

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

DISTRICT BUILDING

WASHINGTON, D. C. 20004



IN REPLY REFER TO:

LCD:L&O:TB:pm
(82-653)

October 7, 1982

OPINION OF THE CORPORATION COUNSEL

SUBJECT: Award of Attorneys Fees and
Compensatory Damages by the Office of
Human Rights

Mr. Elijah B. Rogers
City Administrator
District Building
Washington, D. C. 20004

Dear Mr. Rogers:

This is in reply to your request dated September 16, 1982 for an opinion of this Office as to whether or not the Office of Human Rights has the authority to award attorney's fees or compensatory damages in proceedings initiated by employees against the District of Columbia Government. In my opinion, the Office of Human Rights presently lacks the authority to make such awards.

On November 16, 1973, the appointed District of Columbia Council enacted Title 34 D.C.R.R., the Human Rights Law, prohibiting certain discriminatory acts in employment. Reg. No. 73-22, 20 D.C.R. 345. In Subpart C, "Procedures," Title 34 provided that the Commission on Human Rights, upon a finding of unlawful discrimination, may order hiring, reinstatement, or promotion with or without back pay, and the payment of both compensatory damages and attorney's fees; however, the Commission was required to submit guidelines for the award of compensatory damages and attorney's fees to the Council for review prior to implementation. Sec. 33.4 (a). Title 34 also provided that "Notwithstanding any other provision of this Title, the Mayor-Commissioner shall establish rules of procedure" for the handling of complaints filed against D.C. Government agencies; "The final determination in such matters shall be made by the Mayor-Commissioner or his designee." Sec. 29.3.

On October 31, 1975, the Mayor (having succeeded to the authority of the Mayor-Commissioner, D.C. Code sec. 1-212) issued Mayor's Order 75-230, establishing procedures for the handling of complaints against D. C. Government agencies under Title 34. He designated the Director of the Office of Human Rights as the Director of Equal Employment Opportunity to act for him in such matters. Sec. 5. He authorized the Director EEO in cases of discrimination by D.C. Government agencies to "issue an order to the department head requiring appropriate remedial action including, but not limited to" hiring, reinstatement, or promotion with or without back-pay. See secs. 10 and 19. Mayor's Order 75-230 does not mention compensatory damages or attorney's fees.

The elected Council of the District of Columbia subsequently adopted the Human Rights Act of 1977, D.C. Law 2-38, effective Dec. 13, 1977, D.C. Code secs. 1-2501 et seq. That Act reenacted Title 34 verbatim "with one technical amendment, which does not change the substance of the bill." Committee on Public Services and Consumer Affairs, Committee Report on Bill 2-179, July 5, 1977 at 1. The new statute "makes no substantive changes in the text of present Title 34." Id. The sole purpose of reenacting Title 34 as statute was to give its provisions greater stature and force. Id. at 1-3. As a matter of statutory construction, reenactment of a prior law results in continuous operation of the reenacted provisions. 1A C.A. Sands, Sutherland on Statutory Construction. Sec. 22.33 at 191 (4th ed. 1972) In these circumstances Mayor's Order 75-230 still governs exclusively discrimination claims by employees against D.C. Government agencies. See Porter v. District of Columbia, 502 F.Supp. 271 (D.D.C. 1980), and O'Neill v. District of Columbia Office of Human Rights, 355 A.2d 805 (D.C. App. 1976).

I find the absence of any explicit authorization in Mayor's Order 75-230 to be dispositive of the question of whether or not the Office of Human Rights has authority to award compensatory damages and attorney's fees in proceedings initiated by employees against D. C. Government agencies. When the Council authorized the Commission on Human Rights to order "affirmative action", it went on to authorize explicitly the award of compensatory damages and attorney's fees; the Council recognized the special nature of these awards by requiring the Commission to submit guidelines for such awards to it for review before implementation. See Human Rights Act of 1977, sec. 313, D.C. Code sec. 1-2553(a). In contrast, when the Mayor authorized the Director EEO to order "appropriate remedial action", he went on to authorize explicitly a number of the actions available to the Commission without mentioning compensatory damages or attorney's fees. See Human Rights Act of 1977, sec. 303, D.C. Code sec. 1-2543. Expressio unius est exclusio alterius. "The force of the maxim is strengthened by contrast where a thing is provided in one part of the statute and omitted in another". 2A C.A. Sands Sutherland on Statutory Construction sec. 47.23 at 123.

This construction of Mayor's Order 75-230 is reinforced by the decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), and its progeny. In Alyeska, the Supreme Court held attorney's fees are not

ordinarily recoverable by the prevailing litigant under the "American Rule", absent statutory authorization. Alyeska was followed in Kennedy v. Whitehurst, Civil No. 80-1183 (D.C. Cir., Sept. 17, 1982), a case with striking similarities to the facts presented in this opinion. There the Court found no statutory authority to award attorney's fees in administrative proceedings brought by an employee of the District of Columbia Department of Human Services under the Age Discrimination in Employment Act; the Court was persuaded by the statute's silence with regard to attorney's fees awards to such employees, despite the statute's explicit authorization of attorney's fees for private sector employees. Slip opinion, pp. 29-30.

Sincerely,



Judith W. Rogers
Corporation Counsel, D. C.