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United States District Court, N.D. Illinois, Eastern Division.

ALLIANCE TO END REPRESSION, et al.
Plaintiffs,
v.
CITY OF CHICAGO, et al. Defendants.

No. 74 C 3268 consolidated with 75 C 3295 & 76 C 1982. | October 24, 1985.

Opinion

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

***1** This civil rights action is before the court on several motions: the motion of ACLU plaintiffs to correct a mistaken statement in the court's memorandum opinion and order dated August 8, 1984; the motion of Alliance plaintiffs for sanctions against defendant City of Chicago; and two petitions for fees. The City's motion for separate trials on the issue of damages liability has been withdrawn.

Motion to Correct

In this motion, the ACLU plaintiffs have asked for correction of an August 8, 1984 order in which this court denied the City's motion for a stay pending appeal of an earlier order requiring all public gathering and dignitary protection investigation as defined in § 1.2 of the Judgment Order to be contrally supervised and documented and ordering that periodic independent audits of implementation and compliance encompass all city government, not only the police department. In commenting on the impact of that earlier order, the court on August 8, 1984 said that the Judgment Order did not impose additional procedural safeguards on public gathering investigations beyond central supervision unless those investigations were directed towards First Amendment Conduct.

The plaintiffs report that the City does not object to the timing of the present motion and the City has concurred in that understanding. In addition, the City voluntarily dismissed its appeal of the June 6 order in the fall of 1984, so there is no conflict with the jurisdiction of the Seventh Circuit. Correction of the August 8 Order is apparently necessary, however, to resolve a disagreement among the parties and to clarify the judicial record.

The language of the Judgment Order in this respect is clear. The Order distinguishes between public gathering, dignitary protection, criminal, and regulatory investigations for purposes of procedural safeguards. Dignitary protection, criminal, and regulatory investigations are subject to specific safeguards only if 'directed toward First Amendment Conduct.' Public gathering investigations, however, whether or not directed toward First Amendment Conduct, must comply with the procedural requirements of § 3.1 and also those further requirements specifically set forth in § 3.4. The omission of the language 'directed toward First Amendment Conduct' in § 3.4, where every other subsection contains that language, is clear.

The City points out that the language of § 3.1 refers only to investigations directed toward 'First Amendment Conduct.' This is perfectly correct as far as it goes. Section 3.4 unambiguously provides, however, that 'Any public gathering investigation must comply with Part 3.1.' The latter provision expressly and categorically addresses the issue presented by the parties and therefore controls the more comprehensive language of § 3.1. The court therefore grants the plaintiffs' motion to correct, and orders its August 8, 1984 memorandum opinion to be modified and corrected by striking the first full paragraph on page 2 and inserting the following in its place:

> ***2** All the June 6 Order held was that the Judgment Order required that all public gathering and dignitary protection investigations be reported to a central unit, so that as a result there will be some assurance that dignitary protection investigations directed toward First Amendment conduct, and all public gathering investigations, will be conducted in accordance with the procedural requirements of the Judgment Order. The important distinction between dignitary protection investigations directed at First Amendment conduct and other dignitary protection investigations is not disturbed by the June 6th order.

Motion for Sanctions

In the motion, the 26 Alliance plaintiffs move for sanctions in the form of a contempt finding, a preclusion order, and attorneys' fees against the City of Chicago for failure to answer interrogatories and to obey for seven years a court order to produce certain files. The facts underlying this motion are as follows. On May 4, 1977, Judge Alfred Y. Kirkland ordered the City to place in the document depository its 'transmittal files.' According to the plaintiffs, the term 'transmittal files' refers to all files concerning the transmittal of information between the Chicago Police Department Subversive Unit and other agencies. According to the City, however, the term referred only to files containing so-designated 'Transmittal Reports,' and did not encompass a separate filing system for correspondence involving the transmittal of information between the City and police departments in various other cities. It is the City's failure to produce these 'letter files' until expressly asked to do so in September of 1984 which forms the basis for the present motion.

In order to support their understanding of the term 'transmittal file,' each side has submitted various materials underlying the background of the May 4, 1977 order. The uncontested parts of the record are as follows. On December 12, 1974, defendants were asked to name all organizations to whom intelligence information from the file room was disseminated and approximately how many instances of dissemination occurred. (Interrogatories #29 and #30). Defendants objected to these interrogatories on the grounds that they were too burdensome, and on March 5, 1976, Judge Kirkland ordered the defendants to respond. On April 1, 1976, defendants answered that 'Records relating to the dissemination of intelligence file information . . . were kept only . . . for 1 year for dissemination beyond the department. . . . When the files were closed they were physically moved, and the records of dissemination for the 1 year prior to March, 1975 cannot now be located. A further search will be made.' (Pltf's Addendum Exhibit A).

