LITIGATION NEWS

ABA Litigation Section

TOP STORY

Attorney Fees Award Encourages Voting Rights Litigants

By Josephine M. Bahn – February 16, 2023

A federal appellate court affirmed an attorney fees award to voting rights advocates requiring a state to pay more than $842,000 in legal fees in a moot case with no final appealable order. In *Tennessee State Conference of the NAACP v. Hargett*, the Court of Appeals for the Sixth Circuit reasoned that voting rights advocates, including the Tennessee State Conference of the NAACP (NAACP) and the League of Women Voters (LWV), were "prevailing parties" under federal law in obtaining an injunction, even though the case later became moot. The voting rights advocates earned their fees, despite the legislature's subsequent repeal of the offending legislation and plaintiffs' voluntary dismissal of the case.

Preliminary Injunction Qualifies for Attorney Fees

In May 2019, Tennessee's governor Bill Lee signed new voting rules mandating training and similar requirements for parties to engage in voter registration initiatives. Shortly thereafter, the NAACP and LWV filed a motion seeking a preliminary injunction in the U.S. district court. In September 2019, the trial court granted the preliminary injunction, finding that the voting rights advocates would likely succeed on the merits of their constitutional challenge to the training requirements. Before a final order could be issued, however, the Tennessee General Assembly repealed the offending law, and the plaintiffs dismissed the case.

Despite the mootness of the case, the district court determined that the voter rights advocates win on the "likelihood of success on the merits" element was sufficient to hold that they were the prevailing party in the litigation. The district court held that the voter rights groups were entitled to applicable attorney fees and court costs despite their legal challenge becoming moot before the trial court could enter a final appealable order.

The Tennessee Secretary of State appealed the fee award to the Sixth Circuit. Tennessee argued that the grant of the preliminary injunction was an interlocutory order and that the voter rights groups therefore could not be prevailing parties. The appellate court disagreed, holding that the voter rights groups were the prevailing parties by obtaining their preliminary injunction victory, even though plaintiffs voluntarily dismissed the case shortly after the law was repealed.

The appellate court found that voters who were registered during the preliminary injunction period could not be "unregistered" when the injunction expired, making the lower court's injunction order final. The court also held that when a preliminary injunction is granted at the district court level and not challenged on appeal, the case's procedure and record are "enduring enough to support prevailing-party status."

The dissenting opinion argued that the majority broke with the Supreme Court precedent in *Buckhannon Board & Care Home Inc. v. West Virginia Department of Health & Human Services*, where plaintiffs were deemed not entitled to an attorney fees award because the defendants only invalidated the challenged law. Further, the dissenting opinion argued that in instances where "a state-defendant voluntarily repeals the statute before a merits decision," organizations should not be entitled to fees.

Enormous Expense of Voting Rights Litigation

The Sixth Circuit's holding highlights the tremendous expense and resources that are needed to pursue voting rights cases, especially when a claimant needs to marshal substantial evidence to prove a widespread constitutional or statutory violation, explains Allegra Hardy-Lawrence, Atlanta, GA, cochair of the ABA Litigation Section's Minority Trial Lawyer Committee. The ability to recover legal fees and court costs make the investment worthwhile, she adds. "The fee-shifting provisions of our civil rights laws allow individuals and civic groups to mount legal challenges to unlawful election practices with the confidence that, in success, their enormous investment is somewhat recoverable," she continues. Hardy-Lawrence points out that the Sixth Circuit's decision is compatible with practical reality because so few cases are litigated to final judgment.

Encouraging Attorneys to Take on Voting Rights Litigation

Although the state of Tennessee, rather than individual clients or corporations, was required to pay the imposed fees, the Sixth Circuit encouraged more voter rights litigation with its decision, observes John S. Austin, Raleigh, NC, cochair of the Litigation Section's Professional Liability Committee. Although the state was required to pay fees as part of the court's decision, the fees do not "punish the State, but encourage attorneys to represent and defend citizens' civil rights," Austin clarifies.

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Recovery of a litigation investment may be necessary to protect essential rights. “Section 1988 allows for discretionary granting of fees and costs because civil rights cases are not easy or profitable, but must be taken on to ensure all of our fundamental rights continue; so when a party has met the legal standards to be granted fees and cost, it should stand,” asserts Griselda Vega Samuel, Chicago, IL, cochair of the Section’s Diversity, Equity & Inclusion Committee.

Josephine M. Bahn is an associate editor for Litigation News.

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- William M. Dunham, “What Does ‘Prevailing Party’ for Title VII Defendants Mean?,” *Litigation News* (July 9, 2016).

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