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

July 28, 1997

JAMES O. JARVIS, Complainant , v. AK STEEL, Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00024)))

ORDER GRANTING RESPONDENT'S REQUEST FOR ATTORNEYS' FEES

On April 30, 1997, complainant's November 18, 1996 Complaint, alleging citizenship status discrimination and document abuse in violation of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324b(a)(1)(B) and the Immigration Act of 1990 (IMMACT), 8 U.S.C. §1324b(a)(6), was dismissed, with prejudice to refiling, for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction.

In that Order of Dismissal, respondent was advised that its request for a reasonable attorney's fee and costs would be considered if it filed that request with supporting documentation on or before June 16, 1997.

Accordingly, on June 16, 1997, respondent filed a pleading captioned Motion for Attorneys' Fees and Costs, along with a memorandum in support and documentary data supporting its claim for attorneys' fees and costs in the total sum of $1,886.68.

Complainant has not filed a response to respondent's request for attorneys' fees despite having been granted until July 16, 1997 to do so.

Accordingly, we must assess the sole remaining issue presented for adjudication, AK Steel's request that, as the prevailing party, it be awarded the sum of $1,886.68 as its reasonable attorneys' fees incurred in defending complainant's IRCA charges.

The provisions of IRCA, at 8 U.S.C. §1324b(h), provide that "[i]n 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."

The applicable procedural regulation dealing with the award of attorney's fees in this type of proceeding, 28 C.F.R. §68.52(c)(2)(v)(1996), provides also that "[a]ny application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed."

Because AK Steel's January 21, 1997 Motion to Dismiss was granted in its entirety, it is found that AK Steel has compellingly demonstrated that it is the prevailing party within the meaning of 8 U.S.C. §1324b(h).

We turn now to resolving the question of whether complainant's argument has been shown to have been without reasonable foundation in law and fact.

By enacting the unfair immigration-related employment practice provisions of IRCA, Congress sought to grant a cause of remedial action to those persons upon whom citizenship status discrimination or document abuse had been wrongfully practiced. Congress also quite fairly imposed a concomitant duty of proof namely, that those pursuing those causes of action demonstrate the efficacy of their charges by providing a preponderance of evidence in support of such allegations.

Congress also felt strongly that in those instances in which the losing party's argument was without reasonable foundation in law and fact, it would only be equally fair to reward reasonable attorneys' fees to prevailing parties against whom or which those charges had been unreasonably brought.

In doing so, Congress was merely following the ruling of the U.S. Supreme Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), wherein it was held that a court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *Id*. at 420; *see also Brooks v. Center Park Associates*, 33 F.3d 585, 587 (6th Cir. 1994); *Kasuri v. St. Elizabeth Hosp. Medical Center*, 897 F.2d 845, 854 (6th Cir. 1990); *Wije v. Barton Springs*, 5 OCAHO 785 (1995).

In fleshing out the foregoing standard in *Christiansburg Garment Co.*, the Supreme Court provided the following caveat:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset a party may have an entirely reasonable ground for bringing suit.

434 U.S. at 421–22.

Turning then to the inquiry concerning whether complainant's argument is without reasonable foundation in law and fact, after careful review of the record and mindful of the Supreme Court's caveat, I find that it is not.

It is plain that from the very outset complainant's dispute with AK Steel had nothing whatsoever to do with IRCA's purpose of eliminating and making unlawful unfair immigration-related employment practices. Instead, this factual scenario clearly demonstrates that complainant's claim is ideological in nature and that his dispute is with the Internal Revenue Service concerning Federal tax laws namely, the withholding of taxes from his wages.

As noted in the April 30, 1997 Order of Dismissal, this case represents another in a series of tax protester cases that have recently been adjudicated by this Office. *See, e.g.*, *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996); *Horne v. Town of*

Hampstead, 6 OCAHO 906 (1997); *Wilson v. Harrisburg School District*, 6 OCAHO 919 (1997); *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997); *Boyd v. Sherling*, 6 OCAHO 916 (1997); *Costigan v. NYNEX*, 6 OCAHO 918 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997).

