U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

CLARENCE SCOTT, **ARB CASE NO. 01-065**

COMPLAINANT, **ALJ CASE NO. 98-STA-8**

v. **DATE: May 29, 2003**

ROADWAY EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Philip L. Harmon, Esq., *Worthington, Ohio*

For the Respondent:
Barbara J. Leukart, Esq., Johanna Fabrizio Parker, Esq., *Jones, Day, Reavis & Pogue, Cleveland, Ohio*

ORDER GRANTING ATTORNEY'S FEES

Clarence Scott was a truck driver who complained that Respondent Roadway Express, Inc. violated the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C. § 31105 (1994). The Administrative Review Board issued a Final Decision & Order (D. & O.) on July 28, 1999, in which it affirmed the Administrative Law Judge's ruling that Roadway had not disciplined the Complainant in retaliation for making safety complaints or discharged him for refusing to drive while ill. However, the ARB also affirmed the ALJ's holding that Roadway violated the STAA when it issued disciplinary warnings to him for refusing to drive while sick. Consequently, the Board affirmed the ALJ's determination that Scott was entitled to attorney's fees and costs, but reduced the award to $9,334.04.

On Roadway's appeal of the Board's decision, the United States Court of Appeals for the Sixth Circuit held on March 7, 2001, that the Complainant's claim that the warning letters violated the STAA had become moot, since he was no longer a Roadway employee and since the

letters had expired after nine months and could no longer be used against him. *Roadway Express, Inc. v. Administrative Review Board*, No. 99-4156, 2001 WL 259158, at *13 (6th Cir. March 7, 2001). Nevertheless, because Roadway's sick leave policy had been found to violate the STAA and the Respondent had been ordered to post a sign noting the violation, the Circuit upheld Scott's prior award of attorney's fees and costs. *Id.* at *16.

Before us at this time is Scott's June 11, 2001 Petition for Additional Costs and Attorney Fees Incurred During Review By Administrative Review Board and By Sixth Circuit Court of Appeals. The petition, which Roadway has opposed, seeks $5,461.94 in attorney's fees and costs for defending the ARB decision and the fee award in the Court of Appeals. We discuss our authority to make such an award and the appropriateness of the amount.

DISCUSSION

We begin with the language of the STAA. If the Secretary of Labor determines that a respondent has violated the Act and orders "affirmative action to abate the violation" or other relief, *see* 49 U.S.C. § 31105(b)(3)(A), the Secretary may award attorney's fees and costs to the complainant for bringing the action.[1] Under 49 U.S.C. § 31105(b)(3)(B):

> If the Secretary [of Labor] issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint. The Secretary shall determine the costs that reasonably were incurred.

The Sixth Circuit affirmed Scott's recovery of attorney's fees at the administrative level pursuant to the statute because an order of violation had issued against Roadway: "The question of whether a claimant can recover costs and attorney's fees under [the STAA] is . . . not governed by the prevailing party doctrine . . ." because "[t]he [STAA]… permits the assessment of fees and costs 'against the person against whom the order [of violation] is issued.' 49 U.S.C. 31105(a)(3)(B)." *Roadway Express v. Administrative Review Board*, at *16. Scott did not petition the Circuit, but rather the ARB for an award of attorney's fees and costs for successfully defending Roadway's appeal.

We do not find the Sixth Circuit's decision in *DeFord v. Sec'y of Labor*, 715 F.2d 231 (6th Cir. 1983) an absolute bar to our awarding fees in this case. *DeFord* arose under the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 (1988), not the STAA. The Circuit had to determine whether the Secretary could award fees under § 5851(b)(2)(B)(ii), which, like 49 U.S.C. § 31105(b)(3)(B), provided:

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[1] Pursuant to Secy's Ord. No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), the Secretary has delegated to the ARB her authority to review STAA and other cases listed at 29 C.F.R. § 24.1(a).

> If an order is issued under this paragraph, the Secretary [of Labor], at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

In construing this statute, the Circuit noted that the authority to award fees was conferred on the Secretary, not the court. 715 F.2d at 232. Although the law did not clearly confer authority upon the Secretary to award fees for appellate proceedings, "inferences" could be drawn that would support that authority. For instance, a complainant's petition seeking appellate review of a Secretary's order in the same case could be deemed "reasonably incurred . . . for, or in connection with, bringing the complaint upon which the [Secretary's] order was issued." 715 F.2d at 232. However, the award of fees sought by DeFord did not arise from the complaint upon which the order was issued, but rather a related case in which he was not a party:

> Before this court DeFord did not incur any attorney's fees or other costs for litigation of claims arising from the complaint upon which the Secretary's order was issued. That complaint was lodged against TVA [an intervenor and third party petitioner]. Rather, DeFord incurred attorneys' fees and other costs before this court in pursuit of a distinguishable cause – complaints against the Secretary arising out of dissatisfaction with his order. DeFord's complaint against the TVA, it may be recalled, was at issue only in case number 81-3254, to which he was not a party and as to which the court has indicated that he incurred no costs.

