MR Faulkner
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DECISION

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

PLM II

FILE: B-193144 DATE: September 15, 1980

MATTER OF: Equal Employment Opportunity Commission - Administrative Payment of Attorneys Fees

DIGEST:

1. EEOC may provide in its regulations for administrative payment of attorneys fees to prevailing party in Federal employee complaints filed under Rehabilitation Act of 1973, as amended, since scope of regulatory and judicial authority is same as granted under Title VII of Civil Rights Act of 1964, as amended.

2. EEOC may provide in its regulations for administrative payment of attorneys fees to prevailing party in Federal employee complaints filed under Age Discrimination in Employment Act (ADEA) of 1967, as amended. Scope of authority granted to EEOC to regulate is virtually the same as granted in Title VII of Civil Rights Act of 1964, as amended, and legislative history of 1978 amendments to ADEA shows no intent to deprive prevailing Federal employees of right available to non-Federal employees to receive attorneys fees awards.

We have been asked whether the Equal Employment Opportunity Commission (EEOC) may include, in its regulations, provisions for the payment at the administrative level of attorneys fees to prevailing parties in "handicap" and "age" discrimination cases. For the reasons set forth below, we hold that the EEOC, if it chooses to do so, may provide for payment of attorneys fees to prevailing parties at the administrative level in those cases.

The EEOC has issued interim revised regulations implementing Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-16 et seq. (Title VII), which include provisions for the payment of attorneys fees at the administrative level. 45 Fed. Reg. 24130 (1980). They wish to include provisions for the payment of attorneys fees in connection with complaints brought

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under the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701 et seq., and the Age Discrimination in Employment Act (ADEA) of 1967, as amended, 29 U.S.C. §§ 621 et seq. By letter of May 16, 1978, to the Attorney General, we indicated that if the Civil Service Commission, which was then charged with the task of drafting the Title VII regulations, chose to provide for the administrative payment of attorneys fees in those cases, we would not object to such regulations. By Reorganization Plan No. 1 of 1978, 43 F.R. 19807, 92 Stat. 3781, February 23, 1978, the EEOC was given the authority to administer and/or enforce, among others, Title VII of the Civil Rights Act of 1964, as amended; the Rehabilitation Act of 1973, as amended; and the Age Discrimination in Employment Act of 1967, as amended.

The Rehabilitation Act of 1973 was amended by Public Law 95-602, November 6, 1978, 92 Stat. 2955, adding, inter alia, 29 U.S.C. § 794a, which provides, in pertinent part, that:

> "(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.
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> "(b) In any action or proceeding to enforce or charge a violation of a provision

> of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

This section makes it doubly clear that a prevailing party may be awarded attorneys fees, as section 706(k) of Title VII authorizing attorneys fees in court actions is included in those sections incorporated by reference. The statutory authorization for promulgating the implementing regulations under the Rehabilitation Act is the same as the statutory authorization for promulgating implementing regulations under Title VII. We have already indicated that we will not object to Title VII regulations which authorize administrative payment of attorneys fees. Similarly, if the EEOC chooses to authorize administrative payment of attorneys fees for cases under the Rehabilitation Act of 1973, we would not object to such regulations.

Unfortunately, the question raised regarding the ADEA may not be disposed of as easily. When the ADEA was originally enacted in 1967, it did not apply to Federal employees. It does not create a separate enforcement mechanism. Rather, 29 U.S.C. § 626(b) adopts by reference the powers, remedies and procedures of the Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 211(b), 215, 216, and 217. The right to recover attorneys fees is specifically set out in section 216(b). Through the FLSA Amendments of 1974, Public Law 93-259, April 8, 1974, 88 Stat. 55, 74, the ADEA was made applicable to the Federal Government.

In the 1974 Amendments, the only additions to the then-existing procedural and enforcement structure were to provide, in language virtually identical to that used in Title VII, for the enforcement of the Act for Federal employees by the Civil Service Commission (CSC), with a grant to CSC of the same wide-ranging authority to issue regulations that was given in Title VII. These provisions were codified in 29 U.S.C. § 633a(b). It should also be noted that a Federal employee in section 633a(c) was given the right to bring "a civil action in any

Federal district court of competent jurisdiction for such legal and equitable relief as will effectuate the purposes of this chapter." Similar language is used in section 626(c) to give the right to bring a civil action to all other individuals covered by the ADEA. These Amendments did not change the definition of the class covered by the ADEA, i.e., individuals who were 40 to 65 years of age.

The ADEA was next amended by the Age Discrimination in Employment Act Amendments of 1978, Public Law 95-256, April 6, 1978, 92 Stat. 189. This Act did several things. It changed the definition of the protected class, for individuals who were not employees of the Federal Government, to people who were 40 to 70 years of age. For Federal employees, or applicants for Federal employment it extended the Act's coverage to anyone over 40. Some very specific exemptions for tenured college professors and policy-making executives were created. It also confirmed, at least for non-Federal employees, the right to a jury trial.

