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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13800

D.C. Docket No. 7:12-cv-00089-HL

THOMAS HAYDEN BARNES,

Plaintiff - Appellant,

versus

RONALD M. ZACCARI,
individually and in his official capacity as
President of Valdosta State University,
VALDOSTA STATE UNIVERSITY,
BOARD OF REGENTS OF THE UNIVERSITY
SYSTEM OF GEORGIA,
LAVERNE GASKINS,
individually and in her official capacity as
in-house counsel at Valdosta State University,
KURT KEPPLER,
individually and in his official capacity as Vice President
for Student Affairs at Valdosta State University, et al.,

Defendants- Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(January 12, 2015)

Before JORDAN and BENAVIDES,[*] Circuit Judges, and BARTLE,[**] District Judge.

PER CURIAM:

I. BACKGROUND

This action was brought by Plaintiff-Appellant Thomas Hayden Barnes ("Barnes") against Valdosta State University ("VSU") and various VSU officials and employees, alleging constitutional and statutory violations and breach of contract. During the relevant time period in 2007, Barnes was a student at VSU.

Barnes had previously been enrolled at VSU in the fall of 2005 as a transfer student, but he subsequently left while on academic probation to attend paramedic school in Savannah, Georgia in 2006. In January 2007, Barnes re-enrolled at VSU and contacted the VSU Access Office, which provides services to students with disabilities, to register as an on-campus disabled student suffering from a panic disorder with agoraphobia. Dr. Kimberly Tanner, Director of the VSU Access Office, assisted Barnes in submitting the proper documentation of his disability and 1d

Chancellor, contacted Zaccari and informed him that she was concerned that Barnes might disrupt the Board meeting. Daniels asked campus police at Georgia Southern University, where the meeting was to be held, to provide additional security as a precaution.

On April 16, Zaccari learned of the fatal shootings that had taken place on Virginia Tech's campus. These fatal shootings caused Zaccari to have a heightened concern regarding campus safety at VSU. That same day, Barnes called Zaccari to request a meeting, and Zaccari met with Barnes at 5pm. Russ Mast ("Mast"), Dean of Students, was also present at this meeting. They discussed Barnes's opposition to the parking garage. Zaccari explained how VSU had approved the construction and funding of the parking garage. Zaccari felt that Barnes was unresponsive despite what he believed were attempts to have a productive discussion. Zaccari admitted that he was "stern" with Barnes. Zaccari told Barnes that he was "personally offended" by Barnes's activities and "didn't know what to do with [Barnes]." Zaccari "was upset that Hayden had [gone] to the members of the Board of Regents and [said] that he was embarrassed that [Barnes] did not come and talk to him about that." Ultimately, Barnes assured them that he did not plan to attend or protest at the board meeting.

After meeting with Barnes, Zaccari learned that Barnes had been writing about the parking garage on his Facebook page. Zaccari was subsequently given a

copy of what Barnes had posted on Facebook, a collage titled "S.A.V.E. – Zaccari Memorial Parking Garage," which included a picture of Zaccari. Zaccari told his staff that he felt threatened by the posting.

On April 19, VSU's newspaper published Barnes's letter to the editor criticizing the construction of the parking garage. On April 20, Zacc

function. Additionally, Tanner stated that Barnes had been admitted to VSU on academic probation.

Major Farmer took contemporaneous meeting notes that indicated that Mast suggested that the Facebook collage could be viewed as a veiled threat and used as a basis for a disorderly conduct withdrawal. It is not apparent to us that this collage on its face directly or indirectly expresses a threat or suggests that harm would come to Zaccari or anyone else. The notes also provided that Zaccari pointed out that board member Daniels had been so concerned about Barnes's phone calls that she had alerted the campus police department at Georgia Southern University prior to the board meeting.

