

ENTERED

December 07, 2016

David J. Bradley, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

DAVID BAILEY, et al,

Plaintiffs,

VS.

BRYAN COLLIER, et al,

Defendants.

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CIVIL ACTION NO. 4:14-CV-1698

ORDER

On June 21, 2016, the Court partially granted Plaintiffs’ Emergency Motion for Preliminary Injunction (Doc. No. 434), ordering the Texas Department of Criminal Justice “to provide drinking water to the [prison] inmates at the Wallace Pack Unit [in Navasota, Texas] that conforms with EPA maximum contaminant level requirements....” (Doc. No. 477 at 15.) The preliminary injunction was in effect until September 22, 2016, and was not renewed at that time. Defendants appealed the injunction, but the Fifth Circuit has not yet ruled. Litigation as to the underlying issue in this case—the high temperatures in Texas prisons during the summer months—is ongoing.

Pending before the Court is Plaintiffs’ Amended First Motion for Attorneys’ Fees. (Doc. No. 484.) Plaintiffs contend that, because the Court entered a preliminary injunction with regard to the arsenic-laden water, they are “prevailing parties” under 42 U.S.C. § 1988(b) and are entitled to attorney’s fees. The Court finds and holds that Plaintiffs’ motion is premature and must be denied.

The governing statute, 42 U.S.C. § 1988(b), provides that “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee....” In

Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, the Supreme Court stated that a prevailing party exists when there is a “judicially sanctioned change in the legal relationships of the parties.” 532 U.S. 598, 605 (2001). Since *Buckhannon*, the Fifth Circuit has not decided under what circumstances a preliminary injunction may meet the prevailing party standard and support an award of attorney’s fees. However, a number of circuit courts have addressed the issue, and the Fifth Circuit reviewed the varying analyses in *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 480 F.3d 734 (2007).

For example, the Eleventh Circuit has stated that “a preliminary injunction on the merits, as opposed to a merely temporary order which decides no substantive issues but merely maintains the status quo, entitles one to prevailing party status and an award of attorney’s fees.” *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987). However, attorneys’ fees will not be awarded if it is later determined that the preliminary injunction was granted as a result of a “mistake in law.” *Id.* The Seventh Circuit has held that a preliminary injunction may lead to prevailing party status if the plaintiff obtains “substantive relief that is not defeasible by further proceedings” and the case is mooted after the preliminary injunction is granted. *Dupuy v. Samuels*, 423 F.3d 714, 719 (7th Cir. 2005). The D.C. Circuit determined that a preliminary injunction suffices for prevailing party status if the plaintiff obtains substantial relief and the defendant does not appeal the injunction. *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945 (D.C.Cir. 2005). And the Ninth Circuit has found that a preliminary injunction “carries all the ‘judicial imprimatur’ necessary to satisfy *Buckhannon*.” *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002). The Ninth Circuit noted, however, that if a plaintiff secures a preliminary injunction but subsequently loses on the merits, the plaintiff would not be a

prevailing party. *Id.* at 1096.

The Fifth Circuit did not select an approach from those outlined in *Planned Parenthood* because it found that the plaintiffs did not qualify as prevailing parties under any of the existing tests. *Id.* at 741.

Although it is possible that Plaintiffs in this case will eventually qualify as a “prevailing party” on the basis of the preliminary injunction, the Court cannot make that determination at this stage. Several of the tests described above look to information that is not yet available in this case, such as whether the preliminary injunction is upheld on appeal, or whether the plaintiffs ultimately prevail on the merits of their case. Other tests require showings that are directly contradicted in this case, such as the case having been mooted or the defendants having failed to appeal the injunction. As a result, the Court lacks sufficient information to determine whether Plaintiffs are “prevailing parties” entitled to attorneys’ fees at this time.

For these reasons, Plaintiffs’ Amended First Motion for Attorneys’ Fees is **DENIED**.

IT IS SO ORDERED.

SIGNED at Houston, Texas on the 7th of December, 2016.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE