Debra P. Hackett
Clerk, U.S. District Court
15 LEE ST STE 206
MONTGOMERY AL 36104-4055

August 19, 2008

Appeal Number: 07-14854-DD
Case Style: USA v. Thomas G. Flowers
District Court Number: 68-02709 CV-T-N

TO: Debra P. Hackett

CC: Christopher W. Weller

CC: Gary L. Brown

CC: Raymond P. Fitzpatrick, Jr.

CC: Hon. Charles S. Coody

CC: Administrative File

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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The enclosed certified copy of the judgment and a copy of this court's opinion are hereby issued as the mandate of this court.

Also enclosed are the following:

Bill of Costs

The clerk of the court or agency shown above is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being mailed to counsel and pro se parties. A copy of the court's decision was previously mailed to counsel and pro se parties on the date it was issued.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: James O. Delaney (404) 335-6113

Encl.

United States Court of Appeals

For the Eleventh Circuit

No. 07-14854

District Court Docket No.
68-02709-CV-T-N

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Jun 18, 2008
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA, Plaintiff,

TIMOTHY D. POPE,

Invervenor-Plaintiff-Appellee,

JOHNNY REYNOLDS, et al.,

Intervenor-Plaintiffs,

versus

THOMAS G. FLOWERS, et al.,

Defendants,

STATE OF ALABAMA PERSONNEL DEPARTMENT,

Defendant-Appellant.

A True Copy - Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit
By: _____
Deputy Clerk
Atlanta, Georgia

Appeal from the United States District Court
for the Middle District of Alabama

J U D G M E N T

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

ISSUED AS MANDATE
AUG 19 2008
U.S. COURT OF APPEALS
ATLANTA, GA.

Entered: June 18, 2008
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 18, 2008
THOMAS K. KAHN
CLERK

No. 07-14854
Non-Argument Calendar

D.C. Docket No. 68-02709-CV-T-N

UNITED STATES OF AMERICA,

Plaintiff,

TIMOTHY D. POPE,

Invervenor-Plaintiff-Appellee,

JOHNNY REYNOLDS, et al.,

Intervenor-Plaintiffs,

versus

THOMAS G. FLOWERS, et al.,

Defendants,

STATE OF ALABAMA PERSONNEL DEPARTMENT,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(June 18, 2008)

Before EDMONDSON, Chief Judge, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Defendants-Appellants, the Alabama State Personnel Board, other Alabama State Departments and named State employees (collectively the "State defendants"), appeal an award of attorney's fees to Intervenor-Appellee, Timothy D. Pope. No reversible error has been shown; we affirm.

In 1968, the United States brought an enforcement action against the State defendants alleging a pattern or practice of racial discrimination in employment. In 1970, the district court found the defendants liable and entered injunctive orders designed to remedy the illegal discriminatory practices. See United States v. Frazer, 317 F.Supp. 1079 (M.D. Ala. 1970) (the "Frazer litigation"). Those injunctive orders set out an extensive remedial framework to redress discrimination. Part of that framework became known as the Frazer No-bypass Rule: Alabama state officials were prohibited from bypassing a higher ranked African-American applicant in favor of a lower-ranked white applicant on a certificate of eligibles. The Frazer No-bypass Rule remained in effect for over thirty years without court review or reauthorization.

Timothy Pope is a white employee of the Alabama Department of Corrections. In September 2002, Pope was offered a promotion but that

promotion was rescinded as violative of the No-bypass Rule. Pope filed a race discrimination charge, received a right-to-sue letter, and is the plaintiff in a Title VII case pending in district court. In addition to his Title VII suit, Pope, on 25 February 2003, moved to intervene in the Frazer litigation; Pope asserted, among other things, that the No-bypass Rule was unconstitutional and must be modified or ended.

That the State defendants commenced a review of the continuing necessity of the No-bypass Rule in May 2002, well before Pope moved to intervene is undisputed. Those efforts included preparation of a detailed (and costly) statistical analysis of the racial composition and recent racial hiring patterns in the Alabama public workforce. On 11 February 2003, the State defendants began discussions with the United States about the results of the statistical analysis and proposed to file a joint motion to terminate the No-bypass Rule on the grounds that the problems addressed in the Frazer litigation had been remedied. Because discussions were in process, the State defendants and the United States sought additional time to respond to Pope's intervention motion. On 20 May 2003, the State defendants and the United States filed a joint motion to terminate the No-bypass Rule; on that same date, they each filed answers opposing Pope's motion to intervene on the ground that Pope's interests were adequately

represented by the existing parties. On 22 May 2003, a motion to intervene to support the continued efficacy of the No-bypass Rule was filed on behalf of African-American employees and applicants. On 20 January 2004, the district court granted both intervention motions under the permissive intervention provisions of Fed.R.Civ.P. 24(b).

On 20 May 2005, the district court granted a motion filed by Pope and supported by the State defendants and the United States to enjoin preliminarily the operation of the No-bypass Rule. At that time, the district court only suspended the Rule so that the African-American intervenors would have the opportunity to refute the district court's initial assessment that the No-bypass Rule no longer passed constitutional muster. On 30 June 2006, the district court permanently terminated the Rule. Pope sought attorney's fees and expenses totaling $105,317.82; the district court awarded $61,499.70.

