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DIGEST: FEDERAL AGENCY HAS DISCRETION UNDER REHABILITATION ACT OF 1973, AS AMENDED, TO AWARD ATTORNEY FEES TO COMPLAINANT WHO PREVAILS AT ADMINISTRATIVE LEVEL.

AUTHORITY OF DEFENSE MAPPING AGENCY TO AWARD ATTORNEY FEES FOR ADMINISTRATIVE PROCEEDING UNDER REHABILITATION ACT:

THE DEFENSE MAPPING AGENCY (DMA) HAS ASKED WHETHER ON DECEMBER 4, 1980, IT HAD THE AUTHORITY TO AWARD ATTORNEY FEES TO A COMPLAINANT WHOSE ALLEGATIONS OF HANDICAP DISCRIMINATION UNDER THE REHABILITATION ACT WERE SETTLED AT THE ADMINISTRATIVE LEVEL. FOR THE FOLLOWING REASONS, WE HOLD THAT THE DMA POSSESSED THE DISCRETION TO MAKE SUCH AN AWARD.

THIS QUESTION AROSE IN CONJUNCTION WITH THE REMOVAL OF DONALD E. BECK FROM FEDERAL SERVICE. MR. BECK APPEALED HIS TERMINATION TO THE MERIT SYSTEMS PROTECTION BOARD, ALLEGING THAT HE HAD BEEN DISCRIMINATED AGAINST ON THE BASIS OF HANDICAP IN VIOLATION OF THE REHABILITATION ACT OF 1973, AS AMENDED, 29 U.S.C. SECS. 701 ET SEQ. ON DECEMBER 4, 1980, THE DEFENSE MAPPING AGENCY HYDROGRAPHIC/TOPOGRAPHIC CENTER (HTC) AND MR. BECK ENTERED INTO A SETTLEMENT AGREEMENT, WHICH PROVIDED FOR THE CANCELLATION OF MR. BECK'S DISMISSAL IN EXCHANGE FOR HIS VOLUNTARY RESIGNATION. CLAUSE 6 OF THE AGREEMENT STATED THAT: "TO THE EXTENT AUTHORIZED BY LAW, HTC WILL REIMBURSE MR. BECK FOR REASONABLE ATTORNEY FEES EXPENDED IN HIS APPEAL TO THE BOARD." THE QUESTION THUS AROSE AS TO THE EXTENT TO WHICH THE DEFENSE MAPPING AGENCY POSSESSED THE AUTHORITY TO AWARD ATTORNEY FEES TO MR. BECK.

WE BEGIN BY NOTING THE RECENT LINE OF AUTHORITY UPHOLDING THE AWARD OF ATTORNEY FEES IN ADMINISTRATIVE PROCEEDINGS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, BECAUSE IT IS UPON THE FOUNDATION ESTABLISHED BY THESE CASES THAT THIS DECISION RESTS. IN PARKER V. CALIFANO, 182 U.S. APP. D.C. 322, 561 F.2D 320 (1977), THE DISTRICT OF COLUMBIA COURT OF APPEALS HELD THAT "IN A TITLE VII SUIT, BROUGHT BY A FEDERAL EMPLOYEE, ATTORNEY FEES AWARDED UNDER SECTION 706(K) 42 U.S.C. SEC. 2000E-5(K) MAY INCLUDE COMPENSATION FOR WORK DONE AT BOTH JUDICIAL AND ADMINISTRATIVE LEVELS." 561 F.2D AT 324. ACCORD, JOHNSON V. UNITED STATES, 554 F.2D 632 (4TH CIR. 1977). SUBSEQUENT DECISIONS, USING PARKER V. CALIFANO, AS A POINT OF DEPARTURE, HAVE HELD THAT AGENCIES POSSESS THE DISCRETION TO AWARD ATTORNEY FEES TO PREVAILING TITLE VII PLAINTIFFS. SMITH V. CALIFANO, 446 F.SUPP. 530 (D.D.C. 1978); WILLIAMS V. BOORSTIN, 451 F.SUPP. 1117 (D.D.C. 1978); PATTON V. ANDRUS, 459 F.SUPP. 1189 (D.D.C. 1978). CONTRA, NOBLE V. CLAYTOR, 448 F.SUPP. 1242 (D.D.C. 1978) (HOLDING BASED IN PART ON SUBSEQUENTLY REVISED EEOC REGULATIONS, WHICH DID NOT EXPRESSLY DELEGATE TO

