Fairman
C.G.M

DECISION

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

7806

FILE: B-190940 DATE: September 21, 1978

MATTER OF: Franklin v. Brown -- Payment of Attorney Fees

DIGEST: Order of District Court awarding attorney fees in action under Civil Rights Act may be certified for payment even though underlying order relating to merits is being appealed, since award of attorney fees was made in separate order which neither party has appealed and which has become final by operation of law.

This decision results from a request by plaintiff's counsel for payment of attorney fees awarded to the plaintiff by the United States District Court for the District of Columbia in Franklin v. Brown, Civil No. 2127-72, an action brought pursuant to the Civil Rights Act of 1964, as amended.

Litigation in the case commenced in October, 1972, and since that date the matter has involved extensive legal proceedings. On November 21, 1977, the District Court awarded the plaintiff attorney fees in the amount of $20,292.86.

On December 13, 1977, the United States Attorney for the District of Columbia requested the advice of the General Accounting Office (GAO) as to the appropriateness of initiating the process of securing payment of the award. At the time of the inquiry, the plaintiff had filed a notice of appeal of the underlying judgment and it was not completely clear which issues would be involved in the appeal or whether the award of attorney fees would be among them. Consequently, we advised the United States Attorney on January 17, 1978, that the attorney fees award was not a final judgment within the meaning of 28 U.S.C. § 2414, which provides in pertinent part:

> "Payment of final judgments rendered by a district court against the United States shall be made on settlements by the General Accounting Office. * * *"

The permanent indefinite appropriation for the payment of judgments against the United States, 31 U.S.C. § 724a is similarly limited to the payment of "final judgments". We concluded at that time that we did not have the authority, nor were there funds legally available, to pay the award at that stage of the litigation.

Plaintiff's counsel now advises us that the plaintiff's appeal involves only the Court's order of October 20, 1977, which denied the plaintiff reinstatement and back pay. We are further advised that neither party has appealed the order of November 21 which awarded the attorney fees, and that the time for taking such an appeal has expired.

Our January 1978 opinion to the United States Attorney was based in part on a prior decision, B-172574, May 19, 1971. Under the particular circumstances of that case, in which the United States had appealed a District Court judgment, the United States would have been liable for half of the amount of the judgment had it won on appeal, but would have been liable for the entire amount had it lost. We were asked to certify for payment the half that the United States would presumably have had to pay ultimately in any event. In concluding that we could not certify the payment as requested, we said:

> "[W]hile the pending appeal to the United States Court of Appeals may not affect the present obligation of the United States to pay one-half of the awards, it is not clear from the Assistant Attorney General's letter whether the United States will petition the Supreme Court for a writ of certiorari, if the Circuit Court's decision is adverse to the Government. * * *
>
> "Also, we were informally advised by a representative of your Department that if the Department decided to request certiorari it could request the Supreme Court to consider the liability of the Government for any damages, although it probably would not do so, and that even if your Department did not itself raise the issue of the Government's liability for damages the Supreme Court could--although the possibility may be extremely remote--sua sponte open the entire record and consider the liability of the Government for the damages covered by that part of the judgment which the Assistant Attorney General now recommends we pay. * * *
>
> * * * * *
>
> "Therefore, unless, in accordance with 28 U.S.C. 2414, you formally advise us that no further review will be sought from the appeal now pending we would have no authority to pay one-half of the judgments * * * as recommended in the Assistant Attorney General's letter."

In our opinion, in view of the additional information which has now been submitted to us, the above decision is not controlling in this situation.

Bradley v. Richmond School Board, 416 U.S. 696 (1974), concerned an award of attorney fees in a school desegregation case involving private litigants, pursuant to a statute which authorized such an award upon the "entry of a final order" (20 U.S.C. § 1617). In discussing the concept of finality in this context, the Supreme Court stated:

> "Since most school cases can be expected to involve relief of an injunctive nature that must prove its efficacy only over a period of time and often with frequent modifications, many final orders may issue in the course of the litigation. To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel, and discourage the institution of actions despite the clear congressional intent to the contrary * * *. A district court must have discretion to award fees and costs incident to the final disposition of interim matters." Id., at 722-23.

The Court further noted that it had been inclined to follow a "pragmatic approach" to the question of finality, that there was precedent for the view that the most suitable test of finality was appealability, and that finality for purposes of appealability "does not necessarily mean the last order possible to be made in a case." Id., at 722, note 28.

While the "order" discussed in Bradley was an order relating to the merits, the rationale would seem equally applicable to a separate order awarding attorney fees in appropriate circumstances.

The Franklin litigation began in October 1972 and has already lasted nearly 6 years. There were two proceedings in the District Court separated by two appeals. The District Court was directed by the United States Court of Appeals for the District of Columbia in the first remand (filed February 9, 1977) to "also consider appellant's claim for attorney's fees" before the Court of Appeals pursuant to 42 U.S.C. § 2000e-5(k). This provision authorizes an award of attorney fees and costs to the prevailing party.

The first trial occurred in 1973 following an administrative hearing. In the first trial the plaintiff was (according to the District Court) the prevailing party, although to a limited extent.

The second trial occurred in 1977 but plaintiff did not prevail in the second trial, and no attorney fees were awarded for this trial. In its November 21, 1977, memorandum accompanying the order awarding attorney fees and expenses, the court noted that on the appeals the plaintiff did not achieve any measurable favorable result, but as prevailing party was entitled to be compensated for the work of his attorneys. As we understand it, the present appeal is an appeal from the District Court's action on the remand in denying the plaintiff reinstatement and back pay.

From the foregoing it appears the appeal does not involve that part of the District Court decision in which the plaintiff prevailed. Further, the November 21, 1977, order awarding attorney fees was a separate order and not a part of the order which reflected the Court's determination on the merits. Neither party has appealed from the November 21 order, the time for doing so has expired, and the order has thus become final by operation of law.

Accordingly, in view of the facts of this case and the Supreme Court's discussion in Bradley, we would not object to the United States Attorney's initiating the process of securing payment pursuant to the November 21 order.

R. F. Keller

Acting Comptroller General
of the United States