In the

Supreme Court of the United States

CHRISTIANSBURG GARMENT COMPANY,

PETITIONER,

V.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

RESPONDENT.

No. 76-1383

Washington, D. C.
November 28, 1977
November 29, 1977

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CHRISTIANSBURG GARMENT COMPANY, Petitioner,	:	
v.	:	No. 76-1383
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Respondent.	:	

Washington, D. C.,

Monday, November 28, 1977

The above-entitled matter came on for argument at 2:32 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

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APPEARANCES:

WILLIAM W. STURGES, ESQ., Weinstein, Sturges, Odom Bigger, and Jonas, P.A., 810 Baxter Street, Charlotte, North Carolina 28202; on behalf of the Petitioner.

THOMAS S. MARTIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1383, Christiansburg Garment against EEOC.

Mr. Sturges, you may proceed when you're ready.

ORAL ARGUMENT OF WILLIAM W. STURGES, ESQ.,

ON BEHALF OF THE PETITIONER

MR. STURGES: Mr. Chief Justice, and may it please the Court:

This case arises under Title VII of the Civil Rights Act of 1964. This particular action began or had its genesis in the charge that was filed with the EEOC in 1968. This charge was processed and disposed of by a right-to-sue letter issued by that agency in July of 1970.

In January of 1974, the Commission filed a suit in the District Court for the Western District of Virginia on that charge, on the basis of purported authority contained in the 1972 Amendments to the Act. The EEOC Commission lost.

Sometime after that, the prevailing defendant, pursuant to Section 706(k) of Title VII, which states, "the court, in its discretion, may allow the prevailing party a reasonable attorney's fee" filed a motion in the district court for attorney's fees in the case. The district court held that the prevailing defendant was not entitled to attorney's fees, because the EEOC had exercised good faith in bringing and maintaining the suit.

Christiansburg appealed to the Fourth Circuit. At this time the Fourth Circuit had followed the decision of this Court in Newman vs. Piggie Park Enterprises, to the effect that prevailing plaintiff should be awarded attorney's fees in the ordinary cases unless there is some special compelling circumstances that they should not be.

Despite this rule that was followed in the Fourth Circuit in the case of prevailing plaintiffs, the Fourth Circuit, in a two to one decision, ruled in favor of the EEOC.

So we are now before this Court with the issue before the Court fairly simple, in a sense; the issue being whether prevailing defendants and plaintiffs are to be treated equally in the awarding of attorney's fees under the statute.

As of this time, some of the circuit courts follow a double standard, in which they award attorney's fees to defendants only in bad-faith cases, while other circuit courts, most recently panels of the Fifth and the Sixth Circuits, rule that defendants are entitled to attorney's fees on the same basis as the plaintiffs.

We, of course, argue that equality of treatment should prevail.

In our brief we have argued that the plain meaning of Section 706 should control, that the statute says simply the court may allow the prevailing party a reasonable attorney's fees --

QUESTION: Mr. Sturges, might I --

MR. STURGES: Yes, Your Honor.

QUESTION: I know you do, in this Court, take the position that the same rule should apply to both parties. The Court of Appeals opinion suggests that you took a different position in that Court; that there you argued there was a difference between the plaintiff and defendant and that the standard would be reasonableness as opposed to good faith for the defendant. Is that correct, or did you --

MR. STURGES: Your Honor, that is what we argued in our brief to the Court of Appeals and in our oral argument it was directed to the rule should be the same for the prevailing plaintiffs and defendants.

QUESTION: You mean you changed from your brief to the oral argument in the Court of Appeals?

MR. STURGES: Yes, we did, Your Honor.

QUESTION: I see. I see.

MR. STURGES: Indeed, as we point out in this brief here, if the rule is not to be the same for prevailing defendants and prevailing plaintiffs, what is it to be? We suggest it's not to be the bad-faith rule for the prevailing defendant and the ordinary rule for the prevailing plaintiff; which is the Court of Appeals rule.

If it's not to be that, then a new rule from whole cloth, if you will, has to be construed, whatever that may be.

In the -- frankly, in the circuit court we suggested some rule of reason, but that was very difficult, if you will, to apply and, secondly, there was really no statutory basis for that.

