



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Drug Enforcement Agency - Source for Payment of
Expert's Fee in Segar v. Civiletti

File: B-231513

Date: January 16, 1990

DIGEST

A court order finding defendant agency guilty of discrimination and directing the specific administrative action of developing new, nondiscriminatory employment systems is not a money judgment for which 31 U.S.C. § 1304, the Judgment Fund, is available as a source of funding. The fees and expenses of an expert paid for by defendant agency to help develop the new systems were neither "costs" of the litigation nor part of the plaintiffs' attorney fees. Accordingly, the expert's fees and expenses are properly paid for out of agency appropriations, not the Judgment Fund.

DECISION

The question in this case is whether the cost of an expert hired in order to effectuate several court orders in a case arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, may be paid from 31 U.S.C. § 1304, the Judgment Fund.^{1/} The fees and expenses of the expert selected to help implement specific administrative actions that the court ordered defendants to perform do not constitute a money judgment for which the Judgment Fund is available. The expert's fees and expenses do not qualify as "costs" of the litigation nor as part of plaintiffs' attorney fees. Accordingly, they are properly payable from agency appropriations.

^{1/} This responds to a letter dated May 18, 1988, from the United States Attorney for the District of Columbia concerning Segar v. Meese, USDC, D.C. Civil Action No. 77-0081.

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BACKGROUND

The Drug Enforcement Agency (DEA) was found guilty of racial discrimination in a class action brought by DEA's black special agents in Segar v. Civiletti, 508 F. Supp. 690 (D.D.C. 1981). DEA was ordered to immediately commence validity studies to "implement effective, nondiscriminatory supervisory evaluation, discipline, and promotion systems" and the parties were ordered to suggest other remedial actions. To effectuate the court's order, the parties entered a Joint Stipulation, adopted as an order by the court on July 31, 1981, that established a working group, which included "an expert selected by plaintiffs" whose cost "shall be treated as a cost of this litigation."

As a result of the remedial actions suggested by the parties, the court ordered on February 17, 1982, among other items of relief, that defendants develop and implement new, nondiscriminatory employment systems for the DEA. The court also awarded costs, including reasonable attorney fees, to plaintiffs as prevailing parties. DEA appealed the 1981 liability finding and the 1982 remedial order. However, to develop the new employment systems pending appeal, the parties entered a stipulation, adopted by the court as an order on April 28, 1983, which included plaintiffs' expert as a member of the working group during the first two stages of the project plan who would be paid \$400 per day up to a maximum total of \$12,000 (plus travel and per diem expenses). The stipulation and order also stated that DEA would reimburse plaintiffs on a current basis for these expenses but that the necessity for the expert's services was still contested and the costs were to be "treated as a cost of this litigation." A final footnote in the stipulation regarding the expert's costs stated:

"The sums referred to in this paragraph shall be paid from the fund created by 31 U.S.C. § 724(a) [since recodified as § 1304] pursuant to Comptroller General Decision B191321."

The District Court's order was affirmed in part and vacated and remanded in part. Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984). There was no reference in the decision to the expert or to the payment arrangements for his expenses. However, DEA's liability for discrimination was affirmed. Litigation was completed when the Supreme Court denied certiorari on May 20, 1985. 471 U.S. 1115 (1985). The remaining issues were resolved by a stipulation and order respecting outstanding claims, agreed to by the District Court on February 17, 1987, which found that plaintiffs were prevailing parties and provided that the development of new

employment systems would continue to completion in accord with the stipulation and order of April 28, 1983. The February 17, 1987, order did not finally resolve the amount to be paid for attorney fees and costs but stated that it was to remain in effect for 4 years. No subsequent orders have been issued by the court.^{2/}

OPINION

Specific Agency Action

The Judgment Fund is available to pay money judgments against the United States--not judgments directing a specific action, even if that specific action may be translated into a measurable cost. B-193323, Jan. 31, 1980. For example, if a judgment ordered reinstatement of a terminated federal employee--but did not specifically order backpay to the employee--any resulting payment to the employee because of the reinstatement would not be paid from the Judgment Fund but from agency appropriations. 58 Comp. Gen. 311 (1979). Also, a court-approved settlement in which a defendant agency agrees to hire an equal opportunity expert to review the agency's equal opportunity procedures and to make recommendations for their improvement is a specific action to be paid from agency appropriations rather than the Judgment Fund. Securities and Exchange Commission, B-234793.2, June 5, 1989.