At one point during the meeting, Major Farmer advised Zaccari to apply for a restraining order against Barnes if he felt threatened. However, Zaccari never applied

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Zaccari asked about administratively withdrawing Barnes, and Neely told him to do what he had to do to keep the campus safe and that they would worry about a lawsuit at a later date.[1]

On May 3, Zaccari met with Gaskins; Farmer; Keppler; Mast; Tanner; and Victor Morgan ("Morgan"), Director of VSU's Counseling Center. Zaccari said that if they were to proceed with a disorderly conduct withdrawal, they would have to convene a student-faculty review. Gaskins expressed concerns that Barnes was entitled to have a hearing. Zaccari then stated that if they implemented an administrative withdrawal, they needed to show a threat to Barnes himself or the community. Zaccari mentioned that they "must be concerned with First Amendment rights, but first we have to look at the safety issue. Ultimately, we have to have documentation to support that [Barnes] is a danger and a threat." He then asked the group, "How do we present to a third party that a threat exists?" Zaccari then stated that Barnes's putting up flyers, writing an apology letter, calling board members, and his writings on Facebook were "out of the norm."

Zaccari told the group that Neely had previously asked him why he did not withdraw Barnes immediately. However, Zaccari stated that he wanted to allow Barnes to finish final exams that week, and Zaccari "didn't want to cause an uproar that could cause a flashpoint."

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[1] After an administrative withdrawal, a student may be eligible to be readmitted to VSU. After an expulsion, generally speaking, a student is not eligible to be readmitted.

letter was coming from the President's office, it should be delivered by that department.

On May 7, at Zaccari's request, Gaskins drafted the letter to administratively withdraw Barnes. Gaskins attached a memo to Zaccari, explaining that Barnes was entitled to notice and a hearing. That same day, the letter was delivered to Barnes's dorm room, and it informed Barnes that "[a]s a result of recent activities directed towards me by you, included but not limited to the attached threatening document, you are considered to present a clear and present danger to this campus." The attached document was the above-mentioned collage posted by Barnes on Facebook. The letter provided that Barnes was administratively withdrawn from VSU effective that day.

indirectly or directly—to anyone on campus.[2] McMillan's letter also provided that if Barnes returned to VSU, she would continue seeing him in the counseling center. Dr. Winders's letter to the Board stated that he did not think that Barnes was violent or a threat to campus.

The Board requested a response from Zaccari regarding Barnes's administrative withdrawal. Zaccari drafted a response for the Board, and Gaskins assisted him in editing the letter, which was sent on June 21. On January 17, 2008, the Board set aside Barnes's administrative withdrawal without comment.

Meanwhile, on January 9, 2008, Barnes brought suit in the Northern District of Georgia against

court also granted Barnes summary judgment against the Board of Regents on his breach-of-contract claim. *Id.* at 1338.[3] The district court granted summary judgment in favor of the Defendants on the remaining claims, including Barnes's claim of retaliation for exercising his right to free speech under the First Amendment. *Id.* at 1326–38.

Zaccari and the Board of Regents filed an interlocutory appeal to this Court with respect to whether Zaccari was entitled to qualified immunity and whether the Board of Regents was entitled to Eleventh Amendment immunity. *Barnes v. Zaccari*, 669 F.3d 1295, 1298 (11th Cir. 2012).[4] This Court held that Zaccari was not entitled to qualified immunity because it was clearly established that although Barnes "was due some predeprivation process," he received none. *Id.* at 1308. However, this Court explained that the issue of whether Zaccari was entitled to qualified immunity did "not drop out of the case." *Id.* The Court further explained that the district court could "use a special verdict or written interrogatories to determine any disputed facts and the reasonable inferences drawn from those facts." *Id.* After resolution of the factual issues, Zaccari could raise his defense of qualified immunity in a motion for judgment as a matter of law. *Id.* With respect

[3] The court found that VSU was an improper party to the lawsuit. *Barnes*, 757 F.Supp.2d at 1334. The Board of Regents was the proper party to name as a defendant in the lawsuit. *Id.*

[4] Barnes filed a cross appeal, and this Court held that it did not have jurisdiction over those claims because the district court had not yet entered final judgment. *Barnes*, 669 F.3d at 1302 n.6.

to the breach-of-contract claim, this Court reversed the district court, holding that Georgia had not waived its sovereign immunity and thus, the district court did not have jurisdiction to reach the breach-of-contract claim against the Board of Regents. *Id.* at 1308–0991 T 0 Td2Bour4u04 5,iT1 n

Thus, the court ruled that Zaccari was not entitled to qualified immunity as a matter of law with respect to Barnes's claim of a procedural due process violation.

