

14105 PLM-I

DECISION



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

FILE: B-195314

DATE: June 23, 1980

MATTER OF: Ellen V. Damareck - [Claim for Attorney Fees]

- DIGEST:**
1. Internal Revenue Service (IRS) employee was sued for allegedly disclosing confidential information contained in tax return. Lawsuit was dismissed upon plaintiff's motion with no finding of liability on part of defendant. IRS may not reimburse employee for legal fees under 26 U.S.C. § 7423(2) (1976) which authorizes Secretary of Treasury to reimburse damages and costs assessed against employee in suit brought against employee by reason of anything done in performance of duty under IRS code. There was no court finding of liability and, therefore, legal fees were not "damages or costs" assessed by court.
 2. Internal Revenue Service (IRS) employee was sued for allegedly disclosing confidential tax information. Before representation was requested from Government, employee hired private counsel who filed answer to complaint. Although Department of Justice subsequently agreed to represent employee, Justice declined to reimburse her legal fees under 28 C. F. R. §§ 50.15, 50.16. IRS may not reimburse employee since under circumstances we do not find that representation by Justice was appropriate but unavailable. J. N. Hadley, 55 Comp. Gen. 408 (1975), distinguished.

This decision is in response to the request from Florence M. Oakley, Chief, Fiscal Section, Internal Revenue Service (IRS) Mid-Atlantic Region, concerning the claim of Ellen V. Damareck, an IRS employee, for reimbursement of legal fees incurred in defending against a lawsuit alleging that she improperly disclosed confidential information about an individual's tax returns. The issue presented for our decision is whether the IRS may reimburse Mrs. Damareck for legal fees incurred prior to her representation in this lawsuit by the Department of Justice.

On September 29, 1977, Mrs. Damareck and her husband (who is not employed by IRS) were sued in Federal district court

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by an individual taxpayer under the provisions of 26 U. S. C. § 7217 (1976) for allegedly improperly disclosing confidential tax information about the plaintiff. On October 20, 1977, the plaintiff filed an amended complaint making the United States a party defendant and on October 26, 1977, Mrs. Damareck and her husband through their private attorney filed an answer to the complaint denying the allegations in the complaint.

By letter dated October 28, 1977, the IRS Regional Counsel advised Mrs. Damareck that she might be eligible for and could request representation by Government counsel. Mrs. Damareck requested representation on November 4, 1977. The IRS immediately forwarded her request to the Department of Justice, and Justice responded by letter dated February 28, 1978, offering representation subject to certain conditions. On March 8, 1978, the IRS Regional Counsel advised Mrs. Damareck not to accept Justice's conditional offer of representation without the concurrence of her private attorney. It appears that after further discussion between the IRS Regional Counsel and Justice, Justice offered Mrs. Damareck representation on May 16, 1978, subject to certain conditions which were to be set forth in Justice's regulations concerning representation of Federal employees (28 C. F. R. §§ 50.15 and 50.16). Mrs. Damareck accepted that offer of representation and Justice entered an appearance on her behalf. On June 23, 1978, the lawsuit was dismissed with prejudice upon the plaintiff's motion to that effect.

Mrs. Damareck sought reimbursement from the IRS in the amount of \$400 for legal fees incurred prior to representation by Government counsel. The IRS requested that Justice reimburse Mrs. Damareck for the expenses, but, by letter dated May 10, 1979, Justice declined to pay such expenses since the circumstances did not meet the conditions set forth in Justice's regulations contained in 28 C. F. R. § 50.16.

In seeking our opinion on whether it may pay the legal fees in question, the IRS argues that since Justice ultimately defended Mrs. Damareck, it has been shown that she was involved in the suit in her official capacity and that the Government had a valid interest to be protected. Furthermore, the IRS contends that since Justice did not offer Mrs. Damareck even qualified representation until 5 months after the complaint was served, it was reasonable and necessary for Mrs. Damareck to retain private

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counsel in order to file a proper response in court and avoid a default judgment.

The first question is whether the IRS may reimburse Mrs. Damareck from appropriated funds available for expenses of litigation arising under 26 U.S.C. § 7217 (1976). Section 7217 of title 26, United States Code, provides that a taxpayer may bring a civil action for damages against any person who knowingly or negligently discloses the taxpayer's return or return information in violation of section 6103 of the Internal Revenue Code. Section ~~7423(2)~~ of the Internal Revenue Code provides that the Secretary of the Treasury may repay all damages and costs recovered against any officer or employee of the United States in any suit brought against him by reason of his performance of official duties under the Internal Revenue Code. In this regard our Office has held that the liability of certain employees for damages and costs under section 7217 may be assumed by the United States under section 7423(2) and paid from general operating appropriations. 56 Comp. Gen. 615 (1977).

