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SECOND CIRCUIT REVIEW

Expert Analysis

Second Circuit Expands Definition Of 'Prevailing Party' for Attorney's Fees

By **Martin Flumenbaum** And **Brad S. Karp**

This month we discuss *Perez v. Westchester County Dep't of Corr.*,[1] in which the U.S. Court of Appeals for the Second Circuit affirmed a district court decision holding that a party to a private settlement, whose terms are incorporated into an order of dismissal, is a prevailing party under 42 U.S.C. §1988(b) (a fee-shifting statute governing civil rights actions), and therefore eligible for attorney's fees. The Second Circuit's decision, written by Judge Guido Calabresi and joined by Judge Debra Ann Livingston and District Judge Edward R. Korman (sitting by designation), expands the circumstances in which a settling party may be considered a "prevailing party" and thus eligible for attorney's fees under 42 U.S.C. §1988(b). The decision was a case of first impression for the Second Circuit, which had never previously considered whether an order of dismissal incorporating settlement terms was sufficient to constitute a judicial imprimatur and thus support a grant of attorney's fees.[2]

Procedural History

Defendants, the Westchester County Department of Corrections and three of its employees, refused to provide Halal meat to Muslim inmates, other than during two Muslim holidays. In contrast, the county accommodated Jewish inmates by serving them Kosher meat approximately four or five times a week. While the county did provide a "Muslim diet tray," it generally deviated from Muslim dietary practices. Despite years of protests and grievances by Muslim inmates and the jail's Muslim chaplain, the county's practice of declining to serve Halal meat to Muslim inmates persisted.

Plaintiff, inmate Henry Perez, filed a complaint in the U.S. District Court for the Southern District of New York, seeking injunctive and monetary relief pursuant to 42 U.S.C. §§1983 & 1988(b). He alleged that the county's conduct violated his First Amendment right to free exercise of religion, his Eighth Amendment right to be free from cruel and unusual punishment, and his 14th Amendment rights to due process and equal protection. Twelve other inmates filed nearly identical complaints. The District Court consolidated all actions filed prior to Nov. 29, 2005.

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The county moved to dismiss plaintiffs' complaints, arguing that denial of Halal or Kosher food did not amount to a constitutional violation. Plaintiffs opposed the motion, and cross-moved for a preliminary injunction. Plaintiffs' request for a preliminary injunction sought a court order that the county provide Halal meat to Muslim inmates with the same frequency as it provided Kosher meat to Jewish inmates, and refrain from including Haram (meaning, "legally forbidden by Islamic law") meat on the Muslim diet tray.

The District Court granted in part and denied in part the county's motion to dismiss and denied plaintiffs' cross-motion for a preliminary injunction, without prejudice.[3] The District Court dismissed plaintiffs' Eighth Amendment claims, but denied the county's motion as to the First and 14th Amendment claims. In the same order, the court directed the parties to appear at a settlement conference before the court. At the conference, District Judge Richard Berman "actively urged settlement," opined that the law was on plaintiffs' side, and "extensively probed the County's arguments" that providing the requested Halal meat constituted a cost problem or a security threat.[4] Judge Berman set a short discovery period and set the case for trial within five months.

At a subsequent settlement conference, the county proposed to serve Halal meat to Muslim inmates with the same frequency as it provided Kosher meat to Jewish inmates. Judge Berman directed plaintiffs' counsel to confer with plaintiffs to see if they would accept such relief. The county asked the court not to enter a consent decree. In response, Judge Berman discussed other means of guaranteeing that the county would comply with the settlement.

The parties then entered into a settlement agreement, pursuant to which the county agreed to provide all present and future Muslim inmates of the Westchester County Jail who request a Halal diet with Halal meat, with the same frequency as Kosher meat is served to Jewish inmates requesting a Kosher diet. The settlement agreement did not constitute an admission of liability and was not a "consent decree." Dismissal of the lawsuits only took effect upon the court's approval and entry of the settlement agreement. The settlement agreement provided that plaintiffs reserved the right to file for attorney's fees, and the county had the corresponding right to oppose plaintiffs' attorney's fees motion.

Judge Berman reviewed and revised the settlement agreement with the parties present. First, he amended the document's caption to reflect that the settlement agreement was an "Order of Settlement." Second, he added language that allowed the court to retain discretion to accept any case related to plaintiffs' right to bring an action if the county failed to comply with the terms of the settlement. Third, he instructed the clerk to close the case, and "so-ordered" the

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settlement.

Following the settlement, plaintiffs' counsel filed an application for attorney's fees pursuant to 42 U.S.C. §1988(b). Plaintiffs' counsel argued that plaintiffs were "prevailing parties" because the settlement materially altered the legal relationship between the parties and the settlement had sufficient judicial imprimatur to warrant attorney's fees under the statute. Defendants argued that plaintiffs were not prevailing parties because the change in conduct was voluntary. Defendants also contended that there was insufficient judicial imprimatur because the District Court did not retain jurisdiction to enforce the settlement, the settlement agreement was not a consent decree, and the District Court had closed the case.

The court awarded $99,658.48 to plaintiffs in attorney's fees, holding that plaintiffs were prevailing parties because (1) the Order of Settlement materially altered the parties' legal relationship, and (2) there was "ample evidence of judicial imprimatur as the court denied the motion to dismiss, held several settlement conferences, participated in an effort to resolve contested issues, and then reviewed, revised and so-ordered the settlement."[5] The county appealed the grant of attorney's fees.

Second Circuit Decision

The Second Circuit began its analysis by reviewing Supreme Court precedent covering the requisite judicial imprimatur for a plaintiff to be considered a "prevailing party" so as to warrant a grant of attorney's fees. In *Buckhannon Bd. & Care Home Inc. v. West Virginia Dep't of Health & Human Res.*,[6] the Supreme Court found that a defendant's voluntary change in conduct was insufficient, without the necessary judicial imprimatur, for a plaintiff to be deemed a "prevailing party"—a legal term of art employed by Congress in various fee-shifting statutes.[7] In reaching its conclusion, the Supreme Court rejected the "catalyst theory," espoused by the majority of circuits at the time, under which "a plaintiff could recover attorney's fees if it established that the complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted."[8]

The Supreme Court explained that a judgment on the merits, a consent decree, and a settlement enforceable through consent decree all would serve as a basis for the grant of attorney's fees. In a footnote, the Supreme Court addressed its characterization in a few prior decisions that *Maher v. Gagne* permitted the award of attorney's fees in private settlements. The court explained, "this dicta ignores that *Maher* only held that fees may be assessed…after a case has been settled by the entry of a consent decree…. Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal."[9]

In so stating in the footnote, the Supreme Court relied in part on its prior precedent, *Kokkonen v. Guardian Life Ins. Co. of Am.*, which held that a federal district court could not exercise jurisdiction to enforce a private settlement because its order of dismissal neither included a provision retaining jurisdiction, nor incorporated the terms of the settlement agreement.[10]

Synthesizing the Supreme Court's precedent, the Second Circuit in *Perez* found the presence of the *Buckhannon* conditions unnecessary for a party to prevail; the court distinguished the order in *Perez* from *Buckhannon* because in *Perez* there was neither a judgment on the merits nor a consent decree. Instead, the Second Circuit focused on the two situations discussed in *Kokkonen*—relying on the *Buckhannon* opinion's approval and reaffirmance of *Kokkonen* (despite the fact that *Kokkonen* is cited only once in *Buckhannon*, in a footnote). The Second Circuit also examined its prior decision, *Roberson v. Giuliani*. *Roberson* concerned a prevailing party that satisfied the first *Kokkonen* scenario—an order of dismissal permitting the court to retain jurisdiction, but not itself incorporating settlement terms.[11]

The Second Circuit rejected the county's contention that 'Buckhannon' was limited in its application to the narrow circumstances of a judgment on the merits, a consent decree, or a settlement made enforceable by consent decree.

