

1991 WL 193535
United States District Court, N.D. California.

Herbert BONDY, individually and on behalf of a
class of persons similarly situated

v.
SULLIVAN.

No. C 90-0223 TEH. | May 8, 1991.

Opinion

Order

I. Background

THELTON E. HENDERSON, Chief Judge:

*1 The Court has already granted summary judgment, *see* Order of 21 November 1990, and injunctive relief, *see* Order of 24 January 1991, to Herbert Bondy, a Jew who fled his native Austria in 1938 to avoid Nazi prosecution, and who filed a class action seeking declaratory relief and an injunction forbidding the Secretary of Health and Human Services from including Austrian reparations payments to victims of Nazi persecution in calculating eligibility for Supplemental Security Income.

In accordance with Local Rule 270-1, Bondy's counsel met and conferred with the Secretary's counsel for the purpose of resolving all disputed issues relating to attorneys' fees. Since the counsel were unable to agree on Bondy's entitlement to fees, Bondy now requests that the Court order the Secretary to pay attorneys' fees under the Equal Access to Justice Act. For the reasons below, the Court grants Bondy's motion and awards him attorneys' fees at market rates as well as costs.

II. Discussion

Bondy moves for attorneys' fees under two distinct subsections of the Equal Access to Justice Act, 28 U.S.C. § 2412. Because we find that market-rate fees are appropriate under subsection (d), we do not need to resolve whether Bondy should be granted such fees under subsection (b).

A. Whether Fees Should Be Awarded At All

A court shall award to a prevailing party fees and other expenses incurred by that party in any civil action, including proceedings for judicial review of agency action, brought 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. § 2412(d)(1)(A).

The Ninth Circuit has long applied a test of reasonableness in determining whether the government's position was substantially justified. *Thompson v. United States Dept. of Labor*, 885 F.2d 551, 558 (9th Cir.1989). Thus, the plaintiff is not entitled to attorneys' fees if there was a reasonable basis in law and fact for the government's position. *Id.* at 559. The inquiry into the existence of substantial justification must focus on two questions: whether the government was substantially justified in taking its original action and whether the government was substantially justified in defending the validity of the action in court. *Id.*

Our Order of 21 November 1990 leaves no doubt that the Secretary's position was not substantially justified. This should have been an easy case for lawyers well versed, as the parties' counsel are, in social security law. We found that the result was controlled by recent Ninth Circuit precedent, *Grunfeder v. Heckler*, 748 F.2d 503 (9th Cir.1984) (en banc), because the Austrian payments at issue here served the same purpose as the German payments at issue in *Grunfeder*: they were reparations for Nazi persecution. As we said in our order, the Secretary's objections that the payments constitute an Austrian pension were based on irrelevant characteristics of the Austrian system for payment. Further, the Secretary's attempts to argue that recent Supreme Court decisions have limited this Court's review of an agency's construction of a statute did not demonstrate that the Ninth Circuit has any intention of reversing *Grunfeder* or limiting it to its facts; on the contrary, recent Ninth Circuit decisions have applied *Grunfeder* without adverse comment. Because the Secretary claimed to distinguish *Grunfeder* by refusing to acknowledge the essential similarity of the Austrian payments, the Secretary's position had no basis in law or in fact. Though the Secretary may have been no more than careless in denying Bondy's benefits, he was not justified in defending the validity of this action in court, where the applicability of *Grunfeder* should quickly have become obvious.

*2 For the most part, the Secretary argues that his position was substantially justified (or that special factors make an award of fees unjust) by, in effect, rearguing that *Grunfeder* should be limited to its facts. But no matter how strong the Secretary's distaste for this case, he cannot

Bondy v. Sullivan, Not Reported in F.Supp. (1991)

make Ninth Circuit precedent disappear, and his arguments remain unconvincing. The clarity of the legal precedent of *Grunfeder*, leading the Court to grant Bondy's motion for summary judgment, explains the clarity with which we grant his motion for attorneys' fees under subsection (d).

One of the Secretary's arguments, however, should be directly addressed. He contends that our decision was based on a letter to the Court from the Austrian Consul General explaining the intent of the relevant Austrian Articles under which Bondy receives payments and that, since this letter was submitted by an amicus, it was not before the Administrative Law Judge who denied Bondy his benefits. Consequently, contends the Secretary, his position in taking his original action was hardly unjustified; indeed, without this late-submitted letter, he would have won the case.

