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 Daphene Grassi, Charging Party, Daphene Grassi, Intervenor, v. Country Manor Apartments, Gail Rucks, Hollis Helgeson and H.H.H., Incorporated, Respondents.

HUDALJ 05-98-1649-8
Decided: January 18, 2002

Todd A. Kelm, Esq.
Matthew W. Brune, Esq.
For the Respondent

Karla A. Krueger, Esq.
Doug Clark, Esq.
For the Intervenor

Elizabeth Crowder, Esq.
Kathleen A. Szybist, Esq.
Joseph A. Pelletier, Esq.
Barbara J. Elkins, Esq.
Linda M. Cruciani, Esq.
For the Secretary

Before: William C. Cregar
Acting Chief Administrative Law Judge

INITIAL DECISION AND ORDER ON APPLICATION FOR ATTORNEY FEES

On September 20, 2001, I issued a decision in the above-captioned case, finding in favor of the Charging Party and the Intervenor. On October 22, 2001, the decision became a final agency decision. On November 26, 2001, the Intervenor filed a motion for attorney fees and costs, pursuant to the Fair Housing Act as amended, 42 U.S.C. §3612(p), and 24 C.F.R. §180.705. The Intervenor requested attorney fees on the basis of the work of two attorneys, Karla A. Krueger and Doug Clark, from the St. Cloud Area Legal Services, at the rate of $150 per hour for 89.5 hours and $200 per hour for 109.1 hours, respectively. In addition Intervenor requested costs in the amount of $256 for copies and a witness fee, bringing the total requested to $35,501.

On December 7, 2001, Respondents filed a motion in opposition to the motion for attorney fees and costs. Respondents assert that special circumstances existed in this case that would warrant denial of the request for attorney fees and costs because 1) Respondents acted in good faith and were doing what they thought was right in order to protect their tenants[1], and 2) because the issue before the court was one of first impression, and was a close one, Respondents could not have foreseen that their actions could be considered to be discriminatory. Intervenor filed a response to Respondents' motion in opposition on December 28, 2001, and requested additional attorney fees of $800 to cover the time spent preparing the response, bringing the total requested to $36,301.

For the reasons set forth below, I grant Intervenor's motion for attorney fees and costs as amended.

Discussion

[1]For purposes of this motion I assume, *arguendo*, that Respondents acted in "good faith."

The fee-shifting provisions of the Fair Housing Act as Amended provide that the Administrative Law Judge may, in his or her discretion, award reasonable attorney fees and costs to the prevailing party. 42 U.S.C. §3612(p); 24 C.F.R. §180.705. If an intervenor is the prevailing party, a respondent is liable for attorney fees unless "special circumstances" make the recovery of such fees and costs unjust. 24 C.F.R. §180.705.

A commonly urged "special circumstance" is a respondent's or defendant's good faith interpretation of a law, or an action taken, that is ultimately held to be in violation of a federal right. However, it is widely recognized that a defendant's good faith does not ordinarily constitute a "special circumstance." *See, e.g., Turner v. D.C. Board of Elections and Ethics*, 170 F.Supp.2d 1, 6 (D.D.C. 2001); *Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1301-02 (1st Cir. 1997); *Harrington v. DeVito*, 656 F.2d 264 (7th Cir. 1981), *cert. denied* 455 U.S. 993 (1982); *Love v. Mayor*, 620 F.2d 235 (10th Cir. 1980); *Riddell v. Nat'l Democratic Party*, 624 F.2d 539 (5th Cir. 1980). The proper focus in statutory fee-shifting cases is not on the defendant's "fault." As the *Turner* Court stated, "It must never be forgotten that Congress enacted the fee-shifting provision not to punish defendants but to encourage lawyers to undertake litigation to vindicate the constitutional and statutory rights of those who could not otherwise afford to vindicate those rights." *Turner*, 170 F.Supp.2d at 6.

Respondents' similar argument that they were doing what they thought was right to protect their residents, and that they could not have known until the issuance of the decision in this case that their actions were a violation of a federal right, has also been rejected as a "special circumstance" warranting the denial of attorney fees. For example, in *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), a county attorney argued that he should not have to pay attorney's fees because, as a government official he was required to follow and enforce state law, and he could not have known the law would turn out to be unconstitutional at the time he was enforcing it. *Id.*, at 1152. However, the court disagreed. Although it acknowledged that a prosecuting attorney might not know for sure whether a state law is valid or not, the court held that this did not constitute a special circumstance. *Id*. "Presumably it will always be true that state officials enforcing a law or otherwise defending state action will believe, or at least hope, that the law or action in question will be upheld against a federal constitutional attack. The point of §1988 is that such officials proceed at their peril. . . . The judgment of Congress is that the burden rests more properly on them than on the party who has been wronged by the application of an invalid law."[2] *Id*.

[2]Section 1988 includes a fee-shifting provision with language identical to the one at issue in this case.

Finally, close legal questions do not normally constitute a special circumstance warranting denial of attorney fees. For example, in *American Auto. Mfrs. Ass'n v. Cahill*, 53 F.Supp.2d 174, 187 (N.D.N.Y. 1999), the defendants argued that it would be unjust to award fees in a case involving such a close legal question. The court stated, "Defendants are again confusing the standard under which fees are awarded. While prevailing defendants must show that the plaintiff's case was frivolous in order to obtain fees, prevailing plaintiffs need not show that Defendant's position was frivolous."

The Intervenor was the prevailing party. For the reasons stated above, Respondents have failed to demonstrate the existence of special circumstances warranting denial of the request for attorney fees and costs. Respondents do not dispute the reasonableness of the claimed attorney fees and costs and I conclude that they are reasonable.[3]

Conclusion and Order

Accordingly, within 45 days the date this initial decision becomes final, Respondents are **ORDERED** to pay Intervenor a total of $36,301 for attorney fees and costs.

/s/

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WILLIAM C. CREGAR
Acting Chief Administrative Law Judge

Dated: January 18, 2002

[3]Attorney fees are permitted in cases in which the representation is provided by nonprofit legal services organization. *See, e.g., Blanchard v. Bergeron*, 109 S.Ct. 939 (1989).