The State defendants argue that the district court erred as a matter of law in concluding that Pope was a prevailing party vis-à-vis the State defendants;[1] according to the State defendants the interests of the State and Pope were aligned: both parties were successful in their efforts to terminate the No-bypass Rule. And

[1]In civil rights litigation, the district court may award the prevailing party, other than the United States, reasonable attorney's fees. 42 U.S.C. § 1988(b).

the State defendants maintain that even if Pope could be considered a prevailing party for fee award purposes, special circumstances make such an award manifestly unjust.

We review a district court's award of attorney's fees and costs for abuse of discretion, with underlying questions of law reviewed de novo and factual findings reviewed for clear error. See Smalbein ex rel. Estate of Smalbein v. City of Daytona Beach, 353 F.3d 901, 904 (11th Cir. 2003). The State defendants argue that as a matter of law no attorney's fees may be awarded; they offer no challenge to the district court's attorney's fee calculation.

A party in civil rights litigation is a prevailing party for fee-shifting purposes if success has been attained on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Hensley v. Eckerhart, 103 S.Ct. 1933, 1939 (1983) (quotation and citation omitted). Key to the determination of prevailing-party status is whether the party achieved "a resolution of the dispute which changes the legal relationship between itself and the defendant." Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 109 S.Ct. 1486, 1493 (1989). When Pope moved to intervene in the Frazer litigation, the No-bypass Rule was being applied to promotion decisions made by the State defendants and thus to Pope as an employee of the Department of Corrections. As

a consequence of litigation acts taken by Pope and the State defendants, the No-bypass Rule has been terminated judicially. There can be no doubt that there has been a "judicially sanctioned change in the legal relationship of the parties." Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources, 121 S.Ct. 1835, 1840 (2001). Pope was a prevailing party.

The State defendants seek to engraft a requirement that the defendant must assume an adversarial posture as a precondition to finding prevailing-party status. But we see nothing in the language of section 1988 that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing posture.[2] The district court found and concluded expressly that Pope made a separate contribution to the litigation, that Pope's belief that his presence in the litigation was necessary was a reasonable belief, and that Pope's contribution was a substantial force in the court's decision to suspend the No-bypass Rule.[3] Because Pope's efforts contributed to a change in the State

[2]The State defendants cite Reeves v. Harrell, 791 F.2d 1481 (11th Cir. 1986), for the position that fee applications are to be denied in civil rights litigation when the interests of the party seeking fees are aligned with the party against whom the fees are to be assessed. In Reeves, the defendants remained neutral on issues raised by plaintiffs in plaintiffs' efforts to defend a consent decree against third party attack. The attorney's fee applicant in Reeves sought no -- and achieved no -- change in the legal landscape.

[3]From the outset, Pope argued the unconstitutionality of the No-bypass Rule whereas the State defendants focused on statistical evidence to terminate the Rule. Pope's argument was of substantial import in suspending the Rule; Pope's argument was of more limited import in the final decision to terminate the Rule.

defendants' personnel practices, we see no error in the district court's determination that Pope was a prevailing party -- and a prevailing party vis-à-vis the State defendants -- for purposes of a fee award.

The State defendants argue that, even if Pope properly is considered a prevailing party, special circumstances render a fee award unjust. The State defendants argue correctly that a court may deny an award of attorney's fees to an otherwise prevailing party when special circumstances would render an award unjust. See Hensley v. Eckerhart, 103 S.Ct. 1933, 1937 (1983); Martin v. Heckler, 773 F.2d 1145, 1149 (11th Cir. 1985), abrogated on other grounds by Texas State Teachers Ass'n. v. Garland Indep. Sch. Dist., 109 S.Ct. 1486, 1489 (1989) ("it is accepted jurisprudence that federal statutes which permit an award of attorney's fees to prevailing parties in selected litigation are subject to a special circumstances provision"). The defendant bears the burden of establishing that special circumstances render a fee award unjust, Martin, 773 F.2d at 1150; and this judicially created exception to the statutory fee provision is to be narrowly construed. Id.

We see no abuse of discretion in the award of fees under the circumstances of this case. The special circumstances cited by the State defendants -- that the State defendants' efforts to terminate the No-bypass Rule predated Pope's

intervention, that the parties' interests were aligned, that Pope's contribution was largely redundant, that the State incurred considerable expense in compiling the statistical data upon which the district court relied in the final termination decision, that the State defendants were under legal compulsion to apply the No-bypass Rule until the district court ruled otherwise, and that Pope's intervention was "claim jumping" -- are either contrary to the district court's findings, or are already accounted for by the district court's deductions from the fee request, or otherwise fail to persuade us that the district court abused its discretion when it failed to apply the narrow special circumstances exception to the fee award statute.

AFFIRMED.