The Secretary's argument is not well taken. The Consul General's letter was quoted at length, Order of 21 November 1990 at 6:10–17, not because it was the only relevant evidence but because it succinctly summarized the issue before the Court. The Order also observed that the Austrian statute under which Bondy receives payments is entitled "Preferential Treatment of Victims for Political or Religious Reasons or for Reasons of Ancestry", *id.* at 6:5–8, and found that the Official Statements of Legislative Intent accompanying the Amendments to Articles 500–506 of the Austrian Act underscore the humanitarian and restitutionary nature of the Austrian payments, *id.* at 6:18–20. Since the ALJ had before him an English copy of the Austrian statutes and a statement from the Austrian agency that Bondy received the payments because he had been a victim of persecution, Plaintiff's Reply Brief at 10:18–11:6; *see* ALJ Decision of 14 September 1989 at 3 (quoting the Austrian law in English), it is not surprising that the ALJ's conclusion that the Austrian payments should be treated like a pension was based primarily on his finding that, although the Austrian payments may be restitution for persecution, they are paid, not under a system similar to the German reparation system, but under the Austrian pension system. In other words, the ALJ was aware of the restitutionary nature of the payments but chose to ignore their implication and focus on an irrelevant characteristic, the Austrian method of payment. The Secretary can hardly argue that the information in the Consul General's letter came as a surprise. At any rate, once it came to light, the Secretary was not justified in defending his position in court.

Both parties dispute briefly the significance of the Solicitor General's refusal to allow the Secretary to pursue his appeal of our decision. Bondy suggests that this refusal reveals the Government's realization that the Secretary's position was not substantially justified. But the Secretary correctly observes that the Solicitor General

considers a variety of factors not considered by a private litigant, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal. *United States v. Mendoza*, 464 U.S. 154, 161 (1984) (nonmutual offensive collateral estoppel does not apply against the Government). Therefore, this refusal sends no signal about the justification of the Secretary's position. The dispute is irrelevant in any case: our conviction that the Secretary's position was not substantially justified is based on the discussion above and in no way relies on the Solicitor General's decision.

B. Whether Fees Should Be Awarded at the Market Rate

*3 The next question is at what rate attorneys' fees should be paid. Subsection (d) states that fees shall be based upon prevailing market rates as long as they are under \$75 per hour, unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. § 2412(d)(2)(A). Bondy contends that the limited availability of qualified attorneys for this action justifies an increase in attorneys' fees to reflect market rates.

This special factor has recently been examined in some detail by the Supreme Court and the Ninth Circuit. It is not enough that lawyers skilled and experienced enough to try the case are in short supply. *Pirus v. Bowen*, 869 F.2d 536, 541 (9th Cir.1989) (citing *Pierce v. Underwood*, 487 U.S. 552, 571 (1988)). The fact that prevailing hourly rates in a community might dissuade attorneys from taking a case at a \$75 hourly rate was not the type of limited availability that Congress had in mind, since implicit in the language of the statute was a Congressional determination that \$75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be. *Id.* (citing *Underwood* at 572). Congress instead intended for courts to deviate from the statutory cap only if there was limited availability of attorneys having some distinctive knowledge or specialized skill needful for the litigation in question. *Id.* (same). As examples of the type of lawyers who possess the distinctive knowledge or skill that would justify deviation from the \$75 cap, the Supreme Court has described lawyers who have an identifiable practice specialty such as patent law or those who have knowledge of foreign law or language. *Id.* (same). Where such qualifications are necessary and can be obtained only at rates in excess of the \$75 cap, reimbursement above the limit is allowed. *Id.* (same).

With words that apply equally to Bondy's lawyers, the *Pirus* court identified social security law as a distinctive practice specialty.

The expertise and skills that they developed are in many

Bondy v. Sullivan, Not Reported in F.Supp. (1991)

ways akin to those developed by a patent lawyer: expertise with a complex statutory scheme; familiarity and credibility with a particular agency; and understanding of the needs of a particular class of clients—in this case, the elderly—and of how those needs could best be met under the existing statute and regulations.

