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May a Prevailing Party be Awarded "Attorney Fees" for Paralegal Services?

Jay E. Grenig
Marquette University Law School, jay.grenig@marquette.edu

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Case at a Glance

After a government contractor submitted an application under the Equal Access to Justice Act for reimbursement of fees and expenses, including for paralegal services, the Department of Transportation Board of Contract Appeals reimbursed the contractor for paralegal services at the cost to the attorney and not the market rate. The contractor appealed the amount of reimbursement.

May a Prevailing Party Be Awarded "Attorney Fees" for Paralegal Services?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 262–266.

Jay E. Grenig is a professor of law at Marquette University Law School in Milwaukee, Wisconsin. He is co-author of *Electronic Discovery and Records Management.* Professor Grenig can be reached at jgrenig@earthlink.net or (262) 646-3324.

ISSUE

Under the Equal Access to Justice Act, are paralegal services "attorney fees" compensable at market rates subject to statutory caps or are they "other expenses" compensable at the rate of the cost to the attorney?

FACTS

Richlin Security Service Company, a government contractor, agreed to provide guard services for detainees at the Los Angeles International Airport. As the result of a mutual mistake, the contracts misclassified Richlin's employees as "Guard I" rather than "Guard II" for purposes of the wage classification scheme of the Service Contract Act (41 U.S.C. § 351 et seq.) The error resulted in an underpayment of Richlin's employees.

In February 1995, the Department of Labor determined Richlin's employees were entitled to back wages. Richlin then filed a claim against the government for more than $1.5 million in back wages and associated taxes on the ground that the original contract price should have been higher to account for the increased wages and associated costs. The contracting officer denied Richlin's claim, and Richlin appealed to the Department of Transportation Board of Contract Appeals. The government resisted reformation of the contract and defended the subsequent appeals on the ground that Richlin bore the risk of misclassifying its employees.

After a series of appeals to the Transportation Board and the U.S. Court of Appeals for the Federal Circuit, the board awarded Richlin the amount of the additional wages, payroll taxes, and workers compensation premiums that Richlin was required to pay. *Richlin Sec. Serv. Co.,* 02-2 BCA ¶ 31,876, 2002 WL 1042294 (DOTCAB 2002). The Federal Circuit affirmed the board's decision. *Richlin Sec. Serv. Co. v. Ridge,* 99 Fed. Appx. 906 (Fed. Cir. 2004).

Richlin then submitted a timely application for reimbursement of attorney's fees, expenses, and costs

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ARGUMENT DATE:
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FROM: THE FEDERAL CIRCUIT

to the board pursuant to the Equal Access to Justice Act (EAJA) for the time its lawyers and paralegals spent over nine years before the board. The board determined that Richlin was a prevailing party and that the government's position on the merits was not substantially justified. The board then awarded Richlin approximately $50,000 for work done by Richlin's lawyers.

The board did not award Richlin fees at the $50 to $95 per hour market rates for paralegal services charged to Richlin over the course of the proceedings, however. The board determined that the EAJA does not "expressly provide for the reimbursement of paralegal services at the market rate." The board ruled that paralegal services were reimbursable only at the attorney's cost, even if the paralegal time was billed to the client at hourly market rates in the relevant legal market and not at the attorney's cost as an out-of-pocket expense. Taking judicial notice of paralegal salaries in the Washington, D.C., area, the board awarded Richlin $35 per hour as the "reasonable cost to the [law] firm." The board awarded Richlin approximately $10,600, representing 300 hours of compensable paralegal time.

A divided panel of the Federal Circuit affirmed the board's determination. *Richlin Security Service Co. v. Chertoff,* 472 F.3d 1370 (Fed. Cir. 2006) (rehearing en banc denied). The Federal Circuit stated that if fees for paralegal services were "attorney fees," then in light of the cap on attorney fees, law firm charges for paralegal services would be fully recoverable while charges for attorney services would not, leading to the overuse of paralegals.

Richlin's petition for certiorari was accepted by the Supreme Court. 128 S.Ct. 613 (2007).

Case Analysis

The Equal Access to Justice Act (5 U.S.C. § 504) authorizes an award of fees and other expenses to certain parties who prevail against the United States in court or in adversary administrative proceedings. The EAJA provides, in pertinent part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party … 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.
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> ***
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> (b)(1) For the purposes of this section—
> (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved justifies a higher fee.

Relying on *Missouri v. Jenkins,* 491 U.S. 274 (1989) (involving the Civil Rights Attorney's Fees Awards Act of 1976—42 U.S.C. § 1988), Richlin argues that fees incurred for paralegal services are compensable at market rates under the EAJA. He points out that paralegal services are considered to be "attorney's fees" under the Civil Rights Attorney's Fees Awards Act and are compensable at market rates if they are billed separately on that basis in the relevant legal community.

