IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE:	)	
	)	
JEFFERSON COUNTY,	)	Case No.:11-05736-TBB9
ALABAMA,	)	Chapter 9 Proceeding
	)	
Debtor.	)	

RESPONSE TO MEMORANDUM BRIEF OF ANNE-MARIE ADAMS

Respondents-- the Plaintiffs in the state court case of *Working v. Jefferson County Election Commission, et al.,* No. CV-2008-900316, and their counsel Albert L. Jordan and the law firm of Wallace Jordan Ratliff & Brandt, LLC-- hereby respond to the Memorandum Brief of Anne-Marie Adams (Doc. No. 2905) in support of her motion for Sanctions, etc. (Doc. 2898) (the "Motion"). Respondents organize this response by reference to the numbered sections of the Adams Memorandum.

I.

Adams incorrectly cites Ala. Code § 17-13-4, and its authorization for Jefferson County to pay election expenses, in support of her Motion. This statute does not apply because it provides for county payment of election expenses only when elections are "held under the provisions of this chapter...." The point of the underlying suit was that the disputed election should *not* have been conducted. Respondents won their point, established that the election scheduled for filling the county commissioner vacancy was illegal, and obtained an injunction against Adams, the Sheriff, and the Probate Judge-- who constitute the Election

Commission. Thus, in *Working v. Jefferson County Election Commission*, 2 So.3d 827 (Ala. 2008) ("*Working I*"), the Supreme Court held that Act No. 2007-488 (codified at Ala. Code § 11-3-1) repealed any authority in the "Election Commission" to schedule an election to fill a local office vacancy. The court wrote:

> Act No. [1977]-784, by purporting to provide for special elections to fill vacancies on the Jefferson County Commission, is "in conflict" with § 11-3-1(b), which requires vacancies to be filled by gubernatorial appointment, with no exception for preexisting local laws. Act No. 784, as a preexisting local law, therefore was repealed by the legislature's adoption of § 11-3-1(f). The trial court's validation of the February 5 special election on the basis that it was authorized by Act No. 784 is due to be reversed.

Id. at 841. Accordingly, the illegal election is not one for which the payment of expenses is authorized by Ala. Code § 17-13-4. Even if it were, that would not require Respondents to obtain payment of attorneys fees from Jefferson County.

Adams gains nothing in her misguided effort to show that Respondents' attorneys fee motion seeks county money by pointing to the fact that, in 2008, Jefferson County paid for ballots to be printed to include the commissioner vacancy. Respondents established their standing to sue as taxpayers in *Working I* precisely because Jefferson County was not supposed to be spending taxpayer money to print ballots for an unauthorized election to fill the commissioner vacancy. Thus, in *Working I*, the Supreme Court wrote: "The standing of taxpayers to challenge the expenditure of public funds extends to funds expended for holding elections not authorized by law." *Id.* at 833. And further in the *Working I* decision, the court

wrote: "[T]he challenge here is to the very holding of the election. It is a challenge to the election as one 'not authorized by law and therefore wholly void.'" *Id.* at 838.

Respondents' motion for attorneys fees does not require that she seek payment of her fees from County-owned, held, or controlled taxpayer funds, or from the funds that Adams improperly spent from the County treasury. Adams has not made that contention. Rather, she argues that Respondents may not seek fees from the State of Alabama, or its officials--like the Circuit Clerk, the Sheriff, and the Probate Judge in their election administration. That argument is dead wrong. Adams continues to overlook 42 U.S.C. § 1988.

II.

Adams still makes no mention of the statute which provides for attorneys fees, 42 U.S.C. § 1988. This statute permits the very thing that Adams seems to believe to be impossible-- relief against the State of Alabama and its officials. Respondents agree that, under the law of this case, the members of the Election Commission, in performing their duties to schedule and supervise election, act in a statutorily mandated and ministerial nature. Relief is not barred because Adams is due to act in a ministerial or statutorily mandated way, and she was found to have violated her duties under State law.

