SCOTUSwiki Analysis of and Information About the Supreme Court's 2009-10 Term
Employment and Labor Related Cases:
PROCEDURE

Submitted by

Thomas C. Goldstein
Akin Gump Strauss Hauer & Feld LLP
Washington, D.C.

Links to briefs, certiorari-stage documents, and other documents appearing on the following SCOTUSwiki web pages can be accessed by clicking on (or cutting and pasting into a web browser) the underlined link appearing at the bottom of each web page.

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Perdue v. Kenny A.

From ScotusWiki

Argued October 14, 2009.

Authorship: Scott Street of Akin Gump (with SCOTUSblog’s Lyle Denniston covering the cert.-stage proceedings)

Issue: The grant is limited to question one of the petition: Can a reasonable attorney’s fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation?

Docket: 08-970

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Briefs and Documents

Decision


Oral Argument

Transcript (October 14, 2009)

Merits Briefs

- Brief for Petitioner Sonny Perdue, In His Official Capacity as Governor of Georgia, et al.
- Brief for Respondent Kenny A., By His Next Friend Linda Winn, et al.
- Reply Brief for Petitioner Sonny Perdue, In His Official Capacity as Governor of Georgia, et al.

Amicus Briefs

- Brief for the States of Alabama, Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Indiana, Maine, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania,
Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming, and
The District of Columbia in Support of Petitioner

- Brief for the United States of America in Support of Petitioner
- Brief for the National School Boards Association in Support of Petitioner
- Brief for the The National Governors Association, National Conference of State Legislatures, National Association of
Counties, International City/County Management Association, and International Municipal Lawyers Association in Support
of Petitioner
- Brief for the Association County Commissioners of Georgia in Support of Petitioner
- Brief for the Washington Legal Foundation in Support of Petitioner
- Brief for the Old Republic Insurance Company and the National Association of Waterfront Employers in Support of
Petitioner
- Brief for Small Private Law Firms That Rely on Statutory Fee Awards in Public Interest Litigation in Support of
Respondent
- Brief for NAACP Legal Defense and Education Fund in Support of Respondent
- Brief for the Liberty Legal Institute, the American Center for Law and Justice, the CATO Institute, the Institute for Justice,
Liberty Counsel, Alliance the Defense Fund, and the James Madison Center for Free Speech in Support of Respondent
- Brief for the Lawyers’ Committee for Civil Rights Under Law, AARP, Alliance for Justice, the American Civil Liberties
Union, the Mexican American Legal Defense and Education Fund, the National Disability Rights Network, the National
Partnership for Women and Families, the National Urban League, the National Women’s Law Center, and Public Citizen in
Support of Respondent
- Brief for Law and Economics Scholars Lucian A. Bebchuk, Albert Choi, Andrew F. Daughety, John J. Donohue III,
Theodore Eisenberg, Bruce L. Hay, Avery W. Katz, Herbert M. Kritzer, Jennifer F. Reinganum, and Kathryn Spier in
Support of Respondent
- Brief for the Civil Rights Clinic at Howard University School of Law in Support of Respondent
- Brief for the New York State Bar Association, the Pennsylvania State Bar Association, the Ohio State Bar Association, the
Bar Association of the District of Columbia, the Iowa State Bar Association, the Tennessee State Bar Association, the
Washington Bar Association, the American Association of Jewish Lawyers and Jurists in Support of Respondent
- Brief for the American Association for Justice, Public Justice, P.C., The National Employment Lawyers Association, and
the Impact Fund in Support of Respondent

Certiorari-Stage Documents

- Opinion below (11th Circuit)
- Petition for certiorari
- Brief in opposition

Opinion Recap

Scott Street originally wrote the following for SCOTUSblog:

Although it split the Court into the typical 5-4 split, on its face, there is little that is controversial about the Supreme Court’s
decision in *Perdue v. Kenny A.*

After all, every member of the Court agreed that the lodestar should be used to determine what fees an attorney should be able to
recover under 42 U.S.C. § 1988. They also agreed that the fee yielded by the lodestar should be the presumptive fee and should
only be enhanced in extraordinary circumstances. The justices simply disagreed about whether the district court properly enhanced
the fee that the lodestar yielded in this case.

Despite those agreements, Justice Alito’s majority decision reflects a hostility toward district judges that could produce a new
wave of fee litigation in the circuit courts. And I base that opinion not just on the result (finding an abuse of discretion in the
district court’s decision) or on the fact that, in reversing, the Court decided a question on which it had not granted cert. (although
nothing precludes the Court from doing that), but on the standard that the majority requires district judges to apply when
considering fee enhancements in the future.