If I may add this, by the time we arrived in the Court of Appeals in the Fourth Circuit, the tide was running pretty much against the position that we now espouse in this Court.

In terms of the plain meaning of the statute, respondents and the amici who support respondent do not seem to take much issue. They suggest, rather, that the legislative history or perhaps policy considerations override what the plain meaning of the statute suggests.

In respect to the legislative history, there is no question that the first bill that was introduced into the House of Representatives provided only that prevailing plaintiffs would be entitled to the award of attorney's fees. Of course, that was subsequently changed to prevailing party.

Two Senators commented in the debates on very similar language under Title II, that if the plaintiffs lost, attorney's fees could be awarded against them. Indeed, one of those Senators replied to a statement by Senator Ervin of North Carolina that the Act might encourage ambulance chasing, and the reply was, "No, it would not encourage ambulance chasing because the attorney's fees could be awarded against the

plaintiff.

Now, it's arguable that the legislative history is inconclusive, but what is not inconclusive is there is no legislative history suggesting that a different standard apply to defendants than apply to plaintiffs. There is just nothing in the legislative history that deals with that particular subject matter.

In view of that, if it's concluded the legislative history is inconclusive, then we suggest all the more reason the plain meaning of the statute should apply and the rule then so provides.

QUESTION: Well, Mr. Sturges, you keep talking about plain meaning of the statute, and the statute just says that the trial court may exercise its discretion to assess attorney's fees either against the plaintiff or against the defendant. It doesn't say that it shall -- it doesn't say a word about its applying the same criteria.

Maybe, in its discretion, --

MR. STURGES: Well, Mr. Justice --

QUESTION: -- the plain meaning of the language is that it need not and should not use the same criteria. It talks about the trial court's discretion.

What is there in the plain meaning of the statute, in other words, that leads inevitably to the conclusion that the criteria have to be identical?

MR. STURGES: There's nothing in the statute that says a different standard should apply to the --

QUESTION: I know, but there's nothing in the plain meaning of the statute, is there, that requires identity of criteria?

MR. STURGES: Only that the statute suggests that both the plaintiffs and defendants are, first of all, entitled to the attorney's fees.

QUESTION: And everybody agrees with that?

MR. STURGES: And everybody agrees with that.

QUESTION: And that's what those Senators said, that sometimes attorney's fees can be assessed against plaintiffs, and everybody agrees that sometimes they can.

MR. STURGES: Right. Now, in passing the statute, if the Congress had intended that different statutes -- different standards would apply, it could, for example, have just said "only prevailing plaintiffs will be entitled to attorney's fees"; and then, in that event, the only time the defendants would be entitled to attorney's fees if they prevail would be if the plaintiff had acted in bad faith.

QUESTION: Well, I wonder if they would ever be, if the Congress had said "only prevailing plaintiffs shall be entitled to attorney's fees". I would think it would be pretty clear that prevailing defendants would then, under such enactment, never be entitled to attorney's fees.

MR. STURGES: Well, this Court has indicated, in both the Alyeska cases and in Newman vs. Piggie Park, that the courts have the inherent jurisdiction to award attorney's fees to either a plaintiff or defendant if the other has acted in bad faith.

QUESTION: If there's no congressional enactment to the contrary.

MR. STURGES: Well, perhaps my choice of the words "only plaintiffs are entitled to attorney's fees" was unfortunate; I perhaps should have said "prevailing plaintiffs".

QUESTION: Perhaps Congress's use of the word "discretion" is unfortunate to you, too.

MR. STURGES: Well, Your Honor, the Congress certainly didn't define discretion, but this Court did.

QUESTION: Well, we know what "discretion" means; don't you?

MR. STURGES: Well, I read the decisions of this Court -- excuse me?

QUESTION: It's the chancellor's foot.

MR. STURGES: Chancellor's foot.

And this Court, in the Newman case, said here is how the discretion is to be applied, here is how the district courts are to apply the discretion. And this happened to be a plaintiff's case, and they said it should be applied in the ordinary case, attorney's fees should be granted.