The 1978 Amendments also added section 633a(f) which provides that:

> "Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section."

Section 631(b) defines the protected class of Federal employees as those over 40 years of age.

A literal reading of section 633a(f) would appear to limit the remedies and enforcement provisions to those described in section 633a. In that section there is no specific authority to award attorneys fees to complainants. We are not convinced that this provision must be read that literally.

In Moysey v. Andrus, 21 FEP Cases 836 (D. D.C. 1979), the court, along with the merits of the claim, had to deal with the issue of whether or not Federal employees could file a class action under the ADEA. The defense argued that the FLSA provisions governed and under those provisions an individual may be a party-plaintiff only if he gives his written consent. The plaintiff argued that under section 633a(f), the restraints on class actions imposed by the FLSA no longer applied to suits by Federal employees and that the normal class action procedures under the Federal Rules of Civil Procedures should be applied. The court, after reviewing the legislative history of section 633a(f), held that the FLSA procedural provisions were incorporated through a section other than 633a; therefore, section 633a(f) eliminated their applicability to Federal employee cases. The court's interpretation of section 633a(f) is literal, and apparently applies to both procedural and substantive rights.

In Harris v. United States Department of the Treasury, 489 F. Supp. 476 (N.D. Ill. 1980), the court more narrowly construed the language of 633a(f) in holding that a Federal employee was entitled to a jury trial in an ADEA action. In footnote 11 of the decision the court discusses the meaning of section 633a(f):

> "As the defendants admit, it is reasonable to assume that the purpose of § 633a(f) was to establish that 'substantive rights and obligations for Federal employers would be different in some situations from those for private employers.' Defendants' Memorandum in Support of Motion to Strike at 15a (emphasis supplied). For example, § 623 provides certain defenses for private employers which are unavailable to government employers. There is no indication that § 633a(f) was intended to establish different procedures by which public and private employees could vindicate their substantive rights under the ADEA." 489 F. Supp. at 480.

Compare Nakshian v. Claytor, 22 FEP 41 (D.C. Cir. 1980), also confirming the right of a Federal employee to a jury trial. The fact that the Moysey and Harris cases reach differing conclusions as to the meaning of section 633a(f) would seem to indicate that the section is not as simple to interpret as it might seem.

Prior to the 1978 Amendments, the right of the prevailing party to receive attorneys fees was clear because of the incorporation by reference of the FLSA procedures. If section 633a(f) is interpreted as it was in Moysey, then the right to attorneys fees, even in the District Court, for Federal employees under the ADEA depends upon a finding that the language of section 633a(c), providing for "such legal and equitable relief as will effectuate the purposes of this chapter," gives the court the authority to award attorneys fees. This would be contrary to the general rule that attorneys fees may be awarded against the Federal Government only when specifically authorized. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). For non-Federal sector employees, the right to attorneys fees depends not on such a broad interpretation of section 626(c), the analog of 633a(c), but on the FLSA procedural rights.

The right of a prevailing party to receive an award of attorneys fees is an important right. Clearly prevailing parties in "handicap" discrimination cases and in Title VII cases may receive attorneys fees awards. Thus, prior to the ADEA Amendments of 1978 the remedies available for all three types of discrimination complaints included a right in the prevailing party to receive an award of attorneys fees. We find nothing in the 1978 Amendments or their legislative history that indicates that the Congress intended to eliminate the right of a prevailing Federal employee in an ADEA case to receive an award of attorneys fees. In fact, both the 1974 and 1978 Amendments generally broadened the rights of Federal employees, and to construe section 633a(f) to eliminate the right to receive attorneys fees runs counter to this widening of their rights. The fact that the general statements in both sections 626(c) and 633a(c) that a

court of competent jurisdiction may grant "such legal or equitable relief as will effectuate the purposes" of the ADEA were not revised by the 1978 Amendments seems to indicate that the Congress did not intend to significantly lessen the remedies available to Federal employees by eliminating their right to an award of attorneys fees.

Based on the above, we are inclined to interpret section 633a(f) as did the court in Harris v. United States Department of the Treasury, as an indication of differing substantive rights and obligations. As with the procedural right to a jury trial addressed in Harris, we do not believe section 633a(f) was intended to deprive Federal employees of an important part of the remedy available to non-Federal employees under the ADEA--the right to receive attorneys fees. Since we believe that Federal employees may be awarded attorneys fees by courts in ADEA cases, just as in Title VII cases, and since the language granting the authority to regulate and enforce the ADEA is virtually the same as it is in Title VII, we hold that the EEOC may include provisions in ADEA regulations for the payment, at the administrative level, of attorneys fees to a prevailing party.

Milton J. Socolar

For the Comptroller General
of the United States