Id. Bondy requests fees for three lawyers: Tom Weathered and Judy Hitchcock, who work for Legal Assistance to the Elderly, Inc., in San Francisco, and Gill Deford, who works for the National Senior Citizens Law Center, in Los Angeles. All three have filed declarations that, in addition to their able prosecution of this action, convince the Court of their expertise in social security law.

Counsel's distinctive skill warrants additional fees only if it is in some way "needful for the litigation in question". It may appear that there is an inherent tension between Bondy's claims that this was an easy case and that he needed the specialized skill of his expensive counsel. But that tension is superficial. Much law is simple only to those whose special experience allows them to absorb it and use it to their advantage. As we stated above, this should have been an easy case for lawyers *well versed in social security law*.

*4 This is not a case like *Ramon-Sepulveda v. Immigration and Naturalization Service*, 863 F.2d 1458 (9th Cir.1988), where the I.N.S. instituted a second deportation proceeding after the Ninth Circuit had denied the I.N.S.'s attempt to reopen the unsuccessful first proceeding. There, the legal problem required no distinctive knowledge or specialized skill but involved established principles of *res judicata*, with which most attorneys were or should be familiar. *Id.* at 1463. Furthermore, there was no shortage of attorneys in Los Angeles qualified to assist aliens in deportation proceedings. *Id.*

Here, Bondy's counsel needed expertise in prosecuting social security class actions. They had to answer with relevant case law and statutory interpretation the Secretary's arguments that the class should not be certified, and they had to argue the applicability of *Grunfeder* and distinguish the Secretary's attempts to limit it to its facts. Furthermore, Bondy's counsel have alleged to the Court's satisfaction that these skills could not have been obtained in San Francisco or Los Angeles at the statutory rate. *See* Decl. of Tom Weathered at ¶ 3; Decl. of Gill Deford at ¶ 18. As the *Pirus* court stated in upholding an award of fees under the special factor of limited availability, this class action was no routine disability case and these skills could not be obtained in the relevant geographic area at the statutory rate. *See Pirus*, 869 F.2d at 542. Because Bondy convincingly argues that there was a limited availability of qualified

attorneys for the proceedings involved, his counsel should receive fees at market rates for their services.

Bondy also argues for an increase in the statutory rate owing to the increased cost of living. Since the above discussion renders this argument moot, the Court declines to address it.

C. Bad Faith

Although our decision to award Bondy attorneys' fees at market rates renders moot any resolution of Bondy's argument that he deserves such fees under subsection (b) of the Equal Access to Justice Act, a short discussion is appropriate in light of Bondy's request at oral argument that the Court nonetheless award fees under this subsection to "send a message" to the Social Security Administration.

A court may award reasonable fees and expenses of attorneys to the prevailing party in any civil action brought against any official of the United States acting in his official capacity; the United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law. 28 U.S.C. § 2412(b). This "liable under the common law" provision has been used to allow awards of attorneys' fees at market rates in cases involving "bad faith" by an agency of the United States. *Brown v. Sullivan*, 916 F.2d 492, 495 (9th Cir.1990). This bad-faith exception is a narrow one, typically invoked in cases of vexatious, wanton, or oppressive conduct. *Id.* An award of attorneys' fees under this exception is punitive, and the penalty can be imposed only in exceptional cases and for dominating reasons of justice. *Id.*

*5 Bondy alleges two aspects of bad faith on the Secretary's part: his refusal to follow *Grunfeder* and his conduct during the litigation. The first aspect is insufficient. It is not enough that the government unreasonably implemented and defended its policy; bad faith requires a further finding of vexatious or oppressive conduct. *Id.* The Ninth Circuit has cited with approval a case that found no bad faith where the government's position lacked not only substantial justification but all justification. *Barry v. Bowen*, 825 F.2d 1324, 1333 (9th Cir.1987)

The second aspect, however, is more difficult to resolve. Bondy details the Secretary's legal positions throughout the litigation, attacking them as obstructive and unreasonable. We are not happy with the way the Secretary litigated this action, and at times his arguments were so unpersuasive as to smack of bad faith; nevertheless, using irrelevant and wrong arguments to support a weak position suggests an ill-considered litigation strategy rather than bad faith. But Bondy also

Bondy v. Sullivan, Not Reported in F.Supp. (1991)

alleges that the Government did not always use legal means: on 15 October 1990, Magistrate Wilken awarded attorneys' fees to Bondy as a sanction for the government's initial untimely and incomplete responses to requested discovery. Since one hallmark of bad faith is a disregard of the judicial process, *Brown*, 916 F.2d at 496 (finding that the cumulative effect of the Government's actions, which caused delay and necessitated the filing and hearing of additional motions, constituted bad faith), the Government's conduct here may approach bad faith.

