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to the development and maintenance of the jobs organizing movement itself. An organizing effort that demands WIN placement will be rebuffed by recipients who correctly perceive that WIN jobs are to be avoided, not embraced. Welfare recipients and their advocates must oppose the expansion of WIN-type jobs designed to enforce the work requirement.

When they are organized, welfare recipients can be a powerful force that even Congress must deal with, as the history of the welfare rights movement—for example, the repeal of Congress' attempt to "freeze" the rolls—so clearly revealed. Together with other unemployed and underemployed people, welfare recipients must demand per-

manent, well-paid positions that enable them to support their families comfortably. Moreover, the jobs movement must fight to prevent both governmental and private sector employers from using PSE positions or employment tax credits to displace currently employed workers to make room for recipients. The jobs movement must not participate in a strategy that simply shifts the composition of the unemployment line or public assistance rolls, or undermines the gains won by those who are presently employed. Rather than allowing the unemployed and the employed to be pitted against one another, we must tailor the demand for employment so as to unite the struggles of these groups.

A SUMMARY OF ISSUES INVOLVING ATTORNEYS' FEES IN CIVIL RIGHTS CASES

by Anne Berkovitz*

INTRODUCTION

A surprising degree of confusion and inconsistency still surrounds the implementation of the Civil Rights Attorneys Fees Awards Act of 1976 as it amended 42 U.S.C. §1988 more than two-and-one-half years after its enactment. The statute reads:

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes (42 U.S.C. §§1981, 1982, 1983, 1985, 1986) . . . or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In enacting the legislation, Congress was responding to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*¹ which held that attorney's fees based on

a plaintiff's role as a private attorney general could be awarded only where specifically authorized by Congress.

Legal services attorneys are among those most affected by the Act and by the shifting court interpretations. Circumstances under which attorney's fees are granted or denied are being gradually delineated through case law interpreting section 1988. This article presents an overview of the legislative history of the Act, as well as major court decisions under it, and a survey of other cases that have arisen under different statutory authorizations.² It is hoped that the article will clarify issues common to many claims for fees and thus assist legal services lawyers in anticipating litigation surrounding such claims.

A note of caution and explanation: this summary cannot and is not intended to take the place of in-depth research into fee award issues. What is provided here is merely a guide to some key issues and cases. In a field where case law is expanding at an accelerating rate, yet inconsistencies abound, this survey can, at best, alert practitioners to issues common to many claims for fees and to a few of the leading cases pertaining to these issues.

When the Civil Rights Attorneys Fees Awards Act of 1976 first went into effect, there were open questions as to whether "prevailing party" included defendants as well as plaintiffs, whether the Act was to apply retroactively to pending litigation, and whether states would be able to invoke eleventh amendment immunity against liability for attorneys' fees. Some of these issues were quickly resolved. The

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1. 421 U. S. 240 (1975).

2. In *Alyeska, id.* at 260-261, fn. 33, the Supreme Court listed a total of 29 statutes which allow federal courts to award attorneys fees in certain suits.

eleventh amendment issue was disposed of by the Supreme Court in *Hutto v. Finney* last year.³ The Court pointed out that the Act imposes attorneys' fees "as a part of the costs," and costs have traditionally been awarded without regard for the states' eleventh amendment immunity. The Court held that Congress was authorized to amend its definition of taxable costs and to include attorneys' fees as an item of costs. Previously, the Court had dealt with the eleventh amendment issue in *Fitzpatrick v. Bitzer*,⁴ where it reasoned that, because the fourteenth amendment postdated the eleventh amendment, Congress had the power to override the eleventh amendment's strictures when acting pursuant to its authority under section five of the fourteenth. Taken together, the two rulings closed the door on any eleventh amendment-based argument against awards of attorneys' fees.

The question of the retroactivity of the Act was favorably resolved by virtue of the Act's legislative history⁵ as well as by judicial interpretation of cases arising under similar statutes and under the Act itself.

A unanimous Supreme Court clarified the basis for retroactive application of attorneys' fees laws in *Bradley v. School Board of City of Richmond*⁶ under section 718 of the Emergency School Aid Act, holding the law to be retroactive on the grounds that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is legislative history to the contrary.⁷ *Bradley* was deemed controlling in decisions based on section 402 of the Voting Rights Act⁸ and, subsequently, on the Civil Rights Attorneys Fees Awards Act.⁹

The other "hot" issue at the time of the Act's passage was whether the term "prevailing party" encompassed prevailing defendants as well as prevailing plaintiffs.¹⁰ Generally, the issue has been resolved in favor of maintenance of a "dual standard"¹¹ under which prevailing plaintiffs should receive fees as a matter of course, while prevailing defendants are eligible for fees only if plaintiffs are found to have brought suit vexatiously, for purposes of harassment, or otherwise in bad faith.

With these issues essentially settled, interpretation of the Civil Rights Attorneys Fees Awards Act has focused on new problem areas.

3. 437 U.S. 678 (1978).
4. 427 U.S. 445, (1976).
5. See, e.g., statement by Rep. Robert Drinan, House co-sponsor and floor manager of S.2278: "This bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation." 122 CONG. REC. H. 12160 (Oct. 1, 1976).
6. 416 U.S. 696 (1974).
7. *Id.* at 711.
8. See *Torres v. Sachs*, 538 F.2d 10 (2nd Cir. 1976).
9. See *supra* note 5. See also *Finney v. Hutto*, 548 F.2d 740, 742 (8th Cir. 1977); *Wharton v. Knefel*, 562 F.2d 550, 557 (8th Cir. 1977). There are still marginal issues relating to retroactivity raised in cases under the Act depending on the status of proceedings at the time of the enactment, but, generally, retroactive application is accepted.
10. See *Larson, The Civil Rights Attorneys Fees Awards Act of 1976*, 10 CLEARINGHOUSE REVIEW 778 (January 1977), for full legislative and case law history.
11. This term was used by Rep. Drinan to describe the application of the "prevailing party" language. See 122 CONG. REC. H. 12160 (Oct. 1, 1976).

I. WHEN IS A PLAINTIFF DEEMED TO HAVE PREVAILED?

The legislative history of the Act states that parties can be considered to have prevailed in litigation when they "vindicate rights through a consent judgment or without formally obtaining relief."¹² Courts have generally followed the mandate of Congress in awarding attorneys' fees under section 1988 to plaintiffs whose success in litigation is achieved by settlements prior to trial.¹³ Yet the outcome is never totally predictable and different interpretations of plaintiffs' success or lack of it can be invoked.¹⁴

A similar level of flexibility was approved in an Eighth Circuit decision in which the court ruled that attorneys' fees for a claim which is reasonably calculated to advance the client's interest should not be denied solely because the claim did not provide the precise basis for the relief granted.¹⁵

Recently, the plaintiff in a Title VII suit who won a preliminary injunction but ultimately lost at the trial on the

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12. S. Rep. No. 94-1011, 94th Cong. 2d Sess. 5 (1976), *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS, 5902, 5912; H.R. Rep. No. 94-1558, 94th Cong. 2d Sess., 7, 8 (1976).
 13. See *McManama v. Lukhard*, 464 F.Supp. 38, 41 (W.D. Va. 1978):

A party need not win a full trial on the merits to be said to prevail, but the lawsuit must have resulted in or been the catalyst of a victory for the party or the class he represents. *E.g.*, *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). Courts have uniformly followed this Congressional mandate and awarded attorney's fees under §1988 to plaintiffs who have successfully terminated litigation by settlement prior to trial. *E.g.*, *Brown v. Culpepper*, 559 F.2d 274, 276-77 (5th Cir. 1977); *Howard v. Phelps*, 443 F.Supp. 374, 376-77 (E.D. La. 1978); *Hartmann v. Gaffney*, 446 F.Supp. 809, 812 (D. Minn. 1977); *Mental Patient Civil Liberties Project v. Hospital Staff*, 444 F.Supp. 981, 985-86 (E.D. Pa. 1977); *Buckton v. NCAA*, 436 F.Supp. 1258, 1264-65 (D. Mass. 1977). The settlement in this action clearly accomplished the goals of the suit, and therefore under controlling precedents plaintiffs are properly deemed "prevailing parties" for the meaning of §1988.

14. In *Tobeluk v. Lind*, 589 P.2d 873, the Alaska Supreme Court upheld a denial of attorneys' fees after a settlement was reached in an action to compel provision of secondary schools in local native communities. The court analyzed the settlement as being a political resolution, with no showing that it resulted from the lawsuit or that plaintiffs would have prevailed had the suit gone to trial.
15. *Brown v. Bathke*, 588 F.2d 634, 637 (8th Cir. 1978). In a footnote, the court also related its holding to computation of fees:

The mechanical division of claimed hours into those expended on issues on which the plaintiff ultimately prevailed and those expended on issues on which the plaintiff did not, with compensation given only for the former, ignores the interrelated nature of many prevailing and non-prevailing claims. 588 F.2d, at 637, fn. 5.

But see Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), for the opposite proposition.

merits was awarded attorneys' fees up through the entry of the injunction, pursuant to 42 U.S.C. §2000e-5(k).¹⁶

In a prisoners' civil rights action, a court found that success on "any significant issue" which achieves some benefit which had been sought is sufficient to consider the plaintiffs prevailing parties.¹⁷ Also, settlement by voluntary agreement following filing of an action to enjoin unconstitutionally composed jury lists has been held to meet the requirement for a "prevailing party" and hence entitlement to attorneys' fees under the Act.¹⁸ Furthermore, where the lawsuit functions as a "catalyst" which prompts defendants to take action to meet plaintiffs' claim, courts have awarded fees in a series of employment discrimination cases.¹⁹ Fees have also been granted to plaintiffs who ultimately prevailed at the administrative level.²⁰

Cases have also focused on preliminary injunctions as they create a "prevailing" plaintiff. In one case, issuance of a preliminary injunction was held to be the "critical step," procuring all the relief desired.²¹

16. *Smith v. University of North Carolina*, No. C-76-362-D (M.D. N.C. 1979), reported at 13 CLEARINGHOUSE REV. 29 (May 1979). In that case the court relied principally on *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131 (9th Cir. 1974), and held that the term "prevailing party" includes a party who has prevailed on a procedural motion that is "sufficiently significant and discrete to be treated as a separate unit." The court noted that a preliminary injunction is an extraordinary remedy designed to prevent irreparable injury to the parties pending the outcome of litigation, and that the decision to grant or deny a preliminary injunction often determines the practical outcome of a case. Here, where plaintiff was ordered to be retained in her job pending the outcome of litigation, the court held that the preliminary injunction met the standard, and fees of \$8,600 were awarded. The court warned, however, that not every procedural motion will be compensated and that to make an award prior to decision on the merits could result in an unfair tactical advantage to one side. The court further took note of cases where interim awards were made subject to return in the event of reversal.
17. *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978).
18. *Brown v. Culpepper*, 559 F.2d 274, 276 (5th Cir. 1977), *reh. den.* 561 F.2d 1177.
19. *Fischer v. Adams*, 572 F.2d 406 (1st Cir. 1978), *citing* *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Drew v. Liberty Mutual Insurance Co.*, 480 F.2d 69 (5th Cir. 1970), *cert. den.* 417 U.S. 935. What constitutes such a "catalyst," however, is a factual and legal determination on which courts vary. In *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), the court discussed at some length the cases involving such determinations, and the fact that the granting of fees may depend on whether the court finds that litigation brought about the changes or whether defendants made the changes irrespective of the litigation.
20. In *Johnson v. U.S.*, 554 F.2d 632 (4th Cir. 1977), the court awarded fees to a plaintiff who brought suit after being unsuccessful in his administrative claim for employment discrimination. On remand, he prevailed in an administrative hearing and the court granted an award of fees, pointing out, however, that it was not reaching the question of whether a prevailing party would be entitled to attorneys' fees for representation in an administrative proceeding which took place entirely independent of or prior to an action in the district court. *See also*, *Foster v. Boorstein*, 561 F.2d 340 (D.C. Cir 1977).
21. *Yablonski v. United Mine Workers*, 466 F.2d 424, 431 (D.C. Cir 1972): "Effectiveness in terms of practical results should be the key to deciding which one party has prevailed over the other." *See also supra* note 15.

The fact that a plaintiff prevails on a nonconstitutional (statutory) ground after raising a constitutional issue does not preclude an award of attorneys' fees, according to rulings in numerous cases. One court explained:

It is often difficult to characterize claims one way or the other, particularly when the claims are constitutional ones which the court deliberately chose not to reach. Under such circumstances, it would seem to be manifestly unfair to penalize plaintiffs who couple their constitutional claims with meritorious nonconstitutional claims, and who thereby facilitate the federal policy of avoiding unnecessary constitutional decisionmaking, by flatly refusing any compensation for claims not reached because, as to those claims, they have not "prevailed".²²

Where the plaintiffs prevail only upon a pendent non-constitutional statutory claim, the district court must determine first that the constitutional claim is substantial and that the successful pendent claim arose from the same nucleus of facts. Once this analysis is made, the legislative history of the Act supports the awarding of fees under such circumstances.²³

An effort to limit attorneys' fees to the work performed only on issues on which plaintiffs were successful has been suggested in some cases.²⁴

II. COMPENSATION FOR TIME SPENT ESTABLISHING FEE CLAIMS

Whether the process of seeking fees and establishing claims under the Civil Rights Attorneys Fees Awards Act is itself compensable under the Act continues to be litigated as part of section 1988 actions and appeals. Cases in several circuits have supported such claims; however, defendants continue to argue that civil rights attorneys should be compensated only for time spent in their client's behalf, not in seeking fees.

