IN THE SUPREME COURT OF THE UNITED STATES

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

Washington, D. C.,

Tuesday, November 29, 1977.

The above-entitled matter was resumed for argument at 10:05 o'clock, a.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

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume arguments in 1383.

Mr. Martin, you may proceed.

ORAL ARGUMENT OF THOMAS S. MARTIN, ESQ.,

ON BEHALF OF THE RESPONDENT -- Resumed

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

When we closed yesterday, Justice Rehnquist had questioned whether fee awards against sometimes indigent Title VII plaintiffs would really deter enforcement, and some Title VII plaintiffs are undoubtedly indigent and perhaps judgment-proof; many more are not. Title VII claims are brought not only by incumbents and unsuccessful applicants, not only by blue-collar workers but by executives.

We think that the threat of fee awards against their personal property, however modest, would be a substantial deterrent; and, more importantly, Congress thought that it had this deterrent effect because Congress authorized the awards to deter frivolous or abusive conduct.

This is also the same basis that this Court has used to uphold the American Rule. This Court said in Fleischmann that if defendants were forced to -- if plaintiffs were forced to pay not only their own fees but the fees of their opponents when they lost, the poor might be unjustly discouraged from

bringing action to vindicate their rights. We think this is not an abstract concern, the Lawyers' Committee for Civil Rights, the NAACP, based upon their experience, in their briefs they conclude that an ordinary award of attorney's fees against unsuccessful defendants would have a substantial adverse effect upon Title VII enforcement.

We think --

QUESTION: Against unsuccessful plaintiffs.

MR. MARTIN: Against unsuccessful plaintiffs, yes.

This is surely inconsistent with Newman and we don't think it's impossible -- it's impossible that Congress could have intended that. Especially since Congress was concerned that these plaintiffs would be unable to pay their own fees, and that's why they passed the statute. Senator Humphrey said: the purpose of the statute is to help poor plaintiffs bring meritorious litigation.

QUESTION: Mr. Martin.

MR. MARTIN: Yes, Mr. Justice Powell?

QUESTION: Could a district court, in the exercise of its discretion, consider the fact that the prevailing defendant was, say, a charitable corporation, non-profit corporation?

MR. MARTIN: I think the district court could consider that, the district court has a grant of discretion, it's a wide grant, and the courts have considered those kinds of factors

in the cases that are -- where the good-faith standard has been applied. I don't think it's a strait-jacket for district court consideration.

It would also have to consider, though, Mr. Justice Powell, the status of the plaintiff, and the fact that the plaintiff, for example, might be the EEOC, which has an obligation to advance Title VII law, it might be a poor plaintiff, and it has to consider the fact that awarding an attorney's fee might deter future Title VII litigation.

So it has discretion, it can consider that factor, but it has to consider it within the whole scope of the purpose of Title VII, to eliminate discrimination in this country in employment.

QUESTION: In your view, could the district court also consider the size and financial condition? Many of these defendants are quite small, almost line-par businesses.

MR. MARTIN: I think the district court could consider that, Mr. Justice Powell, but it should also consider these factors: that before Congress was an amendment to eliminate fee awards against small businesses -- that was in '72, and is set forth in our brief -- and Congress rejected that amendment.

Before Congress were many amendments to eliminate the coverage of Title VII from small businesses; nevertheless, Congress refused to withdraw Title VII coverage from small

businesses. If we had a course of dealing in which district courts consistently refused to award fees, award fees in cases brought against small businesses, it might effectively insulate those small businesses from Title VII coverage and therefore reverse the two decisions made by the Congress, one, to cover them, and, two, not to allow mandatory fees in such cases.

So -- and let me also mention that in this case, Christiansburg was a company in 1970 which had 230 employees, and that was almost ten times the minimal amount that was needed for Title VII coverage. So it wouldn't be dispositive in this case, regardless.

But, to answer your question, I think the district court has discretion to consider these factors, but it has to measure all this against Title VII's purposes.

QUESTION: It isn't so much your answer that confuses me, I thought it was your position that a district court should exercise its discretion to impose attorney's fees upon plaintiffs only on a finding that the action has been brought in bad faith or vexatiously. And I should think the identity of the defendant would have nothing whatsoever to do with that criterion.

MR. MARTIN: Well, the indicia associated with the fee award are bad faith, vexatiousness, et cetera, so I think in the normal case, as a normal rule, that fees should not be

awarded, absent those indicia.