Now, all we're saying to this Court is that standard should be the same for the defendant, if some other standard should prevail, or this Court thinks some other standard should be imposed under the Act, fine, it should be the same for the plaintiff as for the defendant. And there's nothing in the history that suggests otherwise.

QUESTION: Do you have to go that far in order to support a discretionary treatment? That they cannot be manifestly different so as to produce different results simply because one is the plaintiff and one is the defendant, but leaving otherwise a wide discretion in the trial judge.

Isn't that as far as you need to go?

MR. STURGES: Your Honor, I think all I need to go is that whatever discretion is exercised on, for either party, it should be the same.

Arguments that have been made in the briefs for the amici, Respondent's amici, suggest that if this Court were to rule as the Petitioner argues, that plaintiffs would be chilled in bringing actions under the Act. We suggest to this Court that that has not happened up to this point, and this statute has -- plaintiffs' attorneys have been aware of this statute since 1964. And, indeed, there has been a plethora of litigation under Title VII.

So we don't concede, if this Court rules that the statute means the same kind of discretion is to be exercised

for both parties, that this will chill any litigation that it hasn't chilled so far.

At most, the legislative history suggests that the purpose in passing the statute was both to encourage litigation and discourage litigation, to encourage litigation that would be meritorious and to discourage litigation that would be unmeritorious.

And the statute suggests that the determinant is who prevails, whether it's the plaintiff or the defendant, and that the prevailer is the one that is entitled to the attorney's fees.

I guess I can best sum up, if you will, by stating what the dissent said in the Court of Appeals.

"The net result we end up with as a result of the majority opinion, under a statute which says the court may allow an attorney's fee in its discretion to the prevailing party, is that a prevailing plaintiff is allowed an attorney's fee absent exceptional circumstances, while a prevailing defendant under the same statute is not allowed an attorney's fee unless the plaintiff has prosecuted his action in bad faith. I suggest this is not the level floor the courthouse demands."

If we may, we would reserve the rest of our time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Martin.

ORAL ARGUMENT OF THOMAS S. MARTIN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MARTIN: Mr. Chief Justice, and may it please the Court:

The attorney's fees provisions of Title II and VII of the 1964 Civil Rights Act are, by their terms, permissive grants that the court, in its discretion, may allow prevailing party a reasonable attorney's fee. In Newman vs. Piggie Park Enterprises, this Court established standards to inform that discretion with respect to plaintiff's awards under Title II.

Before the Court today are similar standards for defendants, also based upon the proposition that statutory discretion is not a license for arbitrary action. And the question here, as it was in Newman, is whether the standards properly effectuate the congressional purpose.

Now, these standards which are now followed by six Courts of Appeals state that the indicia associated with the awards to defendants are vexatiousness, meritless litigation, abusive conduct, frivolous litigation, or an attempt to harass or embarrass.

We think that the so-called good-faith test is what Congress intended, because, No. 1, it tracks the purpose statements in the legislative history of the '64 Act; two, it was relied upon by Congress in enacting parallel Civil Rights legislation; and three, it preserved the enforcement

incentive provided by Section 706(k).

QUESTION: What are the EEOC's motives in bringing an action against a defendant, one of several motives, was the feeling that they had a lot more legal resources at their command than the defendant did, and therefore he would be likely to cave in rather than fight the thing. Would that meet the bad-faith test?

MR. MARTIN: Mr. Justice Rehnquist, I think the practical answer to your question is that the courts, in applying the bad-faith test, look to objective critaria. No one deposes the EEOC to decide what their motives were. They look to whether it made sense, whether it's a reasonable ground, whether there was in fact some evidence of discrimination. They look to the fact that the EEOC has a burden, a responsibility to advance Title VII's purposes. This test is applied in an objective fashion rather than in a subjective fashion.

QUESTION: Well, then, why do you call it a good-faith test? Good faith speaks to me in terms of subjective intentions.

MR. MARTIN: I think in some ways it's a misnomer, it's a short form for the set of indices that the courts look to. These are just referances. The courts have discretionary grant from Congress, and they look to these indices to see if something like this has occurred.

