

Attorney's Fees - UL v. Carteret

9/17/87

Letter ~~to clerk~~ ^{to clerk} re: enclosed Reply Letter Brief

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THE STATE UNIVERSITY OF NEW JERSEY
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School of Law-Newark • Constitutional Litigation Clinic
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September 17, 1987

VIA LAWYERS SERVICE

Mr. J. G. Trubenbach, Clerk
Superior Court, Appellate Division
Hughes Justice Complex, CN 006
Trenton, NJ 08625

RE: Urban League of Greater New Brunswick
vs. The Mayor and Council of the Borough of Carteret,
et al.
Docket No. A 3416-86T1

Dear Mr. Trubenbach:

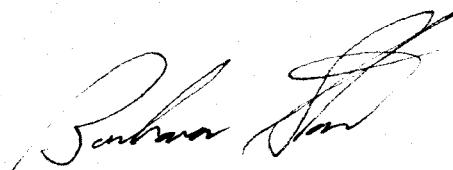
Enclosed please find original and five copies of the Civil League appellants' Reply Letter Brief in connection with the above matter. Kindly file same and return the extra copy, stamped FILED or RECEIVED to this office in the envelope enclosed for that purpose.

I hereby certify that by copy of this letter, two copies of the within pleading are being served on Lionel Frank, Esq., attorney for the municipal defendants.

Very truly yours,

encls

cc/Lionel Frank, Esq.



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Docket No. A 3416-86T1

Dear Honorable Judges:

This letter brief is respectfully submitted by way of reply to the Answering Brief filed by defendant municipalities. Plaintiffs will not waste the valuable time of this Court by replying on a point by point basis to defendants' extended arguments as to the exact amount, allocation among defendants, and specific costs to be included in the fee sought. As recognized by the trial court, these are tangential issues which should be addressed on remand.

The only question properly before this Court is whether the Hagans/Gibbs test set forth in Maher v. Gagne, 448 U.S. 122 (1980)¹ should be applied where, like here, plaintiffs prevail on a state claim arising from a "common nucleus of operative facts" as that of a "substantial" federal fee claim, which has been raised in the same case but has not been decided by the court. It is respectfully submitted that the trial court's failure even to apply the Maher test here was reversible error. It was not necessary for plaintiffs to prevail on their federal fee claim under 42 U.S.C. §3601 et seq ("Title VIII") in order for a fee to

¹ Under this test, if plaintiffs' federal civil rights claim was (1) "substantial" Hagans v. Lavine, 415 U.S. 528 (1974) and, (2) arose from "a common nucleus of operative facts" United Mineworkers v. Gibbs, 383 U.S. 715 (1966), as the state claim upon which they prevailed, they are entitled to attorneys' fees under their federal fee claim.

be granted where, like here, they easily satisfy the two-pronged Hagans/Gibbs test.

Defendant municipalities fail to address this critical issue. Indeed, defendants do not cite a single case in which plaintiffs have been denied attorneys fees under such circumstances. Instead, citing cases in which, unlike here, plaintiffs did not even raise state claims, defendants insist that it is "absolutely necessary" to prove racial discrimination in order to be awarded fees (Dbl3). Unable to distinguish the controlling precedent, defendants simply ignore the plethora of cases that have correctly applied the Maher test.

Defendants' arguments must fail for two basic reasons; first, they misconstrue the gist of Maher, which is simply that as long as there is no adverse determination with respect to a plaintiff's fee claim, a fee award may be predicated upon that claim. Second, defendants misstate the "common nucleus of operative facts" test, arguing that that test requires an identity of facts (Db7). It is well established in the majority of jurisdictions, including the United States District Court for the District of New Jersey, that the Gibbs test merely requires an evidentiary overlap between the state and federal claims. Guyette v. Stauffer Chemical Co., 518 F. Supp. 521 (D.N.J. 1981). The evidentiary overlap between plaintiffs' Title VIII claim, in which they alleged that the zoning ordinances in 23 municipalities operated to exclude lower income blacks, and their state constitutional claim, in which they alleged that those same ordinances in those same communities operated to exclude all lower income persons, clearly meets that standard.

A. A Favorable Determination of Plaintiffs' Fee Claim Is Not Required For An Award of Fees Under Maher

Defendants argue that the "fatal defect" of plaintiffs' argument is that there was no finding of racial discrimination by the court. Defendants' astonishing contention that "Such a determination is absolutely necessary to sustain the award of attorneys fees" (Dbl3) is flatly contrary to well-settled law. Defendants rely upon cases decided prior to the enactment of 42 U.S.C. §1988 (the Civil Rights Attorneys Fees Act of 1976, hereafter the "Fees Act"). These cases are not only inapposite, but they amply demonstrate the need for the Hagans/Gibbs test, subsequently endorsed by Congress in the legislative history of the Fees Act and explicitly adopted by the Supreme Court in Maher.²

Defendants cite Morales v. Haines, 486 F.2d 880 (1973), for example, for the proposition that "attorneys fees may only be awarded under [Title VIII] upon a finding of racial discrimination." In Morales, a black purchaser of a federally subsidized house sought to enjoin the defendant municipality from preventing its construction. Plaintiff also sought damages and attorneys fees. The court granted the injunctive relief on the ground that there was economic discrimination, without addressing the issue of racial discrimination. The Seventh Circuit, finding that a determination as to racial discrimination was "material to the resolution of the plaintiff's prayers for actual and punitive damages and attorneys' fees", (id. at 882), remanded the case for a determination of that issue.

Prior to the enactment of the Fees Act, a remand for the determination of plaintiffs' Title VIII claim, like the remand in Morales, may well have been necessary here. As the Maher Court explained, however, a court may legitimately avoid such a determination. Indeed this approach is consistent with the well established judicial policy of avoiding the unnecessary determination of federal constitutional questions.

Precisely such a question was raised by plaintiffs' Title VIII claim in the Mount Laurel litigation. By ruling in plaintiffs' favor on their state claim; and granting the plaintiffs all of the relief which they could have obtained under their federal claim, and more; the New Jersey Supreme Court neatly avoided deciding substantial federal constitutional issues.³ In enacting the Fees Act, Congress rendered the kind of

2 There is no question of the applicability of the Fees Act and its legislative history to litigation, like that at bar, instituted prior to its enactment. In Dillon v. AFBIC Development Corp., 597 F.2d 556, 564 (5th Cir. 1979), cited by defendants, the Court expressly noted the applicability of the Fees Act to actions filed prior to its enactment:

"The plaintiff may seek to recover attorney fees under [the Fees Act] even though this action was filed before Congress passed that statute."

3 Not only was there a question of racial discrimination against plaintiffs, but whether Warth v. Seldin, 422 U.S. 490 (1975) required more. Indeed, as defendants concede, by reinstating plaintiffs' Title VIII claim, Judge Antell expressly recognized that these were open questions.

remand required in Morales unnecessary, thereby eliminating the need for exactly the kind of time-consuming, redundant litigation implicitly demanded by defendants. By citing Morales, defendants suggest that this case be remanded for a determination of these difficult federal issues solely to ascertain plaintiffs' entitlement to attorney fees. It is respectfully submitted that this reflects either a complete disregard for judicial economy, or a fundamental misunderstanding of the Haqans/Gibbs test.

Defendants' reliance on Dillon v. AFBIC Development Corporation, 597 F.2d 556 (5th Cir.1979) is similarly misplaced. In Dillon, while plaintiffs were "awarded their full cost and attorneys fees for their successful prosecution of their individual claim," they were not granted fees arising out of their efforts on behalf of the class. In Dillon, unlike the instant case, there was an express finding by the court that defendants "had committed no class violations." Id. at 564. Plaintiffs have never suggested that they would be entitled to fees had there been an adverse decision with respect to their Title VIII claim. Here, however, there was no finding with respect to defendants' violation of Title VIII. It is respectfully submitted that defendants' misguided reliance on Dillon again demonstrates their misreading of Maher.

Shannon v. U.S. Dept. of Housing & Urban Develop., 409 F. Supp. 1189 (E.D. Pa. 1976) is equally distinguishable. The businessmen plaintiffs in Shannon, who sought to prevent rather than facilitate the construction of subsidized housing, alleged only that defendant failed to comply with Section 3608(d)(5) of Title VIII. The court was constrained to deny their demand for attorneys' fees because it found that such an award could not be predicated on the specific provision cited. Plaintiffs here, unlike the Shannon plaintiffs, sought relief pursuant to §3601 et seq. In Smith v. Anchor Building Corp., 536 F.2d 231 (8th Cir. 1976), the court found no impediment to an award of fees under §3612(d) in a claim thus phrased. There, however, the matter was remanded because there was no evidence as to plaintiff's inability to assume her own fees. Here, it was undisputed below that the Civic League was unable to pay its own fees.

Defendants' reliance on Smith v. Robinson, 468 U.S. 992 (1984) is also misplaced. The Smith plaintiffs did not prevail on a state ground, like plaintiffs here, but on an alternative federal ground. This was significant because the Court explicitly predicated its denial of fees on its finding that that particular federal statute precluded such an award:

"Even if the §1983 claims were substantial, however, given the comprehensiveness of

the Education of the Handicapped Act ("EHA"), Congress could not have intended its omission of attorney's fees relief to be rectified by recourse to [the Fees Act]." Id. at 1003.

* * *

We have little difficulty concluding that Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." Id. at 1009.

This underlying rationale of Smith simply does not apply here.

