UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES D. MacMILLAN,	)	1:87 CV 2820
Plaintiff,	)	
- vs -	)	ORDER
CITY OF ROCKY RIVER, et al.,	)	
Defendants.	)	

Battisti, J.

On September 21, 1990, an order was issued addressing the parties cross motions for summary judgement in the instant case. The court ruled that the Rocky River municipal ordinances in question were facially valid, but as applied were preempted by PRB-1, an FCC regulation. In so ruling, the court declined to reach the constitutional issues raised by the Plaintiff, James D. MacMillan. Plaintiff was left to seek his amateur radio antenna permit under the codified Rocky River procedures, and Defendants were instructed that future decisionmaking in this area must include "a reasonable accommodation of the federal government's interest in amateur radio communications," as expressed in PRB-1.

With the issue of the ordinances' validity addressed, all that remained for consideration was the Plaintiff's request for damages. Accordingly, the parties were requested to brief

any remaining claims for damages.[1]

Since Plaintiff's subsequent brief raised only the issue of attorney's fees under 42 U.S.C. § 1988, the court assumes that this is the only issue remaining for disposition.

Section 1988 states, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Plaintiff claims that although the court did not rule on any of his constitutional claims, he is entitled to attorney's fees as discussed in Maher v. Gagne, 448 U.S. 122, 130-32 (1980).

Although Maher explores the intended scope of § 1988, Seaway Drive-In, Inc. v. Township of Clay, 791 F.2d 447 (6th Cir. 1986), cert. denied 479 U.S. 884 (1987), is more relevant to the present inquiry. Seaway Drive-In explains the Sixth Circuit's application of Maher, as well as, the Supreme Court's later holdings in Smith v. Robinson, 468 U.S. 992 (1984), and Hensley v. Eckerhart, 461 U.S. 424 (1983).

In Seaway Drive-In, the plaintiff challenged a town ordinance that regulated drive-ins. 791 F.2d at 449. A preliminary injunction and eventual consent decree were based upon state law claims, obviating the need for the district

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[1] The court had held that the Defendants were entitled to qualified immunity with regard to the claims against them in their individual capacity.

court to consider the plaintiff's constitutional challenges. Id. The district court declined to award § 1988 attorney's fees and the court of appeals reversed. Id. at 455. Seaway Drive-In is analogous to the instant case in which the court did not reach the Plaintiff's constitutional challenges due to the presence of a dispositive non-fee claim.

The Seaway Drive-In court began its analysis by citing the following passage from Maher.

> The legislative history [of § 1988] makes it clear 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. The Report of the Committee on the Judiciary of the House of Representatives accompanying H.R. 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:
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> > To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding fees. Morales v. Haines, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagens v. Lavine, 415 U.S. 528 [94 S.Ct. 1372, 39 L.Ed.2d 577] (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see Hagens v. Lavine, supra; United Mine Workers v. Gibbs, 383 U.S. 715 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966), attorney's fees may be allowed even though the court declines to enter judgement for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' United Mine Workers v. Gibbs, supra, at 725 [86 S.Ct. at 1138]. H.R.Rep. No. 94-1558, p. 4, n. 7 (1976).

448 U.S. at 132, n. 15 (cited at 791 F.2d at 451).

The court equated the test laid out in the legislative history -- i.e. the requirements that the fee claim be substantial and that the fee and non-fee claims arise out of a common nucleus of operative -- with that used to determine whether a court has pendent jurisdiction over state law claims. Seaway Drive-In, 791 F.2d at 452. In addition, it held that the district court had erred in basing its substantiality determination on whether the fee claims could survive a motion for summary judgement at the time of the consent decree. Id. Under the proper substantiality test, a claim is only "insubstantial if it is 'obviously without merit' or if 'its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" Id. (citing Hagans, 415 U.S. at 537).[2]

Based upon the Sixth Circuit's construction of the Maher test, this court finds that Plaintiff's constitutional claims were both substantial and arising out of a nucleus of

[2] Further the court stated that "[t]he claim must be 'so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court] or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits.'" Seaway Drive-In, Inc. v. Township of Clay, 791 F.2d 447, 452 (6th Cir. 1986), cert. denied 479 U.S. 884 (1987), (citing Hagans v. Lavine, 415 U.S. 528, 543 (1974)).

operative fact common to both the fee and non-fee claims.[3]

Finally, the Defendants make the unfounded claim that the Plaintiff is not a prevailing party. The plaintiff is considered to have prevailed if there is "some actual benefit to the plaintiff either in terms of monetary damages, injunctive relief, or a voluntary change in defendant's conduct." Wooldridge v Marlene Industries Corp., 898 F.2d 1169, 1174 (6th Cir. 1990).

Plaintiff's claims all involved a challenge to the review process to which he was subjected. The court determined that the process was flawed, but only reached

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[3] The Defendants raise Smith v. Robinson, 468 U.S. 992 (1984), as a basis for denying attorney's fees. The Sixth Circuit addressed both Smith and Hensley v. Eckerhart, 461 U.S. 424 (1983), in Seaway Drive-In, Inc. v. Township of Clay, 791 F.2d 447, 453-55 (6th Cir. 1986), cert. denied 479 U.S. 884 (1987).

Smith involved plaintiff seeking district court review of an adverse agency ruling on numerous non-fee grounds. The only fee claim was a due process attack on the administrative proceedings themselves. The due process claim sought only to prevent further state hearings under the challenged regulation. The Court's holding, therefore, that a fee award was inappropriate was based on the fact that "the due process claim and the substantive claim on which plaintiffs ultimately prevailed involved entirely separate legal theories and, more important, would have warranted entirely different relief." Smith, 468 U.S. at 1015.

The Sixth Circuit viewed Hensley as reaching a similar holding. "Hensley makes clear that the purpose of the 'relationship between the claims' element of the fees award test is to prevent the award of fees in those cases where the fee and non-fee claims are aimed at achieving different results or where they are based on different facts and different legal theories." Seaway Drive-In, 791 F.2d at 455.

Neither of these cases is analogous to the instant case. The constitutional claims in this case arose from the same local review process. In addition, the relief available in each was substantially similar.

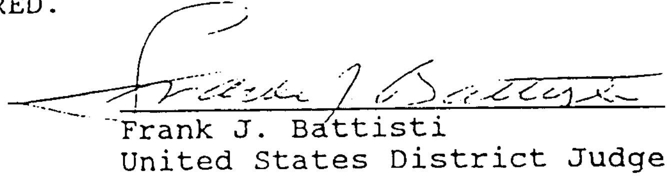
Plaintiff's preemption claim. Plaintiff has, therefore, succeeded in obtaining a new hearing in which the federal interest in amateur radio operation is to be seriously considered. This should lead to a hearing process which is substantially different from Plaintiff's last hearing.

Defendants make the alarming allegation that the new review "is consistent with and is not a material alteration of previous consideration of PRB-1 by ROCKY RIVER." This statement is followed by a citations to the transcript of the prior review which indicates that PRB-1 and technical data were submitted for consideration. The Defendants ought not to think that they will comply with this court's order by merely going through the motions of denying Mr. MacMillan another permit. Any decision to disregard the federal interests raised in PRB-1 must be based upon substantial justification and explained in the record. Defendants should keep in mind that after this litigation it may be more difficult to support a claim for qualified immunity if they once again fail to sufficiently consider the federal interests involved.

Plaintiff's motion for § 1988 attorney's fees is GRANTED. Plaintiff is instructed to submit a reasonable accounting of his fees in this case within thirty days of the issuance of

this order.

IT IS SO ORDERED.



Frank J. Battisti
United States District Judge