Richlin reasons that the Court's determination in *Jenkins* applies to the EAJA because "attorney's fees" under section 1988 and "attorney fees" under the EAJA are nearly identical terms. The petitioner says that Congress's use of the same or similar terms ordinarily should be accorded the same meaning statute to statute. Richlin contends the legislative history indicates that Congress would not have expected that market-rate recovery for paralegal services would result in overuse of paralegals in comparison to the higher-priced lawyers for whom they work. Richlin declares that limiting reimbursement for paralegal services to the law firm's cost, as the Federal Circuit held, would drive up the cost of litigation for clients.

The government responds that *Jenkins* does not support Richlin's position. It explains that *Jenkins* involved the interpretation of a different fee-shifting statute with materially different language. The government points out that, except for a narrow category of court "costs," 42 U.S.C. § 1988 (the statute at issue in *Jenkins*) authorizes reimbursement of prevailing civil rights plaintiffs only for "attorney's fees." In the EAJA, however, the government says Congress provided for reimbursement of a second statu-

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tory category—"other expenses"—in addition to "attorney fees." The government argues that this second category fundamentally changes the analysis.

According to the respondent, in *Jenkins* the Court's task was to define the term "attorney's fees," and paralegal expenses were either encompassed in that term or unrecoverable. The government stresses that, in this case, by contrast, paralegal expenses can be recovered, and the Court's task is to decide which statutory category encompasses paralegal expenses.

In addition, the government argues the canon of construction that similar words should normally be construed similarly does not mean that *Jenkins* should be extended to the EAJA context. The respondent argues that the canon readily yields when, as in this case, it is reasonable to conclude from variations in statutory text and context that the words were intended to embrace different meanings. The government says the Supreme Court has construed virtually identical language in fee-shifting statutes differently when the policy considerations and legislative history underlying the statutes pointed to different outcomes.

The government claims the EAJA's legislative history underscores that Congress intended the term "attorney fees" and the cap on such fees to apply "only to the compensation of lawyers" themselves and not to other costs connected with their representation of parties. The respondent says Congress made that intent plain in the process of reenacting the EAJA in 1985. It points out that the Senate Report on reenactment explained that attorneys' out-of-pocket expenses should be compensated under EAJA as other expenses and that "paralegal time" should be reimbursed in that manner "at cost."

Pointing out that the EAJA provides for reimbursement for "fees and other expenses" to prevailing parties, the government explains that "fees" are categorized as attorney, agent, and expert witness fees, the reimbursement of which is limited to prevailing market rates subject to a statutory ceiling for each category. The government argues that the legislative history of the EAJA demonstrates that paralegal expenses are "other expenses" reimbursable at cost, and not "attorney fees."

The petitioner, Richlin, argues the Federal Circuit erred in maintaining that *Jenkins* is inapplicable because of the EAJA's adjustable dollar-per-hour cap on attorney rates. Richlin disagrees with the Federal Circuit's statement that if fees for paralegal services were "attorney fees," law firm charges for paralegal services would be fully recoverable while charges for attorney services would not, leading to the overuse of paralegals and undermining *Jenkins*'s efficiency rationale.

According to Richlin, the Federal Circuit's view is misguided for a host of reasons. Richlin asserts that when the EAJA was enacted and reenacted in 1980 and 1985, respectively, market rates for most or all lawyers practicing in most locations were at or below the EAJA cap. Therefore, Richlin declares, Congress would not have expected market-rate recovery for paralegal services to result in "overuse" of paralegals in comparison to the higher-priced lawyers for whom they work. Richlin argues that limiting reimbursement for paralegal services to the law firm's cost would improperly drive up the cost of litigation for clients—the people that EAJA was intended to benefit.

The government responds that the most "natural" reading of "attorney fees in 5 U.S.C. § 504 provides compensation for an attorney's time spent representing a party in litigation. According to the respondent, "[i]n common parlance, 'attorney fees' do not mean 'paralegal' expenses." The government says that interpretation is bolstered by the surrounding text. It claims the EAJA's broader category of "other expenses" naturally captures costs associated with an attorney's representation of a party, but that those costs are not themselves "attorney fees." While expenses for paralegal assistance are not readily embraced by the phrase "attorney fees," the government contends they fall comfortably into the EAJA's second and related category of reimbursable "other expenses."

Richlin says this is exactly the argument that the Supreme Court rejected in *Jenkins*. The petitioner emphasizes that the Court in *Jenkins* found "self-evident" the proposition that the statutory term "attorney's fees" includes the work of paralegals "and [all] others whose labor contributes to the work product for which attorney bills her client."