Specifically, the majority stated that a fee enhancement is only justified when “specific evidence” shows “that the lodestar fee
would not have been ‘adequate to attract competent counsel.’” Although the Court did not define the term “competent,” it is
difficult to imagine a situation where the lodestar would not hypothetically be sufficient to attract *some* attorney. So long as a
defendant can produce evidence that *some* attorney would have taken the case for the lodestar-produced fee, it seems a court
would have to reject an enhancement.
True, the Court offers some situations that might meet its standard—such as cases in which the attorney’s performance “includes an extraordinary outlay of expenses and the litigation is exceptionally protracted” and in which the “attorney’s performance involves exceptional delay in the payment of fees”—but it limits even those situations by saying that an enhancement should be calculated by an objective formula, “such as by applying a standard rate of interest.”

Indeed, what seemed to trouble the majority most in *Perdue* was not the fact that the district court enhanced the plaintiffs’ attorneys’ fees, but the fact that it enhanced the fees by seventy-five percent, a seemingly arbitrary number. “Why,” Justice Alito wondered, “did the court grant a 75% enhancement instead of the 100% increase that respondents sought? And why 75% rather than 50% or 25% or 10%?” The Court worried that the district court “did not employ a methodology that permitted meaningful appellate review.” And it rejected the idea that a trial judge should be able to enhance fees “on an impressionistic basis,” something that did not concern Justice Breyer’s dissent.

Therefore, after *Perdue*, district judges should remember this: the Supreme Court does not trust you. It is concerned that you get caught up in the heat of litigation, ascribe too much importance to attorney performance, and are too generous in diverting public funds to those lawyers. So if you are going to enhance an award of attorneys’ fees, you better tie it to specific evidence and explain why the lodestar-produced award was not sufficient to attract “competent” counsel. And bear in mind that, because the term “competent” is so undefined, your decision will almost certainly get challenged on appeal.

How will the district judges respond? I suspect that, rather than trying to meet the Supreme Court’s enhancement standard, they will simply adjust their lodestar calculations to give attorneys an amount that the judges think they deserve. After all, district judges are attorneys too, and they understand that some decisions, including this one, are best based on impression rather than a rigid formula. That will force the Court to reassess the question it dodged this time: whether enhancements are ever necessary to fulfill the statutory objectives of Section 1988.

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**Lyle Denniston originally wrote the following for SCOTUSblog:**

Attorneys who take on civil rights cases may need to do some creative re-thinking of how they calculate the basic fees they seek to recover if they win, because the chances that they can get a “bonus” on top of that now seem less likely, even if they do a superb job in winning. That is the message the Supreme Court appeared to be sending Wednesday when it decided the most important attorneys’ fees case in years: *Perdue v. Kenny A.* (08-970). While the Court did not rule out a “performance enhancement” for fee recovery under federal fee-shifting laws, the language and the mood of the controlling opinion could be captured in two words: “almost never.”

Because the Court put such heavy emphasis upon the usually-controlling calculations that go into the so-called “lodestar” amount, attorneys who are confident that they can and will provide a better-than-normal performance will no doubt seek to find ways to quantify performance as a “lodestar” entry, rather than an above-lodestar bonus. It might be done by enhancing the hourly rate, or perhaps clever minds may be able to devise some way to put the quality of lawyering into numbers. What is most clear is that they cannot expect the mere impression that they did well to lead to a fee enhancement.

In one sense, the bottom line of the Perdue ruling may seem unremarkable. The Court ruled that a strong performance by a civil rights lawyer who wins a case can lead to a fee enhancement, but only in “extraordinary circumstances.” But the Court had said exactly that much in prior fee rulings, especially in 1984, 1986 and 1992. But that is only what the decision stands for on the surface. Between the lines of the spare 15-page opinion for the Court by Justice Samuel A. Alito, Jr., lurks a strong devotion to the “lodestar” calculation as the gold standard on fee calculation, and a deep-seated skepticism about superior performance — unless it can be measured by hard, objective, measurable and perhaps even provable factors.

The Alito opinion for five Justices used words like “rare” and “exceptional” to describe a potential case in which a bonus fee might be justifiable. Justice Anthony M. Kennedy, one of the five, said in a separate opinion that such a fee should be awarded “only in the rarest circumstance.” And Justice Clarence Thomas, another one of those five, urged readers to pay close attention to those parts of the Alito opinion that put “precise limitations” on such awards. (The vote on the case was 5-4, with the split keyed to the specific outcome.)

The overall thrust of the main opinion can be seen in a simple fact: the Court overturned a fee enhancement which appeared to be based upon the trial judge’s conclusion that the lawyers who won the case had done the best job of lawyering that the judge had seen “in any other case” over 27 years on the bench. The Court treated that conclusion as having only “an impressionistic basis.” What any judge must do, in setting a fee award, is to lay down “a reasonably specific explanation for all aspects” of the award, in a form that allows “meaningful appellate review,” the Court stressed.