The district court awarded Barnes $407,242 in attorney's fees based on the successful prosecution of his claim of a procedural due process violation against Zaccari. Additionally, because the court ruled that Barnes's claims against McMillan, Gaskins, VSU, Keppler, Mast, and Morgan were frivolous, the court awarded those defendants $396,224.50 in attorney's fees.

Barnes now appeals the district court's grant of summary judgment with respect to (1) his retaliation claim against Zaccari, (2) the amount of attorney's fees awarded to him as the prevailing plaintiff, and (3) the award of attorney's fees to the Defendants. We hold that the district court erred in granting summary judgment in favor of Zaccari on the retaliation claim and therefore vacate and remand that claim to the district court. We also vacate and remand the judgment awarding attorney's fees to Barnes. We reverse the award of attorney's fees to McMillan, Keppler, Mast, and Gaskins. We vacate and remand the award of attorney's fees to Morgan and VSU for recalculation.

II. FIRST AMENDMENT RETALIATION CLAIM

Barnes argues that the district court erred in granting summary judgment in favor of Zaccari with respect to his First Amendment retaliation claim. This Court reviews a district court's grant of summary judgment *de novo* and views the evidence in the light most favorable to the non-moving party. *Castle v. Appalachian Technical Coll.*, 631 F.3d 1194, 1197 n.2 (11th Cir. 2011).

A. Individual Claim of Retaliation

This Court has explained that to state a claim for retaliation, the plaintiff "must establish first, that his speech or act was constitutionally protected; second, that the defendant's retaliatory conduct adversely affected the protected speech; and third, that there is a causal connection between the retaliatory actions and the adverse effect on speech." *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005). In his complaint before the district court, Barnes asserted that Zaccari retaliated against him by having him withdrawn from VSU for exercising his free speech rights under the First Amendment.[5] The district court specifically noted

agreement with anyone else to retaliate against Barnes for exercising his freedom of speech rights." *Id.* at 1333. More specifically, the court found that the "undisputed facts show that Zaccari alone made the decision to administratively withdraw Barnes from VSU." *Id*. at 1325. The court concluded that "Zaccari did not participate in any sort of conspiracy because no one would agree with [his] decision to withdraw Barnes." *Id.* at 1333. Accordingly, the court granted summary judgment in favor of Zaccari on the retaliation claim. We note that the court did not expressly reach the question of whether Zaccari retaliated against Barnes for exercising his free speech rights under the First Amendment. Instead, it held that there was no showing that Zaccari *conspired* with the other Defendants to retaliate against Barnes.

On appeal, Barnes argues that the district court erred in ruling that Count 3 of his complaint did not raise an individual retaliation claim against Zaccari. We must therefore determine whether Barnes's complaint raised an individual retaliation claim (as opposed to only raising a claim of conspiring to retaliate) against Zaccari. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint must give the defendants fair notice of the bases for relief and the grounds upon which the claim rests. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007).

Count 3 of the complaint is entitled "42 U.S.C. § 1983: Individual Liability Free Speech Clause Violation (Individual Defendants in Personal Capacity)." Complaint at 25. Although not dispositive, we note that the title of the claim did not refer to a conspiracy. In fact, the text of Count 3 had only one reference to a conspiracy, alleging that the "Defendants' actions in conspiring to expel Barnes from VSU were taken in retaliation for Barnes's exercise of his First Amendment freedoms." However, simply alleging a conspiracy is not enough to sufficiently plead a claim of conspiracy. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). In any event, we need not determine whether a conspiracy claim was adequately plead1 -2.2(of)4(a)12ea658 0 Td ( )Tj 0.004 T6r

substantial anger towards Barnes, especially regarding the fliers that previously were posted around campus"); *id.* ("Zaccari then decided to use the Facebook posting, along with his awareness that Barnes had availed himself of campus counseling services, to concoct a claim, in retaliation for Barnes's speech activities questioning his parking garage plans, that Barnes represented some kind of danger");[6] *id.* at 26 (Zaccari's "stated reasons for expelling Barnes from VSU were pretextual and had no rational basis, being wholly contradicted by the views of mental health professionals, communicated to [Zaccari], that Barnes posed no threat to self or others at any time").

Further, the record demonstrates that Zaccari received fair notice of Barnes's individual retaliation claim against him because Zaccari's briefing with respect to the motion to dismiss and the motion for summary judgment did not even mention a conspiracy claim. *See Erickson v. Pardus*

remand it to the district court to address in the first instance. *Cf. Branscomb v. Sec'y of the Navy*, 461 F. App'x 901, 906 (11th Cir. 2012) (per curiam) (remanding a retaliation claim to the district court to allow it to address the claim in the first instance).

B. Qualified Immunity as to First Amendment Retaliation Claim

Zaccari argues that he is entitled to the defense of qualified immunity because he withdrew Barnes from VSU based on Barnes's threatening behavior and perceived mental instability, and not because of Barnes's speech activities. The district court never addressed whether Zaccari was entitled to qualified immunity with respect to the First Amendment retaliation claim because it ruled that Barnes's complaint had not raised an individual claim of retaliation against Zaccari.[7] As set forth above, we are vacating and remanding the summary judgment on this First Amendment retaliation claim. Thus, on remand, the district court will have the opportunity to address whether Zaccari is entitled to qualified immunity on the retaliation claim. *See Hart v. Hodges*, 587 F.3d 1288, 1300 (11th

Cir. 2009) (explaining that because the issue of qualified immunity was not decided in the district court, the Court would remand it to allow the district court to decide it in the first instance).

III. ATTORNEY'S FEES

A. Attorney's Fees Award to Barnes

Barnes contends that the district court erroneously discounted the attorney's fees awarded to him as a prevailing plaintiff against Zaccari. In light of our holding that the district court erred in granting summary judgment against Barnes and in favor of Zaccari on the retaliation claim, we are remanding the claim to the district court. Accordingly, the attorney's fee award to Barnes will have to be recalculated once the retaliation claim is resolved. Nonetheless, in the interest of efficiency, we provide some guidance by addressing Barnes's arguments to the extent they may be relevant on remand. *See ACLU of Ga. v. Barnes*, 168 F.3d 423, 438 (11th Cir. 1999) (providing guidance for the recalculation of fees on remand).

The applicable statute, 42 U.S.C. § 1988, allows a district court to award attorney's fees to the prevailing party in civil rights cases brought under § 1983. The Supreme Court has explained that when a plaintiff succeeds in bringing a civil rights claim, "he serves as a private attorney general, vindicating a policy that Congress considered of the highest priority." *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) (internal quotation marks and citation omitted). Thus, a successful civil

rights plaintiff "'should ordinarily recover an attorney's fee'

hours claimed by Barnes's counsel was "appropriate" and that counsel "exercised appropriate billing judgment in the hours submitted to the Court. [Counsel] cut down the hours for which they seek fees from a raw number of 5,818.30 hours to 3,707.30 hours." Order at 53 (July 24, 2013) (citations omitted). Based on the submitted hours, the lodestar calculation was $1,012,587.25 in attorney's fees.

However, the district court found that the amount of attorney's fees under the lodestar approach was excessive. One of the reasons that the district court found the amount

determining the lodestar figure, it should not be reconsidered to further adjust the lodestar because "doing so amounts to double-counting").

