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## Education Law News

Recent Developments Regarding Attorney Fee Awards

### **Ninth Circuit Wrestles With Supreme Court Decision Limiting Definition of “Prevailing Party” When Awarding Attorney Fees Under Federal Laws**

In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), a 5 to 4 decision, the United States Supreme Court addressed the issue of who is a “prevailing party” for the purpose of receiving an award of attorney fees under the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, and the Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. §§ 3601 *et seq.* Although the lawsuit in *Buckhannon* involved only these two statutes, the breadth of the Supreme Court’s decision appears to encompass many more federal statutes that allow “prevailing parties” to recover attorney fees. The Ninth Circuit Court of Appeals has decided three important cases interpreting *Buckhannon*. This article will discuss *Buckhannon* and the resulting Ninth Circuit Court of Appeals decisions.

#### ***Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources: A Party Who Fails to Secure a Judgment on the Merits or a Consent Decree Is Not a “Prevailing Party” Under ADA and FHAA***

Buckhannon Board and Care Home, Inc., which operates assisted living homes, failed a fire inspection because some of the residents were incapable, under West Virginia State law, of self-preservation in situations involving imminent danger, such as fire. After receiving orders to close its facility, Buckhannon Board sued the State of West Virginia, claiming the self-preservation requirement violated the FHAA and the ADA. The West Virginia Legislature then eliminated the self-preservation requirement and the federal district court dismissed Buckhannon Board’s lawsuit because it was moot.

Buckhannon Board asked the trial court to award it attorney fees as the “prevailing party” in the lawsuit because the West Virginia Legislature had voluntarily changed the law. Following decisions by both the district court and the Fourth Circuit Court of Appeals that Buckhannon Board was not the prevailing party and could not recover attorney fees, the United States Supreme Court agreed to hear Buckhannon Board’s appeal.

In *Buckhannon Board*, the Supreme Court rejects the “catalyst theory” used to determine who is the “prevailing party.”

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The determination of who was the “prevailing party” under the two federal statutes centered on the “catalyst theory.” Under this theory, a plaintiff is considered a prevailing party if it achieves the desired result because the lawsuit brings about a voluntary change in the defendant’s conduct. The catalyst theory does not require the plaintiff to receive a judgment on the merits or a consent decree (a settlement accomplished through a court order to which the parties agree to be bound).

Every federal circuit court of appeals that had addressed the issue, with the exception of the Fourth Circuit, had adopted the catalyst theory. Nonetheless, the Supreme Court rejected the catalyst theory and held that a plaintiff is a prevailing party under the ADA and FHAA only where there is an enforceable alteration of the legal relationship of the parties. This occurs when the plaintiff receives an award of some relief from the court; for example, if it attains an enforceable judgment on the merits or a court-ordered consent decree. It is not enough to merely show that, during the lawsuit, the defendant voluntarily changed its behavior.

***Bennett v. Yoshina. Buckhannon Applies to Attorney Fee Awards Under the Civil Rights Attorney’s Fees Awards Act of 1976***

In *Bennett v. Yoshina*, 259 F.3d 1097 (9<sup>th</sup> Cir. 2001), a three-judge panel of the Ninth Circuit Court of Appeals, relying on *Buckhannon*, denied an award of attorney fees under the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988.

In *Bennett*, the plaintiffs sued various Hawaii State officials and entities in federal court. They alleged violations of the United States Constitution arising out of a vote on holding a state constitutional convention. The Ninth Circuit Court of Appeals ruled against the plaintiffs; however, while the Court of Appeals was considering whether to reconsider its decision, the Hawaii Legislature passed a bill providing for a second vote on the constitutional convention. The day after the governor signed the bill into law, the Court of Appeals said it would not reconsider its decision.

The plaintiffs then asked for an award of attorney fees, relying on the catalyst theory and arguing that their lawsuit had brought about a voluntary change. The Court of Appeals denied the request for attorney fees. Acknowledging that *Buckhannon* involved only the ADA and FHAA, the Court nevertheless stated, “There can be no doubt that the Court’s analysis in *Buckhannon* applies to statutes other than the two at issue in that case. Specifically, the provision at issue in this case, the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988, was cited by the Court as a ‘nearly identical [fee-shifting] provision[ ]’ to the two at issue in *Buckhannon* . . . .” Thus, the Court held that the catalyst theory did not apply and denied the request for attorney fees because the plaintiff had not obtained a judgment on the merits or a consent decree.

