Civil Rights

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. 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.” 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.”

Fee-shifting statutes “encourage individuals injured by racial discrimination to seek judicial relief.” 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.” 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.”

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

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
achieved a favorable result sought by the plaintiff.”17
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 ‘substan-
tial’ or ‘significant’ cause of defendant’s action
providing relief.”18
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.” 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 fol-
low the catalyst theory.
Then came another Fourth Circuit case, Buck-
hannon Board and Home Care v. West Virginia
Department of Health and Human Services.10 The
plaintiff, owner of a chain of assisted living facil-
ties, 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 legisla-
ture 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 be-
tween 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 ex-
plained 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 attor-
ey’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 empiri-
cal evidence.”16
The Fourth Circuit’s, and later, the
Supreme Court’s rejection of the cata-
lyst theory has had a profoundly nega-
tive 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 dif-
cult, “because requiring a formal judgment
takes away the potential for face-saving,
out-of-court settlements in which defen-
dants 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 sig-
nificant investment of time and money by the plain-
tiffs, 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]he 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 ac-
tions.”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 Repre-
sentatives.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.


3. Id. at 402.

4. Id.


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).


9. 21 F.3d 49, 51 (4th Cir. 1994) (en banc)

10. 203 F.3d 819 (4th Cir. 2000).


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.


18. Id. at 1128.

19. Id. at 1130.