

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION**

**CONSTANCE McMILLEN**

**PLAINTIFF**

**VS.**

**CIVIL ACTION NO. 1:10-cv-00061-GHD-JAD**

**ITAWAMBA COUNTY SCHOOL DISTRICT;**

**DEFENDANTS**

**TERESA McNEECE, in her official capacity as the**

**Superintendent of Itawamba County School District;**

**TRAE WIYGUL, in his official capacity as Principal of**

**Itawamba Agricultural High School; and RICK MITCHELL,**

**in his official capacity as Assistant Principal of Itawamba**

**Agricultural High School**

**DEFENDANTS' RESPONSE TO  
PLAINTIFF'S MOTION FOR ATTORNEY'S FEE  
WITH MEMORANDUM OF AUTHORITIES**

Defendants, by counsel, respectfully submit their Response to Plaintiff's Motion for Attorney's Fee pursuant to 42 U.S.C. §1988 and Memorandum of Authorities. Defendants request the Court to scrutinize the submitted time sheets and affidavits of Plaintiff's six counsel for lack of billing judgment reflected by excessive, redundant and duplicative hours expended by multiple counsel, and departures from the prevailing hourly rate in this District, and allow no more than a reasonable attorney's fee in accordance with the terms of the Offer of Judgment heretofore accepted by Plaintiff, upon which judgment has been entered pursuant to Rule 68, Fed. R. Civ. Proc.

For their response, Defendants submit the following:

1. The hourly rates sought by three of the six counsel representing Plaintiff in this case, Christine Sun, Norman Simon and Kristy Bennett, are excessive and not consistent with the hourly rates typically charged by attorneys within the local legal community familiar with the First Amendment issues raised in this matter. As set forth in the Declaration of David D. O'Donnell, a

copy of which is attached to this Response as Exhibit "A" and incorporated herein by reference, the highest hourly rate to be charged by the most experienced attorney well familiar with the First Amendment issues raised in this matter would be in the \$185 - \$200 range.

2. The First Amendment issues and the factual record bearing on those issues as evidenced by the Motion for Preliminary Injunction, Defendants' response thereto and the Court's Opinion denying Plaintiff's Motion for Preliminary Injunction, demonstrate that neither the factual record nor the First Amendment issues at stake could in any way be considered "complex" or of such complexity to justify staffing this case with six attorneys. As set forth in the Declaration of David D. O'Donnell, Exhibit "A" hereto, the straightforward First Amendment issues at stake in this case, illustrated by this Court's findings that the contours of Plaintiff's First Amendment rights were "clearly established", as well as the fact that Plaintiff demonstrated a "substantial likelihood of success on the merits," did not justify the approximately 44 hours of research time devoted to the First Amendment issues prior to the preliminary injunction hearing. In this regard, the remedy for failing to exercise billing judgment is to reduce the hours awarded by a percentage.<sup>1</sup> Further, the approximately 24 hours of time devoted to research on First Amendment "damages" issues are plainly excessive, as set forth in the Declaration of David D. O'Donnell, Exhibit "A" hereto, and the excessiveness of the hours devoted to these two separate research activities is best explained by the

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<sup>1</sup>*Baptist Mem. Hospital-Desoto, Inc. v. Crain Automotive, Inc.*, 2008 WL 5100317 (N.D. Miss. 2008) (determining reasonable hours requires some exercise of billing judgment to eliminate hours that are excessive, redundant or otherwise unnecessary; reduction was proper where three main plaintiff's attorneys triple billed for intraoffice correspondence and conferences); *Baker v. Washington Mut. Finance Group, LLC*, 2007 WL 571103, at \*10 (S.D. Miss. 2007)(court found attorneys did not exercise billing judgment as evidenced by charges for legal research and long-distance calls, efforts to reach opposing counsel, attempted phone calls or calls to confirm status of case or travel information, and organizing materials).

excessive staffing devoted to these issues by Plaintiff's counsel.<sup>2</sup>

3. With respect to the "lodestar" requested by Plaintiff's counsel, particularly the amount of time devoted to drafting a 17-page Memorandum Brief in support of the Plaintiff's Motion for Preliminary Injunction, it appears that three of the Plaintiff's six attorneys, Attorneys Moff, Glick and Simon, all self-professed "experienced" First Amendment attorneys, devoted approximately 42 hours to drafting and revising the Memorandum Brief.<sup>3</sup> As set forth in the Declaration of David D. O'Donnell, Exhibit "A" hereto, the straightforward matters addressed in the Memorandum Brief as well as the relative brevity of that Memorandum Brief, do not justify the amount of time reflected in Plaintiff's fee submission. The excessiveness of the "lodestar" requested by Plaintiff's counsel is clearly evident on the face of the Motion for Attorney's Fees and the declarations of the six attorneys submitted in support thereof, and such excessiveness should not be rewarded at this stage in the proceedings. Indeed, this case has been brought to a conclusion through the expeditious, reasonable and collaborative efforts of defense counsel in an effort to bring closure to this matter in a manner that best serves the public interests.

4. With regard to the assertion by Plaintiff's various counsel that this civil rights action in somehow should be characterized as more or less desirable than any other civil rights action, such

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<sup>2</sup>*Maggette v. BL Devel. Corp.*, 2009 WL 3048682, at \*2 (N.D. Miss. 2009) (reduction proper where counsel listed excessive charges of half an hour for each e-filing of a motion or memo, and rates quoted were in excess of those generally charged in the Northern District); *Hackett v. Xerox Corp. Long-Term Dis. Income Plan*, 355 F. Supp. 2d 931, 935 (N.D. Ill. 2005)(court determined case was overstaffed with 13 lawyers, 6 paralegals, 2 librarians, 2 law clerks, 5 proofreaders, 1 docket clerk, and 4 other individuals to litigate the case).

<sup>3</sup>*Baker v. Washington Mut. Finance Group, LLC*, supra n.1, citing *Alberti v. Klevenhagen*, 896 F. 2d 927, 933-34 (5<sup>th</sup> Cir.), vacated in part on other grds., 903 F. 2d 352 (5<sup>th</sup> Cir. 1990) ("A number of hours were expended familiarizing the attorneys with the law, time spent consulting with individuals concerning cases in general, and time spent researching in the library. Quite simply, attorneys cannot charge [defendant] for staying current in class action law.")

assertion of undesirability is unsupported and contrary to the reality of First Amendment litigation and civil rights generally, as alluded to in the Declaration of David D. O'Donnell, Exhibit "A" hereto.

**Conclusion and Request for Relief**

Based upon the foregoing, Defendants respectfully submit that Plaintiff's Motion for Attorney's Fee and the submitted demands for excessive compensation by Plaintiff's six attorneys should be scrutinized for lack of billing judgment. These submissions by Plaintiff's counsel reflect redundant and excessive hours expended by multiple attorneys on the same or similar matters, hours "learning the law" and an hourly rate far in excess of the prevailing rate in this District. Defendants request that the excessive and redundant hours should be eliminated and the lodestar reduced accordingly by this Court so that the same may accurately reflect the prevailing hourly rate in the Northern District and a reasonable attorney's fee to which the Plaintiff is entitled pursuant to 42 U.S.C. §1988, and no more.

**RESPECTFULLY SUBMITTED** this 9th day of September, 2010.

**GRIFFITH & GRIFFITH**

*/s/ Ben Griffith*

By: \_\_\_\_\_  
Benjamin E. Griffith, MS BAR NO. 5026  
*Attorney for Defendants*

Of Counsel:

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**CERTIFICATE OF SERVICE**

I, Benjamin E. Griffith, counsel of record for Defendants, do hereby certify that I have this day filed the foregoing *Defendant's Response to Plaintiff's Motion for Attorney's Fee* to be delivered by the CM/ECF system, which will send notice of filing to all CM/ECF participants, including counsel for Plaintiff below:

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**ATTORNEYS FOR PLAINTIFF**

**DATED** this 9th day of September, 2010.

*/s/ Ben Griffith*

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Benjamin E. Griffith