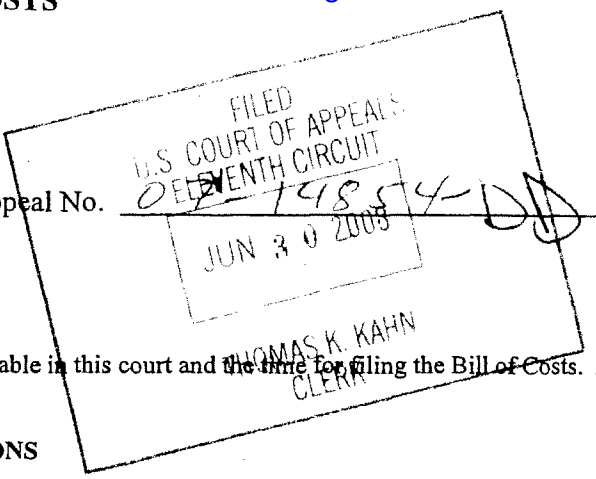
A True Copy - Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit
By: _____
Deputy Clerk
Atlanta, Georgia

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
BILL OF COSTS

UNITED STATES, TIMOTHY POPE
Appellant

vs.

FLOWERS
Appellee



Appeal No. 08-12154-DD

Fed.R.App.P. 39 and 11th Cir. R. 39-1 (see reverse) govern costs which are taxable in this court and the time for filing the Bill of Costs. A motion for leave to file out of time is required for a Bill of Costs not timely received.

INSTRUCTIONS

In the grid below, multiply the number of original pages of each document by the total number of documents reproduced to calculate the total number of copies reproduced. Multiply this number by the cost per copy ($.15 per copy for "In-House", up to $.25 per copy for commercial reproduction, supported by receipts) showing the product as costs requested.

DOCUMENT	Repro. Method (Mark One) In-House	Comm*	No. of Original Pages	Total No. Documents Reproduced	Total No. of Copies	COSTS REQUESTED	CT. USE ONLY COSTS ALLOWED
Appellant's Brief							
Record Excerpts							
Appellee's Brief		✓	52	20 (11)	1040	$153.37	$ 83.45
Reply Brief							
*Note: If reproduction was done commercially, receipt(s) must be attached.					TOTAL	$ 153.37 REQUESTED	$ $83.45 ALLOWED

I hereby swear or affirm that the costs claimed were actually and necessarily incurred or performed in this appeal and that I have served this Bill of Costs on counsel/parties of record.

Date Signed: June 26, 2008

Signature: [signature]

Attorney for: TIMOTHY D. POPE
(Type or print name of client)

Attorney Name: RAYMOND P. FITZPATRICK, JR.
(Type or print your name)

A True Copy - Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit
By: [signature]
Deputy Clerk
Atlanta, Georgia

FOR COURT USE ONLY

Costs are hereby taxed in the amount of $ $83.45 against Appellant

and are payable directly to Appellee

Thomas K. Kahn, Clerk

Issued on: AUG 19 2008

By: Teresa A. Patterson
Deputy Clerk

MISC-12
(12/07)

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
(2) if a judgment is affirmed, costs are taxed against the appellant;
(3) if a judgment is reversed, costs are taxed against the appellee;
(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of Costs; Objections; Insertion in Mandate.

(1) A party who wants costs taxed must — within 14 days after entry of judgment — file with the circuit clerk, with proof of service, an itemized and verified bill of costs.
(2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time.
(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must — upon the circuit clerk's request — add the statement of costs, or any amendment of it, to the mandate.

(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;
(2) the reporter's transcript, if needed to determine the appeal;
(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
(4) the fee for filing the notice of appeal.

* * * *

11th Cir. R. 39-1 Costs. In taxing costs for printing or reproduction and binding pursuant to FRAP 39(c) the clerk shall tax such costs at rates not higher than those determined by the clerk from time to time by reference to the rates generally charged for the most economical methods of printing or reproduction and binding in the principal cities of the circuit, or at actual cost, whichever is less.

Unless advance approval for additional copies is secured from the clerk, costs will be taxed only for the number of copies of a brief and record excerpts or appendix required by the rules to be filed and served, plus two copies for each party signing the brief.

All costs shall be paid and mailed directly to the party to whom costs have been awarded. Costs should not be mailed to the clerk of the court.

* * * *

I.O.P. -

1. Time - Extensions. A bill of costs is timely if filed within 14 days of entry of judgment. Judgment is entered on the opinion filing date. The filing of a petition for rehearing or petition for rehearing en banc does not extend the time for filing a bill of costs. A motion to extend the time to file a bill of costs may be considered by the clerk.

2. Costs for or Against the United States. When costs are sought for or against the United States, the statutory or other authority relied upon for such an award must be set forth as an attachment to the Bill of Costs.

3. Reproduction of Statutes, Rules, and Regulations. Costs will be taxed for the reproduction of statutes, rules, and regulations in conformity with FRAP 28(f). Costs will not be taxed for the reproduction of papers not required or allowed to be filed pursuant to FRAP 28 and 30 and the corresponding circuit rules, even though the brief, appendix, or record excerpts within which said papers are included was accepted for filing by the clerk.