AGENCIES THE AUTHORITY TO AWARD ATTORNEY FEES). WE AGREE WITH THE SMITH COURT THAT THE UTILITY OF THE ADMINISTRATIVE ENFORCEMENT MECHANISM MIGHT BE UNDERMINED IN THE ABSENCE OF AGENCY AUTHORITY TO AWARD ATTORNEY

"*** THE COMPLAINANT AND HIS COUNSEL MIGHT CONCLUDE THAT IT IS NOT COST-EFFICIENT TO INVEST THE TIME NECESSARY AT THE ADMINISTRATIVE LEVEL TO DEVELOP HIS CASE PROPERLY. THUS, THE ADMINISTRATIVE PROCEEDING MIGHT BE RELEGATED TO A PRO FORMA EXHAUSTION STEP DECREASING THE LIKELIHOOD THAT CLAIMS COULD BE RESOLVED WITHOUT RESORTING TO THE COURTS. IT MIGHT ALSO MEAN THAT THE ADMINISTRATIVE RECORD, WHICH CAN BE ADMITTED AS EVIDENCE IN COURT, WOULD BE LESS COMPLETE AND THUS OF LESS ASSISTANCE IN CONSERVING THE COURTS' TIME IN SUITS THAT ARE FILED." 446 F.SUPP. AT 534.

ON APRIL 9, 1980, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PUBLISHED REVISED REGULATIONS ON EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT. THE INTERIM REGULATIONS, EFFECTIVE AS OF APRIL 11, 1980, GIVE BOTH THE AGENCY AND THE EEOC THE DISCRETION TO AWARD REASONABLE ATTORNEY FEES INCURRED IN TITLE VII PROCEEDINGS, INCLUDING THE SETTLEMENT OF A COMPLAINT UNDER 29 C.F.R. SEC. 1613.217(A). 29 C.F.R. SEC. 1613.271(C)(1); 45 FED.REG. 24132 (APRIL 9, 1980). WE RECOGNIZE THAT IN THE EXPLANATORY NOTE WHICH ACCOMPANIED PUBLICATIION OF THE REVISED REGULATIONS, THE COMMISSION INDICATED THAT:

"BECAUSE OF DIFFERENCES IN STATUTORY LANGUAGE, THE CURRENT PROPOSAL IS LIMITED TO COMPLAINTS UNDER TITLE VII. THE HANDICAP DISCRIMINATION REGULATIONS WERE PROMULGATED BY THE CIVIL SERVICE COMMISSION UNDER THE BACK PAY ACT, 5 U.S.C. 7153, AND SECTION 501 OF THE REHABILITATION ACT, 29 U.S.C. 791, NEITHER OF WHICH PROVIDED FOR THE AWARD OF ATTORNEY'S FEES OR COSTS. A RECENT AMENDMENT TO THE REHABILITATION ACT MAY PROVIDE FOR SUCH AN AWARD. ***" 45 FED.REG. 24130.

THE "RECENT AMENDMENT" REFERRED TO WAS THE ADDITION OF SECTION 505, DISCUSSED BELOW. IN OUR OPINION, THE EEOC'S COMMENT THAT THE ADDITION OF SECTION 505 TO THE REHABILITATION ACT "MAY" PROVIDE FOR THE AWARD OF ATORNEY FEES TO PREVAILING COMPLAINANTS AT THE ADMINISTRATIVE LEVEL WAS UNDULY CAUTIOUS, HOWEVER. SECTION 505(A)(1), 29 U.S.C. SEC. 794AA)(1), PROVIDES THAT:

