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

IN RE CHARGE OF	)	
KATALIN BALAZS-KILGORE	)	
UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 93B00109
AUBURN UNIVERSITY,	)	
Respondent.	)	
______________________________	)	

ORDER
(September 22, 1994)

I. *Procedural and Other Background*

On June 10, 1994, Complainant filed its motion to withdraw the complaint. Previously, following depositions and briefing, I dismissed that portion of the complaint addressed to one of the two of Respondent's employing entities alleged to have discriminated against Dr. Balazs-Kilgore. See Order, 4 OCAHO 617 (3/10/94). Following the fourth telephonic prehearing conference and intermediate orders and filings by the parties, including a motion by Respondent for attorneys fees, I issued an Order Dismissing Complaint While Retaining Case on the Docket, 4 OCAHO 662 (7/14/94). The complaint was dismissed with prejudice. Id. at 2.

Respondent justifies fee shifting on the bases, inter alia, that the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) lacked reasonable cause to file a complaint, and asserted an erroneous charge filing date as the result of which Respondent incurred the expense of a partially unwarranted defense. The July 14, 1994 order, inter alia, directed that OSC's response to the motion to shift attorneys fees should advise whether Respondent's motion "is reasonably susceptible to an agreed disposition, and of the efforts of the parties in that respect." Id. at 2. On August 2, 1994, OSC filed its reply

in opposition to fee shifting. Respondent did not, or otherwise seek to, file a response to the reply to its motion.

OSC's reply omits an answer to the inquiry about settlement. Instead, OSC asks that I deny Respondent's motion. OSC contends that the doctrine of sovereign immunity denies jurisdiction to the administrative law judge (ALJ) to award fees against OSC because 8 U.S.C. §1324b, including specifically §1324b(h), does not explicitly establish liability of the United States. OSC's rationale is that absent an explicit congressional waiver of sovereign immunity, OSC as a federal government entity cannot be liable for fee shifting under §1324b(h).

OSC argues also that the text and meaning of the fee shifting provision of §1324b, enacted at Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), do not authorize an award:

> 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 attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

8 U.S.C. §1324b(h).

Relying on precedents outside IRCA,[1] OSC suggests that voluntary dismissal of the complaint, by means of settlement, Mobile Power Enterprises, Inc. v. Power Vac., Inc., 496 F.2d 1311, 1312 (10th Cir. 1974) or otherwise, Marquart v. Lodge 837, International Assoc. of Machinists, 26 F.3d 842, 847-54 (8th Cir. 1994), precludes a finding that the respondent is a prevailing party because there is "no judicial declaration to its benefit." Id. at 852.

Finally, OSC argues that its case did not lack a reasonable foundation in law and fact. I characterize OSC's argument to be that the standard of reasonableness sufficient to initiate a §1324b case and insulate against fee shifting implies a less qualitative analysis of the facts than is necessary to sustain its ultimate burden of proof before the trier of fact. OSC argues in effect that reasonable cause, and not the preponderant evidence, is the appropriate test. Following deposition and motion practice (and inferentially the prior ruling dismissing as to one of the two mathematics departments), and further consultations with the charging party, OSC "conclusively determined that it could not meet its ultimate burden of proof." OSC Reply at 19.

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[1] OSC is correct that "virtually every OCAHO decision to date concerning the attorney's fee standard under section 1324b has relied upon Title VII precedent." Reply at 7, note 5.

II. *Discussion*

Interestingly, having concluded that a voluntary dismissal of the complaint by a plaintiff is insufficient to characterize the defendant as a prevailing party in an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq., the Marquart court nevertheless found it "useful to go through the merit prong of the analysis" to determine whether the plaintiff's claim was "frivolous, unreasonable, or groundless." 26 F.3d at 853. As the result of case gloss, "frivolous, unreasonable, or groundless" or similar formulations comprise the Title VII analog to the §1324b(h) criterion of "without reasonable foundation in law and fact," in cases where the Title VII defendant is the putative prevailing party. See Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 695, 700 (1978).

