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# Who Pays the Piper if You Cut Into the Dance? An Analysis of Independent Federation of Flight Attendants v. Zipes

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## *Who pays the piper if you cut into the dance?*

by Barbara J. Fick

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### **Independent Federation of Flight Attendants**

v.

**Ann B. Zipes**  
(Docket No. 88-608)

*Argument Date: April 25, 1989*

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The parties to a lawsuit are normally confined to the plaintiff and defendant. Sometimes, however, the issues raised in a lawsuit and its possible disposition could affect the interests of absent third parties. In such circumstances, these third parties seek to intervene in the lawsuit to protect their interests. Such intervention can have the consequence of prolonging the litigation and increasing its cost to the parties involved.

The general rule in this country is that each party bears its own costs in litigation, including the payment of attorney fees. There are some exceptions to this rule, particularly in the field of civil rights litigation, where Congress has statutorily provided that courts may require unsuccessful litigants to pay the prevailing party's attorney fees.

There are well-developed guidelines to assist courts in allocating attorney fees between plaintiffs and defendants. It is not so clear what standard should be used in assessing fees against an intervener.

#### **ISSUE**

This case raises the question of what standard the courts should apply in deciding whether to assess attorney fees against an unsuccessful intervener in federal employment discrimination cases.

#### **FACTS**

TWA had a policy of terminating all flight attendants who became mothers. The Airline Stewards and Stewardesses Association, the union representing the flight attendants, filed a class action lawsuit on behalf of the terminated flight attendants, challenging the policy as constituting unlawful sex discrimination under Title VII of the Civil Rights Act of 1964.

Subsequently, ALSSA and TWA entered into a settlement agreement which provided that TWA would discontinue its policy and offer reinstatement to the next available opening to all attendants discharged pursuant to the policy, with

seniority as of the date of discharge. The settlement did not provide for back pay or retroactive seniority. The 7th Circuit Court of Appeals vacated the district court's approval of the settlement, finding ALSSA to be an inadequate class representative due to the conflict of interest between the class members and the incumbent employees of TWA.

On remand, ALSSA was removed as class representative and replaced by individual class members. The district court held that TWA's policy violated Title VII and also held that the claims of all class members were timely filed and, therefore, that all class members were entitled to a remedy.

The 7th Circuit affirmed the finding of a violation but reversed the court's holding on the timeliness issue, finding that TWA has not engaged in a continuing violation and that Title VII time limits were jurisdictional prerequisites. The latter finding meant that the claims of approximately 92 percent of the class were time-barred and therefore these individuals were not entitled to a remedy.

Certiorari petitions were filed with the Supreme Court; the Court granted a joint motion to defer consideration of the petitions pending settlement negotiations between the parties. In settlement, TWA set up a \$3 million fund from which class members would receive back pay and the attorney fees for the class would be paid. TWA also agreed to reinstate all class members as vacancies occurred, with retroactive seniority from their original dates of hire.

A notice of the settlement agreement was sent to the Independent Federation of Flight Attendants, the successor union to ALSSA. IFFA intervened in the lawsuit and objected to the settlement on the grounds that the grant of retroactive seniority would adversely impact on incumbent employees' seniority rights under the collective bargaining agreement, and that the district court lacked the authority to approve a settlement of the claims of those class members whose charges were untimely.

The district court rejected the IFFA's objections and approved the settlement. The union appealed and the 7th Circuit affirmed the district court order. The union obtained certiorari and the Supreme Court granted the previously filed certiorari petitions which had been held in abeyance pending settlement.

The Supreme Court ruled that Title VII time limits were not jurisdictional prerequisites and could be waived, and thus that the district court had subject matter jurisdiction to approve the settlement. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

Plaintiffs then sought attorney fees of \$1,400,000 from both TWA and IFFA pursuant to § 706(k) of Title VII, which provides that a court may award fees to a prevailing party.

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The district court held that under the terms of the settlement agreement, TWA's liability for attorney fees was limited to \$1,250,000, and assessed an award of \$180,915.84 against the IFFA.

