

Immigrants Can Sue Over Sexual Assaults

By John Roemer
Daily Journal Staff Writer

Two female Chinese immigrants who were asked for bribes and sexually assaulted by a federal asylum officer can sue for infliction of emotional distress and for interference with their civil rights, a divided 9th U.S. Circuit Court of Appeals panel held on Thursday.

The 2-1 decision reversed Senior U.S. District Judge Consuelo B. Marshall of Los Angeles. The opinion, by Senior Circuit Judge John T. Noonan Jr., explored the intersection of California law with the Federal Tort Claims Act. *Lu v. Powell*, 2010 DJDAR 14025.

Asylum Officer Thomas A. Powell Jr. of Anaheim asked Xue Lu and Jie Hao for bribes and touched them sexually in separate incidents at the women's homes in 2000, following initial asylum interviews at his office. In both cases Powell made it clear that the bribes and sexual favors were the price the women would have to pay for him to grant them asylum. Each woman informed her lawyer, and Hao wore a wire during Powell's visit to her.

Though the women did not know one another, they were linked by chance through the immigration attorney who represented both of them, Douglas Ingraham, a Venice sole practitioner who reported Powell to authorities.

"These weren't his first victims," Ingraham said Thursday. "His luck just ran out with these two."

Powell was tried, convicted and

sentenced to almost four years in prison for soliciting sex and money from asylum seekers; he committed suicide in prison soon after.

In 2001, the women sued Powell and the government for infliction of emotional distress, deprivation of their civil rights, negligent employment and other claims. Their case

"Obviously the United States had not employed him to prey on asylum petitioners or seek graft from their perilous predicaments," wrote Noonan in explaining Marshall's reasoning. "Self evidently, it may have seemed, an asylum officer gone bad had stepped out of his assigned job in order to become a predator."

to spread the risk of loss.

"Powell abused his powers for his own benefit," wrote Noonan, joined by Circuit Judge Richard R. Clifton. "In doing so, he acted within the scope of his employment as defined by California. To compensate his victims, spread the loss, and stimulate the government to greater vigilance in controlling aberrant behavior, California law makes the United States bear the cost of Powell's conduct, unauthorized but incidental to the asylum system."

Dissenting, Circuit Judge Jay S. Bybee argued that even under California law, the federal government has no responsibility for Powell's acts.

"His authority to grant or deny Lu's asylum application does not persuade me that vicarious liability should attach to the United States for Powell's lewd and selfish conduct," Bybee wrote. "Likewise, the fact that Powell used his authority to come over to Lu's home does not make his subsequent criminal activity fall within the scope of his employment."

When the case returns to Marshall's courtroom for trial, DeSimone said, he intends to ask for substantial damages in compensation. "Of course, we'll allow Judge Marshall to decide what is fair," he said. "But today is a great day for justice."

Department of Justice spokesman Charles Miller declined to comment on the case.

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DOUGLAS INGRAHAM
SOLE PRACTITIONER

was delayed while Powell's criminal prosecution proceeded; when it resumed, Marshall dismissed the claims under the Federal Tort Claims Act, which governs lawsuits against the U.S. government and its officials. Marshall concluded that Powell in his interactions with Lu and Hao was not acting within the scope of his employment as an asylum officer.

Both appealed the dismissal, aided by V. James DeSimone of Schonbrun DeSimone Seplov Harris Hoffman & Harrison in Venice. In the intervening decade, Lu has been ordered deported because she was unable to persuade an immigration judge that her asylum claim was valid. The order has been stayed while her civil case progresses. Hao has joined the U.S. Army.

But the tort claims act takes into account the law of the state where the wrong occurred, and Noonan noted that Marshall did not consider California's rule that "an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment ... even though the employer has not authorized the employee to commit crimes or intentional torts."

Noonan cited California Supreme Court Associate Justice Kathryn Mickle Werdegar, who explained the rationale for the rule in *Lisa M. v. Henry Mayo Newhall Memorial Hosp.*, 12 Cal.4th 291 (1995). Three public policy considerations were involved, Werdegar wrote, including the need to increase employers' vigilance, the need to ensure compensation for injuries and the need