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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-215672

DATE: March 18, 1985

MATTER OF: Albert D. Parker

- DIGEST:**
1. In view of authority granted to the Equal Employment Opportunity Commission by statute, the Comptroller General does not render decisions on the merits of, or conduct investigations into, allegations of discrimination (including age discrimination) in employment in other agencies of the Government. However, based upon the authority to determine the legality of expenditures of appropriated funds, he may determine the legality of awards agreed to by agencies in informal settlements of discrimination complaints.
 2. An agency may settle a discrimination complaint informally for an amount which does not exceed the maximum amount that would be recoverable under Title VII of the Civil Rights Act, if a finding of discrimination were made. The amount that can be awarded under an informal settlement must be related to backpay and generally cannot exceed the gross amount of backpay less any interim earnings. The Equal Employment Opportunity Commission regulations direct use of the same standards in computing amounts payable in age discrimination cases. Therefore, an agency does not have the authority to make an award in informal settlement of an age discrimination complaint to the extent it exceeds the amount of backpay which could be recovered if a finding of discrimination were made.
 3. An amount agreed to in compromise settlement at the administrative level of a Federal employee's complaint under the Age Discrimination in Employment Act may not include attorney fees and costs. In 59 Comp. Gen. 728 (1980) the Comptroller General indicated that he would not object if regulations were promulgated authorizing Federal agencies

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to pay attorney fees in settling such cases. However, in view of the lack of specific statutory authority and subsequent court decisions holding that attorney fees are not payable at the administrative level in Federal employee age discrimination cases, that decision will no longer be followed concerning attorney fees in age discrimination complaint settlements. 59 Comp. Gen. 728 overruled in part.

4. The judgment fund provided by 31 U.S.C. § 1304 does not encompass payment of awards made in administrative settlement of an age discrimination complaint. The language of the relevant provisions clearly contemplates final judgments of a court of law and settlements entered into under the authority of the Attorney General.

The Savannah District, Corps of Engineers, Department of the Army, seeks to make a lump-sum payment in an informal settlement of an age discrimination complaint filed by Mr. Albert D. Parker, a former employee of that agency.^{1/} The submission lacks enough information about the settlement for us to make a specific determination of the amount payable, but the amount of the proposed settlement appears to exceed the amount allowable under the guidelines outlined in this decision.

Background

Mr. Parker was a civilian employee of the Corps of Engineers in a GS-1171-11 appraiser position. He held one of two such positions located in Cary, North Carolina, in the North Carolina Area Real Estate Project Office, Real Estate Division of the Savannah District. On March 30, 1983, he requested advance sick leave of 245 hours and in April 1983, while he was on sick leave,

^{1/} Mr. P. M. Baldino, Chief, Finance and Accounting Division, Directorate of Resource Management, Office of the Chief of Engineers, forwarded the Savannah District Disbursing Officer's request for an advance decision to us.

he was visited by his immediate supervisor who informed him that his job was to be abolished effective June 30, 1983. Mr. Parker was also informed that only 24 hours of sick leave could be approved since that was the amount that would accrue to the date that his job would be abolished. He was told, however, that if he accepted an offer of reassignment, adjustment would be made for the remainder of advance leave he had requested. He was offered a position as a realty specialist, GS-1170-11, in Savannah, Georgia.

In May 1983, Mr. Parker accepted the offer, "subject to judicial discretion." He returned to duty on May 12, and contacted an Equal Employment Opportunity counselor on June 20, 1983. On June 28, 1983, he submitted a request for retirement in lieu of accepting the reassignment. His retirement was effective June 30, 1983. He filed a formal complaint on July 27, 1983, alleging discrimination on the basis of age.

An investigation was conducted by the United States Army Civilian Appellate Review Agency. Its report concluded that although management had articulated a legitimate nondiscriminatory reason for implementing the personnel action, the reason was a pretext to mask discrimination because of Mr. Parker's age and associated eligibility for retirement. The Appellate Review Agency's report recommended reinstatement of Mr. Parker to a position comparable to his former position with attendant backpay and benefits.

After negotiations with Mr. Parker and his attorney, the agency determined that it was in the best interest of the Government to accept a settlement of the complaint by paying Mr. Parker \$45,000, plus attorney fees. On the basis of Mr. Parker's assertion that but for the action of the agency he would not have retired before July 1, 1985, the agency calculated Mr. Parker's losses in the following manner:

- \$18,889.89--net backpay
(July 1, 1983 - July 1, 1984)
- \$29,219.62--net salary loss
(July 1, 1984 - July 1, 1985)
- \$20,359.56--annuity loss (at \$130/monthly
for 13 years).