Whether Congress meant to preclude the court from even considering the fact that, in the exercise of its discretionary grant, that the employer was a small employer, doesn't appear from the legislative history except to the extent that Congress decided to cover those employers and rejected amendments that would have given them mandatory awards.

QUESTION: Well, then --

MR. MARTIN: I think it's unlikely that it will ever -- it shouldn't be dispositive.

QUESTION: Well, should it be any element in the district court's decision as to whether or not to exercise its discretion to assess attorney's fees. According to your -- certainly whether or not a claim is brought in bad faith or vexatiously has really nothing to do with how big or how small or how rich a plaintiff or defendant is.

MR. MARTIN: That's right. That should be -- I think that should be the normal rule. All I'm suggesting is that that rule seems to be in the nature of a guideline, as it -- at least as articulated by the Courts of Appeals.

The Courts of Appeals have not articulated whether in fact the consideration which Mr. Justice Powell suggests should be excluded. They haven't said it should be excluded, and therefore I don't think, to affirm this case which just says

that the indicia associated with award of bad faith and vexatiousness, we need to necessarily deal with that problem of what -- of whether you should or should not consider it.

QUESTION: But your answer implied that if not -- either it should be, or, in any event, it could permissively be included, which is inconsistent with what you say in your brief, as I read your brief.

MR. MARTIN: Well, I think that the Courts of Appeals decisions which we cite in our brief suggest -- in United States Steel they suggest the possibility of taking into consideration economic factors, for example. And that's how the standard has been applied.

As I say, Mr. Justice Stewart, in the normal case, you're absolutely right, fees should be --

QUESTION: Well, I'm not suggesting it.

MR. MARTIN: Right. In the normal case fees should be denied in the absence of these indicia, of bad faith or frivolousness.

QUESTION: And, as you say, should be the sole test. That's the submission in your brief, as I understand it at least.

MR. MARTIN: That should -- that should be the sole test, but -- and those are whether -- again, the grant of the statute is discretionary.

QUESTION: Right.

MR. MARTIN: Discretionary fee award. Okay. And the indicia, a guideline associated with that, are these tests that we have suggested.

QUESTION: So you do now concede that in addition to whether or not the action was brought in bad faith or vexatiously, that the court might permissively consider other elements in deciding whether or not to assess attorney's fees.

MR. MARTIN: I think it's hard to look at the legislative history and the language of the statute and say they can exclude it, I think it should never be dispositive.

QUESTION: Well, if things are in equipoise except for that element, that it's going to be dispositive.

MR. MARTIN: I think it's -- I think it would be -- well, there could be a case, Mr. Justice Stewart, and all I'm saying is that, looking at the legislative history, I cannot exclude the possibility that the court could take that into consideration. I think that the normal, the indicia associated with award of attorney's fee should be vexatiousness and frivolousness, normally.

That's the best answer that I think I can give to the question.

QUESTION: Well, that is a somewhat different position than the position taken in your brief, as I understand it. Am I wrong in my understanding of your brief?

MR. MARTIN: Well, I -- the brief's position is that

the -- the good-faith standard should be applied as it's applied by the Courts of Appeals now. And if you look to those decisions I'm suggesting to you that they do not say, they have not reached the question of excluding this kind of concern altogether.

And I am suggesting that what they have reached is that the normal indicia associated with the award should be those criteria. That's all that's necessary to resolve this case, and that's the point that we made in our brief. That in this kind of case, in the normal case, the vexatious and frivolous rule should be dispositive.

QUESTION: Well, we're not a police court here to decide each case on sort of an ad hoc basis. One of our functions, perhaps the primary function, is to give some guidance to the courts and lawyers of this country, and in this area it's quite important, it seems to me, to -- what we're asked to do is to set the metes and bounds of the area within which a district court should exercise its discretion.

MR. MARTIN: Yes. Well, my answer to -- let me say that my answer, and maybe this will do it, I don't think it should ever be dispositive. And I think that the criteria should be the vexatious rule.

QUESTION: Then, if it should never be dispositive, then it's an impermissible element, you would agree, wouldn't you?

MR. MARTIN: Oh, then I would agree with you.

QUESTION: Do you think your responses to Mr. Justice Powell and subsequently to Mr. Justice Stewart fall within the framework of the Fourth Circuit opinion in this case?