Now, if the EEOC brought litigation that was, let's say, had a reasonable legal ground, or let's say a private plaintiff brought litigation at a reasonable legal ground, this is a Carrion case in the Second Circuit, but had brought that same litigation already in another form and lost, the court said, well, you know, although this is reasonable, there's a bad intent here.

So there can be bad-intent cases, but most of the time they're looking for really objective purposes -- objective judgments.

QUESTION: Are you suggesting that all the thousands of lawyers that are employed in government at one level or another, that there never can be some occasion when government proceedings are brought vindictively and in bad faith?

MR. MARTIN: I think that there can be that, and,if that occurred, that the court could award attorney's fees under this good-faith standard.

There's no question, I'm just suggesting to you that --

QUESTION: Then you have just restored some rather substantial meaning to the -- content to the good-faith.

MR. MARTIN: Well, I think there is a bad-faith element in it. I'm suggesting that it's not just that. In other words, it's not just a subjective test. It doesn't require, for an award of attorney's fees, that we prove that

the EEOC had a bad motive, the EEOC brought an outrageous, frivolous litigation. Fees would be awarded against it regardless of its good motive. But if it brought litigation with a bad motive, fees would also be awarded against it. So it has both aspects.

QUESTION: I see.

QUESTION: Mr. Martin, I take it from what you've said and what you also have said in your brief that you would apply different standards, depending on whether you have the defendant prevailing or the plaintiff prevailing.

MR. MARTIN: Absolutely.

QUESTION: Do you find any justification in the language of the statute for different standards?

MR. MARTIN: I find the justification, Mr. Justice Powell, in the legislative history, which I'd like to turn to now.

QUESTION: But the question was, in the language.

MR. MARTIN: In the language, all the language says is that the award shall be in the discretion of the district court.

QUESTION: Right. I'm familiar with the language.

MR. MARTIN: And it points out no distinction between plaintiffs and defendants.

QUESTION: None whatever?

MR. MARTIN: None whatever.

QUESTION: And so you fall back solely on policy?

MR. MARTIN: No, not on policy, Mr. Justice Powell, we fall back on the teaching of Albemarle and I think what's implicit in Newman, is that when you have a discretionary standard, it's not a license for arbitrary action. Discretion has to be exercised in conformity with the purposes of Title VII, with the statutory scheme, with whatever there was in the legislative history.

QUESTION: Is there any legislative history that would confine recovery by a defendant to a situation involving bad faith?

MR. MARTIN: I think there is, and I'd like to turn to it, if I could. The legislative history, as you know, is a slim legislative history.

QUESTION: Yes, it is.

MR. MARTIN: But we think the statements with respect to awards to defendants have a uniform theme, and those are the --

QUESTION: Does the legislative history indicate why Congress didn't make that explicit?

MR. MARTIN: No, it doesn't indicate why it did not make it explicit. I think it's fair to assume that Congress was enacting a new statute, it was difficult to conceive of all the possible situations that might arise, so what it did was grant a discretionary power and, through the legislative

history, gave a guidance to the court in how that discretionary power might be interpreted. And I think that's -- and that was a successful effort, I think, to deal with the kinds of problems which might come up; rather than strait-jacket the courts into some particular standard, they gave them a broad grant of discretion and, through the legislative history, informed that discretion.

QUESTION: A bad-faith standard is quite a strait-jacket.

MR. MARTIN: I don't think it is, Mr. Justice Powell, unless you interpret it as a totally subjective standard, which it is not and has never been. If it includes the award of fees in cases of frivolousness, harassing litigation, vexatious litigation. The Courts of Appeals in Carrion included unreasonable litigation; a new Eighth Circuit case includes unreasonable litigation. I think that's a broad standard and permits the district court the discretion to respond to what Congress was concerned about.

And what Congress was concerned about is demonstrated by the statements by Senator Humphrey and Senator Lausche and Senator Pastore, and they said that the purpose of these fee awards to defendants was to prevent harassment suits, to prevent unjustified suits, to prevent suits without foundation, and to prevent frivolous suits. And that's exactly, we think, what the good-faith standard does. It also tracks the

language used by Congress.

QUESTION: Do you happen to know how many EEOC claims are now pending at the Commission level?