On June 23, 1976, the plaintiffs in consolidated discovery took the deposition of Sergeant Jerome Latimer, Commanding Officer of the Records Unit in charge of the Intelligence Division files. Mr. Gutman participated in the deposition. At that deposition, Sgt. Latimer testified that the department kept 'transmittal reports' for inter-departmental distribution of intelligence information, (serial 37 reports), but testified that intelligence information sent to outside agencies would be classified under a separate letter file (serial 17 reports). Sgt. Latimer did not, however, testify that the letter file was still in existence, and confirmed the earlier interrogatory answer that such reports were typically kept for one year only.

***3** In the meanwhile, the Alliance plaintiffs moved for sanctions under Fed.R.Civ.P. 37(d) for the defendants' failure to answer certain interrogatories, including interrogatories 29 and 30. On November 10, 1976, Judge Kirkland found the defendants' answers 'incomplete' and 'evasive' within the meaning of Rule 37, and further found that defendants' document destruction had made it impossible for plaintiffs to prove their allegations of inflitration and information dissemination. See Alliance to End Repression v. Rochford, 75 F.R.D. 438, 440 (N.D. Ill. 1976). Accordingly, Judge Kirkland sanctioned the defendants by holding that plaintiffs had made a prima facie showing on paragraphs 82, 96, and 97 of the complaint, and that defendants therefore had the burden of showing that intelligence files were not circulated to other agencies.

On December 8, 1976, the Alliance and ACLU cases were consolidated for discovery purposes. On December 23, 1976, the City filed its answers to ACLU interrogatories 12 and 19. Interrogatory answer 12 listed four types of records used to transmit intelligence information, including both 'transmittals' and 'letters' identified as such. The interrogatory answer also says, however, that these documents had been 'previously submitted' to plaintiffs.

Also on December 23, 1976, the ACLU plaintiffs filed a motion to establish a document depository for all materials concerning 'subversive' matters. In the motion, plaintiffs stated that the City had made its non-criminal, or 'subversive,' files available for copying, but that bureaucratic procedures and general disorganization were impeding discovery. On May 4, 1977, Judge Kirkland granted the motion, and listed 'transmittal files presently located at 843 West Maxwell Street' among the documents to be deposited. The court also ordered defendants to place any other discovery documents 'of substantial volume' in the depository. The City turned over the serial 37 files but not the serial 17 files. According to plaintiffs' attorney, the relevant serial 17 reports totaled more than 2,000 pages and were thus not 'insubstantial' in volume.

On September 27, 1977, plaintiffs obtained a further court order stating that 'city defendants shall promptly produce for inspection and copying all documents generated by or presently in the custody or control of the Intelligence Division which do not relate to specific criminal investigations.' Nonetheless, the serial 17 files were still not produced, and plaintiffs never requested copies of the letters. Not until 1980 were any serial 17 files copied and served on plaintiffs: on February 16 of that year, Mary Edwards, on behalf of Mr. Gutman, acknowledged receipt of 55 pages of Intelligence Division reports, all prefixed by code number 17. For reasons which are unclear, however, Mr. Gutman himself did not learn of the serial

17 files until early 1984, at which time he contacted the City about the documents and was allowed to inspect and copy all serial 17 files on lawful political activity.

***4** The record established beyond doubt that defendants failed to comply with discovery either by failing to turn over the serial 17 reports as 'transmittal files' or by failing to amend their interrogatory answers which indicated that these files had been either destroyed and/or 'previously submitted.' The question is what sanctions would be appropriate. The City points out that it appointed a special corporation counsel in November of 1977, and that the City has cooperated in discovery since that time. Given the long time since the omission, the May 1976 order sanctioning defendants for allegedly destroying these documents, and the fact that Mr. Gutman should have known by 1980 at the latest about the serial files, the City asks that the motion for sanctions be denied on grounds of laches.

A district court's power to sanction a party for failure to provide discovery is expressly set forth in Rule 37(b) of the Federal Rules of Civil Procedure:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as the just, and among others the following:
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> . . .
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> (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
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> . . .
>
> (d) . . . an order treating as a contempt of court the failure to obey any orders . . .
>
> In lieu of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order and the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The sanctions in appropriate cases may be as severe as dismissal. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 638, 643 (1976).

