UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-CIV-KING/O'SULLIVAN

AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS; AMERICAN FEDERATION OF
STATE, COUNTY AND LOCAL EMPLOYEES,
AFL-CIO; FLORIDA PUBLIC EMPLOYEES COUNCIL
79, AFSCME, AFL-CIO; AND SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,

Plaintiffs,

v.

KURT S. BROWNING, Secretary of State of Florida,

Defendant.
____/

SECRETARY OF STATE'S MOTION FOR COSTS AND ATTACHED BILL OF COSTS

Pursuant to 28 U.S.C. § 1920, Federal Rule of Civil Procedure 54(d)(1), and Local Rule 7.3(C), Defendant Kurt S. Browning, in his official capacity as Florida Secretary of State, respectfully moves the Court for an order taxing costs against Plaintiffs and attaches hereto, as Exhibit A, a bill of costs as required by Section 1920 and Local Rule 7.3(C).

Introduction

Plaintiffs initiated this challenge to election regulations shortly before the 2004 general election, alleging violations of the Voting Rights Act, the National Voter Registration Act, and the United States Constitution. *See* Second Amended Complaint. On June 20, 2007, this Court dismissed Plaintiffs' statutory claims and directed Plaintiffs to plead more clearly any constitutional claims they intended to pursue. *See Diaz v. Cobb*, 435 F. Supp. 2d 1206 (S.D. Fla.

2006). In response to the Court's order, Plaintiffs filed a Third Amended Complaint, which presented their constitutional claims, and the Court held a six-day trial beginning February 4, 2008. On March 25, 2008, the Court denied Plaintiffs' request for injunctive relief and dismissed Plaintiff's Third Amended Complaint. As the prevailing party on all claims raised by Plaintiffs, the Secretary respectfully requests the Court to enter an order taxing costs.

Taxation of Costs

Federal Rule of Civil Procedure 54(d)(1) provides that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be awarded to the prevailing party." Though the Rule is couched in precatory terms, "there is a strong presumption that the prevailing party will be awarded costs." *Mathews v. Crosby*, 480 F.3d 1265, 1276 (11th Cir. 2007); *accord Smith v. Vaughn*, 171 F.R.D. 323, 326 (M.D. Fla. 1997) ("There is a presumption that prevailing parties will receive costs unless the losing party demonstrates some fault, misconduct, default, or action worthy of penalty on the prevailing side."). Indeed, a "trial court [that] denies the prevailing party its costs . . . *must* give a reason for its denial of costs so that the appellate court may have some basis upon which to determine if the trial court acted within its discretionary power." *Head v. Medford*, 62 F.3d 351, 354 (11th Cir. 1995) (quoting *Gilchrist v. Bolger,* 733 F.2d 1551, 1557 (11th Cir. 1984)) (emphasis added). Thus, the award of costs pursuant to Rule 54(d)(1) is commonly a matter of course.

While Rule 54(d) provides the procedure for the recovery of costs, federal statutes confer the substantive right. Thus, 28 U.S.C. § 1920 provides that a "judge or clerk of any court of the United States may tax as costs the following":

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

In the present case, the Secretary has prepared a bill of costs in an aggregate amount of $36,684.47. *See* Ex. A. Because the recovery of these expenses is authorized by Section 1920, and because Plaintiffs cannot demonstrate any fault, misconduct, default, or action worthy of penalty on the Secretary's part, the Secretary's request is appropriate and the Court should tax the enumerated costs as a matter of course.

Specific Items of Cost

The Secretary respectfully requests that the Court tax the following items of cost specified in Section 1920. Additional detail regarding these costs is provided in a spreadsheet prepared by the Secretary's counsel, summarizing the costs sought to be taxed and attached hereto as Exhibit B, and in the supporting documentation that comprises Exhibits C (fees of the clerk), D (fees of the court reporter), E (fees and disbursements for printing), F (witness disbursements), and G (other costs).

A. Fees of the Clerk.

Pursuant to Section 1920(1), the Secretary seeks to recover fees paid to the clerk in the amount of $225.00. This amount represents fees paid to the clerk in connection with the *pro hac*

vice applications of the Secretary's counsel, Peter Antonacci, Allen Winsor[1], and Andy Bardos.

B. Fees of the Court Reporter.

Section 1920(2) awards costs for fees paid to a "court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." This includes not only the cost of hearing transcripts but also the cost of deposition transcripts that are "reasonably necessary." *U.S. E.E.O.C. v. W&O*, *Inc.*, 213 F.3d 600, 622 (11th Cir. 2000). The Eleventh Circuit has held, for example, that "[t]axation of deposition costs of witnesses on the losing party's witness list is reasonable because the listing of those witnesses indicated both that the plaintiff might need the deposition transcripts to cross-examine the witnesses, . . . and that the information those people had on the subject matter was not so irrelevant or so unimportant that their depositions were outside the bound of discovery." *Id*. at 621.

