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9th Circ. Vacates \$1M Atty Fees Award In Asylum Bribery Suit

By **Mike LaSusa**

Law360 (April 17, 2019, 8:46 PM EDT) -- A Ninth Circuit appeals panel on Wednesday sent a lawsuit over an asylum officer's alleged bribery and sexual misconduct back to trial court and ordered a California federal judge to reconsider her previous award of nearly \$1 million in attorney fees in light of a 2017 U.S. Supreme Court ruling.

The three-judge panel said that when the trial judge made her decision on the fee award, the Supreme Court hadn't yet decided **Goodyear v. Haeger**, which **set limits** on judges' abilities to award attorney fees as a punishment rather than to simply make victims whole.

"In short, Goodyear clarified that when awarding attorneys' fees as a sanction for bad faith conduct, a district court must identify the conduct that abused the judicial process and, applying Goodyear's but-for standard, identify only those expenses that the wronged party would not have incurred but for the misconduct," the appeals panel said.

The unanimous, published opinion, penned by Circuit Judge Sandra S. Ikuta, said the district court would have to trace any attorney fees to be awarded back to specific misconduct by the government, unless the district court determined the case was "exceptional" because the government's bad faith conduct "so permeated the suit as to make that misconduct a but-for cause of every subsequent legal expense."

The appeals panel cited "several indications" the case at hand may not clear the bar for being "exceptional," but plaintiffs' attorney Jim DeSimone told Law360 on Wednesday that he sees it differently.

"We believe this falls into the category of exceptional cases," he said.

The lawsuit stems from two incidents in the year 2000, during which an asylum officer named Thomas Powell attempted to solicit sexual favors and monetary bribes from Chinese women seeking asylum in the U.S.

According to court records, one of the women agreed to participate in a sting operation that ended up helping to convict Powell on criminal charges, but during the operation, Powell sexually assaulted her. The two women sued the government over Powell's conduct and after years of litigation eventually won a ruling in their favor.

After the favorable decision by the trial court in 2013, the women filed a bid for attorney fees. The trial court awarded \$881,675 in fees, finding that not all of the government's conduct was in bad faith, but that the bad faith conduct "affected all portions or phases of the litigation."

The government appealed, but the Ninth Circuit upheld most of the decision. However, the appeals court kicked the fee issue back to the trial court, and in the second go-around in 2016, the district judge ended up awarding the women \$993,758 in attorney fees.

The government appealed again, sending the case back to the Ninth Circuit, which issued the latest ruling Wednesday.

DeSimone, the plaintiffs' lawyer, said he is "confident" that on remand, the trial judge will grant his clients the award they're seeking.

"These two asylum seekers cooperated with the United States, and helped put this asylum officer in jail for his misconduct," he said.

The government did not respond to requests for comment Wednesday.

U.S. Circuit Judges Sandra S. Ikuta and John B. Owens, along with U.S. District Judge Haywood S. Gilliam Jr., sitting by designation, sat on the panel.

The plaintiffs were represented by Jim DeSimone of V. James DeSimone Law, Douglas Grant Ingraham of the Law Offices of Douglas G. Ingraham, and Colleen M. Mullen and Michael D. Seplow of Schonbrun Seplow Harris & Hoffman LLP.

The government was represented by Karen Schoen and Charles W. Scarborough of the U.S. Department of Justice Civil Division.

The case is Xue Lu et al v. U.S., case numbers 17-55040 and 17-55087, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Abbie Sarfo.