

Supreme Court Allows Attorneys' Fees in Mixed Action; Defendants Entitled to Fees for the Frivolous Portion of the Suit

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Plaintiffs often file lawsuits which eventually contain frivolous as well as non-frivolous claims. When the defendant prevails in a civil rights suit which contains both types of claims, what is the court to do when the defendant requests its attorneys' fees as the prevailing party?

Generally, in certain civil rights cases the "prevailing party" may be entitled to "reasonable attorneys' fees" under 42 U.S.C. 1988. Typically, the plaintiff is in the position of requesting its fees, but when the *defendant* prevails courts have held defendants may be entitled to its fees only when the claims are frivolous, unreasonable or without foundation. Can the defendant in such a mixed case seek *all* of its fees from the plaintiff?

The United States Supreme Court recently answered that question "no." However, defendant may seek a *portion* of its fees; but only those attributable solely to the frivolous portion of the suit.

In *Fox v. Vice* (June 6, 2011), ___ U.S. ___, 10-114, the newly elected police chief of Vinton, LA, claimed he was subjected to dirty tricks during his campaign, and filed suit against the incumbent chief based on state law claims (defamation) as well as federal civil rights violations under 42 U.S.C. 1983. Once the defendant filed a motion for summary judgment, plaintiff admitted that his federal civil rights claims were not valid.

The District Court then granted defendant his request for attorneys fees under Section 1988 based on *all* of the hours incurred in the suit, on the grounds that the federal claims were frivolous. However, plaintiff's state law claims had yet to be determined, and therefore had not been determined to be frivolous. No differentiation was made between the fees incurred for the state law vs. the federal claims.

The Supreme Court reversed, holding defendant would be entitled to only those costs defendant would not have incurred but for the frivolous claims. Stated without the double negative, defendants may be entitled to fees in a case of both frivolous and non-frivolous claims, but the entitlement goes to those fees incurred for the frivolous claims only.

The court reasoned since plaintiffs may be entitled to its fees even though it does not prevail on every claim, so too should defendants be entitled to a portion of its fees if some of the claims are frivolous.

The critical question, then, is one of allocation. The Supreme Court provided us with some guidance on that process as well:

- The fees attributable to non-frivolous claims are not recoverable;
- The fees attributable exclusively to frivolous claims are recoverable;

- The difficult question, of course, arise from the fees for defense against non-frivolous and frivolous claims alike (such as depositions which involve both issues);
 - Defendants are entitled to the fees incurred because of, but *only because of*, the frivolous claims;
 - If the deposition, for example, would have taken the same amount of time regardless of the existence of the frivolous claims, then the fees incurred for that deposition should not be recovered;
 - If the frivolous claims created the right to remove to federal court, thereby increasing the litigation costs, then those fees may be recoverable; and
 - If the frivolous claims triggered a new area of the law, requiring specialized counsel, the increased marginal costs and fees of new counsel may be recoverable.