Decisions negating these assertions have been based on the following grounds:

- A. The very purpose of the Fees Awards Act would be contradicted and frustrated by refusal to compensate an attorney for time reasonably spent establishing and negotiating his rightful claim to a fee.²⁵
22. *Brown v. Bathke*, 588 F.2d 634, 637 (8th Cir. 1978). *See also* *Southeast Legal Defense Group v. Adams*, 436 F.Supp. 891, 895 (D. Ore. 1977); *Kimrough v. Arkansas Activities Association*, 574 F.2d 423 (8th Cir. 1978).
23. *Lund v. Affleck*, 587 F.2d 75, 76-77 (1st Cir. 1978), *citing* H. Rep. No. 1558, 94th Cong., 2d Sess. 4, n.7 (1976), [1976] U.S. CODE CONG. & AD. NEWS 5908, 5911. *See also* *La Raza Unida of Southern Alameda County v. Volpe*, 440 F.Supp. 904 (N.D. Cal. 1977); *Kimrough v. Arkansas Activities Association*, 574 F.2d 423 (8th Cir. 1978); *White v. Beal*, 447 F.Supp. 788 (E.D. Pa. 1978).
24. *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978).
25. *Lund v. Affleck*, 587 F.2d 75, 77 (1st Cir. 1978): "It would be inconsistent with the purpose of the Fees Act to dilute a fees award

- B. Failure to compensate an attorney for time required to litigate his claim would effectively reduce his rate for all hours spent on the case.²⁶
- C. Time spent by attorneys for prevailing plaintiffs in establishing their entitlement to a fee award under the Act is itself compensable under the Act. Very recently, the Second Circuit spoke emphatically to that point; it overruled a district court decision which had deducted from the fee award the number of hours devoted to seeking an award of attorneys' fees on the basis that such hours were spent solely for the attorneys' benefit and did not benefit the plaintiffs.²⁷
- D. One court indicated that compensation would not be granted for attorney time spent in pursuit of fee claims if the claims were "exorbitant" or consumed "unreasonable" amounts of time.²⁸

III. JUDICIAL DISCRETION IN SETTING AWARDS

[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

That the discretionary power rests with the trial court is long-established law, but the extent of discretionary range has been interpreted differently in a variety of cases and jurisdictions.

Congressional intent as to fee determination has been weighed by the First Circuit:

by refusing to compensate the attorney for the time reasonably spent in establishing and negotiating his rightful claim to the fee. *See Souza v. Southworth*, 564 F.2d 609, 614, (1st Cir.1977)." *See also* a more recent decision: *Weisenberger v. Huecker*, 593 F.2d 49 (6th Cir. 1979).

- 26. *Prandini v. National Tea Co.*, 585 F.2d 47, 53 (3rd Cir. 1978): "If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased."
- 27. *Gagne v. Maher*, 594 F.2d 336, 343-344 (2nd Cir. 1979), *rev'd* 455 F.Supp 1344 (D. Conn. 1978). The circuit court relied on *Prandini*:

If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased.

Such a result would not comport with the purpose behind most statutory fee authorizations, *viz.*, the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies.

Gagne was brought by an AFDC recipient challenging procedure for computing benefits. It was resolved by consent judgment.

- 28. *Lund v. Affleck*, 587 F.2d 75, 77 (1st Cir. 1978): "On the other hand, if the attorney's initial claims are exorbitant, or the time spent advancing them unreasonable, the district court should refuse the further compensation."

The Act's legislative history leaves no doubt that Congress intended not only that fees be adequate enough to "attract competent counsel" but "that the amount . . . [would] be governed by the same standards which prevail in other types of equally complex Federal litigation such as antitrust cases."²⁹

As for the factors to be generally considered in determining reasonable fees for counsel, a list of 12 criteria enumerated in a 1974 Fifth Circuit case was cited approvingly in the legislative history of the Act.³⁰ The list has become standard in every attorneys' fee case, but courts have exercised considerable leeway in the application of the factors under the circumstances of each particular case.³¹ The list also does not indicate how a district court is to use the various factors or how a court is to attach a relative weight to the different factors in determining an award of fees.³² What is required of the trial court, however, is a disclosure of the basis upon which the fee award was determined, so that meaningful review can be given, and a showing that the award reflects consideration, at least, of the *Johnson* points.³³

In setting priorities among the itemized factors, at least one court has more specifically defined some of the criteria, citing "complexity or risk of loss on the legal issues and benefit to the clients."³⁴ And one court specifically opted to downgrade the element of "undesirability of the case" in an AFDC challenge brought by legal aid attorneys:

Moreover, as a legal aid society charged with the obligation to take some of the work which other attorneys might find unattractive, the attorneys may accept such cases without the risk of diminishing their reputation with the community.³⁵

In considering the factor of the results obtained, one court specified that, even if the plaintiff's success did not result in "significant" advances, that factor should not be given such weight as to reduce below a reasonable level the attorneys' fees granted to the prevailing plaintiff.³⁶

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- 29. *King v. Greenblatt*, 560 F.2d 1024, 1026 (1st Cir. 1977).
 - 30. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *cited in* S.Rep. No. 1011. 94th Cong., 2d Sess., 6, in [1976] U.S. CODE CONG. & AD. NEWS 5913. The list includes the time and labor involved; the novelty and difficulty of the questions; the skill requisite to perform the legal service properly; the preclusion of other employment due to acceptance of the case; the contingent or fixed nature of the fee; the time limitations imposed by the client or the case; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; the "undesirability" of the case; the nature of the professional relationship with the client; and awards in similar cases.
 - 31. *See, e.g.*, *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974).
 - 32. *Wolf v. Frank*, 555 F.2d 1213, 1218-19 (5th Cir. 1977); *Bolton v. Murray Envelope Corp.*, 553 F.2d 881 (5th Cir. 1977).
 - 33. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Wolf v. Frank*, 555 F.2d 1213, 1219 (5th Cir. 1977).
 - 34. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2nd Cir. 1974).
 - 35. *McManama v. Lukhard*, 464 F.Supp. 38, 43 (W.D. Va. 1978).
 - 36. *Brown v. Bathke*, 588 F.2d 637 (8th Cir 1978).

Generally, courts seem to come down on the side of caution and frugality in fee computations. One court backed up its fiscal conservatism by invoking a 26-year-old cautionary note concerning the "duty" to resist "succumbing to the natural tendency of vicarious generosity in awarding attorney's fees out of state funds."³⁷

IV. FEES FOR LEGAL SERVICES: HOW POVERTY LAWYERS FARE UNDER THE ACT

That fees should be awarded to legal services attorneys on the same basis as to private attorneys under the Civil Rights Attorneys Fees Awards Act of 1976 has been affirmed in numerous cases.³⁸ There are threshold issues, however, that are consistently raised when defendants make an effort to bar, or to keep to a minimum, payments of fees to legal services counsel. Some have been overwhelmingly rejected as contradictory to the essential purpose of the Act, yet they reappear in slightly altered guise in new cases. Others have found limited support in some courts and continue to bedevil legal services attorneys in their claims for attorneys' fees.

Attorneys' fees motions can be expected to be resisted on some or all of the following bases.

A. Clients Are Not Charged a Fee by Legal Services Attorneys

Courts have consistently held that attorneys' fees in civil rights cases may be awarded regardless of whether the client is charged a fee by the attorney.³⁹

Sometimes the argument is turned around and focuses on the client rather than the attorney—that the client has not sufficiently shown that he or she is unable to pay a fee. This line of reasoning has been found incompatible with the Act.⁴⁰

B. Fees for Legal Services Attorneys Should Be Scaled to Their Salary Rates

The argument that fees going to legal services and public interest counsel should be keyed to the attorneys' salaries has been used to keep court-awarded fees to a minimum, well below what would have been awarded to private counsel.

One court construed the Attorneys Fees Awards Act as having been designed to encourage private attorneys to represent indigent plaintiffs with legitimate civil rights claims, and thus not requiring that legal services attorneys be compensated at the same rates as private counsel, but rather at a rate based on their own hourly salaries.⁴¹ In some instances, however, courts have found that the Act is to be applied with little or no reference to salaries of organizational counsel. The First Circuit has stated that "[a]ttorneys fees are, of course, to be awarded to attorneys employed by a public interest firm or organization on the same basis as to a private practitioner."⁴²

The Third Circuit, however, indicated that it would give some consideration to a salary-based, lower-fee rationale: "While a LSC attorney salary need not be ignored by the trial court, neither should it serve as the polestar for fixing a reasonable hourly rate of compensation."⁴³

The Second Circuit awarded attorneys' fees under the Voting Rights Act to a publicly financed legal services organization over defendants' argument that the allowable measure of fees should be reduced. The court disagreed: "Application of the provision to furnish full recompense for the value of services in successful litigation helps assure the

37. *Fitzpatrick v. Bitzer*, 455 F.Supp. 1338, 1344 (D. Conn. 1978), citing *Twentieth Century Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 859 (8th Cir. 1952). In *Fitzpatrick*, the district court, in reconsidering the attorney's fees issue following the 1976 Supreme Court decision (*Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614) was willing to grant a 15 percent add-on, plus an increase in hourly rates "considering the inflationary pressures which increased the attorney's overhead and expert testimony concerning prevailing hourly rates." 455 F.Supp. at 1343.

