United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

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SECRETARY OF LABOR Complainant, v. MEGAWEST FINANCIAL, INC. Respondent.	OSHRC DOCKET NO. 93-2879

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on November 2, 1995. The decision of the Judge will become a final order of the Commission on December 4, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before November 22, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: November 2, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-2879

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant-respondent, v. MEGAWEST FINANCIAL, INC., Respondent-petitioner.	OSHRC Docket No. 93-2879

DECISION ON FEE AND EXPENSE APPLICATION

Megawest Financial, Inc., seeks attorney fees and other expenses it incurred during its successful defense against a serious citation issued by the Secretary of Labor on October 12, 1993. Pursuant to The Equal Access to Justice Act [5 U.S.C. 504] and implementing regulations at 29 C.F.R. § 2204.101, Megawest petitioned for a total of $16,824.30 in fees and expenses: $14,992.50 in attorney fees and $1,831.80 in expenses. By Order dated September 6, 1995, Megawest's request for attorney fees was struck from the petition. Megawest asks for reconsideration of the Order striking fees.[1] The September 6 Order also required Megawest to supplement its petition with a more detailed net worth exhibit, which it has now done.

The EAJA

The EAJA was designed to encourage persons of limited means to seek review of, or defend against, unjustified governmental actions. *Nitro Electric Co.*, 16 OSHC 1596 (No. 91-3090, 1994). The EAJA does not routinely provide for awards to the prevailing party, even if that party meets the

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1 Megawest also renews its argument that the Secretary's response to the application was untimely. Megawest filed its application with the Review Commission in Washington D.C. on July 17, 1995. Although filing with the Commission, it did not serve the Secretary's representative, either in Atlanta or in Washington. Therefore, the Secretary's time to respond did not begin to run until the Solicitor's Office received a copy of Megawest's application. The Secretary's response was timely filed.

financial eligibility criteria. Payment is to be ordered only if the Secretary has acted without substantial justification or where there are no special circumstances which make the award unjust.

Criteria for Eligibility

The Secretary's case against Megawest involved one alleged violation of the general duty clause. That violation was vacated after a hearing on the merits. Megawest was the prevailing party in this action. Under the EAJA a prevailing party must meet initial eligibility requirements. A corporation such as Megawest cannot have a net worth of more than $7 million or employ more than 500 employees to qualify for an award. Megawest has submitted financial and other data, affied to be correct, which is sufficient to establish eligibility under the Act.

No Reimbursement for Attorney Fees for Pro Se Litigant

Although having struck that portion of the application which sought reimbursement for attorney fees, Megawest requested reconsideration. The decision to strike fees has been reviewed. Peter Anzo, Megawest's president, represented the corporation *pro se* at all stages of the litigation. Megawest argues that since its president acted only as an agent of the corporation, it is entitled to the fees paid to one "engaged in the business of acting as attorneys, *agents*, and expert witnesses. . ." (§ 2204.107(a); emphasis added). It is well settled that a *pro se* litigant is not entitled to a reimbursement for fees under the EAJA and similar statutes, including reimbursement for necessary preparation time, lost opportunity and personal effort. *E.g., Kay v. Ehrler*, 499 U.S. 432, 435 (1991); *Benavides v. Bureau of Prisons*, 61 LW 2738 (DC Cir. 1993); *Merrell v. Block*, 809 F.2d 639, 642 (9th Cir. 1987). By its nature a corporation always acts through its agents. Even though Megawest's president is an "agent" of the corporation, the fact remains that the entity represented itself in the litigation. An hourly reimbursement for the time expended by Peter Anzo could not be awarded, even if payment was otherwise appropriate.

History of Allegation

In determining the merits of the EAJA application, the facts of record and those known to the Secretary when he proceed with the case are weighed.[2] The action must remain substantially justified

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Commission rule 2204.307 specifies that an award shall be made on the basis of the written record, except where the parties' request otherwise or where the Judge orders further proceedings. Neither party requested additional proceedings.

from the time of citation through the time of hearing. *Consolidated Constr., Inc.*, 16 OSHC 1001 (No. 89-2839, 1993).

Megawest is a service corporation which employs personnel to manage apartment communities for the owners. One such managed apartment complex was the Villas, located in greater Fort Lauderdale, Florida. In the course of their employment, Megawest's employees at the Villas were subjected to verbal and, on occasion, to physical abuse from residents. After a series of such incidents, employees filed a formal complaint with OSHA, seeking protection from the perceived danger in their workplace. OSHA investigated the complaint.