"THE REMEDIES, PROCEDURES, AND RIGHTS SET FORTH IN SECTION 717 OF THE CIVIL RIGHTS ACT OF 1964 (42 U.S.C. 2000E-16), INCLUDING THE APPLICATION OF SECTIONS 706(F) THROUGH 706(K) (42 U.S.C. 2000E-5(F) THROUGH (K)), SHALL BE AVAILABLE, WITH RESPECT TO ANY COMPLAINT UNDER SECTION 501 OF THIS ACT 29 U.S.C. 791, TO ANY EMPLOYEE OR APPLICANT FOR EMPLOYMENT AGGRIEVED BY THE FINAL DISPOSITION OF SUCH COMPLAINT, OR BY THE FAILURE TO TAKE FINAL ACTION ON SUCH COMPLAINT. ***" PUB.L. NO. 95-602 (NOVEMBER 6, 1978), SEC. 120, 92 STAT. 2982.

SECTION 706(K) OF TITLE VII, 42 U.S.C. SEC. 2000E-5(K), PROVIDES THAT:

"IN ANY ACTION OR PROCEEDING UNDER THIS SUBCHAPTER THE COURT, IN ITS DISCRETION, MAY ALLOW THE PREVAILING PARTY *** A REASONABLE ATTORNEY'S FEE ***."

THE 1978 AMENDMENTS ADDED VIRTUALLY IDENTICAL LANGUAGE TO THE REHABILITATION ACT, PROVIDING AT SECTION 505(B), 29 U.S.C. SEC. 794AB), THAT:

"IN ANY ACTION OR PROCEEDING TO ENFORCE OR CHARGE A VIOLATION OF A PROVISION OF THIS SUBCHAPTER, THE COURT, IN ITS DISCRETION, MAY ALLOW THE PREVAILING PARTY *** A REASONABLE ATTORNEY'S FEE ***."

WE AGREE WITH THE COURT IN THE ONLY REPORTED DECISION CONSTRUING THE AUTHORITY OF A FEDERAL AGENCY TO AWARD ATTORNEY FEES IN AN ADMINISTRATIVE PROCEEDING UNDER THE REHABILITATION ACT, WATSON V. UNITED STATES VETERANS ADMINISTRATION, 88 F.R.D. 267 (C.D. CAL. 1980), THAT SINCE THE REHABILITATION ACT'S ATTORNEY FEES PROVISION IS ALMOST IDENTICAL TO THE ANALOGOUS TITLE VII PROVISION, 42 U.S.C. SEC. 2000E 5(K), THE EEOC'S HESITATION "APPEARS TO DISREGARD CONGRESS' PURPOSE IN EMPLOYING VIRTUALLY IDENTICAL LANGUAGE IN THE TWO STATUTES." 88 F.R.D. AT 269. THE WATSON COURT NOTED, IN ADDITION, THAT "ALL OF THE REASONS ADVANCED BY THE EEOC FOR THE ADOPTION OF THE ATTORNEY FEES REGULATION IN TITLE VII PROCEEDINGS APPLY, PERFORCE, TO REHABILITATION ACT PROCEEDINGS." ID. THESE REASONS, SET FORTH AT 45 FED.REG. 24130 (APRIL 9, 1980), WERE THAT "IF AGENCIES WERE UNABLE TO GRANT REASONABLE ATTORNEY'S FEES AND COSTS AS PART OF THE ADMINISTRATIVE REMEDY, PARTIES WOULD BE ENCOURAGED TO CIRCUMVENT THE ADMINISTRATIVE PROCESS IN ORDER TO RECOVER ATTORNEY'S FEES AND COSTS AND, THUS, UNDERMINE THE INTENT OF CONGRESS THAT COMPLAINTS BE HANDLED AT THE ADMINISTRATIVE LEVEL ***."

