

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**Case No. 15-81782-CIV-MARRA**

KIM PETER TILLMAN,

Plaintiff,

vs.

ADVANCED PUBLIC SAFETY, INC. and  
TRIMBLE INC.,

Defendants.

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**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS'  
MOTION TO DETERMINE ENTITLEMENT TO ATTORNEYS' FEES**

Plaintiff, Kim Peter Tillman ("Mr. Tillman"), hereby files his Response in Opposition to Defendants' Motion to Determine Entitlement to Attorneys' Fees [DE 262] (the "Motion").

In support, Mr. Tillman states:

Defendants' Motion is premature, ignores the Jury's Verdict in Mr. Tillman's favor, and ignores the applicable law and Local Rules governing motions for attorneys' fees. Defendants' Motion should be denied.

**I. Defendants' Motion should be denied because it is premature.**

Defendants' Motion is premature as the Court has not yet entered final judgment in this case. Moreover, final judgment will be entered in Mr. Tillman's favor as the jury entered a verdict in favor of Mr. Tillman on Count I (Florida Whistleblower Act) and Count II (Breach of Contract). *See* Jury Verdict [DE 241]. As Defendants' own case law recognizes, the fact Mr. Tillman did not prevail on every claim or receive every dollar of damages he sought does not change the fact he is the prevailing party in this litigation. *Al-Ghena International Corp. v. Radwan*, 13-61557-CIV, 2016 WL 9526406, at \*2 (S.D. Fla. Aug. 19, 2016), *report and*

*recommendation adopted*, 2016 WL 9526407 (S.D. Fla. 2016) (“[A] party who has obtained some relief will be regarded as the prevailing party, even though he has not sustained all of his claims. Indeed, courts in this Circuit consistently have approved shifting costs even if the prevailing party obtains judgment on a fraction of the claims he has advanced.”).<sup>1</sup>

**II. Defendants’ Motion should be denied because it fails to comply with Local Rule 7.3.**

Pursuant to Local Rule 7.3, a motion for attorneys’ fees “shall” “be verified”; “state the amount sought”; “disclose the terms of any applicable fee agreement”; and provide detailed information about each timekeeper and their applicable rates and time spent. S.D. Fla. Local Rule 7.3(a). Even if the Court excuses Defendants’ Motion from these requirements because it requests a ruling on entitlement and not amount, it still fails to include the required certification of a good faith effort to resolve the issues as required by Local Rule 7.3(b).

By failing to comply with the Local Rules’ mandatory procedures for motions for attorneys’ fees, Defendants’ Motion should be denied. *See Hahn ex rel. Barta v. Linn County, Iowa*, 191 F. Supp. 2d 1051, 1065 (N.D. Iowa 2002) (denying motion for attorneys’ fees where defendants fail to comply with the local or federal rules).

**III. Defendants’ Motion should be denied because Mr. Tillman prevailed on his claim for Breach of Contract (Count II).**

Even if Defendants’ Motion was not premature and had complied with the applicable Local Rules, it still must be denied. Defendants’ argument regarding their entitlement to attorneys’ fees based upon the 2004 Representative Agreement ignores the fact Mr. Tillman prevailed on his claim for Breach of Contract (Count II) against Defendants. *See Jury Verdict [DE 241]*.

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<sup>1</sup> Mr. Tillman expressly reserves the right to file a motion for attorneys’ fees and costs *after* the Court enters Final Judgment in his favor.

As discussed above, the fact that Mr. Tillman did not obtain *all* of the relief sought against Defendants on his claim for Breach of Contract does not change the fact that he prevailed at trial and is the prevailing party for purposes of awarding attorneys' fees.

Iowa law, which the Court found applies to Mr. Tillman's claim for Breach of Contract, provides for the recovery of attorneys' fees when a prevailing employee recovers "unpaid wages or expenses." Iowa Code §91A.8.<sup>2</sup> Accordingly, "if an employer is held liable to an employee for unpaid wages or expenses, the employer is also liable for the usual and necessary fees of the employee's attorney. The employer bears this liability whether the failure to pay was intentional or otherwise." *Maday v. Elview-Stewart Sys. Co.*, 324 N.W.2d 467, 469 (Iowa 1982); *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 596 (Iowa 1999) ("An employer who fails to pay wages to an employee as required under the law is liable to the employee for the unpaid wages, court costs, and attorney fees incurred in the recovery of the unpaid wages.").

Mr. Tillman's Breach of Contract claim sought the payment of unpaid bonus and unpaid commissions, both of which are considered "wages" for purposes of Iowa law on the

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<sup>2</sup> Even under Florida law, the result is the same: Mr. Tillman is entitled to recover his attorneys' fees for prevailing and recovering commissions even though he did not recover all of his claimed commissions or on all of his claims. "Section 448.08, Florida Statutes (1985), provides as follows: 'The court may award to the prevailing party *in an action for unpaid wages* costs of the action and a reasonable attorney's fee.' Florida courts have held that the prevailing party in an action to recover unpaid periodic salary, unpaid sales commissions, an unpaid bonus, or unpaid severance pay—all allegedly due under a contract of employment for services rendered—is entitled to an award of attorney's fees under the above statute." *Coleman v. City of Hialeah*, 525 So. 2d 435, 436 (Fla. 3d DCA 1988) (footnotes omitted). "[A] party prevails within the meaning of section 448.08 when there is an affirmative judgment rendered, **even if it is for less than the amount claimed and recovery is not had on all counts.**" *Langford v. Paravant, Inc.*, 48 So. 3d 75, 76 (Fla. 5th DCA 2010) (reversing denial of attorneys' fees where plaintiff employee recovered only a portion of the unpaid commissions sought) (emphasis added, quoting *Community Design Corp. v. Antonell*, 459 So.2d 343, 346 (Fla. 3d DCA 1984), *review denied*, 469 So.2d 748 (Fla.1985)).

recovery of fees.<sup>3</sup> The fact Mr. Tillman recovered some, but not all, of his claimed wages does not change Mr. Tillman's entitlement to the recovery of his attorneys' fees from Defendants. *See Maday v. Elview-Stewart Sys. Co.*, 324 N.W.2d 467 (Iowa 1982) (holding that plaintiff was entitled to attorney fees pursuant to section 91A.8, even though the jury returned a verdict for plaintiff for only *some* of the unpaid commissions sought). Accordingly, Defendant, Advanced Public Safety, Inc. is not entitled to the recovery of its own legal fees pursuant to the language of the 2004 Representative Agreement.<sup>4</sup>

**IV. Defendants' Motion should be denied because Mr. Tillman's claim for Age Discrimination was not frivolous.**

Defendants' Motion makes the unsupported assertion that Mr. Tillman's claim for age discrimination under the Iowa Civil Rights Act was frivolous, ignoring the fact there were genuine issues of material fact that defeated Defendants' Motion for Summary Judgment. *See* Defendants' Motion for Final Summary Judgment [DE 136]; Order Denying Defendants' Motion as to Count V [DE 163] at p. 13.

The authority cited by Defendants supports the denial of Defendants' Motion. In *Hahn ex rel. Barta v. Linn County, Iowa*, 191 F. Supp. 2d 1051, 1065 (N.D. Iowa 2002), the Court recognized that "attorneys' fees are generally not recoverable by a prevailing defendant, even if the defendant prevails on the merits of the case." The *Hahn* Court, applying the familiar standard first established in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 5, 14 (1978) to a

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<sup>3</sup> *See Miller v. Component Homes, Inc.*, 356 N.W.2d 213, 216 (Iowa 1984) ("Wages' are defined as 'compensation owed by an employer for: a. Labor or services rendered by an employee, whether determined on a time, task, piece, commission, or other basis of calculation.'" (quoting Iowa Code §92A.2(2) (now §92A.2(4)); *Dallenbach v. MAPCO Gas Products, Inc.*, 459 N.W.2d 483, 487-89 (Iowa 1990) (holding that plaintiff's bonus, which was supposed to be paid pursuant to a contract, constituted "wages" under Iowa Wage Payment Collection Law).

<sup>4</sup> Separately, Defendants provide no basis for an award of fees in favor of Trimble, Inc. which is not a party to the 2004 Representative Agreement between Mr. Tillman and APS.

claim under the Iowa Civil Rights Act, denied the prevailing defendants' motion for fees, concluding: "[t]his was a close case and by no means a frivolous one. The plaintiffs survived two motions for summary judgment, demonstrating the genuine issues generated by their claims." *Id.* at 1064-65.

Courts in this circuit routinely deny motions for fees by prevailing defendants in civil rights cases, even where the defendants prevail on summary judgment. *Smith v. Miami-Dade County*, 13-21986-CIV, 2014 WL 11894427, at \*7 (S.D. Fla. Oct. 14, 2014), *report and recommendation adopted*, 13-CV-21986-UU, 2014 WL 11879594 (S.D. Fla. Dec. 1, 2014) ("[T]he cautionary language in Christiansburg that courts should not engage in the hindsight logic that the claims of a losing civil rights plaintiff must have been frivolous is particularly applicable here" where claims survived until they were defeated by a motion for summary judgment.).

The showing required to support a finding of frivolity is a stringent one, requiring that all evidence be viewed in the light most favorable to the non-prevailing plaintiff. *Johnson v. Florida*, 348 F.3d 1334, 1354–55 (11th Cir. 2003). All three of the factors the Court is to weigh to assess whether Mr. Tillman's claim was frivolous weigh in Mr. Tillman's favor. *Id.* (citing factors established by *Sullivan v. School Bd. of Pinellas County*, 773 F.2d 1182 (11th Cir.1985) as "(1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle; and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits.").

First, Mr. Tillman established a *prima facie* case as evidenced by the fact Defendants did not even move to dismiss Mr. Tillman's age discrimination claim. *See* Defendants' Partial Motion to Dismiss Amended Complaint [DE 49] (challenging Mr. Tillman's other claims,

including those in which he ultimately prevailed). Second, Defendants have offered no evidence that they made a reasonable settlement offer to resolve Mr. Tillman's age discrimination claim before trial. Third, the trial court did not dismiss the claim before trial and instead required a full-blown trial on the merits. *See* [DE 163].

Evidence was presented at trial, through the testimony of Mr. Tillman and the deposition testimony of Mark Sean Garrison, that Mr. Tillman was not paid commissions in similar circumstances in which Mark Sean Garrison, a younger co-worker, was paid. Additionally, evidence was presented at trial, through the testimony of Mr. Tillman and William Martin, that changes to Defendants' compensation policies were made that only impacted Mr. Tillman, who was the oldest member of the sales team. Even though Defendants ultimately prevailed on Mr. Tillman's age discrimination claim, Defendants fail to meet the "stringent" standard required to establish that Mr. Tillman's claim was frivolous when it survived summary judgment and required a jury to weigh the evidence.

For the foregoing reasons, Defendants' Motion should be denied.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 1, 2018, 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 identified on the below Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

*/s/Roger W. Feicht* \_\_\_\_\_

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