The present situation presents an unusual situation in that plaintiffs, having obtained preclusion sanctions years ago for destruction of these documents, now seek broader sanctions upon discovering that the documents were in fact available all along. Plaintiffs' particulars of disadvantage from the nondisclosure rest largely on the value these files had for proof of dissemination allegations. Because those dissemination allegations were deemed prima facie true as of November 1976, however, plaintiffs had little need to prove their allegations. This is not to condone defendants' failure to comply with discovery, only to observe that plaintiffs overstate the harm they have suffered from the nondisclosure, particularly where the damages cases have yet to be tried, the files have now (apparently) been fully turned over, and the plaintiffs' attorney arguably should have uncovered the files' existence in 1980.

The present situation is also unusual in that defendants switched counsel in late 1977, and the City's present attorney asked plaintiffs' lawyers to inform him of all outstanding discovery obligations at that time. While the City's current attorney failed to amend previously misleading discovery answers, his failure to turn over the serial 17 files before 1984 apparently stemmed from a belief that plaintiffs' lawyers were disinterested in the files, and not from an awareness that the plaintiffs were ignorant of the files' existence. The files were indeed turned over once specifically requested. The long lapse of time since the discovery was first requested is not evidence of willful violation which would support a contempt.

***5** However, the court concludes that some sanction beyond that ordered in November 1976 is warranted. Judge Kirkland sanctioned the defendants then for destroying documents after the case was filed, not for lying in response to discovery requests. The plaintiffs' failure to request the serial 17 files specifically does not excuse the government's failure to provide that information, and the plaintiffs' omission was caused by the defendants' earlier failure to cooperate in discovery. That Mr. Gutman received some '17' files in 1980 should not automatically have alerted him to the existence of full-fledged files which had been withheld. As noted in National Lawyers Guild v. Attorney General, 94 F.R.D. 600, 615 (S.D.N.Y. 1982), the need for harsh measures to enforce discovery compliance is 'particularly evident when the disobedient party is the government.'

Accordingly, the court orders that paragraphs 82–86 of plaintiffs' complaint concerning dissemination of information be deemed true without being subject to rebuttal by the City, and that Alliance attorney Richard Gutman recover a reasonable attorney's fee for time spent both in obtaining the serial 17 files during 1984 and in filing the present motion.

Motion for Fees—Audit Appeal

Also before the court is the motion of the Alliance plaintiffs for attorneys' fees under § 1988 for time spent defending against the City's appeal of the court's June 6, 1984 order requiring the auditing of all city agencies. Notice of appeal was filed by the City on July 5, 1984; a motion for stay pending appeal was briefed by the parties and denied by the court on August 8, 1984. On November 17, 1984, pursuant to the City's motion for voluntary dismissal, the Seventh Circuit dismissed the appeal with prejudice. Plaintiffs have itemized 30 hours spent by their attorney Mr. Gutman in connection with the appeal, including time spent opposing the motion to stay and preparing the petition for fees when the City refused to settle the fees.

Plaintiffs have requested an hourly fee of $150 plus a multiplier. The City challenges solely the reasonableness of the hours spent and the request for a multiplier. This court has previously ruled that an hourly rate of $150 per hour fully compensates the attorneys in this case and related litigation for risk. See S.A.C.C. v. City of Chicago, Slip Op. No. 80 C 4714 (Feb. 14, 1985); Alliance to End Repression v. City of Chicago, Slip Op. No. 74 C 3268 (April 4, 1983). Accordingly, the request for a multiplier is denied.

The court also disagrees that plaintiffs' initial request of 20.5 hours, or the additional 9.5 hours spent responding to defendants' objections, are unreasonable in light of the defendants' decision to dismiss voluntarily. The plaintiffs could not have known defendants would do that and therefore had the right to begin preparing their appeal. Moreover, at least six of those hours were incurred in opposing the motion to stay, another 1.75 are attributed to designating the record on appeal, over three hours were spent reviewing a proposed training bulletin at defendants' request, and four hours were spent attempting to settle fees and filing the instant petition. Thus, only five hours were spent planning appellate strategy in advance of being served with the appellant's brief.

***6** In reviewing the plaintiffs' itemized hours, however, the court notes that plaintiff reports one hour spent 'studying' defendants' four motions for extensions of time, and one hour spent 'studying' defendants' January 1985 motion in this court for an extension of time, including .25 hours for reviewing this court's one sentence minute order granting the motion. This overstatement apparently results from plaintiffs' attorney's habit of billing a minimum of .25 hours for any time spent in connection with the litigation, no matter how de minimis. The court will deduct these two hours as unreasonable, but otherwise the plaintiff's request for the lodestar amount of fees is sustained.

Accordingly, plaintiffs are entitled to a fee award of $4,200 for 28 hours of work in connection with defendants' unsuccessful appeal of the order requiring citywide auditing.

Attorneys' Fees—Equal Access to Justice Act

The final matter before the court is the petition of the Alliance plaintiffs for attorneys' fees against the federal defendants under § 1988 and the Equal Access to Justice Act, 28 U.S.C. § 2412(d). The court remembers telling Alliance attorney Mr. Gutman some time ago that this petition would be denied, but has now discovered that no order was ever entered confirming that decision. Accordingly, the court now reaches the merits of the plaintiffs' claim for fees against the federal government.

Under the Equal Access to Justice Act, 28 U.S.C. § 2412(b), the United States shall be liable for attorney fees and expenses 'to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.' Plaintiffs argue that because this action was brought under the civil rights laws, fees against the federal government are enforceable pursuant to the terms of § 1988, which specifically provides for such an award in civil rights cases against other defendants. Under 28 U.S.C. § 2412(d), repealed in 1984 but still applicable to prior pending cases, Pub.L. 96–481, Section 204(c), a court shall award attorneys' fees to a prevailing party in a suit brought by or against the United States, 'unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.' Plaintiffs argue that the position of the federal government in this suit was not substantially justified, and that fees should therefore be awarded.

A preliminary issue to be addressed is whether the Act applies at all to plaintiffs' claim. The EAJA, by its terms, limits the availability of attorneys' fees against the United States to adversary adjudications 'pending on, or commenced on or after, [October 1, 1981].' In the present case, the federal defendants and the plaintiffs entered into settlements in late 1980. Notice was given and a fairness hearing held on February 13, 1981. The record was closed on June 11, 1981, and the settlements were approved by court order on August 11, 1981. By joint motion of the parties, judgment was entered September 2, 1981.

***7** Although the entry of final judgment before October 1, 1981 would appear to end the matter, plaintiffs argue that the pendency of the attorneys' fee petition in and of itself would suffice for applicability of the EAJA. This argument is incorrect as a matter of law. Numerous courts, including the Seventh Circuit, have held that a case is no longer 'pending' for purposes of the EAJA when the sole issue remaining on the effective date of the Act is the collateral issue of the federal government's

liability for fees. Tongol v. Donovan, 762 F.2d 727, 732 (9th Cir. 1985); Nichols v. Pierce, 740 F. 2d 1249, 1256 (D.C. Cir. 1984); Commissioners of Highways v. United States, 684 F.2d 443, 444–45 (7th Cir. 1982). The rationale of these cases is that waivers of soverign immunity, like the EAJA, must be strictly construed, and that the mere pendency of issues collateral to liability after October 1, 1981, does not suffice to create statutory liability for fees under the Act. While the Fifth and Eighth Circuits have held to the contrary, see Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 679 F.2d 64, 67–68 (5th Cir. 1982); United States ex rel. Heydt v. Citizens States Bank, 668 F.2d 444, 446 (8th Cir. 1982); this court is bound to follow the authority of the Seventh Circuit.

Plaintiffs also argue that an action for purposes of the EAJA should be considered 'pending' so long as a party's right to appeal has not been exhausted, even though final judgments may have been entered before October 1, 1981. Generally, an action is considered 'pending' so long as a party's right to appeal has not yet been exhausted or expired. United States ex rel. Heydt v. Citizens State Bank, 668 F.2d 444, 446 (8th Cir. 1982); Photo Data, Inc. v. Sawyer, 533 F.Supp. 348, 350–51 (D.D.C. 1982). This rule was adopted by the Seventh Circuit for purposes of the EAJA in Berman v. Schweiker, 713 F.2d 1290 (7th Cir. 1983). In that case, much like the present one, judgment was entered on August 17, 1981, but was not recorded on the docket until September 2d. In a long footnote, the court noted that Fed.R.App.P. 4(a) gives a losing party in an action involving the federal government sixty days after entry of judgment to file a notice of appeal. Since the time to appeal had not expired as of October 1, 1981, the court determined that the action was still pending as of October 1, 1981, id. at 1293 n.8, and went on to affirm the district court's award of fees. Id. at 1303.

