

9th Circuit Vacates Attorney Fees In Asylum Case Against Government

By Malcolm Maclachlan | Apr. 19, 2019

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Citing a 2017 U.S. Supreme Court decision, the 9th U.S. Circuit Court of Appeals on Thursday vacated \$993,758 in attorney fees in a lawsuit against the federal government over an officer who demanded bribes and sexual favors from two women from China who were seeking asylum.

Citing a 2017 U.S. Supreme Court decision, the 9th U.S. Circuit Court of Appeals vacated \$993,758 in attorney fees Thursday in a lawsuit against the federal government over an officer who demanded bribes and sexual favors from Chinese women seeking asylum.

The case began after the two women from China claimed in 2000 they were sexually assaulted and asked for bribes by Thomas Powell, the U.S. Immigration and Naturalization Service officer evaluating their asylum claims. In 2004, Powell was convicted of two federal corruption counts and sentenced to four years in prison, where he committed suicide.

The women filed a civil suit in 2001. In 2013, *V. James DeSimone*, founding partner of V. James DeSimone Law in Marina Del Rey, won \$1.2 million in damages after a court ruled the government liable for Powell's conduct. *Lu v. United States*, 2019 DJDAR 3223.

U.S. District Judge Consuelo B. Marshall of Los Angeles approved DeSimone's fees, but the U.S. Department of Justice appealed, citing the U.S. Supreme Court decision. *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017).

In an 8-0 ruling, the high court found in *Goodyear* that when a federal court "sanctions bad-faith conduct by ordering a litigant to pay the other side's legal fees, the award is limited to the fees the innocent party incurred solely because of the misconduct."

In applying the *Goodyear* test to *Lu*, 9th Circuit Judge [Sandra S. Ikuta](#) found the question of bad faith was difficult to untangle.

Marshall applied a pre-*Goodyear* bad faith test to the government's actions, such as when a federal law enforcement officer failed to intervene when one of the plaintiffs suffered a subsequent assault while helping with a sting operation against Powell.

But these standards were inconsistent with the new case law and "were recoverable merely because the government's bad faith conduct" existed at the beginning of litigation, Ikuta added.

The appeals court judge wrote that the bad faith did not rise to the level of a "sordid scheme," as identified in *Goodyear*, which would permeate all subsequent actions by the government. For instance, she said there was no evidence the government harassed the women or delayed their asylum claims after the initial wrongdoing by Powell was uncovered.

Ikuta remanded the matter for a "do-over," writing that if the district court finds the case fits into an exception to the precedent, "it must explain why."

9th Circuit Judge [John B. Owens](#) and U.S. District Judge [Haywood S. Gilliam Jr.](#) of the Northern District of California, sitting on the panel by designation, agreed with Ikuta's ruling.

"We will make an application to Judge Marshall for her to award the same attorneys' fees that were awarded the first time around, because we feel strongly that this is an exceptional case in which bad faith permeated the litigation," DeSimone said.

"Frankly, we should have had closure in that we've been litigating this for 20 years," he added. "They've done everything they can to avoid fairly compensating our clients."

The U.S. Department of Justice could not be reached for comment Thursday.