In the present case no damages or costs have been assessed by the court against Mrs. Damareck since the lawsuit was dismissed upon plaintiff's motion. Therefore, Mrs. Damareck's legal fees do not constitute "damages and costs" under the provisions of section 7423(2) and there is no basis for the IRS to reimburse her under that authority.

The second question is whether Mrs. Damareck may be reimbursed by the Department of Justice or the IRS on the basis of the Government's obligation to represent Federal employees. Our decisions have held that generally the hiring of private counsel to represent an employee is a private matter between the attorney and the client. 55 Comp. Gen. 1418 (1976). However, the Government may provide the employee with representation for private litigation when the interest of the United States is at stake along with the personal interest of the employee. B-130441, April 12, 1978. We have recognized that the Government has an interest in judicial proceedings brought by a private party against a Federal employee in his individual capacity arising out of conduct within the scope of his Federal employment and that the Government may properly provide representation in such proceedings. B-150136, May 19, 1978.

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The Department of Justice provides its attorneys to represent Federal employees in court actions brought against them in their individual capacities because of acts performed within the scope of their employment under the authority of 28 U.S.C. §§ 516-518, 547(3) and 28 C.F.R. §§ 50.15 and 50.16. As we noted in 56 Comp. Gen. 615, supra, Justice regulations provide that when an employee is sued in an individual capacity for actions that are employment-related, the matter should be referred to Justice for a determination of whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing legal representation is in the interest of the United States. Where the appropriate determinations have been made, Justice will defend the employee unless (1) the employee is the target of a criminal investigation concerning the same matter or (2) there is a conflict between the legal or factual positions of various employees in the same case. 28 C.F.R. § 50.15(a)(5, 6). In the latter two instances, Justice will pay for representation by private counsel, provided it has approved in advance the counsel to be retained. 28 C.F.R. § 50.16.

In the present case Justice has advised IRS that Mrs. Damareck's situation does not come within one of the two exceptions listed above, and that therefore Justice would not authorize payment of these legal fees under this authority.

The IRS points out that if Mrs. Damareck had waited until Justice entered an appearance or approved the selection of her private counsel, she would have likely suffered a default judgment in this case. Thus, the question is raised whether representation by Justice was appropriate but unavailable and therefore whether the agency involved has authority to reimburse the employee for the costs of private counsel.

In our decision J. N. Hadley, 55 Comp. Gen. 408 (1975), we considered a situation where the United States Attorney agreed to defend a former Small Business Administration (SBA) employee who was sued for acts performed within the scope of his employment. The U.S. Attorney later withdrew from the case even though the Government's interest in defending the former employee continued. In order to protect his interests, the employee retained the services of a private attorney. After reviewing the several statutory authorities making it the responsibility of Justice to represent the Government's interest in court actions, we stated:

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"Although provisions of law cited, supra, preclude the Administrator from reimbursing the employee for expenses of hiring private counsel if representation from the United States Attorney was available, if such representation was sought, but was unavailable, we believe such provisions of law would not be a bar to reimbursement if otherwise appropriate. To hold otherwise would yield a result contrary to the general rule that such litigation expenses should be borne by the United States rather than the employee. * * *"

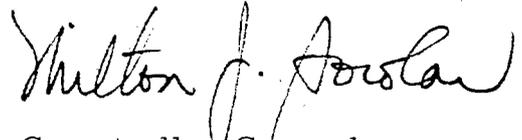
Since Justice had determined that it was in the interests of the United States to defend the employee and had undertaken to provide him with legal representation, we held that SBA could reimburse the employee for legal fees incurred as a result of his obtaining private counsel when representation by the United States became unavailable. Hadley, supra.

In the present case, however, there has been no showing that representation by Justice was unavailable since representation was not requested under the provisions of 28 C. F. R. §§ 50.15 and 50.16 until after the period for filing an answer had passed. The regulations issued by Justice state that the agency shall determine if the employee was acting within the scope of employment and then forward this information to Justice in a timely manner. See 28 C. F. R. § 50.15(a)(1). These regulations also provide for provisional representation on the basis of telephone contact by the agency to assure that the employee's interests are protected in circumstances requiring a quick legal response. 28 C. F. R. § 50.15(a)(1).

The record indicates that the delay in seeking representation on Mrs. Damareck's behalf may have been due in part to her failure to recognize that the suit was one in which the Government had an interest and in part to inexperience on the part of IRS officials in dealing with suits against individual employees under 26 U. S. C. § 7217, as added by the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1687. It is unfortunate that representation by Justice was not requested and approved until after private counsel was hired and an answer filed, but we cannot not say that representation by Justice in this case was appropriate but unavailable as we found in Hadley, supra.

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Accordingly, we conclude that under these circumstances Mrs. Damareck's legal fees may not be reimbursed by the Government.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States