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The Supreme Court's Rejection of the "Catalyst Theory" in the Awarding of Attorneys' Fees and Litigation Costs

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The Americans with Disabilities Act (ADA) contains a provision that explicitly authorizes attorneys' fees and other costs of litigation; it declares:

In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.¹

To be entitled to such fees, a party must be "the prevailing party" in the lawsuit or administrative proceeding. For many years most U.S. courts, in determining eligibility for attorneys' fees under civil rights laws and other federal statutes, had applied an analysis called the "catalyst theory." In *Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001), the Supreme Court drastically reduced the availability of attorneys' fees and litigation expenses by rejecting the "catalyst theory." This policy brief in the National Council on Disability's *Righting the ADA* series examines the meaning and effect of the "catalyst theory" and the implications for the enforcement of the ADA caused by the Court's rejection of the theory.

THE CATALYST THEORY

Unlike in some other countries (most notably England) where the winning party may recover costs of litigation and attorneys' fees from the loser, in the United States courts generally apply what is known as the "American Rule" and require parties to pay for their own attorneys and costs, whether they win or lose. U.S. courts usually do not award fees to a prevailing party unless there is a statute that explicitly authorizes them to do so. Congress has authorized the award of attorneys' fees to the "prevailing party" in a variety of laws, including the ADA, the Civil Rights Act of 1964, the Fair Housing Amendments Act of 1988, the Voting Rights Act Amendments of 1975, the Civil Rights Attorney's Fees Awards Act of 1976, and quite a few others.

The ADA provision quoted above was carefully worded to authorize "a reasonable attorney's fee, including litigation expenses, and costs." "Costs" is a term of art that is defined by federal law to include certain specific kinds of expenses, such as fees for clerks and marshals, fees of the court reporter and the cost of stenographic transcripts, printing costs, document copies, docket fees, and compensation of court-appointed experts.² Other kinds of costs associated with lawsuits are termed "litigation expenses." The House Judiciary ADA Committee report explained that this phraseology was chosen in response to Supreme Court decisions that called for statutes to explicitly include other types of costs within provisions for attorneys' fees.³ The House Education and Labor Committee report noted that "litigation expenses include the costs of experts and the preparation of exhibits."⁴ While the language of the statute lets courts award attorneys' fees to the "prevailing party" — seemingly either plaintiffs or defendants — the Judiciary Committee explained that "expenses" are "included under the rubric of 'attorney's

fees’ and not ‘costs’ so that such expenses will be assessed against a plaintiff only under the standard set forth in *Christiansburg Garment Co. v. EEOC*.⁵ In *Christiansburg*, the Court ruled that a plaintiff cannot be assessed an opponent’s attorneys’ fees unless a court finds that the plaintiff’s claim is frivolous, unreasonable, or groundless.⁶ Because the attorneys’ fees provision in the ADA applies to administrative proceedings as well as to court actions, and because it expressly includes litigation expenses, such as fees of expert witnesses and consultants, in addition to attorney remuneration and costs, the ADA’s attorneys’ fees provision is broader than that in prior civil rights laws.

In applying such statutory provisions, the courts were generally in agreement that the “prevailing party” meant something broader than simply a party that had won a final judicial ruling in its favor. The courts routinely applied a “catalyst theory” under which a plaintiff was considered a “prevailing party” eligible to be awarded attorneys’ fees if it achieved its desired result because the lawsuit brought about a voluntary change in the defendant’s conduct. The idea was that in circumstances where the filing of a lawsuit caused a defendant to change its ways and cease some action whose legality had been challenged, the plaintiff had achieved the goal of the lawsuit, and was the “prevailing party.” If filing a lawsuit proved to be a catalyst for the defendant’s compliance, the plaintiff had prevailed even if the legal proceedings never reached the formal decision stage.

The lower courts had not granted “prevailing party” status lightly; they had imposed certain conditions for a party to qualify as a prevailing party under the catalyst theory: (1) a plaintiff had to show that the defendant provided some of the benefit sought by the lawsuit; (2) a plaintiff had to demonstrate that the suit stated a genuine claim — one that was at least “colorable,” not frivolous, unreasonable, or groundless; and (3) the plaintiff had to establish that the suit was a “substantial” or “significant” cause of the defendant’s action providing relief.