715 F.2d at 233.

Thus, as we read *DeFord,* the Secretary is not foreclosed from awarding attorney's fees to a complainant who prevails in his or her own case before the Sixth Circuit. We are mindful of, but also distinguish, several prior rulings where we concluded that appellate work in the Sixth Circuit was not compensable. In *Sprague v. American Nuclear Resources, Inc.*, No. 92-ERA-37 (ARB July 15, 1996), the complainant whistleblower prevailed under the ERA, and the ARB (as successor to the Secretary) awarded back pay, attorney's fees and costs below, but not fees and costs relating to work in the Sixth Circuit ("We are compelled to follow *DeFord*"). *Id.* at 2. On appeal to the Sixth Circuit, the respondent became the petitioner and Department of Labor (as defender of the ARB ruling in favor of the complainant) was the respondent. The complainant, as a result, was not a party. The Circuit reversed the ARB finding in favor of the complainant, and so had no occasion to consider an award of fees incurred before the court. *American Nuclear Resources, Inc. v. United States Dep't of Labor,* 134 F.3d 1292, 1297 (6th Cir. 1998).

In *Pillow v. Bechtel Constr.,* ARB No. 97-040, ALJ No. 87-ERA-35 (ARB Sept. 11,

1997), the ARB awarded attorney's fees under the ERA for the complainant's successful defense of the Secretary's decision in the Eleventh Circuit. In dicta, the ARB said, "Whereas we are compelled to follow the *DeFord* rule disallowing appellate fees in the Sixth Circuit, . . . we are not so constrained in this case because it arises within the Eleventh Circuit." *Id*., slip op at 3. Finally, in *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000), the Board cited *DeFord*, but gave as its reason for not awarding fees the fact that the complainant was pro se and therefore would have incurred no fees. *Id.*, slip op. at 23.

In circuits other than the Sixth, this Board has exercised its authority in whistleblower cases to award attorney's fees for appellate work. *See, e.g., Polgar v. Florida Stage Lines*, No. 94-STA-46 (ARB March 31, 1997) (STAA case); *Delcore v. W.J. Barney Corp.*, No. 89-ERA-38 (ARB Oct. 31, 1996) (ERA case). In *Blackburn v. Reich*, 79 F.3d 1375, (4th Cir. 1996), a complainant under the ERA appealed from the Secretary's decision denying attorney's fees for the prior appeal to the Fourth Circuit. Determining that he did not have authority to award fees for work performed before the appellate court, relying upon *DeFord*, the Secretary denied that portion of the fee petition. However, the *Blackburn* panel reversed and remanded for reconsideration of the complainant's fee petition. The Fourth Circuit said the *DeFord* "rationale" for denying the Secretary authority to award fees for the Circuit appeal did not "withstand[ ] scrutiny." *Blackburn*, 79 F.3d at 1377. It questioned *DeFord's* conclusion that the Secretary and court had mutually exclusive authority to award costs, saying, "[t]here is . . . no impenetrable barrier between the various levels of the court system as far as costs are concerned, and, as a general matter, we see no problem whatsoever with permitting the Secretary to award appeal-related 'costs' [including attorney's fees] when the appeal is from an agency to the court of appeals." 79 F.3d at 1378.

The *Blackburn* court also interpreted *DeFord* as "holding . . . that the appeal involved a dispute with the Secretary rather than the respondent-employer and, therefore, on appeal the complainant 'did not incur any attorneys' fees or other costs for litigation of claims arising from the complaint.'" 79 F.3d at 1378. Taking issue with that conclusion, the Fourth Circuit noted that "[e]very appeal arises from dissatisfaction with the order appealed from, and, in that sense, every appeal involves a dispute with the decisionmaker." 79 F.3d at 1378. The respondent's success at the administrative level necessitated the complainant's appeal and the fees incurred were thus "in connection with" the claim. 79 F.3d at 1378. Finally, "if fees are authorized at all, they are recoverable for all phases of the litigation, and, moreover, appellate fees can be awarded by a lower court." 79 F.3d at 1378.

In the instant case, Scott was a party and necessarily and successfully defended the Respondent's appeal to the Sixth Circuit. Although Scott's own claim had become moot, the orders that resulted from the initiation of his complaint were not vacated on appeal, and the Circuit upheld his entitlement to fees before the ALJ, as revised by the ARB. Based upon our reading of *DeFord* and *Blackburn* and our own cases, we rule that Scott is entitled to attorney's fees and costs for defending the decision of the Board and the original attorney's fee award in the Circuit Court. We now turn to the amount.

The ARB employs the lodestar method of calculating attorney's fees, which entails multiplying the number of hours reasonably expended by a reasonable hourly rate. *Gutierrez v. Regents of the Univ. of California,* ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 12 (ARB Nov. 13, 2002); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The party seeking a fee award must submit evidence documenting the hours worked and the rates claimed. A "complainant's attorney fee petition must include adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area, as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs." *Gutierrez*, slip op. at 13 (internal quotations and citations omitted).

The Complainant has submitted an appropriately itemized and documented Petition for Additional Costs and Attorney[']s Fees. The hours expended and the hourly rate are reasonable; and we note that the Complainant's attorney has not charged for time associated with a dismissed cross-appeal. We, therefore, **GRANT** the Petition.

CONCLUSION

Respondent Roadway shall pay to Scott's counsel the amount of $5,461.94 in additional attorney fees and costs reasonably incurred in bringing the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge