LITIGATION

UNITED STATES SUPREME COURT

Pierce v. Underwood,

___U.S.___, 88 D.A.R. 8240,
No. 86-1512 (June 27, 1988).

Availability of Attorneys' Fees Multipliers Severely Limited Under Equal Access to Justice Act

The Supreme Court reversed a trial court decision awarding fees in excess of the statutory $75 per hour cap, holding that only very limited "special factors" will justify an award in excess of the cap.

The Secretary of the U.S. Department of Housing and Urban Development was sued in several courts for refusing to implement an operating subsidy program. Following several losses, a new Secretary settled remaining lawsuits, including the instant case. Plaintiff moved for an award of attorneys' fees under the Equal Access to Justice Act (EAJA), which mandates the shifting of fees to the United States "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. section 2412(d)(1)(A). Fee awards are limited to $75 per hour, "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. section 2412(d)(2).

The trial court determined that the defendant's position was not substantially justified, and awarded fees to plaintiff's counsel, the Western Center on Law and Poverty, in the amount of $1,129,450. This figure was based on 3,304 hours expended, with hourly rates ranging from $80 to $120 per hour from 1976 through 1982, and then used a multiplier of 3.5. Both the higher hourly rates and the multiplier were based on the court's finding that special factors existed. Specifically, the trial court relied upon the standard factors used to adjust multipliers in attorneys' fees awards (*see, e.g., Serrano v. Priest*, 20 Cal. 3d 25, 49 (1977)), including both the statutory example, and "the novelty and difficulty of the issues,...the undesirability of the case,...the work and ability of counsel,...the results obtained,...[and] customary fees and awards in other cases." The Ninth Circuit upheld the hourly rates based on the special factors, but rejected the use of the multiplier, reducing the award to $322,700.

The Supreme Court, per Justice Scalia (joined by Chief Justice Rehnquist and Justice Stevens and a concurrence on this issue by Justices Brennan, Marshall, and Blackmun), upheld the basis for an award, holding that the trial court's decision to award a fee is reviewed using the abuse of discretion standard, and should not be reviewed de novo. On the amount, however, the Supreme Court struck down each of the factors used by the trial court to raise the rates above $75 per hour. The Court held that Congress had determined that $75 per hour is reasonable regardless of the true market rates, and only where there is a highly specialized bar (such as patent attorneys) could a special factor justify a higher rate. The other factors, although used in civil rights fee awards under 42 U.S.C. section 1988, do not apply under the EAJA.

Felder v. Casey,

___U.S.___, 88 D.A.R. 8029,
No. 87-526 (June 22, 1988).

Plaintiff Need Not Comply With State Notice of Claims Statute Prior to Filing Federal Civil Rights Suit In State Court

The Supreme Court recently held that a plaintiff's failure to comply with a state claims statute does not bar the filing of a civil rights lawsuit under 42 U.S.C. section 1983 in state court.

The plaintiff sued the City of Milwaukee and several of its police officers for injuries stemming from a disorderly conduct arrest, alleging the events were racially motivated. Plaintiff filed suit under 42 U.S.C. section 1983 in state court. Defendants moved to dismiss on grounds that plaintiff failed to comply with Wisconsin's notice of claims statute, which requires that prior to the filing of any suit against the state or a local entity, a claim must be filed within 120 days of the events giving rise to the claims. The trial court and intermediate appellate court dismissed the state claims, but refused to dismiss the federal claims. The Wisconsin Supreme Court reversed and dismissed the federal claim as well, reasoning that although the federal government could create causes of action cognizable in the state courts, the states retain the power to establish their own jurisdictional and procedural rules.

The United States Supreme Court (per Justices Brennan, White, Blackmun, Marshall, Stevens, Scalia, and Kennedy), held that the Supremacy Clause of the U.S. Constitution preempts any procedural requirements on section 1983 actions that would tend to produce a different outcome in state rather than federal courts. Such a difference would interfere with section 1983's remedial purposes. Moreover, the statutory scheme to permit redress of constitutional deprivations by state and local officials does not permit a state-created prerequisite of submission of the matter to state officials before vindicating the right. The primary purpose of claims statutes is to limit governmental liability. Although the claims statutes are part of a legislative scheme to open up liability by abrogating sovereign immunity, liability here is created not by the state but by the federal government. The states may not limit their exposure to liability created by the federal government.