THE EEOC HAS APPARENTLY COME TO THE CONCLUSION THAT THE 1978 AMENDMENTS TO THE REHABILITATION ACT DO INDEED PERMIT THE AWARD OF ATTORNEY FEES AT THE ADMINISTRATIVE LEVEL, AND OUR OFFICE HAS INDICATED THAT IT WOULD NOT OBJECT TO REGULATIONS PROVIDING FOR SUCH PAYMENT. 59 COMP.GEN. 728 (1980). A PROPOSED REVISION TO 29 C.F.R. SEC. 1613.708, PUBLISHED AT 45 FED.REG. 43794 (JUNE 30, 1980), READS AS FOLLOWS:

"AN AGENCY SHALL PROVIDE REGULATIONS GOVERNING THE ACCEPTANCE AND PROCESSING OF COMPLAINTS OF DISCRIMINATION BASED ON A PHYSICAL OR MENTAL HANDICAP WHICH COMPLY WITH THE PRINCIPLES AND REQUIREMENTS IN SECS. 1613.213 THROUGH 1613.283, AND SECS. 1613.601 THROUGH 1613.643. ***"

WHILE WE ARE AWARE THAT THIS IS A PROPOSED, RATHER THAN AN INTERIM OR FINAL REGULATION, WE NONETHELESS THINK IT SUFFICIENT TO OVERCOME THE ARGUMENT ADVANCED BY THE COURT IN NOBLE V. CLAYTOR, SUPRA, THAT THE EEOC HAS INTERPRETED STATUTORY LANGUAGE SUCH AS THAT FOUND IN THE REHABILITATION ACT AS NOT PROVIDING FOR THE AWARD OF ATTORNEY FEES AT THE ADMINISTRATIVE LEVEL.

WE AGREE WITH THE PENULTIMATE PARAGRAPH OF THE WATSON V. UNITED STATES VETERANS ADMINISTRATION DECISION, WHICH STATES THAT:

"*** CONSTRUING THE REHABILITATION ACT TO AUTHORIZE THE ADMINISTRATIVE AWARD OF ATTORNEY'S FEES WILL HELP TO PROMOTE THE JUST, SPEEDY AND EFFICIENT DETERMINATION OF HANDICAP DISCRIMINATION COMPLAINTS. CONSISTENT WITH THE STATUTE AND ITS PURPOSE, THE AGENCY SHOULD BE AUTHORIZED TO GIVE COMPLETE RELIEF TO A MERITORIOUS CLAIMANT. RESOLUTION OF THE DISPUTE AT THE ADMINISTRATIVE LEVEL SHOULD BE ENCOURAGED. WOULD BE AN ANOMALY, AS THIS CASE PROVES, THAT A CLAIMANT SHOULD PREVAIL ENTIRELY BEFORE THE AGENCY, YET HAVE TO FILE A COMPLAINT IN THE DISTRICT COURT TO SEEK THE JUDICIAL AWARD OF ATTORNEY'S FEES. THE AGENCY BEFORE WHOM THE SERVICES WERE RENDERED IS IN THE BEST POSITION TO EVALUATE THE VALUE OF THE SERVICES RENDERED AND THE REASONABLENESS OF THE AWARD SOUGHT AND IT SHOULD MAKE THE DETERMINATION IN THE FIRST INSTANCE."

ACCORDINGLY, WE CONCLUDE THAT THE DEFENSE MAPPING AGENCY WAS AUTHORIZED UNDER THE REHABILITATION ACT AMENDMENTS OF 1978 TO AWARD A PREVAILING COMPLAINANT REASONABLE ATTORNEY FEES.

THE NEXT STEP IS TO APPLY THIS PRINCIPLE TO THE FACTS OF THIS CASE. THE

COMPLAINANT, DONALD BECK, WAS REMOVED FROM FEDERAL SERVICE. HE CHALLENGED THE REMOVAL, ALLEGING HANDICAP DISCRIMINATION. WHILE HIS APPEAL WAS PENDING BEFORE THE MERIT SYSTEMS PROTECTION BOARD, MR. BECK AND THE DEFENSE MAPPING AGENCY ENTERED INTO A SETTLEMENT AGREEMENT. UNDER THE AGREEMENT, MR. BECK WAS TO WITHDRAW HIS APPEAL AND VOLUNTARILY RESIGN. RETURN, THE DEFENSE MAPPING AGENCY AGREED TO CONVERT CERTAIN ABSENCE WITHOUT LEAVE TO LEAVE WITHOUT PAY, CANCEL THE REMOVAL, AND PROVIDE MR. BECK WITH A LETTER OF RECOMMENDATION ATTESTING TO HIS TECHNICAL COMPETENCE.