At first blush, applicability of the EAJA would appear to follow as a matter of course from Berman. Because judgment was entered less than sixty days before October 1, 1981, then the time to appeal had not yet expired, with the consequence that the action was still pending as of the Act's effective date. Berman, however, involved a grant of summary judgment against the government. An appeal was therefore both practically and realistically possible. In the present case, judgment was by consent decree, and neither party had standing to appeal. The time to appeal therefore lapsed contemporaneously with the entry of judgment, and the September 2, 1981 order was final in all senses of the word. The court thus concludes that Berman is distinguishable and that there is no authorization for the imposition of fees under the EAJA.

***8** Even assuming that the present case was pending as of October 1, 1981, the court still concludes that fees would be inappropriate. In Aho v. Clark, 608 F.2d 365, 367 (9th Cir. 1979), the Ninth Circuit held that there were special circumstances warranting a denial of attorneys' fees under § 1988 where the plaintiff's complaint requested declaratory and injunctive relief as well as attorneys' fees, but the consent decree entered into made no provision for such an award. The court emphasized that § 1988 had taken effect 'only slightly more than two months before the consent agreement was approved by the parties,' id., and that the parties may well have negotiated 'upon the understanding that the law did not authorize attorneys' fee awards in such cases.' In this context the court concluded that an award of attorneys' fees would alter the compromise of the parties, and would be 'manifestly unfair' if not 'unduly harsh.' Id. The court also based its conclusion, however, on the particular equities of the case, in which the relief obtained was largely prompted by factors independent of the lawsuit.

Aho thus has obvious relevance for this case. Under the facts at bar, settlement negotiations between the plaintiffs and the federal defendants extended over several years and the issue of attorneys' fees was discussed from the outset. (See Defendants' Exhibits A–C). On February 1, 1980, ACLU attorney Douglass Cassel wrote to government attorney Charles Kruse, with a carbon copy going to Alliance attorney Richard Gutman. Mr. Cassel enclosed an outline of a suggested agreed decree, and notes that 'ancillary matters such as damages, attorneys' fees and costs' remained to be resolved. (Exhibit D). The proposed joint motion transmitted in return by Mr. Kruse contained no provision for payment of fees. (Exhibit E).

Mr. Cassel on June 20, 1980, again with a carbon to Mr. Gutman, sent a revised stipulation to the defendants. This stipulation contained a new Section VII, which provided for attorneys' fees for certain aspects of the litigation. (Exhibit F). After a day-long negotiation session at which Mr. Gutman and Mr. Cassel were present, both plaintiff attorneys signed a letter addressed to Mr. Kruse again raising the matter of fees. Plaintiffs stated that they had previously thought the Attorney General's authority to settle litigation would include the authority to pay fees, but suggested that attorneys' fees could be paid to the plaintiffs with respect to their Privacy Act claims. 5 U.S.C. § 552a(g)(4)(B). (Exhibit G). The letter makes no mention of the Civil Rights Attorney's Fee Awards Act or the Equal Access to Justice Act as authorizing fees.

On July 10, 1980, Mr. Kruse sent duplicate letters to the plaintiffs transmitting clean draft copies of the Joint Motion and Stipulation to reflect the latest negotiating session. Paragraph 7.1 provided that each party shall bear its own costs and expenses. (Exhibit H). In a letter dated August 6, 1980, the government urged plaintiffs to waive any provision for payment of money damages and to agree to Section VII as now drafted. (Exhibit J). Mr. Kruse pointed out that the plaintiffs' tort and privacy act claims were weak, and stated that the tentative agreement

contained the maximum the government could include in a settlement agreement.

***9** On August 15, 1980, Mr. Cassel responded by agreeing to defer proposals concerning damages provided that the government agree to pay plaintiffs' costs. (Exhibit K). Mr. Cassel also noted that, in light of Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977), attorneys' fees should not be a subject of negotiation until agreement was reached on all other matters. A carbon copy of the letter was sent to Mr. Gutman. In response, the government agreed to pay plaintiffs' costs which would be taxable pursuant to 28 U.S.C. § 1920. (Exhibit L). On September 3, 1980, Mr. Cassel wrote to Mr. Kruse, with a carbon copy to Mr. Gutman, to express his understanding that the proposed Joint Motion and Stipulation was acceptable to plaintiffs' counsel and to plaintiffs' negotiating team. The letter concluded that 'Rick Gutman, on behalf of his clients, concurs in this letter.' (Exhibit M). The letter contained no reservation of rights regarding fees.

