UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3455

(Summary Calendar)

LAGRANGE TRADING COMPANY,
d/b/a Airline Bookstore,

Plaintiff-Appellant,

versus

NICKY NICOLOSI,

Defendant,

AARON BROUSSARD and
CITY OF KENNER, LOUISIANA,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(90-CV-2306-J(1))

(June 22, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Lagrange Trading Company ("Lagrange") contends that the district court erred in finding that it was not a prevailing party for the purpose of receiving attorney's fees under 42 U.S.C. § 1988. Finding no clear error, we affirm.

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

Lagrange operated an adult bookstore at 1824 Airline Highway in Kenner, Louisiana. In October 1989, the City of Kenner adopted ordinance No. 6333, which provided zoning regulations for adult book/video stores and massage parlors. The ordinance required all existing adult bookstores to relocate within one year to a light or heavy industrial zone a certain distance away from other activities and required approval of the new location by the issuance of a special permit from the city council.

In June 1990, Lagrange filed suit pursuant to 42 U.S.C. § 1983 against the City of Kenner, Mayor Aaron Broussard, and Nicky Nicolosi, the Chief of the Inspection and Code Enforcement Department, seeking that the district court grant declaratory relief, preliminary and permanent injunctive relief by prohibiting the defendants from enforcing the ordinance, "which attempts to zone the Airline Bookstore . . . out of business at its present location." Lagrange also requested that the court declare the ordinance unconstitutional. The complaint listed eighteen reasons the zoning amendment was unconstitutional, one of which was that the special permit requirement granted unbridled discretion to city officials to deny approval for relocation.

The City of Kenner agreed to forego enforcement of the ordinance pending a "timely determination" of the suit. The court found the special-permit requirement of the ordinance unconstitutional, but concluded that with the permit provision severed, the remainder of the ordinance was constitutional. The

court then entered judgment against Lagrange and dismissed the complaint. Lagrange subsequently moved its adult bookstore to an industrially zoned location in the City of Kenner.

In November 1992, Lagrange filed a petition for award of attorney's fees. The magistrate judge recommended that the petition be denied because Lagrange was not a prevailing party within the meaning of 42 U.S.C. § 1988. The district court entered a final judgment adopting the findings and recommendation of the magistrate judge, from which Lagrange timely appealed.

II

The sole issue on appeal is whether the district court erred in finding that Lagrange was not a prevailing party. The determination whether a plaintiff is a prevailing party is a question of fact, which we review for clear error. *See Watkins v. Fordice,* 7 F.3d 453, 457 (5th Cir. 1993) (reviewing a finding that a plaintiff was a prevailing party for clear error); *see also White v. City of Richmond,* 713 F.2d 458, 460 (9th Cir. 1983) (stating that the district court's determination of whether plaintiffs were prevailing parties would "not be set aside unless clearly erroneous"). "[A] finding is `clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.,* 105 S. Ct. 1504, 1511 (1985) (attribution omitted). "If the district court's account of the evidence is plausible in light of

the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.*

Only "prevailing parties" may recover attorney's fees under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. *Watkins,* 7 F.3d at 456. To be considered a prevailing party within the meaning of § 1988, actual relief on the merits of the plaintiff's claim must materially alter the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Farrar v. Hobby,* 113 S. Ct. 566, 573 (1992). "Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Id.*

In *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 109 S. Ct. 1486 (1989), the plaintiffs challenged the school district's policy of prohibiting communications by or with teachers concerning employee organizations during the school day. *Id.* at 1490. The district court found for the plaintiffs regarding only one of the challenged provisions, declaring a regulation requiring that nonschool hour meetings be conducted only with prior approval from the local school principal unconstitutionally vague. *Id.* at 1493. The district court noted that there was no evidence that the plaintiffs were ever refused permission to use school premises during nonschool hours and that the issue itself was "of minor significance." *Id.* We affirmed that holding, but also found other

restrictions unconstitutional. *Id.* The Supreme Court, in discussing the district court's original holding, stated that if this had been plaintiffs' only success in the litigation, "this alone would not have rendered them `prevailing parties' within the meaning of § 1988." *Id.*

Similarly, there is no evidence that Lagrange was ever denied permission to relocate based on a failure to receive a special permit. Moreover, it must be emphasized that Lagrange sought injunctive relief which would allow it to remain at the Airline Highway location. By declaring the ordinance constitutional save for the special permit requirement, the district court failed to grant the relief sought by Lagrange. Thus, any relief which Lagrange may have gained was only of minor significance, particularly because the special permit requirement was never enforced by the City of Kenner against Lagrange, even before the district court found the provision to be unconstitutionally vague. We therefore hold that it was plausible for the district court to have found that the removal of the special permit requirement did not materially alter the legal relationship between the parties to Lagrange's benefit. Thus, the court's factual finding was not clearly erroneous.

III

Accordingly, we AFFIRM the judgment of the district court.