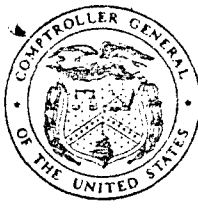


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**DECISION**



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

**FILE:** B-201602

**DATE:** April 1, 1981

**MATTER OF:** James L. Sweeney - [Court leave  
erroneously granted]

**DIGEST:** Employee who was unsuccessful litigant in civil rights action in Federal court was granted court leave by agency contrary to 59 Comp. Gen. 290 (1980). Although agency was unaware of decision, agency must retroactively correct employee's leave record. The decision is controlling even though Office of Personnel Management instruction reflecting that holding was not issued until after agency had erroneously granted leave in question.

*DLG00925*

We have been asked by the Defense Logistics Agency <sup>379</sup> (DLA) to determine whether it must now adjust Mr. James L. Sweeney's leave account to charge him leave for 48 hours of absence previously treated as court leave. The court leave in question was granted in connection with Mr. Sweeney's unsuccessful discrimination action against his employing agency under Title VII of the Civil Rights Act of 1964, as amended, codified at 42 U.S.C. § 2000e-16 et seq. Although the agency's determination to grant Mr. Sweeney court leave predated the Office of Personnel Management's instructions making it clear that court leave is not authorized in this situation, the employee's absence should be charged to the otherwise appropriate leave account on the basis of our holding in Wilma Pasake, 59 Comp. Gen. 290 (1980).

From June 24 to July 1, 1980, Mr. Sweeney was granted 48 hours of court leave to pursue a discrimination action against his employing agency, the Defense Logistics Agency, in Federal District Court. As the record reveals, the agency was unsure if Mr. Sweeney was entitled to court leave but concluded that certain regulations and statutes, although not directly applicable, provided support for its determination to grant the leave in question.

At the time of Mr. Sweeney's court action the agency was unaware of our decision in 59 Comp. Gen. 290, in which we held that the authority of 5 U.S.C. 6322 to grant court leave to a Government employee summoned as a witness in certain proceedings does not extend to an employee who is the plaintiff in such action. In that decision, issued

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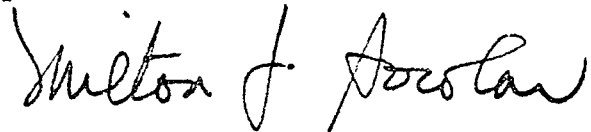
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March 4, 1980, we recognized that there is authority to grant official time to a plaintiff/employee who prevails in an action brought against the United States under 42 U.S.C. § 2000e-16.

The agency recognizes that Mr. Sweeney did not meet the test for court leave, as set out in the Pasake decision and that he is not entitled to official time because he was not the prevailing party. The agency however questions whether there is a need to retroactively adjust Mr. Sweeney's leave account. Primarily the agency's position is that their decision to grant court leave was justifiable in view of the applicable laws and regulations regarding discrimination actions and the lack of specific guidance in the applicable Office of Personnel Management regulations and bulletins. As the agency points out, it was not until the issuance of Federal Personnel Manual (FPM) Bulletin 630-38 of August 4, 1980, that the Office of Personnel Management provided Federal agencies instructions consistent with the holding in the Pasake case.

While the agency's original determination was carefully considered and was a good faith attempt to follow the law, the determination was nevertheless erroneous. Our decision in Pasake was rendered more than 3 months prior to the time the leave here in question was granted. Although the Defense Logistics Agency was not aware of the ruling, it had been rendered and was effective. There is no basis to consider the holding in Pasake as applicable only from the date FPM Bulletin 630-38 was issued some 5 months after the decision was rendered. That bulletin merely clarifies the purpose of 5 U.S.C. 6322 in a manner consistent with our holding in Pasake.

Accordingly, the agency determination cannot be sustained and Mr. Sweeney must be charged with 48 hours of annual leave or leave without pay, as appropriate.



Acting Comptroller General  
of the United States