It is not clear, however, whether the Secretary's undeniably bad conduct on one occasion is sufficient to taint the whole litigation with bad faith. We remain uncertain whether this sole example of bad conduct is so vexatious, wanton, and oppressive as to make this an exceptional case that requires a punitive award. Given this uncertainty, we decline to resolve the bad-faith issue. But the fact that we have taken time to discuss the issue at all should sufficiently indicate the Court's displeasure with having had this relatively straightforward case heatedly litigated before us for so long.

D. Calculation of Award

Total hours. Having examined the attorneys' declarations, the Court calculates that a total of 288.55 hours was billed: 176.20 hours by Tom Weathered, 46.10 hours by Judy Hitchcock, and 66.25 hours by Gill Deford. The Secretary argues that Bondy should not be reimbursed for the hours for which Magistrate Wilken has already awarded him sanctions. But whereas our award would compensate Bondy's attorneys for their time, Magistrate Wilken's sanctions were intended to punish the Government for its improper behavior during discovery. Bondy convincingly argues that deducting the Magistrate's sanctions from our award would eliminate the effect of the Magistrate's award as a sanction. Bondy should be awarded fees for all 288.55 hours.

*6 *Hourly rate.* Bondy's attorneys request fees at these hourly rates \$235 for Weathered, \$185 for Hitchcock, and \$237 for Deford. Since virtually all the hours billed are for services performed in or after 1990, the Court notes the incongruity of the current request with Weathered's valuation of his services at \$200 an hour in October 1990, when Magistrate Wilken awarded sanctions against the Government, and with Deford's request for fees at \$200 an hour in several other cases he handled in 1990, *see* Decl. of Gill Deford at ¶ 14. The Secretary properly asks that fees be awarded for the value of the services at the time they were performed. We should consider the

incongruity of Weathered's and Deford's requests good reason to lower their hourly rate to \$200 if the information appended to the Declarations of Gill Deford and of Richard M. Pearl, which surveys market rates in San Francisco and Los Angeles, did not so thoroughly convince us that the rates requested by all three counsel accurately reflect the value of their services. We cannot say why Weathered and Deford last year, for purposes of a sanctions award, valued their services at \$200 an hour; but we are sure that Bondy should be awarded fees at the requested hourly rate.

Costs. Bondy requests costs in the amount of \$120. A judgment for costs may be awarded to the prevailing party in any civil action brought against any official of the United States acting in his official capacity. 28 U.S.C. § 2412(a). Furthermore, subsection (d) allows awards for costs as well as for attorneys' fees. The Secretary did not oppose the amount at oral argument, so Bondy should be reimbursed for costs in the amount of \$120.

Total. The award of fees and costs, $(176.20 \times \$235) + (46.10 \times \$185) + (66.25 \times \$237) + \120 , therefore totals \$65,756.75.

III. Conclusion

Because the position of the United States throughout this litigation was not substantially justified, and because no special factors make an award of attorneys' fees unjust, the Court finds that an award of attorneys' fees is appropriate under 28 U.S.C. § 2412(d). Because there was a limited availability of qualified attorneys for the proceedings involved, the Court finds that these fees should be calculated at market rates. Based on Tom Weathered's billings of 176.20 hours @ \$235, Judy Hitchcock's billings of 46.10 hours @ \$185, and Gill Deford's billings of 66.25 hours @ \$237, the Court finds that attorneys' fees total \$65,636.75. The Court also finds that an award of costs for \$120 is appropriate under both 28 U.S.C. § 2412(a) and § 2412(d). Therefore, the Court orders the Secretary to pay Bondy's counsel \$65,756.75 within thirty days from the date of this order.

Parallel Citations

Unempl.Ins.Rep. (CCH) P 16143A