Section 1988 provides for a "prevailing party" to receive attorneys fees as part of costs "in any action or proceeding to enforce" 42 U.S.C. § 1983. It is undisputed that Working sought relief on the basis of federal law, and that the case was resolved in her favor without deciding her federal claim. Under those circumstances, the case is an action to enforce

§ 1983, and Working is a "prevailing party" entitled to fees. As explained in *Maher v. Gagne*, 448 U.S. 122 (1980):

> [T]he trial judge did not find any constitutional violation, [but] the constitutional issues remained in the case until the entire dispute was settled by the entry of a consent decree. ... We agree that Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim. ...

Id. at 131-32. Further, the Supreme Court reported that "Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act [if sued on alone]." *Id.* at 132 n.15. *See Lowery v. Thomas,* 575 So. 2d 1030 (Ala. 1990); *Davis v. Everett,* 443 So. 2d 1232 (Ala. 1983) (relief granted on state law grounds); *Canterbury Nursing Home, Inc. v. Alabama State Health Planning & Dev. Agency,* 425 So. 2d 1103 (Ala. 1983).[1]

It also is incorrect, as Adams notes on page 3 of her Memorandum, that Adams and the other members of the Election Commission were not sued in their individual capacities. Respondents assert they are due to pursue official capacity relief to the extent possible, before seeking individual relief. *See Spallone v. United States*, 493 U.S. 265, 279-80 (1990).

---

[1] Alabama's approach conforms to the understanding of other state courts on how to apply § 1988 when the case is resolved on state grounds, and federal law grounds are not resolved. *See Dawson v. Birenbaum,* 968 S.W.2d 663, 666-67 & n.3 (Ky. 1998) (citing *Davis v. Everett* and other jurisdictions); *Cepulonis v. Registrars of Voters of Worcester,* 488 N.E. 2d 1166 (Mass. 1986)(fees awarded, voting rights for inmates wrongly denied under State law); *County Executive of Prince George County v. Doe,* 479 A.2d 352, 358 (Md. 1984) (fees denied, refusal of abortion subsidy wrongfully stopped under State law)

III.

Adams wrongly invokes, on page 3 of her Memorandum, the 2013 decision of the Alabama Supreme Court in *Working v. Jefferson County Election Commission,* 2013 WL 6360938 (Ala. Dec. 6, 2013) (*"Working III"*) to bar "any recovery from the State" of attorneys fees. That case focused whether Adams and the other members of the Election Commission are not due to participate in mediation of Respondents' attorneys fees claims under Ala. Code § 6-6-20 because they made a proper "claim of immunity." The *Working III* decision did not hold, as Adams writes, that "Respondents may not seek any recovery from the State." She does not purport to quote from any portion of the *Working III* decision in making this argument.

In fact, the *Working III* case determined that further proceedings were needed in the trial court to address whether there was an immunity from Working's motion for award of attorneys fees pursuant to 42 U.S.C. § 1988 (at *1, citing *Working v. Jefferson County Election Commission,* 72 So. 3d 18, 20 (Ala. 2011) ("*Working II*")) ("Working plaintiffs filed a motion in the trial court seeking attorney fees under the common benefit doctrine and as a 'prevailing party' pursuant to 42 U.S.C. § 1988"). The *Working III* decision held that the "common benefit doctrine," as a State law ground for attorneys fees, was not available against State officials like the "Election Commission" officials because of the protection afforded by § 14 of the State Constitution. Working's basis for an award of attorneys fees, to the extent based on § 1988, was not blocked by immunity:

> In its order, the trial court discussed only § 6-6-20 and the claim of immunity under § 14 of the Alabama Constitution as to the Working plaintiffs' state-law claims; it did not address the Working plaintiffs' federal-law claims under § 6-6-20. Accordingly, the trial court has not completely complied with this Court's mandate in *Working II*. Therefore, we are again compelled to remand this cause with instructions that the trial court enter a new order addressing the Working plaintiffs' federal-law claims in compliance with § 6-6-20 and this Court's mandate in *Working II*.
>
> Based on the foregoing, we affirm the trial court's judgment on the issue of immunity and state-law claims, but we remand the case with instructions on the issue concerning § 6-6-20 and the federal-law claims.

