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## Attorney Fees

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## ATTORNEY FEES

*Hadden v. Bowen*, 851 F.2d 1266

Appellee Hadden filed a claim for attorney fees under the Equal Access to Justice Act (EAJA) after successfully litigating her entitlement to Social Security disability benefits. Under the EAJA, the government must prove its position was substantially justified to avoid an award of attorney fees to a successful claimant.

The Tenth Circuit reversed the award of attorney fees, holding that the district judge erred by equating a lack of substantial evidence on the merits with a lack of substantial justification under the EAJA. The court stated that to do so would result in an automatic award of attorney fees in all Social Security cases in which the government was unsuccessful on the merits.

*GHK Exploration Co. v. Tenneco Oil Co.*, 857 F.2d 1388

GHK Exploration sued Tenneco Oil for oil drilling costs allegedly owed by defendant under an election to participate in a forced-pooling order. At trial, the court addressed the issue of whether an election to participate occurred. On appeal, the Tenth Circuit reversed, holding that the court lacked subject-matter jurisdiction due to plaintiff's failure to exhaust its administrative remedies in the Oklahoma Corporation Commission (Commission). Dismissed.

On plaintiff's petition for rehearing and upon defendant's motion for award of attorneys' fees, the appeals court held dismissal of the action was proper, since the Commission has exclusive jurisdiction to determine if a party has elected to participate in a forced-pooling order. The district court has jurisdiction only to enforce payment of any costs owing due to a determination by the Commission that an election existed. The court denied attorneys' fees to the defendant. Only a prevailing party, and not merely a party for whom a cause of action has been dismissed on grounds other than the merits, may win attorneys' fees.

*Glass and Phelps-Chartered v. Pfeffer, et al.*, 849 F.2d 1261

In an earlier appeal in this case, the Tenth Circuit affirmed a judgment dismissing a civil rights action brought against defendant police officers. The district court ordered plaintiffs and plaintiff's counsel to pay defendant Forster's attorney's fees. The district court ruled that from the deposition it was clear that Forster was not present at the time of the mistaken arrest and found no excuse for plaintiff's failure to voluntarily dismiss Forster from the action.

This appeal addresses only the propriety of the attorney's fee award and its amount. The court found that award of fees against the plain-

tiff's counsel was justified under the district court's inherent power and was supported by finding that counsel willfully continued to advance groundless and patently frivolous litigation against Forster after it was determined he was not present at scene of alleged unlawful arrest and that counsel's conduct was tantamount to bad faith. The court affirmed that upon remand of the initial award, the district court was justified in awarding additional monies for fees incurred in litigating entitlement to original fee award where plaintiff's counsel, in opposing award, went well beyond scope of remand order, greatly multiplying proceedings after remand. Additionally, the court affirmed it was appropriate to levy attorney's fees against a firm that is responsible for the pleadings signed by its employees. The court held the sanctions be applied against plaintiff's law firm as opposed to the individual attorney employed by the firm.

The court found no abuse of discretion in the district court's refusal to recuse itself on remand, warning that such a change is serious in nature and an affidavit seeking refusal is insufficient if it merely states conclusions, rumors, beliefs and opinions. Remand was required on the limited issue of reasonable attorney's fees to be awarded against plaintiff's law firm for time spent by defendant's counsel in defending appeal.

*Ikerd v. Lacy*, 852 F.2d 1256

Plaintiff appeals the district court's order dismissing his complaint and imposing fees for refiling. Additionally, plaintiff appeals the denial of his motion for reconsideration and vacation of the foregoing order. Affirmed.

Plaintiff filed a civil rights action which was set for preliminary hearing on August 12, 1986. Due to a conflicting court case, plaintiff's attorney did not attend this hearing. (Plaintiff contends counsel merely arrived twenty minutes late.) Pursuant to Fed. R. Civ. P. 16(f) allowing sanctions for failure to comply with pretrial orders, the district court dismissed plaintiff's complaint without prejudice, and mandated that refiling a \$500 per attorney fee be paid to each attorney present at the hearing. Finding a conflicting court appearance insufficient to justify missing a scheduled pretrial hearing, the Tenth Circuit held the imposition of sanctions here was no abuse of discretion.

*Velasquez v. Director, Office of Workers' Compensation Programs*, 844 F.2d 738

Attorney petitioned, pursuant to 30 U.S.C. § 932(a), for attorney's fees incurred while representing a client on an appeal arising out of recovery for black lung disability benefits.

In granting the petitioning attorney only part of the amount requested, the Tenth Circuit set forth the following factors to be considered in determining the proper amount of such fees: Time and labor required; novelty and difficulty of issues; preclusion of other employ-

ment due to client's case; skill required; customary fee (whether fixed or contingent); amount of damages awarded; experience and reputation of attorney; undesirability of case; nature and length of relationship between attorney and client; and amount of fees awarded in similar cases.

*Burkhart v. The Kinsley Bank*, 852 F.2d 512

Plaintiff-appellee brought suit against defendant-appellant and Cimarron Cooperative Equity Exchange, alleging that the two defendants conspired to convert, and did convert, to their own use, wheat belonging to appellees. The district court granted summary judgment for the defendants. Along with the motion for summary judgment, defendants filed a motion seeking sanctions against appellees and their attorney. The district court denied this motion on the grounds there was no "subjective bad faith" by the appellees or their attorney.

The appellants appealed this finding, and the Tenth Circuit reversed the district court, holding that subjective bad faith was not a prerequisite to an award of sanctions under Rule 11. On remand, the district court again denied appellant's motion for sanctions. Affirmed.

The court of appeals first determined that the Tenth Circuit is committed to an "across the board" use of the "abuse of discretion" standard, rather than *de novo* review as argued by appellants. Referring to comments by the district judge, the panel noted that decisions by a judge in Kansas did support the appellees' legal position, thereby indicating that appellees' complaint was warranted by existing law. Thus, the district court did not abuse its discretion in denying appellant's motion for sanctions.

