

Academic Component Institutions:
The University of Texas at Arlington
The University of Texas at Austin
The University of Texas at Brownsville
The University of Texas at Dallas
The University of Texas at El Paso
The University of Texas-Pan American
The University of Texas of the Permian Basin
The University of Texas at San Antonio
Institute of Texan Cultures
The University of Texas at Tyler



Health Component Institutions:
The University Southwestern Medical Center at Dallas
The University Medical Branch at Galveston
The University of Health Science Center at Houston
The University of Texas Health Science Center at San Antonio
The University of Texas M. D. Anderson Cancer Center
The University of Texas Health Center at Tyler

THE UNIVERSITY OF TEXAS SYSTEM

Office of General Counsel

201 WEST SEVENTH STREET AUSTIN, TEXAS 78701-2981

TELEPHONE (512) 499-4462

FAX (512) 499-4523

Cullen M. Godfrey

Vice Chancellor and General Counsel

RECEIVED

March 27, 2001

MAR 29 2001

OPINION COMMITTEE

RECEIVED

MAR 28 2001

OPEN RECORDS DIVISION

RQ-0370-9C

The Honorable John Cornyn
Attorney General of the State of Texas
Opinion Committee Division
Price Daniel Sr. Bldg., 6th Floor
209 W. 14th Street
Austin, Texas 78701

FILE # ML-41939-01
I.D. # 41939

Re: Request for Attorney General's Opinion Regarding Section 9-6.33(j) of the 1999
General Appropriations Act

Dear General Cornyn:

Section 9-6.33(j) of the 1999 *General Appropriations Act* states that "The funds appropriated by this Act may not be expended to pay the legal fees or expenses of a lawyer or law firm that represents the State or any of its agencies in a contested matter if the lawyer or law firm is representing a plaintiff in a proceeding seeking monetary damages from the State or any of its agencies." One reasonable construction of this provision would bar all state agencies, including The University of Texas System and its component institutions, from being represented by any lawyer or law firm that also represents a plaintiff who is seeking to recover money from a state agency. Such a construction would conclude that the term "monetary damages" includes attorney fees and costs. This would mean that a lawyer or firm that represented a plaintiff who was suing the University for solely declaratory and injunctive relief but was also seeking to recover attorneys' fees and costs could not be paid from appropriated funds to represent the University or any other state agency in other contested matters. There is a contrary argument that attorneys' fees and costs are distinguishable from monetary damages, and a claim for attorneys' fees and costs by a lawyer or law firm in a suit against the state or any of its agencies does not preclude that same lawyer or law firm from representing the state or any of its agencies in an unrelated contested matter.

March 27, 2001

Page 2

This question arises from an action brought against the University Interscholastic League (UIL), a subdivision of The University of Texas at Austin. See §33.083, *Texas Education Code*. In the instant suit, Dallas Jesuit College Preparatory School and Charles Gonzales have sued the UIL pursuant to 42 U.S.C. §1983 and the *Texas Restoration of Religious Freedom Act*. Plaintiffs are challenging the UIL's rule that only allows public schools to be members. Plaintiffs seek a declaratory judgment and a permanent injunction against the UIL. The plaintiffs are also requesting attorneys' fees and costs. The law firm that is representing the plaintiffs in this action currently represents the University in at least one other contested matter.

There is an appropriate simplicity to the idea that attorneys' fees by any other name are monetary damages. The plain thrust of this provision of the *Appropriations Act* is that the State should not fund a lawyer or law firm in one case while that firm is seeking recovery of any monetary amounts from a state agency in a different case. A reasonable interpretation of the *Appropriations Act* is that appropriated funds should not be used to pay a lawyer in one case who is suing for the payment of state moneys for any purpose in a different case.