The government asserts, however, that other provisions of the EAJA confirm that "attorney fees" do not include paralegal expenses. While the EAJA requires that attorney fees be calculated based on prevailing market rates, the government points out that Congress also imposed a statutory ceiling on the amount of "attorney fees" that may be awarded. The respondent says that Congress set the cap based on the billing rates of attorneys and not the rates of paralegals, which were dramatically lower. The government therefore observes that when Congress set the cap at $75 and later increased it to $125, the ceiling capped "attorney fees" at a level below that of many attorneys nationwide. The government rea-

sons that Congress's decision to use attorneys' charged rates subject to caps and its failure to impose any analogous caps on paralegals' rates strongly suggests Congress thought paralegal charges would be treated as expenses (subject to the "cap" of their actual cost).

According to Richlin, treating paralegal services as compensable at the cost of those services is at odds with the judicial understanding of the EAJA, under which cost-based awards generally are for out-of-pocket expenses charged by third-party vendors. As examples, Richlin cites items such as travel costs and long-distance phone calls.

The government argues that compensating paralegal expenses as "attorney fees" would result in EAJA awards for paralegal time that are disproportionately high relative to the fees that can be recovered for ordinary attorney work (because paralegal rates are generally much lower than those of attorneys) and would permit attorneys to recover paralegal expenses that are near or equal to the awards given for the time of even extraordinarily experienced attorneys. To the extent that litigation against the government is informed by the availability of EAJA fees, the government declares that this anomaly could "distort the normal allocation of work" by encouraging attorneys to shift work to paralegals (where they can recover the full amount of, or at least a greater proportion of, their normal hourly rates) and thus "result in a less efficient performance of legal services."

Even if it were appropriate under the EAJA to reimburse paralegal expenses at "cost," Richlin says reimbursement should be based on the cost incurred by the client, not by the lawyer. Richlin stresses that it is clients—not lawyers—whose interests EAJA seeks to protect. The petitioner argues that basing the client's reimbursement for paralegal services on what it costs the lawyer to employ the paralegal leaves the client with a cost bearing no rational relationship to the costs faced by the client or the EAJA's purposes.

The government responds that the Supreme Court should reject petitioner's argument that, even if paralegal time is not compensated as "attorney fees" and are "other expenses" under the EAJA, "other expenses" should be reimbursed at the market rate paid by the client, not at the cost of the attorney. The government contends the petitioner's argument is not fairly included in the question presented, was not pressed or passed upon below, and therefore is not properly before the Court. The government argues the EAJA specifically provides that attorney, agent, and expert witness "fees" are to be awarded at prevailing market rates but makes no similar provision for "other expenses."

If there were any doubt as to the proper construction of "attorney fees," the government argues, the canon of construction that "the scope of waivers of sovereign immunity should be narrowly construed in favor of the sovereign" compels the conclusion that paralegal expenses are not a type of "attorney fees" within the meaning of the EAJA. The government says nothing in the EAJA's text requires a contrary result, particularly because the EAJA's provision of "other expenses" aptly captures paralegal expenses necessary for the preparation of a party's case.

Significance

The Supreme Court is called upon to resolve a dispute between the Federal Circuit and four other circuits. Disagreeing with the Federal Circuit, four circuits have held that a prevailing party may be awarded attorney fees for paralegal services. See *Role Models America, Inc. v. Brownlee,* 353 F.3d 962, 974 (D.C. Cir. 2004); *Hyatt v. Barnhart,* 315 F.3d 239, 255 (4th Cir. 2002); *Miller v. Alamo,* 983 F.2d 856, 862 (8th Cir. 1993) (interpreting similar language in 26 U.S.C. § 7430); *Jean v. Nelson,* 863 F.2d 759, 778 (11th Cir. 1988), *aff'd on other grounds sub nom. Immigration & Naturalization Serv. v. Jean,* 496 U.S. 154 (1990). Given the frequency with which attorney fee questions arise under the EAJA, resolving this split of authority will provide a greater degree of clarity and consistency.

Amicus curiae suggest that a decision affirming the Federal Circuit would reduce the use of paralegals in administrative proceedings, increasing the costs for clients. The amici also assert that a decision affirming the Federal Circuit would prolong administrative proceedings and result in time-consuming hearings to determine appropriate reimbursement rates.

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normal hourly rates) and thus "result in a less efficient performance of legal services."

Attorneys for the Parties

For Petitioner Richlin Security Service Co. (Brian Wolfman (202) 588-1000)

For Respondent Michael Chertoff, Secretary of Homeland Security (Paul D. Clement (202) 514-2217)

Amicus Briefs

In Support of Petitioner Richlin Security Service Co.

National Association of Legal Assistants, Paralyzed Veterans of America, and the National Organization of Social Security Claimants' Representatives (Amy Howe (202) 237-7543)