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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-195915

DATE: March 4, 1980

MATTER OF: Wilma Pasake ~~Plaintiff~~
[REQUEST FOR] Court Leave

DIGEST: Although not entitled to court leave authorized by 5 U.S.C. § 6322 which is limited to jurors and certain summoned witnesses, prevailing plaintiff in civil action in U.S. District Court against employing Federal agency based on sex discrimination under the Civil Rights Act of 1964, as amended, is entitled to official time for attendance at trial and should not be charged annual leave or leave without pay.

DLG 03384

Mr. Bernard F. McCullough, Finance and Accounting Officer, U.S. Army Armament Research and Development Command, has requested a decision as to the entitlement of Mrs. Wilma Pasake, an employee of the Command, to court leave.

Mrs. Pasake brought a civil action for sex discrimination against her employing agency in a U.S. District Court under the provisions of section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16(c)). Judgment was entered in her favor and she was awarded a retroactive promotion with backpay and attorney fees.

Mrs. Pasake was charged annual leave for 6 days in February 1979 during which she attended the trial as the plaintiff in this action. She has requested that this charge be changed to administrative or court leave.

Court leave, as that term is generally used, refers to leave authorized by subsection 6322(a) of title 5, United States Code. This subsection provides that a Federal employee is entitled to leave, without loss of or reduction in pay or leave to which he is otherwise entitled, when in response to a summons in connection with a judicial proceeding he serves: (1) as a juror, or (2) except as provided in subsection 6322(b), as a witness on behalf of any party when the United States, the District of Columbia, or a state or local government is a party to the proceeding. Subsection 6322(b) provides that an employee

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is not on leave but is performing official duty when in response to a summons or order of his agency he: (1) testifies or produces official records on behalf of the United States or the District of Columbia, or (2) testifies in his official capacity or produces official records on behalf of any other party.

Mrs. Pasake's appearance in court as the plaintiff in a sex discrimination action does not appear to be covered by any of the foregoing provisions. However, in Coles v. Martin, Civil Action No. 1626-73 (D.D.C., November 30, 1978), the District Court, speaking of a nonprevailing plaintiff in a discrimination action, said:

"Plaintiff has finally alluded to the question of his status under 5 U.S.C. § 6322. The Civil Service Commission has expressed the view that when the employee is a plaintiff who is being deposed by the government or otherwise summoned to testify, he is a 'witness' within the meaning of the statute, but when an employee is a plaintiff testifying in his own behalf, he is not 'summoned,' and must therefore take annual leave or leave without pay. It is not necessary in this case, on this relatively meager record on this question, to decide the matter. Accordingly, the Court will do what it stated at the trial it would do--to consider Mr. Coles to have been called by the Court during the pendency of his trial and thus 'summoned' under any interpretation of 5 U.S.C. § 6322."

While we have no similar statement by the court in this case, we reach the same end result--no charge to annual leave or leave without pay--by a slightly different route. One of the purposes of section 717(c) of the Civil Rights Act of 1964 is to "make whole" to the extent feasible those who have been discriminated against in Federal employment. To this end an employee is entitled to a reasonable amount of official time to pursue his administrative remedy under this law. 29 C.F.R. § 1613.214(b). A holding that an employee is in a less advantageous position when he continues to seek relief beyond the administrative level and successfully pursues a judicial remedy specifically provided by this Act would, in our view, be inconsistent and indefensible.

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We also note that if Mrs. Pasake had been separated because of sex discrimination, instead of being passed over for promotion, and the court had ordered her retroactively restored with backpay, neither her backpay nor her annual leave would have been reduced for the time she was in attendance at her trial. This is so because the Back Pay Act, 5 U.S.C. § 5596 (1976), provides that an employee who has been found to have suffered an unjustified or unwarranted personnel action "for all purposes, is deemed to have performed service for the agency" during the period such action was in effect. Further, the implementing regulations for the computation of backpay, 5 C.F.R. § 550.804(d), provide that backpay is to be granted for any period during which the employee was unavailable for performance of his or her duties "for reasons related to, or caused by, the unjustified or unwarranted personnel action."

For the foregoing reasons and to achieve the "make whole" objective of the Civil Rights Act, it is our conclusion that Mrs. Pasake, as a prevailing plaintiff who has been adjudged by the court to have in fact been discriminated against, is entitled to official time for attendance in court at her trial and should not be charged annual leave for that period.

Milton J. Acolar

FOR THE Comptroller General
of the United States

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Elmer B. Straats