After *Roberson*, consent decrees that satisfied *Buckhannon's* prevailing party standard became interchangeable with orders of dismissal in which a district court retained jurisdiction. The Second Circuit rejected the county's contention that *Buckhannon* was limited in its application to the narrow circumstances of a judgment on the merits, a consent decree, or a settlement made enforceable by consent decree. The court also deemed it significant that the county in *Perez* opposed entering a consent decree, and did not mention this fact in its substantive analysis.

The Second Circuit explained that it had never considered the second *Kokkonen* scenario—an order of dismissal explicitly incorporating the terms of the settlement—until *Perez*. While the court indicated that, under *Roberson's* logic, such orders must satisfy *Buckhannon*, it narrowed the scope of its decision by indicating that the mere physical incorporation of settlement terms would be insufficient to satisfy *Buckhannon*; additional evidence of a district court's intent to place its imprimatur on the settlement is necessary.[12] Evidence of judicial intent to approve a settlement ensures that a party will not be deemed "prevailing" in cases in which the lawsuit's dismissal is effectuated by stipulation or mutual agreement, and did not require any judicial action.

The court identified the following facts as relevant evidence of an intent to place a "judicial imprimatur" on a settlement: (1) the lawsuit's dismissal is predicated upon the court's approval and entry of the settlement order, such that the settlement is only operative upon the court's review and approval; and (2) the district judge's "extensive involvement and close management of the case," including playing an integral role in resolving the lawsuit, advising the parties on the lawsuit's expected results, suggesting settlement terms, directing counsel to conduct negotiations and bring offers back to the parties, and urging that the agreement be part of an enforceable stipulation.[13] The district judge's actual intent, even if an express belief that the settlement is judicially sanctioned, is not dispositive.[14] In sum, although an order of dismissal incorporating terms from a private settlement may result in awarding a prevailing party attorney's fees, there must be evidence of judicial imprimatur beyond the terms themselves.

Analyzing the facts in the record, the Second Circuit determined that there was strong evidence here of a judicially sanctioned settlement. The court concluded that the evidence, considered together, demonstrated that the order of settlement in *Perez* bore the imprimatur of the District Court, satisfying *Buckhannon*, and qualifying plaintiffs to be "prevailing parties" under 42 U.S.C. §1988(b).

1. Docket No. 08-4245-pr, 2009 U.S. App. LEXIS 25396 (2d Cir. Nov. 19, 2009).
2. Id. at *25.
3. *Perez v. Westchester County Dep't of Corr.*, No. 05 Civ. 8120, 2007 U.S. Dist. LEXIS 32638, *7-28 (S.D.N.Y. April 30, 2007).
4. *Perez*, 2009 U.S. App. LEXIS at *10.
5. Id. at *14.
6. *Buckhannon Bd. & Care Home Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001).
7. Id. at 603, 605. Currently, Congress has promulgated over 50 statutes with fee-shifting provisions that allow the prevailing party to recover reasonable attorney's fees. See,e.g., Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong. 2d Sess., Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 1988, S. 2278, Source Book: Legislative History, Texts, and Other Documents app. A, at 220-21 (1976) (listing fee-shifting statutes).
8. *Buckhannon Bd. & Care Home Inc.*, 532 U.S. at 605 (internal citations omitted).
9. Id. at 604, n.7 (internal citations omitted) (citing *Farrar v. Hobby*, 506 U.S. 103, 111 (1992); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994)). See also *Maher v. Gagne*, 448 U.S. 122 (1980).
10. See *Buckhannon Bd. & Care Home Inc.*, 532 U.S. at 604, n.7. See also *Kokkonen*, 511 U.S. at 380-81.
11. *Perez*, 2009 U.S. App. LEXIS at *23-24; *Roberson v. Giuliani*, 346 F.3d 75, 81 (2d. Cir. 2003).
12. *Perez*, 2009 U.S. App. LEXIS at *26 (citing *Torres v. Walker*, 356 F.3d 238, 244 (2d Cir. 2004).
13. Id. at *26-28.
14. Id. at *27-28, n.8.