2013 WL 6360938 at *6. *See also*, *id.* at *6-7 (Murdock, J., concurring in the result in part and dissenting in part) ("the attorneys fees permitted by 42 U.S.C. § 1988 are recoverable, notwithstanding a provision of a state constitution that might otherwise afford immunity to the party against whom the fees are sought.").

As noted in the Opposition filed January 2, at page 4 ¶ 6, the circuit court ruled with the concurrence of Adams's counsel that there was no bar to Respondents' § 1988 attorneys fee claim. In sum, the decision in *Working III* did nothing to prevent Respondents from seeking fees, to the extent the claim is based on § 1988.

Working's federal law claim for attorneys fees is made under 42 U.S.C. § 1988. It imposes an obligation to award "the prevailing party" attorneys fees as part of costs "[i]n any action or proceeding to enforce a provision of section[] ... 1983 ... of this title [42]." Section 1983 authorizes suit against "[e]very person who, under color of any statute ... of any State ... subjects ... any citizen of the United States or other person within the jurisdiction thereof

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws ...."

The immunity-abrogating power of § 1988 against a State is hornbook law. *See Missouri v. Jenkins by Agyei*, 491 U.S. 274, 279 (1989); *Hutto v. Finney*, 437 U.S. 678, 693-95 (1978); *Chapman v. Gooden*, 974 So. 2d 972, 991 (Ala. 2005). Accordingly, any immunity of the State provided to Adams and the other members of the Election Commission by § 14 of the Alabama Constitution, provides no protection against a judgment for attorney fees based on § 1988.

IV.

This immunity-abrogating power of § 1988 applies with full force to defenses grounded in the "Eleventh Amendment." This point is not subject to dispute, as noted explicitly in *Missouri v. Jenkins by Agyei*, 491 U.S. at 279, where the U.S. Supreme Court wrote: "[I]t must be accepted as settled that an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment." Moreover, the precedents applying the Eleventh Amendment to bar damages claims, were deemed inapt where the underlying § 1983 claims resulted in an injunction against State officials:

> In *Hutto v. Finney*, the lower courts had awarded attorney's fees against the State of Arkansas, in part pursuant to § 1988, in connection with litigation over the conditions of confinement in that State's prisons. The State contended that any such award was subject to the Eleventh Amendment's constraints on actions for damages payable from a State's treasury. We relied, in rejecting that contention, on the distinction drawn in our earlier cases between "retroactive monetary relief" and "prospective injunctive relief." *See Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 123

> (1908). Attorney's fees, we held, belonged to the latter category, because they constituted reimbursement of "expenses incurred in litigation seeking only prospective relief," rather than "retroactive liability for prelitigation conduct." *Hutto*, 437 U.S., at 695; *see also id.*, at 690. We explained: "Unlike ordinary 'retroactive' relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief." *Id.*, at 695, n. 24. Section 1988, we noted, fit easily into the longstanding practice of awarding "costs" against States, for the statute imposed the award of attorney's fees "as part of the costs." *Id.*, at 695-696, citing *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927).
>
> After *Hutto*, therefore, it must be accepted as settled that an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment.

491 U.S. at 278-79. Indeed, even if an award of attorneys fees under § 1988 were deemed to be damages, it would be permissible. However, because attorney fees are "part of costs," they have traditionally been awarded without regard for the States' Eleventh Amendment immunity." *Id.* at 279-80 (quoting *Hutto v. Finney*, 437 U.S. at 695).

Adams refers the Court, on pages 4 and 5, to precedents interpreting whether the underlying claim for damages relief *under § 1983* extends to the State. Thus, she cites *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (*en banc*), and asserts that a Georgia sheriff, as "an arm of the State," is "entitled to Eleventh Amendment immunity from claims brought under 42 U.S.C. § 1983."

