UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

IN RE CHARGE OF MARGARITA MORALES-DELGADO

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	CASE NO. 90200097
WELD COUNTY SCHOOL DISTRICT, RE-8, FT. LUPTON, COLORADO, Respondent.	)	

FINAL DECISION AND ORDER

E. M. Frosburg, Administrative Law Judge

Appearances:
Bruce Friedman, Esquire
Office of Special Counsel for Complainant

Linda R. White, Esquire
Office of Special Counsel for Complainant

Kenneth D. Delay, Esquire
for Respondent

Margaret Sickel, Esquire
for Respondent

BACKGROUND

On May 14, 1991, I issued a Decision and Order finding inter alia that the preponderance of evidence presented by the Complainant was not sufficient to determine that Margaret Morales-Delgado was discriminated against on the basis of her citizenship by the Weld County School District of Ft. Lupton, Colorado, on or about August 29, 1989. Therefore, the instant action was dismissed pursuant to 28 C.F.R. Part 68.50(c)(1)(iv).

On June 13, 1991, the Respondent filed a Memorandum in Support of Motion as well as Motion for Costs and Attorneys' Fees, pursuant to 28 C.F.R. Part 68.50(c)(1)(v).

On July 9, 1991, the Complainant filed a Reply to the Respondent's Motion and Memorandum regarding Costs and Attorneys' Fees. On August 13, 1991, the Respondent filed a response to the Complainant's Reply to the Respondent's Memorandum and Motion for Attorneys' Fees and Costs.

Section 274(B)(h), codified at 8 U.S.C. 1324(b)(h), provides for the awarding of Attorneys' Fees

> In any Complaint respecting an unfair immigration-related employment practice, an Administrative Law Judge, in the judge's discretion may allow a prevailing party, other than the United States, a reasonable attorneys' fee, if the losing party's argument is without reasonable foundation in law and fact.[1]

In order for the Respondent to recover any Attorneys' Fees, I must first determine whether or not the Respondent was a "prevailing party" as that term is defined in IRCA. Neither the legislative history of IRCA nor the statute of regulations promulgating thereunder provide any specific help in defining what is a "prevailing party" for the purposes of awarding Attorneys' Fees.

A "prevailing party" is that party in whose favor the decision or verdict is rendered and judgment entered. Blacks Law Dictionary 1069 (5th ed. 1979). Under IRCA, Administrative Law Judges have significant discretion to determine if a party is "prevailing" and on what grounds. Several OCAHO cases have addressed this context.

[1] The regulations relating to attorney's fees merely restate the statutory language and do not expand upon the meaning of the "prevailing party" or "reasonable foundation in law and fact." 28 C.F.R. Part 68.50(c)(1)(v).

See Jones v. DeWitt Nursing Home, 1 OCAHO 189 (June 29, 1990); Banuelos v. Transportation Leasing Company, 1 OCAHO 255 (Oct. 24, 1990); and Ordonez v. Educational Employment Enterprise, et al, 1 OCAHO 293 (Feb. 1, 1991).

The Respondent, Weld County School District, would be considered the prevailing party in this matter since the Complaint was dismissed in its entirety.

TIMELINESS OF RESPONDENT'S MOTION FOR FEES

The Complainant in its rebuttal Motion for Costs and Attorneys' Fees, argued that the Respondent's Motion for set fees was not filed timely because it was not filed within thirty (30) days of the Final Decision and Order. The Respondent's Motion was received in my office on June 18, 1991, which was thirty-five (35) days after my Decision and Order. However, the OCAHO regulations allow for five (5) additional days if the pleading is done by mail as in this case. Therefore, I find that the Respondent's Motion for Costs and Attorneys' Fees was timely.

COMPLAINANT'S ARGUMENT AS TO SOVEREIGN IMMUNITY REGARDING AN AWARD OF FEES AGAINST THE UNITED STATES IN SECTION 102 HEARINGS IS MISPLACED

The Complainant argues in its rebuttal Motion that the Respondent would not be entitled to fees against the United States even if it were a prevailing party because of the Doctrine of Sovereign Immunity.

Since 28 C.F.R. Part 68.50 of OCAHO Regulations, does allow for Attorneys' Fees and Costs, the Complainant's argument appears to be misplaced.

RESPONDENT WOULD NOT BE ENTITLED TO FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

Since 28 C.F.R. Part 68.5 of OCAHO Regulations is appropriate and controlling the Equal Access to Justice Act (EAJA) would not be applicable in this case.

In their Motion, Respondent moves for Costs, Expenses and Attorneys' Fees under the Judicial Fee Provision of the EAJA, 28 U.S.C. § 2412. It is apparent that 28 U.S.C. § 212 would not be

applicable to provide the relief requested in this particular case under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA). Therefore, as far as EAJA is concerned the Respondent's Motion appears to be misplaced.

REASONABLE FOUNDATION IN LAW AND FACT

The next prong to be decided is whether Complainant's argument were without reasonable foundation in law and fact.

"Without reasonable foundation in law and fact," has been equated in IRCA cases as analogy to "without merit." Id. DeWitt at 28. Under Christianburg, "without merit" means "groundless or without foundation," rather than simply that the party has lost his case.

Both the Complainant and Respondent cited Christianburg Garment Company v. EEOC, 434 U.S. 412, 421-22, 98 S.Ct. 694, as a leading case to be followed in traditional civil rights action cases involving Attorneys' Fees and Costs. It was apparent in Christianburg, that the Court adopted a different view for the awarding of Attorney's Fees to prevailing defendants and prevailing plaintiff in Title VII actions. The Court indicated, that an awarding of fees to prevailing plaintiffs is intended to make easier the bringing of suits by plaintiffs whereas an award to prevailing defendant is intended to deter the bringing of lawsuits without foundation. Id. at 420, 98 S.Ct. at 700. See also, Banuelos v. Transportation Leasing Company, 1 OCAHO 255 (Oct. 24, 1990); Jones v. DeWitt Nursing Home. 1 OCAHO 189 (June 29, 1990).

Therefore, keeping in mind the prevailing Title VII case as well as applicable OCAHO cases, regarding the issuance of Attorneys' Fees, I am not persuaded by the argument of the Respondent that the Record, taken as a whole, in this matter is devoid of any evidence of an inference of discrimination. As I had indicated in my Decision and Order, I did find that the Complainant had made out a prima facie case. Additionally, I did find that there was credible testimony on the part of some of the witnesses which would at least establish that the Complainant had a reasonable foundation in law as well as fact to bring this action.

Since the burden is upon the Respondent, the moving party, to substantiate the above two prong test, I cannot find in consideration of the entire record, that the Complainant's case is without foundation in law and fact.

Therefore, I must find that the Respondent's Motion for Attorneys' Fees and Costs, filed on June 18, 1991, is denied.

Order

Respondent's Motion for awarding of Attorneys' Fees and Costs is denied.

This Decision and Order, upon issuance and service upon the parties in accordance with the provisions of 8 U.S.C. § 1324b(g)(1), become final unless as set forth in the provisions of 8 U.S.C. 1324(i), any person aggrieved by such order seeks timely review of that order in United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which employee resides or transacts business, and does so no later than sixty (60) days after entry of such order.

IT IS SO ORDERED this 27th day of September , 1991, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge