IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20737
Summary Calendar

FREDERICK J. KEVETTER,

Plaintiff-Appellant,

v.

RUBEN LUGO-RIGAU, ET AL.

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 91 2397)

July 7, 1995

Before KING, JOLLY, and SMITH, Circuit Judges.

PER CURIAM:[*]

Frederick J. Kevetter appeals the district court's decision denying him an award of attorney's fees for a series of motions filed after a settlement agreement between Kevetter and Texas Southern University was breached.

I. BACKGROUND

---

[*]Local Rule 47.5 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

From 1988 to 1992, Kevetter was a student at Texas Southern University's Thurgood Marshall School of Law, a state-supported institution. In his initial complaint, Kevetter alleged that during the period he attended law school, both law school personnel and the school administration participated in discriminatory actions which deprived Kevetter of his rights under the Fifth and Fourteenth Amendments of the United States Constitution, the Rehabilitation Act of 1975, 42 U.S.C. §§ 6101-07, and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1988. In addition to these claims, Kevetter brought suit seeking relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. Kevetter invoked federal jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3).

After the trial court denied a motion to dismiss filed by the law school, the two parties entered into arbitration. The settlement the parties eventually agreed upon provided that Kevetter was to receive $90,000 and that law school officials would not alter Kevetter's school record. The morning the agreement was signed, the law school changed a grade of "Incomplete" in a course Kevetter had taken to a grade of "C". Kevetter then moved to reinstate his claim, alleging the change constituted a breach of the settlement. The district court reinstated the claim and soon thereafter issued a conditional order directing the law school to comply with the settlement agreement by returning the status of the course to "Incomplete." Nonetheless, the district court found that the law school's

breach was inadvertent and owing in part to Kevetter's failure to bring the status of his grade to the law school's attention. Further, the court denied Kevetter's request for attorney's fees incurred in moving for reinstatement. Kevetter then filed motions for entry of final judgment and to reinstate his case, both of which were denied.

On appeal, Kevetter contends that the trial judge's refusal to award attorney's fees is erroneous on three grounds: (1) Section 38.001 of the Texas Civil Practice and Remedies Code bars judges from denying a proper request for attorney's fees based on an oral or written contract breach; (2) the trial judge's conclusion that Kevetter was partially to blame for the law school's breach of the settlement agreement was unsupported by the evidence in the record; and (3) the trial judge did not give the required deference to a prevailing plaintiff's request for attorney's fees in a complaint originally brought to remedy alleged civil rights deprivations. Kevetter argues that this alleged failure on the part of the trial judge amounts to an abuse of discretion.

The law school counters that Section 38.001 of the Texas Civil Practice and Remedies Code does not apply to the state or its agencies. Because Texas Southern University is a state institution, the school argues, its law school is immune from liability for attorney's fees under § 38.001. Additionally, the law school contends that the trial court's determination that

Kevetter was partly to blame for the breach of contract was supported by sufficient evidence.

II. STANDARD OF REVIEW

A district court's findings of fact must be accepted unless clearly erroneous; a district court's conclusions of law are reviewable de novo. Prudhomme v. Tenneco Oil Co., 955 F.2d 390, 392 (5th Cir.), cert. denied, 113 S.Ct. 84 (1992).

III. ANALYSIS

With regard to Kevetter's first point of error, Section 38.001 of the Texas Civil Practice and Remedies Code provides in pertinent part, "[a] person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract." TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1986). Under § 38.001, a trial court has discretion in determining the amount of recoverable attorney's fees. Smith v. United Nat. Bank, 966 F.2d 973, 978 (5th Cir. 1992). A trial court does not, however, have the discretion to deny attorney's fees entirely. Id. Despite the clear mandate of § 38.001, the wording of the section has not been held to apply to the state or its agencies. State v. Bodisch, 775 S.W.2d 73, 75 (Tex. App.--Austin, 1989, writ denied). State universities and colleges, including Texas Southern University, are agencies of the state. See TEX. EDUC. CODE ANN. §§ 65.02(a)(7), 74.101 (Vernon 1991); see also Sparks v. Texas Southern Univ., 824 S.W.2d 328, 330

(Tex. App.--Houston [1st Dist.] 1992, n.w.h.). Section 38.001 only permits a party to recover attorney's fees from an "individual or corporation." The language of § 38.001 thus precludes recovery of attorney's fees from Texas Southern University because the state and its agencies are neither individuals nor corporations. Bodisch 775 S.W.2d at 75; see also Dallas Area Rapid Transit v. Plummer, 841 S.W.2d 870, 875 (Tex. App.--Dallas 1992, writ denied).

Further, it is not incumbent upon Texas Southern University to have plead its affirmative defense of immunity from an award of attorney's fees at the trial level. Because attorney's fees may not be awarded unless provided for by statute or by agreement between the parties, a plaintiff has the burden to prove his cause of action for attorney's fees. See Texas Employment Comm. v. Camarena, 710 S.W.2d 665, 670 (Tex. App.--Austin 1986), aff'd in part, rev'd in part on other grounds, 754 S.W.2d 149 (Tex. 1988); see also Bodisch, 775 S.W.2d at 76. As Kevetter's request for attorney's fees is erroneously based on § 38.001 and there is no indication of an agreement providing for such fees between the parties, Kevetter's cause of action on appeal must fail. Accordingly, the district court correctly denied Kevetter's request for mandatory attorney's fees pursuant to Texas Civil Practice and Remedies Code § 38.001.

With regard to Kevetter's second point of error, a district court's finding of fact is clearly erroneous when, although there is enough evidence to support it, the reviewing court is left

with a firm and definite conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Henderson v. Belknap (In re Henderson), 18 F.3d 1305, 1307 (5th Cir. 1994), cert. denied, 115 S.Ct. 573 (1994). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, an appellate court may not reverse it even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. Anderson v. City of Bessemer City, 470 U.S. 564, 573-574 (1985). In the case at bar, the district court's finding that Kevetter's failure to inform the law school that he had an outstanding "Incomplete" grade was a partial cause of the breach is plausible in light of Kevetter's own testimony that he knew the status of his grade before the settlement was signed. Moreover, in light of the testimony of the defense attorney that the law school only changed the grade as a "housekeeping measure," it is also plausible that the law school did not intentionally breach the settlement agreement, but only did so inadvertently. Accordingly, the district court's finding is not clearly erroneous.

With regard to Kevetter's third point of error, although prevailing parties in a civil rights case should ordinarily be awarded attorney's fees, see Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1967), Kevetter is not a prevailing party on a civil rights claim. The settlement agreement specifically disavows any liability on the law school's part for allegedly

unconstitutional discrimination. While Kevetter's cause of action was initially based on alleged instances of constitutional deprivation, there has been no trial or admission of guilt on these claims. The district court's order that the law school comply with the settlement agreement and its later refusal to reinstate Kevetter's claim after the school complied with the agreement were rightfully limited to the contractual terms at issue -- namely, whether the school had altered Kevetter's school record after the agreement was signed. Accordingly, we find no abuse of discretion on the part of the district court.

IV. CONCLUSION

For the foregoing reasons, the district court's judgment is AFFIRMED.