After quoting a leading Title VII case, Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975), to the effect that the Supreme Court "has distinguished between prevailing Title VII plaintiffs and prevailing Title VII defendants," 26 F.3d at 848, the Marquart court summarized and relied on the rule of Christiansburg for its analysis, after noting that

> In summary, under Christiansburg, courts may award attorneys' fees to prevailing Title VII plaintiffs except under special circumstances, but may not award attorney's fees to prevailing Title VII defendants except in narrow circumstances.

Marquart, 26 F.3d at 849.

The result in Marquart contrasts with a recent OCAHO adjudication on point. In Huesca v. Rojas Bakery, 4 OCAHO 654, (6/24/94), decided less than two weeks after Marquart, the ALJ concluded that the respondent employer was the prevailing party where the complainant moved to withdraw his complaint. After discussing a split among the circuits on the question of whether voluntary dismissal of the complaint before trial supports a finding that the defendant/respondent is a prevailing party, citing a Title VII Fifth Circuit opinion, the ALJ held that,

> Because a dismissal with prejudice is tantamount to a judgment on the merits for the purposes of res judicata, I conclude that Rojas Bakery is a prevailing party within the meaning of 8 U.S.C. § 1324b(h). See Anthony v. Marion County General Hospital, 617 F.2d 1164, 1169-70 (5th Cir. 1980) (upholding trial court's finding that the hospital was a "prevailing party" under 42 U.S.C. §2000e-5(k), stating that "[a]lthough there has not been an adjudication on the merits in the sense of a weighing of facts, there remains the fact that a dismissal with prejudice is deemed an adjudication on the merits for the purposes of res judicata."). (Footnotes omitted.)

Huesca at 10.

See also Davidson v. Allis-Chalmers Corporation, 567 F. Supp. 1532, 1545 (W.D. Mo. 1983).

Remarkably, OSC's argument against prevailing party status for Auburn omits any mention of Anthony v. Marion County General Hospital, despite OSC's reminder that "[D]ecisions of the former Fifth Circuit decided before October 1, 1981, are binding in the Eleventh Circuit. Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc)." Reply at 14, note 8.

It is elementary that absent jurisdiction to shift fees pursuant to §1324b(h), an ALJ does not reach the question whether voluntary dismissal with prejudice of the complaint invites prevailing party analysis on behalf of the respondent, occasioning inquiry as to whether the complainant's "argument is without reasonable foundation in law and fact." A ruling in favor of OSC's sovereign immunity claim would dispose of the case.

OSC's claim that sovereign immunity precludes fee shifting against it is premised on the rationale that a waiver "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969)," and that §13424b(h) "provides no explicit assertion of a waiver." Reply at 2. However, citing NAACP v. Civiletti, 609 F.2d 514, 516-17 (D.C. Cir. 1979), OSC acknowledges that "[T]he waiver may either be found in language referring specifically to the liability of the United States or the statutory context in which the fee provision arises." Reply at 2. OSC's argument concedes that a waiver does not require explicit terminology.

In any event, focusing only on §1324b(h) and not on §1324b or IRCA generically, OSC does not challenge the current OCAHO jurisprudence to the effect that IRCA waives immunity so as to render the United States amenable to ALJ jurisdiction for substantive violations of §1324b discrimination prohibitions. See Mir v. Federal Bureau of Prisons, 3 OCAHO 510 (4/20/94) (Order) at 1-11; Roginsky v. Dept. of Defense, 3 OCAHO 426 (5/5/92) at 5-14. In light, however, of a very recent decision which addresses sovereign immunity of the United States from liability for §1324b violations, the impact of sovereign immunity upon §1324b(h) jurisdiction needs to be further considered. This is so because it may be argued that if the United States is not subject to §1324b liability for substantive violations, a fortiori it cannot

be liable for fee shifting upon failure to prevail as a §1324b complainant.[2]

The Tenth Circuit Court of Appeals held in Hensel v. Office of the Chief Admin. Hearing Officer, No. 93-9551, 1994 U.S. App. LEXIS 25802 (10th Cir. Sept. 16, 1994), that the "[P]etitioner has not demonstrated that the IRCA contains explicit and unambiguous language that waives the immunity of the United States. Id. at *11. Citing United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992)[3], the Hensel court equates the Supreme Court's requirement for an "'unequivocal expression' of sovereign immunity" with a requirement for "explicit" text. LEXIS 25802 at *11.

