

Supreme Court Adopts “But-For” Test for Awarding Attorneys’ Fees to Defendants

by:

Paul A. Patten
Jackson Lewis LLP - Chicago Office

Date: 6.6.2011

A defendant in a federal civil rights lawsuit is entitled to its attorneys’ fees if a court determines that the plaintiff’s claims are frivolous, the U.S. Supreme Court has ruled, clearing any uncertainty among the lower courts as to the standards for determining fee awards to defendants where some of a plaintiff’s claims are frivolous and some are not. The Supreme Court adopted a “but-for” test for assessing fees against plaintiffs. It ruled that a defendant is “to receive only the portion of his fees that he would not have paid but for the frivolous claim.” *Fox v. Vice*, No. 10-114 (June 6, 2011).

Facts

Ricky Fox alleged that the late Billy Ray Vice, his opponent in an election for chief of police in Vinton, Louisiana, engaged in “dirty tricks” to force Fox out of the race. Fox filed a lawsuit against Vice, claiming Vice violated his civil rights under 42 U.S.C. § 1983. Fox’s lawsuit also sought damages under state law, including defamation.

After Vice moved for summary judgment on the federal § 1983 claim, Fox admitted the federal claim was not valid. The federal district court remanded the case to state court for further consideration.

Vice then asked the federal court to award attorneys’ fees against Fox as permitted under 42 U.S.C. § 1988. Vice argued that Fox’s federal claim was “baseless and without merit.” In seeking attorneys’ fees, Vice submitted attorney billing records estimating the time spent on the entire lawsuit, not differentiating between federal and state law claims.

Proceedings Below

The district court granted Vice’s motion for attorneys’ fees, finding that Fox’s federal claims were frivolous. However, although the court did not find that the state law claims were frivolous, it did not require Vice to distinguish between the attorneys’ work performed on the two separate claims.

Fox appealed the district court ruling to the U.S. Court of Appeals for the Fifth Circuit, arguing that all claims must be frivolous if the defendant is to recover any fees. The Fifth Circuit found the district court was correct to order Fox to pay all of Vice’s attorneys’ fees because Fox’s lawsuit had focused on the frivolous federal claims.

Supreme Court's Ruling

Justice Elena Kagan, writing for a unanimous court, first reviewed the treatment of attorneys' fees in civil rights cases. Normally, courts follow the "American Rule" and each party bears its own litigation costs. However, Congress has enacted legislation altering this rule. Under 42 U.S.C. § 1988, successful plaintiffs seeking relief under various civil rights statutes are generally awarded their attorneys' fees as "prevailing parties." A defendant, on the other hand, is generally only awarded fees if the plaintiff's claim was "frivolous, unreasonable or without foundation."

Kagan noted that the U.S. Court of Appeals for the Sixth Circuit, in another case, had established a rule that allowed attorneys' fees to be awarded to a defendant only if *all* of the plaintiff's claims are frivolous. In rejecting this plaintiff-favorable standard, Kagan observed that the Supreme Court previously ruled that a court should award fees to a prevailing civil rights plaintiff even if the plaintiff fails to prevail on every contention. Similarly, Kagan reasoned, defendants should be entitled to attorneys' fees in the face of a frivolous claim from a plaintiff, even if other claims are not frivolous.

On the question of how fees should be allocated to a defendant where some of a plaintiff's claims are frivolous and others are not, Kagan adopted what she called a "but for" test: "Section 1988 permits the defendant to receive only the portion of his fees that he would not have paid but for the frivolous claim." Slip Opinion at 8.

Thus, if a frivolous claim causes a defendant to incur attorneys' fees, a court may award the defendant those fees. However, if the defendant would have incurred those fees anyway in defending non-frivolous claims, a court may not transfer the expense to the plaintiff. Slip Opinion at 8-9. To illustrate the distinction, she said, if the defendant's attorney takes a deposition on matters relevant to both a frivolous and a non-frivolous claim and the time spent on the deposition would have been the same regardless of the frivolous claim, the defendant has suffered no additional incremental harm and is not entitled to its fees.

Justice Kagan, however, also contemplated a situation in which time spent on both frivolous and non-frivolous claims might result in all the time being subject to a fee awarded in favor of the defendant: if the frivolous claims would result in damages against the defendant, but the non-frivolous claims would not result in damages against the defendant.

Implications

Section 1988's attorneys' fee provision applies to claims made under various civil rights statutes, including 42 U.S.C. § 1981, a statute that provides a right of action for race discrimination in employment. Title VII's and the Americans with Disabilities Act's attorneys' fee provisions are both found in Title VII (the ADA incorporates the Title VII provision by reference), but contain wording substantially similar to that of § 1988.

© 2011 Jackson Lewis LLP. Reprinted with permission. Originally published at www.jacksonlewis.com. Jackson Lewis LLP is a national workplace law firm with offices nationwide.