38. In *McManama v. Lukhard*, 464 F.Supp. 38, 41-42 (W.D. Va. 1978), the court enumerated cases where "in applying the 1976 amendments to §1988, courts have universally granted attorney's fees to plaintiffs represented by both public interest organizations and legal services projects." See *Mid-Hudson Legal Services, Inc. v. G. & U., Inc.*, 518 F.2d 34 (2d Cir. 1978); *Walston v. School Board*, 566 F.2d 1201 (4th Cir. 1977) (NAACP Legal Defense Fund); *Reynolds v. Abbeyville County School District*, 554 F.2d 638, 644 (4th Cir. 1977) (ACLU); *NAACP v. Bell*, 448 F.Supp. 1164 (D. D.C. 1978); *Willett v. Chester Water Authority*, 447 F.Supp. 967 (E.D. Pa. 1978) (legal services); *White v. Beal*, 447 F. Supp. 788, 795 (E.D. Pa. 1978) (legal services); *Alsager v. District Court*, 447 F.Supp. 572, 576-78 (S.D. Iowa 1977) (ACLU); *Card v. Dempsey*, 446 F.Supp. 942, 944-45 (E.D. Mich. 1978) (legal services); *Howard v. Phelps*, 443 F.Supp. 374 (E.D. La. 1978) (legal services).

39. *Fitzpatrick v. Bitzer*, 455 F.Supp. 1338, 1341 (D. Conn. 1978); *Torres v. Sachs*, 538 F.2d 10, 13 (2nd Cir. 1976); *Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974); *Jordan v. Fusari*, 496 F.2d 646, 649 (2nd Cir. 1974). In *Fitzpatrick* the court found that the fact that the suit was initiated by the Connecticut Civil Liberties Union (CCLU) was not material, and added that "it cannot be assumed, merely from the participation of

the CCLU, that the plaintiffs are indigent." *Fitzpatrick, supra* at 1341, fn. 1.

40. *Gore v. Turner*, 563 F.2d 159 (5th Cir. 1977). The court held that the district court could not refuse to award a reasonable attorney's fee merely because a civil rights complainant did not prove that she was unable to pay a fee. See also *Bunn v. Central Realty of Louisiana*, 592 F.2d 881, 892 (5th Cir. 1979), where the plaintiff's ability to pay her own attorney's fees was deemed not to constitute a "special circumstance" that would prohibit an award of attorney's fees under the Act.

41. *Alsager v. District Court of Polk County, Iowa*, 447 F.Supp. 572, 577 (S.D. Iowa 1977). The *Alsager* court's formula for computing the ACLU attorneys' fees according to their salaries has recently been called into question in another Iowa case, *Gunther v. Iowa State Men's Reformatory*, 466 F.Supp. 367 (N.D. Iowa 1979). The court pointed out that compensation according to salaries does not take into consideration legal services agency overhead costs and salaries of support personnel, which are routinely included in privately retained attorney's fees.

42. *Reynolds v. Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978). See also *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Swann v. Charlotte-Mecklenberg Board of Education*, 66 F.R.D. 484 (W.D. N.C. 1975).

43. *Rodriguez v. Taylor*, 569 F.2d 1231, 1248 (3rd Cir. 1977).

continued availability of the services to those most in need of assistance."⁴⁴

In two Pennsylvania cases, fees were awarded to public interest groups at the same rate as for any other attorneys' services.⁴⁵ Furthermore, in one of those cases, the court specifically rejected the suggestion that fees should be diminished because one attorney involved in the suit was on retainer as a consultant to the office of general counsel of a civil rights organization and was employed as a law school teacher.⁴⁶ But in a Virginia case, the court indicated that by the very nature of their work, legal services might not be entitled to equal fees with private practitioners.⁴⁷

C. Legal Services May Not Accept Fee-Generating Cases

Opponents have also suggested that the Legal Services Corporation Act prohibits legal services attorneys from accepting fee-generating cases, and therefore, from accepting fees. This argument was dealt with recently by the Third Circuit; the court pointed out that the Act permits the Legal Services Corporation to make exceptions to this provision and noted that LSC has adopted regulations relating to the acceptance of fee-generating cases.⁴⁸ The court drew on the legislative history of the Act to explain congressional intent: "It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex federal litigation such as antitrust cases and not be reduced because the rights involved may be non-pecuniary in nature."⁴⁹