Based on this agreement, both sides undertook the task of obtaining concurrence from their respective clients. According to the affidavits of Dennis Hoffman, special FBI agent, and Mr. Kruse, the proposed settlement was described to the FBI and CIA clients as not authorizing payment of attorneys' fees. (Exhibits S & T). This understanding was further reflected in the joint motion of Mr. Gutman and Mr. Cassel to establish procedures for approval of the proposed federal settlement, filed with the court on December 22, 1980. (Exhibit N). Paragraph 12, page 6, of that motion states that 'No attorney's fees are to be paid under the proposed settlement.'

The above documents compel the conclusion that the parties negotiated on the understanding that the only statutory authorization for fees was the Privacy Act. Indeed, the ACLU plaintiffs represented to the court long ago that they considered themselves to have waived any right to fees under the settlement, and therefore filed no petition for fees against the federal defendants. Mr. Gutman, by contrast, denies having ever waived any statutory right to fees, and argues (quite correctly) that mere silence of a consent decree on the question of fees does not necessarily preclude a court from awarding fees under § 1988 or analogous statutes. Regaldo v. Johnson, 79 F.R.D. 447, 451–52 (N.D. Ill. 1978). While the evidence is reasonably susceptible of an interpretation finding no waiver, the facts also indicate that the EAJA was simply not considered by the parties. Indeed, Mr. Gutman admits that he didn't learn of his potential EAJA entitlement until August of 1981 (Gutman Affidavit). Whatever plaintiffs' intent, however, the government in settling reasonably understood the plaintiffs to be giving up their claims for fees, and the court is hesitant to override that understanding.

Plaintiffs place particular emphasis on the August 15th letter of Mr. Cassel in which he suggests that attorneys' fees not be a subject of negotiation until reaching agreement on all other matters. The apparent motive behind this was to avoid the improper situation where a lawyer is forced to give up a statutory fee entitlement in exchange for obtaining relief for his clients. Numerous courts have disapproved of simultaneous negotiations of fees and merits in civil rights cases, although many continue to enforce fee waivers obtained during settlement. See generally Moore v. National Association of Securities Dealers, 762 F.2d 1093, 1100–1104 (D.C. Cir. 1985); Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985); Jeff D. v. Evans, 743 F.2d 648, 652 (9th Cir. 1984), cert. granted, 105 S.Ct. 2319 (1985); Prandini, 557 F.2d at 1017–1021.

***10** The court agrees that Mr. Cassel's August 15th letter evidences a deferral of fee discussions, and not an absolute waiver. However, given the lack of statutory authority for awarding fees against the federal government in 1980, the subsequent submission of the settlement for court approval with only costs awarded indicates that the parties would reasonably have concluded the fee question to be a dead letter. Were the EAJA applicable during the settlement negotiations, the federal government's blanket refusal to pay fees might be viewed as improper under Prandini and its progeny. The documentary evidence shows, however, that the government simply considered itself to have no statutory liability for fees. Under Aho v. Clark, 608 F.2d 365 (9th Cir. 1979), retroactive application of the EAJA in contradiction to this understanding would significantly alter the terms of the settlement and would be 'unjust' within the meaning of both § 1988 and the EAJA.

The court lays particular stress on the fact that the EAJA was not passed until after the lawyers in this case reached settlement and did not take effect until after the court approved the settlement. As noted in Benitez v. Collazo, 571 F.Supp. 246, 249 (D. P.R. 1983), Aho has been undercut by decisions such as Prandini and should not be followed in cases where the right to civil rights attorneys' fees is well developed. The view of the particular circumstances and timing of the settlement here, the court views plaintiffs' representation to the court that attorneys' fees would not be awarded under the settlement and their failure to reserve a right to petition the court for fees as dispositive. Accordingly, the Alliance plaintiffs' petition for attorneys' fees against the federal defendants is denied.

Conclusion

The motion of the ACLU plaintiffs to correct is granted.

The Alliance motion for attorneys' fees in connection with the appeal of the audit issue is granted; plaintiffs are awarded $4,200.000 in fees. The Alliance plaintiffs' motion for sanctions is granted in part; the court orders that paragraphs 82–86 of plaintiffs' complaint concerning dissemination of information be deemed true without being subject to rebuttal by the City, and that Alliance attorney Richard Gutman recover a reasonable attorney's fee for time spent both in obtaining the serial 17 files during 1984 and in filing the sanctions motion. All petitions for fees against the federal defendants are denied.

It is so ordered.