Prior to 1994, the Courts of Appeals were unanimous (except the Federal Circuit, which had not addressed the issue) in accepting the catalyst theory and permitting plaintiffs to obtain fee awards even if they did not obtain a judgment or consent decree. In 1994, the Fourth Circuit reversed course from its prior stance and broke ranks from the other circuits by holding that a plaintiff could not become a “prevailing party” without an enforceable judgment, consent decree, or settlement.⁷ Subsequently, the nine other circuits reaffirmed their endorsement of the catalyst approach.

THE *BUCKHANNON* DECISION AND ITS IMPLICATIONS

In *Buckhannon Board and Care Home, Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598 (2001), the Supreme Court agreed with the position of the Fourth Circuit and rejected the “catalyst theory.” The Court viewed the term “prevailing party” as a legal term of art that, according to the leading legal dictionary, meant “[a] party in whose favor a judgment is rendered

....”⁸ The Court characterized its prior decisions as having not ever reached or as expressly reserving the issue of the validity of the catalyst theory, but considered them as consistent with the view that a “prevailing party” is one who has been awarded some relief by the court, since it had never awarded attorneys’ fees for a nonjudicial alteration of actual circumstances.⁹ The Court deemed the critical factor in attorneys’ fees cases to be whether there is “judicially sanctioned change in the legal relationship of the parties.”¹⁰ It held that a defendant’s voluntary change in conduct, even if it accomplishes what the plaintiff sought to achieve by the lawsuit, lacks the necessary “judicial *imprimatur*” on the change.¹¹ The Court ruled that the “clear meaning” of “prevailing party” in the fee-shifting statutes compelled such a conclusion.¹² Accordingly, the Court rejected the catalyst theory and affirmed the judgment of the Fourth Circuit.

For a more detailed discussion of the five-to-four decision in *Buckhannon*, the factual situation from which the case arose, and the reasoning of the majority and the dissenting Justices, see <http://www.ncd.gov/newsroom/publications/decisionsimpact.html>.

In her opinion for the four dissenting Justices in *Buckhannon*, Justice Ginsburg predicted that “the Court’s constricted definition of ‘prevailing party,’ and consequent rejection of the ‘catalyst theory,’ [will] impede access to court by the less well-heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general.”¹³ In regard to the ADA, Justice Ginsburg’s prediction has certainly proven to be accurate; the *Buckhannon* decision has undercut incentives for both public interest lawyers and the private bar to undertake ADA cases.

As with civil litigation generally, only a small percentage of ADA cases proceed to trial. Subsequent to the *Buckhannon* ruling, defendants have a significant additional reason to settle cases informally rather than by consent decree or to make the cases moot by voluntary compliance, because they can thereby avoid paying attorneys’ fees. Private attorneys are aware that there is a good chance that promising ADA cases will be settled informally or mooted out and attorneys’ fees precluded, so, unless significant monetary damages are at issue or the plaintiff is well-to-do and can afford to pay fees, there is little chance the attorney will make any money on such cases.

This problem is particularly severe in the context of ADA Title III claims of discrimination by public accommodations. Unlike Titles I and II, Title III does not authorize compensatory damages for successful complainants. As a result, about the only inducement for members of the private bar to take such cases had been the promise of attorneys’ fees. Since many architectural access claims brought under Title III in regard to existing facilities are easily remedied (the standard is that changes must be “readily achievable” — “easily accomplishable and able to be carried out without much difficulty or expense”),¹⁴ such cases are frequently settled informally. In such circumstances, after *Buckhannon*, attorneys’ fees are generally no longer available. Because they need not fear that they will have to pay attorneys’ fees, owners or operators of public accommodations now have much less incentive to comply with Title III until they are

actually sued. If and when they are sued, public accommodations owners or operators can make necessary changes to their facilities at that time and still incur no costs other than the cost of compliance with ADA requirements.

Similar difficulties arise under Titles I and II of the ADA as well. Under Title I, the constricted definition of disability under the Supreme Court's rulings, the "catch-22" of proving serious enough limitations to establish a disability while simultaneously proving that the complainant is "qualified" to do the job at issue, and other problematic interpretations have combined to make employment discrimination cases very difficult to win under the ADA. For other papers in the National Council on Disability's *Righting the ADA* series addressing such problems, see <http://www.ncd.gov/newsroom/publications/broadnarrowconstruction.html>; <http://www.ncd.gov/newsroom/publications/mitigatingmeasures.html>; <http://www.ncd.gov/newsroom/publications/notjustonejob.html>; <http://www.ncd.gov/newsroom/publications/decisionsimpact.html>; and <http://www.ncd.gov/newsroom/publications/extentoflimitations.html>. Studies show that only about one in ten Title I cases that are filed in court get beyond the motion-to-dismiss or summary judgment stage. Claims that a person was terminated from a job or not hired because of a disability often involve clients who are no longer employed and cannot afford to pay fees and expenses of litigation themselves. Understandably, private attorneys frequently balk at the notion of fronting the costs of a Title I lawsuit themselves when the chances of ultimately winning may be small and the only potential reward if the case is settled informally is some percentage of any wages or compensatory damages the employer may agree to pay.

Similarly, while monetary damages are potentially available for successful plaintiffs under Title II of the ADA, this option has been seriously tarnished by the uncertainty surrounding the extent of sovereign immunity available to public entities under Supreme Court rulings recognizing such immunity from suits for monetary damages in some circumstances. For a discussion of cases addressing such immunity, see <http://www.ncd.gov/newsroom/publications/alvgarrett.html>. Apprehensions about being able to obtain damages against public entities are compounded by the possibility that defendants may choose to correct ADA violations voluntarily to avoid attorneys' fees in situations in which they feel that plaintiffs might prevail. And under Title II, as under the other Titles of the ADA, the risk to attorneys of not being able to get attorneys' fees will be even greater in cases in which potential compensatory damages are small or where the plaintiff is primarily seeking an injunction ordering the defendant to stop its discriminatory actions. A compliant defendant may be able to avoid almost any potential financial consequences of its previous noncompliance with ADA requirements. Accordingly, an attorney bringing such a case may have little chance to receive compensation for her or his work.

Attorneys working for not-for-profit or publicly-funded agencies likewise find themselves reluctant, and sometimes unable, to take some ADA cases as a result of the *Buckhannon* decision. Such entities commonly do not charge their clients for representation and thus depend in large part on attorneys' fees to support their efforts. Less availability of attorneys' fees means

fewer resources and fewer cases, making it more difficult for persons with disabilities to secure legal representation, even in instances where discrimination on the basis of disability has clearly occurred.

One publicly funded advocacy agency complained that it had spent hundreds of thousands of dollars litigating a case involving alleged inhumane conditions at a state residential center for persons with mental retardation, but lost its chance to recover attorneys' fees and litigation expenses when the state decided to close the facility.¹⁵ Even though the federal district court indicated it was inclined to believe that the state's action was the result of the lawsuit, the court was foreclosed from awarding attorneys' fees and litigation costs under the *Buckhannon* ruling. The loss of such fees and costs severely hampered the level of service the agency would otherwise have been able to provide to other clients. Another advocacy organization that provides attorney representation at no cost to families in special education proceedings reported that after *Buckhannon* it was unable to negotiate any fees in any of the special education cases that were resolved through settlement.¹⁶ Since 90 percent of its cases were typically settled, the result was that it no longer recovered fees for most of its work, with negative effects on both the quality of the work it undertakes (by reducing resources for retaining experts, obtaining evaluations, and similar expenses) and the number of families it can provide such representation for. Another agency reported that as a result of *Buckhannon*, "we are obtaining fewer fees, which impacts on our ability to hire additional staff, and pay current staff sufficiently, both of which decrease our ability to serve more people with disabilities."¹⁷

Not-for-profit and publicly-funded legal advocacy organizations often seek to maximize the effect of their limited resources by involving the private bar to handle particular cases, either through co-counsel arrangements or by total referrals of cases to them. Many private attorneys and law firms take on such cases on a pro bono basis, but, in the past, had the possibility of recovering attorneys' fees if they were successful. With chances of such fee recovery diminished after *Buckhannon*, public interest groups are finding their attempts to recruit pro bono attorneys have been undermined. A representative of one publicly funded disability advocacy agency observed:

Buckhannon ... has had a dampening effect on our work in recruiting pro bono attorneys. ... In the past, we have been able to recruit private pro bono attorneys with the promise of recouping their time through attorney fees statutes. Unfortunately, the current reality is that if the attorney makes a persuasive case, the defendant can then change [its] policy or practice and moot out the case, thereby defeating the plaintiff's claim for attorneys' fees.¹⁸

Several lower court decisions illustrate that many attorneys who would have been likely recipients of attorneys' fees before the *Buckhannon* decision are no longer being compensated for cases challenging discrimination on the basis of disability. In *Iverson v. Sports Depot*,¹⁹ the defendant in a Title III action reacted to the lawsuit by voluntarily reducing challenged barriers

to access in his restaurant in various ways, including removing planters obstructing wheelchair-accessible parking spaces, installing new wheelchair access signs in the parking lots and bathrooms, and altering the bathroom stall doors. The parties went to trial regarding a remaining issue of whether the defendant was required to lower the urinal in the men's bathroom, and the plaintiff prevailed. The court ruled that the plaintiff was the "prevailing party," and thus entitled to an award of attorneys' fees, but only as to the issue regarding the urinal. Notwithstanding defendant's removal of numerous architectural barriers, prompted by the plaintiff's lawsuit, "the only material change in the legal relationship between the parties occurred when the defendant was ordered to lower a urinal in the men's bathroom."²⁰ As a result, plaintiff's attorney was awarded less than 10 percent of his total fees and costs related to filing and trying the lawsuit.²¹

In *Dorfsman v. Law School Admissions Council, Inc.*,²² the plaintiffs sued the Council for failing to provide accommodations to students with disabilities taking the Law School Admissions Test (LSAT). As a result of the lawsuit, the Council provided all the accommodations sought by one of the named plaintiffs, and the parties entered into a stipulation dismissing her case. The district court found that the plaintiff was not entitled to attorneys' fees, however, because she "failed to achieve a judicially sanctioned change in the parties' legal relationship."²³ Likewise, in *Griffin v. Steeltek, Inc.*,²⁴ the 10th Circuit ruled that an ADA plaintiff was not entitled to attorneys' fees even though after the lawsuit was filed the employer discontinued the practice, challenged in the suit, of asking questions regarding medical history on job applications. The *Buckhannon* ruling has had a similar impact on attorneys' fees in cases brought under Section 504 and the Individual's with Disabilities Education Act.²⁵

One very limited and partial silver lining in regard to the application of *Buckhannon* to the ADA is that the provision of the ADA authorizing attorneys' fees and litigation costs specifically includes administrative proceedings as well as court suits. Thus a plaintiff who has achieved a favorable decision by a hearing officer or other administrative official can be eligible for attorneys' fees and costs for the work leading up to that decision, even though no court ruling has been obtained. However, if the defendant decides to appeal such a decision into the judicial process, the administrative decision will not then be a final resolution and the plaintiff will not yet be a prevailing party, so that the dangers under *Buckhannon* of extrajudicial resolution will again be applicable.

CONCLUSION

The ADA contains a provision expressly authorizing attorneys' fees and costs of litigation to be paid to the prevailing party in any action or administrative proceeding brought under the Act. Until the Supreme Court made its ruling in *Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, all but one of the federal circuit courts had recognized a "catalyst theory" by which a plaintiff was considered a "prevailing party" eligible to be awarded attorneys' fees if a lawsuit achieved its desired result by bringing about a voluntary change in the

defendant's conduct. In *Buckhannon*, the Supreme Court rejected the catalyst theory and interpreted the term "prevailing party" as meaning a party in whose favor a judgment is rendered. The Court required that there must be a judicially sanctioned change in the legal relationship of the parties before a party could be eligible for attorneys' fees.

The result of the *Buckhannon* decision has been to undercut incentives both for public interest lawyers and the private bar to undertake many ADA cases. Justice Ginsburg's prediction in her dissent in *Buckhannon* that "the Court's constricted definition of "prevailing party," and consequent rejection of the "catalyst theory," [will] impede access to court by the less well-heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general"²⁶ has proven all too accurate. As a consequence of the *Buckhannon* ruling, defendants have a significant motivation to settle promising ADA cases informally rather than by consent decree or to make the cases moot by voluntary compliance, so that they can avoid paying attorneys' fees. This possibility makes many ADA cases less desirable to private attorneys and more demanding of scarce resources of public interest advocacy agencies. Reduced availability of attorneys' fees means fewer resources for ADA advocates, who as a result can litigate fewer cases. Ultimately, this makes it much more difficult for persons with disabilities, including those who have suffered egregious discrimination on the basis of disability prohibited by the ADA, to obtain legal representation.

This policy brief was written for the National Council on Disability (NCD) by Professor Robert L. Burgdorf Jr. of the University of the District of Columbia, David A. Clarke School of Law. Some of the material about lower court decisions was derived from an earlier paper in NCD's *Righting the ADA Series* written by Sharon Perley Masling, Director of Legal Services, National Association of Protection and Advocacy Systems. That paper is found on the NCD Web site at <http://www.ncd.gov/newsroom/publications/decisionsimpact.html>.

ENDNOTES

1. 42 U.S.C. § 12205.
2. 28 U.S.C. § 1920 provides:
A judge or clerk of any court of the United States may tax as costs the following:
 - (1) Fees of the clerk and marshal;
 - (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
 - (3) Fees and disbursements for printing and witnesses;
 - (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
 - (5) Docket fees under section 1923 of this title;
 - (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.
3. H.R. REP. NO. 101-485, pt. 3, at 73 (1990) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)).
4. H.R. REP. NO. 101-485, pt. 2, at 140 (1990).
5. H.R. REP. NO. 101-485, pt. 3, at 73 (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)).
6. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).
7. *S-1 and S-2 v. State Bd. of Ed. of N. C.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) ("A person may not be a 'prevailing party' ... except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought").
8. 532 U.S. at 603, quoting BLACK'S LAW DICTIONARY 1145 (7th ed. 1999).
9. 532 U.S. at 603-04.
10. *Id.* at 605.
11. *Id.*
12. *Id.* at 610.

13. 532 U.S. at 622-23 (Ginsburg, J., dissenting).
14. 42 U.S.C. §§ 12182(b)(2)(A)(iv), 12181(9).
15. Correspondence from Lauren Young, Legal Director, Maryland Disability Law Center, to Sharon Masling, November 11, 2002, quoted in text accompanying endnote 110 in [INSERT HERE A LINK TO SHARON'S PAPER]
16. E-mail correspondence from Tim Sindelar, Senior Attorney, Disability Law Center, to Sharon Masling, October 29, 2002, quoted in text accompanying endnote 111 in [INSERT HERE A LINK TO SHARON'S PAPER]
17. E-mail correspondence from Jeff Spitzer-Resnick, Managing Attorney, Wisconsin Coalition for Advocacy, to Sharon Masling, October 4, 2002, quoted in text accompanying endnote 112 in [INSERT HERE A LINK TO SHARON'S PAPER]
18. Correspondence from Lauren Young, Legal Director, Maryland Disability Law Center, to Sharon Masling, November 11, 2002, quoted in text accompanying endnote 110 in [INSERT HERE A LINK TO SHARON'S PAPER]
19. 2002 WL 745824 (D.Mass. 2002).
20. *Id.* at *2.
21. *Id.*
22. 2001 WL 1754726 (E.D.Pa. 2001).
23. *Id.* at *5.
24. 261 F.3d 1026 (10th Cir. 2001).
25. *See, e.g., J.C. v. Regional School Dist. 10, Bd. of Educ.*, 278 F.3d 119 (2d Cir. 2002) (student who obtained all requested relief -- including finding of eligibility for special education services and termination of expulsion hearing -- not entitled to attorneys' fees under either the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act because relief was not "judicially sanctioned").
26. 532 U.S. at 622-23 (Ginsburg, J., dissenting).