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Labor Law - Mandatory Attorney's Fees - Section 102 Labor-Management Reporting and Disclosure Act - Hall v. Cole, 93 S. Ct. 1943 (1973)

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COMMENT

LABOR LAW—MANDATORY ATTORNEY'S FEES— Section 102 Labor-Management Reporting and Disclosure Act *Hall v. Cole*, 93 S. Ct. 1943 (1973).

INTRODUCTION

Fee-shifting is the transfer of an obligation to pay for legal services from the contracting party to another party. The United States Supreme Court, in the decision of *Hall v. Cole*,[1] affirmed an award of counsel fees for a successful action brought under section 102 of the Labor-Management Reporting and Disclosure Act (LMRDA).[2] The decision ended any lingering doubts as to whether or not a district court *might* award the successful section 102 litigant legal fees. But at the same time, *Hall* raised the troubling question of whether the successful section 102 litigant *must* be awarded counsel fees. This comment will explore why the Court's reasoning leads to the conclusion that counsel fees are no longer to be awarded on a discretionary basis, but rather that a successful section 102 litigant must be granted attorney's fees.

I. FACTS

John Cole attempted to present a set of preambles and resolutions[3] that would have modified existing union rules.[4] Following a heated debate, union officers finally relented and permitted a vote on the resolutions. The resolutions were defeated and a "Charge Sheet" demanding Cole's expulsion was subsequently filed. It alleged that Cole had violated the union constitution by presenting the resolutions. His actions were said to be a "malicious vilification" of the officers and of the union. Cole was tried

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[1]93 S. Ct. 1943 (1973).

[2]Section 102 of the Act, 29 U.S.C. § 412 (1959), provides in pertinent part:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

[3]At a membership meeting of petitioner's labor union in Brooklyn, New York, on August 6, 1962, the Respondent, John Cole, introduced for consideration a proposed resolution calling for reform of the union's shipping rules.

[4]The resolution sought to regularize the union's rotary hiring process so that men would be shipped in proper order; it also sought to end the ruinous policy of "raiding" sister unions. Brief for Respondent at 1-7, Hall v. Cole, 93 S. Ct. 143 (1973).

before the Union Trial Committee which found him guilty and ordered his expulsion.[5] After exhausting all intra-union remedies, Cole was granted a temporary injunction forbidding his expulsion.[6] Trial on the merits resulted in a permanent injunction and an award of attorney's fees.[7] This decision was subsequently affirmed by the Second Circuit.[8]

The Supreme Court granted certiorari on the questions of whether (1) an award of attorney's fees is permissible under section 102 of the LMRDA, and if so, (2) whether such an award under these facts constituted an abuse of the district court's discretion. The Court found that the award of counsel fees is within the discretion of a district court, and that such discretion was not abused in this case.

II. BACKGROUND

A. *The American Rule*

The decision in *Hall* to award attorney's fees was dictated by following a recognized exception to the American rule. American courts typically will not include counsel fees, either as part of a cash award or in conjunction with equitable relief,[9] absent a statutory or contractual authorization.[10] "In support of the American rule, it has been argued that since litigation is at best uncertain, one should not be penalized for merely defending or prosecuting a lawsuit."[11] If the penalty for losing may include an opponent's

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[5]The resolution contained several "Whereas" clauses of which two—the eighth and the ninth—were the subject of the charges. The eighth "Whereas" clause commented that "moral arguments fabricated to justify the [petitioner-union's] interference in interunion beefs are both contridictory and phony." The ninth "Whereas" clause criticized Paul Hall for having begun a pattern of "organizational hijacking" by a raid on a sister union.

The trial took place on October 9, 1962. Cole submitted to the Trial Committee a written statement admitting that he had introduced the resolution but denied that it constituted a "malicious vilification." There was no oral testimony taken at the trial. A recommendation made by the Trial Committee that Cole be found guilty and expelled was ratified by the union members. Brief for Respondent at 1-7, Hall v. Cole, 93 S. Ct. 1943 (1973).

[6]Cole v. Hall, 56 L.R.R.M. 2606 (E.D.N.Y. 1964).

[7]Cole v. Hall, 66 CCH Lab. Cas. ¶ 22,011 (E.D.N.Y. 1971).

[8]Cole v. Hall, 462 F.2d 777 (2d Cir. 1972).

[9]Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).

[10]Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967). *See* Havenstein v. Lynham, 100 U.S. 483 (1879); Day v. Woodworth, 54 U.S. (13 How.) 363 (1852).

[11]Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

legal fees, many individuals might be unjustly discouraged from instituting actions to vindicate their rights.[12] There are, however, three recognized exceptions under which federal courts will award counsel fees.

First, awards will be granted when the other party's action is vexatious, oppressive, or deemed to be in bad faith.[13] This determination can only be made in light of all the surrounding circumstances,[14] and an award by a court under this exception is justified as a punitive grant.[15]

Second, awards will be granted when an individual's action creates or preserves a common fund for the benefit of the members of an identifiable class.[16] A fund is created when a defendant is ordered to transfer into the court assets which *have not* previously been claimed by class members. A fund is preserved when a defendant is ordered to transfer into the court assets which *have* previously been claimed by class members. In either instance:

> a court of equity will require that every member of the class who seeks to participate in the benefits derived from the exertions of counsel [for the individual instituting the action] shall contribute pro rata to the reasonable compensation of counsel for what they have done in that matter.[17]

These awards will be made in situations in which the plaintiff does not claim to be a class representative, as well as in those in which he does.[18] The courts justify these awards as grants preventing the unjust enrichment of class members at the expense of the claimants.

Finally, courts will award counsel fees when the plaintiff's private suit enforces an important statutory policy. Such suits render substantial benefits to others in addition to the plaintiff.

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[12]*Id.*

[13]Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951); 6 J. MOORE, FEDERAL PRACTICE ¶ 54,77 [2] (2d ed. 1972).

[14]Local 149, UAW v. American Brake Shoe Co., 298 F.2d 212 (4th Cir.), *cert. denied*, 369 U.S. 873 (1962).

[15]Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946); City Bank v. Rivera Davila, 438 F.2d 1367 (1st Cir. 1971).

[16]Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784, 786 (1939).

[17]Burroughs v. Taxaway, 185 F. 435, 441 (4th Cir. 1911).

[18]In Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939), the petitioner's action established her claim to the proceeds of a trust fund. The action also established a similar right of recovery for a class of claimants to 14 other trust funds. Although the petitioner in *Sprague* did not suggest that she was acting in a representative capacity, the court found the benefit derived by all members of the class justified the award of attorney's fees.

Fees are awarded not because of a contribution to a common fund, nor for a showing of bad faith, but rather because of the plaintiff's contribution to the enforcement of congressional policy and the protection of the rights of others.[19] However, courts do not have a free hand in awarding attorney's fees as a remedy to enforce all statutes.[20] For example, in *Fleischmann Distilling Corp. v. Maier Brewing Co.*,[21] the Supreme Court held that an award of attorney's fees under the Lanham Trade-Mark Act would be inappropriate. The Court briefly dismissed both of the first two exceptions to the American rule as being inapplicable to the facts of the case.[22] Consideration was then given to whether an award of counsel fees would effectuate the congressional intent underlying the Act.

It was decided that because the remedial section was drafted with intricate detail, a broadening of the remedies of that Act would be contrary to the congressional intent.[23]

Judicial consideration of congressional intent is therefore the key to determining when the third exception may appropriately be implemented. A statute need not, however, *expressly* provide for an award. There is sufficient authorization if the award effectuates the congressional policy implicit in the language of the statute.[24]

B. *Circuit Courts' Interpretations of Section 102*

Six circuit courts ruled on the propriety of a district court's award of counsel fees under section 102 prior to *Hall*.[25] The Sixth Circuit Court, in *McGraw v. United Association of Journeymen*,[26] was the first to decide this issue. It was the only circuit court to reject the idea that counsel fees are within the ambit of section 102. The court reiterated the contention of the district judge that because no provision is made for attorney's fees under either sec-

[19]Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).