B. Attorney's Fees Award to Defendants

Barnes also contends that the district court erred in awarding attorney's fees to the following Defendants: McMillan, Keppler, Mast, Gaskins, Morgan, and VSU.[9] As set forth above, a prevailing plaintiff should generally receive attorney's fees from the defendant in order to reimburse a plaintiff for what it cost him to vindicate his civil rights. *Fox*, 131 S. Ct. at 2213. On the other hand, with respect to a prevailing *defendant*, there is a different standard that reflects the very different equitable considerations at stake. *Id.* In 42 U.S.C. § 1988, Congress intended "to protect defendants from burdensome litigation having no legal or factual basis." *Id.* (internal quotations marks and citation omitted). Thus, a district court may award attorney's fees to a prevailing *defendant* in a § 1983 action if the plaintiff's claim was "frivolous, unreasonable, or without foundation." *Id.*; *Sullivan v. Sch. Bd. of Pinellas Cnty.*, 773 F.2d 1182, 1188 (11th Cir. 1985).

> With respect to determining whether a claim is frivolous, the Supreme Court has cautioned:[I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

[9] Barnes does not appeal the summary judgment in the Defendants' favor on the merits of the claims against them. *See supra* note 5.

claim. A "claim is not frivolous when it is 'meritorious enough to receive careful attention and review.'" *Cohen v. World Omni Fin. Corp.*, 457 F. App'x 822, 828 (11th Cir. 2012) (quoting *Busby v. City of Orlando*, 931 F.2d 764, 787 (11th Cir. 1991)). "Determinations regarding frivolity are to be made on a case-by-case basis." *Sullivan*, 773 F.2d at 1189.

1. District Court Rulings

With respect to the first factor, the district court held that Barnes failed to establish a prima facie case as to all six Defendants. With respect to the second factor, the court recognized that VSU had offered a $5,000 to settle all claims as to all Defendants.[10] Nonetheless, the court opined that that offer "can hardly be considered a serious settlement negotiation, considering that Barnes asserted damages for millions of dollars." Order at 35 (July 24, 2013). As for the third factor, none of the claims against these six Defendants went to trial. In considering the fourth factor, the district court stated that there "is no doubt that this case has been the subject of much judicial attention in the well over five years that it has been pending in federal court." Order at 27 (July 24, 2013). However, the court concluded that as to these six Defendants, the level of attention afforded the claims against them did not rise to a level of extended review that would render them non-frivolous.

[10] Gaskins and McMillan state that they never engaged in settlement negotiations.

2. Standard of Review

Accordingly, we must now determine whether the district court erred in ruling that Barnes's claims were frivolous. The parties agree that we review the determination of whether the claims were frivolous for abuse of discretion. *See Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1179 (11th Cir. 2005) (reviewing ruling that plaintiff's claims under the Americans with Disabilities Act were frivolous for abuse of discretion); *Bonner v. Mobile Energy Servs. Co.*, 246 F.3d 1303, 1304 (11th Cir. 2001) (same standard of review in Title VII case). Of course, a "'district court by definition abuses its discretion when it makes an error of law.'" *Quintana v. Jenne*, 414 F.3d 1306, 1309 (11th Cir. 2005) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

In determining whether a claim is frivolous, "we view the evidence in the light most favorable to the *non*-prevailing plaintiff." *Cordoba*, 419 F.3d at 1179 (emphasis in original). Thus, we view the evidence in the light most favorable to Barnes with respect to each Defendant in determining whether Barnes's claims against them were frivolous.