The IFFA appealed the award of fees against it, arguing that it was not a violator of federal law, and that it should be considered a "functional plaintiff" for purposes of awarding fees. Therefore, it should be held liable for attorney fees only if its claims were frivolous. The 7th Circuit rejected the union's argument and affirmed the decision of the district court. The Supreme Court granted certiorari on the issue of the award of attorney fees.

### BACKGROUND AND SIGNIFICANCE

Title VII was passed with the objective of eradicating employment discrimination and compensating victims of such discrimination. The enforcement of the Act is largely dependent on lawsuits brought by private plaintiffs. Congress, recognizing that private individuals, particularly those who are victims of employment discrimination, often lack the resources necessary to retain counsel to represent them, included a provision which allows a court to award attorney fees to prevailing parties: § 706(k).

In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the Supreme Court had occasion to consider the intent and application of § 706(k). It held that successful plaintiffs should ordinarily recover their attorney fees from unsuccessful defendants in the absence of special circumstances that would make such an award unjust. This almost automatic award of fees to plaintiffs is justified because it encourages private plaintiffs to enforce the statute, and because the award is assessed against proven violators of federal law.

The Court then considered under what circumstances, if any, a successful defendant is entitled to an award of fees. The Court held that the statutory term "prevailing party" was not limited to plaintiffs but was broad enough to encompass successful defendants. However, the factors that justified the almost automatic award of fees to successful plaintiffs are absent when the case involves a successful defendant. Therefore, successful defendants are not automatically entitled to an award of attorney fees; they are eligible only if the plaintiff's case was frivolous, unreasonable or without foundation.

The issue raised by this case concerns the standard to be used in determining an unsuccessful intervenor's liability for the plaintiff's attorney fees. Should an unsuccessful intervenor be viewed as equivalent to the unsuccessful defendant who is almost automatically liable for fees, or to the unsuccessful plaintiff who is liable only if his case is frivolous?

While this case arises under Title VII, its outcome will have ramifications for parties involved in litigation arising under a number of federal statutes. 42 U.S.C. § 1988 is substantially identical to § 706(k), and any interpretation of § 706(k) will be applied to cases involving § 1988. Section 1988 governs the award of attorney fees in cases alleging civil

rights' violations by state and local governments, in cases alleging racial discrimination by private citizens in the making of contracts or the sale or lease of property, and in cases alleging discrimination in federally assisted programs. The fee shifting provisions of the Clean Air Act and the Fair Housing Act are also substantially identical to § 706(k).

Parties intervene in litigation when they have an interest in the subject matter of the litigation and the disposition of the case may affect that interest. Should the Court apply the "almost automatic" standard to unsuccessful intervenors, this could deter parties from protecting their interests through intervention. This could encourage parties to file separate lawsuits to protect their interests, so as to gain the advantage of being considered a plaintiff for purposes of fee-shifting, thus leading to duplicitous litigation.

Moreover, in civil rights cases, remedies ordered by a court often affect the rights of individuals not parties to the case. Detering intervention not only adversely impacts on these individuals' decision to protect their rights, but also impairs the court's ability to render a just decision, since it will remain uninformed about the ramifications of its decision on the rights of others, having heard only two sides in a multi-sided dispute.

On the other hand, adopting the "frivolous" standard could deter plaintiffs from vindicating their rights, contrary to congressional reliance on private parties for enforcement of civil rights laws. The disposition of civil rights cases tends to affect broad classes of people, and plaintiffs know that in vindicating their rights, they will often have to defend the remedies achieved from attacks by third-party intervenors.

If plaintiffs are unable to recover the attorney fees they expended due to the prolongation or obstruction of litigation caused by intervenors, plaintiffs may decide that it is not worth the effort to enforce their rights when any monetary recovery may be eaten up by attorney fees, or where the payment of such fees leaves them worse off than before litigation.