THE FIRST POINT TO NOTE FROM THIS IS THAT MR. BECK'S COMPLAINT WAS RESOLVED BY "INFORMAL" SETTLEMENT RATHER THAN FORMAL ADMINISTRATIVE PROCEEDINGS. AS WE RECENTLY STATED IN THE TITLE VII CONTEXT:

"*** IT IS OUR POSITION THAT *** FEDERAL AGENCIES NOW HAVE THE NECESSARY AUTHORITY TO PAY ATTORNEY FEES AND COSTS TO A PREVAILING COMPLAINANT IN THE INFORMAL SETTLEMENT OR FORMAL RESOLUTION OF EQUAL EMPLOYMENT OPPORTUNITY PROCEEDINGS." B-199291, JUNE 19, 1981.

THUS, AS LONG AS THE MATTER IS BEYOND THE PRELIMINARY INVESTIGATIVE STAGE, AN AGENCY CAN "SETTLE" A DISCRIMINATION COMPLAINT SHORT OF A FULL FORMAL PROCEEDING, AND THIS SETTLEMENT IS SUFFICIENT TO TRIGGER AN AWARD OF ATTORNEY'S FEES.

UNDER THE STATUTE, AN AWARD OF FEES IS AUTHORIZED ONLY IF THE COMPLAINANT IS THE "PREVAILING PARTY." HERE, WE NOTE THAT MR. BECK "PREVAILED" ONLY TO A VERY LIMITED EXTENT. HE WAS NOT REINSTATED TO HIS FORMER POSITION NOR WAS HE AWARDED BACKPAY. HE "PREVAILED" ONLY TO THE EXTENT OF THE LEAVE CONVERSION AND THE SUBSTITUTION OF VOLUNTARY RESIGNATION FOR INVOLUNTARY REMOVAL. THE END RESULT WAS STILL THE TERMINATION OF HIS EMPLOYMENT WITH THE DEFENSE MAPPING AGENCY. NEVERTHELESS, DRAWING AGAIN FROM THE TITLE VII CONTEXT, A PLAINTIFF DOES NOT HAVE TO WIN ON EVERY ISSUE IN ORDER TO BE A PREVAILING PARTY, AND A PARTY MAY BE FOUND TO PREVAIL EVEN UNDER A STIPULATION WHICH DOES NOT REQUIRE THE DEFENDANT TO ADMIT DISCRIMINATION. E.G., RICHARDSON V. CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, 420 F.SUPP. 64 (E.D.N.Y. 1976). SEE ALSO B-190940, SEPTEMBER 21, 1978. ACCORDINGLY, WE WOULD NOT QUARREL WITH A DETERMINATION IN THIS CASE THAT MR. BECK WAS THE PREVAILING PARTY, OR AT LEAST SUFFICIENTLY SO AS TO JUSTIFY A FEE AWARD.