MR. MARTIN: I think it does, Mr. Chief Justice. The Fourth Circuit rejected a rule that would depend upon an ordinary fee award to plaintiffs or that would depend upon reasonableness alone. And looked to the United States Steel rule, which was dependent upon the indicia of frivolousness, meritless and vexatiousness.

QUESTION: Now, the statute talks in terms of prevailing parties, does it not?

MR. MARTIN: It does.

QUESTION: Now, Senator Humphrey and the others debating this matter on the Floor had no difficulty in singling out plaintiff, defendant; what conclusions should be drawn from the fact that Congress used the term "party" rather than "plaintiff", "prevailing plaintiff"?

MR. MARTIN: I think the conclusion that should be drawn is that Congress did not want to exclude prevailing defendants from ever receiving an attorney's fee award, and in order not to exclude them, and to provide for a disincentive for frivolous litigation it included the "prevailing party" language.

Mr. Justice Powell asked me yesterday whether Congress

would ever use this language and nevertheless mean that there should be two different standards. But, in fact, Congress has repeatedly done exactly that, in the statutes which are pointed out in the Lawyers' Committee brief, for example, ranging from consumer protection to marine pollution; Congress used exactly this prevailing language and nevertheless meant to apply two different standards, one for the plaintiff and one for defendants.

And, more importantly, Congress relied upon this interpretation in the '76 Civil Rights Attorney's Fees Act, that was comprehensive legislation, intended to parallel the '64 Act, Congress tracked the language of 706(k) and explicitly stated that fees should only be awarded where the plaintiff's suit was frivolous, vexatious or brought for harassment purposes.

QUESTION: You say Congress explicitly stated that. Did you mean that literally?

MR. MARTIN: I mean in both the House and Senate Reports, which are set out in the brief. Not in the statute. They used the same language in the statute as they did in 706(k), but they made clear in the legislative history, as explicitly as one could, that they intended fees only to be awarded on this standard.

QUESTION: Mr. Martin, when you answered Mr. Justice Powell's question about the character of a corporate defendant,

charity or small business, were you answering with reference to fee awards against the plaintiff or fee awards against the defendant?

MR. MARTIN: Fee awards would ordinarily be made in favor of a successful plaintiff, according to Newman vs. Piggie Park.

QUESTION: You're saying that in a plaintiff's claim for a fee, a successful plaintiff's claim for a fee, the court might deny them on the ground that the defendant --

MR. MARTIN: No. Fee awards are -- under the Newman rule, they are ordinarily made.

QUESTION: Well, what was your answer to Mr. Justice Powell, then?

MR. MARTIN: Well, Mr. Justice Powell asked, I think, whether the court in its discretion could ever take into consideration these other factors.

QUESTION: When the defendant had prevailed, that was in my question.

MR. MARTIN: When the defendant had prevailed?

QUESTION: Yes.

MR. MARTIN: Right. I thought you had just asked me whether if the plaintiff prevailed.

QUESTION: Well, I was not clear whether you answered it in the context of defendant or plaintiff prevailing.

MR. MARTIN: No. No, and I --

QUESTION: And you're saying that when a defendant prevails, a factor that would tend to justify a fee would be that the defendant was a charitable corporation or a small business?

MR. MARTIN: Maybe -- maybe this way, you know, if -- I think this is a part of it --

QUESTION: Or did you depart from that answer --

MR. MARTIN: When the EEOC brings -- one of the criteria might be whether it's an unreasonable action. Okay. By the EEOC. And some court might, in deciding whether EEOC was unreasonable in bringing the suit, look at the question of whether, you know, the size of this defendant. You know, as Mr. Justice Stewart said, that would be inconsistent with the whole thrust of what these fee awards were supposed to do. But that, you know, it has been done, and that's really what I was saying.

QUESTION: Mr. Martin, you've been subjected to very skillful cross-examination by my brothers --

MR. MARTIN: I have, Mr. Justice Powell.

QUESTION: -- what I want to ask you now is: Are we to understand that the answers you gave me still stand?

[Laughter.]

MR. MARTIN: I think Mr. Justice Stewart has skillfully brought me to the point where I have to say that if the court took into consideration the size of -- as I was trying

to state generally -- the size of the company, it would be inconsistent with what Congress did in covering the company and refusing a normal award of attorney's fees.

