18547 Mr. Schneider

DECISION

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

FILE: B-199291 DATE: June 19, 1981

MATTER OF: EEO Regulations - Attorney Fees

DIGEST: 1. Title VII of the Civil Rights Act of 1964 grants agencies the authority to enforce the Act through appropriate remedies and, in accordance with the prevailing view of courts considering the question, we interpret that authority to include issuing regulations governing the award of attorney fees to prevailing complainants at the administrative level.

2. Payments of fees awarded by agencies pursuant to the EEOC regulations are to be made from agency operating funds and not the judgment fund of 31 U.S.C. § 724a. The judgment fund is statutorily limited to court judgments and a few other situations not here relevant.

This decision is in response to a request from the Assistant Secretary of the Army for our opinion on the legality of Equal Employment Opportunity Commission (EEOC) interim regulations (29 C.F.R. Part 1613, published at 45 Fed. Reg. 24130) allowing Government agencies to award attorney fees and costs to complainants under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (1976). Specifically, a decision is requested regarding the following two questions:

> "(a) Is the EEOC interim regulation valid with respect to an agency's ability in the absence of express statutory authority to award attorney fees as part of the administrative complaint process under title VII?
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> "(b) If so, should installation operating funds be used for this purpose?"

In defense of the regulations, the EEOC has responded to the above questions by letter dated February 13, 1981.

Agency Authority to Pay Attorney Fees

The first question addresses the authority of a Government agency to award attorney fees as provided in the EEOC regulation. As is correctly observed in the Army's letter, the question whether attorney

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fees may be awarded to the prevailing party in an adminstrative proceeding is a matter to be resolved on the basis of whether there is express statutory authority for such payment. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). However, we do not agree with the Army's conclusion that the EEOC lacks the requisite authority under 42 U.S.C. § 2000e-16, and, for the reasons contained in the following discussion, we endorse the validity of the subject regulation.

Initially, clarification of the position of this Office is necessary. Although originally in B-167015, April 7, 1978, we stated in a letter to the Attorney General that Federal agencies would require special legislative authority to pay attorney fees in Title VII proceedings under the Civil Rights Act, that position was subsequently rescinded by letter of May 16, 1978 (B-167015). After that date, our decisions have maintained that we would not object to regulations permitting the award of attorney fees to prevailing parties at the administrative level in Title VII cases. On September 12, 1978 (B-167015), we commented on Civil Service Commission proposed regulations and reiterated that position.

In support of the argument against the EEOC regulations, the Army cites B-193536, June 18, 1979, where we held that under Alyeska, supra, no express authority existed for the award of attorney fees in standards of conduct proceedings conducted by the Securities and Exchange Commission (SEC). However, that case is not pertinent to the present situation for two reasons: It did not involve a Title VII complaint (see below), and there existed no applicable regulations similar to those under consideration here. It is our position that in view of the court cases since Alyeska, and with the issuance of the EEOC regulations, Federal agencies now have the necessary authority to pay attorney fees and costs to a prevailing complainant in the informal settlement or formal resolution of equal employment opportunity proceedings.

The considerations underlying this position were set forth by the D.C. District Court in Smith v. Califano, 446 F. Supp. 530 (1978), where it was stated (at 533-34, footnotes deleted):

> "Several courts have emphasized the important role an attorney may play during the administrative phase of a Title VII proceeding. The Supreme Court has emphasized that one of the central policies of Title VII is to make whole the person who has been subjected to discrimination, and an award of attorneys' fees is a significant means of accomplishing that. Thus, although Title VII does not

> expressly state that an agency may award attorneys' fees, it does state that the agency is to enforce the Act 'through appropriate remedies . . .' 42 U.S.C. § 2000e-16(b) (Supp. V 1975). Because the 'make-whole' concept is one of those policies, this provision can be read to permit the agency to award attorneys' fees, thereby making whole one who prevails before it.
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> "This conclusion is consistent with one of the purposes in allowing awards of attorneys' fees under Title VII, which is to reduce the hardship on a complainant in bringing a meritorious suit. Parker v. Califano, 561 F. 2d at 334. Were an award of fees not available if plaintiff succeeded before getting to court, he might not think his rights were worth the cost of vindicating them. Id. He would have to hope his claim is good enough to prevail, but not so good that he would prevail too early.
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> "Moreover, this conclusion supports the interrelatedness of the administrative and judicial enforcement mechanisms under Title VII emphasized by the Supreme Court in Brown v. GSA, 425 U.S. 820, 829-33, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976). Were the agencies not authorized to award attorneys' fees, the balance of this interrelatedness would be severely upset.* * * [T]he administrative proceeding might be relegated to a pro forma exhaustion step decreasing the likelihood that claims could be resolved without resorting to the courts. It might also mean that the administrative record, which can be admitted as evidence in court, would be less complete and thus of less assistance in conserving the courts' time in suits that are filed. See Parker v. Califano, 561 F.2d at 334."

The holding in Smith v. Califano was followed in Williams v. Boorstin, 451 F. Supp. 1117 (D.D.C. 1978), rev'd. on other grounds, Doc. No. 79-1684 (D.C. Cir. October 3, 1980), and in Patton v. Andrus, 459 F. Supp. 1189 (D.D.C. 1978).

There is one case to the contrary. In Noble v. Claytor, 448 F. Supp. 1242 (D.D.C. 1978), the court came to the conclusion that agencies lack authority to award attorney fees. However, the Noble decision represents the only judicial precedent for that proposition.

