UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Nancy Williams and her two children, Nantu Williams and Deon Williams, Charging Party, v. Montview Park Partnership, Hudson Real Estate, and Ginger Klietz Respondents.	HUDALJ 08-93-0421-8 Decided: July 6, 1995

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Before: CONSTANCE T. O'BRYANT
Administrative Law Judge

INITIAL DECISION AND ORDER ON APPLICATIONS FOR ATTORNEY FEES

On January 17, 1995, I signed and entered the Initial Decision and Settlement Agreement ("Settlement Agreement") between the parties to the above-entitled litigation.

The Secretary did not review that Settlement Agreement and, thus, it became final thirty days after that date. 42 U.S.C. § 3612(h), 24 C.F.R. § 104.930, and 24 C.F.R. § 104.940. The Settlement Agreement required Respondents Montview Park Partnership ("Montview"), Hudson Real Estate ("Hudson"), and Ginger Klietz ("Klietz") to pay Complainant the sum of $1,000. It also ordered injunctive relief to vindicate the public interest, requiring Respondents to institute and maintain records concerning the operation of the property, to provide copies of such records to HUD, and to attend fair housing training. In March 1995, Respondents filed timely Applications for Award of Fees and Expenses under the Equal Access to Justice Act ("EAJA"). Their Applications, made pursuant to 5 U.S.C. § 504, 42 U.S.C. § 3612, and 24 C.F.R. § 104.940, seek fees and costs of $5,421.35 for Montview; $22,963.72 for Hudson; and $6,760.95 for Klietz. The Applications will be denied.

Statement of the Issue

Whether Respondents are entitled to attorneys' fees and costs depends on whether they are "prevailing parties" in the administrative proceeding which ended with a Settlement Agreement. Respondents assert that they are the prevailing party. HUD asserts that there is only one prevailing party in this case and that it is HUD.

Based on the Charge of Discrimination, Respondents could have been found liable on a charge of race discrimination and suffered awards of damages plus assessment of civil penalties totalling $55,709 ($1,709 in tangible damages, $33,000 in intangible damages, and $21,000 in civil penalties), as well as costly litigation. Respondents deny that they were guilty of discrimination and assert that it was clear to them early in the case that the government's case was essentially without merit. They assert that they entered into the Settlement Agreement solely to avoid costly litigation. According to Respondents, they chose settlement after balancing the onerous additional costs of trial against the nominal cost of settlement, which they claim was "essentially a 'payoff' to Complainant so that she would agree to dismissal of the Charge" -- a "nuisance value amount to appease the Complainant."

Respondents assert that the law under EAJA controls the determination of who is the "prevailing party," and that under EAJA the test is simply whether Respondents succeeded on any significant issues in the litigation, i.e. did Respondents receive substantially the relief that they requested? Using this test, Respondents argue that they are the prevailing parties because the government received only a "nominal" sum of money and an order for "diminimus" training and recordkeeping, whereas Respondents received a substantial portion of the relief sought -- "there was no finding of liability, [they] paid a nominal amount and the case went away." (Reply Brief, pp. 3-8).

Applicable Law

Section 3612(p) of the Fair Housing Act, as amended, 42 U.S.C. § 3601 *et seq.* ("the Act"), provides that a prevailing party in an administrative proceeding, other than the United States, may recover attorney fees and costs, and that the United States shall be liable for such fees and costs to the extent provided by § 504 of Title 5 or through the Equal Access to Justice Act 28 U.S.C. § 2412 (1994). *See also* 24 C.F.R. § 104.940. EAJA, in turn, provides that an agency "shall award to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1). Thus, in order for the tribunal to award fees under EAJA to a party that participated in an adversarial proceeding against the United States, the applicant must, as a threshold matter, establish that it is a "prevailing party."

Pursuant to § 3602(o) of the Act, the term "prevailing party" as used in the Act has the same meaning as in § 1988 of Title 42 -- the Civil Rights Attorney's Fees Awards Act of 1976 ("CRA Fees Act"). (42 U.S.C. § 3602(o))[1]. Cases interpreting the CRA Fees Act also apply to the FHA. *See* House Judiciary Comm., *Fair Housing Amendments Act of 1988*, H. Rep. No. 711, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2174 (amendments to the Act make its fee provision similar to those in other civil rights statutes).