The agency requests an advance decision concerning payment of this settlement in view of our decision 62 Comp. Gen. 239 (1983). The agency contends that its settlement does not fall within the prohibitions of that decision, and therefore may be paid. The agency also asks whether or not payment of this sum may be made from the permanent judgment fund.

Legal Framework

In view of the authority granted to the Equal Employment Opportunity Commission by statute, we do not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in other agencies of the Government. See 29 U.S.C. § 633a (1982), and 62 Comp. Gen. 239 (1983). As is the case with actions brought under Title VII of the Civil Rights Act of 1964, the General Accounting Office has no authority to review the merits of age discrimination cases. However, we may determine the legality of awards agreed to by agencies in informal settlements of discrimination complaints, based upon our authority to determine the legality of expenditures of appropriated funds. See 62 Comp. Gen. 239, supra.

Although not stated in the agency's submission, we assume that since the complaint in this case was based on age discrimination, it was filed with the agency pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq., as amended, rather than under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. The Age Discrimination Act was passed in 1967 to protect older members of the nation's workforce from discrimination premised on age differences. Lorillard v. Pons, 434 U.S. 575 (1978).

Section 15 of the Age Discrimination Act, which was added by amendment in 1974, provides a cause of action for discrimination on account of age in Federal Government employment. 29 U.S.C. § 633a. Regulations developed pursuant to the Age Discrimination Act are found in 29 C.F.R. § 860.1, et seq., and 29 C.F.R. § 1613.501, et seq. (1983).

The Age Discrimination Act is more than a simple extension of Title VII of the Civil Rights Act. Although, like Title VII, the Age Discrimination Act is directed toward elimination of discrimination, it has its own separate statutory scheme of remedies and enforcement provisions. Fellows v. Medford Corp., 431 F. Supp. 199 (1977).

The Age Discrimination Act as originally enacted, specifically in 29 U.S.C. § 626, incorporated by reference parts of the Fair Labor Standards Act, including 29 U.S.C. §§ 216 and 217, which provide that only unpaid wages and compensation which would have been due from an employer who violated the Fair Labor Standards Act, are available for damages. See Lorillard v. Pons, *supra*. Section 15 of the Age Discrimination Act (29 U.S.C. § 633a) was added in 1974 to protect Federal employees from discrimination on account of age. A 1978 amendment, adding section 15(E), made the sections in the Fair Labor Standards Act inapplicable to claims of age discrimination in Federal Government employment. Swain v. Secretary, 27 FEP Cases 1434 (1982), *aff'd without opinion*, 701 F.2d 222 (App. DC 1983). Section 633a of title 29, United States Code, provides that the Equal Employment Opportunity Commission may enforce the provision:

"* * * through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. * * *" (Emphasis added.)

The statute specifically mentions backpay as a monetary award. It does not specifically provide for awards of compensatory or punitive damages. We have approved the interpretation of similar language in Title VII of the Civil Rights Act as limiting awards in informal settlements to an amount related to backpay and not to exceed the amount that would be recoverable if a finding of discrimination were made. 62 Comp. Gen. 239, 244.

Payment of Settlement

We do not question the agency's authority to make informal settlements in cases brought under the

Age Discrimination Act. Nor do we question that informal settlement is encouraged under both that Act and Title VII of the Civil Rights Act. However, we question the propriety of payment of \$45,000 in settlement of this claim.

The agency, in its submission, asserts that it has followed the procedures outlined in 29 C.F.R. § 1613.217 (1983), which allows informal settlement of complaints in Title VII cases. The regulations pertaining to age discrimination provide that acceptance and processing of age discrimination complaints shall comply with the principles and requirements of various provisions of the regulations governing Title VII complaints including 29 C.F.R. § 1613.217. See 29 C.F.R. § 1613.511. This appears consistent with the nearly identical language concerning remedies used in the two statutes as they relate to Federal employees. See 42 U.S.C. § 2000e-16(b) and 29 U.S.C. § 633a(b).

Under 29 C.F.R. § 1613.217 an agency may settle informally for an amount which does not exceed the maximum amount which would be recoverable if a finding of discrimination were made under Title VII. We have held that the amount that may be awarded under an informal settlement must be related to backpay and generally may not exceed the gross amount of backpay the employee lost, minus any interim earnings and other deductions. 62 Comp. Gen. 239, supra, at 244-245.