More significantly, as was noted in Watson v. United States Veterans Administration, 88 F.R.D. 267 (C.D. Cal. October 30, 1980):

> "* * *one of the circumstances on which the Noble court premised its decision no longer exists. That decision was partially based on the lack of any regulations promulgated by the agency charged with enforcing the statute authorizing the award of attorney's fees at the administrative level. Id., at 1246-47.* * *"

As noted, in view of these court cases, we feel that pursuant to its regulations, EEOC may award attorney fees to a prevailing party in its administrative proceedings. Similarly, agencies may make awards of attorneys fees in Title VII proceedings they hold.

Effect of the Bauman Amendment

The Army also questions the effect of the "Bauman amendment," section 308 of the Legislative Branch Appropriation Act of 1979, act of September 30, 1978, Pub. L. No. 95-391, 92 Stat. 763, (which has been incorporated in subsequent appropriations acts) which provides, in pertinent part:

> "None of the funds appropriated or otherwise made available in this Act for the House of Representatives or for any other agency shall be used to provide legal representation for any employee without the specific authorization of the Congress."

Our decision, B-167015, September 12, 1978, is mentioned, along with our other decisions discussed above, as raising "doubt as to the validity and legality of the EEOC regulation." However, as recognized in the Army submission, that decision discusses the effect of the prohibition contained in the Bauman amendment upon this Office and other legislative branch agencies, since the provision only purports to limit agencies funded by the Legislative Branch Appropriation bill. Indeed, the EEOC was fully cognizant of the issue, stating in the Supplementary Information section of the introduction to the interim regulations (45 Fed. Reg. at 24130):

> "* * * Title VII complaints against agencies funded under the Legislative Branch Appropriation Act of 1979 and complaints of age discrimination were also excluded from this proposal because recent enactments

> may preclude the award of attorney's fees and costs in such instances.* * *"

Therefore, the question of the validity of the prohibition against award of attorney fees from legislative branch appropriations is inapposite to the application of EEOC regulations to departments of the executive branch.

Source of Funds

The next issue raised is the source of funding for awards made by an agency or by EEOC. EEOC argues that as a matter of policy, administrative settlements of discrimination complaints should be paid from the permanent indefinite appropriation for judgments, established under 31 U.S.C. § 724a (1976 and Supp. III 1979), so that agencies will not be discouraged from entering into administrative resolutions. EEOC offers as a basis for payment of attorney fees from section 724a an Attorney General memorandum dated August 31, 1977, which states that:

> "* * *to avoid any appearance on the Government's part of unfairly hindering Title VII lawsuits, the Government will not attempt to contest a final agency or Civil Service Commission finding of discrimination by seeking a trial de novo in those cases where an employee who has been successful in proving his or her claim before either the agency or the Commission files a civil action seeking only to expand upon the remedy proposed by such final decision." 2 CCH Employment Practices Guide 5046.

On the basis of that memorandum, EEOC contends that administrative judgments are, in effect, made final because no further action is taken in those cases where discrimination has been found.

Section 724a provides in pertinent part:

> "There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of sections 2414, 2517, 2672, or 2677 of Title 28 * * * together

> with such interest and costs as may be specified in such judgments or otherwise authorized by law * * *."

28 U.S.C. § 2414 provides for payment only upon final judgment rendered by a district court against the United States. (Sections 2517, 2672, and 2677 are not relevant to this discussion.) It also provides in pertinent part:

> "* * * settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies * * * made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to judgments in like causes * * *."

Accordingly, this Office has held that a judgment of a court under Title VII against a Government agency is payable from section 724a when that judgment is final, i.e., not subject to further litigation. 58 Comp. Gen. 311 (1979). We have also held that a court award of attorney fees against the Government as losing plaintiff in a Title VII action is payable from the permanent section 724a appropriation. B-167015, May 31, 1979. However, the question in the instant situation is very different: whether award of attorney fees at the administrative level falls within the ambit of section 724a.

In our view section 724a does not encompass payment of administrative awards; the language of the relevant provisions clearly contemplates only final judgments of a court of law and settlements entered into under authority of the Attorney General. In B-191802, May 17, 1978, we held that 28 U.S.C. § 2414 and 31 U.S.C. § 724a do not give this Office authority to certify attorney fees for payment based solely on an agreement of the parties; compromise settlements may be paid from section 724a only if authorized by the Attorney General.

Moreover, we do not read the Attorney General's directive as conferring "final judgment" status upon administrative determinations. Nor does the memorandum constitute a blanket authorization within the terms of 28 U.S.C. § 2414. That section contemplates a case by case review and cannot be used, as EEOC suggests, to bring all Title VII cases under the judgment fund of section 724a.

Despite the absence of specific statutory authority to pay attorney fees, an agency may expend funds for any purpose that is

reasonably necessary and proper for, or incidental to, carrying out the purpose of its appropriation unless the expenditure is for an illegal purpose or a purpose for which other appropriations are specifically available. See, e.g., 44 Comp. Gen. 313, 314 (1964). Clearly, agencies are required, as a necessary incident of their missions, to comply with the equal opportunity mandates of Title VII and regulations thereunder. Given EEOC's authority to issue regulations governing the award of attorney fees in Title VII cases, it logically follows that agencies may use their appropriations to implement those provisions.

In sum, although we are mindful of the policy factors supporting an argument for the availability of section 724a funds, we cannot find any basis for it in the law. As a result, attorney fees awarded pursuant to the EEOC interim regulations are payable from an agency's appropriations and not the judgment fund of 31 U.S.C. § 724a.

Milton J. Socolar

Acting Comptroller General
of the United States