Discussion

The standard for determining when a party is the "prevailing party" in a § 1988 case was clearly articulated in the 1992 Supreme Court case of *Farrar v. Hobby*. 506 U.S.__, 113 S. Ct. 566 (1992). There the Court was called upon to decide whether a plaintiff who had sought $17 million but only won $1 in nominal damages from a jury was the "prevailing party" for purposes of the award of attorney's fees under § 1988. *Farrar* reconfirmed the teaching of *Texas State Teachers Ass'n v. Garland Independent Sch. Dist.*, 489 U.S. 782, 792-93, (1989), that "the touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties," that is, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. That "touchstone" is a precondition to

[1] As amended Pub. L. 100-430, § 5(b), Sept. 13, 1988, 102 Stat. 1619.

"prevailing party" status within the meaning of § 1988 *Id.* 489 U.S. at 877. *See also Beard v. Teska*, 31 F.3d 942, 951 (10th Cir. 1994).

In *Farrar*, the Court undertook to clarify when there has been a material alteration of the legal relationship of the parties. It held that under the Court's "generous formulation" of the term "prevailing party," a plaintiff who wins nominal damages is a prevailing party under § 1988, since a judgment for damages in any amount modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he or she otherwise would not pay. The Court quoted from its prior decision in *Hensley v. Eckerhart*, 461 U.S. 435, 440 (1989) that "plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." Based on this formulation, if a plaintiff has succeeded on any significant issue in the litigation which achieved some of the benefit or relief the plaintiff sought in bringing the suit, the plaintiff has crossed the threshold to a fee award of some kind. The amount of benefit received or the degree of plaintiff's success in comparison to the amount of damages sought is not a factor in determinating eligibility as a prevailing party to receive an award. However, whatever relief plaintiff secures must directly benefit him at the time of the judgment or settlement to be said to affect the behavior of the defendant toward the plaintiff. The Court reasoned that there is no material alteration of the legal relationship between the parties without entitlement to enforce the judgment, decree or agreement.

It is clear that a party may prevail through a settlement rather than through litigation. As the Court held in *Maher v. Gagne*, 448 U.S. 122, 129, (1980), "the fact that a party has prevailed through settlement rather than through litigation does not weaken that party's claim to "prevailing party" status within the meaning of § 1988." The *Maher* Court, citing S. Rep. No. 94-1011, p. 5 (1976), noted that the Senate Report expressly stated that for purposes of counsel fees, "parties may be found to have prevailed when they vindicated rights through a consent judgment or without formally obtaining relief." The Court's ruling in *Maher* was reaffirmed in *Farrar.*

Moreover, unless there are separate, unrelated claims in the same lawsuit that are in all respects distinct from one another, and as to which the plaintiff prevails on some and the defendant prevails on others, it is logically impossible for both a plaintiff and a defendant to prevail at the same time. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Thus, in a single issue case, if the plaintiff meets the definition of a "prevailing party," it is impossible for the defendant to have prevailed as well.

In this case, a single issue is involved, i.e., whether Respondents discriminated against Complainant by refusing to rent to her on a given date because of the race of her children. The Settlement Agreement provided a legally enforceable remedy against

Respondents for the benefit of the Complainant and HUD. Moreover, the Settlement Agreement provides that any failure on the part of Respondents to comply with these provisions is enforceable in the U. S. Court of Appeals. Thus, although HUD had sought $55,709 in damages, costs and penalties, and settled for only $1,000, HUD is the "prevailing party" in this case because it achieved some of the benefits sought (monetary compensation and injunctive relief against Respondents). The terms of the Settlement Agreement altered the legal relationship between the parties by forcing Respondents to pay Complainant a sum of money and to undergo training and keep records they otherwise would not have done.

Conclusion and Order

For all the above reasons, HUD is the prevailing party in this case by virtue of the Settlement Agreement, and Respondents are not entitled to attorney's fees and costs. Accordingly, Respondents' applications for fees and costs must be denied.

It is so ORDERED.

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CONSTANCE T. O'BRYANT
Administrative Law Judge