IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARK DUWE, ANDREW BOURDO,
MARY STROSIN, JAMES DRAGANI,
RITA DRAGANI, AMY GEHRKE,
MARY BAXA, MICHAEL BAXA and
WISCONSIN RIGHT TO LIFE, INC.,

Plaintiffs,

v.

MEMORANDUM AND ORDER

06-C-766-S

JAMES C. ALEXANDER, LARRY BUSSAN,
GINGER ALDEN, DONALD LEO BACH,
JENNIFER MORALES, JOHN R. DAWSON,
GREGORY A. PETERSON, WILLIAM VANDER LOOP,
MICHAEL R. MILLER, JAMES HANEY and
KEITH L. SELLEN,

Defendants.

Plaintiff Wisconsin Right to Life, Inc., a non-profit organization interested in surveying candidates for Wisconsin judgeships and publishing results of those surveys, commenced this action against members of the Wisconsin Judicial Commission to declare unconstitutional five Wisconsin Supreme Court Rules which regulate the conduct of candidates for judicial office. Individual plaintiffs are voters interested in seeing survey results. On May 29, 2007 the Court resolved all issues in the case, cross motions to dismiss and for summary judgment. It ruled that one of the challenged statutes was facially unconstitutional, that another was unconstitutional as applied to plaintiffs' survey and that three were constitutional, but had no application to limit judicial candidates in their ability to respond to the survey.

The matter is presently before the Court on plaintiffs' motion to recover attorneys fees pursuant to 42 U.S.C. § 1988(b) as a "prevailing party." Plaintiffs seek fees and costs in the total amount of $135,066.66. Defendants contend that plaintiffs did not achieve sufficient success to warrant prevailing party status. Alternatively, defendants ask that the award be reduced to account for plaintiffs' limited success. Defendants do not contest the reasonableness of the hours billed and hourly rates, except as it relates to their limited success argument.

Section 1988 provides that "[i]n any action or proceeding to enforce a provision of section[] . . . 1983 of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." For plaintiffs to be considered prevailing they "must obtain at least some relief on the merits of [their] claim" sufficient to "materially alter[] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits" plaintiffs. Farrar v. Hobby, 506 U.S. 103, 111-12 (1992).

A plaintiff who achieves only limited success does not lose status as a prevailing party, however the degree of success is considered in assessing the amount of the award. Where plaintiffs partially prevail on single or closely related claims the Court must look to the "overall results obtained." Connolly v. National School Bus Service, Inc., 177 F.3d 593, 598 (7th Cir. 1999).

> Thus, in determining the degree of success a plaintiff has obtained, this Court has used a three-part test derived from Justice O'Connor's concurrence in *Farrar*, 506 U.S. at 121-122. Under this test, "we look at the difference between the judgment recovered and the recovery sought, the significance of the legal issues on which the plaintiff prevailed and, finally, the public purpose served by the litigation."

Id. (quoting Cartwright v. Stamper, 7 F.3d 106, 109 (7th Cir. 1993)).

Considering the purpose of the action and the overall result obtained the Court finds that plaintiffs prevailed and that there is no basis to reduce the fee award for limitation of success. Judicial candidates had repeatedly refused to respond to plaintiffs' survey on the basis of the challenged rules, at least two of which reasonably appeared to prohibit a response. Judicial Advisory Committee opinion 06-1R bolstered the reluctance of candidates to speak. Under these circumstances it is not surprising that candidates, including those who expressly avowed an interest in responding, refused to respond for fear of repercussions under the rules. As a result of the rulings in this case, all doubts concerning the legality of responding to the survey have been removed. Candidates who wish to respond may now do so free of the fear of prosecution. Candidates who do not wish to respond may not use the rules as a justification for their decision to remain silent. In short, plaintiffs fully achieved the object of the suit.

Defendants emphasize two points in opposition. First, that the plaintiffs failed to obtain a declaration of unconstitutionality as to three of the five provisions. Second, that there was no real modification of defendants' behavior because defendants had not previously indicated their intent to prosecute survey respondents, therefore the result did not modify their behavior. Neither position withstands scrutiny.

Concerning the first argument, the principal rules under attack were those which the Court found unconstitutional. The three rules which were not found unconstitutional were less important, yet reasonably raised in the suit because of their mention in Judicial Advisory Committee opinion 06-1R and the likely chilling effect of that opinion on potential respondents. By obtaining a judicial determination that none of these provisions could be constitutionally applied against survey respondents plaintiffs removed all impediments to the desired speech. Nor, in light of the standing advisory opinion, can plaintiffs be faulted for including those rules in the action which were not found to be unconstitutional.

Concerning the second argument, the action did alter the legal relationship between the parties. It may be that defendants would not have pursued a violation of the rules against a judicial candidate who responded to the survey. However, the matter could not be tested until a candidate exposed him or herself to potential

prosecution. Plaintiffs were not in a position to compel such a case. One alternative mechanism (recommended by defendants in at least one instance) was to refer the matter to the advisory committee, however that alternative served to heighten the concern that prosecution was likely. The present suit was the only available mechanism to definitively resolve defendants' authority to prosecute candidate respondents. As a result of the action it is clear that defendants lack that authority, significantly altering the legal relationship of the parties. Viewed in terms of the three factors set forth in Cartwright, plaintiffs achieved substantially all that they hoped to accomplish by the suit, significantly impacted judicial candidates' right to speak and not only enabled responses to the survey, but expanded the potential breadth of speech in Wisconsin judicial races.

ORDER

IT IS ORDERED that plaintiffs are awarded fees and costs in the total amount of $135,066.66 and that judgment be amended accordingly.

Entered this 10th day of August, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge