Civil Rights

Attorney's Fees and *Buckhannon*

How the Supreme Court (with help from the Fourth Circuit) erected a formidable barrier to certain civil rights litigation

by Rebecca Glenberg

The fundamental rights protected by the Constitution and civil rights statutes have little meaning unless those rights can be enforced in court. But those most vulnerable to civil rights violations by the government, employers, or landlords are typically those who are least able to pay for attorney. And civil rights cases are often not amenable to contingency arrangements. In some cases, plaintiffs seek not monetary damages but an injunction against an unlawful statute or policy. In other cases, the plaintiff's injury – say, being stopped by the police on the basis of race, or being chilled in the exercise of free speech – is not concrete enough to yield substantial damages. The doctrines of qualified immunity and sovereign immunity often preclude any monetary damages in many cases against government actors. As a result, except in cases of the most flagrant abuses resulting in serious injury to person or property, it is plaintiffs with meritorious civil rights claims who may not be able to find an attorney.

To address this problem, Congress has enacted fee-shifting statutes that allow a court to award attorney's fees to the "prevailing party" in a civil rights lawsuit.[1] As the Supreme Court has explained, "[w]hen the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."[2] A civil rights plaintiff acts "not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."[3] Fee-shifting statutes "encourage individuals injured by racial discrimination to seek judicial relief."[4]

In light of this Congressional policy, the Supreme Court has held that under civil rights fee-shifting statutes, "a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances."[5] But, in order not to deter difficult civil rights cases, fees should not be awarded to a prevailing *defendant* unless the court finds that the plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[6]

Usually, it is quite easy to tell whether a civil rights plaintiff is a "prevailing party" and thus entitled to attorney's fees. But not always. One of the more vexing questions has involved the mooting of a case before final judgment is reached. Say, for example, a plaintiff challenges a city ordinance as unconstitutional. Extensive discovery is taken; expensive expert witness reports are prepared. The judge denies the defendant's motion for summary judgment, and his opinion makes clear that the plaintiffs are likely to win the case. Shortly before trial, the city council repeals the ordinance. The case is then dismissed as moot. Although he has received no judicial relief, the plaintiff has entirely succeeded in his role as "private attorney general": he has caused the repeal of an unconstitutional ordinance. Is he entitled to recover the costs and attorney's fees expended on the case?

Until 2001, the answer was a nearly unequivocal "yes." Almost every federal appellate court subscribed to the "catalyst theory," under which a plaintiff could recover fee if his lawsuit acted as a "catalyst" for a favorable outcome. Under this theory, "a plaintiff may achieve its victory in a lawsuit even if there is no award or injunction, so long as the lawsuit effectively

achieved a favorable result sought by the plaintiff."[7] In most circuits, to qualify for attorney's fees under the catalyst theory, a litigant typically had to meet three conditions: (1) "that the defendant provided some of the benefit sought by the lawsuit"; (2) "that the suit stated a genuine claim, *i.e.*, one that was at least 'colorable," not 'frivolous, unreasonable, or groundless'"; and (3) "that her suit was a 'substantial' or 'significant' cause of defendant's action providing relief."[8]

It will come as no surprise to Virginia civil rights practitioners that the Fourth Circuit was the sole federal appeals court to reject the catalyst theory. In a 1994 case called *S-1 and S-2 v. State Bd. of Educ.*, the court, by a 6-5 vote, held that "[a] person may not be a 'prevailing party' ... except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought."[9] *S-1 and S-2* made it all the more difficult to bring civil rights cases in the Fourth Circuit. In any case that involved only equitable relief, there was always a danger that the defendant would engage in "strategic capitulation" – finding a way to moot the case in order to avoid attorney's fees. Still, at least the problem was limited to the Fourth Circuit. Every other federal circuit continued to follow the catalyst theory.

Then came another Fourth Circuit case, *Buckhannon Board and Home Care v. West Virginia Department of Health and Human Services*.[10] The plaintiff, owner of a chain of assisted living facilities, brought a Fair Housing Act and Americans with Disabilities Act challenge to a state law that required their residents to be capable of "self-preservation." Following discovery, the district court denied the defendants' motion for summary judgment, clearing the way for the case to proceed to trial. Less than a month later, the state legislature repealed the challenged statute, and the court dismissed the case as moot. Citing *S-1 and S-2*, the court denied the plaintiffs' request for attorney's fees. The Fourth Circuit affirmed. The plaintiffs petitioned for *certiorari*, and the Supreme Court accepted the case to resolve the disagreement between the Fourth Circuit and the rest of the country about the applicability of the catalyst theory to civil rights attorney's fees statutes.[11]

In an opinion by then-Chief Justice Rehnquist, Supreme Court sided with the Fourth Circuit in rejecting the catalyst theory. The Court held that only "enforceable judgments on the merits and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees."[12] In other words, even if the plaintiff obtains all the relief he seeks through legislative or policy change, he is not entitled to attorney's fees absent some "judicial imprimatur."[13]

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, dissented. The dissent explained that "[a] lawsuit's ultimate purpose is to achieve actual relief from an opponent. . . . At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant." Thus, "a party 'prevails,' in a true and proper sense, when she achieves, by instituting litigation, the practical relief sought in her complaint."[14]

The dissent was alert to the danger of strategic capitulation. In the absence of a catalyst theory, defendants on the verge of defeat could avoid attorney's fees by mooting the case, through voluntary conduct, on the eve of trial. The dissent approvingly quoted Judge Friendly: "Congress clearly did not mean that where [a Freedom of Information Act] suit had gone to trial and developments made it apparent that the judge was about to rule for the plaintiff, the Government could abort any award of attorney fees by an eleventh hour tender of the information."[15] The majority dismissed this concern as "entirely speculative and unsupported by any empirical evidence."[16]

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The Fourth Circuit's, and later, the Supreme Court's rejection of the catalyst theory has had a profoundly negative impact on civil rights litigation. One post-*Buckhannon* survey of public interest law organizations found that classic public interest impact litigation, such as class-actions seeking injunctive relief against government officials, is the loser under *Buckhannon*.[17] Survey respondents said that *Buckhannon* made settlement more difficult, "because requiring a formal judgment takes away the potential for face-saving, out-of-court settlements in which defendants do not admit to wrongdoing."[18] *Buckhannon* severely reduces plaintiffs' leverage in settlement negotiations, since defendants are aware that they can avoid an attorney fee award by capitulating at any point in the case.

Such disadvantages deterred public interest organizations from embarking on certain kinds of impact litigation because of the risk that, after significant investment of time and money by the plaintiffs, the defendants would moot the case through voluntary conduct, leaving the plaintiffs unable to recover their costs and fees. This risk also made it more difficult for organizations to find outside co-counsel for public interest cases. The survey authors noted that "[t]hese are perhaps the most disturbing implications of *Buckhannon*, for they suggest that this decision undermines the incentives for private attorneys general to bring future enforcement actions."[19]

Despite this dismal picture, there is reason for hope. Last year, the Civil Rights Act of 2008 was introduced in both the Senate and House of Representatives.[20] The bill reinstated the catalyst theory by defining "prevailing party" as "a party whose

pursuit of a nonfrivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought." The bill went nowhere in 2008, but similar legislation is expected to be introduced this year. With a former civil rights lawyer and constitutional law scholar in the White House, it just may have a chance.

Endnotes

1. *See, e.g.*, 2 U.S.C.A. §2000e-5(k) (fees for prevailing party in suits under Title VII of the Civil Rights Act of 1964) 42 U.S.C.A. §3612(p) (Fair Housing Act); 42 U.S.C. §1988(b) (other civil rights statutes). This article treats the fee-shifting provisions of the various civil rights statutes interchangeably as, for the most part, have the federal courts.
2. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 (1968).
3. *Id*. at 402.
4. *Id*.
5. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978) (emphasis in original).
6. *Id*. at 422.
7. *Stanton v. Southern Berkshire Regional School Dist.*, 197 F.3d 574, 577 (1st Cir. 1999). *See also Marbley v. Bane*, 57 F.3d 224, 234 (2nd Cir. 1994); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-550 (3rd Cir. 1994); *Payne v. Board of Ed.*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Little Rock School Dist. v. Pulaski Cty. School Dist.*, # 1, 17 F.3d 260, 263, n. 2 (8th Cir. 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951-952 (10th Cir. 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999).
8. *Buckhannon Board and Home Care, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 627 (2001) (Ginsburg, J., dissenting) (internal quotation marks and citations omitted).
9. 21 F.3d 49, 51 (4th Cir. 1994) (*en banc*)
10. 203 F.3d 819 (4th Cir. 2000).
11. *Buckhannon*, *supra* n.8.
12. *Id*. at 604 (internal quotation marks and citation omitted).
13. *Id*. at 605.
14. *Id*. at 634 (internal quotation marks and citations omitted).
15. *Id*. at 636 n. 10 (*quoting Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509, 513 (2d Cir.1976).
16. *Id*. at 608.
17. Catherine R. Albiston & Laura Beth Nielsen, "The Procedural Attack on Civil Rights: The Empirical Reality of *Buckhannon* for the Private Attorney General," 54 *UCLA L. Rev.* 1087 (2007).
18. *Id*. at 1128.
19. *Id*. at 1130.
20. H.R. 5129, S. 2554, 110th Cong., §2 (2008).

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