IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ORIT SKLAR and RUTH MALHOTRA, Plaintiffs, v. G. WAYNE CLOUGH, individually and in his official capacity as President of the Georgia Institute of Technology; GAIL DISABATINO, individually and in her official capacity as Dean of Students, et al., Defendants.	:	CIVIL ACTION NO. 1:06-CV-0627-JOF

OPINION AND ORDER

This matter is before the court on Defendants' motion for reconsideration [127]; Plaintiffs' motion for attorney's fees [128]; Defendants' objections to Plaintiffs' bill of costs [133]; and Plaintiffs' motion to deny Defendants' costs [135].

In an order dated April 29, 2008, the court granted in part and denied in part both parties' motions for summary judgment. In short summary, the court concluded that (1) the speech code issue had been resolved through mediation and no further action would be taken; (2) that because Georgia Tech had changed its speech zone policy, Plaintiffs' request for declaratory and injunctive relief was moot and their request for nominal damages was barred by qualified immunity; likewise, Plaintiffs were not entitled to attorney's fees on the speech zone policy because Georgia Tech had altered it without a judicial judgment; (3) because Plaintiffs were unable to link Defendants who were sued with the allegedly unconstitutional actions taken with respect to the student activities fees program and allocation, the court found Plaintiffs could not establish a constitutional violation on this claim; and (4) Defendants Dean Ray and President Clough in their official and individual capacities had violated the Establishment Clause by favoring one religion over another in the state-associated Safe Space Program, although they were entitled to qualified immunity in their individual capacities. The court directed Defendants to remove the religious information from the Safe Space training manual.

Defendants' Motion for Reconsideration

Defendants' motion for reconsideration is based on an assertion that religious material had been removed from the Office of Diversity Program's Safe Space web site a year prior to the court's ruling. This was certainly news to the court. This court had been dealing with motions regarding the religious material for about eight months and used every means known to it to encourage settlement. At no time did the Attorney General for the State of Georgia even hint that the issue was moot and instead continued to litigate aggressively. A court-appointed mediator spent hours with the lawyers and the parties, including representatives of Georgia Tech and the Georgia Board of Regents, in December

2007 discussing this specific issue with no indication that the information was no longer contained in Safe Space's training materials.

On May 9, 2008, Defendants filed the instant motion for reconsideration announcing many new "facts" to the court and Plaintiffs, one, that the Georgia Tech student organization Pride Alliance "assumed official control over the Safe Space program." *See* Motion, at 1 (citing Second McKee Aff., ¶¶ 6, 8). "Once the program transferred to Pride Alliance, the organization's officers made the decision to remove the training manual from the Safe Space web site. The Safe Space web site was updated to reflect this change in April 2007." *Id.* at 1-2. During preparation for training in November 2007, the officers of Pride Alliance revised the manual and deleted all references to religion or spirituality. *Id.* at 2. Defendants' counsel indicated she learned of these changes on May 1, 2008, when she informed Defendants of the court's order. *Id.*

Defendants argue that because the material was removed prior to the court's ruling on the parties' summary judgment motions, the court is "unable to provide Plaintiffs any meaningful relief on this claim." *Id.* Defendants assert that the case has been mooted by Defendants' voluntary conduct and is unlikely to repeat.[1] *Id.* at 4. In reply, however, Defendants concede that one portion of the religious materials the court ordered stricken from the Safe Space training materials did remain even after the Pride Alliance purportedly

[1]In light of the conduct of the Defendants, the court does not share this view.

removed the religious materials in November 2007, that portion being "Is Homosexuality Immoral?" Defendants still claim, though, that the court's April 29, 2008 order is "largely moot." *See* Reply, at 3.

Plaintiffs responded to the motion for reconsideration asserting that the religious materials were still readily available on Georgia Tech's web site, nor was there any indication on Georgia Tech's web site that Safe Space was an initiative of Pride Alliance. Ms. Malhotra filed a declaration stating that on May 9, 2008, she accessed the Safe Space training guide, including the religious sections, through Georgia Tech's web site. She had also found the same materials there after the December 2007 mediation. *See generally* Malhotra Decl., May 22, 2008. On May 19 and May 22, 2008, Ms. Sklar also went to the Georgia Tech web site and using the "search" feature located the same Safe Space training materials. She also found that the Safe Space program was still listed as a program of Georgia Tech's Office of Diversity Programs. *See generally* Sklar Decl., May 22, 2008.