It is the Legislature's province to decide who is to receive appropriated funds. Similarly, it is also the Legislature's decision whether to waive sovereign immunity and allow a party suing the state to recover attorney's fees or any other form of money damages. See *Leeper v. Texas Education Agency*, 893 S.W.2d 432 (1994).¹ In the instant case, the plaintiffs have based part of their suit on Chapter 110, *Texas Civil Practices and Remedies Code*. The chapter, also known as the *Restoration of Religious Freedom Act* (the Act), appears to allow a successful plaintiff to recover, among other things, reasonable attorney's fees. Section 110.005 (a)(4), *Tex. Civ. Prac. & Rem. Code*. The Act makes the required clear and unambiguous waiver of sovereign immunity in Section 110.008, *Tex. Civ. Prac. & Rem. Code*, and referring to Section 110.005, provides that "a claimant may sue a government agency for *damages* allowed by that section." (emphasis added)²

Is it a reasonable interpretation of Section 110.008 to conclude that the Legislature intended to waive immunity as to damages and not as to attorney's fees? To hold that "damages" are distinct from "attorney's fees" seems to require such a conclusion. This interpretation would allow Section 110.008 to trump the parts of Section 110.005 that allow for recovery of "attorney's fees, court costs and other reasonable expenses incurred in bringing the action." Just reviewing the statute itself, one could say that it's doubtful that this result is what was the Legislature intended. An applicable rule is that statutory interpretations are to follow the intent of the Legislature and one that defeats the purpose of the legislation is to be rejected so long as another reasonable one exists. *Citizens Bank v. First State Bank, Hearne*, 580 S.W.2d 344, at 348 (Tex. 1979). If this rule gives

¹ When the Legislature makes a decision to waive the state's immunity from any sort of money damages, including attorney's fees, it considers, among other things, its broad duty to the treasury and the taxpayers. See *Leeper v. Texas Education Agency*, 893 S.W. 2d , 432, at 447-450 (Tex. 1994). This duty and others are the same sorts of policy issues that are considered by the Legislature as part of appropriations process.

² The discussion of the Act's waiver of sovereign immunity and a state agencies' liability for damages, attorney's fees and costs is not an admission on these issues and is done solely for the purpose of requesting an Attorney General opinion.

March 27, 2001

Page 3

rise to the conclusion that it was the Legislature's intent that "damages" also means "attorney's fees" under the Act, it surely requires that the phrase "monetary damages" in Section 9-6.33(j) of the 1999 *General Appropriations Act* includes attorneys' fees.

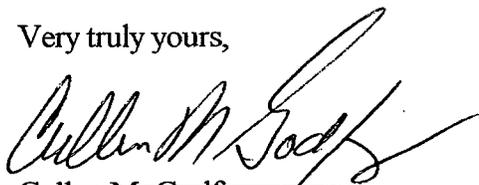
Also consider that attorneys' fees, like other damages, belong to the client and not to the attorney. If a plaintiff is successful in obtaining them in a lawsuit they are paid in money just like any other damage award. Generally speaking, an attorney cannot recover fees without a client, and any judgment entered requiring payment of fees is entered on behalf of the prevailing party and not his or her attorney. In this case, the federal causes of action open the possibility of a fee award under 42 U.S.C. §1988. This section "makes the prevailing *party* eligible for a discretionary award of attorney's fees. Because it is the party, rather than the lawyer, who is so eligible, we have consistently maintained that fees may be awarded under §1988, even to those plaintiffs who did not need them to maintain their litigation..." *Venegas v. Mitchell*, 495 U.S. 82, at 87, (1990) (emphasis in original). Thus, it is the plaintiff alone that is empowered to seek monetary relief under the category of attorneys' fees. Recovery of attorney's fees in such an instance is a facet of money damages recovered by the plaintiff. On the basis of this analysis, it is not an appropriate construction of the cited appropriations section to find that the use of public funds for the payment of "fees" is different from the payment of monetary damages.

Based on the foregoing discussion of the issues that have been raised in this matter, your opinion is requested on the following question:

Does Section 9-6.33(j) of the 1999 *General Appropriations Act* prevent appropriated funds from being used to pay the legal fees of a lawyer or a law firm that is representing a state agency in a contested matter if the same lawyer or law firm is representing a plaintiff who is seeking to recover attorneys' fees but no other monetary damages, as part of an action filed against a state agency?

Please let me know if you need anything further from this office. Thank you for your assistance in helping The University of Texas at Austin and the University Interscholastic League resolve the issue raised by the cited *Appropriations Act* provision and the pending lawsuit.

Very truly yours,



Cullen M. Godfrey