As set forth below, we are persuaded that the evidence against the six Defendants establishes that Barnes's claims against them were not frivolous. *Cf. id.* at 1181 (explaining that although the plaintiff's "case was exceedingly weak on this point, it was not so weak as to make it frivolous for her to argue that [her

supervisor's] knowledge of her disability presented a triable issue of fact"). The factors regarding frivolity are general guidelines only and not hard and fast rules. *Sullivan*, 773 F.3d at 1189.[11] Our precedent dictates that "[d]eterminations regarding frivolity are to be made on a case-by-case basis." *Id.* As explained below, we conclude that the district court erred as a matter of law by failing to view the evidence in the light most favorable to Barnes. When the evidence against the Defendants is viewed in the proper light, we conclude that the claims are not without foundation. In other words, it was not unreasonable for Barnes to believe that the Defendants participated in his withdrawal from VSU. *Cf. Bruce v. City of Gainesville, Ga.*, 177 F.3d 949, 952 (11th Cir. 1999) (finding that the plaintiff's belief that he was terminated because of his disability was not unreasonable

demonstrates that Barnes's claims against McMillan were not frivolous, unreasonable, or without foundation. Thus, we reverse the district court's judgment awarding attorney's fees to McMillan.

b. Keppler (Vice President of Student Affairs)

In determining that Keppler was entitled to attorney's fees, the district court relied upon Keppler's testimony that he had nothing to do with Zaccari's "final decision" to withdraw Barnes from VSU. Order at 41 (July 24, 2013). However, the district court ignored testimony that implicated Keppler in the decision to withdraw. There were notes from a meeting attended by Keppler and Zaccari that indicated that Keppler supported attempting to withdraw Barnes from VSU on an academic basis. F

Barnes to believe that Keppler participated in having Barnes withdrawn. Barnes's claims against McMillan were not frivolous, unreasonable, or without foundation. Therefore, we reverse the district court's judgment awarding attorney's fees to Keppler.

c. Mast (Dean of Students)

The district court awarded attorney's fees to Mast, stating that Barnes primarily relied upon "Mast's alleged lack of action and his omissions as opposed to any affirmative action." Order at 41 (July 24, 2013). The court further stated

could be used as a basis for withdrawal for disorderly conduct. Again, we note that although Mast testified that he did not give Zaccari the above-referenced image generated by Barnes and that he did not remember suggesting a basis for Barnes's withdrawal during the meeting, we must look at the evidence in the light most favorable to Barnes. In that light, we cannot say that Barnes's suit against Mast was frivolous, unreasonable, or without foundation. We therefore reverse the district court's judgment awarding attorney's fees to Mast.

d. Gaskins (VSU In-House Counsel)

Gaskins met with Zaccari on April 26, 2007, to discuss possible avenues for withdrawing Barnes from VSU. In her deposition, Gaskins admitted that she researched different VSU policies that could possibly be used to withdraw Barnes, and that she provided the results of that research to Zaccari. Gaskins also attended the May 3 meeting with Zaccari and other staff members in which Zaccari announced his decision to administratively withdraw Barnes.

"Collectively though, the group agreed that Barnes should be withdrawn on May 7, a full four days later." *Id.*[13]

At Zaccari's request, Gaskins drafted the letter that withdrew Barnes from VSU. On appeal, Gaskins relies heavily on the fact that she advised Zaccari in an attached memorandum that Barnes was entitled to a hearing. Although this evidence indicates that Gaskins did not participate in violating Barnes's due process rights, it does not mean that she had no involvement in assisting Zaccari in having Barnes withdrawn in retaliation for exercising his First Amendment rights. During his deposition, Mast te

was ultimately not enough to create a jury question with respect to discrimination on the basis of gender discrimination does not make [the plaintiff's] claim frivolous"), *with Cazares*, 638 F.2d at 1290 (upholding award of attorney's fees because "there was no material, admissible evidence to support [the plaintiff's] civil rights claim"). We therefore hold that the district court abused its discretion in ruling that Barnes's claims against McMillan, Keppler, Mast, and Gaskins were frivolous, and we reverse the court's judgment awarding attorney's fees to those Defendants. With respect to the fees awarded to Morgan and VSU, we vacate the judgment awarding those fees and remand to allow the district court to recalculate the attorney's fees award to reflect only the attorney's fees incurred because of

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FOR THE ELEVENTH CIRCUIT

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