What the student affiants testify to may now be true as to Pride Alliance which the court presently regards as a student-run organization. The question before the court, however, is what the state-sponsored Safe Space program provides in its training materials. It is clear from the foregoing that not only were all religious materials ***not*** removed from the Safe Space training materials in November 2007, but ***all*** of the religious materials were still available through the Georgia Tech Safe Space web site even after Defendants filed their motion for reconsideration. For that reason, the court declines Defendants' invitation to "modify its Order to reflect the limited relief the Court may now provide to Plaintiffs." *See* Reply, at 4. The court further rejects Defendants' parsing argument that because the April 29, 2008 order only directed Defendants to remove the "religious/spirituality materials from the Safe Space training manual," the fact that the materials were still located in a copy of the manual on the web site is "entirely irrelevant." *Id.* The document accessed by Plaintiffs after Defendants filed their motion for reconsideration was, in fact, a copy of the Safe Space manual. The fact that it was housed on Georgia Tech's web site rather than in physical notebooks used for Safe Space training is, to use the words of Plaintiffs, entirely irrelevant. In fact, the web-based product could have had more reach than the physical documents themselves. Based on the foregoing, the court finds there is no merit to the claim that the issues ruled upon by the court in its April 29, 2008 order were moot, and the court DENIES Defendants' motion for reconsideration [127].

The motion for reconsideration containing the new claim that the Safe Space program did not use those materials, despite the fact they were easily accessible by computer search as evidenced by Plaintiffs' declarations, is part and parcel of the lack of candor[2] of Georgia

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[2]The day after the court issued its previous order granting summary judgment to the Plaintiffs, Georgia Tech issued a press release. Anyone with passing familiarity of the instant litigation would not be faulted for questioning the accuracy of numerous portions of this short press release. In fact, all three of the four challenged policies are materially different than they were before the suit. As to the fourth, although the court did not order a change, the court did not discuss Georgia Tech's student activity fee program for 23 pages

Tech throughout the litigation of this case. In response to numerous of Plaintiffs' claims, Georgia Tech felt it sufficient to argue that the school did not ever intend to enforce its policies in that way (despite the wording of the policies) or some such similar argument, the current iteration being that the Safe Space program did not really use the religious materials anyway. This is not an area of the law that allows for a "no harm, no foul" defense. What is significant in these cases is not whether an administrator presently intends or does not intend to enforce the policies as written, but rather whether the existence of rules – such as the speech policies – or materials – such as the Safe Space training program – creates a perception that chills speech in certain areas of the school or engenders a reasonable belief that Georgia Tech prefers certain religious denominations over others.

Bills of Costs

Both parties have filed bills of costs and objections to the other's bill of costs. Since both parties also make arguments based on who is the "prevailing party" in this litigation, the court discusses the matter before turning to more specific objections.

Federal Rule of Civil Procedure 54(d) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." The presumption is in favor of awarding costs. *See Arcadian Fertilizer, L.P. v. MPW Indus. Servs., Inc.*, 249 F.3d 1293, 1296 (11th Cir. 2001). The Supreme Court has held that district

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in any way to "rule[] in favor" of the program.

courts are limited in the costs that may be reimbursed by the list of items set forth in 28 U.S.C. § 1920 and related statutes. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). Furthermore, the Eleventh Circuit has determined that the language of Rule 54(d) "reasonably bears intendment that the prevailing party is prima facie entitled to costs and it is incumbent on the losing party to overcome that presumption." *Gilchrest v. Bolger*, 733 F.2d 1551, 1556-57 (11th Cir. 1984).

In *Head v. Medford*, 62 F.3d 351 (11th Cir. 1995), the Eleventh Circuit held that to be a "prevailing party" for the purposes of Rule 54(d):

> [a] party need not prevail on all issues to justify a full award of costs, however. Usually, the litigant in whose favor judgment is rendered is the prevailing party for the purposes of Rule 54(d). . . . A party who has obtained some relief usually will be regarded as the prevailing party even though he has not sustained all of his claims. . . . Cases from this and other circuits consistently support shifting of costs if the prevailing party obtains judgment on even a fraction of the claims advanced.

Id. at 354-55 (quoting *United States v. Mitchell*, 580 F.2d 789, 793-94 (5th Cir. 1978)). While some district courts have determined that both plaintiff and defendant can be prevailing parties, *see*, *e.g.*, *James v. Wash Depot Holdings, Inc.* 242 F.R.D. 645 (S.D. Fla. 2007), the Eleventh Circuit does not seem to favor this approach. Rather, in the Eleventh Circuit, a defendant can be a prevailing party only if the plaintiff has received nothing in the litigation. *See, e.g., Pickett v. Iowa Beef Processors,* 149 Fed. Appx. 831 (11th Cir. 2005) ("A defendant is a prevailing party if the plaintiff achieves none of the benefits sought in bringing its lawsuit."). A district court does have the option of exercising its discretion in the matter of costs to determine that each side should bear its own costs. *See* 528 F.2d 993 (5th Cir. 1976).

Here, there were four core claims. Plaintiffs prevailed entirely on their Establishment Clause challenge to the Safe Space program. The parties mediated a settlement to the speech code issue embodied in a consent decree which resulted in a change of language in Georgia Tech's speech code along with court supervision over the language for five years. Georgia Tech also changed its speech zone policy in response to Plaintiffs' allegations, although no court direction was involved in that matter. Finally, although the court did not grant Plaintiffs any relief, the court's order on summary judgment certainly indicates potential constitutional pitfalls to the manner in which Georgia Tech administers its student activity fees program. Based on *Head*, the court finds that Plaintiffs are the only prevailing party in this litigation. While the court does have the discretion to adjust the amount of costs awarded based on the partial success of Plaintiffs, it finds no need to do so here as Plaintiffs' request for costs is minimal. The court discusses the different situation of attorney's fees below.