We believe that the orders in 1981 and 1982 requiring DEA to develop and implement new, nondiscriminatory employment systems were orders that directed specific actions for which DEA's appropriations were available. The manner in which DEA stipulated with plaintiffs to implement the orders--reimbursing plaintiffs or directly paying for an expert selected by plaintiffs--is not determinative. The court orders were not money judgments payable out of the Judgment Fund. Nor do we find that the expert's expenses could qualify to be paid out of the Judgment Fund as litigation "costs" or as part of attorney fees.

Expert's Fee as Litigation "Cost"

The Judgment Fund is available to pay the "cost" of litigation awarded a prevailing plaintiff against the defendant government. 31 U.S.C. § 1304. Defendant DEA made

^{2/} The expert has continued to work on the new nondiscriminatory employment systems under the same arrangement as he did on the first two phases of the project plan. Beginning in 1988, he has been paid directly by the government.

clear in its stipulations implementing the district court orders that it opposed the selection by plaintiffs of an expert because the agency believed that it had not discriminated and did not need to change its existing employment systems. The DEA wanted to preserve the right to recover the expert's expenses if it prevailed on appeal. Hence, the parties stipulated that the expenses would "be treated as a cost of this litigation."

Subsequent to the stipulations in this case, however, the Supreme Court ruled that the expenses in excess of \$30 a day of a non-court-appointed expert used as a witness could not be taxed as a "cost" of litigation. Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987). The court also ruled at pp. 441-442 that unless an item of litigation expense appears in 28 U.S.C. § 1920, it may not be taxed as a "cost" of litigation. The expert in this case does not appear to have been used as a witness. See State of Ill. v. Sangemo Const. Co., 657 F.2d 855 (7th Cir. 1981). Therefore, since the expenses of the expert in this case, a non-witness expert, are not listed in section 1920, they may not be taxed as "costs." Crawford, supra; Shipes v. Trinity Industries, Inc., 685 F. Supp. 612 (E.D. Tex. 1987).

Although the stipulation cited a decision of the Comptroller General, B-191321, published at 58 Comp. Gen. 115 (1978), as the authority for paying this non-witness expert out of the Judgment Fund, that decision had nothing to do with the payment of "costs" or experts from the Judgment Fund. It stated that a judgment which specifically designates the government's contribution to the Civil Service Retirement Fund incident to a backpay award to be paid from the Judgment Fund would be honored. That contribution, as designated, was just an additional part of a money judgment, which is routinely paid from the Fund. The decision provides no authority for transforming a non-witness expert's expenses into taxable "costs" contrary to law. Since the expert's expenses are not "costs," they may not be paid from the Judgment Fund on that basis. Also, the stipulation could not properly designate the Judgment Fund as the source of the government payment if the congressional appropriations scheme provides a different source of funds, either. Cf. Eastern Transportation Co. v. United States, 159 F.2d 349 (2d Cir. 1947).

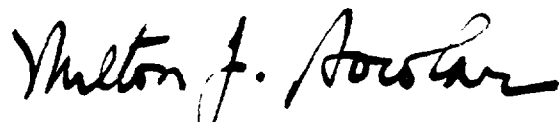
Expert's Fee as Part of Attorney Fees

The expenses of the non-witness expert in this Title VII case are also not payable from the Judgment Fund under the theory that they are part of the award of attorney fees to

the prevailing plaintiffs because they have not been shown to be part of the work product of plaintiffs' attorneys.

If the expenses are not shown to contribute to the work product of the attorney, they cannot be included in the fee award. Missouri v. Jenkins by Agyei, ____ U.S. ____, 109 S. Ct. 2463, 2470 (1989). See also Denny v. Westfield State College, 880 F.2d 1465, 1472 (1st Cir. 1989). In the present case the non-witness expert was hired after the trial that determined DEA's liability and apparently was not involved at all in the appeals process that confirmed DEA's liability. His function was to work along with DEA in developing a new employment system, which has not been shown to be a part of plaintiffs' attorney's work product.

Accordingly, since the expert's fees and expenses are the result of specific actions ordered by the court and not a money judgment, and since they cannot be taxed as "costs" or included as part of the award of attorney fees, they are payable out of DEA's appropriations and may not be paid from the Judgment Fund.

for 
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of the United States