WE NOTE IN CLOSING THAT WE DO NOT VIEW OUR DECISION TODAY AS INCONSISTENT WITH OUR DECISIONS IN B-195544, NOVEMBER 20, 1979, AND B-196019, APRIL 23, 1980. IN THESE TWO DECISIONS, WE HELD THAT FEDERAL AGENCIES HAD NO AUTHORITY TO PAY ATTORNEY FEES INCIDENT TO THE SETTLEMENT OF DISCRIMINATION COMPLAINTS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED (42 U.S.C. SEC. 2000E-16(B)), IN THE ABSENCE OF SPECIFIC LEGISLATION, FURTHER CLARIFICATION OF CONFLICTING COURT DECISIONS OR APPROPRIATE REGULATIONS. THIS HOLDING WAS BASED ON OUR VIEW THAT NEITHER TITLE VII ON ITS FACE NOR ITS LEGISLATIVE HISTORY INDICATED WHETHER CONGRESS INTENDED TO AUTHORIZE THE AWARD OF ATTORNEY FEES BY AGENCIES. COURTS HAD CONFLICTED IN THEIR INTERPRETATION OF CONGRESSIONAL INTENT, AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAD NOT (UNTIL THE APRIL 9, 1980 INTERIM REGULATIONS) INTERPRETED THE AUTHORITY OF AGENCIES TO INCLUDE THE AUTHORITY TO AWARD ATTORNEY FEES. WITHOUT ANY CLEAR INDICATION FROM CONGRESS ITSELF, THE COURTS, OR THE EEOC THAT THE AWARD OF ATTORNEY FEES WAS PERMISSIBLE, WE DECLINED TO PERMIT THEIR PAYMENT. CONGRESSIONAL INTENT IS NOT SO AMBIGUOUS UNDER THE REHABILITATION ACT. IN INTERPRETING THE ATTORNEY FEES PROVISION OF TITLE VII (SEC. 706(K)) AS ALLOWING AGENCIES TO AWARD ATTORNEY FEES TO

PREVAILING TITLE VII COMPLAINANTS, THE EEOC NOTED THAT SUCH REGULATION WAS "NECESSARY AND APPROPRIATE TO CARRY OUT THE POLICIES OF SECTION 717 OF TITLE VII ***." 45 FED.REG. 24132 (APRIL 9, 1980). SECTION 505(A)(1) OF THE REHABILITATION ACT DIRECTLY INCORPORATES SECTION 706(K), AND SECTION 505(B) ADDS A SECOND ATTORNEY FEES PROVISION IN ALMOST IDENTICAL LANGUAGE. IF, GIVEN SECTION 706(K), THE AUTHORITY FOR AGENCIES TO ADMINISTRATIVELY AWARD ATTORNEY FEES IS A SIGNIFICANT MEANS OF ACCOMPLISHING THE STATUTORY PURPOSE, THEN, GIVEN SECTION 505(A)(1) AND SECTION 505(B) OF THE REHABILITATION ACT, IT IS NO LESS SO WITH RESPECT TO THAT STATUTE. WE ARE THUS OF THE VIEW THAT THE EEOC INTERPRETATION OF SECTION 706(K) SHEDS A GREAT DEAL OF LIGHT ON THE APPROPRIATE INTERPRETATION OF THE ATTORNEY FEES PROVISION OF THE REHABILITATION ACT.

WE FURTHER NOTE THAT WE ARE NOT CONFRONTED WITH CONFLICTING JUDICIAL INTERPRETATIONS OF SECTION 505 OF THE REHABILITATION ACT. ONLY THE WATSON COURT HAS CONSIDERED THE ISSUE WITH WHICH WE ARE CONFRONTED, AND ITS HOLDING IS IN COMPLETE HARMONY WITH OUR HOLDING IN THIS CASE. (TO THE EXTENT THAT NOBLE V. CLAYTOR, SUPRA, CAN BE VIEWED AS CONTRARY AUTHORITY, WE NOTE THAT IT IS A MINORITY OF ONE IN A SERIES OF DECISIONS, CITED ABOVE, THE REST OF WHICH ARE CONSISTENT WITH THE HOLDING IN WATSON.) MOREOVER, AS PREVIOUSLY STATED, THE EEOC HAS PROPOSED REGULATIONS WHICH WOULD PERMIT THE ADMINISTRATIVE AWARD OF ATTORNEY FEES. WE ARE THEREFORE NOT FACED WITH CONFLICTING COURT INTERPRETATIONS AND AGENCY SILENCE, AS WE WERE IN OUR TITLE VII DECISIONS, AND WE ACCORDINGLY DO NOT VIEW OUR DECISION TODAY AS A DEPARTURE FROM THAT PRECEDENT.