On May 23, 2008, Plaintiffs filed a bill of costs listing $700 in fees of the clerk, including filing fees and fees for pro hac vice admission; $214 in fees for service of summons and subpoena; and $1,483.58 in court reporting fees for the depositions of

Defendants DiSabatino, McDonald, and Ray, for a total of $2,397.58. Defendants object to Plaintiffs' bill of costs on the basis of prevailing party status, asking that the court award only those costs directly attributable to the Safe Space issue. Even if the court were inclined to limit the award of costs to Plaintiffs, there would be no basis to do so in the limited costs Plaintiffs seek. In order to have succeeded even only on the Safe Space program, Plaintiffs would have needed to file and serve the complaint, and have their attorneys admitted pro hac vice. Further, Defendants DiSabatino, McDonald, and Ray were the primary actors involved in the issues from the Defendants' perspective. The court referred to portions of each of their depositions in its order on the parties' motions for summary judgment. As such, the court finds it reasonable for Plaintiffs to have taken their depositions and have used them in litigating the motion for summary judgment. There is no basis upon which to argue that such depositions were taken only for "convenience" or "investigation." *See EEOC v. W&O, Inc.*, 213 F.3d 600, 620-21 (11th Cir. 2000). Therefore, the court DIRECTS the Clerk of the Court to TAX COSTS for Plaintiffs and against Defendants in the amount of $2,397.58.

Because the court has determined that Plaintiffs are the only prevailing parties for the purpose of Rule 54(d), the court GRANTS Plaintiffs' motion to deny Defendants' motion for costs [135].[3]

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[3]The court notes additionally that costs for mediation cannot be awarded under 28 U.S.C. § 1920. *See Brisco-Wade v. Carnahan*, 297 F.3d 781 (8th Cir. 2002) (per curiam); *Mota v. University of Texas Houston Health Sciences Center*, 261 F.3d 512, 529-30 (5th Cir. 2001). As such, $3,437.50 of Defendants' bill of costs would be disallowed even were the

Plaintiffs' Motion for Attorney's Fees

In their motion, Plaintiffs seek $295,978.12 in attorney's fees which represents 1,171.8 attorney and paralegal hours and $21,494.62 in non-taxable costs and expenses. Plaintiffs contend they are the "prevailing parties" and eligible for attorney's fees under 42 U.S.C. § 1988, particularly on the Safe Space and speech code portions of their complaint. Plaintiffs excluded from their motion hours incurred for the August 2006 speech code injunction, as well as "time spent on claims for which they were not a prevailing party." *See* Motion, at 7. Plaintiffs, however, also claim that the entirety of the litigation related to First Amendment issues and suppression of religious and conservative speech on Georgia Tech's campus, so all of the claims involved a common set of facts and related legal theories. *Id.* at 8. In sum, Plaintiffs contend that the remaining fee requests are "for the prosecution of Plaintiffs' Safe Space challenge and the portions of litigation that cannot be separated out by claim, including the investigation of Plaintiffs' claims, filing of the complaints, responding to Defendants['] multiple motions, and discovery." *Id.* at 16. On the itemized bill attached to their motion, Plaintiffs have made certain notations including fees they "agreed not to seek in the preliminary injunction" and fees where they "did not prevail on cause of action." Plaintiffs aver they have excluded almost 430 hours in an amount of

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court to determine that Defendants were entitled to their costs as well.

approximately $94,000 based on exclusion of speech code injunction, speech zone, and student activity fee issues.

As explained above, the court retains discretion to adjust Plaintiffs' motion for attorney's fees in light of the fact that they were only partially and not wholly successful in their causes of action. While the court understands Plaintiffs to argue that they have eliminated a portion of fees to account for the fact they did not succeed on each of Plaintiffs' claims, the court believes it would benefit from Defendants' response to Plaintiffs' motion for attorney's fees, particularly now that the court has ruled on Defendants' motion for reconsideration and the parties' bills of costs. Defendants are DIRECTED to respond to Plaintiffs' motion for attorney's fees within twenty (20) days from the date of this order. Plaintiffs may then reply.

Conclusion

The court DENIES Defendants' motion for reconsideration [127]; OVERRULES Defendants' objections to Plaintiffs' bill of costs [133]; and GRANTS Plaintiffs' motion to deny Defendants' costs [135].

Defendants are DIRECTED to respond to Plaintiffs' motion for attorney's fees within twenty (20) days from the date of this order. Plaintiffs may then reply.

The Clerk of the Court is DIRECTED to TAX COSTS for Plaintiffs and against Defendants in the amount of $2,397.58.

IT IS SO ORDERED this 23rd day of July 2008.

s/ J. Owen Forrester
J. OWEN FORRESTER
SENIOR UNITED STATES DISTRICT JUDGE