In the *Bennett* case, the court again rejects the “catalyst theory” because plaintiff had not obtained a judgment on the merits or a consent decree.

## ***Perez-Arellano v. Smith. Buckhannon Applies to Attorney Fee Awards Under the Equal Access to Justice Act***

The plaintiff in *Perez-Arellano*, 279 F.3d 791 (9<sup>th</sup> Cir. 2002), sued the Department of Immigration and Naturalization Service (INS), seeking review of the INS's denial of his application for citizenship. While his lawsuit was proceeding, the plaintiff resubmitted his application of naturalization and the INS granted it. Based on a joint motion of the plaintiff and the INS, the lawsuit was dismissed.

The plaintiff then sought attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A). Relying on *Buckhannon*, a three-judge panel (different from the panel in *Bennett*) of the Ninth Circuit Court of Appeals held that the plaintiff was not the prevailing party, because he had not received an enforceable judgment on the merits or a settlement agreement enforceable through a court-ordered consent decree. The Court of Appeals concluded that there was “no reason to interpret the EAJA inconsistently with the Supreme Court’s interpretation of ‘prevailing party’ in the FHAA and the ADA as explained in *Buckhannon*.”

## ***Barrios v. California Interscholastic Federation: Plaintiff Can Recover Attorney Fees in ADA Lawsuit Because He Entered into a Settlement Agreement***

The plaintiff in *Barrios v. California Interscholastic Federation*, 277 F.3d 1128 (9<sup>th</sup> Cir. 2001), sued several entities under the ADA, claiming that they discriminated against him when they prohibited him from going onto the baseball field to coach because he was in a wheelchair. After several months of negotiations, the parties agreed on a settlement, which provided that the plaintiff would be allowed to coach baseball on the field and would receive \$10,000 in compensatory damages. The trial court entered a judgment and order according to the terms of the settlement agreement. However, it subsequently vacated that order and the parties thereafter agreed to a dismissal of the lawsuit.

The plaintiff then asked the trial court to award him attorney fees. A three-judge panel of the Ninth Circuit Court of Appeals (again different from the panels in *Bennett* and *Perez-Arellano*) held that the plaintiff was the prevailing party and entitled to attorney fees, because he could “enforce the terms of the settlement agreement.” The Court implicitly concluded that the “legal relationship is altered because the plaintiff can force the defendant to do something he otherwise would not have to do.”

The Court noted that *Buckhannon* did not prohibit it from determining that the plaintiff was the prevailing party. According to the Court, the settlement agreement afforded Barrios “a legally enforceable instrument,” making him a prevailing party. The Court of Appeals discounted the Supreme Court’s statement that suggested that “a plaintiff ‘prevails’ only when he or she receives a favorable judgment on the merits or enters into a court-supervised consent decree.” Important to the Court of Appeals was a provision in the settlement agreement

In *Perez-Arellano*, the Court of Appeals concurs with the Supreme Court’s interpretation of “prevailing party” as explained in the *Buckhannon Board* case.

allowing the trial court to “retain jurisdiction over the issue of attorneys’ fees, thus providing sufficient judicial oversight to justify an award of attorneys’ fees and costs.”

*Conclusion:*

**The Ninth Circuit Court of Appeals, En Banc, Must Determine Whether a Settlement Agreement, Unapproved by the Court, Makes a Plaintiff a Prevailing Party**

Because the parties jointly agreed to dismiss the lawsuit, the court did not approve the settlement agreement in *Barrios*. It appears from the language of *Buckhannon* that, under those circumstances, the plaintiff should not be considered a prevailing party because he did not receive a judgment on the merits or a settlement enforceable by the court through a consent decree. In finding that the plaintiff was the prevailing party, however, the three-judge panel of the Court of Appeals relied on the fact that, although the settlement was not approved by the court, it could be enforced by the courts like other contracts. This finding seems to run counter to the decisions in *Buckhannon*, *Bennett*, and *Perez-Arellano*. To resolve the apparent conflict and to establish a clear precedent for trial courts to follow, the Ninth Circuit Court of Appeals, en banc, will inevitably have to hear the issue.

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The *Barrios* case is different because the parties entered into a settlement agreement.

However, there is discrepancy regarding whether the agreement needs to be approved by the court.

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