In the alternative, the Smith plaintiffs argued that they were entitled to fees because they had sought and obtained injunctive relief from the school board's refusal to grant them a hearing at the beginning of their litigation. The Supreme Court held that the vindication of a constitutional right in connection with a separate preliminary hearing did not entitle plaintiffs to fees for the remainder of the litigation. (It is noteworthy that the Smith plaintiffs were awarded fees in connection with obtaining that preliminary injunctive relief.) The Smith plaintiffs' demand for a hearing, and the school board's initial refusal to grant it, was characterized by the Court as "entirely separate" from plaintiffs' claims in the ensuing litigation for a free public education. Here, of course, plaintiffs' Title VIII claims were not asserted in connection with a preliminary, collateral proceeding. Rather, those claims were an integral part of the complaint and remained an integral part of the case throughout the litigation.

In Smith, the lower court had already awarded plaintiffs fees in connection with their preliminary federal due process claim. Here, since the lower court improperly held that it lacked authority to award plaintiffs attorneys' fees attributable to their federal claim, it is respectfully submitted that Smith requires a remand for that purpose.

B. Gibbs does not require that the proofs for the federal and state claims be identical

Defendants argue that plaintiffs' request for fees should be denied because the underlying facts of their Title VIII claim are not the same as those of their state claim:

Those facts essential to the Mount Laurel II decision are not the same facts which would justify a finding of discrimination based upon

race, color, religion, sex, or national origin in connection with the sale or rental of housing units under [Title VIII]"(Db7-8)

Identity of facts is not required by United Mineworkers v. Gibbs, 383 U.S. 715 (1966). The Gibbs' test involves a two-tiered inquiry: first, whether a federal court hearing a federal cause of action has the power to hear a pendent state claim; second, whether the court should, as a matter of discretion, assert jurisdiction over that state claim. The "common nucleus of operative facts" test is the standard for the first tier. (The second tier is irrelevant for purposes of a fee determination.) The Congress and the Supreme Court of the United States have unequivocally established that the first prong of the Gibbs' test is to be applied to determine whether plaintiffs prevailing on a state claim may recover attorneys fees where their federal fee claim, like plaintiffs' Title VIII claim, has not been addressed by the court. There is no requirement, as defendants insist, that the operative facts be identical, merely that there be an overlap, such that the "two claims would be expected to be tried in one proceeding." Gibbs, supra at 725. See also Schenkier, "Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction", 75 Nw. U.L. Rev. 245, 262 (1980).

Here, the dispositive question here is whether, if plaintiffs had brought their Title VIII claim in federal court, that court would have had the power to assert jurisdiction over plaintiffs' state constitutional claim. The answer is clearly yes. In fact, the claims would have had far more evidentiary overlap than is required to satisfy Gibbs. Plaintiffs' Title VIII claim alleged discrimination against lower income blacks. Proofs would have been adduced as to the zoning ordinances of the defendant municipalities, as well as the lower income population of those municipalities, broken down by race. The same proofs would have been submitted in support of plaintiffs' state constitutional claim, except that the figures as to lower income persons would not have been broken down by race. Although, as explained above, the second tier of the Gibbs analysis need not be considered here, it is respectfully submitted that it would have been particularly appropriate for a federal court to assert jurisdiction over the pendent state claim in this action since that claim would have been dispositive, thus obviating the need for a determination of the constitutional federal claim. As the Court held in Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 191-193 (1909):

Where a case in this court can be decided without reference to questions arising under the Federal

Constitution, that course is usually pursued and is not departed from without important reasons.

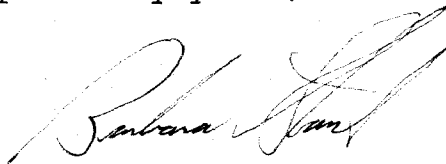
CONCLUSION

Defendants' Answering Brief is replete with imaginative arguments. They attempt to dispose of plaintiffs' fee claim by rewriting the procedural history, for example, but the claim remains as a matter of record. They seek to trivialize plaintiffs' fee claim, but they cannot deny that that claim was "substantial" within the meaning of Hagans. It is a matter of record, moreover, that defendants never sought to have that claim dismissed as unsubstantial.

Defendants even insist that they were "the representatives of, and advanced, the public interest" rather than the plaintiffs (Db26), notwithstanding the trial court's observation that "it would have been difficult to maintain a straight face" had defendants made such a contention during oral argument (T67-8).

It is respectfully submitted that defendants' convoluted arguments do not change the simple facts that plaintiffs unequivocally prevailed in the Mount Laurel litigation; that the Supreme Court of New Jersey based its ruling on state grounds, and that that ruling did not address plaintiffs' federal fee claim. Since plaintiffs' Title VIII claim was "not frivolous" and arose from a common nucleus of operative facts as their state claim, it is respectfully submitted that they are entitled to attorneys fees and costs and that this matter should be remanded to the trial court for a determination of same.

Respectfully yours,



cc: Lionel Frank, Esq.