Since then, the First Circuit has definitively answered in the affirmative that legal services organizations have the right to receive fees. A series of rulings flatly stated that legal services programs may recover fees under the Civil Rights Attorneys Fees Awards Act of 1976 on the same basis as private counsel.⁵⁰

D. Legal Services Are Publicly Funded and Do Not Need Revenue from Fees for Their Operations

To advance this argument, reference is generally made to the basic purpose of the Civil Rights Attorneys Fees Awards Act: encouraging the institution of meritorious lawsuits which, due to economic considerations, would not be brought if attorneys' fees could not be assessed against a defendant. Legal services agencies, the argument runs, are not restricted by such economic considerations because of the nature of their funding.

The countervailing reasoning most generally accepted by the courts relies on the finite quality of even the most adequately funded legal services budget. Legal services organizations must be cautious in their expenditure of financial and work force resources for maximum effectiveness and coverage.

The Third Circuit has spoken clearly on this point, stating that legal services organizations often must ration their limited financial and manpower resources. "There are no persuasive logical or policy reasons why awards of fees to legal services organizations in particular cases cannot complement the base funding of such groups."⁵¹

In a very recent ruling, the very fact that legal services programs are obligated to represent all the poor and reimbursement is "completely contingent on success" was deemed to be a cause for a more liberal application of the considerations guiding a court in awarding a fee.⁵²

But public funding can loom as a problem for legal services attorneys in bids for attorneys' fees. The Second Circuit has declared it is "appropriate" for a district court to consider the factor of federal funding in its computation of a discretionary attorneys' fee award.⁵³

In at least one case, a fee award to a legal services agency was reduced specifically because the same funding source which supported the agency would also be paying the court-assessed fee.⁵⁴

44. *Torres v. Sachs*, 538 F.2d 10, 13 (2nd Cir. 1976). Relying in part on *Torres*, the court in *Kulkarni v. Nyquist*, 446 F.Supp. 1274 (N.D. N.Y. 1977), awarded a full measure of fees under the Attorney's Fees Awards Act.
45. *White v. Beal*, 447 F.Supp. 788 (E.D. Pa. 1977); *Commonwealth of Pennsylvania v. O'Neill*, 431 F.Supp. 700 (E.D. Pa. 1977).
46. *Commonwealth of Pennsylvania v. O'Neill*, 431 F.Supp. 700 706, fn.11 (E.D. Pa. 1977).
47. *McManama v. Lukhard*, 464 F.Supp. 38, 43 (W.D. Va. 1978).
48. Legal Services Corporation Regulations §1609.4. Among other things, the regulations allow acceptance of fee-generating cases of the type that private attorneys in the area ordinarily do not accept, or do not accept without prepayment of a fee. The regulations also allow acceptance of a case where recovery of damages is not the principal object and the request for damages is merely ancillary to an action for equitable or other non-pecuniary relief.
49. *Rodriguez v. Taylor*, 569 F.2d 1231, 1249 (3rd Cir. 1977), cert. den. 98 S.Ct. 2254, citing S. REP. NO. 94-1011, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. CODE CONG. & AD. NEWS, 5913.
50. *Lund v. Affleck*, 587 F.2d 75, 76 (1st Cir. 1978); *Perez v. Rodriguez Bou*, 575 F.2d 21, 24 (1st Cir. 1978); *Reynolds v. Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978).

51. *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3rd Cir. 1977), cert. den. 98 S.Ct. 2254. See also *Commonwealth of Pennsylvania v. O'Neill*, 431 F.Supp. 700 (E.D. Pa. 1977):

The very purpose of awarding attorney fees in civil rights cases is to assure that private enforcement remains available to those citizens who have little or no money with which to hire an attorney: the amount of the award should therefore not be such as to discourage other attorneys from undertaking to attack discriminatory practices.