QUESTION: Is it your view that the court acts in its function as a court of equity when it makes this judgment?

MR. MARTIN: It acts, according to this -- Title VII is an equitable statute, in general, that's right.

QUESTION: That is right. And are you now saying that a court of equity cannot consider the size or character of a defendant who has prevailed in a Title VII case?

MR. MARTIN: Well, I think, Mr. Justice Powell, --

QUESTION: And if so, what in the statute gives you any basis for making that argument?

MR. MARTIN: All right. The only thing that -- and I think this is what Mr. Justice Stewart said -- is that the indices that were associated with the fee award, when Congress articulated what its purposes were, were indices of bad faith and frivolousness, I think Congress did not include in that small business and other kinds of concerns.

There is discretionary fee award language. Courts of Appeals, in applying this rule, have looked to the other language, to these other concerns, but, to the extent that they would upset a case in equipoise, then I think that would be inconsistent with Congress's purpose. I think that's what Mr. Justice Stewart has suggested here.

The double standard that the court found to be -- the dissenting judge found to be unfair, we think is not unfair because this statute was -- has a particular purpose: it's to implement Title VII's policies. And plaintiffs and defendants are differently situated with respect to those policies.

And while plaintiffs have an enforcement role, defendants do not have that enforcement role. Therefore, Congress could have precluded prevailing defendants from ever obtaining a fee award, but it made a different choice: it decided that in cases of unjustified abuse, of frivolous litigation, fee awards could be made. And that's the balance that Congress struck, and that's the balance that we think should be sustained.

QUESTION: You seem to disparage the adversary system somewhat in that response, Mr. Martin. Isn't it the function of the advocates on both sides to present their positions vigorously, to see that ultimately the intent of Congress is carried out?

MR. MARTIN: It certainly is, Mr. Chief Justice.

QUESTION: Now, if the defense then, if the defendant company prevents an inexperienced or ill-advised or indolent judge from going too far off the beaten path, hasn't he performed a function consistent with the administration of the Act?

MR. MARTIN: I think he has, and -- but what our problem is is not deciding what would be a good rule but what Congress was thinking about when it passed the '64 Act. Its concern was providing an incentive for plaintiffs; it had raised no concern of providing an incentive to defendants. It probably presumed the defendants have enough incentive to defend against Title VII litigation.

And so, interpreting what Congress said, as opposed to what might be, you know, considered to be a good rule, Congress seemed to intend the good-faith standard.

QUESTION: But if your last answer is correct, they simply would have given attorney's fees to prevailing plaintiffs, period, wouldn't they?

MR. MARTIN: Except that they had another concern, and that was to prevent frivolous and abusive litigation. They didn't want this process to be abused, and that's why they provided prevailing party for awards. They have done this, as I say, in numerous other statutes, including the parallel legislation of the '76 Act.

They had to do this for another reason, Mr. Justice Rehnquist, because costs would not be allowed against the United States in the absence -- because of 20 U.S.C. 2412 -- costs would not be allowed against the United States under the equitable rule.

So, to provide against -- to stop frivolous actions,

to provide fees against the United States, they had to pass the prevailing party language.

QUESTION: Well, they certainly could have worded it so that costs would be allowed against the United States, but not attorney's fees.

MR. MARTIN: But they intended to allow attorney's fees against the United States, they needed the prevailing party language to do that.

QUESTION: Well, that's what I suggest, that your answer to the Chief Justice's question is not wholly satisfactory.

MR. MARTIN: In what sense, Mr. Justice Rehnquist? I'm not sure I understand you.

QUESTION: Well, that Congress was seeking to encourage private litigants to prosecute but not to encourage to the same extent meritorious defenses to be made.

MR. MARTIN: All I can say is that in the legislative history there are only about four statements. One is Senator Humphrey's statement, saying that we want to encourage private litigation. And that was made when he introduced the amendment to the bill.

QUESTION: How would you read the statute if the -- without referring to these various remarks on the Floor?

MR. MARTIN: If there was no legislative history, I would then look to the purposes of Title VII, and the statutory

scheme and the legislative history would seem to be to encourage the elimination of discrimination.

I think what we have is some remarks on the Floor, a legislative scheme which was designed, as this Court said in Newman, to encourage private enforcement. We have subsequent parallel legislation in the '76 Act, we have the same use of similar language in other statutes by Congress. All those indicators, we think, point in the same direction. That is, that the Congress intended, when it used this language, to set up one rule for prevailing plaintiffs and the good-faith rule for prevailing defendants. That's our best estimate of what Congress intended, based upon all these legislative indicators.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Sturges, do you have anything further?

REBUTTAL ARGUMENT OF WILLIAM W. STURGES, ESQ.,

ON BEHALF OF THE PETITIONER

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

I do, a few remarks. First of all, in respect to considering the financial ability of the loser to pay, we think that is a matter that a district court can properly consider. And if the plaintiff is judgment-proof, or if the defendant is judgment-proof, certainly in that kind of a case

the court should exercise its discretion not to award attorney's fees to the winning party.

In respect to the question asked by Mr. Justice Powell in respect to a non-profit corporation, that is a matter again, we would submit, in the district court's jurisdiction and discretion and undoubtedly the -- a variety of facts would have to be taken into consideration as to whether an award should be made.

Secondly, the law as it existed before Title VII or the 1964 Act was passed, provided attorney's fees to a party if that party was subjected to a vexatious or bad-faith suit or defense.

QUESTION: That was in the absence of any legislation, to qualify.

MR. STURGES: That was in the absence of any legislation, yes, Your Honor, that was the inherent equitable power of the federal courts.

QUESTION: Under the American rule.

MR. STURGES: Now, there are some 40 or 50 statutes that the Congress has passed in respect to attorney's fees, and they provide attorney's fees in a variety of cases, sometimes to the prevailing party, sometimes to the injured party, sometimes to the prevailing plaintiff, sometimes in exceptional cases, sometimes otherwise.

We submit that there is no holding by this Court or

by any court that when Congress passes a statute allowing attorney's fees to the prevailing party, that if the -- either party had acted in bad faith, they would have been precluded from receiving attorney's fees, absent a provision in the statute which would allow it.

Indeed, this Court, in Newman v. Piggie Park Enterprises, in its Footnote 4, stated: If Congress' objective had been to authorize the assessment of attorney's fees against defendants who made completely groundless contentions for purposes of delay, no new statutory provision would have been necessary. For it has long been held that a federal court may award counsel fees to a successful plaintiff where a defendant has -- a defense has been maintained "in bad faith, vexatiously, wantonly, or for oppressive reasons".

And the Court again adopted this same language in its Alyeska Pipeline Service Company case, in which it said the Court, in referring to this same footnote in Newman, where it stated: The Court reasoned that if Congress had intended to authorize fees only on the basis of bad faith, no new legislation would have been required in view of the history of the bad-faith exception.

So we way to the Court and argue that it was not necessary for the Congress to pass the statute allowing the -- including "prevailing parties" in the statute, in order to award attorney's fees for bad faith, either to the plaintiff

or the defendant.

QUESTION: Mr. Sturges, could I interrupt for just a moment?

MR. STURGES: Yes, sir.

QUESTION: I was reflecting on your argument last night, and you said that your position now is that the same rule should apply to both sides, whether the plaintiff or the defendant prevails; is that right?

MR. STURGES: That's correct, Mr. Justice.

QUESTION: Now, does that mean that -- which of two positions do you therefore take? That the rule of Piggie Park has been changed for successful plaintiffs, or that whenever a defendant wins, the defendant should routinely get fees from the plaintiff?

MR. STURGES: I say that the rule enunciated in Piggie Park should apply to defendants as well as to plaintiffs.

QUESTION: So that in the normal case of a defendant that wins, he automatically gets fees, unless there's some exceptional reason for denying him fees?

MR. STURGES: That is our position, Mr. Justice.

QUESTION: I just wanted to be sure.

MR. STURGES: Now, in respect to public policy. In the Newman case, this Court analogized the successful plaintiff as carrying the burden of a private attorney general. We would say the -- and that was based, in part, on the statutory

history, what little there is to encourage such litigation. As we have pointed out, that statutory history also discourages unmeritorious litigation.

And we would submit to the Court the analogy that the successful plaintiff, if you will, is similar to the private defendant..

Lastly, we would suggest to the Court that the legislative history of the '76 Attorney's Fees Act is in no way relevant to what the Congress in 1964 intended in respect to the provision under consideration here, and we submit -- I believe it's Footnote 36 in the Teamsters v. T.I.M.E. case, as further support for that position.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:33 o'clock, a.m., the case in the above-entitled matter was submitted.]

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