Most of these complaints, which advance the same theories, were filed and pursued by John B. Kotmair and the National Worker's Rights Committee and were dismissed at an early stage on motions to dismiss for lack of jurisdiction or for failure to state a claim or both. In *Lee v. Airtouch Communications*, respondent was awarded its costs and attorneys' fees. Despite those rulings, these hapless actions continue to be filed.

This record is equally clear that the U.S. Department of Justice Office of Special Counsel (OSC), the office initially tasked with the investigation of complainant's charges, was quite aware of the nature of complainant's claims and so advised complainant during its 120-day investigation period, and quite obviously chose not to file citizenship status discrimination and document abuse charges against AK Steel.

In its August 20, 1996 determination letter, OSC stated that these charges are based on complainant's request that AK Steel "stop withholding federal tax from his wages, and [AK Steel's] refusal to comply with that request."

Despite OSC's reasoned assessment of his claims, complainant, led by his designated representative John B. Kotmair, chose to commence this frivolous action against AK Steel.

Complainant could not hope to obtain the type of relief namely, among other things, back pay and/or reinstatement, which are available to those individuals who have meritorious claims that an employer has engaged in an unfair immigration-related employment practice. That because it was found that in 1958 Jarvis was hired by AK Steel as a machinist in that firm's facilities located in Ashland, Kentucky, and that he voluntarily retired in 1996.

Under those facts, it is clear that complainant did not have a reasonable basis for filing this case and quite obviously intended to harass and force AK Steel to end complainant's capricious conduct by offering a financial settlement of this matter.

And complainant may not claim surprise upon learning of this $1,886.68 fee shifting ruling since he was advised in OSC's August 20, 1996 determination letter and prior to having filed his OCAHO Complaint, that an administrative law judge may allow a reasonable attorney's fee to AK Steel in the event his argument is found to be without reasonable foundation in law and fact.

Finally, fee shifting in this case would not have the effect of discouraging "all but the most airtight claims," because this is precisely the type of case which the statute was designed to deter. *Christiansburg Garment Co.*, 434 U.S. at 422; *Airtouch Communications*, 7 OCAHO 926, at 8.

The only remaining matter to be resolved is that of determining whether AK Steel's request that it be reimbursed the sum of $1,886.68, as and for its reasonable attorneys' fees in this proceeding, is in order.

The Supreme Court has repeatedly advised that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989); *Blum v. Stenson*, 465 U.S. 886, 888 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see also Coulter v. Tennessee*, 805 F.2d 146, 148 (6th Cir. 1986).

In arriving at the requested attorneys' fees, AK Steel's counsel of record, William Bevan III, Esquire, Reed Smith Shaw & McClay, provided the following itemized statement of fees and costs extending from December 23, 1996, 14 days after AK Steel had acknowledged receipt of the Complaint, through March 21, 1997:

William Bevan III, Esquire 5.25 hours @ $240	$1,260.00
Bernard J. Casey, Esquire 2 hours @ $275	550.00
Eva C. Tuttle .25 hours @ $95	23.75
Total Legal Fees	$1,833.75

Total Expenses—copying, postage, telephone	$ 52.93
Total Attorneys' Fees	$1,886.68

AK Steel's counsel spent an appropriate amount of time defending this matter namely, 7 and 1/2 hours, reflecting the fact that the Complaint was dismissed at an early stage. Approximately 83% of that time (6.25 hours) was spent preparing respondent's answer and motion to dismiss. Respondent's counsel is to be commended for distilling complainant's obscure tax-related claims in such a short amount of time. Accordingly, the time expended in defending this matter is found to be reasonable.

It can readily be seen, also, that 70% of those billing hours had been incurred at the rate of $240 per hour. That rate, as well as the rates for the remaining percentage of billable hours, as well as the nature and total sum of the miscellaneous expenses, are also found to be reasonable.

In summary, because complainant's claims are found to have been made without reasonable foundation in law and fact, and because the attorneys' fees incurred by AK Steel in defending this matter have been found to be reasonable, it is further found that AK Steel is entitled to the sum of $1,886.68 as its reasonable attorneys' fees.

Accordindgly, under the authority contained in the provisions of 8 U.S.C. §1324b(h), it is hereby ordered that complainant pay to AK Steel the sum of $1,886.68 as reasonable attorneys' fees.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of this

Order in the United States Court of Appeals for the Circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.