In this case, the Secretary seeks, in addition to the costs of certain hearing transcripts, court reporters' fees incurred in connection with twenty-five depositions, each of which was reasonably necessary for use in this case. Eleven of the twenty-five—Jon Winchester, Sarah Jane Bradshaw, Arthur Anderson, Lester Sola, Ivy Korman, Buddy Johnson, Pat Hollarn, Alma Gonzalez, John Sullivan, Deborah Dion, and Ion Sancho—testified in person at trial. Six others—Jean Bedini, Bill Cowles, Richard Feller, Jerry Holland, Brenda Snipes, and Linda Tanko—testified at trial by the introduction of excerpts from their depositions on the stipulation of the parties. Two of the remaining eight—Jean Bedini and Charmaine Kelly—were listed by name on Plaintiffs' witness list (Doc. 304, Ex. C), and fees to the court reporter in connection with their depositions are therefore presumptively taxable. The six remaining depositions—those of David Watson, Barbara Peacock, Melissa Winchester, Don Roberts, Peggy Taff, and

[1] Allen Winsor was initially admitted *pro hac vice* to this Court, but has since been admitted to the Bar of this Court.

Paul Craft—were each taken at Plaintiffs' instance, with copies requested by the Secretary. Fees incurred in connection with depositions noticed and taken by the non-prevailing party are by their nature reasonably necessary to the prevailing party. Indeed, the very fact that the adverse party sought their depositions indicates—like the adverse party's identification of individuals on its witness list—that the subject matter is relevant and important and within the bounds of discovery. *See*, *e.g.*, *Fogleman v. ARAMCO*, 920 F.2d 278, 285 (5th Cir. 1991) (costs of deposition taxable if, at the time it was taken, it could "reasonably be expected to be used for trial preparation"). Each of the six, moreover, testified about important aspects of the voter registration system at issue in this case.

C. <u>Fees and Disbursements for Printing</u>.

Section 1920(3) authorizes the taxation of costs for fees and disbursements for printing. The Secretary seeks to recover $329.81 in printing costs incurred by Eric Jaffe, who served as counsel to the Secretary on appeal in the early part of 2005, an additional $1,912.96 incurred more recently for printing in connection with the production of documents sought by Plaintiffs in discovery, and $97.75 paid to the Florida State Archives for the preparation of documents requested by the Secretary's counsel.

D. <u>Witness Disbursements</u>.

Section 1920(3), as limited by 28 U.S.C. § 1821, authorizes the taxation of costs related to witness appearance fees and subsistence costs. Specifically, Section 1821(c)(4) provides that "[a]ll normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920." "Such expenses include expenses for transportation, parking, and overnight accommodations, when necessary." *Dillon v. Axxsys Intern.*, *Inc.*, No. 8:98-cv-2237-T-23TGW, 2006 WL 3841809, at *8 (M.D. Fla. Dec. 19, 2006). In this case, the Secretary

reimbursed two witnesses for their reasonable travel costs, which included roundtrip airline fare (coach) from Tallahassee and Fort Walton Beach, reasonable hotel charges, and local transportation. As reflected in Exhibit F, the Secretary seeks to recover $3,471.34 for these witness disbursements.

E. <u>Other Costs</u>.

Finally, the Secretary seeks $12,832.08 in counsel travel expenses incurred over a three-and-a-half year period. While the propriety of taxing travel has been disputed, *see*, *e.g.*, *Coss v. Sunbelt Rentals, Inc.*, Case No. 8:03-cv-129-T-30EAJ, 2005 U.S. Dist. LEXIS 34324 (M.D. Fla. Aug. 30, 2005), the Eleventh Circuit has held that "travel expenses are appropriate expenses under § 1920 to the extent they are reasonable." *Cullens v. Georgia Dep't of Transportation*, 29 F.3d 1489, 1494 (11th Cir. 1994); *accord Price v. United Technologies Corp*., No. 99-8152-CIV, 2001 WL 36085163, *3 (S.D. Fla. July 27, 2001). Each of the trips identified by the Secretary was reasonable, as all but one involved travel to Miami for attendance at court proceedings. (The other one involved travel to Miami for preparation in advance of oral argument on appeal.) The attendant expenses, such as those for lodging, meals, and ground transportation, were necessarily and properly incurred in connection with these trips. Travel expenses, moreover, are properly chargeable to Plaintiffs, who might have brought this action in the Northern District of Florida where the courthouse is a short walk from the offices of the Secretary and his counsel. Nevertheless, though their own counsel are not based in South Florida, Plaintiffs elected, presumably for tactical reasons, to initiate this action in the Southern District. They cannot now complain, in light of binding Eleventh Circuit precedent and the equities of the case, that the costs which their election created should be borne by the Secretary.

F. Interest.

The Secretary further seeks interest pursuant to 28 U.S.C. § 1961 on any award of costs.

Certification of Conference With Opposing Counsel

Counsel for the Secretary conferred with Plaintiffs' counsel in an effort to resolve the request for fees. The parties were unable to reach agreement.

WHEREFORE, the Secretary respectfully seeks entry of an order awarding his costs.

Respectfully submitted, this 24th day of April, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 24, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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United States District Court, Southern District of Florida

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