MR. MARTIN: EEO -- are we talking about litigation or --

QUESTION: Talking about pending claims. I think I read in the press a few months ago that there were over 120,000 claims pending.

MR. MARTIN: That would be correct, Justice Powell.

Let me give you some perspective on that. Each year the Commission gets something in the nature of 100,000 claims. Out of all those claims, the Commission selects out only about 300 cases in which to sue. So the perspective that one might get from the briefs of some of the parties here, that the Commission is running wild all over the country suing people, I think is inaccurate. In selecting 300 out of 100,000 cases, the Commission sued by statute only after investigation, only after conciliation, only after approval,by procedure, only after approval by the General Counsel's office and the Commission itself.

QUESTION: But all of those remaining out of the 100,000 are free to sue, once they get a right-to-sue letter.

MR. MARTIN: Oh, absolutely.

QUESTION: That's 100,000 potential plaintiffs.

MR. MARTIN: And in actuality that turns into -- as

the statistics, I believe it's in the Lawyers' Committee brief, state -- that there were about 5,000 suits last year of an employment discrimination nature.

QUESTION: And all of them entitled to attorney's fees under the --

MR. MARTIN: If they prevail --

QUESTION: -- presumably under the Newman standard.

MR. MARTIN: Absolutely. And if they -- and if those suits turn out to be unreasonable, frivolous, meritless, outrageous, abusive, all of them will be -- all the defendants are also entitled to attorney's fees.

QUESTION: Well, they have all been given the right-to-sue letters by the Commission, ex hypothesi.

MR. MARTIN: Correct.

QUESTION: Mr. Martin, do you think the Ninth Circuit case which allowed fees, which is cited in the cert petition, was correctly decided?

MR. MARTIN: I think that's a difficult case. I think it's on the line, and probably suggests the breadth of discretion that's permitted the courts under this standard.

There the EEOC pursued an appeal from a denial of an intervention order. It wasn't totally denied, but partially denied. And the Ninth Circuit apparently felt that the precedent was so clear against the EEOC's action that it was in the nature of a frivolous or harassment suit, and awarded

fees against the EEOC.

QUESTION: Well, I know what the Ninth Circuit felt, I was wondering what the government's position is. Was that a proper case for the allowance of fees?

MR. MARTIN: Well, we thought --

QUESTION: When there's precedent against the government.

MR. MARTIN: -- we thought it was not a frivolous action. And we thought it was not abusive and fees ought not to have been awarded, but we did not seek certiorari.

The Van Hoomisen case in the Ninth Circuit.

QUESTION: That's cited in the cert petition.

MR. MARTIN: Yes, it is.

QUESTION: Well, you don't think the standard should be, in awarding fees to a defendant, that if a judge thinks the EEOC or the plaintiff should have known he was going to lose the case?

MR. MARTIN: I don't think it should be something -- I think that, that's a standard which would be so difficult to apply, and a standard that might so discourage private enforcement or EEOC enforcement, as not to be a good standard.

I think the thrust of what Congress was suggesting that fees should be awarded in something like abusive conduct, not just the fact that the district court says, "Well, this is obviously wrong", but that it really looks like a --

QUESTION: Well, you really are talking about subjective, then, subjective bad faith?

MR. MARTIN: I don't think so. I think that the court looks to a kind of -- one kind of case, for example, where, for example this case, where it was a case of first impression. And the court said, "This is a case of first impression, you know, this doesn't look like abusive conduct to us." Now, if this case, if the EEOC had brought a kind of action and had lost in nine Courts of Appeals and the Supreme Court and tried again, the court would say, "Well, regardless of the great motives of the EEOC, fees could be awarded." It's not totally a subjective test.

QUESTION: How much discouragement factor do you think the awarding of attorney's fees to defendants has with plaintiffs? So far as the EEOC is concerned, they get their money from the public treasury. And so far as the private plaintiffs are concerned, most of them are judgment-proof, anyway, aren't they?

MR. MARTIN: Well, --

MR. CHIEF JUSTICE BURGER: We'll resume there tomorrow morning.

MR. MARTIN: -- I'll answer your question tomorrow. Thank you.

[Whereupon, at 3:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., Tuesday, November 29, 1977.]