[20]Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

[21]*Id.*

[22]*Id.* at 721.

[23]*Id.* at 719-20.

[24]Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

[25]Kerr v. Screen Extras Guild, 466 F.2d 1267 (9th Cir. 1972); Yablonski v. United Mine Workers, 466 F.2d 424 (D.C. Cir. 1972); Cole v. Hall, 462 F.2d 777 (2d Cir. 1972); Burch v. International Ass'n of Machinists, 454 F.2d 1170 (5th Cir. 1971); Gartner v. Soloner, 384 F.2d 348 (3rd Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968); McGraw v. United Ass'n of Journeymen, 341 F.2d 705 (6th Cir. 1965).

[26]341 F.2d 705 (6th Cir. 1965).

tion 101 or section 102 of the Act, the court is without jurisdiction to make such an award.[27]

The Third Circuit Court rejected the *McGraw* interpretation in *Gartner v. Soloner*.[28] The court recognized that Congress made no move to "limit or prescribe the scope of recovery" under section 102:

> It should be emphasized that these words [section 102] are not of the limiting type found in *Fleischmann v. Maier Brewing* . . . to restrict recovery to those remedies which are expressly set forth in the statute. In contrast, the scope of authority under Section 102 and the flexibility with which that power may be exercised is practically unlimited in view of the courts [*sic*] legal and equitable jurisdiction.[29]

Gartner dismissed as inconclusive the fact that other sections of the LMRDA specifically permit the award of counsel fees. Rather, because of its broad language, section 102 was found to allow the awarding of attorney's fees.[30]

Each of the five circuit court cases which found that an award of counsel fees was properly within the purview of a district court[31] couched its finding in terms of the discretionary power of the district court. Not one of these opinions suggested that the award was one which the district court must make.

With this background, little if any doubt existed that the Supreme Court ruling in *Hall* would be consistent with the five-to-one circuit court score. And a cursory reading of that opinion might indeed be construed as just that: a mere affirmation of the five circuit courts. Mr. Justice Brennan, the author of the *Hall* opinion, stated in the final sentence of the decision[32] that awarding of counsel fees was within the discretion of the district court. This conclusion would indicate that *Hall* went no further than the five circuit courts' decisions. Does it then follow that Congress intended to empower a district court to pick and choose when it will award attorney's fees to the successful litigant? An analysis

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[27] *Id.* at 710.

[28] 384 F.2d 348 (3rd Cir. 1967).

[29] *Id.* at 354.

[30] *Id.* at 355.

[31] Kerr v. Screen Extras Guild, 466 F.2d 1267 (9th Cir. 1972); Yablonski v. United Mine Workers, 466 F.2d 424 (D.C. Cir. 1972); Cole v. Hall, 462 F.2d 777 (2nd Cir. 1972); Burch v. International Ass'n of Machinists, 454 F.2d 1170 (5th Cir. 1971); Gartner v. Soloner, 384 F.2d 348 (3rd Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968).

[32] Hall v. Cole, 93 S. Ct. 1943, 1951 (1973).

of both the legislative history of Title I[33] of LMRDA and the logic employed by the Court in *Hall* suggests that such awards are not discretionary, but rather are mandatory.