OSHA investigator Michael Illes considered the case to be unusual and one of a very few that involved workplace violence. He tried to make his investigation exhaustive, explaining that he demanded specific proof to be assured that "this wasn't just a frivolous complaint that somebody was threatened one time and then they called OSHA" (Tr. 348). The office employees believed they were in serious physical danger. One of the staff members who complained to OSHA, Paula Powers, was Megawest's manager at the Villas. Her knowledge of the violent conduct the residents directed at the staff was specifically conveyed to Megawest's upper management. That concern was stated orally and in writing before the employees complained to OSHA (Tr. 294). The staff gave Illes six police report numbers. One referred to a macing incident which resulted in two staff employees being hospitalized and losing workdays. Another incident involved having the office door kicked in by an irate, threatening tenant. Illes also observed an assault on an office worker by a resident while Illes was interviewing the employees concerning their OSHA complaint (Tr. 348-49). Illes learned from the local police that the apartment community was in a "high crime area," and he secured a printout showing a high number of police interventions on behalf of the Villas' staff. Illes became convinced that the office employees were exposed to a constant threat of violence and that there was a high probability that someone could get seriously hurt (Tr. 373-74). Illes went to other apartment complexes in the area which he considered comparable to the Villas. These had some type of additional security for the office workers (Tr. 355-63, 399). Based on a then-recent NIOSH (National Institute for Occupational Safety and Health) study, Illes knew that over 800,000 injuries and over 1,000 homicides were reported each year because of workplace related violence. Illes

described how concerned OSHA was with the issue of workplace violence and opined that it intended to pursue such cases in the future (Tr. 416).

In addition to Illes, the Secretary's witnesses included law enforcement officers, members of the Villas office staff, managers from surrounding apartment communities, and its expert witness. The expert witness offered his opinion that the residents presented a hazard to the safety of the Villas' staff. He suggested methods by which the alleged hazard could be addressed and minimalized (Tr. 435-461). The Secretary presented proof for each of the § 5(a)(1) elements.

Substantially Justified

The Secretary has the burden of demonstrating that an award should not be made in a given case because its action was substantially justified or other circumstances make an award unjust. *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1209 (5th Cir. 1991). This burden is not insurmountable. "The standard . . . should not be read to raise a presumption that the Government's position was not substantially justified, simply because it lost the case." 1980 U.S. Code Cong. & Admin.. News at 4989 & 4997. "Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose." *Pierce v. Underwood,* 487 U.S. 552, 569 (1988).

The test is whether the Secretary had a reasonable basis in fact and in law. *Id.* at 565. The facts forming the basis for a governmental action need not be uncontradicted. If reasonable persons may fairly disagree whether evidence establishes a fact in issue, the evidence can be said to be substantial. In the main, the parties did not dispute the salient facts. They did dispute, however, whether legal conclusions could be supported by those facts. A legal position must be based on more than supposition or conjecture. It should be of a kind a reasonable mind might accept as adequate to support the proposed legal conclusion.

This was a case of first impression involving a general duty charge for violence in the workplace. The Secretary argues that his legal theory was substantially justified because he met accepted criteria for proving a general duty violation: (1) there was a hazard; (2) respondent's management was aware of the hazard (recognition); (3) the probable result was serious injury; and (4) a feasible means existed to reduce the hazard. Megawest, on the other hand, contends that "it should have been apparent that the employer cannot control the actions of the individuals the

employees were paid to serve" and that there was no substantial justification for bringing a general duty action against it.

When enacting the EAJA, Congress stressed that the Act should not deter the government from pursuing in good faith actions which credibly extend the law, although proceeding into novel areas of governmental enforcement. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4953, 4990. The law involving workplace violence is unsettled both under the OSH Act and in the field of private litigation. As stated, there was no Commission precedent specifially on point. Further, it is recognized that before and during this litigation, private individuals brought personal injury lawsuits arising from workplace violence in a number of jurisdictions. Many courts hearing these private actions considered the issue in terms of foreseeability, but even these courts have reached differing conclusions regarding liability. The Commission recognizes that substantial justification may more readily be found when the law of the case is in its formative stages. *See Mautz & Oren Inc.*, 16 BNA 1006, 1011 (No. 89-1366, 1993). The Secretary viewed this novel issue as a logical extension of accepted legal principles. Although ultimately not persuasive, the Secretary's position was based on more than supposition or conjecture. The legal conclusions flowed from a rational process of reasoning and logical deduction. Accordingly, the Secretary was substantially justified both in fact and in law in proceeding with the litigation.

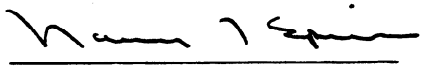
Conclusion

As the Secretary's counsel stated at the close of hearing and as this judge also observed, Peter Anzo ably represented Megawest in this action. Awards must be consistent with the intent of the EAJA, however, regardless of the skill of an advocate or the financial circumstances of a respondent. In light of the factual and legal presentation made by the Secretary, it would be inappropriate to award fees against him because he sought to extend OSHA's protection to service employees exposed to violence in the workplace.

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ. P.

ORDER

Based upon the foregoing decision, it is ORDERED that the application for attorney's fees and expenses in this case is DENIED.



NANCY J. SPIES
Judge

Date: October 25, 1995