶ 57-85.) Defendants moved to dismiss all but the
13 outrage claim. (MTD (Dkt. # 19) at 2.)

14 The court upheld Mr. Dodge's First Amendment retaliation claim against
15 Defendants' argument that Mr. Dodge had not suffered an adverse employment action.
16 (7/30/20 Order at 6-7.) However, the court dismissed Mr. Dodge's §§ 1985 and 1986
17 claims, the Washington State Constitution claim, RCW 41.06.250 claim, and defamation
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19 ¹ Neither party requests oral argument (*see* Mot. at 1; Resp. at 1), and the court finds that
20 oral argument would not be helpful to its disposition of the motion, *see* Local Rules W.D. Wash.
LCR 7(b)(4).

21 ² The court has detailed the factual and procedural background of this case in several
22 prior orders. (*See* 7/30/20 Order (Dkt. # 24); 11/23/20 Order (Dkt. # 41); 1/13/21 Order (Dkt. #
52); 5/3/21 Order (Dkt. # 97).) Thus, the court recounts here only the information relevant to the
present motion.

1 claim with prejudice. (*Id.* at 13.) Specifically, the court dismissed the §§ 1985 and 1986
2 claims because Mr. Dodge “identifie[d] no congressional statutes or court decisions
3 extending federal protection to” MAGA supporters. (*Id.* at 7-9.) Mr. Dodge conceded
4 that his claim under the Washington State Constitution could not proceed. (*Id.* at 10.)
5 The court further dismissed his RCW 41.06.250 claim because the statute did not create
6 an implied private cause of action. (*Id.* at 10-12.) Finally, it dismissed his defamation
7 claim because his challenged statements were those of opinion, not fact. (*Id.* at 12-13.)

8 The court additionally dismissed Mr. Dodge’s substantive due process claim
9 without prejudice and with leave to amend. (*Id.* at 13.) Specifically, the court recognized
10 that Mr. Dodge could not “double up” constitutional claims but found his substantive due
11 process claim to be “vague . . . without explaining what conduct violated which right.”
12 (*Id.* at 5.) Thus, the court “allow[ed] [Mr.] Dodge an opportunity to amend his
13 [c]omplaint to explain exactly what conduct supports his different constitutional claims.”
14 (*Id.* at 6.) Mr. Dodge subsequently amended his complaint to include three remaining
15 claims: (1) § 1983 First Amendment retaliation; (2) § 1983 substantive due process
16 “stated in the alternative to” the First Amendment claim; and (3) outrage. (Am. Compl.
17 ¶¶ 59-71.) Defendants moved for summary judgment on all remaining claims. (Dist. 1st
18 MSJ (Dkt. # 36) at 1; Garrett 1st MSJ (Dkt. # 39) at 1.)

19 The court again upheld Mr. Dodge’s First Amendment claim but dismissed his
20 substantive due process and outrage claims with prejudice. (1/13/21 Order at 26.) The
21 court rejected Defendants’ argument that Mr. Dodge’s MAGA hat did not constitute
22 protected speech under the First Amendment. (*Id.* at 12-16.) However, the court held

1 that Mr. Dodge’s substantive due process claim remained duplicative even after
2 amendment and that there was no genuine issue of material fact supporting a finding that
3 Defendants engaged in sufficiently outrageous and extreme conduct. (*Id.* at 16-26.)

4 Defendants subsequently moved for summary judgment again on the remaining
5 First Amendment retaliation claim, this time arguing that the individual defendants—Ms.
6 Garrett and Ms. Gomes—were protected by qualified immunity and that EPS was not
7 liable as a matter of law under *Monell v. Department of Social Services*, 436 U.S. 658
8 (1978). (Dist. 2d MSJ (Dkt. # 53) at 13-20; Garrett 2d MSJ (Dkt. # 56) at 17-19.) The
9 court granted Defendants summary judgment. (5/3/21 Order at 33.) The court held that
10 both Ms. Garrett and Ms. Gomes were entitled to qualified immunity. (*Id.* at 18-28.) For
11 Ms. Gomes, the court additionally held that Mr. Dodge had not established that his
12 MAGA hat was a substantial or motivating factor driving her subsequent actions. (*Id.* at
13 28-29.) And finally, the court held that Mr. Dodge had not raised a genuine issue of
14 material fact regarding causation or EPS’s ratification of an unconstitutional decision—
15 both requirements to establish *Monell* liability. (*Id.* at 30-33.) Mr. Dodge filed a notice
16 of appeal to the Ninth Circuit Court of Appeals on May 25, 2021. (Not. of Appeal (Dkt.
17 # 106).)

18 **III. ANALYSIS**

19 Defendants move for attorneys’ fees and costs pursuant to 42 U.S.C. § 1988
20 because (1) Ms. Garrett and Ms. Gomes were clearly entitled to qualified immunity (Mot.
21 at 7-10); and (2) EPS’s actions were clearly insufficient to sustain *Monell* liability (*id.* at

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1 10-11).³ A court may, in its discretion, award attorneys’ fees to the prevailing party in a
2 § 1983 action under 42 U.S.C. § 1988. *See* 42 U.S.C. § 1988(b). Unlike a § 1983
3 plaintiff, who should be awarded attorneys’ fees unless special circumstances render such
4 an award unjust, a § 1983 defendant “should not routinely be awarded attorneys’ fees
5 simply because he has succeeded.” *Vernon v. City of L.A.*, 27 F.3d 1385, 1402 (9th Cir.
6 .1994); *see also Harris v. Maricopa Cnty. Superior Ct.*, 631 F.3d 963, 968 (9th Cir. 2011)
7 (awarding fees to prevailing defendants “only in exceptional circumstances”). This
8 policy “avoid[s] discouraging civil rights plaintiffs from bringing suit” and thus
9 encourages “the efforts of Congress to promote the vigorous enforcement of civil rights
10 laws.” *Harris*, 631 F.3d at 971 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S.
11 412, 422 (1978)) (internal quotation marks omitted).

12 To that end, a prevailing defendant is only awarded attorneys’ fees when the
13 plaintiff’s civil rights claims are “frivolous, unreasonable, or without foundation,” or the
14 plaintiff “continued to litigate after it clearly became so.” *Hughes v. Rowe*, 449 U.S. 5,
15 14 (1980) (quoting *Christiansburg*, 434 U.S. at 421-22) (internal quotation marks
16 omitted). In evaluating whether claims are frivolous, the Supreme Court has cautioned:

17 It is important that a district court resist the understandable temptation to
18 engage in *post hoc* reasoning by concluding that, because a plaintiff did not
19 ultimately prevail, his action must have been unreasonable or without
20 foundation. This kind of hindsight logic could discourage all but the most
airtight claims, for seldom can a prospective plaintiff be sure of ultimate
success.

21 ³ Defendants contend only that Mr. Dodge’s claims brought under § 1983 are frivolous.
22 (*See* Mot. at 6 (arguing entitlement to attorney’s fees “solely because of [Mr. Dodge’s] [§] 1983
claims”).) Thus, the court does not address Mr. Dodge’s remaining claims.

1 | *Christiansburg*, 434 U.S. at 422; *see also Hughes*, 449 U.S. at 14 (“The fact that a
2 | plaintiff may ultimately lose his case is not in itself a sufficient justification for the
3 | assessment of fees.”). Accordingly, a claim is frivolous only when “the result is obvious
4 | or the appellant’s arguments . . . are wholly without merit,” meaning that the Ninth
5 | Circuit has already spoken directly on the issue. *Vernon*, 27 F.3d at 1402; *Taylor AG*
6 | *Indus. v. Pure-Gro*, 54 F.3d 555, 563 (9th Cir. 1995). A case is “less likely to be
7 | considered frivolous when there is ‘very little case law directly apposite.’” *Karam v. City*
8 | *of Burbank*, 352 F.3d 1188, 1195 (9th Cir. 2003) (quoting *In ’tl Bhd. of Teamsters v.*
9 | *Silver State Disposal Serv., Inc.*, 109 F.3d 1409, 1412 (9th Cir. 1997)).