Nothing in the *Manders* case purports to address the issue of attorneys fees ancillary to an award of prospective relief. In fact, in contrast with damages relief against a State official, injunctive relief against a State official under § 1983 has been held not to conflict

with the Eleventh Amendment. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). As explained in the *Will* case:

> [A] state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 U.S. [159,]167, n. 14; *Ex parte Young*, 209 U.S. 123159-160 (1908). This distinction is "commonplace in sovereign immunity doctrine," L. Tribe, *American Constitutional Law* § 3-27, p. 190, n.3 (2d ed. 1988), and would not have been foreign to the 19th-century Congress that enacted § 1983, *see, e.g., In re Ayers*, 123 U.S. 443, 506-507 (1887); *United States v. Lee*, 106 U.S. 196, 219-222 (1882); *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1876); *Osborn v. Bank of United States,* 9 Wheat. 738 (1824). . . . .

491 U.S. at 71 n.10 (limiting immunity from § 1983 relief to damage claims).

The *Working* case does not involve a claim for damages. It seeks attorneys fees ancillary to an award of prospective injunctive relief, as was approved in the § 1988 case decided the same term as the *Will* case, *Missouri v. Jenkins by Agyei*, *supra*.

Adams also cites *Ross v. Jefferson County Dept. of Health*, 701 F.3d 655 (11th Cir. 2012) for application of Eleventh Amendment immunity. Assuming that § 1988 would not abrogate, or make inapplicable, any immunity here, that case would not control because it does not involve a claim for injunctive relief available against a State official, which is plainly permitted under the *Will* case. The only defendant in that case was the Department of Health. *Id.* at 661.

Lastly, the assertion of a defense against attorneys fees based on the Eleventh Amendment was waived long ago. It is well-established that the defense may be waived. *See Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 389 (1998). The Eleventh

Amendment was not even mentioned in the case until the briefing in the *Working II* appeal. That kind of litigation conduct serves as a waiver. *See Lapides v. Board of Regents*, 535 U.S. 613 (2002). In this case, the Governor filed a pleading which asserted that the Election Commission had violated the State Constitution by scheduling the primary election to displace his appointee. That filing, alone, should bar an assertion of sovereign immunity by the Election Commission, given the Governor's status as the chief magistrate of the State. *See Ex parte State of Alabama,* 57 So. 3d 704, 719-20,722 (Ala. 2010).

Respectfully submitted this 6th day of January, 2015.

s/ Albert L. Jordan
Albert L. Jordan
Alabama Bar No. ASB-5222-D51A

s/ Susan E. McPherson
Susan E. McPherson
Alabama Bar No. ASB-9277-A59M

s/ Clark R. Hammond
Clark R. Hammond
Alabama Bar No. ASB-1550-D44C

OF COUNSEL:

Wallace Jordan Ratliff & Brandt, L.L.C.
Post Office Box 530910
Birmingham, Alabama 35253
Telephone: 205-870-05555
Facsimile: 205-871-7534
E-mail: bjordan@wallacejordan.com

Attorneys for Patricia Working, Rick Erdemir, and Floyd McGinnis

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2015, I served a copy of the *Response to Memorandum Brief of Anne-Marie Adams* by e-mail on the following as well as all counsel registered with the CM/ECF system:

Jefferson County, Alabama
c/o J. Patrick Darby
Bradley, Arant, Boult, Cummings, LLP
1819 Fifth Avenue North
Birmingham, Alabama 35203
pdarby@babc.com

Shawnna Smith
Brent G. Grainger
Jefferson County Attorneys Office
280 Jefferson County Courthouse
716 Richard Arrington Jr. Blvd. N.
Birmingham, Alabama 35203
smithsha@jccal.org
graingerb@jccal.org

French A. McMillan
Sewell & Sewell, LLC
1841 2nd Avenue, Suite 241
Jasper, Alabama 35501-5359
french@sewellandsewell.com

James E. Murrill, Jr.
Riley & Jackson, PC
3530 Independence Drive
Birmingham, Alabama 35209-5710
jay@rileyjacksonlaw.com

U.W. Clemon
White, Arnold & Dowd, P.C.
2025 Third Avenue North, Suite 500
Birmingham, Alabama 35203
uwclemon@waadlaw.com
hcthompson@whitearnolddowd.com

s/ Albert L. Jordan
Of Counsel