It is our view that this settlement authorization and limitation also applies in Federal employee age discrimination cases. Thus, the payment agreed upon by the agency would be limited generally to the net backpay Mr. Parker could have received had he been successful in his discrimination complaint.

It appears that the amount of \$45,000 is a compromise settlement agreed upon between the claimant and the agency. We do not find that a lump-sum compromise settlement is improper but the amount of the award may not exceed the amount of backpay which could be recovered under a finding of discrimination.

In computing the maximum settlement allowable the agency should determine the total pay and allowances

which would have been paid from the date of separation to the date of settlement and deduct from that amount interim earnings and other deductions as prescribed by regulation. 62 Comp. Gen. at 245.

Attorney Fees and Costs

The agency proposes to pay the attorney fees and costs of the complainant as part of the settlement agreement. Although attorney fees are available at the administrative level in claims brought under Title VII of the Civil Rights Act (see 29 C.F.R. § 1613.217), we now hold that they are not available for claims brought under the Age Discrimination Act.

In this regard, we stated in 59 Comp. Gen. 728 (1980), that we would have no objection if the Equal Employment Opportunity Commission were to revise its regulations and provide payment of attorney fees at the administrative level in age discrimination cases. The Equal Employment Opportunity Commission did not modify the applicable regulations, and in light of subsequent events, we have reevaluated our decision and for the following reasons, as it relates to paying attorney fees in age discrimination cases, it is overruled.

In 59 Comp. Gen. 728, we noted that the "American rule" or "general rule" regarding attorney fees is that each party bears its own costs. The rule was clearly established in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). While recognizing that the matter was not entirely clear, we stated that, since an award of attorney fees had been provided under the acts prohibiting other types of discrimination, and since we found no indication that Congress intended to deny attorney fees in age discrimination cases, we would not object if the Equal Employment Opportunity Commission drafted regulations which would provide for payment of attorney fees at the administrative level in age discriminations cases.

Subsequent to our decision, the courts have specifically held that attorney fees at the administrative level are not available in age discrimination cases. See, Kennedy v. Whitehurst, 690 F.2d 951 (1982); Swain v. Secretary, *supra*; Lehman v. Nakshian, 435 U.S. 156 (1981). The decisions emphasize the standard articulated in Alyeska Pipeline, *supra*: "specific

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statutory authorization for an award of fees is required before the incidence of counsel costs can be shifted." Kennedy v. Whitehurst, supra.

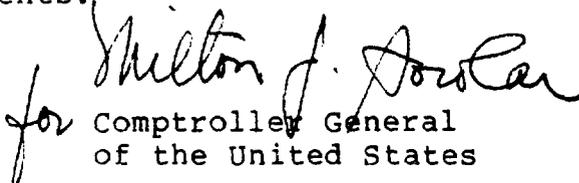
The court in Kennedy, reviewed the legislative history of the Age Discrimination Act and explained that the differences in enforcement schemes between Title VII of the Civil Rights Act and the Age Discrimination Act make clear that only Title VII permits award of attorney fees at the administrative level. Title VII of the Civil Rights Act requires an exhaustion of administrative remedies prior to the filing of a law suit. The Age Discrimination Act requires only that notice of the existence of a complaint be given to the Government before a lawsuit may be filed. Thus, attorney fees were intended to be available in Title VII cases, where the administrative process is mandatory, but were not provided in age discrimination cases which make the administrative process optional.

In view of the above, it is now our position that sufficient statutory authority does not exist which would allow the agency to award attorney fees at the administrative level. Accordingly, a settlement agreement in which the agency awards attorney fees at the administrative level would be prohibited.

Payment from the Permanent Judgment Fund

The agency asks whether the settlement, if proper, may be paid from the permanent indefinite appropriation for judgments established under 31 U.S.C. § 1304 (1982) (formerly 31 U.S.C. § 724a). This statute provides for payments when certified by the Comptroller General, of "final judgments, awards, and compromise settlements." 31 U.S.C. § 1304(a).

However, 31 U.S.C. § 1304 does not encompass payment of administrative awards. The language of the relevant provision clearly contemplates final judgments of a court of law and settlements entered into under the authority of the Attorney General. See EEO Regulations-Attorney's Fees, B-199291, June 19, 1981. Therefore, payment of the lump-sum settlement may not be paid from the permanent appropriation for judgments.

for  Milton J. Fowler
Comptroller General
of the United States