The court prefaced Hensel, with a notice that its order and judgment "is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel," and citation of it is disfavored but nevertheless it "may be cited under the terms and conditions of the Court's General Order filed November 29, 1993. 151 F.R.D. 470." LEXIS 25802 at *1. It may be presumed from the court's Notice that Hensel is to be unpublished. The General Order (GO) "suspends 10th Cir.R. 36.3" until December 31, 1995. The GO authorizes citation of an unpublished opinion, order or judgment "if it is believed that . . . [it] . . . has persuasive value with respect to a material issue in a case and would assist the court in its disposition," provided that a copy is attached to the brief or other document in which it is cited. Id. For the purposes of this Order, the parties will be expected to obtain their own copies of the Hensel ruling.

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[2] A contrary rationale may be hypothesized from the text of §1324b(h) which exclusively and explicitly excepts the United States as a prevailing party from obtaining fee shifting in its favor. That text invites the inquiry as to whether Congress would have excepted the United States from obtaining the benefits of the attorneys fee provision if it did not otherwise believe the provision applied to the government. Of course, a plausible response may be that §1324b expressly contemplates that OSC will be a complainant, engendering the exception to fee shifting on its own behalf in the same fashion that such exceptions appear in other remedial anti-discrimination statutes.

It may be asked similarly why the President's statement, on signing IRCA into law, cautioned that prevailing respondent employers would be entitled to fee shifting against "all non-prevailing parties." Statement by President Ronald Reagan Upon Signing S. 1200, 22 Weekly Comp. Pres. Doc 1534 (Nov. 10, 1986). While a signing statement is arguably no part of the legislative history, the breadth of the remarks may be understood as a contemporaneous view that fee shifting applied regardless of the governmental status of the non-prevailing party.

[3] Acknowledging that the ambit of the sovereign immunity doctrine is unclear, Roginsky distinguished Nordic Village, 3 OCAHO 426 at 8.

Because the Hensel court refers only to petitioner's opposition to the claim of sovereign immunity, it does not appear from the Hensel ruling that the court was advised of or was otherwise aware of the Roginsky and Mir decisions. However, the fact that a circuit court has addressed the §1324b sovereign immunity issue and found waiver wanting, prompts this Order to invite the views of the parties on the matter of jurisdiction. It provides an opportunity also for the parties to address the prevailing party question in the context of Huesca v. Rojas Bakery, 4 OCAHO 654, and Marquart v. Lodge 837, International Assoc. of Machinists, 26 F.3d 842, 847-54 considered together with Anthony v. Marion County General Hospital, 617 F.2d 1164, 1169-70.

In passing, with respect to whether Balazs-Kilgore's claim lacked a "reasonable foundation in law and fact," I note agreement with OSC on the broad proposition that,

> [A]s this ALJ has held, the fact a plaintiff is unsuccessful in obtaining relief does not, without more, mean that its complaint was without reasonable foundation in law and fact. Grodzki v. OOCL (USA), Inc., 1 OCAHO No. 295, at 10 (Feb. 13, 1991). Accord Christiansburg, 434 U.S. at 422; E.E.O.C. v. Jordan Graphics, Inc., 769 F. Supp. 1357, 1385 (W.D.N.C. 1991).

Reply at 11.

III. *Order*

The parties are requested to advise of their respective positions on the issue of fee shifting in light of the jurisprudence identified above together with such other authorities as they each may rely upon.

Responses to this order will be timely if filed not later than October 12, 1994. A party may reply to the filing of the other not later than October 21, 1994.

SO ORDERED.

Dated and entered this 22nd day of September, 1994.

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MARVIN H. MORSE
Administrative Law Judge