10 | Courts have largely declined to award fees when qualified immunity had been
11 | granted. *See, e.g., Galen v. Cnty. of L.A.*, 477 F.3d 652, 667 (9th Cir. 2007). In *Galen*,
12 | the court found that the plaintiff’s “perseverance in his suit was not unreasonable”
13 | because of “the absence of controlling Ninth Circuit or Supreme Court authority.” *Id.*
14 | Indeed, the court observed that because this absence of controlling authority rendered the
15 | law not clearly established, the plaintiff “did not have reason to know that his case was
16 | wholly without merit.” *Id.* Similar, in *C.F. v. Capistrano Unified School District*, No.
17 | SACV-07-01434-JVS, 2009 WL 10698986 (C.D. Cal. Dec. 14, 2009), the court held that
18 | the very premise of qualified immunity, which allowed the defendant to prevail, “was
19 | that there was no clearly established constitutional right on the facts of this case.” *Id.* at
20 | *3. Thus, the court denied an award of fees because the “vagaries of the law in this area,
21 | from which [the defendant] benefited, do not undermine the substantive validity of” the
22 | plaintiff’s claim. *Id.*

1 Under this precedent, the court concludes that Mr. Dodge’s § 1983 claims were
2 not frivolous, unreasonable, or without foundation. For the First Amendment retaliation
3 claim, Ms. Garrett and Ms. Gomes were entitled to qualified immunity because the
4 outcome of the *Pickering v. Board of Education*, 391 U.S. 563 (1968) balancing test did
5 not so clearly favor Mr. Dodge such that it would have been “patently unreasonable” for
6 Ms. Garrett or Ms. Gomes to conclude that the First Amendment did not protect his
7 speech. (5/3/21 Order at 20-28.) Put differently, Mr. Dodge’s First Amendment claim
8 failed because his right to wear his MAGA hat was not so “clearly established” to defeat
9 qualified immunity. (*See id.*) This analysis involved review of the complex legal
10 background, which did not point to a clear answer, and application of the *Pickering*
11 balancing test, which only “further complicate[d]” a reasonable administrator’s
12 understanding and “provide[d] no clear-cut results.” (*See id.* at 21-26.) Accordingly, like
13 in *Galen* and *C.F.*, the court concludes that the absence of case law and complexity of the
14 *Pickering* test—which benefited Ms. Garrett and Ms. Gomes in their qualified immunity
15 argument—also renders Mr. Dodge’s perseverance in his suit reasonable and not wholly
16 without merit.⁴ *See Galen*, 477 F.3d at 667; *C.F.*, 2009 WL 10698986, at *3.

17 None of Defendants’ arguments to the contrary are availing. First, Defendants
18 make much of the fact that claims involving the *Pickering* test “will rarely, if ever, be
19 sufficiently ‘clearly established’ to preclude qualified immunity.” (Mot. at 7-8 (quoting
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21 ⁴ Defendants do not argue that Mr. Dodge’s claim against Ms. Gomes is frivolous based
22 on the alternative holding involving “substantial or motivating factor.” (*See Mot.*; 5/3/21 Order
at 28-29.) Aptly so. Although Mr. Dodge did not prevail, his contention resting on
circumstantial evidence was not wholly without merit.

1 *Moran v. State of Washington*, 147 F.3d 839, 847 (9th Cir. 1998)).) But, as the court
2 recognized in its order, Mr. Dodge’s claim “may constitute ‘one of those rare instances’
3 in which *Pickering* rights are clearly established.” (*Id.* at 20 (quoting *Brewster v. Bd. of*
4 *Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 980 (9th Cir. 1998)).) Indeed,
5 plaintiffs have defeated qualified immunity in cases involving *Pickering*. *See, e.g., Eng*
6 *v. Cooley*, 552 F.3d 1062, 1075-76 (9th Cir. 2009). Thus, the general statement of law
7 regarding how rare it is to have clearly established *Pickering* rights does not render Mr.
8 Dodge’s claim wholly without merit.

9 Second, Defendants purport that “[a]ny amount of pre-suit research would have
10 revealed . . . an absence of authority” to satisfy the “clearly established” prong. (Mot. at
11 8.) While the court agrees that Mr. Dodge had not identified any analogous case law
12 (5/3/21 Order at 26-27), that very lack of controlling precedent cuts against a finding of
13 frivolity, *see Vernon*, 27 F.3d at 1402 (analyzing whether Ninth Circuit has already
14 spoken directly on issue as measure of claim’s merit). Moreover, the court recognized
15 that it is unnecessary to identify a case “precisely like this one” to defeat qualified
16 immunity (5/3/21 Order at 20 (quoting *Eng*, 552 F.3d at 1076)); thus, although Mr.
17 Dodge was ultimately unsuccessful, it was not patently unreasonable for him to have
18 contested Defendants’ assertion of qualified immunity, even without having identified a
19 case directly on point, *see Christiansburg*, 434 U.S. at 422.⁵

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21 ⁵ For the same reason, the court rejects Defendants’ contention that Mr. Dodge’s claims
22 were, at the very least, frivolous starting January 29, 2021, when Defendants asserted qualified
immunity in their summary judgment motions. (*See* Mot. at 9-10.)

1 Mr. Dodge’s claim of *Monell* liability against EPS is similarly not wholly without
2 merit. The Ninth Circuit has not directly spoken on whether a school board’s decision on
3 the appeal of a Harassment, Intimidation and Bullying (“HIB”) complaint qualifies as
4 ratification of unconstitutional conduct. *See Vernon*, 27 F.3d at 1402; (*see* 5/3/21 Order
5 at 30-33.) Nor was there ample case law “directly apposite” Mr. Dodge’s position that
6 EPS had ratified Ms. Garrett and Ms. Gomes’s allegedly unconstitutional actions by
7 affirming the denial of his HIB complaint. *See Karam*, 352 F.3d at 1195; (*see* 5/3/21
8 Order at 30-33). In fact, the court concluded that it was “not at all clear” whether the
9 school board approved of the directive to not wear the MAGA hat. (5/3/21 Order at 31.)
10 And while Mr. Dodge “does not mention causation at all” in his briefing (*id.* at 32), that
11 failure does not render his original assertion without foundation and does not rise to the
12 high standard of “wholly without merit.” *See Christiansburg*, 434 U.S. at 422. Because
13 the result of EPS’s *Monell* liability was not obvious, the court declines to award
14 attorneys’ fees under 42 U.S.C. § 1988. *See Vernon*, 27 F.3d at 1402.

15 Finally, the court reaches the same conclusion for Mr. Dodge’s substantive due
16 process claim.⁶ Again, although the court ultimately dismissed the claim as duplicative
17 of the First Amendment claim, the claim raised the novel issue of whether constitutional
18 claims could be pled in the alternative. (*See* 1/13/21 Order at 18 (“Mr. Dodge pursues a
19 novel strategy of pleading his substantive due process claim ‘in the alternative.’”))
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21 ⁶ It is unclear whether Defendants are arguing that Mr. Dodge’s substantive due process
22 claim merits an award of attorneys’ fees, as the majority of their briefing focuses on the First
Amendment retaliation claim. (*See* Mot. at 6-11.) However, because Defendants mention the
due process claim (Mot. at 7 n.2), the court addresses it for the sake of completeness.

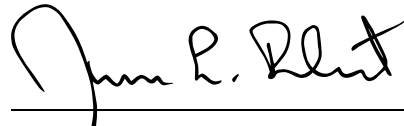
1 (quoting Am. Compl. ¶ 67).) When there is an absence of authority and the issue is
2 novel, the court “cannot say that [the] resolution of [the issue] was ‘obvious’ or that [the
3 legal] claims were otherwise frivolous.” *Karam*, 352 F.3d at 1196. Thus, the court finds
4 that Mr. Dodge had a reasonable basis, albeit a tenuous one, for his due process claim.
5 *See id.*

6 In sum, the court concludes that Mr. Dodge’s § 1983 claims were not frivolous,
7 unreasonable, or without foundation. As such, the court finds no occasion to award
8 attorney fees or costs to the Defendants under § 1988.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the court DENIES Defendants’ motion for attorneys’
11 fees and costs (Dkt. # 101).

12 Dated this 25th day of June, 2021.

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15 JAMES L. ROBART
16 United States District Judge
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