III. FEE-SHIFTING—MANDATORY

The legislative history of Title I reveals a congressional desire to protect union democracy. Protection of these democratic rights was of public concern because free exercise of these rights was found to be in the public interest. Senator McClellan, when introducing Title I, stated his belief that "racketeering, corruption, abuse of power and other improper practices" would never be prevented until Congress prescribed "minimum standards of democratic process."[34] "Without such protection," he declared, "other provisions of law may be of little benefit and meaningless."[35] During the course of the debate, he summarized the basic policy underlying Title I:

> If we want fewer laws—and want to need fewer laws—providing regulation in this field, we should start with basic things. We should give to union members their inherent constitutional rights, and we should make those rights apply to union membership as well as to other affairs of life. We should protect the union members in those rights. By so doing we will be giving them the tools they can use themselves.[36]

Although responsibility for enforcement of these rights was first placed with the Secretary of Labor, section 102 was later amended to permit the individual union member to bring the action on his own behalf.[37] The rights were no less infused with public concern, for effective enforcement of these guarantees was essential to facilitate the congressional policy. Rather, the congressional intent was to avoid "bureaucratic chaos"[38] by allowing individual union members to serve as substitutes for the Secretary of Labor. This change harmonized with the goals of protecting the rights of the individual member and the continued building of a democratic process within a union. The Court in *Hall*

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[33]Title I of the LMRDA is the so-called civil rights provision of the Act. These rights are those possessed by rank and file union members and are enumerated in section 101 of the Act. Section 102 provides for civil enforcement in the event that a person's rights under Title I have been infringed.

[34]U.S. DEP'T OF LABOR, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1098 (1960).

[35]*Id.*

[36]*Id.* at 1103.

[37]*Id.* at 1102.

[38]*Id.* at 1113, 1114, 1117.

recognized that to deny counsel fees would be to frustrate the basic purpose of the Act:

> Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge . . . . Congress passed the Act in an effort to offset the heavy hand of the union by giving the union members the aid of the federal courts.[39]

Moreover, federal courts have an affirmative duty to fashion effective remedies, remedies which are encompassed within the purpose of a statute.[40] Consequently, federal courts must protect the litigant's right to this remedy. A district court which rejects a successful plaintiff's plea for counsel fees likewise denies aid that Congress has sought to insure. "Tools" with which the individual was to have been able to protect his Title I rights are withdrawn.

The Court in *Hall* also noted that the union was benefited by John Cole's action, just as any union is "necessarily" benefited by a successful section 102 action. Union self-government is strengthened and the freedoms of all members are articulated and protected. Cole, by vindicating his right to present a resolution on union policy, opened a forum for debate and insured that future union decisions would be both more responsible and more responsive. "And, by vindicating his own right, the successful litigant dispelled the 'chill' cast upon the rights of others."[41]

Although damages are available under section 102, in many cases there is no pecuniary loss, or the damage may be difficult to prove. John Cole, after pursuing his civil action for 7 years, was found to have suffered no compensable damage.[42] If successful plaintiffs are forced to bear their own counsel fees, few aggrieved parties will be both willing and in a position to bring suit. Both Congress and the Court wanted to avoid this situation.

Finally, the expense that a plaintiff under section 102 incurs is directly related to benefits which a union "necessarily" receives. But there is no contractual obligation which requires a union to compensate a member plaintiff. Mandatory fee-shifting will correct this situation by shifting this obligation to the union.

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[39]Hall v. Cole, 93 S. Ct. 1943, 1951 (1973).

[40]Leo v. Southern Home Sites Corp., 444 F.2d 143, 144 (5th Cir. 1971).

[41]Hall v. Cole, 93 S. Ct. 1943, 1948 (1973).

[42]Cole v. Hall, 462 F.2d 777 (2d Cir. 1972).

On the other hand, failure on the part of any court to award legal fees condones a union's unjust enrichment.

The Court's logic in *Hall* is clear. A successful section 102 action will always bestow a benefit upon a union and its members. Justice demands that the union bear the cost of this benefit. While the plaintiff and not the union is contractually bound to pay legal expenses, fee-shifting transfers this expense from the plaintiff to the union. Legislative history makes it apparent that congressional policy is bent on protecting Title I rights. It therefore would be a perversion of justice and a mockery of congressional policy to permit the use of union funds to pay litigation costs incurred in resisting recognition of democratic rights, but to deny these funds to one seeking to protect these rights. *Hall* demands that fee-shifting be more than discretionary, that it be mandatory.

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