### ARGUMENTS

*For the Independent Federation of Flight Attendants (Counsel of Record, Steven A. Febr, Jolley, Walsh, Hager & Gordon, 204 West Linwood Boulevard, Kansas City, MO 64111; telephone (816) 561-3755):*

1. The policy considerations that justify the almost automatic award of attorney fees against unsuccessful defendants are inapplicable to intervenors. Plaintiffs who cannot recover attorney fees from intervenors will still have an incentive to bring lawsuits because they can expect to recover a substantial portion of their fees from defendants. Unlike unsuccessful defendants, intervenors have not violated federal law but have merely sought to protect their rights.
2. The appropriate standard to adopt in dealing with intervenors who are not responsible for violations of federal law is to treat them as functional plaintiffs who are not assessed fees unless their claims are frivolous, unreason-

able or without foundation.

3. The procedural posture of the parties, particularly in a multi-sided dispute, should not be determinative of the standard of liability for attorney fees. The courts should look beyond litigation labels and determine the individual parties' relation to the issues involved in the lawsuit. Looked at in this manner, IFFA's relation to the issues raised is more akin to that of a plaintiff than a defendant.
4. It is the defendants' violation of the law that triggers lawsuits in the first place and necessitates intervention by third parties. Assessing fees against unsuccessful but innocent interveners unfairly allows unsuccessful defendants who are guilty of violating federal law to shift the burden of litigation costs that are directly attributable to their wrongdoing.
5. Almost automatically assessing fees against unsuccessful interveners will result in a chilling effect whereby third parties may forego asserting their rights.
6. In the circumstances of this case, to assess fees against the IFFA would punish the union for performing an act it was required to do. The settlement agreement between plaintiffs and TWA explicitly provided that it would supersede IFFA's collective bargaining agreement, and in granting retroactive seniority to class members, it adversely impacted on seniority rights of incumbent employees under the collective bargaining agreement. The IFFA, as the bargaining representative of the incumbent employees, was obliged by its duty of fair representation to enforce the employees' contractual rights.
7. Even if the Court were to apply the almost automatic standard, special circumstances exist in this case which make the award of fees against IFFA unjust.

**For Anne B. Zipes, et al. (Counsel of Record, Aram A. Hartunian, Hartunian, Futterman & Howard, Chtd., Suite 1850, 122 South Michigan Ave., Chicago, IL 60603; telephone (312) 427-3600):**

1. The purpose of § 706(k) is to ensure that private plaintiffs, upon whom enforcement of Title VII largely depends, could attract and compensate competent counsel. Counsel expends major effort obtaining and defending remedial orders issued in these cases. An inability to receive fee awards for this work, solely because it is caused by challenges filed by interveners rather than defendants,

would discourage counsel from accepting these cases, contrary to congressional intent.

2. The award of fees is based on the concept of which party prevails, not who violated the law. The purpose of fee-shifting is compensatory, not punitive. It is intended to ensure that parties who litigate in the public interest will not be forced to bear the cost of litigation; it is not intended to punish violators of the law. Whether or not an intervener is innocent of a violation of law is not the determinative factor in awarding fees.
3. The language and purpose of § 706(k) evince no basis for exempting interveners from liability for attorney fees.
4. The role played by the IFFA in this case was not that of a functional plaintiff. The IFFA was not seeking redress for a violation of its rights under Title VII. The union was challenging not only the retroactive seniority provisions but the entire settlement, and in doing so was reasserting a jurisdictional challenge to the lawsuit that the defendant had abandoned.

#### **AMICUS BRIEFS**

##### ***In Support of the Independent Federation of Flight Attendants.***

The EEOC, the International Association of Fire Fighters and the Americans United for Life Legal Defense Fund. The latter group asserted an additional argument in support of the IFFA's position, arguing that fee awards against nonliable interveners violate the rights of those parties to litigate as a means of political expression, and that therefore such awards impermissibly infringe on First Amendment free speech rights.

##### ***In Support of Anne B. Zipes, et al.***

The American Civil Liberties Union and the American Civil Liberties Union of Illinois argued that § 706(k) by its terms leaves the decision regarding the award of attorney fees to the district court's discretion, and thus no absolute rule for interveners is appropriate. Rather, the courts have been given the authority to award fees to prevailing parties when they determine it is appropriate. In making this determination with regard to interveners, courts should consider whether the intervener obstructed or prolonged the litigation, the expenses created for the plaintiff as a result of the intervention, and any other special circumstances.