Eu v. San Francisco County Democratic Central Committee,

No. 87-1269.

Court to Decide Validity of California Law Prohibiting Party Endorsements in Primaries

The U.S. Supreme Court has noted jurisdiction in an appeal from a Ninth Circuit decision striking down California Election Code provisions which ban party endorsements of candidates in primaries, and which regulate party memberships and internal operations. *See Eu v. San Francisco County Democratic Central Committee*, 826 F.2d 814 (9th Cir. 1987). At this writing, no date has been set for argument.

NINTH CIRCUIT COURT OF APPEALS

Gomez v. City of Watsonville,

___F.2d___, 88 D.A.R. 9786,
No. 87-1751 (July 27, 1988).

At Large Elections Violate Voting Rights Act of 1965

The Ninth Circuit has ruled that at-large municipal elections diminish Hispanic participation and power, thereby violating Section 2 of the Voting Rights Act of 1965, 42 U.S.C. section 1973.

The City of Watsonville, like 432 of 450 California cites, uses at-large districts for its city council and mayoral elections. Watsonville switched from

ward to at-large elections in 1950, when Hispanics reached 10% of its population. Currently, the city is 49% Hispanic overall, although the eligible voting percentage is somewhat lower due to large numbers of non-citizen and underage Hispanics. None of the nine Hispanics who had run for office before the suit was filed had been elected.

In 1985, Mexican-Americans challenged the at-large system, alleging that its use in selecting the six city council members lessened their opportunity to participate and to elect representatives of their choice. Following trial, District Court Judge Ingram held that the plaintiffs had not stated a case under section 2 of the Voting Rights Act.

The Court of Appeals, per Judges Goodwin, Nelson, and Gilliam, reversed. The court cited the three standards necessary to show a Section 2 violation. The minority group must be (1) large and geographically compact enough to make a majority in a single-member district; (2) politically cohesive; and (3) faced by a majority that votes as a bloc to usually defeat the minority's candidate. Once these threshold requirements are met, the plaintiffs must also show that the "totality of the circumstances" establishes that the minority group does not have an equal opportunity to participate or elect representatives of its choosing.

Here the plaintiffs established, *inter alia*, that there was racially polarized voting under the threshold tests, that minorities had no electoral success, and that the use of a single district coupled with no residency requirement diluted minority voting.

In addition, the court overturned the trial court's finding that there was "'no evidence whatever of official discriminatory practices of any sort directed at the Hispanic residents of Watsonville, either presently or historically.'" The court of appeals cited a lengthy list of sources, from California and elsewhere, in support of its finding that "[d]iscrimination against Hispanics in California and the Southwest has pervaded nearly all aspects of public and private life." The court held that "the district court's conclusions on discrimination are clearly erroneous."

Johnston v. Koppes,

___F.2d___, 88 D.A.R. 8531,
No. 87-2980 (June 30, 1988).

Government Attorney Has Free Speech Rights To Political Positions Adverse to Employing Agency

The Ninth Circuit recently held that the California Department of Health Services (DHS) violated the civil rights of an employee by punishing her for appearing at a hearing regarding abortion funding.

Plaintiff is a civil service attorney in the DHS, with the designation "lead attorney". Her job does not involve issues related to abortions or abortion rights. On September 11, 1984, she requested two hours' vacation time to attend a legislative committee hearing on the subject of public funding for abortions. Her request was denied by two supervisors, at least partially on the grounds that plaintiff supported the right to abortion and public funding for abortions, while the DHS did not. Plaintiff attended the hearing; she did not speak or otherwise make her presence known at the hearing, but her supervisor indicated "embarrassment" at her presence, and feared she might be called upon by the committee to speak. That afternoon, plaintiff's section was reorganized to remove her functions, and her supervisors sought legal and other advice on what actions they could take in response to her attendance at the hearing. Plaintiff later won a grievance allowing her to take the time as vacation. She was transferred to another section.

Plaintiff filed suit in federal court under 42 U.S.C. section 1983, alleging she had been punished for exercising her first amendment rights. Cross-motions for summary judgment were denied. Defendants appealed on the basis of qualified immunity.

The Ninth Circuit, per Judges Noonan, Koelsch, and O'Scannion, affirmed. The court held that plaintiff had a clearly established constitutional right to attend the hearing, and that defendant's actions in transferring her and otherwise were motivated solely by their desire to punish her for attending. To the extent they may have a good faith defense because they sought legal advice before acting, that advice came from a subordinate and it was not sought to determine the nature of her rights, but the extent of their power to exact retribution. The case was remanded to consider other defenses and damages.

UNITED STATES DISTRICT COURTS

Ramirez v. Secretary of Health and Human Services,

___F.Supp.___, 99 D.A.R. 12180,
No. CV85-6744-ER (C.D.Cal. August 2, 1988).

Case Justifies Award of Fees In Excess of $75 Per Hour in Equal Access to Justice Case

A United States magistrate has awarded a prevailing plaintiff attorneys' fees under the Equal Access to Justice Act in excess of the statutory limit of $75 per hour, due to an increase in the cost of living.

In this case, the court awarded fees following the plaintiff's successful challenge to the Department's finding that he was not disabled. Plaintiff's entitlement to an award was not at issue. The magistrate adjusted the $75 per hour rate upward, using that portion of the fee statute which prohibits a rate greater than $75 per hour "unless the court determines that an increase in the cost of living...justifies a higher fee." 42 U.S.C. section 2412(d)(1)(C)(2)(A)(ii).

The court held that the statute required an increase, and that nothing more than the fact of an increase in the cost of living need be shown. Moreover, the court held that the cost of living should be calculated from the date of the original enactment of the EAJA (1981), rather than its reenactment in 1985. This holding is in line with those of several other appellate courts, although the Ninth Circuit Court of Appeals has not yet ruled upon the issue. Based on a cost of living increase of 26.6% since 1981, the current fee award rate is $94.95 per hour.

CALIFORNIA SUPREME COURT

Lungren v. Deukmejian,

___Cal. 3d___, 88 D.A.R. 8099,
No. S004740 (June 23, 1988).

Confirmation of Constitutional Officer Requires Affirmative Vote of Both Houses of Legislature

The California Supreme Court denied Dan Lungren's petition to be seated as State Treasurer, holding that the Senate's denial of confirmation was sufficient to prevent his taking office; the Assembly's vote to confirm was not sufficient.

Under the California Constitution, vacancies in constitutional offices such as State Treasurer are filled by gubernatorial appointment, subject to confirmation by the legislature. Article V, section 5(b) provides that a nominee "shall take office upon confirmation by a majority of the membership of the Senate and a majority of the membership of the Assembly...In the event the nominee is neither

confirmed nor refused confirmation by both the Senate and the Assembly within 90 days of the submission of the nomination, the nominee shall take office as if he or she had been confirmed...."

The Governor and Lungren contended that the latter part of the cited language meant that Lungren could take office even if one house voted not to confirm, if the other voted in favor; that is, the legislature had to speak with a single voice to deny confirmation, or the default procedure took effect. The legislature and the Attorney General intervened, contending that confirmation could only occur through the positive vote of both houses.

The Supreme Court unanimously adopted the legislature's position that confirmation of office could only occur from the positive vote of both houses, or an affirmative vote by one and inaction by the other. If either house votes not to confirm, the nominee is rejected regardless of the action of the other house.

ATTORNEY GENERAL OPINIONS

"Litigation Exception" to Public Records Act Is Limited

No. 87-304 (July 13, 1988).

The Attorney General, responding to a request from Assemblymember Maxine Waters, has opined the following regarding the Public Records Act, Government Code section 6250 *et seq.*, and its exceptions in section 6254:

(1) The "pending litigation" exception in section 6254(b) is limited to documents specifically prepared for litigation in which the agency is a party.

(2) A document prepared in the regular course of an agency's business does not become exempt either because it might be relevant in future litigation, or because a claim or suit is filed in which the document may be relevant.

(3) If a police record is not exempt from disclosure under the police records provisions of section 6254(f), the filing of a claim or litigation does not make it exempt under section 6254(b).

(4) A claim filed under the California Tort Claims Act is not exempt from disclosure under section 6254(b).