52. *Palmigiano v. Garrahy*, 466 F.Supp. 732, 737 (D. R.I. 1979).
53. *EEOC v. Enterprise Assn. of Steamfitters*, 542 F.2d 10, 11-12 (2nd Cir. 1976), cited with approval by the district court in *Gagne*, 455 F.Supp. 1344 (D.Conn. 1978), which added: "This factor is particularly relevant in this case, in that not only did plaintiffs' attorneys receive federal funding but that funding was distributed by the very defendant from whom the plaintiff now seeks to collect an attorney's fee."
54. *Gagne v. Maher*, 455 F.Supp. 1233 (D.Conn. 1978), aff'd 594 F.2d 336 (2nd Cir. 1979). The judge ordered a reduction in the fees going to Hartford County Legal Aid lawyers to reflect the public contribution of federal funds to the attorneys, citing the fact that the federal Title XX funds which partially supported

One recent case has been uniquely favorable to legal services organizations in their efforts to win attorneys' fees under the Act. The Second Circuit resoundingly supported a federally funded legal services agency in its claims for attorneys' fees while seeking to obtain access to the camps where their clients, a group of farm workers, lived. The court rejected the district court's narrow construction and literal application of section 1988, under which the legal services attorneys had been construed to have been acting in behalf of their own constitutional first amendment rights rather than the rights of the migrant workers in whose behalf the action was originally brought. The circuit court turned to the legislative history of the Act as a mandate to apply it broadly to achieve its remedial purpose, and held that although the farm workers were not party plaintiffs seeking to vindicate their own first amendment rights under section 1983, the legal services agency was acting solely on their behalf and in pursuit of its own congressional directive to provide legal services to these uniquely disadvantaged workers.⁵⁵

On remand, the trial judge in awarding fees said that professional fee standards were to be applied without any reduction based on the non-profit or public interest nature of the legal work performed.⁵⁶

legal aid were distributed by the Connecticut Department of Social Services, the defendant in the AFDC action.

55. *Mid-Hudson Legal Services, Inc. v. G & U, Inc.*, 578 F.2d 34 (2d Cir. 1978).
56. *Mid-Hudson Legal Services, Inc. v. G & U, Inc.*, 465 F.Supp. 262 (S.D. N.Y. 1978). Fees of \$31,945 were awarded to Mid-Hudson for commencing suit, obtaining a permanent injunction preventing farm operators from denying it access to the camps where migrant farmworker clients lived, and establishing the right to, and amount of attorneys' fees.

CENTER FOR LAW AND EDUCATION

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Title I Proposed Regulations

The long-awaited, proposed regulations for Title I* of the Elementary and Secondary Education Act of 1965 have been issued by HEW. They are published at 44 Fed. Reg. 38400-38413 (June 19, 1979).

Public hearings on the proposed regulations were held on July 30, 1979 in each of the 10 regions. However, even if you were unable to participate in any of these hearings, we would strongly urge that you send directly to the Office of Education written comments; however brief, addressing the

* Title I of the Elementary and Secondary Education Act of 1965, as amended by Title I of the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2200, 20 U.S.C. §§241 *et seq.*, published in Cong. Rec. at H-12136-12224 (Oct. 10, 1978).

V. RECORDKEEPING

Keeping time records can be critical when courts begin a determination of which fees will be paid and which will not. The First Circuit has cautioned that in the future, it would not view "with sympathy" a claim that a district court abused its discretion in awarding unreasonably low attorneys' fees in a suit in which plaintiffs were only partially successful, if counsel's records do not provide a proper basis for determining how much time was spent on particular claims.⁵⁷ This should serve to alert legal services attorneys to the need for keeping detailed records as to time spent on each of the several issues in any case.

Acceptable recordkeeping must also relate to the type of legal work performed (*i.e.*, drafting, research, court appearances) and by whom (attorneys, paralegals, law students).

CONCLUSION

While motions for attorneys' fees under section 1988 have become routine in civil rights cases, and courts seem generally inclined to grant such motions, defendants are coming up with new rationales for denying or minimizing such fees. There is no such thing as certainty in awards of attorneys' fees, and legal services attorneys need to be prepared to litigate hard for any fee requested under the Civil Rights Attorneys Fees Awards Act of 1976.

57. *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978).

Title I interests and concerns of your client community. The deadline for these comments is October 1, 1979.

While the Center has, so far, had time to make only a cursory review of the proposed regulations, we wish to call your attention to several provisions which could be detrimental to our clients. As we will continue to analyze these regulations along with other interested persons and organizations, you may contact the Center for further advice and information.

Prior to discussing the text of the proposed regulations, an objection is in order regarding the use of the "newly developed format for regulations," particularly in this instance. As you may know, Title I requires that members of the Parent Advisory Councils (PAC's) be provided with "a copy of any Federal regulation and guideline issued under such title" (§125(c)(1)(B)); yet these regulations, drafted in accordance with HEW's new "Operation Common Sense," make little sense to lawyers, much less parents. To read the proposed regulations requires that one refer both to the Title I statute and to the Education Division General Administration Regulations (EDGAR), which were published in the May 4, 1979 *Federal Register*.

Added to this confusing drafting scheme is the fact that several statutory provisions regarding parent participation