



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

IN REPLY
REFER TO:

B-139703

MAR 2 1978

OFFICE OF GENERAL COUNSEL

The Honorable Barbara Allen Babcock
Assistant Attorney General
Department of Justice

Dear Ms. Babcock:

Reference is made to your January 31, 1978, letter (which we received on February 8) requesting our comments on proposed Department of Justice guidelines for determining whether the Government should move for court costs (not including attorneys fees) when it successfully defends an employment discrimination suit under Title VII of the Civil Rights Act of 1964, as amended. The proposed guidelines are based on the opinion rendered in _____ v. _____, Civil Action No. 76-1411 (D.D.C. September 18, 1977).

We support in principle the promulgation of guidelines which would balance the competing interests which exist when moving for costs in many Title VII cases, as set out in your letter. We also note an apparent trend in the Federal district court for the District of Columbia in awarding court costs to the Government as the prevailing defendant in recent Title VII cases. See, _____ v. _____, Civil Action No. 76-1156 (D.D.C. August 23, 1977); _____ v. Secretary of the Navy, Civil Action No. 75-1883 (D.D.C. August 31, 1977); cf. _____ v. _____, supra.

However, we think that the language of your third factor--the presence or absence of bad faith on the part of the plaintiff--may be too restrictive in some cases. It might be preferable to adopt the standard applied by the Supreme Court in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 46 U.S.L.W. 4105 (1978), in which the Court held that a district court may award attorneys fees to a prevailing Title VII defendant "upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." Christiansburg, of course, involved a private defendant and attorneys fees, rather than costs, but it would seem a fortiori to be an appropriate standard for the awarding of costs. We think the Christiansburg standard would adequately accomplish the Government's purposes without discouraging legitimate or even debatable Title VII claims. We realize that the Christiansburg standard is reflected to some extent in the fifth factor (the closeness of the decision), but suspect that it may tend to become overshadowed by the

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specification of bad faith as a separate factor. The listing of the presence or absence of bad faith as a separate factor could well have the effect of making it the predominant factor, effectively precluding motions for costs by the Government except in cases where an allegation of bad faith can be supported, which we suspect will be extremely rare. In this event, the desired deterrent effect of the guidelines would be largely lost. It might therefore be desirable to combine factors (3) and (5) into a single factor based essentially on the Christiansburg language but recognizing, as the courts seemed to do in Christiansburg and to some extent in _____ supra, that the added presence of bad faith would provide an even stronger basis for the Government's motion.

Finally, a question arises as to the proper disposition of monies awarded as costs by the court to Government defendants.

31 U.S.C. § 484 (1970) provides:

"The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in section 487 of this title, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. * * *"

Under this provision, monies received for the use of the United States must be deposited as miscellaneous receipts into the general fund of the Treasury. We are aware of no law which would make available for expenditure by a Federal agency or establishment monies derived from a judgment for costs awarded by a court in favor of the United States. Thus any award of court costs to the Government in a Title VII action would not be available for use by the Department of Justice or any respondent agency, but must be deposited into the Treasury as miscellaneous receipts. See 47 Comp. Gen. 70 (1967).

If we can be of any further assistance, please let me know.

Sincerely yours,

Paul G. Dembling

Paul G. Dembling
General Counsel